

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

Motion Sequence No. 001

Hon. Melvin L. Schweitzer

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

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N.A. in Its Capacity as Trustee Under the
Indenture and Collateral Agent Under the
Security Agreement*

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Plaintiff Wells Fargo Bank, N.A. (“Wells Fargo” or the “Trustee”), acting in its capacity as Trustee and Collateral Agent¹ under the Indenture and Security Agreement, brought this action seeking straightforward relief in four discrete categories to protect the Collateral. The Trustee filed its Motion in order to obtain this relief on an expedited but preliminary basis, given the state of affairs with the Casino. As indicated in the Motion, the Trustee takes no position regarding which of the competing Factions should be in control of the Tribe, CEDA and the Casino, nor is that issue before this Court. In accordance with applicable law, the Trustee also has avoided taking any action that could be construed as “taking sides” or that could be construed as getting involved in the management of the Casino. Since filing the Motion, the Trustee has attempted to engage all parties to determine the extent to which there is agreement regarding the relief sought, in order to bring CEDA within compliance with the Indenture and other agreements and thereby protect the Collateral.

There is widespread agreement among the Defendants that the Trustee is entitled to the relief it seeks. Immediately after this Court issued the Order to Show Cause, the Trustee circulated a proposed stipulation to Defendants, and the parties quickly reached agreement as to virtually all of the relief at issue in the Order to Show Cause. This relief and the parties’ positions are described below and are memorialized in the Proposed Order submitted as an exhibit attached to the Supplemental Affirmation of Robert J. Malioneck in Further Support of Wells Fargo Bank, N.A.’s Application for a Preliminary Injunction (the “Supp. Malioneck Aff.”). Indeed, almost all parties are willing to sign the Proposed Order as a so-ordered stipulation to

¹ Capitalized terms not otherwise defined shall have the meaning ascribed to them in the prior papers submitted. All references to “Malioneck Aff. Ex. __” are to the exhibits attached to the Supplemental Affirmation of Robert Malioneck submitted herewith. All references to “Slade Aff. Ex. __” are to the exhibits attached to the Affidavit of Michael Slade, which was submitted with the Application for a Preliminary Injunction.

present to the Court. There are a few narrow issues, however, that are the subject of disputes among a few of the parties, also described below. The Trustee thus hopes that the July 2, 2013 Order to Show Cause hearing can be used to obtain the Court's assistance or adjudication in resolving these few narrow issues. For the Court's convenience, a short outline of the Proposed Order is provided below, broken down into the four basic categories of relief outlined in the Motion and a fifth category of Other Relief Requested by Defendants during discussions regarding the Proposed Order.

A. Gross Revenues Relief

To ensure that the Casino has sufficient funds to continue to operate, thereby protecting the Collateral, the Trustee requested in its Motion that the Court: (1) preliminarily enjoin CEDA, the Tribe and the Individual Defendants from maintaining the Gross Revenues and Revenues and Cash of the Casino, other than Operating Cash and Gross Revenues that constitute Excluded Assets, in the cage of the Casino or anywhere other than in an account subject to an Account Control Agreement with the Trustee and (2) direct CEDA, the Tribe and Bank of America to transfer the funds in the Bank of America account and Gross Revenues and Revenues and Cash to the Rabobank Operating Account. As explained in the Trustee's memorandum of law in support of this application, the Gross Revenues relief is consistent with the terms of the Indenture, Security Agreement and related agreements. (See Trustee Mem. at 14-15.) *All of the parties support or do not oppose this requested relief.*² Accordingly, the Trustee requests that the Court grant the Gross Revenues Relief.³

² In his affirmation, Peter T. Shapiro, on behalf of CEDA and the Tribe for the Ayala Faction states that CEDA and the Tribe *do not oppose* the Trustee's Application for a Preliminary Injunction. Affirmation of Peter T. Shapiro dated June 27, 2013 ("Shapiro Aff.") ¶2. In his affidavit, Reggie Lewis, on behalf of CEDA and the Tribe for the Lewis Faction, as well as himself, the Board, Chance Alberta and Carl Bushman, states that he *supports* "most" of the

B. Control Account Relief

To ensure that the Casino has sufficient funds to continue to operate and that the Collateral is thus protected, the Trustee has requested that the Court: (1) direct CEDA, the Tribe and the Individual Defendants to deposit or cause to be deposited, on an ongoing basis and at least once per week, the Casino's Gross Revenues and Revenues and Cash, other than Operating Cash and Gross Revenues that constitute Excluded Assets, into CEDA's Operating Account at Rabobank, consistent with the Security Agreement and Account Control Agreement; (2) direct Global Cash Access to transfer the Global Cash Access Funds to CEDA's Operating Account at Rabobank and (3) direct Rabobank to allow the Bank of America and Global Cash Access Funds to be deposited into CEDA's Operating Account at Rabobank and to allow payments to be made to the Casino's critical vendors for amounts currently owed and on an ongoing basis, and directing the Factions, with Rabobank, to agree upon a list of such vendors. *All of the parties support or do not oppose this requested relief.* Accordingly, the Trustee requests that the Court grant the Control Account relief. A list of such critical vendors (including employees) as submitted by Casino management and represented as necessary to the ongoing operation of the Casino is attached to and incorporated into the Proposed Order. This list was sent to the Lewis Faction on June 21, 2013.

Trustee's Application for a Preliminary Injunction, including the Trustee's requests for Gross Revenue Relief, Control Account Relief and Financial Statement Relief. Affidavit of Reggie Lewis dated June 27, 2013 ("Lewis Aff." or "Lewis Affidavit") ¶¶2, 3 & 25. Bank of America *takes no position on*, and therefore does not oppose, the injunctive relief sought by the Trustee. "Memorandum of Law in Response to Wells Fargo Bank's Application for Preliminary Injunction," dated June 27, 2013, at 1. Neither Rabobank, N.A. nor Global Cash Access, Inc. has opposed the Motion.

³ As reflected in the Proposed Order, the Trustee also requests that the Court order CEDA and the Tribe to transfer funds held in an account at Westamerica Bank, which the Trustee learned about after filing the Complaint and Order to Show Cause, to the Rabobank Operating Account. The Ayala Faction, which opened this account and deposited funds there, does not object to this relief.

Although no party opposes the Control Account Relief, the two Factions disagree on whose signatures should be on the checks issued from the Rabobank Operating Account to pay vendors and employees. The Trustee has attempted to assist the Factions in reaching a compromise on this issue, but takes no position on this issue and requests that the Court adjudicate or otherwise resolve this issue so that payments may be made to critical vendors and employees. Some of the possibilities discussed by the parties include (1) either side having sole authority to sign the checks, (2) having joint signatures on each check, one from a representative of the Lewis Faction and another from a representative of the Ayala Faction and (3) having someone from Casino management sign the checks. In any event, it is expected the checks will be used only to pay critical vendors (including employees) on which the parties agree or which the Court orders, upon submitted evidence, should be paid in order to maintain Casino operations.

C. Unauthorized Action Relief

The Trustee has requested that the Court (1) preliminarily enjoin the Tribal Parties and the Individual Defendants from filing further actions against the Trustee or any of the Holders before the Tribal Court, the Tribal Gaming Commission, or any other court or entity in contravention of the jurisdiction consent provisions of the Indenture, the Security Agreement, and the Account Control Agreement and (2) preliminarily enjoin the Tribal Parties and the Individual Defendants from further interfering with CEDA's and the Tribe's obligations under the Indenture and the Security Agreement by, among other things, sending cease and desist letters to the Casino's vendors. *All of the parties, except for the Lewis Faction⁴, do not oppose*

⁴ The Lewis Affidavit states that the Lewis Faction supports certain items of the Trustee's Application for a Preliminary Injunction, but these items are not on that list. Lewis Aff. ¶25.

this requested relief. As described in the Motion and summarized below, this preliminary relief is essential to prevent irreparable harm to the Trustee and to the Casino and the Collateral.

The Indenture clearly states that any actions arising out of the Indenture must be first brought in New York state or federal court, and the Tribe agreed that it would not sue the Trustee or the Holders in Tribal Court. *See* Slade Aff. Ex. A. (Ex. E Section 11.8(c) of the Security Agreement and Slade Aff. Ex. F Section 10(a)(iii) of the Deposit Account Control Agreement contain similar language). Indeed, as described in the Marston Affidavit, a federal court in California recently enforced these provisions, dismissing a suit brought by the Ayala Faction arising under the Deposit Account Control Agreement. *See* Declaration of Lester J. Marston dated June 27, 2013 ¶5. Permitting the Tribal Parties or the Individual Defendants to file an action in any court or body 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 and (2) will cause the Trustee reputational harm, including losing good will with its customers. *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.”). Conversely, the Lewis Faction would not suffer any harm, as it still may raise any issue with respect to the Indenture or other agreements in this Court, the proper forum.

The Trustee also requested that the Court preliminarily enjoin the Tribal Parties and the Individual Defendants from further interfering with CEDA’s and the Tribe’s obligations under the Indenture and the Security Agreement because, in late April, the Lewis Faction began sending cease and desist letters to various vendors, demanding that they stop providing services

to the Casino. The irreparable harm to the Casino – and to the Collateral – would be tremendous if such practices were allowed to continue.

All parties, except for the Lewis Faction, do not oppose this requested relief. The Lewis Faction claims that a preliminary injunction on this ground would raise First Amendment concerns. That is not true. Courts can and should enjoin speech where the speech itself is tortious conduct and endangers a business or property right. *See, e.g., Trojan Electric & Machine Co. v. Heusinger*, 557 N.Y.S.2d 756, 758 (3d Dep’t 1990) (holding that speech may be preliminarily enjoined “where restraint becomes essential to the preservation of a business or other property rights threatened by tortious conduct in which the words are merely an instrument of and incidental to the conduct”); *Wolf v. Gold*, 193 N.Y.S.2d 36, 38 (1st Dep’t 1959) (“Equity will, however, restrain tortious acts where it is essential to preserve a business or property interests and also restrain the publication of false and defamatory words where it is the means or an incident of such tortious conduct.”). Should the threatened vendors cease providing services to the Casino, the Casino and the Collateral will be endangered beyond repair.

D. Financial Statement Relief

The Trustee requests that CEDA be directed to provide the Trustee and the Holders with CEDA’s 2012-year end audited financial statements and first quarter 2013 unaudited financial statements, as required by the Agreements. *All of the parties support or do not oppose this requested relief.* This relief is imperative in order to allow the Trustee and the Holders the ability to monitor the Casino’s finances in a timely manner so that they can effectively protect the Collateral.

E. Other Relief Requested by Defendants

For months, the Trustee has worked with the Factions in an attempt to resolve the issues affecting the Collateral. Consistent with those efforts, three days after filing the Complaint and

Order to Show Cause, the Trustee circulated a draft stipulation to all Defendants, which addressed all issues raised in the Order to Show Cause. Supp. Malionek Aff. ¶5. The Trustee has elicited comments from all of the Defendants and has incorporated as many as possible into a draft, now submitted as a Proposed Order and attached as Ex. 1 to the Supplemental Malionek Affirmation. As reflected in the draft, certain parties requested additional relief that was not part of the Trustee's Order to Show Cause.

Bank of America has requested that it be allowed to withhold \$277,000 for its fees and expenses. No party has objected to Bank of America's request.⁵

Bank of America and Rabobank requested that certain lawsuits filed against them and Automatic Data Processing, Inc. by the two Factions be dismissed with prejudice. The two Factions do not oppose this requested relief, except that the Lewis Faction has requested that the complaints be dismissed without prejudice.

F. Conclusion

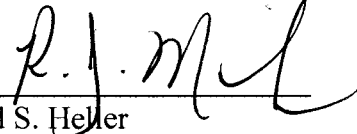
For the foregoing reasons, the Trustee respectfully requests that this Court issue a

⁵ In its memorandum of law, Bank of America claims that its rights to these funds are superior to those of the Trustee. That is incorrect. The Tribe granted a perfected security interest to the Trustee in all of the Casino's Revenues and Cash (as defined in the Security Agreement and which includes "Pledged Revenues" as defined in the UCC), even if the Trustee does not have control over such funds. Under Resolution #2012-51 of the Tribe, which applies here, a security interest in "Pledged Revenues," shall be created and attached upon the giving of value and the granting of a security interest in a writing and may be perfected by filing of a financing statement in the manner described in the California UCC. CEDA granted a security interest to the Trustee in the Pledged Revenues, and the Trustee perfected that security interest by filing a UCC as required by the Tribal Uniform Commercial Code. Regardless, the Trustee does not object to Bank of America withholding its fees.

preliminary injunction as requested in our Application for a Preliminary Injunction and as detailed in the Proposed Order.

July 1, 2013
New York, New York

Respectfully submitted,



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Capacity as Trustee Under the Indenture
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