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8 **UNITED STATES DISTRICT COURT**

9 **EASTERN DISTRICT OF CALIFORNIA**

10	THE PICAYUNE RANCHERIA)	Case No. 1:13-cv-00609 LJO-MJS
	OF CHUKCHANSI INDIANS,)	
11)	PLAINTIFF'S MEMORANDUM OF POINTS
	Plaintiff)	AND AUTHORITIES IN SUPPORT OF
12)	MOTION FOR TEMPORARY
	v.)	RESTRAINING ORDER
13)	
	RABOBANK, a national banking)	Date: TBD
14	association, REGGIE LEWIS, CARL)	Time: TBD
	BUSHMAN, and CHANCE ALBERTA,)	Crtrm: 4, 7 th Floor
15)	
	Defendants.)	
16	_____)	

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INTRODUCTION

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Plaintiff, the Picayune Rancheria of Chukchansi Indians (“Tribe”) seeks a temporary restraining order to restrain the defendant, Rabobank (“Bank”), from breaching its contractual obligations to the Tribe and by requiring the Bank to give the Chukchansi Gold Resort and Casino (“Casino”) access to the Casino’s checking accounts (“Casino Accounts”). The casino accounts include the operating account, jackpot account, merchants account, and payroll account, maintained at the Bank so that the Casino can pay its employees and its vendors. Without access to the Accounts, the Casino will cease to operate, One Thousand One Hundred (1,100) employees will lose their jobs and the local Fresno economy will be severally negatively impacted. The Tribe also seeks a temporary restraining order against the Bank directing the Bank to make a loan payment to Wells Fargo Bank (“Wells Fargo”), on behalf of the Tribe,

1 pursuant to a Deposit Account Control Agreement (“DACA”) between the Bank, the
2 Tribe, and Wells Fargo, as trustee for hundreds of bondholders, pursuant to an
3 indenture under which the loan payment for the prior construction of the Casino is
4 owed, and to interplead any funds remaining in the Accounts with this Court until such
5 time as the Court can determine the merits of this case. Without the issuance of the
6 temporary restraining orders, the Tribe is in imminent danger of having its tribal
7 government and Casino operations dramatically curtailed, if not halted entirely, with
8 devastating consequences to the Tribe, its members, its employees, its vendors and its
9 service providers and the greater surrounding Fresno economy.

10 **STATEMENT OF FACTS**

11 1. The Tribe is a federally recognized tribe, organized under a written
12 constitution (“Constitution”) which designates the Picayune Tribal Council as the
13 governing body of the Tribe. Constitution, Article IV, Section 2. A true and correct
14 copy of the Tribe’s Constitution is attached to the Complaint as Exhibit A. Declaration
15 of Michael Wynn In Support of Motion for Temporary Restraining Order (“Wynn
16 Declaration”) pp. 1-2, ¶ 2.

17 2. Under Article IV, Section 2 of the Constitution, the Tribal Council is
18 composed of seven persons who are elected by the eligible voting members of the
19 Tribe. Under Article VI, Section 2, of the Constitution, a quorum of the Tribal Council
20 consists of four members, and no business of the Tribal Council shall be transacted
21 unless a quorum is present. The Tribal Council can only transact business at a regular
22 or special meeting of the Tribal Council Constitution. Art. VI, Sec.1. Exhibit A to
23 Complaint, pp. 2-3.

24 3. The members of the Tribal Council prior to May 23, 2013, were Nancy
25 Ayala, Chair; Reggie Lewis, Vice Chair; Tracey Brechbuehl, Secretary; Karen Wynn,
26 Treasurer; Charles Sargosa, Council Member at Large; Chance Alberta, Council
27 Member at Large; and Carl Bushman, Council Member at Large. Declaration of Nancy
28 Ayala In Support of Motion for Temporary Restraining Order (“Ayala Declaration”). p.

1 2, ¶ 3.

2 4. The Tribe is the owner and operator of a destination resort and Casino
3 consisting of, among other things, a 400 room hotel, a gaming facility consisting of
4 approximately 1,800 slot machines, 23 table games, and a variety of restaurants and
5 entertainment venues. The Tribe operates the Casino under the fictitious business
6 name of “Chukchansi Gold Resort and Casino.” The Casino employs approximately
7 1,100 people, who are both members and non-members of the Tribe. Declaration of
8 Joyce Markle In Support of Motion for Temporary Restraining Order (“Markle
9 Declaration”), p. 1-2, ¶ 2. In fact, the vast majority of the Casino’s employees are non-
10 members of the Tribe. *Id.*

11 5. The Casino is the Tribe’s principal source of revenue with which to
12 perform essential Tribal governmental functions, programs, and services. Markle
13 Declaration, p. 2, ¶3; Declaration of Carl Casey In Support of Motion for Temporary
14 Restraining Order (“Casey Declaration”), pp. 1-2, ¶ 3.

15 6. Lacking the capital necessary to construct and operate the Casino, the
16 Tribe sought and obtained a loan (“Loan”) in the approximate amount of \$240 Million
17 Dollars from a group of investors or bondholders (“Bondholders”), pursuant to an
18 indenture for which Wells Fargo Bank acts as the trustee (“Indenture”). Under the
19 repayment terms of the note executed by the Tribe in connection with the Loan and the
20 DACA, the Tribe is obligated to make biannual payments to Wells Fargo in the
21 approximate amount of \$28 Million. Markle Declaration, p. 2, ¶ 3.

22 7. In order to operate the Casino and other economic enterprises, the Tribe
23 entered into an agreement (“Agreement”) with the Bank. Under the terms of the
24 Agreement and the DACA, the Tribe maintains a variety of accounts, including, but not
25 limited to account numbers 9592715114, 9284097971, 9545356527, 9616856342,
26 9284337762, 9350033242, and 9387666198, (“Accounts”), with the Bank. Of these
27 Accounts, four (4) accounts, the operating account, jackpot account, merchants
28 account, and payroll account (hereinafter referred to collectively as the “Casino

1 Accounts”), are used to operate the Casino. Up until the time that the disputes in this
2 case arose, the Casino deposited the revenues generated from the operation of the
3 Casino into the Casino Accounts maintained at the Bank. Markle Declaration, p. 2, ¶ 4.

4 8. The Casino Accounts are the general operating accounts which the Tribe
5 maintains in connection with the operation of the Casino. The other accounts (“CEDA
6 Accounts”) are the accounts that the Tribe uses to operate other business enterprises
7 for the Tribe’s Corporation, Chukchansi Economic Development Authority (“CEDA”).
8 Declaration of Martha Pedersen In Support of Motion for Temporary Restraining
9 Order (“Pedersen Declaration”), p. 2, ¶ 3. The Casino Accounts were opened and
10 maintained pursuant to the DACA and the Agreements. From the Casino Accounts, the
11 Tribe issues checks in payment for virtually all goods, services, wages, payment of
12 prizes, capital improvements, and all other expenses incidental to the operation of the
13 Casino, as well as for payments to Wells Fargo in accordance with the note executed in
14 connection with the Tribe’s Indenture. Markle Declaration, pp. 2-3, ¶ 5.

15 9. From the Casino Accounts, the Casino also pays One Million Dollars
16 (\$1,000,000.00) a month to the Tribe, which it uses to fund the operation of the
17 Tribe’s government and other economic projects. Casey Declaration, p. 1-2, ¶ 3; Markle
18 Declaration, p. 3, ¶ 6; Pedersen Declaration, p. 1, ¶ 2

19 10. Under the Agreement, the Bank agreed that the Tribal Council has the
20 authority to designate who the check signers are on the Accounts, and agreed that the
21 Bank will pay any check or warrant that has been executed by the check signers
22 authorized to sign checks by the Tribal Council. Markle Declaration, p. 2, ¶ 5.

23 11. Between January 24, 2013, and February 24, 2013, a dispute (“Dispute”)
24 arose between members of the Tribal Council. Motions were allegedly passed by the
25 Tribal Council suspending and reinstating various Council members during this
26 period. Ayala Declaration, pp. 1-5, ¶ 2-22.

27 12. None of the suspensions of the members of the Tribal Council arising
28 from the Dispute were valid, because they were not imposed at a duly noticed regular

1 or special meeting of the Tribal Council and were not imposed in accordance with the
2 Tribe's Constitution, By-Laws, and Ethics Ordinance. Ayala Declaration, pp. 2-5, ¶ 3-
3 19. True and correct copies of the Tribe's By-Laws and Ethics Ordinance are
4 incorporated by this reference and attached to the Complaint as Exhibits B and C,
5 respectively. Wynn Declaration, pp. 1-2, ¶ 3-4.

6 13. As a result of the Dispute, the Tribal Council divided into two factions.
7 One faction consists of Nancy Ayala, Tracey Brechbuehl, Karen Wynn, and Charles
8 Sargosa ("Ayala Quorum"). The other consists of Reggie Lewis, Chance Alberta, and
9 Carl Bushman ("Lewis Faction"). Ayala Declaration, pp. 5, ¶¶ 22-24.

10 14. Article VI, Section 2 of the Tribe's Constitution provides that four Tribal
11 Council members constitute a quorum of the Tribe's Tribal Council and that the Tribal
12 Council can only conduct business where a quorum is present. Only the Ayala Quorum
13 can establish a quorum of the Tribal Council. Art. VI, Sec. 2. Exhibit A to Complaint,
14 pp. 2-3.

15 15. On or about February 25, 2013, the Lewis Faction stated to officials of the
16 Bank that it had the authority to withdraw funds from the Accounts and to designate
17 which check signers were authorized to withdraw funds from the Accounts. Ayala
18 Declaration, p. 5, ¶ 25.

19 16. On or about March 4, 2013, the Ayala Quorum provided the Bank with
20 documents and relevant legal authorities demonstrating that the suspensions from the
21 Tribal Council were invalid, that the Tribal Council still consisted of all seven (7)
22 members of the Tribal Council, and that the Lewis Faction had no authority to
23 withdraw funds from the Accounts or designate check signers for the Accounts. Ayala
24 Declaration, p. 5, ¶ 26.

25 17. The Bank breached the Agreement with the Tribe by refusing to recognize
26 the Tribal Council, as a whole, as the duly constituted and governing body of the Tribe
27 with the authority to withdraw funds from the Accounts and to designate check signers
28 for the Accounts. Instead, the Bank recognized the Lewis Faction, which cannot

1 establish a quorum of the Tribal Council, as having the authority to withdraw money
2 from the Accounts and designate check signers for the Accounts. Declaration of Lester
3 J. Marston In Support of Motion for Temporary Restraining Order (“Marston
4 Declaration”) p. 1, ¶ 3-4.

5 18. On March 15, 2013, at a duly noticed special meeting of the Tribal
6 Council, with a quorum of the Tribal Council present, a majority of the Tribal Council
7 voted to file suit against the Bank in the Picayune Rancheria of Chukchansi Indians
8 Tribal Court (“Tribal Court”) and seek a order against the Bank to prevent it from
9 allowing the Lewis Faction to withdraw funds from the Accounts and to require the
10 Bank to interplead the funds in the Accounts with the Tribal Court, pending the
11 resolution of the Tribal Court litigation (“Tribal Court Action”). Ayala Declaration, pp.
12 5-6, ¶ 27.

13 19. At the same March 15, 2013 special meeting, the majority of the Tribal
14 Council voted to suspend Lewis, Alberta, and Bushman from the Tribal Council, based
15 on written allegations made by Ayala, Brechbuehl, Wynn, and Sargosa of a number of
16 violations of the Tribe’s Constitution and Ethic’s Ordinance. Ayala Declaration, p. 6, ¶
17 28.

18 20. On March 15, 2013, legal counsel for the Tribal Council notified the
19 Bank’s legal counsel that the Tribal Council had filed a complaint against the Bank for
20 breach of contract and for interpleader, and would be seeking a temporary restraining
21 order directing the Bank to interplead the money in the Accounts with the Tribal Court.
22 Counsel for the Tribal Council provided the Bank’s legal counsel with a copy of the
23 complaint, a motion for a temporary restraining order, a memorandum of points and
24 authorities in support of the motion, and three declarations in support of the Tribal
25 Council’s motion. The Tribal Council’s legal counsel also informed counsel for the Bank
26 that the Tribal Court would hold a hearing on the motion later that afternoon, and
27 provided a telephone conference call telephone number and pass code so that the
28 Bank’s legal counsel could appear by phone and participate in the hearing on the

1 motion. Marston Declaration, p. 3, ¶ 6.

2 21. On March 15, 2013, the Tribal Court held a hearing on the Tribe's motion
3 for a temporary restraining order . Legal counsel for the Bank appeared by telephone.
4 Marston Declaration, p. 3, ¶ 7.

5 22. At the conclusion of the hearing, the Tribal Court issued a temporary
6 restraining order prohibiting the Bank from allowing any person, other than a person
7 or persons designated by the Tribal Council, from withdrawing any money from the
8 Accounts and ordering the Bank to interplead the money in the Accounts with the
9 Tribal Court ("Order"). Marston Declaration, p. 4, ¶ 8.

10 23. On March 15, 2013, counsel for the Tribe served the Order on counsel for
11 the Bank by mail and e-mail. The Order also set a hearing for March 22, 2013, at 10:00
12 a.m. PST, on a motion for preliminary injunction. By stipulation of the parties, the
13 hearing date was moved to March 29, 2013. A true and correct copy of the Court's
14 March 15, 2013, Order is attached to the Complaint as Exhibit M. Marston Declaration,
15 p. 4, ¶¶ 9-10.

16 24. On May 23, 2013, at a duly notice Tribal Council meeting with a quorum
17 present, the Tribal Council, held a hearing on the on the question of whether Lewis,
18 Alberta, and Bushman should be removed from the Tribal Council. Written notice of
19 the hearing and the charges was served on Lewis, Alberta and Bushman on April 16,
20 2013. Neither Lewis, Alberta or Bushman attended the hearing. At the conclusion of
21 the hearing, based upon the facts and evidence presented at the hearing the Tribal
22 Council rendered a decision by a vote of four (4) in favor, zero (0) against and three (3)
23 absent to remove Lewis, Alberta and Bushman from the Tribal Council for violations of
24 the Tribe's Constitution and Ethics Ordinance. Ayala Declaration, p. 6, ¶ 30.

25 25. On March 25, 2013, the Tribe filed an amended complaint in the Tribal
26 Court, adding as defendants Reggie Lewis, Chance Alberta, and Carl Bushman, in both
27 their official and individual capacities. The Amended Complaint added causes of action
28 against Lewis, Alberta, and Bushman and sought injunctive and declaratory relief.

1 Marston Declaration, p. 5, ¶ 15.

2 26. On March 26, 2013, the Tribe filed and served on all of the defendants its
3 motion for a preliminary injunction and supporting brief and declarations. The Bank
4 filed an opposition to the motion on March 28, 2013. Defendants Lewis, Alberta and
5 Bushman did not file an opposition to the motion or any other responsive pleading.
6 Marston Declaration, pp. 5-6, ¶ 19.

7 27. On Friday, March 29, 2013, the Tribal Court held a hearing on the Tribe's
8 motion for a preliminary injunction. At the hearing, counsel for the Tribe appeared in
9 person at the Tribal Court on the Picayune Rancheria; Thomas Gede and Colin West
10 appeared by telephone on behalf of Rabobank. No one appeared on behalf of
11 defendants Lewis, Alberta, or Bushman. Marston Declaration, p. 6, ¶ 20.

12 28. Following the hearing, on March 29, 2013, the Tribal Court entered an
13 order granting the Tribe's motion for a preliminary injunction. Marston Declaration, p.
14 6, ¶ 21. A true and correct copy of the Tribal Court's March 29, 2013, preliminary
15 injunction is attached to the Complaint as Exhibit R.

16 29. The March 29, 2013, preliminary injunction directed the Bank to pay
17 from the Accounts to Wells Fargo Bank the amount of the loan payment owed
18 pursuant to the Indenture and to interplead with the Tribal Court any funds that
19 remained in the Accounts after the Loan payment was made. The Tribal Court in the
20 preliminary injunction also held that the Tribal Council consisted of seven (7) persons
21 Nancy Ayala, Chair; Reggie Lewis, Vice Chair; Tracey Brechbuehl, Secretary; Karen
22 Wynn, Treasurer; Charles Sargosa, Council Member at Large; Chance Alberta, Council
23 Member at Large; and Carl Bushman, Council Member at Large, and that a quorum of
24 these seven (7) members of the Tribal Council was the recognized governing body of
25 the Tribe authorized to transact business on behalf of the Tribe and CEDA.

26 30. The Bank refused to comply with the preliminary injunction issued by
27 the Tribal Court and refused to comply with the Agreement, violating its contractual
28 obligation. Instead, the Bank filed a notice of appeal challenging the Tribal Court's

1 determination that it had jurisdiction to issue the preliminary injunction to the Tribal
2 Court of Appeals. Marston Declaration, p. 6, ¶ 23.

3 31. As a direct and proximate result of the Bank's refusal to honor the Tribal
4 Court's preliminary injunction, the Tribe and CEDA defaulted on its loan payment to
5 Wells Fargo. As a direct and proximate result of the default, Wells Fargo elected to
6 exercise its rights under the DACA and directed the Bank to pay all of the funds, except
7 approximately One Million Dollars (\$1,000,000.00) from the Casino Operating
8 Account to Wells Fargo to pay the amount due the Bondholders under the Note and
9 Casino loan. Unfortunately, there was not enough money in the Operating Account to
10 pay the full amount due to the Bondholders under the Note, leaving a balance due of
11 approximately Three Million Dollars (\$3,000,000.00). Marston Declaration, p. 6, ¶ 24.
12 Because the Individual Defendants refused to allow any payment from the CEDA
13 Account and other accounts not covered by the DACA to be used to pay the balance, the
14 Tribe has been unable to make up the shortfall. At the time of the filing of this motion,
15 although there are sufficient funds in the CEDA account to complete the Loan
16 Payment, the Tribe is not able to make the payment and the Tribe is in default under
17 the terms of the Indenture. Marston Declaration, pp. 6-7, ¶ 31.

18 32. Under the Loan Agreement and the Security Agreement securing the
19 payments of the Loan, the Bondholders have the right to declare the entire balance of
20 the Loan due and payable and seize the assets of the Casino that are pledged as
21 collateral to secure the Note. If the bondholders exercise their rights under the Loan
22 Agreement to seize the collateral, the Casino will no longer be able to operate, 1,100
23 Casino employees will lose their jobs, and the Tribal Government will also not have
24 enough money to operate. Marston Declaration, p. 7, ¶ 32.

25 33. Because the Bank and the Lewis Factions refuse to allow the Tribe and
26 the Casino to use the Tribe's Accounts as an operating account pursuant to the
27 procedures established by the preliminary injunction, and because the lack of an
28 operating account threatens the Casino's operations, which threatens the interests of

1 the Bondholders, the Tribe has been forced to move for this temporary restraining
2 order to allow the Casino to have access to the Operating Account and to require the
3 Bank to pay the balance due the Bondholders. Marston Declaration, p. 7, ¶ 33.

4 34. At present, the Casino does not have enough cash on hand to maintain
5 the minimum amount of money that it is required to maintain in the Casino cage to pay
6 jack pots, pursuant to federal regulations issued by the National Indian Gaming
7 Commission under the IGRA, pay its employees and pay its vendors to continue to
8 operate. The Casino has more than sufficient revenue to pay its operating expenses in
9 the form of checks totaling over Seven Million Dollars (\$7,000,000.00) which it cannot
10 deposit or cash because it does not have access to the Operating Account or any bank
11 account. If the Casino is not able to utilize the Casino's Operating Account, it will be
12 unable to pay its employees, vendors and service providers. This will result in the
13 employees, vendor's and service provider's refusal to supply goods and services
14 essential to the operation of the Casino. That, in turn, will force the Tribe to cease or
15 dramatically restrict the Casino operations. Markle Declaration, pp. 3-4, ¶ 10.

16 35. The halting or significant reduction in the Casino operations will be a
17 second form of default of the DACA. The DACA requires that the Casino continue its
18 operations for the duration of the Loan period, in order to produce the revenues that
19 are the source of the loan payments. Exhibit A to Markle Declaration.

20 36. In addition, if the Casino is not able to utilize the Operating Account, it
21 will be unable to make its monthly payment to the Tribal Government which will result
22 in the Tribe not being able to pay the operating expenses of the Tribe. This in turn will
23 prevent the Tribe from paying its employees, vendors and service providers, who will
24 refuse to supply goods and services essential to the operation of the Tribal government.
25 That, in turn, will force the Tribe to cease or dramatically restrict the Tribal
26 Governmental operations. Casey Declaration, p. 2, ¶ 6.

27
28 **I.**

1 **THE TRIBE IS ENTITLED TO A PRELIMINARY INJUNCTION**

2 Fed. R. Civ. P. 65 authorizes the Court to issue a preliminary injunction upon
3 notice to the adverse party.

4 A plaintiff seeking a preliminary injunction must establish that he is
5 likely to succeed on the merits, that he is likely to suffer irreparable harm
6 in the absence of preliminary relief, that the balance of equities tips in his
7 favor, and that an injunction is in the public interest.

8 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

9 The Tribe meets all of the *Winter* criteria.

10 **A. The Tribe is Likely to Succeed on the Merits.**

11 The fundamental issue in this case is whether this Court should recognize the
12 orders of the Tribal Court. “As a general rule, federal courts must recognize and
13 enforce tribal court judgments under principles of comity.” *AT&T Corp. v. Coeur*
14 *D’Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002) citing *Wilson v. Marchington*, 127
15 F.3d 805, 809-810 (9th Cir. 1997) (“*Marchington*”), “[T]he recognition and
16 enforcement of tribal court judgments in federal court must inevitably rest on the
17 principles of comity.”]. “Comity is neither a matter of absolute obligation on the one
18 hand, nor mere courtesy and good will on the other.” *Marchington*, 127 F.3d at 809
19 citing, *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895). “As a general policy, [c]omity
20 should be withheld only when its acceptance would be contrary or prejudicial to the
21 interest of the nation called upon to give it effect.” *Marchington*, 127 F.3d at 809.

22 Recognition by federal courts of orders issued by tribal courts extends beyond
23 final judgments. Under certain circumstances, where a tribal court issues an order,
24 such as an injunction or a temporary restraining order, a federal court has the
25 discretion to recognize and enforce the order:

26 While there is no doubt that “[t]ribal courts have repeatedly been
27 recognized as appropriate forums for the exclusive adjudication of
28 disputes affecting important personal and property interests of both
Indians and non-Indians,” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,
65-66, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978), the decision whether to
enforce non-final orders of a tribal court is left primarily to our discretion
under the doctrine of comity

MacArthur v. San Juan County, 497 F.3d 1057, 1060 (10th Cir. 2007).

1 Two factors preclude recognition of a tribal court judgment by a federal court:
2 “[F]ederal courts must neither recognize nor enforce tribal judgments if: (1) the tribal
3 court did not have both personal and subject matter jurisdiction; or (2) the defendant
4 was not afforded due process of law.” *Marchington*, 127 F.3d at 810. “[U]nless a
5 federal court determines that the tribal court lacked jurisdiction, . . . the proper
6 deference to the tribal court system precludes relitigation of issues raised . . . and
7 resolved in the tribal courts.” *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1986).

8 Federal courts also have the authority to refuse to recognize tribal court
9 judgments on certain discretionary grounds:

10 a federal court may, in its discretion, decline to recognize and enforce a
11 tribal judgment on equitable grounds, including the following
12 circumstances: (1) the judgment was obtained by fraud; (2) the judgment
13 conflicts with another final judgment that is entitled to recognition; (3)
14 the judgment is inconsistent with the parties’ contractual choice of
15 forum; or (4) recognition of the judgment, or the cause of action upon
16 which it is based, is against the public policy of the United States or the
17 forum state in which recognition of the judgment is sought.

18 *Marchington*, 127 F.3d at 810.

19 When these criteria are applied to the present case, it is evident that none of the
20 circumstances that would support denial of the recognition of the Tribal Court’s orders
21 are present.

22 **1. The Tribal Court Has Jurisdiction over the Defendants and the
23 Claims Against Them.**

24 Article V, Section (w) of the Tribe’s Constitution authorizes the Tribal Council to
25 “provide for the establishment of Tribal Courts. . . .” Exhibit A to the Complaint, p. 3.

26 Pursuant to this constitutional authority, the Tribal Council established the
27 Tribal Court by enacting Resolution No. 2012-45 adopting the Tribal Court Ordinance.
28 Exhibit 1 to the Michael Wynn Declaration. Section 5 of the Tribal Court Ordinance
sets forth the personal, subject matter, and territorial jurisdiction of the Tribal Court.
Other provisions of tribal law grant the Tribal Court jurisdiction over specific matters.
Under the provisions of the tribal law and federal court decisions addressing the
jurisdiction of tribal courts, it is evident that the Tribal Court had both personal

1 jurisdiction over the defendants and subject matter jurisdiction over the claims raised
2 in the Tribal Court complaint.

3 **a. The Tribal Court Had Personal Jurisdiction Over The**
4 **Defendants.**

5 The question of whether the Tribal Court has personal jurisdiction over the
6 Bank, a non-tribal entity, is quite different from that of whether the Tribal Court has
7 jurisdiction over the Individual Defendants, who are tribal members and tribal
8 officials. Each question must be addressed using a different analysis.

9 There is no debate that the Tribal Court has jurisdiction over the Individual
10 Defendants. Each of the Individual Defendants is a member of the Tribe and a
11 member of the Tribe's Tribal Council. Section 5.1(a) of the Tribal Court Ordinance
12 specifically grants to the Tribal Court jurisdiction over tribal members and tribal
13 officers. It is beyond debate that, under countless federal court decisions, Indian
14 Tribes and their tribal courts have jurisdiction over their members. *Strate v. A-1*
15 *Contractors*, 520 U.S. 438, 459 (1997) ("*Strate*"); *Duro v. Reina*, 495 U.S. 676, 694
16 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) ("*Santa Clara*
17 *Pueblo*"). "Tribal governing power is at its zenith with respect to authority over tribal
18 members within Indian country." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.02
19 (2012, Matthew Bender & Company, Inc.).

20 The question of the Tribal Court's jurisdiction over the Bank requires a more
21 complicated analysis. The Tribal Court Ordinance grants to the Tribal Court
22 jurisdiction over any person, organization, or entity, including any "extraterritorial
23 business, [or] corporate entity" that has entered "into a contractual relationship of any
24 kind with any Tribal Entity or relating to any Tribal Property." Tribal Court Ordinance,
25 Section 5.2. It is clear that the Bank, by entering into the Agreements pursuant to
26 which the Accounts were opened, "entered into a contractual relationship" with the
27 Tribe and its agencies and that the Agreements related to a significant amount of the
28 Tribe's property, the revenues from the Casino, the Tribal government, CEDA, and the
Tribal Gaming Commission.

1 The delegation of jurisdiction in the Tribal Court Ordinance is consistent with
2 the federal court decisions on the limits to tribal court jurisdiction over non-tribal
3 members and entities.

4 In *Montana v. United States*, 450 U.S. 544 (1980), the Supreme Court
5 articulated what has come to be regarded as the fundamental test, under federal law,
6 for determining whether a tribe's jurisdiction extends to non-tribal members and their
7 activities:

8 To be sure, Indian tribes retain inherent sovereign power to exercise
9 some forms of civil jurisdiction over non-Indians on their reservations,
10 even on non-Indian fee lands. A tribe may regulate through taxation,
11 licensing, or other means, the activities of non-members who enter
12 consensual relations with the tribe or its members, through commercial
13 dealings, contracts, leases, or other arrangements A Tribe may also
14 retain inherent power to exercise civil authority over the conduct of non-
15 Indians on fee lands within its reservation when that conduct threatens
16 or has some direct affect on the political integrity, the economic security,
17 or the health and welfare of the Tribe.

18 *Montana v. United States*, 450 U.S. at 565-566. See *Strate*, *supra*, 520 U.S. at 445-446
19 [*Montana* is “the pathmarking case concerning tribal civil authority over
20 nonmembers.”]

21 The present case falls within both of these exceptions.

22 The Supreme Court has analyzed the *Montana* exceptions in a number of
23 decisions: *Strate*, *supra*; *Nevada v. Hicks*, 533 U.S. 353 (2001) (“*Hicks*”); *Atkinson*
24 *Trading Company, Inc., v. Shirley*, 532 U.S. 645 (2001) (“*Atkinson*”); and *Plains*
25 *Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316 (2008)
26 (“*Plains Commerce Bank*”). None of those decisions addressed the application of the
27 *Montana* exceptions to tribal court jurisdiction over a dispute arising from tribal bank
28 accounts. Nevertheless, the decisions provide this Court with ample support for the
conclusion that the Tribal Court properly asserted jurisdiction over this case and the
Bank pursuant to both *Montana* exceptions.

The *Strate* decision addressed tribal court jurisdiction over a tort claim arising
from a traffic accident between non-tribal members on a state highway that ran
through the Fort Berthold Indian Reservation. The accident occurred within the

1 boundaries of the reservation. The non-Indian defendant had entered into a
2 subcontract with the Fort Berthold Tribe. The Supreme Court found that the tribal
3 court did not have jurisdiction over the claims of the non-Indian plaintiff, in large part,
4 because the accident occurred on a state highway, for which the United States had
5 granted a right of way, and did not involve the tribe or any tribal members. The Court
6 rejected the plaintiff's argument that the defendant's subcontract with the Tribe
7 constituted a consensual relationship which constituted the type of contract or
8 consensual agreement that the Supreme Court intended under the first *Montana*
9 exception:

10 The tortious conduct alleged in Fredericks' complaint does not fit that
11 description. The dispute, as the Court of Appeals said, is "distinctly non-
12 tribal in nature." 76 *F.3d at 940*. It "arose between two non-Indians
13 involved in [a] run-of-the-mill [highway] accident." *Ibid*. Although
14 [defendant] A-1 was engaged in subcontract work on the Fort Berthold
15 Reservation, and therefore had a "consensual relationship" with the
16 Tribes, "[plaintiff] Gisela Fredericks was not a party to the subcontract,
17 and the Tribes were strangers to the accident." *Ibid*.

18 *Strate*, 520 U.S. at 456-457.

19 *Nevada v. Hicks* addressed the search of a tribal member's home located within
20 the Fallon Paiute-Shoshone Indian Reservation by Nevada State game wardens for
21 evidence of violations of state hunting laws. The Court rejected the Tribal Court's
22 assertion of jurisdiction over the tribal member's tort claims and claim of a violation of
23 his civil rights under 25 U.S.C. § 1983. The Court concluded that the regulation of the
24 activities of state game wardens investigating a violation of state law were not subject
25 to the jurisdiction of Indian tribes, even where the activities occurred on tribal land.
26 Quoting *Montana*, the Court stated: "Where nonmembers are concerned, the 'exercise
27 of tribal power *beyond what is necessary to protect tribal self-government or to*
28 *control internal relations* is inconsistent with the dependent status of the tribes, and
so cannot survive without express congressional delegation." *Hicks*, 533 U.S. at 359
(emphasis original). The Court continued: "Tribal assertion of regulatory authority
over nonmembers must be connected to that right of the Indians to make their own
laws and be governed by them." *Id.*, at 361.

1 The *Hicks* Court rejected the argument that the game wardens' application for
2 and receipt of a search warrant from the Tribal Court qualified as a consensual
3 agreement under the first Montana exception:

4 *Montana* recognized an exception to this rule for tribal regulation of "the
5 activities of nonmembers who enter consensual relationships with the
6 tribe or its members, through commercial dealing, contracts, leases, or
7 other arrangements." 450 *U.S. at 565*. Though the wardens in this case
8 "consensually" obtained a warrant from the Tribal Court before searching
9 respondent's home and yard, we do not think this qualifies as an "other
10 arrangement" within the meaning of this passage. Read in context, an
11 "other arrangement" is clearly another *private consensual* relationship,
12 from which the official actions at issue in this case are far removed.

13 *Id.*, at 359, fn 3.

14 Later, the Court stated that, in creating the first *Montana* exception, the Court
15 "did not have in mind States or state officers acting in their governmental capacity; it
16 was referring to private individuals who voluntarily submitted themselves to tribal
17 regulatory jurisdiction by the arrangements that they (or their employers) entered
18 into." *Id.*, at 372.

19 *Atkinson Trading Company* involved the imposition of a tribal hotel occupancy
20 tax on a hotel located within the boundaries of the Navajo Reservation, but on non-
21 Indian owned fee land. The owner of the resort located on the fee land held an Indian
22 trader's license under federal law, and the resort received fire, police, and other
23 services from the Tribe. The resort owner challenged the imposition of the tax in
24 Navajo Tribal Court. The Navajo Supreme Court upheld the tax. The resort owner
25 then challenged the tax in federal court.

26 The issue upon which the decision turned was whether the Navajo Nation had
27 the regulatory authority to impose the tax on a non-member entity for transactions
28 involving non-members. The Court of Appeals for the Tenth Circuit concluded that
non-member hotel guests had entered into an implied consensual relationship with the
Navajo Nation and that the tribe could impose the hotel occupancy tax under the first
Montana exception.

 In rejecting the Tenth Circuit's analysis, the Court stated:

1 The consensual relationship must stem from "commercial dealing,
2 contracts, leases, or other arrangements," *Montana*, 450 U.S. at 565, and
3 a nonmember's actual or potential receipt of tribal police, fire, and
4 medical services does not create the requisite connection. If it did, the
5 exception would swallow the rule: All non-Indian fee lands within a
6 reservation benefit, to some extent, from the "advantages of a civilized
7 society" offered by the Indian tribe. *Merrion*, [*v. Jicarilla Apache Tribe*,
8 455 U.S. 130] at 137-138 . . . Such a result does not square with our
9 precedents; indeed, we implicitly rejected this argument in *Strate*, where
10 we held that the nonmembers had not consented to the Tribes'
11 adjudicatory authority by availing themselves of the benefit of tribal
12 police protection while traveling within the reservation. . . . We therefore
13 reject respondents' broad reading of *Montana's* first exception, which
14 ignores the dependent status of Indian tribes and subverts the territorial
15 restriction upon tribal power.

9 *Id.*, at 655.

10 The *Atkinson* Court also rejected the argument that the resort owner's receipt of
11 an Indian trader's license from the federal government constituted the requisite
12 consensual relationship:

13 *Montana's* consensual relationship exception requires that the tax or
14 regulation imposed by the Indian tribe have a nexus to the consensual
15 relationship itself. In *Strate*, for example, even though respondent A-1
16 Contractors was on the reservation to perform landscaping work for the
17 Three Affiliated Tribes at the time of the accident, we nonetheless held
18 that the Tribes lacked adjudicatory authority because the other
19 nonmember "was not a party to the subcontract, and the Tribes were
20 strangers to the accident." 520 U.S. at 457 A nonmember's
21 consensual relationship in one area thus does not trigger tribal civil
22 authority in another -- it is not "in for a penny, in for a Pound." The
23 hotel occupancy tax at issue here is grounded in petitioner's relationship
24 with its nonmember hotel guests, who can reach the Cameron Trading
25 Post on United States Highway 89 and Arizona Highway 64, non-Indian
26 public rights-of-way. Petitioner cannot be said to have consented to such
27 a tax by virtue of its status as an "Indian trader."

21 *Id.*, at 656-657.

22 In *Plains Commerce Bank*, the Court addressed whether a tribal court had
23 jurisdiction over a bank and non-members for the sale of fee land within an Indian
24 reservation by the bank to the non-members, based on a claim that the bank engaged
25 in discriminatory behavior toward tribal members who also wished to purchase the
26 land. The contract at issue was between the bank and the non-members, not a contract
27 with the tribe or one of its members, and the land involved was non-tribal fee land.

28 The *Plains Commerce Bank* decision was focused in large part on the fact that

1 the land at issue was not tribal land and that the sale of land did not constitute non-
2 member conduct on the land. “[W]hether or not we have permitted regulation of
3 nonmember activity on non-Indian fee land in a given case, in no case have we found
4 that *Montana* authorized a tribe to regulate the sale of such land. Rather, our
5 *Montana* cases have always concerned nonmember conduct on the land.” *Plains*
6 *Commerce Bank*, 554 U.S. at 334.

7 Significantly, the *Plains Commerce Bank* decision again emphasized that the
8 first *Montana* exception applied to those situations in which the non-member conduct,
9 whether on or off tribal land, has a significant affect on fundamental tribal interests
10 and its ability to govern itself.

11 The logic of *Montana* is that certain activities on non-Indian fee land
12 (say, a business enterprise employing tribal members) or certain uses
13 (say, commercial development) may intrude on the internal relations of
14 the tribe or threaten tribal self-rule. To the extent they do, such activities
15 or land uses may be regulated. See *Hicks*, . . . at 361, . . . (“Tribal
16 assertion of regulatory authority over nonmembers must be connected to
17 that right of the Indians to make their own laws and be governed by
18 them”). **Put another way, certain forms of nonmember
19 behavior, even on non-Indian fee land, may sufficiently affect
20 the tribe as to justify tribal oversight. While tribes generally
21 have no interest in regulating the conduct of nonmembers,
22 then, they may regulate nonmember behavior that implicates
23 tribal governance and internal relations.**

24 *Id.*, at 334-335 (emphasis added).

25 When the Supreme Court’s analysis of the first *Montana* exception is applied to
26 the facts of this case, it is evident that the current case falls within the first exception.
27 The factors cited as the bases for finding that the first *Montana* exception applies are
28 unmistakably present in this case. There is no question that the relationship between
the Tribe and the Bank is a private, commercial, consensual relationship. The Bank has
voluntarily entered into contracts with the Tribe, the Casino, CEDA, and the Tribe’s
Gaming Commission, under which the Bank has agreed to accept for deposit funds and
money generated by the Tribe’s on-reservation Casino and other commercial activities.
Markle Declaration, p. 2, ¶ 4; Casey Declaration, p. 2, ¶ 4. The Bank has voluntarily
agreed to honor and pay all checks, warrants, and requests for wire transfers generated

1 and/or issued by the Tribe and the Casino. While the Supreme Court cases discussed
2 above do not require that the activities that fall within the first *Montana* exception
3 occur on tribal land, in this case the majority of the activities that constitute the
4 obligations under the Account and Agreements between the Tribe and the Bank take
5 place on tribal land. The Casino operations produce the revenue on the Reservation.
6 The Tribal government prepares applications and supporting documentation for
7 federal program and grant funds on the Reservation. The Casino and the Tribal
8 government carry out nearly all of their Account activities on the Reservation,
9 including the issuance of checks to employees, contractors, and vendors. Markle
10 Declaration, p. 3, ¶ 8.

11 While the decisions discussed above suggest that the location of the activities
12 related to the non-member conduct under a consensual agreement (on tribal land
13 versus on non-tribal land) is relevant, the Supreme Court has repeatedly stated that the
14 fact that the activities occur on or off tribal land is not necessarily a determinative
15 factor. See, e.g. *Hicks*, 533 U.S. at 360 (Souter concurring). The fundamental
16 requirement for a consensual, private relationship to give rise to tribal jurisdiction
17 under the first Montana exception is that a tribe, “may regulate nonmember behavior
18 that implicates tribal governance and internal relations.” *Plains Commerce Bank*, 554
19 U.S. at 335. That is precisely why the present case falls within the first *Montana*
20 exception.

21 The property that is the subject of the agreement is exclusively that of the Tribe:
22 tribal revenues. The revenues are not only tribal property, they are central and
23 essential to the functioning of the Tribe. The inability to use the Accounts blocks the
24 Tribe’s government from having access to the revenues in its accounts, prevents the
25 Casino from transferring revenues to the Tribal government, and makes it impossible
26 to receive federal grant and program funding. It is impossible for the Tribe’s
27 government to perform its governmental functions without bank accounts. If the
28 Tribal government is not able to utilize the Accounts, the Tribal government will not be

1 able to function. The Tribal health clinic, day care, and tribal services will be closed,
2 and approximately thirty-five (35) employees of the Tribal government will be laid off
3 or forced to work without pay.

4 The damage to the Tribe does not end there. The Tribal Government inability to
5 carry out its obligation also affects the internal relations of the Tribe. Naturally, tribal
6 members who are employed by the Tribe or the Casino, or receive per capita payments
7 based on Casino revenue, or receive benefits under the Tribe's governmental programs,
8 have become impatient with the tribal government's inability to carry out its
9 obligations normally, leading to significant political turmoil within the membership of
10 the Tribe.

11 The Bank, by initially recognizing the Lewis Faction as the Tribal government,
12 allowing the withdrawal of funds from the Accounts based on the directives of the
13 Lewis Faction, and freezing the Accounts, has made the operation of the Tribal
14 government and the Casino nearly impossible. The Tribe and the Casino cannot issue
15 checks to employees, contractors and vendors. While the Casino has been able to
16 make some payments using cash, it cannot continue to do so. In fact, unless the Casino
17 has access to the Operating Account this week, it will not have enough cash or the
18 means to pay its Casino employees, vendors or make its monthly payment to the Tribe.
19 Markle Declaration, p. 3, ¶ 9. The economic engine of the Tribe is, thus, slowing, and if
20 not provided access to the Operating Account this week will no longer be able to
21 function. *Id.* If the Casino stops operating the Tribe will not be able to pay its loan
22 payments or have the funds necessary to operate the Tribal Government. Casey
23 Declaration, p. 2, ¶ 6.

24 Based on these facts, it is clear that the Bank is directly interfering with the
25 ability of the Tribe to operate its economic enterprise, the Casino, which is the very
26 source of revenue for the operation of the Tribal Government. Unless the Casino can
27 get access to the Operating Account this week, the Tribe will exist in name only. Markle
28 Declaration, p. 4, ¶ 11; Casey Declaration, p. 2, ¶¶ 5-6. There could not be a greater

1 example of non-Indian interference in the ability of the Tribe to govern itself than the
2 facts presented by this case. The conduct of the Bank unquestionably “implicates tribal
3 governance and internal relations.”

4 The second *Montana* exception is that a tribe can exercise jurisdiction over a
5 non-member where “the conduct of non-Indians¹ on fee lands within its reservation
6 when that conduct threatens or has some direct affect on the political integrity, the
7 economic security, or the health and welfare of the Tribe.” *Montana*, 450 U.S. at 566.
8 This exception has received less attention than the first exception, but has been
9 addressed in the line of cases discussed above.

10 In *Strate*, the Supreme Court succinctly addressed the second exception:

11 Read in isolation, the *Montana* rule's second exception can be
12 misperceived. Key to its proper application, however, is the Court's
13 preface: "Indian tribes retain their inherent power [to punish tribal
14 offenders,] to determine tribal membership, to regulate domestic
15 relations among members, and to prescribe rules of inheritance for
16 members. . . . But [a tribe's inherent power does not reach] beyond what
17 is necessary to protect tribal self-government or to control internal
18 relations." 450 U.S. at 564. Neither regulatory nor adjudicatory authority
19 over the state highway accident at issue is needed to preserve "the right of
20 reservation Indians to make their own laws and be ruled by them."
21 *Williams*, 358 U.S. at 220.

22 *Strate*, 520 U.S. at 459.

23 In *Plains Commerce Bank*, the Supreme Court further clarified, and narrowed,
24 the standard for applying the second *Montana* exception:

25 when non-Indians’ “conduct” menaces the “political integrity, the
26 economic security, or the health or welfare of the tribe.” *Montana*, 450
27 U.S., at 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493. The conduct must do more
28 than injure the tribe, it must “imperil the subsistence” of the tribal
community. *Ibid.* One commentator has noted that “th[e] elevated
threshold for application of the second *Montana* exception suggests that
tribal power must be necessary to avert catastrophic consequences.”
Cohen § 4.02[3][c], at 232, n 220.

29 *Plains Commerce Bank*, 554 U.S. at 341.

30 ¹“The Court in *Montana v. United States*, . . . referred to "nonmembers" and "non-
31 Indians" interchangeably. . . . Because, here, we are concerned with the extent of tribes’
32 inherent authority, and not with the jurisdiction statutorily conferred on them by
33 Congress, the relevant distinction, as we implicitly acknowledged in *Strate*, is between
34 members and nonmembers of the tribe.” *Hicks*, 533 U.S. at 337, fn 2.

1 This is an extremely high standard, one which an Indian tribe will rarely be able
2 to meet. This case is one of the rare exceptions.

3 “The second *Montana* exception stems from the same sovereign interests that
4 give rise to the first” *Ibid.* As the forgoing discussion of the impacts of the Bank’s
5 conduct make crystal clear, the Bank’s refusal to honor its obligations and allow the
6 Tribe to use the Accounts has had and will cause “catastrophic consequences”: the
7 dramatic and increasing impairment of the functioning of the Tribe’s government and
8 the economic engine of the Tribe, the Casino. Because of these impacts, because the
9 funds at issue are tribal, the vast majority of which are derived from on-reservation
10 commercial activities, and because the issue of access to the Accounts is inextricably
11 tied to the dispute over which group constitutes the legitimate tribal government, the
12 Tribe’s fundamental sovereign interests are involved. The Tribal Court is the proper
13 forum for the resolution of those issues. The dispute as to the which group constitutes
14 the legitimate tribal government and the operation of the tribal government and the
15 Tribe’s commercial, on reservation enterprises are purely internal matters. “Although
16 no longer ‘possessed of the full attributes of sovereignty,’ [Indian tribes] remain a
17 ‘separate people, with the power of regulating their internal and social relations.’ . . .
18 They have power to make their own substantive law in internal matters, . . . and to
19 enforce that law in their own forums” *Santa Clara Pueblo v. Martinez*, 436 U.S.
20 49, 55-56 (1978) (citations omitted). “Tribal courts have repeatedly been recognized as
21 appropriate forums for the exclusive adjudication of disputes affecting important
22 personal and property interests of both Indians and non-Indians.” *Id.*, 436 U.S. at 56.

23 Importantly, the Bank suffers no negative consequences from the assertion of
24 jurisdiction by the Tribal Court. The only actions that the Bank could be required to
25 take are the same as it would be required to take if it was carrying out the terms of the
26 DACA and the Agreements, making sure that the Bondholders are paid, that the Casino
27 has access to the Operating Account to pay Casino operating expenses and the
28 honoring of the group recognized as the legitimate tribal government.

1 **b. The Tribal Court Had Subject Matter Jurisdiction Over The**
2 **Claims Filed Against The Defendants.**

3 Article V of the Tribe’s Constitution grants to the Tribal Council the authority to
4 “promulgate and enforce ordinances governing the conduct of ... non-members within
5 the Tribe’s jurisdiction; ... to safe guard the peace, safety, morals and general welfare of
6 the Tribe; ... and to manage tribal funds in accordance with approved resolutions...” *Id.*

7 In Section 5.1 of the Tribal Court Ordinance, the Tribal Council granted the
8 Tribal Court jurisdiction over “all causes of action of any kind, civil actions, or
9 equitable matters, and actions for injunctive relief...”. *Id.* Section 5.1 (a). Section 5.1 (b)
10 of the Tribal Court Ordinance provides

11 ... the Court shall have original jurisdiction: ... (b) Over any matter
12 involving any real or personal or tangible property or assets (or any other
13 property or assets of any kind) of any Tribal Entity located within or
14 without the exterior borders of the territorial jurisdiction of the Court...

15 Exhibit 1 to the Wynn Declaration, p. 2.

16 The Tribal Court Ordinance further grants to the Tribal Court jurisdiction
17 over any “legal actions under any contracts entered into with a Tribal Entity
18 concerning Tribal property . . .” *Id.* Section 5.1 (f).

19 The Tribal Council has also adopted the Tribe’s Law and Order Code. Wynn
20 Declaration, p. 2, ¶ 7, Exhibit 2. Pursuant to the Law and Order Code, the Tribal Court
21 is granted “jurisdiction over all civil causes of action . . .” Law and Order Code, § 1-2-5,
22 and over all matters in which the Tribe or its officers acting in their official or
23 individual capacities are a party to the litigation Law and Order Code, § 1-2-7. Section
24 35 of the Tribe’s Law and Order Code also grants the Tribal Court jurisdiction over
25 interpleader actions.

26 Finally, federal courts have ruled that in disputes between two factions of a
27 Tribal government over who has the authority to control funds on deposit in a tribe’s
28 bank accounts, the Tribal Court of the tribe has jurisdiction to determine who the
29 lawful governing body of the tribe is for purposes of determining who the bank must
30 recognize as having the authority to control the bank accounts. *Timbisha Shoshone*
31 *Tribe, et. al. v. Joseph Kennedy, et. al.*, 687 F. Supp. 2d 1171 (E.D. Cal. 2009); see also,

1 *Bank of America v. William Bills, et. al.*, 2008 U.S. Dist. Lexis 17985 (Dist. Nev.
2 2008).

3 **2. The Defendants Were Afforded Due Process by the Tribal**
4 **Court.**

5 "A federal court must also reject a tribal judgment if the [party] was not
6 afforded due process of law." Marchington, 127 F.3d at 811. "It has long been the law of
7 the United States that a foreign judgment cannot be enforced if it was obtained in a
8 matter that did not accord with the basics of due process." *Bank Melli Iran v. Pahlavi*,
9 58 F.3d 1406, 1410 (9th Cir. 1995).

10 Due process, as that term is employed in comity, [requires] . . . that
11 there has been opportunity for a full and fair trial before an impartial
12 tribunal that conducts the trial upon regular proceedings after proper
13 service or voluntary appearance of the defendant, and that there is no
14 showing of prejudice in the tribal court or in the system of governing
15 laws.

16 Marchington, 127 F.3d at 811.

17 [E]vidence 'that the judiciary was dominated by an opposing litigant, or
18 that a party was unable to obtain counsel, to secure documents or
19 attendance of witness, or to have access to appeal or review, would
20 support a conclusion that the legal system was one whose judgments are
21 not entitled to recognition.

22 *Id.* (citing Restatement (Third) of Foreign Relations Law of the United States § 482
23 cmt. B (1986)); *Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006).

24 All of the defendants were provided with due process of law throughout the
25 Tribal Court Action. The Tribal Court conducted all of the proceedings before it
26 pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence.
27 Marston Declaration, p.8, ¶ 35. The defendants were personally served with the
28 summons and complaint. *Id.* at p. 3, ¶ 6. Defendants, through their legal counsel, were
provided notice of and an opportunity to participate in all of the hearings conducted by
the Tribal Court. *Id.* at pp. 3-6, ¶¶ 6-11, 19-21 . The Bank did not voluntarily participate
in the hearing on the Tribe's motion for a temporary restraining order, which took
place on March 15, 2013. *Id.* at p. 3, ¶ 7. The Bank did not submit evidence and
argument to the Tribal Court in opposition to the Tribe's motion for a temporary
restraining order and for an order that the Bank interplead the money in the Accounts

1 with the Tribal Court. *Id.* at p. 3, ¶ 7. The Bank participated in the hearing on the
2 Tribe's motion for a preliminary injunction, through the legal counsel of their choice,
3 who appeared by telephone and argued in opposition to the motion. *Id.* at p. 6, ¶ 20.
4 Defendants Lewis, Alberta, and Bushman, despite being served with the amended
5 complaint and with the motion papers three days before the hearing and being
6 provided with a conference call number and pass code which would have permitted
7 them to appear by telephone, did not participate in the hearing on the motion for a
8 preliminary injunction. Marston Declaration, pp. 5-6, ¶¶ 19-20.

9 The Tribal Court Judge is the Honorable Robert Moeller. Judge Moeller worked
10 for the Office of the Solicitor, Department of the Interior, for 35 years, primarily in the
11 area of Federal Indian law. Marston Declaration, p. 7, ¶ 34. He is the Chief Judge of the
12 Chemehuevi Indian Tribal Court and the Robinson Rancheria Tribal Court. Marston
13 Declaration, p. 7, ¶ 34. He has no personal or financial connection to the Picayune
14 Rancheria of Chukchansi Indians beyond the judicial services contract with the Tribe,
15 pursuant to which he carries out his functions as judge of the Tribal Court. Marston
16 Declaration, p. 7, ¶ 34.

17 Thus, there is no basis for concluding that the defendants were not afforded due
18 process at any point in the Tribal Court proceedings.

19 **3. None of the Discretionary Bases for Denying Recognition**
20 **Apply in this Case.**

21 The only discretionary basis for denying recognition that could apply in this case
22 is a contractual choice of forum. The Bank raised this issue in the Tribal Court below,
23 citing to the DACA. That provision requires that, in the case of a dispute between the
24 Tribe and the Bondholders, the dispute is to be heard first in the Federal District Court
25 for the District of New York, the Supreme Court of the State of New York, and Tribal
26 Court, in that order. However, that provision relates to violations of the DACA, not the
27 Agreements between the Tribe and the Bank relating to the Accounts. That provision,
28 therefore, is inapplicable to the present proceedings.

Moreover, the funds remaining in the Accounts with the Bank are not subject to

1 the DACA, but are only subject to the Agreements.

2 In addition, the payment to the Bondholders and providing the Casino with
3 access to the Casino Operating Account is consistent with and carries out the terms of
4 the DACA.

5 Finally, there is no dispute between the Bank and the Tribe over the terms of the
6 DACA. Even the Bank candidly admits that they would honor the Tribe's requests
7 once it can determine who is a rightful member of the Tribe's Tribal Council. Thus, the
8 real dispute here is the Bank's refusal to recognize the Tribal Court's determination of
9 that issue, once this Court has recognized and enforced the Tribal Court's preliminary
10 injunction.

11 Thus, the Tribe is likely to succeed on the merits of its claim for recognition of
12 the Tribal Court Orders.

13 **B. The Tribe Will Suffer Irreparable Harm if the TRO is not**
14 **Granted.**

15 It is evident, that unless the Court issues a temporary restraining order in this
16 case, the Tribe will suffer devastating harm and irreparable injuries that are not of the
17 sort for which the Tribe could be made whole by a judgment for money damages. What
18 is at stake in this case is the present and future existence of the Tribe as a viable,
19 functioning, political, and governing entity with reputable, profitable commercial
20 enterprises.

21 First, unless the Court issues a temporary restraining order, the Tribe will be
22 unable to meet the operating expenses of its Casino and its Tribal government. Unless
23 those expenses are paid, 1,200 employees of the Casino may be laid off and 35
24 employees in the Tribal government may lose their jobs. Without these employees, the
25 Casino and the Tribal government will cease to operate and the ability of the Tribe to
26 govern itself will be threatened. Markle Declaration, pp. 3-4, ¶ 10. Casey Declaration,
27 p. 2, ¶¶ 5-6.

28 Second, unless the Court issues a temporary restraining order, the Tribe will be
unable to make its Loan payment on the Indenture. The failure to pay the loan will
keep the Tribe in default under the terms of the Loan, which would subject the Tribe to

1 a demand for immediate repayment of the entire Loan amount and possible seizure of
2 the collateral that secures the Loan. In the event of seizure, the Casino will cease
3 operating. Markle Declaration, pp. 3-4, ¶ 10.

4 Third, and more generally, the damage to the Tribe that would result from the
5 Bank's breach of its contractual obligations is incalculable. The Tribe could spend
6 years attempting to get back the money drawn from tribal accounts by unauthorized
7 persons, pay Tribal debts that are incurred as a result of either misappropriation of
8 tribal funds or failure to meet tribal obligations based on the unavailability of those
9 funds, and restore the credit rating and business reputation of the Tribe, if the Bank is
10 not prevented from refusing to recognize the Tribe's check signers and refusing to
11 allow the Tribal Council to draw on the accounts maintained by the Tribe at the Bank.

12 **C. The Equities Favor the Tribal Council.**

13 Fourth, the equities clearly favor the Tribal Council. The Tribal Council's goal in
14 both the Tribal Court proceedings and in this litigation, is to protect the Tribe and
15 resources from loss, waste or destruction. No matter what reasons the Lewis, Alberta,
16 and Bushman Faction may have had for attempting to effectively engineer a coup and
17 take over the reigns of Tribal government, such an unconstitutional process, combined
18 with decisions made by less than a quorum of the Tribal Council do not provide an
19 equitable basis for the Bank to refuse to make the Loan payment. The payment of the
20 Loan and the avoidance of the disastrous consequences of default benefit the Tribe, the
21 Casino, and every individual member of the Tribe. There is also no equitable
22 consideration that would weigh in favor of the Bank to following the directives of the
23 Lewis, Alberta and Bushman Faction, including permitting check signers identified by
24 the Lewis, Alberta and Bushman Faction to withdraw funds from the Tribe's Accounts
25 with the Bank. Even assuming that there is a genuine issue as to who is a member of
26 the Tribal Council, there is no legal or equitable consideration that would support
27 allowing three individuals who, acting alone, do not have the authority to act on behalf
28 of the Tribe or Tribal Council, to take control of the Tribe's Bank Accounts and
revenues.

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CONCLUSION

Unless this Court acts to require the Bank to provide the Casino with access to the Operating Account to pay its operating expenses and pay the Bondholders the balance of the Loan payment, the Casino will have to curtail its operation or cease operating altogether and the Bondholders will be deprived of the monies that are due them under the Note and DACA. The consequences of these actions will have a devastating impact on the Tribe. Literally, unless this Court grants the Tribe's motion the Casino and the Tribal Government will be destroyed.

For all of the foregoing reasons, the Tribe prays that the Court issue a temporary restraining order granting the Tribe the relief it has requested by its motion.

Dated: June 3, 2013

RAPPORT AND MARSTON

By: /s/ Lester J. Marston
Lester J. Marston
Attorney for the Tribe