

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WELLS FARGO BANK, N.A., AS
TRUSTEE,

Plaintiff,

-against -

CHUKCHANSI ECONOMIC
DEVELOPMENT AUTHORITY, THE
BOARD OF THE CHUKCHANSI
ECONOMIC DEVELOPMENT
AUTHORITY, THE TRIBE OF PICAYUNE
RANCHERIA OF THE CHUKCHANSI
INDIANS, THE TRIBAL COUNCIL OF THE
TRIBE OF PICAYUNE RANCHERIA OF
THE CHUKCHANSI INDIANS, THE
PICAYUNE RANCHERIA TRIBAL
GAMING COMMISSION, RABOBANK,
N.A., GLOBAL CASH ACCESS, INC.,
NANCY AYALA, TRACEY
BRECHBUEHL, KAREN WYNN,
CHARLES SARGOSA, REGGIE LEWIS,
CHANCE ALBERTA, CARL BUSHMAN,
and BANK OF AMERICA, N.A.,

Defendants.

Index No. 652140/2013
(Schweitzer, J.)

**DEFENDANT BANK OF AMERICA'S MEMORANDUM OF LAW IN RESPONSE
TO WELLS FARGO BANK'S APPLICATION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
RELEVANT FACTUAL AND PROCEDURAL BACKGROUND	2
A. The Tribe Opens The Bank of America Accounts.....	2
B. Bank of America Freezes Accounts After Notification of Intertribal Dispute.	3
C. Ayala Faction Sues Bank Of America In Its Tribal Court.....	3
D. Lewis Faction Sues Bank Of America In Its Separate Tribal Court.....	4
I. BANK OF AMERICA WILL COMPLY WITH THIS COURT’S ORDER.....	5
II. BANK OF AMERICA HAS THE RIGHT TO DEDUCT ITS FEES AND EXPENSES.....	7
CONCLUSION.....	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Burnham v. Superior Court</u> 495 U.S. 604 (1990).....	6
<u>Montana v. United States</u> 450 U.S. 544 (1981).....	6
<u>Nevada v. Hicks</u> 533 U.S. 353 (2001).....	6
<u>Plains Commerce Bank v. Long Family Land and Cattle Co., Inc. et al.</u> 554 U.S. 316 (2008).....	6

<u>Statutes</u>	<u>Page(s)</u>
Uniform Commercial Code	
§ 9-104(a).....	8
§ 9-312(b).....	7
§ 9-314	7
§ 9-340	9
§ 9-340(c).....	9

INTRODUCTION

Bank of America, N.A. (“Bank of America”) holds deposit accounts opened by the Picayune Rancheria of the Chukchansi Indians (the “Tribe”). Two rival factions of the Tribe are in a heated dispute over control of the Tribal Council. Each faction of the Tribe has established its own separate tribal court and each faction has filed a separate lawsuit against Bank of America in the two separate tribal courts seeking control over the funds on deposit with Bank of America. Not surprisingly, the two lawsuits seek inconsistent relief.

Bank of America has not taken sides in this tribal dispute and has no interest in which faction prevails. But because Bank of America has been subjected to inconsistent demands regarding Tribe’s accounts, Bank of America has frozen the accounts. Shortly after the dispute over the accounts first arose, Bank of America sent a letter to the Tribal factions, asking them to agree that the funds in the accounts could be transferred to Wells Fargo and used to pay obligations on the Tribe’s bonds. The factions could not agree and Bank of America was forced to incur significant expenses to defend the two tribal court lawsuits.

Now, Wells Fargo, in its capacity as Trustee, has filed this lawsuit against the Tribe, various tribal entities, the individuals that make up the two tribal factions, Bank of America, and other parties that hold tribal funds. The Trustee seeks a preliminary injunction directing that the tribal funds that Bank of America currently holds should be transferred to an account at Rabobank and held subject to the Trustee’s control pursuant to the subject agreements between Wells Fargo and the Tribe.

Because Bank of America has no interest in the outcome of this case, it takes no position on the injunctive relief sought by Wells Fargo. However, Bank of America has incurred significant expense in defending the multiple litigations filed by the Tribal factions and the Trustee’s Application and, pursuant to the Deposit Agreement governing the Tribe’s accounts

with Bank of America, Bank of America is entitled to deduct its fees and expenses from the amounts on deposit. Wells Fargo has previously communicated its willingness to permit Bank of America to do so. Accordingly, in the event that the Court grants the relief requested by Wells Fargo, Bank of America respectfully requests that the Court allow it to deduct the attorneys' fees and costs it has incurred before any funds are transferred to Rabobank and establish a holdback of \$50,000 to cover future fees and expenses relating to the disputes.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. The Tribe Opens The Bank of America Accounts.

On or about March 19, 20, and 21, 2013, individuals purporting to act on behalf of the Tribe (including the Tribal Gaming Commission ("TGC") and the Chukchansi Economic Development Authority ("CEDA")) opened a total of nine corporate deposit accounts with Bank of America. (Affirmation of Christine Swanick ("Swanick Aff."), Ex. A (Ayala Lit Smith Dec.), at ¶ 6.) One of these accounts, opened in the name of CEDA and designated as account number XXXXX-X3411 holds substantial funds and is the subject of Wells Fargo's complaint and application for preliminary injunction ("Account"). The other accounts have zero balances.

The Tribe agreed to certain terms and conditions set forth in the Deposit Agreement when it opened the Account and signed Account signature cards. (Swanick Aff., Ex. B (Ayala Lit Engelbrekton Dec.), at ¶ 3 & Ex. K.; Ex. A (Ayala Lit Smith Dec.), at ¶¶ 4, 5 & Ex. I.) The Deposit Agreement provides for the law governing both the Account and disputes related to the Account, including specifically that any such disputes must be filed in the federal or state courts. (Swanick Aff., Ex. B (Ayala Lit Engelbrekton Dec.), at ¶¶ 3, 5 & Ex. K at p. 8, 11.) Additionally, in the very first section of the Deposit Agreement, under the heading "General matters" the depositor agrees that if conflicting claims are made to the Account, the Bank can freeze the Account. (*Id.*, Ex. K at p. 1.) Most critically, for purposes of this proceeding and

Bank of America's position, this same section authorizes Bank of America to charge the Account for "expenses and fees, including attorneys' fees" that Bank of America incurs in connection with a dispute over the Account. (Id.)

B. Bank of America Freezes Accounts After Notification of Intertribal Dispute.

On or about March 25, 2013, Bank of America was notified of an intra-tribal dispute concerning the members of the Tribal Council and their authority to act on behalf of the Tribal Council and the Tribe. (Swanick Aff., Ex. C (Dhindsa Dec.), at ¶ 3 & Ex. A.) Prior to April 2, 2013, Bank of America received a letter on behalf of the faction led by Reggie Lewis stating that there was a dispute as to the funds in the Account. On April 2, 2013, Bank of America froze the Account, as authorized by the Deposit Agreement, until such time as the dispute is resolved to the Bank's satisfaction.¹ After the dispute arose, Bank of America sent a letter to propose a resolution involving the Account. On April 22, 2013, Bank of America proposed that the tribal factions agree that the funds in the Account could be transferred to Wells Fargo and used to pay obligations on the Tribe's bonds. (Swanick Aff., Ex. J.) The Tribe did not agree to any resolution. As a result and as described more fully below, Bank of America has incurred fees and expenses in excess of \$277,0000 defending itself in various courts relating to the Account. (Swanick Aff., ¶ 15.)

C. Ayala Faction Sues Bank Of America In Its Tribal Court.

On or about March 25, 2013, Nancy Ayala, purportedly on behalf of the Tribe, filed in a "Tribal Court Of The Picayune Rancheria Of Chukchansi Indians" (the "Ayala Tribal Court"), an action against Bank of America for injunctive and declaratory relief ("Ayala Litigation"). (Swanick Aff., Ex. D (Ayala Complaint).) The Ayala Litigation alleges that Bank of America's

¹ In fact, Bank of America froze all nine of the tribal accounts.

refused to recognize Ms. Ayala's seven member tribal council (the "Ayala Faction") as the individuals with the authority to designate check signers and the authority to deposit and withdraw funds from the tribal accounts, including the Account. (See generally, *id.*) The complaint in the Ayala Litigation also seeks an order compelling Bank of America to recognize the Ayala Faction and unfreeze the Account and the other tribal accounts. (*Id.*)

The Ayala Faction claims that the Ayala Tribal Court granted the Tribe a Temporary Restraining Order (the "Ayala TRO") that requires Bank of America to honor banking requests from the Ayala Faction and to refuse any banking requests from the Lewis Faction with respect to the Accounts. (Swanick Aff., Ex. E.)

Bank of America has specially appeared in the Ayala Litigation and has responded to the Complaint with a motion to dismiss, asserting that the Ayala Tribal Court lacks subject matter jurisdiction over the dispute and lacks personal jurisdiction over Bank of America. Bank of America also opposed the Ayala Faction's motion for preliminary injunction. (Swanick Aff., ¶ 8.)

D. Lewis Faction Sues Bank Of America In Its Separate Tribal Court.

On or about May 20, 2013, Reggie Lewis, purportedly on behalf of the CEDA, filed in a different "Tribal Court Of The Picayune Rancheria Of Chukchansi Indians" (the "Lewis Tribal Court") a second and separate action against Bank of America, Nancy Ayala, Tracey Brechbuehl, Karen Wynn and Charles Sargosa, Automatic Data Processing Inc. ("ADP") and 200 other unnamed defendants (the "Lewis Litigation"). The Lewis Litigation alleges that Bank of America has communicated with the Ayala Faction and has refused CEDA's request that Bank of America freeze funds maintained in certain accounts at Bank of America, including the Account. (Swanick Aff., Ex. F (Complaint), at ¶¶ 4, 59, 62.) Bank of America has, in fact, frozen the accounts of the Tribe, including the Account. (Swanick Aff., (Ex. G (Lewis Lit

Malingagio Dec.), at Ex. A; Ex. H (Lewis Lit Knudson Dec.), at Exs. A-E.) Bank of America has not frozen the account referred to as the “ADP Account,” which is legally titled to ADP Payroll Services, Inc., and ADP Payroll Services, Inc. is the only authorized signer on the account. (Swanick Aff., Ex. F (Complaint), at Ex. U.)

The Lewis Tribal Court granted CEDA a temporary restraining order (the “Lewis TRO”) *ex parte* and without notice to Bank of America prohibiting the bank from taking “illegal actions”. (Swanick Aff., Ex. I (Lewis TRO), at ¶ 5.) The Court set a hearing for an order to show cause re preliminary injunction, currently set for July 15, 2013. (Swanick Aff., ¶ 12.) The requested preliminary injunction would prevent Bank of America from transferring the funds in the Account to anyone and would further prohibit Bank of America from “participating, facilitating, coordinating, negotiating, colluding, conspiring, or dealing in any manner whatsoever” with the Ayala Faction. (Swanick Aff., Ex. F (Complaint), at Prayer ¶¶ 1-2.)

Bank of America is specially appearing in the Lewis Litigation and has responded to the complaint with a motion to dismiss, asserting that the Lewis Tribal Court lacks subject matter jurisdiction over the dispute and lacks personal jurisdiction over Bank of America. Bank of America also opposed the Lewis Faction’s motion for preliminary injunction. (Swanick Aff., ¶ 13.)

ARGUMENT

I.

BANK OF AMERICA WILL COMPLY WITH THIS COURT’S ORDER

In defending both the Ayala Litigation and the Lewis Litigation, Bank of America has repeatedly disclaimed any interest in the intra-tribal dispute between the Ayala Faction and Lewis Faction of the Tribal Council. Moreover, Bank of America has informed both the Ayala Faction and the Lewis Faction that Bank of America will follow the orders of a state or federal

court properly exercising personal jurisdiction over the bank and subject matter jurisdiction over the dispute regarding disposition of the funds on deposit with Bank of America in the Account.

Bank of America has defended both the Ayala Litigation and Lewis Litigation on the grounds that a Tribal Court does not have subject matter jurisdiction over the dispute between Bank of America and the Tribe. Bank of America is not a member of the Tribe and has not consented to any Tribal Court's jurisdiction. See Nevada v. Hicks, 533 U.S. 353, 382 (2001) (the membership, or nonmembership, status of the parties controls as the primary jurisdictional fact); Plains Commerce Bank v. Long Family Land and Cattle Co., Inc. et al., 554 U.S. 316, 319 (2008) (a tribal court cannot exercise jurisdiction over a nonmember defendant absent that defendant's consent, expressly or by action); Montana v. United States, 450 U.S. 544 (1981) (setting forth general rule that tribe lacks jurisdiction over nonmember).

Moreover, the Ayala Tribal Court and Lewis Tribal Court lack personal jurisdiction over Bank of America because none of the three federal common law bases necessary for personal jurisdiction – personal service on persons physically present in the forum, domicile within the forum, or consent or appearance in the action – exist in the Tribal Courts. Burnham v. Superior Court, 495 U.S. 604, 610 (1990).

However, even if the Tribe had a contract or other voluntary dealings with Bank of America, the only agreement relevant to the Tribe's allegations against Bank of America is the Deposit Agreement. Pursuant to the Deposit Agreement, a state or federal court has jurisdiction over the parties with respect to disposition of the funds on deposit in the Account. Accordingly, Bank of America will follow the directions of this New York State Court for disposition of those funds.

Bank of America takes no position on the issuance of a preliminary injunction and will follow an order of this court to transfer funds in the Account to Rabobank. However, Bank of America requests that the Court issue an order permitting Bank of America to deduct from the Account the legal fees and costs it has incurred in litigation with the Tribe over the Account, as set forth below. Also, Bank of America reserves the right to seek interpleader of the funds if necessary.

II.

BANK OF AMERICA HAS THE RIGHT TO DEDUCT ITS FEES AND EXPENSES

Bank of America does not take a position on whether the Trustee has demonstrated its rights to funds held by Bank of America in the Account. But, whatever rights that the Trustee has are inferior to Bank of America's rights in those funds. Bank of America's right to deduct its fees and expenses is superior to any rights the Trustee (or any other parties) may have because (1) the Trustee lacks control over the Account and (2) the Deposit Agreement expressly permits Bank of America to set-off or recoup its fees and expenses.

First, it is black-letter law that a party does not have a perfected security interest in a deposit account or cash unless that party has control or possession, respectively:

Except as otherwise provided in Section 9-315(c) and (d) for proceeds:

(1) a security interest in a deposit account may be perfected only by control under Section 9-314;

* * *

(3) a security interest in money may be perfected only by the secured party's taking possession under Section 9-313.

UCC § 9-312(b).² Section 9-314 of the UCC provides that “A security interest in ... deposit accounts may be perfected by control of the collateral under Section 9-104....” Control of a deposit account only occurs when: “(1) the secured party is the bank with which the deposit account is maintained; (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or (3) the secured party becomes the bank’s customer with respect to the deposit account.” UCC § 9-104(a).

Here, the Trustee does not have control of the Bank of America Account — Wells Fargo is not the bank with which the deposit account is maintained, there is no authenticated record between Bank of America, the Trustee, and CEDA wherein Bank of America agreed to comply with the Trustee’s instruction, nor has the Trustee become Bank of America’s customer with respect to the Account. Accordingly, the Trustee lacks control over the Bank of America Account.

Second, the Deposit Agreement for the Bank of America Account contains two provisions that expressly permit Bank of America to deduct or charge the deposit account for any amounts owed to Bank of America. In particular, the Deposit Agreement provides:

- We may deduct amounts you owe us ... from your account. If you do not have enough funds in your account to satisfy your obligations to us, we may deduct amounts you owe us from your other accounts with us and our affiliates.

² The Deposit Agreement is governed by California law because that is where the Account is located. The provisions of the Uniform Commercial Code referenced herein are identical or substantially the same in both New York and California and, therefore, Bank of America is citing to the New York Uniform Commercial Code. That is not, however, a waiver or acknowledgement that New York law applies to the Account.

* * *

- If another person or entity makes a claim against funds in your account, or if we believe that a conflict exists between signers on the account or that there is a dispute over matters such as the ownership of the account or the authority to withdraw funds, we may take one or more of these actions without our being liable to you: continue to rely on current signature cards and other account documents; honor the competing claim upon receipt of evidence we deem satisfactory to justify such claim; freeze all or part of the funds until the dispute is resolved to our satisfaction; close the account and send a check for the balance in the account, payable to you or to you and each claimant; or pay the funds to an appropriate court for resolution. We may charge your account for expenses and fees, including attorneys' fees, we incur.

(Swanick Aff., Ex. B (Ayala Lit Engelbrektsen Dec.), at Ex. K, p. 1.) Based upon the dispute between the Ayala Faction and the Lewis Faction, Bank of America froze the Account. Bank of America has also incurred significant fees and expenses in defending against the claims brought by the two factions in the two tribal courts, as well as the Trustee's Application. The total amount of attorneys' fees and costs incurred by Bank of America exceeds \$277,000, (Swanick Aff., ¶ 15), and Bank of America expects to incur additional fees and expenses until the various litigations relating to the Account are resolved. Pursuant to the Deposit Agreement, Bank of America is entitled to charge its fees and expenses to the account and deduct them from the Account.

UCC Section 9-340 sets forth the rules that are applicable to a situation such as this where a bank has a right of recoupment or set-off against a deposit account and a party is claiming a security interest in that account. In particular, Section 9-340(a) provides that "[e]xcept as otherwise provided in subsection (c), a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account." Subsection (c) provides that the right of set-off or

recoupment “is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under Section 9-104(a)(3)” UCC § 9-340(c).

Accordingly, Bank of America should be permitted to deduct its fees and expenses from the Account before transferring any funds.

CONCLUSION

For the foregoing reasons, Bank of America respectfully requests that, should the Court grant the preliminary injunction requested by Wells Fargo and order that Bank of America transfer the funds on deposit with Bank of America in the Account to Rabobank, Bank of America first be permitted to deduct its costs and attorneys’ fees incurred in connection with the litigation with the Tribe and establish a holdback of not less than \$50,000 for any future fees and expenses, pursuant to the terms of Bank of America’s Deposit Agreement with the Tribe.

Dated: June 27, 2013
New York, New York

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By: _____



Robert S. Friedman
Christine L. Swanick
Mark E. McGrath

30 Rockefeller Plaza
New York, New York 10112
Telephone: (212) 653-8700

Attorneys for Defendant Bank of America, N.A.