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

MEMORANDUM OF LAW IN SUPPORT OF WELLS FARGO BANK, N.A.'S APPLICATION FOR A PRELIMINARY INJUNCTION

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Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo" or the "Trustee"), acting in its capacity as Trustee and Collateral Agent under the Indenture and Security Agreement, respectively (as defined below), submits this memorandum of law in support of its application for a preliminary injunction, pursuant to CPLR § 6301, for an Order to enjoin Chukchansi Economic Development Authority ("CEDA" or the "Authority"), the Board of the Chukchansi Economic Development Authority (the "Board"), the Tribe of the Picayune Rancheria of the Chukchansi Indians (the "Tribe"), the Tribal Council of the Tribe of the Picayune Rancheria of the Chukchansi Indians (the "Tribal Council") (CEDA, the Board, the Tribe, and the Tribal Council, collectively, the "Tribal Parties") and the individuals Nancy Ayala, Tracey Brechbuehl, Karen Wynn, Charles Sargosa, Reggie Lewis, Chance Alberta and Carl Bushman (Ayala, Brechbuehl, Wynn, Sargosa, Lewis, Alberta, and Bushman, collectively, the "Individual Defendants") from taking further actions in contravention of the Indenture, Security Agreement and related agreements (the "Agreements"), and for an Order of direction with respect to Bank of America, N.A. ("Bank of America"), Rabobank, N.A. ("Rabobank") and Global Cash Access, Inc. ("Global Cash Access") as third parties to this dispute in possession of funds subject to the Trustee's interests, given that these actions are likely to cause continued irreparable harm to the interests of the Trustee and the holders of the Secured Notes (defined below) (the "Holders").

I. INTRODUCTION

The Trustee seeks a preliminary injunction related to numerous current and ongoing breaches of the Indenture, the related Security Agreement and other agreements at issue. The breaches all relate to a dispute that has erupted within CEDA, which was established by the Tribe to operate the Chukchansi Gold Resort & Casino in Coarsegold, CA (the "Casino"), and which issued approximately $250 million in Secured Notes in May 2012 pursuant to the

Indenture to refinance the debt of the Casino.[1] The breaches occurred no later than February 2013, when at least two separate factions began battling for control of the Tribal Council, which governs the Tribe, and control of CEDA. This Tribal governance dispute has caused chaos and substantially disrupted the Casino's operations and finances, resulting in several serious breaches of the Indenture and related agreements. This situation threatens to cause permanent damage to the health of the Casino and, as a result, to the collateral underlying the Secured Notes (the "Collateral"). The Trustee is not asking this Court to resolve the underlying Tribal dispute nor does it seek to have any role in managing the operations of the Casino. Rather, the Trustee is seeking the Court's intervention to enforce the terms of the Indenture and related agreements, prevent irreparable harm to the rights of the Holders and protect the value of the Collateral. The Tribal Parties have agreed to this Court's exclusive jurisdiction to hear such disputes arising under the Indenture, and the Trustee is left with no choice but to seek the Court's intervention.

Specifically, although the many breaches of the Agreements are detailed in the Trustee's Complaint, including CEDA's failure to pay millions of dollars of interest required by the Indenture, the breaches related to the request for a preliminary injunction are as follows:

(1) The Ayala Faction (as defined below), which controls the management of the Casino and its revenues, recently transferred Casino funds—purportedly in the name of CEDA—into a new bank account at Bank of America because of the Tribal governance dispute, in breach of the Security Agreement that requires CEDA to deposit cash only into accounts over which the Trustee has control.

(2) Upon notice of the Tribal dispute, Bank of America froze the account. Bank of

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[1] As discussed below, the Trustee takes no position with respect to which faction should be in control of the Tribe and CEDA. The Trustee is serving the Tribe and CEDA with this Memorandum and all papers in this action using the procedures provided in the Indenture, and is serving both factions and their counsel with all papers in this action.

America has indicated that it cannot allow either Faction (as defined below) to use the account without further guidance from a court of competent jurisdiction. As a result, the Ayala Faction, again in CEDA's name, began maintaining the Casino's revenues in the Casino "cage" rather than depositing those revenues with a bank, as required under the Indenture, thus putting significant cash at risk and further violating the Indenture and the Security Agreement.

(3) Because of the Tribal dispute, the accounts into which Casino revenues should be deposited, at Rabobank, have also been frozen to CEDA. As with Bank of America, Rabobank has indicated that it cannot allow either Faction to use the accounts in light of the dispute without appropriate direction from a court of competent jurisdiction. As a result, at least one vendor, Global Cash Access, which holds approximately $14 million in uncashed checks—comprising the Collateral—has been unable to deposit those funds, and other critical vendors of the Casino are not being paid, in violation of the Indenture. [2]

(4) The Lewis Faction, also in the name of CEDA, brought suit in a purported Tribal Court not only to challenge the Ayala Faction regarding the rightful control and authority of the Tribal Council, the Tribe and CEDA, but also—in direct violation of the Indenture and related agreements—against the Trustee for taking actions expressly permitted as Indenture Trustee, and instituted related proceedings before a purported Tribal Gaming Commission; and

(5) The Tribe itself, through the actions of both Factions, has, *inter alia*, restricted CEDA's right and ability to conduct Casino business and has done so in a manner that is materially adverse to the economic interests of the Holders.

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[2] The Trustee will give notice of this lawsuit to Bank of America and Global Cash Access and the requested relief and will determine if they oppose the requested relief. Rabobank has indicated that it will accept the funds from Bank of America and Global Cash Access. Rabobank is joined as a party only to the extent necessary to enable those funds to be deposited in the Rabobank Accounts.

The Trustee is an innocent bystander in the underlying dispute and takes no position with respect to which Faction rightfully should be in control of the Tribe and the Tribal Council. But regardless of which Faction ultimately prevails in the underlying tribal dispute, the Trustee is entitled to injunctive relief intended to prevent further damage to the Casino's operations and thereby protect the investment made by the Holders.

The Trustee requests that the Court grant the following injunctive relief: First, CEDA and the Tribe should be enjoined from withholding cash in the Casino cage or in an account not subject to an Account Control Agreement[3], and they and Bank of America should be directed to transfer the funds held at Bank of America, and all appropriate cash and future revenues, under the Indenture, to the Rabobank Accounts (as defined below) ("Gross Revenues Relief"). Second, CEDA, the Tribe and Rabobank should be directed to utilize the Rabobank Accounts for deposits and to make payments to the Casino's critical vendors, as agreed among those parties, in compliance with the Indenture and related agreements, and Global Cash Access should be directed to deposit its funds in the Rabobank Accounts where they belong ("Control Account Relief").[4][5] Third, the Tribal Parties and the Individual Defendants should be enjoined from filing

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[3] Capitalized terms not otherwise defined in this Complaint shall have the meaning ascribed to them in the Indenture, Security Agreement, and related documents. *See* Ex. A, Indenture & Ex. E, Security Agreement. All references to "Ex.__" are to the exhibits attached to the Affidavit of Michael Slade, submitted concurrently herewith.

[4] Specifically, while the Trustee has an uncontested security interest in both the Collateral in the Bank of America account and that held by Global Cash Access, the Trustee's right of possession in the funds and checks is up to an amount sufficient to satisfy the amounts owed by CEDA under the Indenture.

[5] Relatedly, the Trustee requests that the Court declare that (a) the Trustee has a security interest in and right to possession of the funds in the Bank of America account and the uncashed checks held by Global Cash Access, (b) the Trustee has a right to possession of the funds in the Bank of America account and the uncashed checks held by Global Cash Access, up to an amount sufficient to satisfy the amounts owed by CEDA to the Trustee and (c) the funds held by Bank of America and Global Cash Access must be deposited into the Rabobank Accounts.

further actions in venues prohibited by the Agreements ("Unfair Action Relief"). Fourth, CEDA should be directed to provide reports to the Trustee containing the Casino's audited financial statements ("Financial Statement Relief").

The Trustee firmly believes that, with the Court's assistance, there can be a return to the *status quo ante* on an expedited basis before further irreparable harm is done.

II. STATEMENT OF FACTS

A. The Indenture And Related Agreements, And The Security Interests Of The Trustee And The Holders

On May 30, 2012, CEDA issued $250,406,000 9¾% Secured Notes due 2020 (the "Secured Notes") pursuant to that certain Indenture, dated as of May 30, 2012, as amended or modified from time to time (the "Indenture"). As part of the issuance of the Secured Notes, CEDA, the other grantors and the Trustee also entered into a Security Agreement (the "Security Agreement"). The financing to which the Secured Notes relate was used by CEDA to refinance obligations incurred by it to construct the Casino and make capital improvements. As part of the refinancing, CEDA pledged the revenues earned by the Casino as Collateral, among other things, and covenanted to deposit such revenues into certain specified bank accounts at Rabobank, at other Qualified Banks, or with the Collateral Agent. As part of the transaction, CEDA, Rabobank and the Trustee entered into an agreement giving the Trustee control over accounts (the "Rabobank Accounts") at Rabobank (the "Control Agreement").

B. Tribal Dispute

The Tribe elects and appoints a Tribal Council, which serves as the governing body for the Tribe. The elected Tribal Council also sits as the Board of Directors for CEDA. Thus, the make-up of the Tribal Council and the Board of Directors for CEDA is identical.

CEDA is in charge of operating the Casino. At the time of the signing of the Indenture in

May 2012, CEDA's Chairman was Reggie Lewis and its Vice Chairwoman was Nancy Ayala. In December 2012, Ayala was elected Chairwoman of the Tribal Council.

In or around February 2013, a dispute erupted within the Tribe and CEDA regarding who should be in charge of those bodies. This dispute has fractured control of the Casino. Ayala, acting under her purported authority as Tribal Council Chairwoman, took actions to replace certain members of the Tribal Council, including Lewis.

Since that time, at least two separate factions have claimed to be the true leaders of the Tribe, the Tribal Council and CEDA: the "Ayala Faction" and the "Lewis Faction" (collectively, the "Factions"). The "Ayala Faction" consists of Nancy Ayala, Tracey Brechbuehl, Karen Wynn, and Charles Sargosa. These individuals assert that Nancy Ayala is the Tribal Council Chairwoman, and that, as such, she has proper authority to control CEDA and the Casino. The "Lewis Faction" consists of Reggie Lewis, Chance Alberta, and Carl Bushman. These individuals assert that Reggie Lewis is the Tribal Council Chairman, and that, as such, he has proper authority to control CEDA and the Casino. Each Faction claims to have its own Tribal Council, Tribal Court and Tribal Gaming Commission.

During 2013 and at present, the Ayala Faction has been in control of the Casino's operations, but, in violation of the Security Agreement and the Indenture, the Ayala Faction did not deposit Gross Revenues (described below) and Revenues and Cash (described below) in the Rabobank Accounts, but instead began maintaining cash in the Casino.[6] This failure to handle these monies in accordance with the requirements of the Agreements has caused substantial disruption to the management of the Casino's finances, and has put the Collateral at risk.

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[6] Pursuant to Sections 4.4.4(b) and 4.9 of the Security Agreement, CEDA is required to deposit the Casino's Revenues and Cash into a deposit account over which the Trustee has been granted express control by CEDA. This includes the Rabobank Accounts.

C. Breaches and Other Actions in Violation of the Indenture and Related Agreements

1. Failure to Deposit Gross Revenues and Revenues and Cash

Pursuant to Section 4.25 of the Indenture, at least once per week, CEDA is required to cause all Gross Revenues, other than Operating Cash and Gross Revenues that constitute Excluded Assets, to be deposited in Deposit Accounts at a Qualified Bank (*e.g.*, Rabobank). Ex. A. Gross Revenues are defined under Section 1.1 of the Indenture to include all revenues from the Casino, less certain items including Operating Cash. Operating Cash is defined under Section 1.1 of the Indenture as certain cash necessary for the operation of the Casino, not to exceed an aggregate of $10 million.

Additionally, pursuant to Section 4.9 of the Security Agreement, CEDA must deposit all Revenues and Cash in excess of Operating Cash into, and maintain in, an account over which the Trustee has control. Revenues and Cash is defined under Section 1.1 of the Security Agreement to include all profits, income and revenues derived from the Casino.

Since approximately the last week of February 2013, presumably because of the disputes that have arisen, CEDA has stopped depositing the Gross Revenues and Revenues and Cash into the specified Rabobank Accounts. *See* Slade Aff. ¶5. Substantial cash balances, upon information and belief consisting of millions of dollars in excess of necessary Operating Cash, instead are being held in the Casino cage and in locations and bank accounts other than designated Deposit Accounts at Rabobank. *See* Affidavit of Ronald Evans, submitted herewith ("Evans Aff.") ¶ 9. The failure to deposit Gross Revenues and Revenues and Cash into the designated Deposit Accounts at Rabobank constitutes a breach of the Indenture and Security Agreement. Moreover, holding such substantial sums of cash outside of any established bank account not subject to a control agreement presents significant risks to the financial stability of

the Casino as well as to the Holders. CEDA's actions also violate the relevant Tribal Gaming Ordinance in multiple respects, thus constituting further violations of the Indenture. *See*, *e.g.*, Ex. B., Tribal Gaming Ordinance, Sections 6.1, 8.3.

2. Impact of Failure to Handle of Casino Finances in Compliance with Contractual Agreements on Vendor Relationships

The dispute between the Factions also has led to debilitating disruption with the Casino's vendors. For example, Global Cash Access, one of the Casino's key vendors which reconciles the total ATM cash dispensed from the Casino and must reimburse the Casino for these reconciled amounts, has been unable to make payments due to the Casino. Ex. C, Letter dated May 14, 2013 from Global Cash Access to Mr. R. Rosette and Mr. F. Petti. Historically, Global Cash Access regularly deposited these reimbursed amounts directly into the Casino's Rabobank Accounts. In connection with the recent tribal governance dispute, CEDA instructed Global Cash Access to make payments into an unauthorized account at Bank of America but, as described below, that account has been frozen. *Id.* Global Cash Access thus was forced to send checks directly to the Casino, but those checks have not been cashed. *Id.* As of June 17, 2013, Global Cash Access held approximately $14 million in uncashed checks payable to the Casino. Slade Aff ¶18. These funds are Collateral and constitute Revenues and Cash under the Security Agreement.

In late April, the Lewis Faction, claiming to be the true leaders of the Tribe, began sending "cease and desist" letters to various vendors, demanding that they stop providing services to the Casino. *See, e.g.,* Ex. D, Letter dated April 22, 2013 from Mr. R. Rosette to Bally Gaming. The letters claim that, by continuing to provide services to and receive payment from the Casino, the vendors are committing crimes by allegedly supporting the Ayala Faction. By sending these letters, the Lewis Faction is endangering the financial well-being of the Casino,

and the negative impact such letters may have on the Casino's operations is large and irreparable.

3. Opening of Bank of America Account

On March 19, 2013, the Ayala Faction, claiming to be in control of CEDA, opened an account at Bank of America, and on March 20, began depositing Gross Revenues and Revenues and Cash from the Casino into that account. Evans Aff. ¶ 8. However, CEDA did not enter into an Account Control Agreement with the Trustee for the Bank of America account, in violation of the Indenture and the Security Agreement. On April 2, 2013, as a result of the Tribal dispute and through no fault of Bank of America, Bank of America froze this account, which holds approximately $2.6 million. *Id.*

Pursuant to Sections 4.4.4(b) and 4.9 of the Security Agreement, the Trustee has a legal right of possession to the funds in this Bank of America account. These sections explicitly require that the Casino's Revenues and Cash must be deposited into an account over which the Trustee has control through an Account Control Agreement. Moreover, the Trustee has a security interest in all of CEDA's Revenues and Cash, including the funds held at Bank of America. Section 4.9 of the Security Agreement makes clear that CEDA is obligated to deposit the Casino's Revenues and Cash into a Deposit Account. Ex. E. This Section states that CEDA "hereby covenants and agrees that it shall cause all Revenues and Cash consisting of cash and Cash Equivalents in excess of Operating Cash requirements, to be deposited into, and maintained in, a Deposit Account or Securities Account constituting Collateral." *Id.* Section 4.4.4(b), quoted above, makes clear that CEDA must give the Trustee a security interest in Deposit Accounts. *Id.* The funds held in the Bank of America Account are Collateral and constitute both Revenues and Cash under the Security Agreement and Gross Revenues under the Indenture.

Moreover, because CEDA has failed to pay at least $3 million in interest, plus fees and expenses incurred in connection with this dispute, as discussed below, CEDA is in breach of the

Security Agreement and Indenture, and the Trustee has a legal right to possession of the funds in the Bank of America account to satisfy the interest, fees, and expenses that are owed.

The Trustee has contacted Bank of America to make a formal demand for the funds in the Bank of America account to be transferred to the Rabobank Accounts. Bank of America determined that it could not transfer the funds to Rabobank without direction from a state or federal court with proper jurisdiction over the subject matter and the parties.

4. CEDA's Missed Interest Payment

Pursuant to the Indenture, interest on the Notes is due semi-annually on March 30 and September 30. *See* Exhibit A-1 to Ex. A. As of April 1, 2013, CEDA failed to make its scheduled interest payment of $11,933,658.75 to the Holders of the Notes. Slade Aff. ¶6. In addition, CEDA has failed to pay the Trustee millions of dollars in fees and expenses incurred by the Trustee in connection with this dispute, in further violation of the Indenture. *Id.* at ¶7; Ex. A, Section 7.7.

On April 11, 2013, as explicitly allowed under the Agreements, the Trustee directed Rabobank to release a portion of the funds in the Rabobank Account to the Trustee. The Trustee did not sweep the full amount due to it under the Indenture, in order to leave funds in the Rabobank Account to facilitate the Casino's operations. *See*, Ex. F, Deposit Account Control Agreement, Section 1(e).

D. CEDA's Failure to Provide Financial Statements

Under Section 4.18 of the Indenture, CEDA is required to provide financial statements to the Trustee and the Holders on a regular basis. Ex. A. Such financial statements were due on April 15 and May 20, 2013. To date, CEDA has not provided to the Trustee and the Holders these financial statements. Slade Aff. ¶8. The Tribal Gaming Ordinance also requires CEDA to obtain audited financial statements and furnish them to the Tribal Gaming Commission. Ex. B,

Sections 9.5.1 & 9.5.3. CEDA's failure to provide the financial statements is yet another breach of the Indenture. The Trustee understands that the Casino's financial condition is growing precarious as a result of the ongoing Tribal governance dispute, and without the ability to monitor the Casino's finances closely, it is becoming impossible for the Trustee and the Holders to safeguard their interests. *See* Slade Aff. ¶18-22.

E. The Lewis Tribal Court and Tribal Gaming Commission Proceedings

On April 18, 2013, the Lewis Faction, purportedly on behalf of CEDA, sued the Trustee in the Tribal Court established by the Lewis Faction (the "Lewis Tribal Court"). Slade Aff. ¶9. The Lewis Faction alleged that the Trustee, by exercising its contractual right to sweep a portion of the funds due to it under the Indenture, as permitted by the Security Agreement and the Deposit Account Control Agreement for the Rabobank Accounts, had acted improperly, and that by doing so and engaging with the Ayala Faction and its counsel, somehow conspired to overthrow the governing body of the Tribe and CEDA. *Id.*

The initiation of that lawsuit constituted a breach of the Indenture because CEDA and the Tribe consented to the jurisdiction of New York courts in the first instance for any disputes arising under or relating to the Indenture or the Security Agreement. *See* Ex. A., Section 13.1(c) & Ex. E, Section 11.8(c). Moreover, CEDA and the Tribe expressly agreed that they would not "institute any action in its own tribal court system in respect of any claim or cause of action arising out of or relating to the Transaction Documents and the transactions contemplated thereunder, but shall instead resort to the other courts set forth above." *See* Ex. A, Section 13.1(d) & Ex. E, Section 11.8(d). Further, on March 30, 2012, the Tribe passed Resolution 2012-53 which specifically removed jurisdiction of the Tribal Court over any action "arising in respect of or related in any manner ... to a Transaction Document, or to any person who is a participant in a Transaction, a party to or a beneficiary of a Transaction Document, a registered

or beneficial owner of any New Note." *See* Ex. G, Tribal Resolution 2012-53.

On April 26, 2013, the Lewis Faction, through the purported Tribal Gaming Commission, filed Orders to Show Cause requiring the Trustee and one of the Holders to appear on May 2, 2013 to show cause as to why the Tribal Gaming Commission should not take action to reconsider its prior license exemption issued to the Trustee, and to reconsider its license issued to one of the Holders. Slade Aff. ¶10. The Lewis Faction, tracking the lawsuit filed before the Lewis Tribal Court, claimed that by allegedly supporting the Ayala Faction and sweeping the Rabobank Accounts as allowed under the Indenture and related documents, the Trustee and the Holder exerted undue influence over the Casino by engaging in management actions without proper authority and licensure. *Id.* at ¶11.

The Trustee immediately began negotiating with the Lewis Faction in an attempt to have the Lewis Tribal Court complaint and Tribal Gaming Commission proceedings dismissed. *Id.* at ¶13. On May 2, 2013, the Lewis Faction did dismiss its Lewis Tribal Court complaint, but it did so without prejudice as to its purported right to refile an action before that same Tribal Court. *Id.* at ¶14. On May 8, 2013, the Trustee and the Holder filed a joint motion to dismiss the orders to show cause filed with the Tribal Gaming Commission. *Id.* at ¶15. On May 9, 2013, the Tribal Gaming Commission dismissed the orders to show cause, again without prejudice. *Id.* at ¶16.

Both Factions have filed and are continuing to file and appear in a host of actions in courts around the country, and this distracts from what can be achieved in one consolidated action in this Court in the State of New York, which is the appropriate forum as agreed by the Trustee, CEDA and the Tribe in the Indenture.

III. ARGUMENT

Under Section 6301 of the CPLR, a court may grant a preliminary injunction "in any action where the plaintiff has demanded and would be entitled to a judgment restraining the

defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." CPLR § 6301. To obtain a preliminary injunction, a movant must show (1) the likelihood of success; (2) danger of an irreparable injury; and that (3) on balance, the equities favor the granting of a preliminary injunction. *Huff v. C.K. Sanitary Sys., Inc.*, 246 A.D.2d 795, 796-97, 667 N.Y.S.2d 766 (3d Dep't 1998) (affirming Supreme Court's grant of a preliminary injunction); *Gerald Modell, Inc. v. Morgenthau*, 764 N.Y.S.2d 779, 783-84 (N.Y. Sup. Ct. 2003) (citations omitted). These elements are easily established in this case.

The Trustee is requesting that the Court grant injunctive relief in four categories to remedy CEDA's clear breaches of the Indenture and Security Agreement: (1) "Gross Revenues Relief," in which the Trustee requests that the Court enjoin CEDA and the Tribe from maintaining cash in the Casino's cage rather than the Rabobank Accounts, and directing CEDA, the Tribe and Bank of America to transfer the funds in the Bank of America account and appropriate future cash and revenues to CEDA's Operating Account at Rabobank (the "Operating Account"); (2) "Control Account Relief," in which the Trustee requests that the Court direct CEDA, the Tribe and Rabobank to utilize the Rabobank Accounts for deposits and thus in order to pay critical vendors, and to direct Global Cash Access to deposit in the Operating Account the funds payable to CEDA; (3) "Unfair Action Relief," in which the Trustee requests that the Court enjoin CEDA, the Tribe and the Individual Defendants from instituting further proceedings against the Trustee in an improper forum and (4) "Financial Statement Relief," in which the Trustee requests that the Court direct CEDA to provide necessary reports containing its financial statements.

A. Gross Revenues Relief: Request that the Court Enjoin CEDA and the Tribe from Withholding Cash in the Casino's Cage and Directing CEDA, the Tribe and Bank of America to Transfer the Funds in the Bank of America Account and Appropriate Future Cash and Gross Revenues to the Rabobank Accounts

1. The Trustee is Likely to Succeed On the Merits

Sections 4.4.4(b) and 4.9 of the Security Agreement explicitly require that the Casino's Revenues and Cash be deposited into an account over which the Trustee has control, via the Deposit Account Control Agreement. Ex. F.

Section 4.9 of the Security Agreement governs CEDA's obligation to deposit the Revenues and Cash into a Deposit Account. Ex. E. This Section states that CEDA "hereby covenants and agrees that it shall cause all Revenues and Cash consisting of cash and Cash Equivalents in excess of Operating Cash requirements, to be deposited into, and maintained in, a Deposit Account or Securities Account constituting Collateral." *Id.*

Section 4.4.4(b) makes clear that CEDA and the Tribe must give the Trustee a security interest in Deposit Accounts, and states, in relevant part:

> With respect to any Investment Related Property constituting Collateral that is a Deposit Account, each Grantor shall cause the depositary institution maintaining such account to enter into an agreement in the form of the Account Control Agreement . . . which is effective to establish "control" under the UCC, pursuant to which the Collateral Agent shall have "control" (within the meaning of Section 9-104 of the UCC) over such Deposit Account. Each Grantor shall have entered into such control agreement or agreements with respect to: (A) any Securities Accounts, Securities Entitlements or Deposit Accounts constituting Collateral that exist on the Issue Date . . . and (B) . . . Deposit Accounts constituting Collateral that are created or acquired after the Issue Date, as of or prior to the deposit or transfer of any such Securities Entitlements or funds, whether constituting moneys or investments, into such Securities Accounts or Deposit Accounts.

Id. Further, Section 4.25 of the Indenture requires that CEDA deposit all Gross Revenues, other than Operating Cash and Gross Revenues that constitute Excluded Assets into Deposit Accounts

at a Qualified Bank.

Until February 2013, CEDA deposited Gross Revenues and Revenues and Cash into the Rabobank Accounts, which were accounts over which the Trustee, pursuant to the Control Agreement, had control and which complied with the requirements of the Security Agreement.

But after the Tribal dispute erupted, CEDA committed at least two clear violations of the Indenture and Security Agreement. First, CEDA deposited Gross Revenues and Revenues and Cash into the Bank of America account, which is a Deposit Account, while refusing to enter into an Account Control Agreement, constituting a breach of Section 4.4.4(b) of the Security Agreement and Section 4.25 of the Indenture. Second, CEDA withheld Gross Revenues and Revenues and Cash within the Casino cage and did not deposit the funds into a Deposit Account, constituting a breach of Section 4.9 of the Security Agreement and Section 4.25 of the Indenture.

In a motion for a preliminary injunction, this prima facie showing of square violations of the Security Agreement is sufficient to show likelihood of success on the merits. *Maestro West Chelsea SPE LLC v. Pradera Realty Corp.*, 38 Misc.3d 522, 535 (N.Y. Sup. Ct. 2012). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *H. Fox & Co., Inc. v. Blumenfeld,* 809 N.Y.S.2d 87, 88 (2d Dep't 2005).

Moreover pursuant to Sections 4.4.4(b) and 4.9 of the Security Agreement, the Trustee has a legal right of possession to the funds in this Bank of America account. These sections require that Revenues and Cash must be deposited into an account over which the Trustee has control through an Account Control Agreement. Ex. E. The Trustee has a security interest in all

of CEDA's Revenues and Cash[7], including the funds held at Bank of America. As such, as of that date, the Trustee has a security interest in CEDA's Revenues and Cash, which includes Revenues and Cash produced by the Casino and now sitting in the Bank of America account. Moreover, under the Indenture, the Trustee has an immediate right to the funds (and to direct that the funds be transferred to the Operating Account) because of CEDA's breaches and Events of Default. Bank of America, however, has taken the position—because of the Tribal governance dispute, and through no fault of its own—that it must await direction regarding these funds from a court of competent jurisdiction.

2. Irreparable Harm Exists Because, Absent the Injunctive Relief Requested, A Later Final Judgment Will be Ineffectual

A preliminary injunction is appropriate in an action seeking relief relating to the handling of funds, as here, where the defendant is dissipating the funds to which plaintiffs allege a right in a manner that could render the final judgment ineffectual. *Zonghetti v. Jeromack*, 150 A.D.2d 561, 562 (2d Dep't 1989) (enjoining uncontrolled sale and disposition of assets purchased with funds over which plaintiff alleged ownership because such disposition would threaten to render ineffectual any later monetary judgment plaintiffs might obtain); *Pando v. Fernandez*, 124 A.D.2d 495, 496 (1st Dep't 1986) (enjoining lottery winner from disposing of ongoing lottery payments where plaintiff alleged a right to a share of the payments in order to ensure that funds would be available should plaintiff ultimately prevail). Moreover, "injunctive relief is appropriate to remedy the conversion of identifiable proceeds as sought in the underlying action." *Amity Loans, Inc. v. Sterling Nat'l Bank & Trust Co.*, 575 N.Y.S.2d 854, 854-55 (1st Dep't 1991) (affirming grant of preliminarily injunction directing plaintiff to deposit proceeds of

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[7] Pursuant to Section 2.1 of the Security Agreement, CEDA granted the Trustee a security interest in Revenues and Cash and a multitude of other revenue items.

accounts receivable into defendant's bank account, where plaintiff was contractually obligated to hold such proceeds in trust for defendant but refused to turn them over).

Here, CEDA is recklessly maintaining at least $11 million in cash in the Casino without sufficient controls. Evans Aff. ¶ 9. To protect the Trustee's secured interest in those funds, the Tribal Parties must be enjoined from keeping the funds in anything other than a secure bank account. Such withholding of cash significantly increases the risk of theft and accounting improprieties and threatens both the proper functioning of the Casino and the Collateral.

Irreparable harm is also established where an entity's financial situation makes it unlikely that the entity will have access to financial resources to pay a judgment at the conclusion of the litigation. *See Castle* Creek *Technology Partners, LLC v. Cellpoint, Inc.*, 2002 WL 31958696, at *3-4 (S.D.N.Y. Dec. 9, 2002) (finding that a company's potential future insolvency can constitute irreparable harm when it is possible that the defendant will not be able to pay damages at the conclusion of the litigation); *Alpha Capital Aktiengesellschaft v. Advanced Viral Research Corp.*, 2003 WL 328302, at *4 (S.D.N.Y. Sept. 19, 2008) (finding irreparable harm established where defendant's precarious financial situation rendered defendant likely unable to pay judgment at the end of the litigation).

Holding substantial sums of cash outside of any established bank account presents significant risks to the Casino. Already, CEDA has missed an interest payment to Holders. At least one vendor has indicated that, because it could no longer deposit funds into the Rabobank or Bank of America accounts, it was forced to send over $7 million in checks to the Casino, but those checks have not been cashed because the Casino refuses to put those funds into a deposit account—which is part of the Collateral. *See* Ex. C.

Additionally, CEDA has been paying Casino employees by cash and cash voucher, not

by check or direct deposit, raising additional security concerns. Evans Aff. ¶13-14. There is also concern that CEDA will soon be unable to meet upcoming payroll obligations. Slade Aff. ¶19. And, as described in the accompanying Affidavits, the financial condition of the Casino is growing more precarious each day. *Id.* at ¶18-22; Evans Aff. ¶ 7-14.

B. Control Account Relief: Request that the Court Direct CEDA, the Tribe and Rabobank to Utilize the Rabobank Accounts for Deposits and in Order to Pay Critical Vendors, and Direct Global Cash Access to Deposit in the Rabobank Accounts the Funds Payable to CEDA

1. The Trustee is Likely to Succeed on the Merits

As detailed above, until February 2013, CEDA deposited the Casino's Gross Revenues and Revenues and Cash into the Rabobank Accounts, over which the Trustee has control via the Deposit Account Control Agreement dated as of May 30, 2012. Ex. F. Rabobank did not have the authority to freeze the accounts and to deny the Trustee access to the funds therein, in which the Trustee has a security interest.[8] Nor is CEDA allowed to maintain the significant amounts of Revenues and Cash and Gross Revenues that it is holding in the Casino cage; rather, these funds must be deposited into the Rabobank Accounts at least once per week, per Section 4.25 of the Indenture. Ex. A.

Further, the Trustee has a right to the uncashed checks held by Global Cash Access, which constitute part of the Collateral and Revenues and Cash under the Security Agreement. Similar to the Bank of America account, the Trustee has a security interest in the funds held by Global Cash Access, as these are part of the Casino's Revenues and Cash.

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[8] Under Section 2.1 of the Security Agreement, CEDA granted the Trustee a security interest in the Casino's Revenues and Cash.

2. Failure to Unfreeze the Rabobank Accounts and Failure of Global Cash Access to Deposit Funds Into the Rabobank Accounts Will Cause Irreparable Harm to The Trustee

The Trustee is requesting that the Court direct the Tribal Parties to utilize the Rabobank Accounts for deposits and critical payments, and direct Rabobank to unfreeze the Rabobank Accounts because absent this relief, The Trustee will suffer irreparable harm. First, by keeping the Revenues and Cash and Gross Revenues outside of the Rabobank Accounts over which the Trustee has control the Trustee will continue to be denied access to the funds it should distribute, in its role as Trustee, as interest payments to the Holders. More importantly, because the Rabobank Accounts are frozen, the Casino's finances are deteriorating. This endangers the Casino's ability to operate and therefore endangers the Collateral. If the Rabobank Accounts are not unfrozen immediately, the Casino's ability to operate will be jeopardized and the Trustee and the Holders face a far greater risk than not having their interest payments made timely—namely, CEDA's obligation to pay the principal amount it owes the Holders pursuant to the Notes.

Further, Global Cash Access holds approximately $14 million payable to CEDA, in which the Trustee has a security interest. Slade Aff. ¶18. Global Cash Access been unable to deposit these funds into any account because the Rabobank Accounts are frozen. Ex. C. On information and belief, as a result of its failure to handle cash in accordance with the Agreements, CEDA is experiencing increasing difficulties satisfying the daily cash needs of the Casino, including payroll and payments to various critical vendors. *Id.* at ¶19-21. On information and belief, several key vendors who have not received payment in recent weeks are threatening to stop providing services to the Casino. *Id.* at ¶21. If the Rabobank Accounts are not unfrozen quickly, the Global Cash Access funds are not deposited into the Rabobank Accounts and CEDA is not directed to make these payments, the vendors may stop providing services and employees may not show up to run the Casino. In that event, the Casino will not be

able to operate and generate income. Without income, CEDA will be unable to repay the Trustee and the Holders. The Trustee and the Holders will thus be irreparably harmed.

C. Unfair Action Relief: Request that the Court Enjoin CEDA from Instituting Proceedings against The Trustee in an Improper Forum

1. The Trustee is Likely to Succeed on the Merits

The Agreements also require that any actions against the Trustee relating to the Agreements must be filed first in New York. Another court is appropriate only if the New York courts decline jurisdiction. This is part of the bargained-for agreement among all "Tribal Parties" and the Trustee, in the Indenture and other Agreements, signed by Lewis and Ayala.

Section 13.1(c) of the Indenture states, in pertinent part:

> [the Tribe, the Authority, any entity, arm or subunit of the Tribe, and the Guarantors], the Trustee and the Collateral Agent will agree to irrevocably and unconditionally submit, for itself and its property, to the exclusive jurisdiction of the United States District Court, Southern District of New York, and any appellate court from which any appeals therefrom are available (the "New York Federal Courts"), the courts of the State of New York sitting in the City of New York, County of New York, and any appellate court from which any appeals therefrom are available (the "New York State Courts") . . . in any action or proceeding arising out of or relating to any Transaction Document or the transaction contemplated thereby.

Ex. A. (Ex. E Section 11.8(c) of the Security Agreement contains similar language).

Here, the Lewis Faction, acting in CEDA's name, should have brought its action against the Trustee and one of the Holders—if at all—in New York, and not before the Tribal Court and the Tribal Gaming Commission.[9] The Agreements explicitly state that the Tribal Parties will not

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[9] The New York state court has subject matter jurisdiction over this action under N.Y. Judiciary Law § 140-b and Article VI, § 7 of the Constitution of the State of New York. The New York state court has personal jurisdiction over the Tribal Parties in this action pursuant to, *inter alia*, New York General Obligations Law § 5-1402 because the action arises out of a contract relating to transactions covering in the aggregate not less than one million dollars for

bring suit in Tribal Courts.[10] CEDA and the Tribe clearly violated the Agreements by filing actions before the Tribal Court and the Tribal Gaming Commission.

Further, the Eastern District of California recently agreed that the Agreements require that any action arising under those Agreements must first be brought in New York. *See The Picayune Rancheria of Chukchansi Indians v. Rabobank, et al.*, No. 1:13-cv-00609 (E.D. Ca. Jun. 4, 2013) at 3-4. That court opined that an action arising out of the Agreements must be brought in a forum consistent with the contractual choice of forum set out in the Agreements (i.e., New York). *Id.* That court also went on to interpret Resolution 2012-53 to divest any tribal court of jurisdiction over disputes arising out of the Agreements. *See id.* at 4.

The actions of the Lewis Faction and the Lewis Tribal Gaming Commission constitute tortious interference with the contractual relationship among CEDA, the Tribe and the Trustee by participating in a proceeding against the Trustee and one of the Holders. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (N.Y. 1996). That standard is clearly met in this case.

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which a choice of New York law has been made and which contains a provision whereby Defendants agree to submit to the jurisdiction of the courts of this State.

[10] Pursuant to the Indenture, the Tribal Parties have granted an "irrevocable limited waiver of sovereign immunity . . . from unconsented suit, arbitration or other legal proceedings . . . with respect to the Transaction Documents and the transactions contemplated thereby . . . to . . . interpret or enforce the provisions of the Transaction documents or rights arising in connection therewith or the transactions contemplated thereby, whether such rights arise in law or equity." Ex. A, Section 13.1(b). (Ex. E Section 11.8(d) of the Security Agreement contains similar language).

2. The Trustee Will Be Irreparably Harmed If the Tribal Parties and Individual Defendants Are Permitted to File Further Actions Before Tribal Courts and Gaming Commissions Outside Those Bargained For in the Agreements

Permitting the Tribal Parties or the Individual Defendants to file an action in any court except for the agreed upon courts irreparably harms the Trustee because an adverse decision (1) may bar the Trustee from participating in many other business ventures, (2) will cause the Trustee reputational harm, including losing good will with their customers, and (3) will distract the parties from resolving the issues requiring immediate relief before this Court.

As an initial matter, neither the Lewis Tribal Court nor the Lewis Tribal Gaming Commission is an appropriate forum for any dispute relating in any way to the Trustee's or the Holders' actions relating to the Indenture, the Security Agreement or the Control Agreement, including the sweep of the Rabobank Account. The parties specifically contracted that the Tribal Parties would not take action in either forum. New York courts routinely enjoin parties from litigating issues in other jurisdictions where the parties have chosen New York as the jurisdiction for litigating their disputes in a forum selection clause. *See, e.g.*, *Indosuez Int'l Fin., B.V. v. Nat'l Reserve Bank*, 758 N.Y.S.2d 308, 309-10 (1st Dep't 2003) (affirming preliminary injunction enjoining defendant from pursuing "harassing and bad faith" litigation in Russia against plaintiff was proper, in light of mandatory forum selection clause in parties' contract); *Caesars Bahamas Inv. Corp. v Baha Mar Joint Venture Holdings Ltd.*, 2008 WL 4360436 (N.Y. Sup. Ct. Sept. 12, 2008) (preliminarily enjoining defendant from violating forum selection clause by bringing action in Bahamas against plaintiff's parent company).

Although the Tribe previously had *one* Tribal Court and *one* Tribal Gaming Commission, when the Tribal dispute erupted, the Ayala Faction took control of the existing Tribal Court and Tribal Gaming Commission (collectively the "Ayala Tribal Court System"). Around the same

time, the Lewis Faction created a second purported Tribal Court and Tribal Gaming Commission (collectively the "Lewis Tribal Court System"). Thus, one set of these Tribal Courts and Tribal Gaming Commissions is not valid. Accordingly, the Trustee and the Holders should not be subjected to proceedings in those venues until the Tribal dispute is resolved. In any event, neither Faction should be allowed to bring actions in those venues for disputes under the Indenture because the parties expressly chose New York courts to handle those actions.

Moreover, should the Tribal Gaming Commission controlled by the Lewis Faction, for example, find that the Trustee is unsuitable to provide financing to the Tribe for the Casino in accordance with the Tribe's Gaming Ordinance and the Tribal-State Compact, the impact on the Trustee would be grave. The Trustee would need to consider reporting this adverse finding to state level gaming regulators in New Jersey and likely other states. As a result, these regulators may revoke the Trustee's gaming financing source licenses in these states. Thus, an adverse decision from one of the Tribal Gaming Commissions would cost the Trustee its ability to finance other casino bonds in New Jersey and possibly nationwide.

Further, facing the potential adverse determinations of any such purported tribal gaming commission or court, the Trustee risks losing good will among its customers, which also constitutes irreparable harm. *Reuters Ltd. V. United Press Internat'l, Inc.*, 903 F.2d 904, 907-09 (2d Cir 1990) (holding that loss of customers and the competitive disadvantage that resulted from a company's inability to supply its customers with a previously provided product constitutes irreparable harm); *Rex Med. L.P. v. Angiotech Pharmaceuticals, Inc.*, 754 F. Supp.2d 616, 621 (S.D.N.Y. Dec. 1, 2010) ("A company's loss of reputation, good will, and business opportunities from a breach of contract can constitute irreparable harm.") (internal quotation omitted); *Jacob H. Rottkamp & Son, Inc. v. Wulforst Farms, LLC*, 17 Misc.3d 382, 388 (N.Y. Sup. Ct., 2007)

("Evidence of potential damage to a business reputation is a sufficient basis to establish irreparable injury justifying the grant of preliminary injunctive relief. Damage to business reputation and good will can be difficult or impossible to quantify and demonstrates irreparable harm, as opposed to injury that can be compensated with damages.") (citations omitted).

Most importantly, if any further Tribal Court or Tribal Gaming Commission proceedings are initiated against the Trustee or the Holders in connection with these issues, in violation of the Agreements, the parties will be distracted from resolving the critical disputes under the Indenture that are properly before this Court. Given the dire circumstances described herein, this distraction will cause serious and irreparable harm to the Trustee and the Holders.

D. Financial Statement Relief: Request that the Court Direct CEDA to Provide Reports Containing Financial Statements

1. The Trustee Is Likely to Succeed on the Merits

Under the Indenture, CEDA was required to provide the Trustee and the Holders, by April 15, 2013, with reports containing its audited year-end 2012 financial statements. CEDA failed to do so. And on May 20, 2013, CEDA failed to provide reports containing its unaudited first quarter 2013 financial statements.[11] CEDA, in fact, still has not done so. Slade Aff. ¶8.

2. The Trustee Will Be Irreparably Harmed by CEDA's Failure to Provide Audited Financial Statements

The Trustee is being irreparably harmed by CEDA's failure to provide audited financial statements. CEDA agreed to provide audited financial statements to the Trustee and the Holders under the Indenture in order to allow the Trustee and the Holders the ability to monitor the Casino's finances in a timely manner. Such timely monitoring allows the Trustee

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[11] Under Section 4.18 of the Indenture, CEDA is required to provide audited financial statements to the Trustee and the Holders on a regular basis. The section reads in relevant part, "so long as the Notes are outstanding, the Authority will furnish to the Trustee and the Holders within the time periods...specified in the SEC's rules and regulations...(1) all annual and quarterly financial information."

and the Holders the ability to identify financial problems that would endanger the Collateral and the Trustee's and the Holders' ability to take immediate and necessary action to protect their Collateral. Since April 15, 2013, the Trustee and the Holders have been unable to monitor CEDA's and the Casino's finances because of CEDA's failure to provide audited financial statements. As discussed above, the Casino has been experiencing extreme financial difficulties. Because the Trustee and the Holders have been denied access to the audited financial statements, they have been denied their ability to monitor and thus to protect their Collateral. They thus risk irreparable harm without Court intervention requiring compliance with this fundamental obligation in the Indenture. *See Prudential Secs. Credit Corp. v. Teevee Toons*, 2003 WL 346440, at *3 (N.Y. Sup. Ct. Feb. 7, 2003) (finding that "[p]laintiff's rights in the collateralized assets may be irreparably impaired" without full access to financial records because plaintiff would be unable to exercise its right to repossess and sell assets).

E. The Equities Weigh Decidedly in The Trustee's Favor

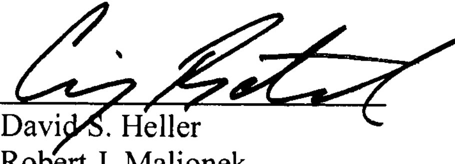
In balancing the equities, the court must weigh the harm each side would suffer in the absence or presence of injunctive relief. *Gerald Modell, Inc.*, 764 N.Y.S.2d at 786. The Trustee faces the potential harm of (1) not being able to collect on a judgment as a result of the Casino's declining financial condition; (2) permanently losing the Collateral as a result of the ongoing Tribal governance dispute; and (3) being subjected to unfair proceedings outside this Court. In comparison, Defendants will suffer no harm if the funds held by Bank of America and Global Cash Access are placed in their proper location at Rabobank. The equities weigh heavily in favor of the Trustee.

IV. CONCLUSION

For the forgoing reasons, the Trustee respectfully requests that this Court issue a preliminary injunction as requested.

June 18, 2013
New York, New York

Respectfully submitted,



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Counsel for Wells Fargo Bank, N.A., in Its Capacity as Trustee Under the Indenture and Collateral Agent Under the Security Agreement

Addendum

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
ALPHA CAPITAL AKTIENGESELLSCHAFT, Plaintiff,
v.
ADVANCED VIRAL RESEARCH CORP., Defendant.

No. 02 CV 10237(GBD), 03 CV 00009, 03 CV 00512.
Feb. 11, 2003.

Holders of stock warrants sued corporation which had refused to deliver shares, alleging breach of contract. On holders' motions for preliminary injunction, the District Court, Daniels, J., held that: (1) holders were likely to prevail on merits of claim, and (2) holders demonstrated irreparable harm.

Motions granted.

West Headnotes

[1] Injunction 212 1466

212 Injunction
212IV Particular Subjects of Relief
212IV(S) Corporations and Other Private Organizations
212k1466 k. Capital and stock. Most Cited Cases
(Formerly 212k138.42)

Corporation, contractually obligated to issue warrants to investors, was not likely to prevail on unclean hands defense, for purpose of determining whether investors were entitled to preliminary injunctive relief in their breach of contract action; evidence did not support claims investors had fraudulently induced corporation to issue warrants or had improperly acted in concert.

[2] Injunction 212 1466

212 Injunction
212IV Particular Subjects of Relief
212IV(S) Corporations and Other Private Organizations
212k1466 k. Capital and stock. Most Cited Cases
(Formerly 212k138.42)

Investors holding warrants to purchase more stock established irreparable injury needed to obtain preliminary injunction in their breach of contract suit against corporation which had refused to issue stock; warrant agreement stipulated that breach would cause irreparable harm, and there was evidence that corporation likely would be unable to pay any judgment at conclusion of case.

MEMORANDUM OPINION AND ORDER
DANIELS, J.

***1** The plaintiffs in these three consolidated actions have each filed a motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 against defendant Advanced Viral Research Corp. ("Advanced Viral").[FN1] Plaintiffs seek an order directing Advanced Viral to deliver certain shares of Warrant common stock exercisable by the language of the original Securities Purchase Agreement among the parties. For the reasons set forth below, plaintiffs' motions are granted.

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FN1. By request of the parties, this Court issued an Order consolidating these cases on February 5, 2003.

Facts

On or about September 9, 2002, plaintiffs purchased shares of defendant Advanced Viral's common stock pursuant to a Securities Purchase Agreement. Plaintiff Alpha Capital Aktiengesellschaft ("Alpha Capital") purchased 3,571,429 shares for $0.14 per share. Plaintiff Bristol Investment Fund, Ltd. ("Bristol") purchased 2,857,143 shares for $0.14 per share. Plaintiff StoneStreet Limited Partnership ("StoneStreet") purchased $750,000 of Advanced Viral stock for $0.14 per share.[FN2] As part of the Securities Purchase Agreement, each plaintiff also acquired a Warrant to purchase additional shares of common stock (the "Warrant Stock").

FN2. The precise number of shares StoneStreet purchased is not included in its motion papers.

There are two key dates in the Warrants: 60 trading days (the "First Determination Date") and 120 trading days (the "Second Determination Date") after plaintiffs purchased the common stock and Warrants. The Warrants provide that on these two dates, the number of shares which plaintiffs will receive upon exercise of the Warrants will be adjusted in accordance with a formula set forth in the Warrants. The Warrants, therefore, provide protection to plaintiffs against a possible decline in Advanced Viral's stock price by requiring an adjustment to the exercise price for the Warrant Stock if the market price falls during the first 60, and 120 trading day periods.

The First Determination Date was December 3, 2002. All three plaintiffs duly submitted their Warrant exercise forms and tendered the Warrant exercise price for the additional shares that were due. Alpha Capital claimed that under the formula set forth in the Warrant, it was entitled to 1,330,532 additional shares of stock. Bristol and StoneStreet, respectively, claimed that they were entitled under the same formulation to 1,132,617 and 1,959,931 additional shares of stock. Defendant currently has over 400 million shares of stock outstanding.

There is no dispute regarding the clearly expressed language of the contract which provides for the exercise of the Warrant stock purchases. Advanced Viral, however, refused to issue the Warrant Stock to any of the plaintiffs. Defendant argues that it was fraudulently induced by false representations that the plaintiffs were purchasing the stock on September 9 for investment only, and that each was a separate investor not acting in concert or as a group. Advanced Viral claims that plaintiffs immediately manipulated the price of the shares downward by shorting and dumping the stock in order to assure that it would be issued a greater number of Warrant shares.[FN3]

FN3. On December 17, 2002, Advanced Viral and its largest shareholder filed suit against the plaintiffs in Florida state court alleging that they engaged in a market manipulation scheme violative of the Florida securities laws.

Discussion

***2** A party may move for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65. *See* FED. R. CIV. P. 65. The movant normally must show: "(1) irreparable harm in the absence of the injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir.2002); *Forest City Daly Hous., Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir.1999). However, where a party seeks a mandatory injunction so as to *alter* the status quo, rather than merely *maintain* the status quo, the

movant must meet a higher standard. A court will order a mandatory injunction only where the movant has made a "clear" showing that it is entitled to preliminary injunctive relief, or where extreme or very serious consequences will arise from the denial of the relief. *See* Tom Doherty Assoc., Inc. v. Saban Enter., Inc., 60 F.3d 27, 34 (2d Cir.1995); *see also* Malentzos v. DeBuono, 102 F.3d 50, 54 (2d Cir.1996). Where a mandatory injunction is sought, the movant, therefore, must show a "clear" or "substantial" likelihood of success on the merits, as opposed to merely a likelihood of success on the merits.[FN4] *See* Tom Doherty Assoc., 60 F.3d at 34; Forest City Daly Hous., 175 F.3d at 149–50.

FN4. The parties agree that plaintiffs are seeking a mandatory injunction and that the higher standard of proof is therefore applicable to plaintiffs' motions.

Plaintiffs argue that they have met their burden of showing a "clear" or "substantial" likelihood of success on the merits. In support of their contention, they argue that the Warrants contain clear and unequivocal language which obligates Advanced Viral to deliver the Warrant stock on the Determination Dates. The Warrants provide:

> *Warrant Adjustment. Sixty (60) Trading Days following the Original Issue Date (the* "First Determination Date"*), a number of shares of Warrant Stock shall become exercisable at $.001.* The amount of shares of Warrant Stock exercisable at $.001 per share shall be equal to the positive difference, if any, between (i) $3,010,000 divided by the VWAP [Volume Weighted Average Price] of the Issuer's Common Stock for the sixty (60) Trading Days preceding the First Determination Date and (ii) 21,500,000. *One hundred twenty (120) Trading Days following the Original Issue Date (the* "Second Determination Date"*), a certain number of remaining shares of Warrant Stock shall become exercisable at $.001.* The amount of shares of remaining Warrant Stock exercisable at $.001 per share shall be equal to the positive difference, if any, between (i) $3,010,000 divided by the VWAP [Volume Weighted Average Price] of the Issuer's Common Stock for the sixty (60) days preceding the Second Determination Date and (ii) 21,500,000....

Alpha Capital's Order to Show Cause, Exh. B, ¶ 4(i) (emphasis added). Plaintiffs contend that Advanced Viral's failure to deliver the Warrant Stock after the First Determination date is a breach of the contract. Plaintiff also contends that this constitutes an anticipatory breach with respect to the Second Determination Date.

***3** [1] Advanced Viral readily admits that it did not deliver the Warrant Stock. It argues, rather, that plaintiffs made fraudulent misrepresentations so as to induce Advanced Viral into the contract, and that plaintiffs are not entitled to the requested equitable relief as they are guilty of "unclean hands." Advanced Viral contends that plaintiffs violated two provisions of the Securities Purchase Agreement. First, Advanced Viral contends that plaintiffs agreed in the contract to hold the stock for investment purposes only, rather than to sell it, and that from September 12, 2002 to sometime in October 2002, plaintiffs surreptitiously directed a Canadian brokerage firm and others to short sell their shares of defendant's stock, in violation of the Agreement. Advanced Viral contends that plaintiffs activities on the market caused the price of the stock to fall from $0.14 on September 12 to $0.09 by their last trade in October. Advanced Viral argues that but for plaintiffs activities, the stock price would have remained at or near $0.14 per share and plaintiffs would have no basis to claim that they are entitled to the adjustment in the Warrants.

The Securities Purchase Agreement provides for the following:

> (h) *Acquisition for Investment Only. Purchaser is*

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> *purchasing the Securities for its own account for investment, and not with a view toward the resale or distribution thereof, except as permitted under the Securities Act.* Purchaser has not offered nor sold any portion of the Securities being acquired nor does Purchaser have any intention of dividing the Securities with others or of selling, distributing or otherwise disposing of any of the Securities either currently or after the passage of a fixed or determinable period of time or upon the occurrence or non-occurrence of any predetermined event or circumstance; *provided, however, that by making the representations herein, Purchaser does not agree to hold any of the Securities for any minimum or other specific term and reserves the right to dispose of the Securities at any time in accordance with or pursuant to a registration statement or an exemption under the Securities Act and in compliance with this Agreement.*

Alpha Capital's Order to Show Cause, Exh. A, ¶ 2(h) (emphasis added). Although the clause states that the purchaser is not purchasing the stock with "a view toward the resale" of the stock, it does not prohibit the purchaser from selling any amount of stock at any particular time. In fact, the clause explicitly states that the "Purchaser does not agree to hold any of the Securities for any minimum or other specific term and reserves the right to dispose of the Securities at any time ..." *Id.* This Court cannot agree with defendant's contention that the clause forbids plaintiffs from selling their shares after purchase. Nor does the immediate sale of stock give rise to the inference that plaintiffs somehow fraudulently induced defendant into signing the contract in order to sell the stock to depress its price and thereby obtain a greater number of shares pursuant to the Warrant provision. In fact, what the evidence demonstrates is that from May 4, 2002 to May 10, 2002, the stock price rose from $0.12 to $0.17 per share. It traded at a high of $0.30 per share on June 30, 2002. By September 9, 2002, when plaintiffs purchased their shares at a price of $0.14 per share, it was trading at $0.16 per share. On September 13, 2002, when the stock began to trade at $0.14 per share and below, plaintiffs began to sell some of their stock. The stock price has yet to recover. The stock currently sells at $0.08 per share. There is presently no evidence before this Court that plaintiffs had a fraudulent scheme to buy stock and depress its price in order to buy more Warrant shares.

***4** Defendant also argues that plaintiffs acted in concert together and shorted the stock, in violation of the agreement. The relevant provision of the agreement provides:

> *Separate Purchasers; Not Affiliates.* Purchaser is a separate investor; no Purchaser is acting in concert with or as a group with any other Purchaser or any other person in connection with the purchase of the Securities pursuant to this Agreement ..... No Purchaser nor its Affiliates has an open short position in the Common Stock of the Company.

Id., ¶ 2(j). In support of its contention that plaintiffs acted in concert, defendant argues that all three plaintiffs sold their stock at some point between September 12 and October of 2000. Defendant also contends that the same Canadian brokerage firm, Canaccord Capital, directed the short sales of two of the three plaintiffs, Alpha Capital and StoneStreet.

Even taking defendant's allegations as true, this still does not rise to even a colorable claim that plaintiffs acted in concert in violation of the provision. The provision prohibits concerted activity at the time of the *purchase* of the stock. Here, defendant has presented no evidence that plaintiffs acted in concert when purchasing the stock. The fact that the plaintiffs all happened to sell the stock within a month of purchasing it or that two of the three used the same Canadian brokerage firm does not alone support a finding that there was some explicit or tacit agreement between the plaintiffs at the time of the purchase. In any event, as discussed earlier, there has been no evidence

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presented so far that plaintiffs, either acting alone or as a group, violated any terms of the contract by simply selling their stock. Defendant has presented no evidence beyond bald assertions that plaintiffs fraudulently induced defendant into the contract by acting in concert at the time of the purchase. Without such a showing, the language of the contract clearly provides for the exercise of the Warrant stock. Consequently, this Court finds that plaintiffs have shown a "clear" or "substantial" likelihood of success on the merits.

[2] As noted earlier, plaintiffs also must establish that they will be irreparably harmed in the absence of a preliminary injunction. Irreparable harm is found where there is "a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." Brenntag Int'l Chem., Inc. v. Bank of India, 175 F.3d 245, 249 (2d Cir.1999). As a general principle, monetary injury does not establish a likelihood of irreparable harm as it can be estimated and compensated. *See id.* However, "preliminary injunctions are proper to prevent a defendant from making a judgment uncollectible." Republic of Philippines v. Marcos, 806 F.2d 344, 356 (2d Cir.1986). "An exception to the general rule exists when it is shown that a money judgment will go unsatisfied absent equitable relief." *Alvenus Shipping Co., Ltd. v. Delta Petroleum (U.S.A.) Ltd.,* 876 F.Supp. 482, 487 (S.D.N.Y.1994). A court may properly find that irreparable harm exists where nothing in the record suggests that a defendant will be able to pay a judgment. *See id.* (granting plaintiff a preliminary injunction after finding that plaintiff demonstrated irreparable harm as nothing in the record suggested that defendant could pay plaintiff's likely future award); *see also* Seide v. Crest Color, Inc., 835 F.Supp. 732, 735 (S.D.N.Y.1993) (granting a preliminary injunction preventing defendant from selling assets where the plaintiff likely would be unable to collect on a judgment against defendant if assets were sold); *Brenntag Int'l Chem., Inc.,* 175 F.3d at 250 (finding irreparable harm present where the obligation is owed by an insolvent defendant).

*5 Plaintiffs argue that they will be irreparably harmed absent injunctive relief as defendant likely will not be able to pay a judgment at the conclusion of this case. In support of their argument, plaintiffs contend that defendant's own registration statement filed on October 7, 2002 states that defendant has no source of product revenue, and that defendant has incurred a deficit of $46,364,951 since its inception as a company. Defendant's registration statement also indicates that defendant anticipates that its deficit will only increase. Defendant's registration statement further indicates that due to the uncertainties involved in obtaining FDA approval for commercial drugs, it is possible that defendant may never be able to sell Product R commercially. Defendant is currently in the process of seeking further necessary investment capital.

Further, plaintiffs point to a clause in the Warrants which states that in the event defendant refuses to issue the Warrant stock, remedies at law are not adequate to compensate plaintiffs and plaintiffs are entitled to specific performance of the Warrant agreement. The relevant provision in the Warrants reads as follows:

> *Remedies. The Issuer stipulates that the remedies at law* of the Holder of this Warrant in the event of any default or threatened default by the Issuer in the performance of or compliance with any of the terms of this Warrant are not and *will not be adequate and that, to the fullest extent permitted by law, such terms may be specifically enforced by a decree for the specific performance of any agreement contained herein or by an injunction* against a violation of any of the terms hereof or otherwise.

Alpha Capital's Order to Show Cause, Exh. B ¶ 15 (emphasis added). Although a contractual stipulation to the effect that irreparable harm exists is not itself dispositive, the Second Circuit still gave great weight

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to such a provision in *Ticor Title Ins. Co. v. Cohen,* 173 F.3d 63 (2d Cir.1999). The court in *Ticor* found that a provision in a contract stipulating that irreparable harm will result from a breach "might arguably be viewed as an admission[.]" *Ticor Title Ins. Co. v. Cohen,* 173 F.3d 63, 69 (2d Cir.1999) (upholding a permanent injunction in an employment contract where the parties had stipulated in the contract that a breach of a non-compete provision will cause irreparable injury).

Here, not only is there a contractual provision in the Warrants stipulating that remedies at law are inadequate and that specific performance is appropriate, but plaintiffs have also demonstrated a substantial likelihood that defendant will not be able to satisfy a judgment at the conclusion of this case. Plaintiffs have therefore demonstrated that they will face irreparable harm absent injunctive relief. Moreover, given the litigation between the parties here and in Florida, the balance of hardships tip decidedly in the movants' favor since even if defendant is ultimately successful in Florida, it can be adequately compensated by damages or further injunctive relief on its behalf.[FN5]

> FN5. Defendant's argument that issuing the limited amount of stock called for by the Warrants could have serious dire consequences for the company and its stock price is purely speculative and not supported by the stock's history or any specific proffered evidence.

***6** Accordingly, plaintiffs' motions for a preliminary injunction are granted. Each plaintiff is ordered by this Court to post a bond of either $100,000 or the market value of the amount of Warrant stock when issued, whichever is higher. This Court further orders that any proceeds of Warrant stock subsequently sold by plaintiffs must be placed in escrow pending final resolution of this case. Plaintiffs have already agreed that such conditions would be appropriate upon the issuance of a preliminary injunction. It is further ordered that upon plaintiffs' exercise of the Warrants on the Second Determination Date, defendant as well must turn over the requisite amount of stock in accordance with the formula set forth in the Warrants. Again, plaintiffs are required to post a bond in the amount noted earlier, as well as place in escrow any proceeds of Warrant stock subsequently sold.

S.D.N.Y.,2003.
Alpha Capital Aktiengesellschaft v. Advanced Viral Research Corp.
Not Reported in F.Supp.2d, 2003 WL 328302 (S.D.N.Y.)

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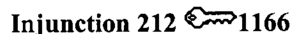
H

Supreme Court, New York,
Commercial Division.
New York County
CAESARS BAHAMAS INVESTMENT CORPORATION, Plaintiff and Counterclaim Defendant,
v.
BAHA MAR JOINT VENTURE HOLDINGS LTD. and Baha Mar Jv Holdings Ltd. and Baha Mar Development Company Ltd., Defendants and Counterclaim Plaintiffs;
Baha Mar Joint Venture Holdings Ltd. and Baha Mar Jv Holdings Ltd. and Baha Mar Development Company Ltd., Third-Party Plaintiffs,
v.
Harrah's Operating Company, Inc., Third-Party Defendant.
No. 0600740/2008.
September 12, 2008.

West Headnotes

Injunction 212 1166

212 Injunction
212IV Particular Subjects of Relief
212IV(A) Courts and Actions in General
212k1166 k. Actions or proceedings in other countries. Most Cited Cases
(Formerly 212k138.27)
Venturer in casino development project demonstrated likelihood of success on the merits of its claim that the forum selection clause in the development agreement prohibited any party, including non-signatories to the agreement, from bringing litigation arising out of the project outside of New York courts, as required element for preliminary injunction to preclude co-venturer from bringing suit in the Bahamas; enforcement of the forum selection clause was foreseeable by the non-signatories involved in the suit, and movant agreed to submit to the jurisdiction of the New York courts if an injunction was granted.

[This opinion is uncorrected and not selected for official publication.]

Charles Edward Ramos, J.S.C.
The following papers, numbered 1 to were read on this motion to/for__________

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - __________
Exhibits ...

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Answering Affidavits - Exhib-
its____________________ __________
Replying Affida-
vits________________________________ __________

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, It Is ordered that this motion Motion is decided in accordance with accompanying Memorandum Decision.

Dated: 9/12/08

<<signature>>

HON. CHARLES E. RAMOS *J.S.C.*

Plaintiff and Counterclaim Defendant Caesars Bahamas Investment Corporation (Caesars) and Third-Party Defendant Harrah's Operating Company, Inc. (Harrah's) (together, Plaintiffs) move by way of order to show cause for a preliminary injunction with a temporary restraining order (TRO) to enjoin Defendants Baha Mar Development Company, Ltd., Baha Mar Joint Venture Holdings Ltd., and Baha Mar JV Holding Ltd. (together, Baha Mar) from commencing a separate action in the Bahamas against Caesars' parent, Harrah's Entertainment, Inc. (Harrah's Entertainment), and its shareholders Apollo Management and TPG Partners (together, Caesars Affiliates), and from using information designated by Plaintiffs as confidential pursuant to the Stipulation and Order for the Production and Exchange of Information (Stipulation) for the purpose of commencing an action in the Bahamas.

Baha Mar cross-moves to declassify certain material that was allegedly improperly designated as confidential, under the Stipulation.

Background

On January 12, 2007, Caesars and Baha Mar entered into a Subscription and Contribution Agreement (Agreement), for the potential development of a casino, golf course, and resort project in the Bahamas (the Project). (Amend. Compl. ¶ 8.) Approximately three months later, Caesars notified Baha Mar that it did not wish to continue with the Project, and that it intended to terminate the Agreement (Amend. Compl. ¶ 16.).

The Agreement contains a choice of law and forum selection clause (Forum Selection Clause), that states,
All claims, demands, controversies, disputes, actions or causes of action of any nature or character arising out of or in connection with this Agreement, whether legal or equitable, known or unknown, contingent or otherwise shall be resolved in the United States District Court for the Southern District of New York and any appellate courts thereto or if federal jurisdiction is lacking, then in the Supreme Court of the State of New York, New York County, and any appellate courts thereto (Agreement, Art. 11.5 [a]).

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Further, the Agreement defines the "Parties" as Baha Mar and Caesars.

On June 13, 2008, counsel for Baha Mar informed counsel for Caesars that it intended to commence a separate action for fraud against the Caesar Affiliates in either the Bahamas or in New York. Subsequently, Plaintiffs moved for a preliminary injunction, and the court granted a TRO pending the resolution of the application.

Discussion

A party seeking preliminary injunctive relief pursuant to CPLR 6301 must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in her favor. *City of New York v. Untitled LLC*, 51 A.D.3d 509, 511, 859 N.Y.S.2d 20 (1st Dept 2008). A. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to succeed on the merits of their claim because the plain language of the Forum Selection Clause prohibits Baha Mar from bringing a suit arising out of the Agreement outside of New York. Additionally, Plaintiffs contend that the broad Forum Selection Clause is applicable to all entities that are involved in a dispute arising out of the Agreement, including non-signatories Baha Mar Development Company Ltd., and the Caesar Affiliates.

Conversely, Baha Mar argues that the Forum Selection Clause applies only to signatories of the Agreement, and thus, does not prevent them from commencing a suit against a non-signatory outside of New York courts. Additionally, Baha Mar argues that because New York courts do not have personal jurisdiction over the non-signatories at issue, the Caesar Affiliates, application of the Forum Selection Clause as against them would effectively prevent Baha Mar from seeking redress. Finally, Baha Mar asserts that the Forum Selection Clause does not apply to actions for fraud.

When the terms of a written agreement are clear and unambiguous, the court should make a practical determination of the intent of the parties based on the plain language found within the four corners of the document. *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 (1990). Further, New York courts have a well-established "policy of enforcing choice of law and forum selection clauses." *Indosuez Intl. Finance, B.V. v. National Reserve Bank*, 304 A.D.2d 429, 430, 758 N.Y.S.2d 308 (1st Dept 2003).

The Forum Selection Clause contains broad language that all controversies "of any nature" arising from the Agreement are to be litigated in New York courts.

Baha Mar argues that the parties intended the clause to apply to the parties to the Agreement only, as evidenced by the next sentence contained in the provision that specifically references the "Parties," defined as Caesars and Baha Mar. The sentence that Baha refers to states, "The Parties agree that service of process for purposes of any such litigation ... need not be personally served" (Agreement, § 11.5 [a]).

However, this sentence concerns service of process only, and does not reference choice of forum. Therefore, it does not otherwise alter the plain meaning of the Forum Selection Clause, that unambiguously states that all disputes arising out of the Agreement are to be litigated in New York.

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Moreover, Plaintiffs contend that the Caesars Affiliates, comprised of Caesar's parent and shareholders, are closely related to Caesars, and therefore, may invoke the Forum Selection Clause. A non-signatory may benefit from a forum selection clause if it is an intended beneficiary entitled to enforce the clause; third party beneficiary status is not required. *Freeford Ltd. v. Pendleton*, ___A.D. 3d___, NY Slip Op 03148 (1*st* Dept 2008). Additionally, parties who are closely related to one of the signatories may enforce a forum selection clause, if the relationship between the non-party and the signatory is "sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them." *Id.*

Plaintiffs clearly share a relationship with the Caesars Affiliates that is sufficiently close, such that enforcement of the Forum Selection Clause to include them is foreseeable. *Accord Indosuez Intl. Fin., B.V.,* 304 A.D.2d at 431, 758 N.Y.S.2d 308 ("Plaintiff's parent and subsidiary, although not parties to the agreement containing the choice of law and forum clause, were sufficiently close in their relation to plaintiff to be within the permanent injunction's protective ambit.").

Moreover, Baha Mar's assertion that it will be deprived of its day in court if the Forum Selection Clause is enforced because the Caesar Affiliates are not subject to this Court's jurisdiction, is without merit. Courts may set aside an otherwise valid forum selection clause if enforcement would be "unreasonable or unjust," such that the challenging party would effectively be deprived of his day in court. *British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg,* 172 A.D.2d 234, 234, 567 N.Y.S.2d 731 (1st Dept 2001). By written correspondence to this Court, the Caesars Affiliates indicated that they would voluntarily submit to the jurisdiction of New York courts in the event that Baha Mar is enjoined from bringing suit in the Bahamas. (Letter from Kearney to Ramos of 6/26/08.)

Finally, Baha Mar argues that the Forum Selection Clause does not apply to its cause of action for fraud, because it does not arise "out of the Subscription Agreement," but rather, arises out of Harrah's misrepresentations concerning its commitment to the Project. However, any alleged misrepresentations made by Harrah's in connection with its intention to go forward with the Project are necessarily and intrinsically tied to the factual circumstances surrounding the Agreement. Therefore, the Forum Selection Clause is sufficiently broad to encompass a claim for fraud. For these reasons, Plaintiffs have demonstrated a likelihood of success on the merits.

B. Irreparable Harm

Plaintiffs argue that if provisional relief is not granted they will suffer irreparable harm because they will be forced to defend litigation in the Bahamas in violation of the Forum Selection Clause. In light of Baha Mar's representation that it intended to commence an action in the Bahamas, it is evident that there is a risk of such harm.

C. Balance of the Equities

Finally, the harm of defending litigation in the Bahamas that is likely in violation of the Forum Selection Clause is greater than the burden faced by Baha Mar, who is free to bring the claim in this court. Therefore, this Court determines that the equities favor granting an injunction to enjoin Baha Mar from bringing suit in the Bahamas against the Caesar Affiliates. Accordingly, it is

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ORDERED that plaintiffs' motion for a preliminary injunction is granted, to the extent that defendants are enjoined from commencing an action against the Caesar Affiliates in the Bahamas, and it is further

ORDERED that the remainder of plaintiffs' motion that seeks to enjoin Defendants from using information designated as confidential, and defendants' cross-motion to declassify certain material designated as confidential, shall be referred to JHO Beverly Cohen for determination; and it is further

ORDERED that the parties are directed to contact JHO Beverly Cohen at 646-386-3719 in connection with the cross-motion.

Dated: September 12, 2008

ENTER

<<signature>>

J.S.C.

CHARLES E. RAMOS

Caesars Bahamas Inv. Corp. v. Baha Mar Joint Venture Holdings Ltd.
2008 WL 4360436 (N.Y.Sup.) (Trial Order)

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C
Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
CASTLE CREEK TECHNOLOGY PARTNERS, LLC, Plaintiff,
v.
CELLPOINT INC., Defendant.

No. 02 Civ. 6662(GEL).
Dec. 9, 2002.

Creditor sued debtor, seeking enforcement of agreement giving it option to convert debt to shares of debtor's stock in event of default. On creditor's motion for preliminary injunction, the District Court, Lynch, J., held that: (1) creditor was likely to prevail on merits of claim, and (2) creditor risked suffering irreparable injury in absence of injunctive relief.

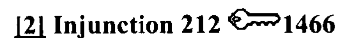
Relief granted in part.

West Headnotes

[1] Injunction 212 **1231**

212 Injunction
212IV Particular Subjects of Relief
212IV(D) Property in General
212k1231 k. Freezing or protecting assets pending litigation. Most Cited Cases
(Formerly 212k147)

Creditor, seeking enforcement of agreement giving it option to convert debt to shares of debtor's stock in event of default, established irreparable harm needed to obtain preliminary injunctive relief; debtor's imminent insolvency raised possibility that it would not be able to satisfy judgment.

[2] Injunction 212  **1466**

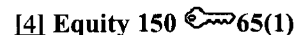
212 Injunction
212IV Particular Subjects of Relief
212IV(S) Corporations and Other Private Organizations
212k1466 k. Capital and stock. Most Cited Cases
(Formerly 212k138.42)

Creditor, seeking enforcement of agreement giving it option to convert debt to shares of debtor's stock in event of default, was likely to prevail on merits of claim, for purpose of obtaining preliminary injunction; event of default was undisputed, and conversion price was established by parties' agreement.

[3] Contracts 95 **321(1)**

95 Contracts
95V Performance or Breach
95k321 Rights and Liabilities on Breach
95k321(1) k. In general. Most Cited Cases

When party to contract has breached agreement, either by acting in bad faith or by violating express covenant within agreement, it may not later rely on that breach to its advantage.

[4] Equity 150  **65(1)**

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(C) Principles and Maxims of Equity
150k65 He Who Comes Into Equity Must

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Come with Clean Hands
150k65(1) k. In general. Most Cited Cases

Unclean hands doctrine did not bar creditor from enforcing agreement giving it option to convert debt to shares of debtor's stock in event of default, though it had refused to continue debt restructuring negotiations, absent showing that creditor had acted in bad faith.

[5] Injunction 212 ⚿1514

212 Injunction
212V Actions and Proceedings
212V(A) In General
212k1511 Time for Proceedings
212k1514 k. Laches. Most Cited Cases
(Formerly 212k141)

Creditor, seeking enforcement of agreement giving it option to convert debt to shares of debtor's stock in event of default, was not barred from obtaining preliminary injunction by equitable doctrine of laches, absent showing that is delay in filing suit had been unreasonable or had resulted in any prejudice to debtor.

Matthew J. Borger, Klehr, Harrison, Harvey, Branzburg & Ellers LLP, Philadelphia, PA (William A. Harvey and Richard M. Beck, Klehr, Harrison, Harvey, Branzburg & Ellers LLP, Philadelphia, PA; Andrew Saulitas, Law Offices of Andrew Saulitas, P.C., New York, NY, on the brief), for Plaintiff Castle Creek Technology Partners, LLC.

Thomas E. Engel, Engel & McCarney, New York, NY, for Defendant Cellpoint, Inc.

OPINION AND ORDER

LYNCH, J.

*1 Plaintiff Castle Creek Technology Partners, LLC ("plaintiff" or "Castle Creek"), seeks a preliminary injunction requiring defendant CellPoint Inc. ("defendant" or "CellPoint"), to deliver to it 1,635,037 shares of CellPoint common stock. The action arises out of a series of agreements between the parties pertaining to CellPoint's $10,000,000 debt to Castle Creek. CellPoint has defaulted on the agreements, triggering Castle Creek's option to convert the debt to shares of CellPoint common stock at a conversion price based on the stock's trading price at the time of the default. For the reasons discussed below, the preliminary injunction is granted as to 1,421,661 shares.

BACKGROUND

CellPoint is an England-based corporation, incorporated under the laws of Nevada, that provides mobile location software to cellular network operators. (Def. Mem. at 2.) In December 2000, CellPoint and Castle Creek entered into a Securities Purchase Agreement, whereby Castle Creek loaned $10,000,000 to CellPoint in exchange for convertible Notes. The Notes provide that CellPoint may repay its debt to Castle Creek in cash, but that Castle Creek may at any time convert all or part of the outstanding balance and interest to shares of CellPoint common stock (Borger Decl. Ex. A ¶ 3.1.) The number of shares to be delivered is determined by dividing the balance that Castle Creek desires to be converted by the conversion price assigned to the shares by the Notes. (*Id.*)

The Notes specify several "Events of Default" that, on occurrence, cause CellPoint to be in breach of its obligations under the Notes. Upon default, Castle Creek has the right to deliver to CellPoint a "Default Notice" and to demand immediate payment of the "Default Amount," an amount somewhat greater than the outstanding balance of the debt.[FN1] (*Id.* ¶ 7.1(a)-(j).) Castle Creek may also demand conversion of shares in lieu of payment. (*Id.*)

FN1. The Default Amount is calculated using a formula based on the outstanding balance, the conversion price, and the bid price of

CellPoint's common stock. (Borger Decl. Ex. A ¶ 7.2.)

Since the parties entered into the Securities Purchase Agreement, CellPoint has been increasingly beleaguered by financial problems. In June 2001, CellPoint defaulted on the Notes by failing to make the required interest payments. (Amended Compl. ¶ 7, *Castle Creek Tech. Partners, LLC v. CellPoint Inc.*, 01 Civ. 9861(GEL).) The parties therefore signed a Forbearance Agreement in July, in which Castle Creek agreed to forbear in enforcing its remedies for CellPoint's default, in return for security interests in CellPoint's intellectual property and other assets. (Borger Decl. Ex. B ¶¶ 4, 6.) The Forbearance Agreement left the Securities Purchase Agreement unchanged in all other relevant respects. (*Id.* ¶ 13.)

In September 2001, the parties entered into a supplemental agreement (the "2001 Amendment") that amends the Securities Purchase Agreement. Most pertinently, the 2001 Amendment adjusts the conversion price, providing that the price shall be fixed at $4.00 per share as long as CellPoint is in compliance with the agreement, but that if an Event of Default has occurred, the conversion price shall be the lower of the average closing bid price or the lowest sale price of CellPoint common stock in the period just before and after the default. (*Id.* Ex. C ¶ 3.) The 2001 Amendment leaves the Securities Purchase Agreement unchanged in almost all other respects, including the list of Events of Default. (*Id.* ¶ 9.)

***2** These supplemental agreements failed to stave off litigation, however, and in November 2001, Castle Creek filed suit against CellPoint in this Court, alleging that, among other things, CellPoint had breached the 2001 Amendment by failing to comply with Castle Creek's request to convert $100,000 to shares of common stock. (Amended Compl. ¶¶ 27–29, *Castle Creek Tech. Partners, LLC v. CellPoint Inc.*, 01 Civ. 9861(GEL).) Castle Creek sought a preliminary injunction requiring that CellPoint convert the shares, but the action settled before this Court considered the injunction.

Meanwhile, CellPoint's financial difficulties continued to worsen. Its stock price, which had closed at a high of $94.50 on February 2, 2000, had fallen to less than $1 by January 2002. By March 2002, CellPoint reported on its Form 10–QSB that it had only $35,503 in cash on hand (Borger Decl. Ex. R at 18), but was spending roughly $700,000 per month (*id.* Ex. S at 2). Consequently, CellPoint and Castle Creek entered into a Term Sheet that provided that the parties would negotiate to restructure CellPoint's debt, converting half of the outstanding debt into a new class of preferred stock at a conversion price of $.78, and creating a new note for the other half. (Törnell Decl. Ex. F.)

Before any final agreement under the Term Sheet could be reached, however, CellPoint defaulted on the Notes. In late April 2002, CellPoint's subsidiary, CellPoint Systems AB, was forced into bankruptcy in Sweden. (Pl. Mem. at 3.) On June 26, CellPoint's stock was delisted from the NASDAQ, and stayed delisted for more than ten consecutive trading days. (Borger Decl. Ex. E.) Both events constituted Events of Default under the Notes (*id.* ¶¶ 7.1(b); 7.1(i)), and on July 18, Castle Creek sent CellPoint a Notice of Default based on the NASDAQ delisting. (*Id.* Ex. M.)

Castle Creek began submitting notices of conversion in June, using the adjusted conversion price that the 2001 Amendment prescribed in the event of CellPoint's default. (Compl.¶ 18.) Between June and September, Castle Creek requested that a total of $422,500 of the principal amount, plus interest, be converted to 2,447,924 shares of CellPoint stock. (Frei Decl. ¶ 4 & Ex. A.) The requests for conversion made prior to the July 18 Notice of Default used a conversion price of $.384 per share, based on the average closing bid price around the time of the bankruptcy, indicating that Castle Creek considered CellPoint to be in default at this time. (Borger Decl. Ex. C ¶ 3.) After July 18, Castle Creek began using an adjusted

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conversion price of $.173 per share, based on the average closing bid price around the time of the NASDAQ delisting (*id.* Ex. M).[FN2] CellPoint disputed the conversion price, contending that the correct figure was $.78 per share (Def. Mem. at 11), as provided by the Term Sheet, and converted the $422,500 plus interest at that price, delivering a total of 1,026,263 shares.[FN3] (Frei Decl. Ex. A; Brown Aff. Ex. A.)

FN2. The 2001 Amendment provided that the conversion price would be recalculated after each subsequent Event of Default. (Borger Decl. Ex. C ¶ 3.)

FN3. This total represents 812,887 shares delivered before Castle Creek's Amended Complaint was filed on September 19, 2002, and 213,376 shares subsequently delivered. (Brown Aff. Ex. A.)

***3** On August 21, 2002, Castle Creek instituted this action, alleging that it was entitled to delivery of the remaining shares that it had requested. Castle Creek subsequently moved for a preliminary injunction requiring CellPoint to deliver 1,635,037 [FN4] shares of common stock, as required by the Notes and the 2001 Amendment. CellPoint contests the motion on contractual grounds, and also argues that Castle Creek is not entitled to injunctive relief because of the equitable doctrines of unclean hands and laches.

FN4. Presumably, the total should now be 1,421,661 shares, following CellPoint's recent delivery of 213,376 shares.

DISCUSSION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (emphasis in original) (quoting from WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed.1995)). Since Castle Creek seeks a mandatory injunction that will change the status quo by requiring CellPoint to deliver the disputed shares, Castle Creek's showing must be judged against the higher standard applicable to mandatory injunctions. *Jolly v. Coughlin,* 76 F.3d 468, 473 (2d Cir.1996). Thus, the preliminary injunction may be granted only if plaintiff has shown that (1) that the injunction is necessary to prevent irreparable harm, and (2) there is a "clear" or "substantial" likelihood that it will prevail on the merits. *Id.* (quoting *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.,* 60 F.3d 27, 33–34 (2d Cir.1995). Since Castle Creek has established both irreparable harm and a clear likelihood of success, it is entitled to the preliminary injunction.

I. *Irreparable Harm*

[1] Castle Creek argues that it will suffer irreparable injury if the injunction is not granted because CellPoint is "at the brink of insolvency," (Pl. Mem. at 6), so that "there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chemicals, Inc. v. Bank of India,* 175 F.3d 245, 249 (2d Cir.1999). While the purely financial injury at stake here is usually not enough to justify injunctive relief, *id.,* a defendant's imminent insolvency can constitute irreparable harm when it is possible that the defendant will not be able to pay damages at the conclusion of the litigation. *Netwolves Corp. v. Sullivan,* No. 00 Civ. 8943(AGS), 2001 WL 492463, at *11 (S.D.N.Y. May 9, 2001). In its Complaint, Castle Creek seeks a declaratory judgment as to the applicability of the adjusted conversion price, and an injunction requiring CellPoint to comply with its conversion requests in full. (Amended Compl. ¶¶ 23–33.) If CellPoint is no longer a going concern at the close of litigation, an injunction ordering the delivery of CellPoint shares would be pointless, and Castle Creek would be left without the converted shares and without the option of obtaining a money judgment for the

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outstanding debt amount, thus suffering irreparable injury. *Netwolves Corp.*, 2001 WL 492463, at *10–*11 (finding irreparable harm where defendant's insolvency would prevent plaintiffs from recovering any value for their stock).

*4 Castle Creek has demonstrated that CellPoint, if not currently insolvent, may become so in the near future. As noted above, CellPoint has had continuous financial problems that have worsened in 2002. In its Annual Report (Form 10–K) for the fiscal year ending June 20, 2002, CellPoint stated that it "has had recurring significant losses," and now has a capital deficiency of approximately $11 million. (Beck Supp. Decl. Ex. T at 52.) CellPoint also continues to spend more money than it receives through its operations. (Borger Decl. Ex. S at 2.) Thus, defendant noted, "[t]here is substantial doubt about [CellPoint's] ability to continue as a going concern unless it is able to obtain additional financing." (Beck Supp. Decl. Ex. T at 52.)

This situation has not changed appreciably since the Annual Report was filed in June. CellPoint has been making efforts to strengthen its financial situation, including cutting costs and repurchasing its bankrupt Swedish subsidiary (Törnell Decl. ¶ 8; Def. Mem. at 4), but these measures are no substitute for the funds necessary to pull the company out of its deficit and satisfy its creditors. CellPoint has also produced evidence of new partnership agreements that will generate revenue over the next few years (Törnell Decl. ¶ ¶ 3–5), but the projected income is nowhere near sufficient to address the capital deficit or even to cover the company's expenses. A recently announced agreement with Lucent (CellPoint Press Release, 11/4/02) will generate only $500,000 to $800,000 annually (Törnell Decl. ¶ 3), and a purchase order with an unnamed buyer has an initial value of $2 million. (*Id.* ¶ 4.) These amounts are, as noted on the Form 10–K, far from certain, and if these and additional funds are not forthcoming, CellPoint will have to "substantially curtail or cease operations." (Beck Supp. Decl. Ex. T at 52.) In addition, CellPoint's stock is currently trading at $.20, and has remained at roughly that price for seven months. *The New York Times,* Company Research: CellPoint Inc., available at http://marketwatch.nytimes.com (Dec. 6, 2002). The early November announcement of the Lucent deal had little effect on the share price, supporting the conclusion that investor confidence is so shaky, and CellPoint's financial situation so dire, that these new deals will do little to alleviate the situation in the short term.

Castle Creek has thus provided ample and specific evidence that CellPoint is at the brink of insolvency, and that by the conclusion of the litigation, CellPoint may be in no position to satisfy a money judgment or an injunction. *Brenntag*, 175 F.3d at 249; *cf* . *Gladstone v. Waldron & Co.*, No. 98 Civ.2038(DNE), 1998 WL 150982, at *2 (S.D.N.Y. Mar.31, 1998) (holding that conclusory allegations of defendant's insolvency are not sufficient to justify granting preliminary injunction). While CellPoint points out that it is not currently insolvent (and may indeed become profitable in the future), the seriousness of the current situation indicates an "actual and imminent threat" of CellPoint's insolvency. *Quantum Corporate Funding, Ltd. v. Assist You Home Care Services of Virginia*, 144 F.Supp.2d 241, 248 (S.D.N.Y.2001). Thus, Castle Creek will suffer irreparable harm if the injunction is not granted. FN5

FN5. Castle Creek also argues that a finding of irreparable harm may be based on the provision in the Notes that states that CellPoint "acknowledges that a breach by it of its obligations will cause irreparable harm to [Castle Creek]." (Borger Decl. Ex. A ¶ 9.14; Pl. Mem. at 8.) It is not clear whether such a contractual provision, on its own, can establish irreparable harm, but the acknowledgment does provide additional support for the finding of irreparable harm. *See, e.g., North Atlantic Instruments v. Haber*, 188 F.3d 38, 49 (2d Cir.1999).

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*5 Nonetheless, CellPoint argues that, despite its potential insolvency, Castle Creek's delay in seeking this injunction indicates that it will not be irreparably harmed if preliminary relief is not granted. (Def. Mem. at 13; Tr. 30.) While an extended delay in seeking a preliminary injunction may indicate the absence of irreparable harm, *Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir.1985), there has been no such delay here. Defendant suggests that plaintiff could have sought this injunction much earlier in the parties' relationship (as early as October 2001, when CellPoint's stock price was much higher), but Castle Creek's cause of action did not actually accrue until June 2002, when CellPoint wrongly refused to convert portions of the debt into shares.[FN6] Thus, plaintiff could not have sought an injunction any earlier than June, and has not delayed in any manner that would cast doubt on the potential for irreparable harm caused by CellPoint's insolvency.

FN6. This argument assumes that the irreparable harm that may be suffered by plaintiff is that the converted shares will be worth little on the market (Def. Mem. at 13), but as noted above, the potential irreparable harm is that CellPoint will become insolvent, leaving Castle Creek without remedies.

II. *Likelihood of Success on the Merits*

[2] Castle Creek has also demonstrated that there is a substantial likelihood that it will prevail on the merits of its claim. CellPoint does not dispute that the Notes give Castle Creek the right to convert the outstanding principal amount, or any part thereof, to common stock at any time, whether or not CellPoint is in default. (Borger Decl. Ex. A ¶ 3.1.) Upon the occurrence of an Event of Default, Castle Creek is entitled under the 2001 Amendment to demand payment of the Default Amount in money or in stock, converted at the specified adjusted conversion price. (*Id.* ¶ 7 .1; *id.* Ex. C ¶ 3.1.) The bankruptcy of CellPoint's Swedish subsidiary, and its delisting from the NASDAQ, both constituted Events of Default under the Notes.[FN7] Thus, Castle Creek was fully entitled to demand payment of the outstanding debt in June, and to insist on conversion of the stock at the adjusted conversion price.

FN7. CellPoint appears to argue, somewhat halfheartedly, that neither of these developments were Events of Default. With respect to the bankruptcy, CellPoint points out in a footnote in its surreply brief that its Swedish subsidiary has been repurchased and is no longer in bankruptcy, and states that "Castle Creek has apparently abandoned its argument that the bankruptcy of CellPoint's Swedish subsidiary constituted a default." (Def. Surreply at 2 n. 2.) Whether the bankruptcy has been cured is not relevant to CellPoint's default under the Notes, however, as Paragraph 7.1 states that a bankruptcy "shall immediately constitute an Event of Default and there shall be no cure period." (Borger Decl. Ex. A ¶ 7.1.) In addition, there is no indication that plaintiff has abandoned its assertion that the bankruptcy was an Event of Default, as it presses this point in its reply brief. (Pl. Reply at 1.)

As to the NASDAQ delisting, CellPoint states that "Castle Creek's argument that NASDAQ de-listing *per se* constitutes a default under the identical 'structure' should go *pari passu* by the boards" (Def. Surreply at 2 n. 2), but it never raised this argument in any other part of its submissions, or at oral argument, and it does not base any of its defenses to this action on its not being in default. Even if CellPoint were seriously pressing this argument, it would be unavailing, as the Notes unambiguously provide that the company's delisting from the NASDAQ is an Event of Default. (Borger Decl. Ex. A ¶ 7.1(b).)

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In response to plaintiff's conversion notices, CellPoint issued 1,026,263 shares between June and October, using the $.78 per share conversion price provided in the Term Sheet, rather than the prices requested by Castle Creek, which were calculated according to the 2001 Amendment. (Def. Mem. at 11.) Both parties agree that the Term Sheet is a preliminary agreement, but CellPoint argues that the provisions of the Term Sheet are themselves binding, and that its $.78 conversion price supersedes the 2001 Amendment's adjusted conversion price even for conversions of common stock. (Def. Mem. at 11; Tr. 27–29, 31–32.) Castle Creek disputes this, contending that the Term Sheet's conversion price was not yet in effect because the Term Sheet was simply a preliminary agreement to agree, binding the parties only to good faith in negotiating. (Pl. Reply at 9; Tr. 31.)

The Second Circuit recognizes two types of preliminary agreements: agreements that are "fully binding," where the parties have "agree[d] on all the points that require negotiation," but have not yet memorialized the agreement in final form; and agreements that leave some major terms open for negotiation, in which the parties commit simply to negotiate in good faith to create a final contract. Adjustrite Systems, Inc. v. Gab Business Services, Inc., 145 F.3d 543, 548 (2d Cir.1998) (internal citations omitted). In determining which type of preliminary agreement the parties created, the "key, of course, is the intent of the parties: whether the parties intended to be bound, and if so, to what extent," as evidenced by the language of the contract, and the words and deeds of the parties. *Id.* at 548–49.

***6** The language used in the Term Sheet indicates that it is the second type of preliminary agreement, one which binds the parties to good faith negotiation, but not to its exact terms. Entered into in March 2002, the agreement delineates the proposed terms of a restructuring of CellPoint's debt, including the conversion of half of the debt into shares of CellPoint preferred stock at $.78 per share. (Törnell Decl. Ex. F ¶ 2.) Castle Creek clearly indicated its intention not to be bound by the provisions of the Term Sheet, stipulating that its "willingness to complete this transaction is expressly subject to final documentation agreed by both parties," the finalization of CellPoint's debt negotiations, and the completion of the financing necessary to stave off bankruptcy. (*Id.* ¶¶ 8–9.) For its part, CellPoint could not have considered the Term Sheet binding, as the class of stock required to restructure the debt in accordance with the Term Sheet did not yet exist, necessitating that CellPoint hold a shareholder vote before it could even begin to comply with the agreement. Accordingly, the provision describing the new debt structure stated that "the parties agree to either try to find an alternative solution that achieves a similar result, or that this part of the agreement is delayed until a shareholders meeting." (*Id.* ¶ 3.) CellPoint also promised to take the necessary steps to effectuate the deal, including obtaining shareholder authorization for the new class of stock and filing a registration statement (*id* . ¶¶ 3, 8). Around the time that the CellPoint signed the Term Sheet, however, it expressed a somewhat pessimistic view of the potential for finalizing the new agreement in its quarterly report to its shareholders, stating that "[t]here is no assurance that [CellPoint] will be able to obtain stockholder approval" to authorize the new class of stock. (Borger Decl. Ex. R at 9.) Thus, the language of the Term Sheet, and the parties' statements with regard to their obligations under it, indicate that neither party intended the agreement to be a binding final contract.

Because the Term Sheet was not a fully binding preliminary agreement, its proposed $.78 conversion price was not yet in effect, and CellPoint had no right to use it instead of the adjusted conversion price specified by the 2001 Amendment. Therefore, CellPoint breached the Notes and the 2001 Amendment by refusing to use the adjusted conversion price, and Castle Creek is entitled to the delivery of 1,421,661 additional shares of CellPoint common stock.[FN8]

FN8. CellPoint does not contest Castle Creek's calculation of the adjusted conversion prices in accordance with the 2001 Amendment, and therefore does not dispute the number of shares to which Castle Creek is entitled when the adjusted conversion prices are used to calculate the conversion.

III. *CellPoint's Additional Defenses*

CellPoint raises three additional defenses to its obligation to deliver the stock, all without merit.

A. *The Notes' Conversion Cap*

CellPoint argues that the Notes themselves limit the number of shares that could be converted by Castle Creek, and that as this limit has already been exceeded, Castle Creek has no right to insist on further conversions. (Def. Mem. at 7.) In order to comply with the National Association of Securities Dealers ("NASD") Rules that applied to CellPoint when it was listed on the NASDAQ (Tr. 5–6), the Notes provide that no more than 2,109,717 shares (20% of the total outstanding shares) may be converted by Castle Creek, unless "stockholder approval in accordance with Paragraph 4(k) of the Securities Purchase Agreement has been obtained." [FN9] (Borger Decl. Ex. A. ¶ 3.3(a).) The Securities Purchase Agreement in turn indicates that CellPoint's "stockholders shall be asked to vote upon and approve" the removal of the conversion cap at the occurrence of certain trigger events. (Beck Supp. Decl. Ex. U ¶ 4(k).) No shareholder vote on the cap ever occurred, however, and CellPoint argues that since it has already converted a total of 2,419,493 shares at Castle Creek's request (Brown Aff. ¶ 8), it has no obligation to honor any further conversion requests.

FN9. NASD Rule 4350 (numbered 4460 at the time of contracting) provides that, for all companies listed on the NASDAQ, shareholder approval must be obtained prior to the company's entering into a transaction, other than a public offering, that involves the sale or issuance of common stock equal to 20% or more of the outstanding common stock or voting power. NASD Rule 4350(i)(1)(D)(ii).

*7 CellPoint may not rely on the cap to avoid honoring Castle Creek's further conversion requests. The fact that the cap is still in place is entirely due to CellPoint's breach of the Securities Purchase Agreement. That Agreement obligated CellPoint to hold a shareholder vote on the cap, at which it would use its best efforts to obtain the votes necessary to lift the cap (Beck Supp. Decl. Ex. U ¶ 4(k)(iii)), at the beginning of May 2002, after its Swedish subsidiary went into bankruptcy.[FN10] The Securities Purchase Agreement required that the meeting be held within ninety days of that event. (Beck Supp. Decl. Ex. U ¶ 4(k)(ii).) Since CellPoint had not held the meeting by early August (Tr. 33), it has been in breach of the Securities Purchase Agreement since then.

FN10. Paragraph 4(k) of the Securities Purchase Agreement specifies that the shareholder vote on the cap was to be held at the annual meeting in December 2001, or when CellPoint's stock price had remained below $7.00 for ten consecutive trading days. (Beck Supp. Decl. Ex. U ¶ 4(k)(ii).) Before the December meeting, however, the parties entered into the 2001 Amendment, which stipulated that CellPoint was not obligated to comply with Paragraph 4(k) of the Securities Purchase Agreement, so long as it remained in compliance with its obligations under the 2001 Amendment. (Borger Decl. Ex. C ¶ 6.) The Amendment went on to provide that the institution of any bankruptcy proceeding against any of CellPoint's subsidiaries would constitute "material default of its obligations under this Agreement." (*Id.*) Thus, CellPoint defaulted under the 2001 Amendment on April 29, 2002, when its subsidiary went into

bankruptcy, and it once more became obligated under Paragraph 4(k) of the Securities Purchase Agreement. At that time, CellPoint common stock was trading at $.45, and remained at roughly that price for ten consecutive trading days. *The New York Times,* Company Research: CellPoint, available at http://marketwatch.nytimes.com. This constituted a trigger event under Paragraph 4(k)(ii), obligating CellPoint to hold a special shareholder meeting, at which a vote on the cap would be conducted, within ninety days. (Beck Supp. Decl. Ex. U ¶ 4(k)(ii).)

[3] CellPoint now relies on this breach in its attempt to avoid its conversion obligations under the Note. When a party to a contract has breached the agreement, however, either by acting in bad faith or by violating an express covenant within the agreement, it may not later rely on that breach to its advantage. Kirke La Shelle Co. v. The Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163, 167–68 (N.Y.1933) (holding that party that had breached one provision within a contract could not rely on that breach to avoid its obligations under a different provision); *cf.* Indovision Enterprizes, Inc. v. Cardinal Export Corp., 44 A.D.2d 228, 354 N.Y.S.2d 113, 115 (1st Dep't 1974) (stating that a "provision that allows either party by his own breach to excuse his own performance is a commercial absurdity"). Thus, CellPoint may not assert that the conversion cap in the Notes excuses its obligation to honor Castle Creek's conversion requests.[FN11]

FN11. Granting the injunction will not cause CellPoint to violate NASD Rule 4350, because it is no longer listed on the NASDAQ (Pl. Reply at 7), and the rule no longer applies.

Allowing CellPoint's breach to enable it to avoid the rest of the agreement would contravene the clear intent of the parties at the time of contracting. The agreement as a whole indicates that the parties contemplated that Castle Creek would have the option to convert the entire outstanding debt amount into stock, a process that, at any conversion price, would entail converting far more stock than the cap would allow. The Notes state that Castle Creek "may ... convert ... all or any part of the outstanding principal amount of this Note, plus all accrued interest thereon" (Borger Supp. Decl. Ex. A ¶ 3.1), and that, in event of default, Castle Creek could continue to submit conversion notices to satisfy the entire outstanding debt (*id.* ¶ 7.1). This language, as well as the Securities Purchase Agreement's requirement that CellPoint use its best efforts to obtain the shareholder approval necessary to life the cap, indicates that the intent of the parties was that the cap would be reached and passed as Castle Creek submitted additional conversion requests. Clearly, then, the cap was included in the Notes solely to satisfy NASD Rule 4350 (*see* Tr. 7), rather than to limit the amount of debt that was convertible. This interpretation is supported by the structure of the transaction as a whole, in which the debt is secured by the potential for Castle Creek to become a controlling shareholder should CellPoint become unable to pay the debt in cash. Otherwise, the Notes would hold little benefit for Castle Creek, as creditor, because its ability to recoup its investment in the already troubled company would be limited by the conversion cap and by CellPoint's diminishing cash resources. Thus, preventing CellPoint from using the conversion cap to nullify the its obligations under the Notes and the 2001 Amendment will give effect to the intent of the parties as to the transaction as a whole. Bourne v. Walt Disney Co., 68 F.3d 621, 629 (2d Cir.1995).

B. *Unclean Hands*

***8** [4] CellPoint next argues that the grant of equitable relief is precluded by Castle Creek's unclean hands in refusing to continue negotiations to restructure CellPoint's debt. (Def. Mem. at 11.) To successfully assert the equitable defense of unclean hands, CellPoint must establish that plaintiff acted in bad faith, and that CellPoint was injured by its conduct. Obabueki v. Int'l Business Machines Corp., 145

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F.Supp.2d 371, 401 (S.D.N.Y.2001).

Defendant's argument is based on the Term Sheet, which, as discussed above, obligated both parties to negotiate in good faith to reach an agreement restructuring CellPoint's debt. (Törnell Decl. Ex. F ¶ 1.) CellPoint contends that Castle Creek refused to continue negotiations in July 2002, when CellPoint prepared a draft Restructure Agreement for Castle Creek's review. (Def. Mem. at 12.) Even crediting CellPoint's allegations (although it has produced no evidence to support its claims), Castle Creek's refusal to continue to negotiate a new agreement does not constitute bad faith.

The obligation to negotiate in good faith prevents a party from "arbitrarily abandoning [a] transaction or insisting on conditions that ... do not conform to what was spelled out in the preliminary agreement," ensuring that "the transaction will falter only over a genuine disagreement." P.A. Bergner & Co. v. Martinez, 823 F.Supp. 151, 156 (S.D.N.Y.1993) (internal citations omitted). Here, Castle Creek's abandonment of negotiations, after CellPoint had repeatedly, and wrongly, refused to honor its conversion requests, was hardly arbitrary or unprovoked. Since the Term Sheet did not alter Castle Creek's right to request the conversion of additional shares of common stock before a final restructuring agreement was reached, CellPoint breached the existing agreements even as it was attempting to negotiate a new agreement in which Castle Creek would give CellPoint yet more time to repay the remaining debt. This was clearly a "genuine disagreement" that went to the heart of the ongoing negotiations, *id.*, since Castle Creek could have concluded in good faith that a further agreement would be insufficient to ensure CellPoint's repayment of the debt. Faced with CellPoint's breach—not to mention its history of inability or unwillingness to repay its debt to Castle Creek, and Castle Creek's repeated forbearance and modification of the debt agreements—Castle Creek could justifiably have concluded that litigation, rather than yet more agreements, was the only effective way to recoup its investment. Thus, CellPoint has failed to establish that Castle Creek acted in bad faith, and cannot rely on the defense of unclean hands.

C. *Laches*

[5] Finally, CellPoint argues that the preliminary injunction is precluded by the equitable doctrine of laches (Def. Mem. at 12–13), because Castle Creek has unreasonably delayed in asserting its rights, thereby prejudicing CellPoint. Times Mirror Magazines, Inc. v. Field & Stream Licenses Co., 294 F.3d 383, 395 (2d Cir.2002). Essentially, CellPoint contends that Castle Creek could have sought injunctive relief immediately in June 2002, as soon as the conversion dispute arose. (Def. Mem. at 13.) Given that Castle Creek's conversion requests were submitted over a period of months (June through September), and that CellPoint did convert some, but not all, of the shares that plaintiff requested, it was reasonable for plaintiff to wait until the extent of the dispute was apparent before filing suit in late August. In addition, defendant offers no evidence to suggest that it has been prejudiced by the fact that plaintiff filed suit in August rather than June. (*Id.* at 12–13.) Thus, the defense of laches is without merit.

CONCLUSION

***9** Plaintiff has demonstrated the potential for irreparable harm and a substantial likelihood of success on the merits of its claim. Defendant is accordingly ordered to deliver to Castle Creek 1,421,661 shares of its common stock.

SO ORDERED:

S.D.N.Y.,2002.
Castle Creek Technology Partners, LLC v. CellPoint Inc.
Not Reported in F.Supp.2d, 2002 WL 31958696 (S.D.N.Y.)

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NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS. NOT REPORTED IN N.Y.S.2d.

Supreme Court, New York County, New York.
IAS Part 49.
PRUDENTIAL SECURITIES CREDIT CORP., LLC, Plaintiff,
v.
TEEVEE TOONS, INC., Teevee Catalog Enterprises, LLC, TVT Music II, LLC, and Dutchmastas II, LLC, Defendants.

Index No. 603112/02.
Feb. 7, 2003.

HERMAN CAHN, J.

***1** Motion by plaintiff for a preliminary injunction compelling disclosure of information regarding assets in which it has a security interest, and enjoining the dissipation or similar disposition of such assets and information (motion seq. no. 003), CPLR 6311.

BACKGROUND

Defendant Teevee Toons, Inc., and its subsidiaries, the other defendants, are claimed to be one of the largest record label conglomerates in the United States. On February 19, 1999, defendants entered into a series of three agreements with plaintiff's predecessor in interest, UCC Lending Corp., in connection with that entity's loan to them of $23,500,000.00. The agreements consist of a Loan Agreement, governing the terms of the actual loan; a Security Agreement, collateralizing the loan; and a Management Agreement, governing the ongoing management of the collateralized, revenue producing assets, consisting of various music titles and publishing rights. Such management functions include marketing, sales, and the collection of royalties.

Under the Loan Agreement, the collateralized assets must reflect a minimum one-to-one (1.00:1.00) Debt Service Coverage Ratio immediately preceding the first of the month installment payment date. In other words, the assets must be generating sufficient revenue to cover all payments of principal and interest due on the first of the month. Failure of the assets to satisfy that ratio is an express "Event of Default" under the Loan Agreement (Loan Agreement § 9.1 [j]). Moreover, failure of the assets to reflect a minimum Debt Service Coverage Ratio of 1.15:1.00 for such period constitutes what is referred to as both a "Termination Event" and a "Coverage Deficiency Event" under the Loan Agreement and the Management Agreement (Loan Agreement § 1.1 at 4, 18; Management Agreement § 1.01 at 10).

On June 30, 2001, defendant TVT Catalog Enterprises, LLC advised plaintiff that the Debt Service Coverage Ratio was not in compliance with the contractual threshold and, on September 21, 2001, further advised plaintiff that the ratio would deteriorate to the point of being a Termination Event by the end of October 2001 (Complaint Ex. E).[FN1] Accordingly, by defendant's own admission, both an Event of Default and a Termination Event have occurred under the Loan Agreement.

FN1. Teevee Toons, Inc., the parent of the TVT entities, was the designated Manager of the assets pursuant to the Management Agreement.

The Security Agreement expressly provides plaintiff with "REMEDIES UPON OCCURRENCE OF A TERMINATION EVENT." (Security Agree-

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ment at 14.) Specifically, plaintiff may, among other things:

> personally, or by agents or attorneys, immediately retake possession of the Collateral or any part thereof, ... with or without notice or process of law, and for that purpose may enter upon the [defendants'] premises where any of the Collateral is located and remove the same and use in connection with such removal any and all services, supplies, aids and other facilities of the [defendants.]

(*Id.* § 8.1[a].) Defendants acknowledged the foregoing rights as being "of the essence of this Agreement...." (*Id.* § 8.1 at 15.) The Security Agreement further affords plaintiff the right to sell, assign, lease, or otherwise dispose of any of the repossessed collateral by private sale, conditioned upon 10 days' written notice and a right of redemption by the defendants during that period (*id.* § 8.2). The Security Agreement finally provides that:

> ***2** THE [DEFENDANTS] HEREBY WAIVE[ ], TO THE EXTENT PERMITTED BY APPLICABLE LAW, NOTICE AND JUDICIAL HEARING IN CONNECTION WITH THE [PLAINTIFF'S] TAKING POSSESSION OR THE [PLAINTIFF'S] DISPOSITION OF ANY OF THE COLLATERAL....

(*Id.* § 8.3.) Plaintiff furnished notice of Termination by letter dated August 15, 2001 (Complaint Ex. D).

Based on defendants' conceded default, plaintiff commenced the within action in August 2002 primarily seeking a judgement of foreclosure of its security interest in the collateral in accord with the foregoing provisions of the various agreements. Plaintiff thereafter moved for a preliminary injunction seeking, *inter alia,* possession of records relating to the collateral, CPLR 6311,[FN2] and for a temporary restraining order enjoining defendants from affecting those assets and any related information, CPLR 6313. The court granted a temporary restraining order.

> FN2. Plaintiff further seeks an order preliminarily enjoining defendants from dissipating, encumbering, or otherwise disposing of or transferring the assets, and directing the depositions of certain of defendants' officers.

In a companion case brought by the defendants, entitled *Teevee Toons, Inc. v Prudential Securities Credit Corp., LLC* (index No. 603116/02) (the "Related Action"), defendants assert that plaintiff agreed to restructure the loan on grounds that the loan, in its current state, together with its required Debt Service Coverage Ratios, were unsupportable under prevailing market conditions. No documentary evidence of consummation of such an agreement is found in the record, and defendants concede that plaintiff never responded to their proposals to infuse more cash into the collateral asset revenue accounts in connection with any purported agreement to restructure (Gottlieb Aff. ¶¶ 21-23).

Defendants also invoke certain provisions of the Management Agreement. That agreement designated Teevee Toons as the Manager of the revenue producing collateral. In the event of termination, as occurred here, plaintiff is afforded the right to terminate Teevee Toons as Manager (Management Agreement § 8.02). Plaintiff may appoint what is referred to as a Back-Up Manager to assume the duties of asset management, selected from among "one of the five major United States record companies (*e.g.,* Sony, BMG, EMI, Polygram or Warner Brothers)...." (*Id.* § 8.03[a].) However, the agreement further provides that until such time as a Back-Up Manager is actually appointed, Teevee Toons "shall continue to perform all Management Services hereunder...." (*Id.*) Defendants assert that plaintiff has breached these provisions by failing to appoint a Back-Up Manager; instead, opting to dictate management decisions to Teevee Toons. Plaintiff argues that without full access

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to the financial records it seeks, it cannot appoint a Back-Up Manager, since the major record companies will not enter into such an agreement without examining those records.

The court, in lengthy conferences, has attempted to negotiate a resolution of the parties' differences, to no avail.

DISCUSSION

In order to be entitled to a preliminary injunction a movant must show a likelihood of success on the merits; irreparable harm absent the injunction; and a balancing of the equities in its favor (*Bishop v. Rubin,* 228 A.D.2d 222, 643 N.Y.S.2d 108 [1st Dept 1996]; *Headquarters Buick-Nissan, Inc. v. Michael Oldsmobile,* 149 A.D.2d 302, 539 N.Y.S.2d 355 [1st Dept 1989]). Plaintiff has amply satisfied these factors.

***3** Plaintiff is likely to succeed on the merits because it is vested with an absolute entitlement to repossession of the collateral upon an Event of Termination, which defendants concede exists by virtue of their inability to maintain the Debt Service Coverage Ratios mandated in the transactional loan agreements. Notwithstanding defendants' protestations about a possible breach of the Back-Up Manager provision of the Management Agreement, plaintiff is entitled to the immediate exercise of its contractual repossessory rights. The Loan Agreement unambiguously provides that:

> If any Termination Event has occurred and is continuing, and irrespective of whether the Loan has become or has been declared due and payable under Section 9.2, the [plaintiff] may proceed and enforce the rights of the [plaintiff] by an action at law, suit in equity or other appropriate proceeding, whether for specific performance of any agreement contained herein or in any other Transaction Document,[FN3] or for an injunction against a violation of any of the terms hereof or thereof, or in aid of the exercise of any power granted hereby or thereby or by law or otherwise.

> FN3. The term "Transaction Documents" encompasses all three agreements discussed herein (Loan Agreement § 1.1 at 12, 18).

(Loan Agreement § 9.3.)

Defendants' possible right to continue as Manager of the assets until proper appointment of a Back-Up Manager is only ancillary to plaintiff's absolute right to foreclose its security interest. Defendant is free to maintain its own separate cause of action to enforce the Back-Up Manager provision of the Management Agreement; and, indeed, already has in the Related Action. Any such cause of action, however, will not operate to impede plaintiff's clear contractual right to foreclosure under the Loan Agreement and Security Agreement.

Plaintiff's rights in the collateralized assets may be irreparably impaired absent turnover of the information which it seeks. Without such information, plaintiff has no way of verifying the status of the property which it is empowered to repossess and privately sell pursuant to the Security Agreement. The information is critical to plaintiff's necessary efforts to value the assets preparatory to such sale. Knowledge of specific record contracts and aggregate royalty income, as well as general information concerning the assets, would assuredly play a prominent role in that exercise. In addition, information concerning the collateral is necessary to enable plaintiff to meaningfully negotiate with prospective Back-Up Managers-something which defendants have urged here and in the Related Action. Because such information presently lies within the exclusive custody of the defendants, who are adversarial to the plaintiff, and because of defendants' self-interest in the information vis-a-vis the facilitation of their own redemption rights under the Security Agreement, the court cannot

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presume the defendants' cooperation in the preservation and production of that information. The court, in deciding another motion, herein has made an order on the record regarding turnover of the records. Defendants' interests were further protected by ordering that a confidentiality agreement be entered into. The defendants are again directed to comply with that order.

*4 Moreover, without an injunction against dissipation or transfer of the assets, plaintiff's rights therein are at risk of irreparable harm and any future judgment in its favor might be rendered futile. It is noted, that pursuant to the terms of the Loan Agreement itself, the amount due may only be recovered from the collateral.

The equities tip decidedly in plaintiff's favor. Defendants encounter no undue prejudice by permitting plaintiff complete access to information regarding the property which it is contractually empowered to seize for subsequent sale. Defendants have long had possession of the information, and are amply capable of utilizing it to facilitate their own redemption rights in advance of any contemplated sale. Preservation of the assets similarly presents no undue hardship for the defendants, while it is essential to plaintiff's rights therein.

Consequently, plaintiff is entitled to a substantial measure of preliminary injunctive relief requested on this motion. However, plaintiff has included among its requests, an order compelling the turnover of the collateralized assets. Such relief would constitute the ultimate relief sought in the action, which is improper within the context of a provisional remedy (*New York Automobile Ins. Plan v. New York Schools Ins. Reciprocal*, 241 A.D.2d 313, 659 N.Y.S.2d 881 [1st Dept 1997] ["Such a final determination is unwarranted and, indeed, is an abuse of discretion on a motion for preliminary injunctive relief."]; *Rosa Hair Stylists, Inc. v. Jaber Food Corp.*, 218 A.D.2d 793, 631 N.Y.S.2d 167 [2d Dept 1995] ["A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite."]). Absent dispositive motion practice on the ultimate issue under Article 32 of the CPLR, the court cannot grant such relief under the guise of a provisional remedy. Plaintiff is free to renew this request in accord with the procedure set forth in said article.

Accordingly, it is

ORDERED that the motion for a preliminary injunction is granted, except for the request that defendants be ordered at this stage to conduct an actual turnover of the collateralized assets.

N.Y.Sup.,2003.
Prudential Securities Credit Corp., LLC. v. Teevee Toons, Inc.
Not Reported in N.Y.S.2d, 2003 WL 346440 (N.Y.Sup.), 2003 N.Y. Slip Op. 50560(U)

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS, Plaintiff, v. RABOBANK, a national banking association, REGGIE LEWIS, CARL BUSHMAN, and CHANCE ALBERTA, Defendants.	**1:13-cv-00609 LJO-MJS** **ORDER DENYING REQUEST FOR TEMPORARY RESTRAINING ORDER (DOC. 16)**

I. INTRODUCTION/BACKGROUND

This case is an offshoot of an ongoing dispute between two factions within the Picayune Rancheria of Chukchansi Indians (the "Tribe"), a federally recognized Indian Tribe. Doc. 1 ("Compl.") ¶ 1. Among other things, the Tribe, through the Chukchansi Economic Development Authority ("CEDA"), operates the Chukchansi Gold Resort and Casino, located in Coarsegold, California (the "Casino"). *Id.* ¶¶ 11, 23. To fund construction of the Casino, CEDA issued roughly $310 million in bonds. Hash Decl., Ex. F, Doc. 10-2 at 1-2. In 2012, CEDA restructured those debts by exchanging the original bonds for new ones issued under an Indenture Agreement between CEDA and Wells Fargo, National Association ("Wells Fargo"). *Id.* The Indenture Agreement required that CEDA deposit all revenues from the Casino's operation into deposit accounts at Rabobank, and also required that CEDA, Wells Fargo, and Rabobank execute a "Deposit Account Control Agreement" ("DACA"), which governs control of the Casino's accounts. West Decl., Ex. A, Doc. 18-1, at 6, 17-18, 29, § 4.25.

On March 21, 2013, one Tribal faction, led by Nancy Ayala and purporting to represent the Tribe ("Plaintiff" or the "Ayala Faction"), filed suit against Rabobank in a judicial entity purporting to be the Picayune Rancheria Tribal Court (the "Ayala Tribal Court"), alleging Rabobank breached its contract with the Tribe by failing to release to the Tribe funds maintained in the Tribe's bank accounts. *See*

1 Compl. at ¶2; Ex. M (Doc. 1-15). The Ayala Tribal Court issued a temporary restraining order followed
2 by a preliminary injunction ordering the Bank to pay a portion of the funds in the disputed accounts to
3 bondholders; directing the Bank to interplead the funds remaining in the Accounts with the Tribal Court;
4 prohibiting withdrawal of funds from the accounts except by order of the court; and establishing a
5 procedure for withdrawal of the funds to pay the legitimate operating expenses of the Casino. *Id*.

6 On May 25, 2013, Plaintiff filed a complaint in this Court for declaratory and injunctive relief
7 against Rabobank and three members of the Tribe's Tribal Council, Chance Alberta, Carl Bushman, and
8 Reggie Lewis (the "Lewis Faction"). Compl. In the Federal Action, Plaintiff seeks to have this Court
9 recognize and enforce the orders issued by the Tribal Court. *Id*.

10 On May 7, 2013, the Lewis Faction moved to intervene. Doc. 8. That motion, which is opposed
11 by the Ayala Faction, Doc. 13, is still pending.

12 On June 3, 2013, the Ayala Faction filed a request for a Temporary Restraining Order ("TRO")
13 requesting that this Court direct Rabobank to make a loan payment to Wels Fargo on behalf of the Tribe
14 pursuant to the DACA and to interplead any funds remaining in the Disputed Accounts until such time
15 as the Court can determine the merits of this case. Doc. 16. Rabobank filed an opposition to the TRO
16 request, Doc. 17, as did the Lewis Faction by way of a special appearance, Doc. 20. Having reviewed all
17 the pleadings, the Court finds that the issues are well defined and that oral argument will not be of
18 material assistance. Therefore, the Court hereby adjudicates this matter on the papers in accordance with
19 Eastern District Local Rule 230(g).

20 **II. ANALYSIS**

21 **A. TRO Standard.**

22 Fed. R. Civ. P. 65(b)(1)(A) permits a temporary restraining order ("TRO") "only if … specific
23 facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or
24 damage will result to the movant before the adverse party can be heard in opposition." As such, the
25 Court may only grant such relief "upon a clear showing that the plaintiff is entitled to such relief."
26 *Winter v. Nat'l Res. Def. Council, Inc*., 555 U.S. 7, 23 (2008). To prevail, the moving party must show:

1 (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable
2 harm absent preliminary injunctive relief; (3) that the balance of equities tips in the moving party's
3 favor; and (4) that preliminary injunctive relief is in the public interest. *Id*. at 20. In considering the four
4 factors, the Court "must balance the competing claims of injury and must consider the effect on each
5 party of the granting or withholding of the requested relief." *Id.* at 23. "[I]njunctive relief [i]s an
6 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such
7 relief." *Id*. at 22.

8 **B. Likelihood of Success on the Merits.**

9 "As a general rule, federal courts must recognize and enforce tribal court judgments under
10 principles of comity." *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002). Under
11 certain circumstances, a federal court has discretion to recognize and enforce non-final orders, such as
12 injunctions. *MacArthur v. San Juan Cnty*., 497 F.3d 1057, 1066 (10th Cir. 2007) ("[T]he decision
13 whether to enforce non-final orders of a tribal court is left primarily to our discretion under the doctrine
14 of comity."). However, federal courts should "neither recognize nor enforce tribal judgments if: (1) the
15 tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not
16 afforded due process of law." *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997). In addition, a
17 federal court has discretion to decline to recognize and enforce a tribal judgment on equitable grounds,
18 including in the following circumstances:

19 (1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties'
20 contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state
21 in which recognition of the judgment is sought.

22 *Id*.

23 Here, this Court finds that it is more likely than not that: (1) the Ayala Tribal Court lacked
24 subject matter jurisdiction over the underlying dispute with Rabobank; and (2) relatedly, enforcement of
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the order would be inconsistent with the Parties' contractual choice of forum.[1] The Court also finds that Plaintiff has not established irreparable harm in the absence of injunctive relief.

1. The Ayala Tribal Court Probably Lacks Subject Matter Jurisdiction Over the Underlying Dispute with Rabobank.

In March 2012, before the Tribal schism, the Tribe passed a resolution approving a "Tribal Court Ordinance." *See* Declaration of Michael Wynn in Support of Motion for Temporary Restraining Order, Ex. 1, Doc. 16-11 (Resolution 2012-45) at 1. The Ordinance, among other things, established a tribal court and delineated its jurisdiction. *Id.* § 2 (establishing the tribal court), §§ 4, 5 (specifying court's territorial and subject matter jurisdiction).

That same month, the Tribe passed an amendment to the Tribal Court Ordinance, which exempted certain transactions, and persons, from the tribal court's reach. The amendment provided that the Tribal Court Ordinance "shall not apply to any cause or right of action of any kind, or any claim, liability, damages, obligation or dispute of any nature arising in respect of or related in any matter to a Transaction, a Transaction Document, or to … a party or beneficiary of a Transaction Document." Wynn Decl., Ex. 3, Doc. 16-13 (Resolution 2012-53) at 2. The amendment defined "Transaction Documents" as those "effecting, implementing, evidencing, securing or otherwise related to any one or more Transactions." *Id.* "Transactions" are defined as "the issuance of New Notes" and "any transaction relating to the foregoing." *Id.* at 2-3.

The term "Transactions" clearly refers to the issuance of new notes as part of the restructuring described above. Execution of the DACA was a requirement of the Indenture Agreement that facilitated the restructuring, and therefore appears to qualify as a "Transaction Document," because it "effect[s] implement[s], evidenc[es], secur[es] or [is] otherwise related to any one or more Transactions." Accordingly, Resolution 2012-53 divests any tribal court organized under the Tribal Court Ordinance of jurisdiction over disputes "arising in respect of or related in any matter to" the DACA.

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[1] Although there are arguably additional reasons why this Court is likely to decline to recognize and enforce the Ayala Tribal Court order, for the sake of expedience, only these two bases are addressed at this time.

It appears that the underlying Ayala Tribal Court lawsuit concerns DACA directly. The Ayala Tribal Court Complain identifies all accounts governed by the DACA as the accounts in dispute, *compare* Doc. 1, Ex. N (Ayala Tribal Court Complaint) *with* Hash Decl., Doc. 10-1, Ex. E ("DACA") at Recital A (listing accounts subject to DACA), and seeks judicial remedies related to the monies held therein.[2]

The DACA, while generally concerning the rights of the "Secured Parties" (e.g., Wells Fargo) to control the listed accounts, also defines the "Depositor" to be CEDA. DACA at 1. At its heart, the Ayala Tribal Court lawsuit is a dispute over who can issue instructions in CEDA's name. *See generally* Doc. 1, Ex. N (Ayala Tribal Court Complaint). Therefore the Ayala Tribal Court lawsuit "aris[es] in respect of or related in any matter to" the DACA, and, thus, Resolution 2012-53 strips the Ayala Tribal Court of subject matter jurisdiction to hear the matter. A federal court should "neither recognize nor enforce tribal judgments if … the tribal court [lacks] subject matter jurisdiction…." *Marchington*, 127 F.3d at 810.[3]

2. Enforcement of the Ayala Tribal Court order is Probably Inconsistent with the Parties' Contractual Forum Selection Clause.

For the same reason, enforcement of the Ayala Tribal Court complaint appears to be inconsistent with the forum selection clauses contained in the DACA. Specifically, in the DACA, CEDA agreed "to irrevocably and unconditionally submit, for itself and its property, to the exclusive jurisdiction [of New York or California courts] … any action or proceeding arising out of or relating to [the DACA]." DACA § 10(a)(iii). CEDA also agreed "that it shall not institute any action in its own tribal court system in respect of any claim or cause of action arising out of or relating to [the DACA] …. or the transactions contemplated hereunder and thereunder, but shall instead resort to the [New York and California courts] set forth above."). DACA at § 10(a)(iv). The DACA further provides that "[t]o the extent that any

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[2] Although the Ayala Tribal Court Complaint lists some additional accounts, the DACA applies to "renumbered or successor accounts," *see* DACA at 1, and Rabobank represents that the accounts listed in the DACA are the only ones containing substantial funds, *see* West Decl., Ex. I, Doc. 18-9 (Decl. of Darrel Hyatt) ¶ 3.

[3] Plaintiff's lengthy disquisition on the *Montana* doctrine and its exceptions, Doc. 16-1 at 13-22, is unpersuasive. *Montana v. United States*, 540 U.S. 544 (1980), and its progeny concern whether a tribal court may exercise jurisdiction over a non-tribal person or entity. Here, the Tribe has chosen not to exercise jurisdiction over certain subject matters. Montana is simply inapposite.

1 provision in this Agreement conflicts with any provision in any other agreement between Bank and
2 Depositor, the provision in this Agreement shall control." DACA at § 11. CEDA's authority to enter into
3 these forum selection clauses was approved by tribal resolution. Hash Decl., Doc. 10-2, Ex. H at 3
4 (acknowledging the DACA may contain the Tribe's "consent to have disputes resolved in non-tribal
5 courts or by arbitration").

6 For the reasons set forth in the previous section, the Ayala Tribal Court lawsuit "aris[es] out of or
7 rela[es] to" DACA. Therefore, this Court would be independently justified in declining to enforce the
8 Ayala Tribal Court order because doing so would be inconsistent with the Parties[4] contractual forum
9 selection clause. *See Marchington*, 127 F.3d at 810.

10 **C. Irreparable Harm.**

11 Plaintiff has also failed to demonstrate irreparable harm sufficient to warrant injunctive relief.
12 Plaintiff's assertion of harm is stated dramatically:

13 What is at stake in this case is the present and future existence of the Tribe as a viable, functioning, political, and governing entity with reputable, profitable commercial
14 enterprises.

15 First, unless the Court issues a temporary restraining order, the Tribe will be unable to meet the operating expenses of its Casino and its Tribal government. Unless those
16 expenses are paid, 1,200 employees of the Casino may be laid off and 35 employees in the Tribal government may lose their jobs. Without these employees, the Casino and the
17 Tribal government will cease to operate and the ability of the Tribe to govern itself will be threatened. Markle Declaration, pp. 3-4, ¶ 10. Casey Declaration, p. 2, ¶¶ 5-6.
18 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
19 in default under the terms of the Loan, which would subject the Tribe to a demand for immediate repayment of the entire Loan amount and possible seizure of the collateral that
20 secures the Loan. In the event of seizure, the Casino will cease operating. Markle Declaration, pp. 3-4, ¶ 10.

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22 Third, and more generally, the damage to the Tribe that would result from the Bank's breach of its contractual obligations is incalculable. The Tribe could spend years
23 attempting to get back the money drawn from tribal accounts by unauthorized persons, pay Tribal debts that are incurred as a result of either misappropriation of tribal funds or
failure to meet tribal obligations based on the unavailability of those funds, and restore

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26 [4] Although Plaintiff is purportedly the Tribe itself, CEDA is the Tribal signatory to the DACA. The Court will assume for purposes of this motion that Plaintiff is attempting to stand in CEDA's shoes, as CEDA is the only Tribal entity with any plausible claim to control the disputed accounts.

> the credit rating and business reputation of the Tribe, if the Bank is not prevented from refusing to recognize the Tribe's check signers and refusing to allow the Tribal Council to draw on the accounts maintained by the Tribe at the Bank.

Doc. 16-1 at 26-27.

Declarant Joyce Markle, the General Accounting Manager for the Casino, states:

> At present, the Casino does not have enough cash on hand to maintain the minimum amount of money that it is required to maintain in the Casino cage to pay jack pots, pursuant to federal regulations issued by the National Indian Gaming Commission, pay its employees and pay its vendors to continue to operate. The Casino has more than sufficient revenue, in the form of checks totaling over Seven Million Dollars ($7,000,000.00), to pay its operating expenses, but it cannot deposit or cash those checks because it does not have access to the Operating Account or any other bank account. If the Casino is not able to utilize the Casino's Operating Account, it will be unable to pay its employees, vendors and service providers. This will result in the employees, vendors and service providers refusing to supply goods and services essential to the operation of the Casino. That, in turn, will force the Tribe to cease or dramatically restrict the Casino operations.

Markle Decl., Doc. 16-7 ¶ 10.

However, there is nothing stopping the Casino from depositing the checks into the disputed Rabobank accounts.[5] Wells Fargo has the right under the DACA to direct that the loan payment be made and that other Casino expenses be paid. *See* DACA § 1(e). Because Plaintiff has failed to establish that the Tribe's debts and the Casino's expenses would not be paid under this provision, it has failed to establish the likelihood of any damage to the Tribe's reputation or credit rating caused by Defendants' conduct.

Plaintiff's complaint that it will be onerous and time-consuming to recover monies improperly withdrawn from the disputed account is insufficient to justify injunctive relief. Injunctive relief is only available when legal remedies are "inadequate." *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (the basis for injunctive relief is irreparable injury and the inadequacy of legal remedies). Thus, "[a] plaintiff is not entitled to an injunction if money damages would fairly compensate him for any wrong he may have suffered." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595 (1952).

[5] In fact, the Lewis Faction's opposition indicates that the Ayala Faction has been deliberately refusing to deposit funds into the Rabobank accounts since as early as February 2013, a practice the Lewis Faction asserts violates Gaming Commission regulations and various contracts relating to the Casino's refinancing. Doc. 20 at 11.

1 "Typically, monetary harm does not constitute irreparable harm." *Cal Pharmacists Ass'n v. Maxwell–*
2 *Jolly*, 563 F.3d 847, 851 (9th Cir. 2009) ("Economic damages are not traditionally considered
3 irreparable because the injury can later be remedied by a damage award.").

4 **III. CONCLUSION**

5 For the reasons set forth above, Plaintiff's request for a temporary restraining order is DENIED.

6 **SO ORDERED**
Dated: June 4, 2013

7 **/s/ Lawrence J. O'Neill**
United States District Judge

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