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

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

SHARP IMAGE GAMING, INC.,

Plaintiff and Respondent,

vs.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Defendant and Appellant.

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

RESPONDENT'S ANSWER TO UNITED STATES' *AMICUS CURIAE* BRIEF

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 6

A. The Trial Court Was Not Required To Make A "Threshold" Determination That The ELA Was Not A Management Contract Under IGRA 6

B. The Trial Court Was Not Required To Defer To The NIGC Chairman's Letter Procured By The Tribe To Defend This Case 11

C. The Promissory Note Is Not Void As A Collateral Agreement To A Management Contract 17

III. CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

American Vantage Companies v. Table Mountain Rancheria
103 Cal. App. 4th 590 (2002) .... passim

AT&T v. Coeur D'Alene Tribe
295 F.3d 899 (9th Cir. 2002) 2, 12, 13

Auer v. Robbins
519 U.S. 452 (1997) .... passim

Bassiri v. Xerox Corp.
463 F.3d 927 (9th Cir. 2006) 14, 15

Cassim v. Allstate Ins. Co.
33 Cal. 4th 780 (2004) 11

Catskill Dev., L.L.C. v. Park Place Entertainment Corp.
547 F.3d 115 (2d Cir. 2008) 4, 12, 18

Center for Sierra Nevada Conserv. v. U.S. Forest Service
832 F. Supp. 2d 1138 (2011) 5, 15

Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.
467 U.S. 837 (1984) 5, 13, 14, 15

Christensen v. Harris County
529 U.S. 576 (2000) 14

Clark v. United Fruit Distributing Co.
97 Cal. App. 784 (1929) 11

Codekas v. Dyna-Lift Co.
48 Cal. App. 3d 20 (1975) 11

Culligan Water Conditioning of Bellflower, Inc. v. State Bd. of Equalization
17 Cal. 3d 86 (1976) 4, 15

Duffens v. Valenti
161 Cal. App. 4th 434 (2008) 7

TABLE OF AUTHORITIES

Page

Eaton v. Brock
124 Cal. App. 2d 10 (1954) 7

Elem Indian Colony of Pomo Indians v. Pacific Development Partners X, LLC
2010 WL 2035331 (N.D. Cal. May 19, 2010) 4, 13

Environmental Protection Information Center v. Cal. Dep't of Forestry and Fire Protection
44 Cal. 4th 459 (2008) 16

Farmers Ins. Exchange v. Superior Court
137 Cal. App. 4th 842 (2006) 5, 16

Fellom v. Adams
274 Cal. App. 2d 855 (1969) 7

First American Kickapoo Operations, L.L.C v. Multimedia Games, Inc.
412 F.3d 1166 (2005) 4, 12

Gallegos v. San Juan Pueblo Bus. Dev. Bd., Inc.
955 F. Supp. 1348 (D.N.M. 1997) 4, 9, 10

Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. For Western Dist. of Mich.
198 F. Supp. 2d 920 (W.D. Mich. 2002) 4, 5, 13

Hinerfeld-Ward, Inc. v. Lipian
188 Cal. App. 4th 86 (2010) 7

Home Box Office, Inc. v. FCC
567 F.2d 9 (D.C. Cir. 1977) 5, 17

In re Quantification Settlement Agreement Cases
201 Cal. App. 4th 758 (2011) 8

In re U.S. ex rel. Hall
825 F. Supp. 1422 (1993) 8

Jackson v. Rogers & Wells
210 Cal. App. 3d 336 (1989) 7

TABLE OF AUTHORITIES

Page

Jena Band of Choctaw Indians v. Tri-Millenium Corp., Inc.
387 F. Supp. 2d 671 (W.D. La. 2005)..........4, 13, 18

Jones v. Tracy Sch. Dist.
27 Cal. 3d 99 (1980)..........4, 15

Kallen v. Delug
157 Cal. App. 3d 940 (1984)..........7

Keys v. Barnhart
347 F.3d 990 (2003)..........14, 15

Machal, Inc. v. Jena Band of Choctaw Indians
387 F. Supp. 2d at 659 (W.D. La. 2005)..........18

Miami Tribe of Oklahoma v. United States
5 F. Supp. 2d 1213 (D. Kan. 1998)..........5

NGV Gaming, Ltd. v. Upstream Point Molate, LLC
355 F. Supp. 2d 1061 (N.D. Cal. 2005)..........4, 13

Outsource Services Management, LLC v. Nooksack Bus. Corp.
292 P.3d 147 (Wash. App. 2013)..........8

Peterson v. Sherman
68 Cal. App. 2d 706 (1945)..........10

Public Lands for the People, Inc. v. U.S. Dept. of Agriculture
697 F.3d 1192 (9th Cir. 2012)..........14

Rumsey Indian Rancheria of Wintun Indians of Cal. v. Dickstein
2008 WL 648451 (E.D. Cal. Mar. 5, 2008)..........4, 10

Sangamon Valley Television Corp. v. United States
269 F.2d 221 (D.C. Cir. 1959)..........5, 17

Shingle Springs Band of Miwok Indians v. Sharp Image Gaming Inc.,
2010 WL 4054232 (E.D. Cal. Oct. 5, 2010)..........2, 4, 10

TABLE OF AUTHORITIES

Page

Skidmore v. Swift & Co.
323 U.S. 134 (1944) 15, 16

Vagim v. Brown
63 Cal. App. 2d 504 (1944) 7

Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.
658 F.3d 684 (7th Cir. 2011) 4, 12, 18

Yamaha Corp. of America v. State Bd. of Equalization
19 Cal. 4th 1 (1998) 15, 16

STATUTES

Civ. Code § 1643 7

Civ. Code § 1667 .... 3, 7

Civ. Code § 3541 7

Evid. Code § 320 .... 3, 9

Evid. Code § 520 7

Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* 1

OTHER AUTHORITIES

2 Schwing, *Cal. Affirmative Defenses* (2013 ed.) § 37:30, n.1 7

I.
INTRODUCTION

Nearly four months after the parties' briefs closed in this appeal, the United States of America ("United States") filed an *amicus* brief abandoning the federal preemption theory advanced by Defendant and Appellant Shingle Springs Band of Miwok Indians (the "Tribe") and offering another in its place.

The Tribe had contended that a letter procured from the Chairman of the National Indian Gaming Commission ("NIGC") in 2009 during this litigation constituted "final agency action" that was binding on the trial court. The letter opined that the Equipment Lease Agreement ("ELA") signed by the Tribe and Plaintiff and Respondent Sharp Image Gaming, Inc. ("Sharp Image") was void under the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, because it was a casino "management contract" that the Chairman had not approved. The Tribe maintained that Sharp Image's only recourse to challenge this letter was to sue the NIGC in federal court under the federal Administrative Procedures Act.

The United State disagrees, noting that despite the Tribe's contention that "the APA provides the proper mechanism for challenging the NIGC's final agency action" (Amicus Br. at 25), Sharp Image's "breach-of-contract suit is not an action against the NIGC; nor is it a challenge to the 2009 Disapproval *per se*." *See* Amicus Br. at 26. The government concludes that Sharp Image "is not limited to the Congressionally-prescribed procedures for challenging" the Chairman's

letter.[1] *Id; see also id.* at 26 (recognizing "[t]he existence of State-court jurisdiction over Sharp's contract claim – notwithstanding the 2009 Disapproval").

However, the United States has a new preemption theory that it asserts on behalf of the Tribe, even though the Tribe has never asserted it and never asked the Superior Court to make the determination the government now says it should have made. The government argues:

> The Superior Court could exercise jurisdiction over Sharp's contract claim only upon a determination that the unapproved ELA was not a management contract, a legal determination that the Superior Court never made. . . .[T]he Superior Court had jurisdiction to resolve this threshold preemption question – giving proper deference to NIGC's legal interpretations – and that the Superior Court erred as a matter of law in failing to reach this question.

Amicus Br. at 2.

The United States thus acknowledges what Sharp Image (and the federal District Court that dismissed the Tribe's collateral attack on the state court action) have said all along: the Tribe's jurisdictional dispute stems from "'the Superior Court's refusal to give deference to the NIGC's determination'" that the ELA is void. Resp. Br. at 30, quoting *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, 2010 WL 4054232, *14 (E.D. Cal. Oct. 5, 2010).

On that point, according to the United States, the trial court was required to defer to any pronouncement by the NIGC that the ELA was void "not only in the 2009 disapproval decision but also in an earlier 2007 opinion letter and . . . in this *amicus* brief." Amicus Br. at 3. The

[1] The Tribe basically relied on a single Ninth Circuit case for its preemption argument: *AT&T v. Coeur D'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002). The United State includes this case in its Table of Authorities but it is not to be found on the page where it is supposedly cited or anywhere else in the government's brief. Amicus Br. at iii, 27.

government asserts that these opinions are "based on an interpretation and application of NIGC's own regulations, that the ELA is a management contract." Amicus Br. at 2-3. The United States maintains that, under *Auer v. Robbins*, 519 U.S. 452 (1997), any court must "defer to an agency's interpretation of its own regulations, even when such interpretation is expressed in an informal opinion or brief." Amicus Br. at 3.

The United States does not and cannot dispute that the NIGC Chairman's 2009 letter declaring the ELA to be void was the product of a secret lobbying effort that deliberately excluded Sharp Image.[2] Resp. Brief at 13-16. But the United States insists these "alleged procedural violations are irrelevant to the deference question . . ." Amicus Br. at 3. In other words, the government insists that the state court could not consider any violation of due process that occurred in connection with the NIGC's attempt to relieve the Tribe of the consequences of its breach of contract.

Put bluntly, none of the United States' novel arguments recited above are supported by any pertinent authority or principle.

To begin with, the government does not cite any decision holding that a trial court must determine whether a contract with an Indian tribe is a management contract under IGRA as a "threshold" matter essential to the court's jurisdiction. To the contrary, the assertion that a contract is void because it violates a statute is an affirmative defense that the defendant must plead and prove. Civ. Code § 1667(a). The government has provided no authority that a trial court, which under California law has complete discretion to control the order of proof (*e.g.*, Evid. Code § 320), must try the Tribe's affirmative defense first.

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[2] Sharp Image has no information as to whether a similar campaign produced the amicus brief. That said, the Tribe has a practice and history of seeking assistance from the federal government in state court litigation. *See* Resp. Br. at 13, n.4.

To the extent the United States claims that a state court breach of contract action is preempted by federal law unless the trial court concludes the contract at issue is not a management contract, there is a line of authority – which includes the federal District Court's considering the 2009 letter from the NIGC Chairman in this case – holding that whether or not a contract is void as an unapproved management contract does not preempt state law or even raise a federal question under IGRA. *See American Vantage Companies v. Table Mountain Rancheria*, 103 Cal. App. 4th 590, 596-97 (2002); *Gallegos v. San Juan Pueblo Bus. Dev. Bd., Inc.*, 955 F. Supp. 1348, 1350 (D.N.M. 1997); *Rumsey Indian Rancheria of Wintun Indians of Cal. v. Dickstein,* 2008 WL 648451, *3-4 (E.D. Cal. Mar. 5, 2008); *Shingle Springs,* 2010 WL 4054232 at *13.

The government's expansive deference argument equally falls afoul of established authority. Numerous cases that the United States does not mention hold that an opinion letter from the NIGC is not entitled to deference. *See, e.g., First American Kickapoo Operations, L.L.C v. Multimedia Games, Inc.,* 412 F.3d 1166, 1174 (2005); *Catskill Dev., L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115, 126-27 (2d Cir. 2008); *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 696 & n.12 (7th Cir. 2011); *Jena Band of Choctaw Indians v. Tri-Millenium Corp., Inc.*, 387 F. Supp. 2d 671, 677 (W.D. La. 2005); *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. For Western Dist. of Mich.,* 198 F. Supp. 2d 920, 927-28 (W.D. Mich. 2002); *Elem Indian Colony of Pomo Indians v. Pacific Development Partners X, LLC,* 2010 WL 2035331, *6 & n.2 (N.D. Cal. May 19, 2010); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1065 (N.D. Cal. 2005). Moreover, California courts do not give deference to agency opinions rendered during litigation. *See, e.g., Jones v. Tracy Sch. Dist.*, 27 Cal. 3d 99, 103-04 (1980); *Culligan Water Conditioning of*

Bellflower, Inc. v. State Bd. of Equalization, 17 Cal. 3d 86, 93 (1976); *Farmers Ins. Exchange v. Superior Court*, 137 Cal. App. 4th 842, 858-59 (2006).[3]

In addition, the United States is plainly wrong that trial court could not consider the secret cooperation between the Tribe and the NIGC. Due process in agency decisions is not "irrelevant to the deference question." Amicus Br. at 3; *see Miami Tribe of Oklahoma v. United States,* 5 F. Supp. 2d 1213, 1216 (D. Kan. 1998). Moreover, the District of Columbia Circuit twice held that agency decisions which violate due process should be disregarded. *See Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) and *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 53-57 (D.C. Cir. 1977). The cases were cited prominently in Sharp Image's brief (Resp. Br. at 35), yet the United States does not mention or attempt to distinguish them. Instead, the government makes the naked assertion that "alleged procedural flaws are never sufficient grounds for rejecting an agency's legal interpretation where no reasonable contrary interpretation is provided." Amicus Br. at 41. The government cites no authority for this supposed principle because there is none.

Finally, despite grounding its theory on appeal in deference to agency action, the United States attempts to establish that the Promissory Note signed by the Tribe promising to repay sums received from Sharp

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[3] While the United States refers to *Auer* deference, cases considering NIGC opinions decline to afford them deference under *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which held that "in appropriate circumstances, [an] agency determination is binding unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to statute." *Grand Traverse*, 198 F. Supp. 2d at 927. *Auer* and *Chevron* "provide essentially the same degree of deference: under each, where the agency has satisfied the procedural prerequisites for deference, agency interpretation of an ambiguous law will be upheld so long as the interpretation is reasonable." *Center for Sierra Nevada Conserv. v. U.S. Forest Service*, 832 F. Supp. 2d 1138, 1151 (2011).

Image – upon which the NIGC has never rendered any opinion or even considered – is nonetheless a "collateral agreement" to a management contract that is also void under IGRA. Amicus Br. at 42-47. This add-on argument reveals that the government's intervention in this case is not animated by any principle but is merely an effort to relieve the Tribe of its contractual obligations and overturn the verdict of a California jury. Moreover, in taking this position, the United States contends that all the case law construing the meaning of "collateral agreement" under IGRA as requiring an aspect of casino management is erroneous.

The United States intervened in this case apparently to save the Tribe from the invalidity of its preemption theory. However, the government fares no better and has accomplished nothing other than further delaying a garden variety breach of contract action filed more than six years ago.

II.
ARGUMENT

A. **The Trial Court Was Not Required To Make A "Threshold" Determination That The ELA Was Not A Management Contract Under IGRA.**

The United States cites no supporting authority for the notion that the trial court had to first make a "threshold" determination that the ELA was not a management contract before it could proceed to adjudicate this case. Instead, the government cites *American Vantage*, which holds the opposite. Amicus Br. at 24-25; *see also id.* at 29-30.[4]

[4] None of the other cases the United States cites articulate a principle that the trial court must determine whether a contract is a management contract as a "threshold" issue for purposes of subject matter jurisdiction in a breach of contract action against an Indian tribe. Amicus Br. at 24-25. They simply do not say that.

In *American Vantage*, a corporate casino developer brought a breach of contract action against an Indian tribe for violation of a consulting agreement. The court noted:

> [The tribe] alleges that the consulting agreement is in reality an unapproved management agreement that is therefore void. At this point it is unknown whether [the Tribe] will be able to prove this defense. Such a determination will require an examination of the relationship of the parties. Once those facts are ascertained in the trial court, they will determine the character of the contract under IGRA.

American Vantage, 103 Cal. App. 4th at 596.

The court's comments are consistent with California law, which categorizes a contention that a contract is void because it violates a statute as an assertion of the defense of illegality. *See* Civ. Code § 1667(1) (a contract is unlawful if its "[c]ontrary to an express provision of law"); *see also id.*, § 1598; *Duffens v. Valenti*, 161 Cal. App. 4th 434, 451 (2008) (contracts that are contrary to express statutes are illegal and void). It is well established that this is an affirmative defense. *See Eaton v. Brock*, 124 Cal. App. 2d 10, 13 (1954). Accordingly, the burden of proof of illegality rests on the defendant. *See id.*; *Fellom v. Adams*, 274 Cal. App. 2d 855, 863 (1969); *Hinerfeld-Ward, Inc. v. Lipian*, 188 Cal. App. 4th 86, 93 (2010); 2 Schwing, *Cal. Affirmative Defenses* (2013 ed.) § 37:30, n.1 (citing 11 cases); Evid. Code § 520.

This is a question for the court to determine under the particular circumstances of the case. *See Jackson v. Rogers & Wells,* 210 Cal. App. 3d 336, 349-50 (1989); *Kallen v. Delug*, 157 Cal. App. 3d 940, 951 (1984). In making that determination, the court applies the principle that a contract must be so construed as to give it legal effect if possible under the circumstances and the court should not strain to find illegality. *See* Civ. Code §§ 1643, 3541; *Vagim v. Brown*, 63 Cal. App. 2d 504, 510-11 (1944);

In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 798 (2011) ("'we will not construe a contract in a manner that will render it unlawful if it reasonably can be construed in a manner which will uphold its validity'" (citation omitted)) (cited by Amicus Br. at 26, 40).

Based on these principles, *American Vantage* correctly held that an Indian tribe's contention that a contract was an unapproved management contract and therefore unlawful and void is an affirmative defense to be ascertained and adjudicated in the ordinary course of trial proceedings. In short, *American Vantage* does not support the government's contention that the trial court had to take up this issue first.

Moreover, it is obvious that the Tribe could not carry its burden of proof on this defense (which perhaps explains why the Tribe sought assistance from the NIGC). An agreement that the NIGC Chairman has not approved is void only if it is a management contract. *See Outsource Services Management, LLC v. Nooksack Bus. Corp.*, 292 P.3d 147, 160 (Wash. App. 2013). Accordingly, the burden was on the Tribe to prove that the ELA was a management contract. On its face, the ELA is not a management contract. Its terms provide only for leasing gaming equipment (Resp. Br. at 7-8), which is not a management activity. "A mere sale or lease of equipment clearly is not management. Nor are delivering, installing, and servicing equipment." *In re U.S. ex rel. Hall*, 825 F. Supp. 1422, 1433 (1993). It is therefore not surprising that members of the Tribe's governing body and its advisors uniformly testified that Sharp Image did not and would not manage the Tribe's casino under the ELA and that the ELA was not a management contract. (RT/Vol. VIII/p. 215:13-15; RT/Vol. XIII/p. 3541:19-23; AA/Vol. III/pp. 667:14-669:11, 778:21-779:17, 791:6-14, 792:14-20, 815:22-25, 853:10-15; AA/Vol. IV/p. 912:13-18; AA/Vol. XXVII/pp. 6980:6-6981:20; AA/Vol. XXVIII/pp. 7102:6-7104:15, 7123:21-7124:17.) In short, "an examination of the relationship

of the parties" established that, in the Tribe's view, as well as that of Sharp Image, the ELA is not a management contract. The Tribe did not carry its burden to prove its illegality defense.[5]

The order in which the trial court addresses these matters is by California statute committed to the discretion of the court. *E.g.*, Evid. Code § 320. The trial court has no obligation adjudicate the Tribe's affirmative defense first, that is, unless this determination is essential to the court's subject matter jurisdiction. On that point, *American Vantage* definitively holds that regardless of the resolution of this issue, there can be no federal preemption. The government may protest but there is no doubt that the court in *American Vantage* held that whether or not a contract is found to be void as an unapproved management contract, "the contract is not subject to IGRA regulation." 103 Cal. App. 4th at 596.[6] Since the defense cannot invoke federal preemption, it does not mandate "threshold" treatment by the trial court.

Unable to distinguish or avoid the holding of *American Vantage*, the United States argues that this decision is not supported by the case it cites, *Gallegos* (Amicus Br. at 32-33). However, *Gallegos* also held that resolution of the question whether a contract is void as an unapproved management contract cannot raise an issue of IGRA preemption. *Gallegos, 955* F. Supp. at 1350.

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[5] In fact, the United States observed that the Tribe failed to press the trial court to decide whether the ELA was a management contract, because the Tribe wrongly believed that the NIGC Chairman's letter was a "final agency decision" binding on the trial court. Amicus Br. at 33. Assuming that is true for argument's sake, had the Tribe done so, it would have confronted the testimony of its own officials and advisors that the ELA was not a management contract.

[6] The holding and reasoning of *American Vantage* and similar decisions is discussed in detail in Respondent's Brief at 24-27.

Undaunted, the government asserts that *Gallegos* "stands for a very different proposition" than *American Vantage*, because the remedy sought in *Gallegos* was replevin, while *American Vantage* was a suit for money damages. Amicus Br. at 32-33. According to the United States, an action for replevin (*i.e.,* return of property) "does not depend on the validity of the agreement." *Id.* at 32. This statement begs the question why, if the government is correct, the court in *Gallegos* bothered to discuss the contract in considering IGRA preemption. The answer is readily found in the background section of the opinion, where the court observed that the plaintiff's "complaint stated only a state law claim for a writ of replevin *based on a breach of the Agreement.*" *Gallegos*, 955 F. Supp. at 1349 (emphasis added). California law also holds that an action for replevin (known as "claim and delivery" in California) may be based on a breach of contract. *See Peterson v. Sherman*, 68 Cal. App. 2d 706, 712 (1945). The government's attempt to distinguish *Gallegos* – and by extension, *American Vantage* – fails.[7]

American Vantage, decided in 2002, has never been called into doubt and states the law in California: an Indian tribe's affirmative defense – that a contract sued on is a management contract under IGRA which is void because the NIGC Chairman did not approve it – does not preempt state law and will be adjudicated in the ordinary course of trial proceedings. If the tribe fails to carry its burden of proof, the defense fails. This is what

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[7] Moreover, the United States does not discuss *Rumsey Rancheria* where the District Court applied the reasoning of *Gallegos* to claims for damages (*see* 2008 WL 648451 at *4) or *Shingle Springs* where the District Court applied *American Vantage*, *Gallegos* and *Rumsey Rancheria* to the ELA (*see* 2010 WL 4054232 at * 13-14) and concluded that "under either party's interpretation of the validity of the [ELA], the litigation is based on a contract dispute that fails to raise a federal question." *Id.* at *14.

occurred in this case,[8] and the United States has presented no basis on which to reverse the jury's verdict because the trial court did not determine this issue as a "threshold" matter.

B. **The Trial Court Was Not Required To Defer To The NIGC Chairman's Letter Procured By The Tribe To Defend This Case.**

Concerned that it would be unable to carry its burden of proof on its illegality defense, the Tribe attempted to circumvent the required showing by secretly procuring opinions from the NIGC in 2007 and 2009 that the ELA was a management contract and therefore void. The trial court, however, disregarded the 2007 opinion and declined to defer to the 2009 opinion because it violated due process and the NIGC's regulations.

Now, the United States contends that the trial court was, and this Court is, required to defer to the NIGC's opinion whether "expressed . . . in the 2009 disapproval decision . . . in an earlier 2007 opinion letter . . . [or] in this *amicus* brief." Amicus Br. at 3.[9] (What the government does not contend, and what it explicitly disavows, is the Tribe's assertion that under

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[8] The government's assertion that the jury did not decide the management contract issue is incorrect. Amicus Br. at 16, n.7. The government correctly observes that the trial court gave the jury instruction the Tribe requested defining management contracts and collateral agreements, and stating that unapproved management contracts are void. Since the jury enforced the contracts, it necessarily rejected this defense. *See Clark v. United Fruit Distributing Co.,* 97 Cal. App. 784, 789-90 (1929). Moreover, a jury is presumed to make any finding necessary to support a general verdict (*Codekas v. Dyna-Lift Co.,* 48 Cal. App. 3d 20, 24 (1975)) (which was rendered here, with special interrogatories) and is also presumed to follow jury instructions. *(Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 803-04 (2004)).

[9] The government's amicus brief is signed by an attorney from the Environment & Natural Resources Division of the United States Department of Justice, but apparently is intended also as an opinion of the NIGC based on the listing of the Acting General Counsel of the NIGC as Of Counsel on the brief.

AT&T, once the NIGC opined on the issue, all proceedings in state court had to stop until and unless Sharp Image successfully sued the NIGC in an APA action.[10]) In short, according to the government, any opinion on the subject by the NIGC is entitled to high deference no matter how informally expressed.

However, the government never mentions the many, many cases holding that NIGC opinion letters on management contracts (or any other subject) are not entitled to deference beyond the power of their reasoning to persuade a court. *First American Kickapoo* is the seminal case, in which the court said:

> The district court's determination that the Operating Lease is unambiguously a management contract is supported by an NIGC Bulletin discussing in general terms the distinction between management contracts and consulting agreements and by an informal opinion letter authored by the NIGC Deputy General Counsel identifying the Operating Lease as a management contract. The informal pronouncements of an agency, which are not subject to rule-making procedures, do not warrant *Chevron* deference. Rather than requiring our deference, such materials may be accepted by a court only as they have the power to persuade.[11]

First American Kickapoo, 412 F.3d at 1174 (citations omitted).

Courts before and after *First American Kickapoo* have likewise declined to defer to NIGC opinions. *See, e.g., Wells Fargo,* 658 F.3d at 696 & n.12 (NIGC bulletin on management contract constituted an "informal agency pronouncement . . . not entitled to deference"); *Catskill Dev.*, 547 F.3d at 126-27 (NIGC opinion letter "is entitled to deference only

[10] *See* pp. 1-2 & n.1, *supra.*

[11] The United States argues that the Court should defer to the exact same NIGC Bulletin that *First American Kickapoo* said was not entitled deference. Amicus Br. at 35-36.

to the extent it has the power to persuade us"); *Jena Band*, 387 F. Supp. 2d at 677 (court owes no deference to NIGC opinion letter that agreements at issue are management contracts); *Grand Traverse,* 198 F. Supp. 2d at 927 ("As NIGC noted in its opinion letter opinion to this court, and the parties agree, because the NIGC did not employ formal adjudicatory procedures, the NIGC's determination is not entitled to the level of deference set forth in *Chevron*"); *Elem Indian Colony,* 2010 WL 2035331 at *5, n.2 ("bulletins and the later-cited informal opinion letter from the NIGC are not entitled to *Chevron* deference"); *NGV Gaming,* 355 F. Supp. 2d at 1065 ("the NIGC letter cannot in itself invalidate the Transaction Agreements, and it is not the role of this Court to interpret and apply such an opinion to invalidate a contract on a motion to dismiss").[12]

The United States bases its claim than any NIGC opinion is entitled to *Chevron*-level deference on *Auer,* in which the Supreme Court deferred to the Secretary of Labor's interpretation, set forth in an amicus brief, regarding the "salary-basis test" for determining an employee's exempt status. The Court said that because the test "is a creature of the Secretary's

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[12] Insofar as any case draws a distinction between an opinion letter from NIGC counsel and a letter from the NIGC Chairman, as here, purporting to disapprove an equipment lease as a management contract, the United States and the NIGC in the amicus brief draw no such distinction. Amicus Br. at 3. Additionally, the United States and the NIGC disagree with the Tribe that the NIGC Chairman's letter deprived the trial court of subject matter jurisdiction (*id.* at 33) and do not rely on or even cite the Ninth Circuit's decision in *AT&T v. Coeur D'Alene* that was the basis of the Tribe's argument that the NIGC Chairman's letter was binding. Thus, the United States' deference argument stands or falls on the position that any informal expression by the NIGC on a management contract issue must receive *Auer/Chevron* deference. As shown, this position finds no support in case law addressing the management contract issue. In any event, Sharp Image explained in detail why the NIGC Chairman's 2009 letter is not "final agency action" by the NIGC but merely another statement of opinion, as the trial court held. Resp. Br. at 30-37; *see also id.* at 18, n.6.

own regulations, his interpretation of it is . . . controlling unless '"plainly erroneous or inconsistent with the regulation."'" *Auer*, 519 U.S. at 461; *see* Amicus Br. at 36-37 (citing *Public Lands for the People, Inc. v. U.S. Dept. of Agriculture*, 697 F.3d 1192, 1199 (9th Cir. 2012), which in turn cites *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006), and *Auer*, 519 U.S at 461). Again, the government's position begs the question why, if *Auer* requires deference to informal expressions of opinion by the NIGC on management contracts, no case is cited so holding. Rather, as shown, the decisions expressly holding to the contrary are legion.

Moreover, the validity of *Auer* has been questioned regarding informal agency pronouncements, particularly those expressed in *amicus* briefs. Judge Posner writing for the Seventh Circuit in *Keys v. Barnhart*, 347 F.3d 990 (2003), observed:

> The government's interpretation of the scope of our review is not saved by *Chevron* . . . because it is found only in a brief, and briefs, it seems, get limited deference. Our hedge ("it seems") is because *Auer* . . . gave full *Chevron* deference to an agency's amicus curiae brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack of the force of law—do not warrant *Chevron*-style deference." Briefs certainly don't have "the force of law."

Id. at 993 (citations omitted).

Judge Posner noted that *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000), did not formally overrule *Auer*, but concluded:

> Probably there is little left of *Auer*. The theory of *Chevron* is that Congress delegates to agencies the power to make law to fill gaps in statutes. It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is

> odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

Keys, 347 F.3d at 993-94 (citations omitted).[13]

California aligns with Judge Posner in that it does not accord high level deference to informal agency pronouncements, including agency interpretations of regulations. The California Supreme Court in *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1 (1998), said:

> An important corollary of agency interpretations . . . is their diminished power to bind. Because an interpretation is an agency's *legal opinion*, however "expert," rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference.

Id. at 11 (original emphasis).

The Court concluded that whether deference to an agency's interpretation is appropriate is "fundamentally *situational.*" *Id.* at 12 (original emphasis). The Court then endorsed the principle stated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that agency interpretations are not binding but a court may defer to them to the extent they have the power to persuade. *Yamaha*, 19 Cal. 4th at 13-15, citing *Skidmore*, 323 U.S. at 140. In short, the California Supreme Court adopted the same standard of non-binding deference articulated in the cases cited above holding that NIGC interpretive bulletins and opinion letters are not entitled to *Chevron* deference. *See also Culligan Water Conditioning of Bellflower, Inc. v. State Bd. of Equalization*, 17 Cal. 3d 86, 92-93 & n.4 (1976); *Jones*

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[13] The Ninth Circuit in *Bassiri* did not agree with *Keys*. *See Bassiri*, 463 F.3d at 930-31 & n.1. But *Bassiri* has failed to quell skepticism in the trial courts within its own circuit. *See Center for Sierra Conservation*, 832 F. Supp. 2d at 1152-53 & n.12 (noting the skepticism in the Sixth and Seventh Circuit about the applicability of *Auer* deference to *amicus* briefs, the District Court said it "shares the underlying skepticism about the propriety of extending *Auer* deference to 'unreviewed staff' decisions").

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v. Tracy Sch. Dist., 27 Cal. 3d 99, 103-04 (1980) (agency interpretation in internal memorandum composed after agency became amicus in the case not entitled to deference); *Farmers Ins. Exchange v. Superior Court*, 137 Cal. App. 4th 842, 859 (2006) (an agency's "ad hoc" interpretation in the course of litigation is not entitled to deference).[14]

Finally, the United States' contention that the question of deference is unaffected by the violation of due process that occurred in this case is equally at odds with applicable law. Amicus Br. at 40. On this point, the government is essentially regurgitating the Tribe's position that the NIGC Chairman's 2009 letter may only be challenged in an APA action in federal court. *See id.* at 25, 40; Opening Br. at 4, 24. But, as the United States has observed, Sharp Image is not suing the NIGC to invalidate the Chairman's 2009 letter. Amicus Br. at 26. Rather, Sharp Image brought to the trial court's attention the violation of due process involved in the dozens of undisclosed contacts between NIGC and the Tribe's officials and advisors culminating in a secret meeting between the NIGC Chairman (with the NIGC's Acting General Counsel in attendance) and the Chairman of the Tribe (accompanied by a lawyer representing the Tribe in this case). Resp. Br. at 13-18. The NIGC and the Tribe deliberately kept Sharp Image ignorant of these contacts until the Chairman's agreement to generate a letter "disapproving" the ELA as management contract was a virtual *fait accompli. Id.* at 15-16.

These events – which the trial court referred to as "'so egregious a violation of the due process requirement'" (Resp. Br. at 17) – led the trial

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[14] The government cites only one California case, *Environmental Protection Information Center v. Cal. Dep't of Forestry and Fire Protection*, 44 Cal. 4th 459, 490 (2008), in support of its claim that agency interpretations of regulations receive "wide deference." However, *Environmental Protection* cites *Yamaha*, which, as explained, stated that agency interpretations receive *Skidmore* deference based on their power to persuade.

court to decline to defer to the 2009 letter. Resp. Br. at 17-18, 34-35. In so doing, the court was on firm ground. Indeed, the Department of Justice – *amicus curiae* in this case – successfully argued in a non-APA action, *Sangamon Valley Television*, 269 F.2d at 224, that secret contacts between a bidder for television channels and the commissioners of the Federal Communications Communication, which allocated the channels, vitiated the allocation decision. The Department of Justice argued "that basic fairness requires such a proceeding to be carried on in the open" and the District of Columbia Circuit agreed. *Id.; accord Home Box Office*, 567 F.2d at 53-57. So too here, the trial court was entitled to disregard any attempt by the NIGC Chairman and the Tribe to generate a letter "decision" on the ELA through secret, *ex parte* contacts. It is telling that there is no mention in the government's Amicus Brief of *Sangamon*, where the Department of Justice took a position contrary to that urged here. Thus, the United States has supplied no rationale or authority to confine vindication of due process in agency decisions to an APA action in federal court.

The trial court properly declined to defer to the NIGC's various pronouncements procured by the Tribe to defend this case and the United States has provided no authority or reasoning for this Court to do otherwise.

C. **The Promissory Note Is Not Void As A Collateral Agreement To A Management Contract.**

Since the Tribe failed to prove their defense and the NIGC's pronouncements are not entitled to deference, the United States' argument that the Promissory Note is a "collateral agreement" to a management contract fails *ab initio*. If there is no management contract, there is no collateral agreement to a management contract.

In any event, as the government notes, multiple courts have held, based on NIGC-promulgated regulations, that collateral agreements that NIGC has not approved are only void if they provide for some aspect of

management. *See Jena Band*, 387 F. Supp. 2d at 678; *Catskill,* 547 F.3d at 130; *Wells Fargo,* 658 F.3d at 700-702.[15]

The United States essentially argues that these cases are incorrect and should be disregarded. In particular, the government claims that only *Jena Band* stated the rule and the other cases did not actually apply it. Amicus Brief at 46. However, in *Catskill*, the Second Circuit also said:

> It is undisputed that both the DCA and LPA are "collateral agreements" to the MA [Management Agreement] insofar as they are "related" to that contract. *See* [25 C.F.R §] 502.5. But a collateral agreement is subject to agency approval under *Id.* § 533.7 only if it "provides for the management of all or part of a gaming operation." *Id.* § 502.15; *see also Machal, Inc. v. Jena Band of Choctaw Indians,* 387 F. Supp. 2d at 659, 665-67 (W.D. La. 2005).

Catskill, 547 F.3d at 130. The Court of Appeals further held: "To the extent that the district court interpreted the regulations as requiring NIGC approval of *all* collateral contracts, it erred." *Id.*, at 130, n.20 (original emphasis); *see also Wells Fargo*, 658 F.3d at 701 (district court erred in concluding that "all collateral agreements . . . require the Chairman's approval").

Thus, the United States argues for a rule that multiple courts have rejected, *i.e.*, that any contract related to a management contract is a collateral agreement requiring the NIGC Chairman's approval. Moreover, the government takes this position without the support of any other NIGC expression of an opinion, formal or informal (outside of the Amicus Brief), that the Promissory Note is a collateral agreement within the meaning of IGRA and NIGC regulations. Instead, the United States simply recites that "the Tribe contends the ELA and Promissory Note are effectively one contract under common-law principles." Amicus Brief at 47. Apparently,

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[15] Sharp Image explained this rule in detail in Respondent's Brief at 38-40.

that contention is good enough for the NIGC to declare that all Sharp Image's contracts "are void." *Id.* If any further illustration is needed that the NIGC's involvement in this litigation has amounted to nothing more than siding with the Tribe, this conclusory statement provides it.

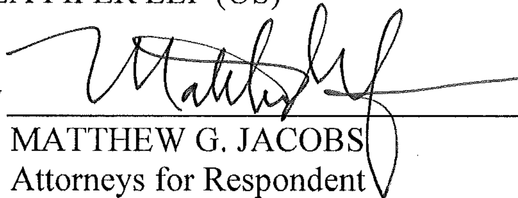
III.
CONCLUSION

It is unfortunate that the federal government feels constrained to interfere in this litigation to aid the Tribe. As the United States points out, IGRA is a balancing act that is designed to promote tribal self-sufficiency as well as protect tribal interests. Amicus Br. at 6. Tipping the balance towards protecting a tribe at all costs undermines the goal of self-sufficiency.

In any event, nothing in the United States' brief changes the right result in this case: the Court should affirm the jury's verdict and the trial court's judgment.

Dated: August 8, 2013

DLA PIPER LLP (US)

By 

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CERTIFICATE OF WORD COUNT

I, Matthew G. Jacobs, counsel for Respondent Sharp Image Gaming, Inc., certify that this brief contains 6,036 words, including footnotes, but excluding the tables and certifications, as calculated by the word processing program used to prepare this brief.

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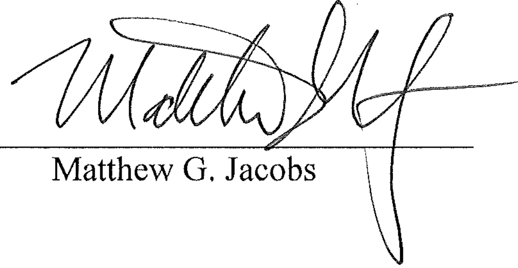

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper LLP (US), 400 Capitol Mall, Suite 2400, Sacramento, California 95814-4428. On August 8, 2013, I served the within documents:

RESPONDENT'S ANSWER TO UNITED STATES' *AMICUS CURIAE* BRIEF

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

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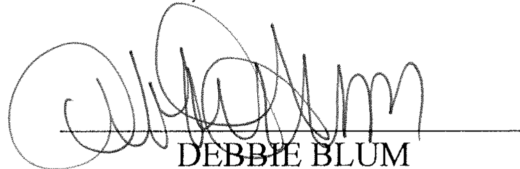

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