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American Arbitration Association

Commercial Arbitration Tribunal

KENWOOD INVESTMENTS NO. 2, LLC,

Claimant,

v.

**FEDERATED INDIANS OF GRATON
RANCHERIA,**

Respondent.

AAA No. 01-15-0005-6087

JAMS No. 1110019071

INTERIM ARBITRATION AWARD

I. Introduction

In February of 2014, Respondent Federated Indians of Graton Rancheria ("Tribe") filed a complaint in the San Francisco Superior Court to enjoin Claimant Kenwood Investments No. 2, LLC (**Kenwood No. 2**) from compelling the Tribe to arbitrate **Kenwood No. 2**'s breach of contract claim asserted against the Tribe. *Federated Indians of Graton Rancheria v. **Kenwood No. 2***, San

Francisco Superior Court, Case No. CGC-14-537441. The Court rejected the Tribe's argument that it had not waived sovereign immunity and thus could not be compelled to arbitrate, and the case was assigned to this arbitration. *Id.*, November 3, 2015 Statement of Decision, ("SOD").

Kenwood No. 2 filed its Demand for Arbitration on November 10, 2005 and supplemented that filing on April 26, 2016 and May 12, 2016. The Tribe denied all claims and asserted multiple affirmative defenses in its July 11, 2016 Statement of Defenses.

The parties appointed a panel of three arbitrators and a hearing was commenced on April 4, 2017. The parties submitted post-hearing briefs on August 4, 2017 and reply briefs on August 25, 2017. The Panel closed the hearing on November 28, 2017. The parties agreed to a January 18, 2018 due date for this Interim Award.

II. Background

The Tribe is an Indian tribe historically located in Marin and Sonoma counties. RT 3882:6-11. The Tribe's federal recognition was involuntarily dissolved in the 1950's due to a lack of tribal activity, but was subsequently restored by the Federal Restoration Act ("FRA") in 2000. *Id.* Under the FRA, the Tribe could acquire land and place it in trust for the benefit of tribal members. Upon restoration, the Tribe wanted to become self-sufficient and maintain its culture, but could not afford to buy land on which to operate a business because its only income came from sporadic grants, sales of baked goods, and occasional fundraising. *Id.* 3885:3-14; 3886:22-3887:19, 3897:3-8. Although the Tribe attempted to collaborate with local businesses on enterprises that would not require the use of tribal land, local businesses were uninterested unless the Tribe held land. *Id.* 3883:3-15; 3887:8-19. The Tribe determined that it needed real property to create a "homeland" and to operate an income generating business, but it lacked the skills and expertise to formulate and execute a plan to do so. *Id.* 3897:3-8.

In 2002, Person A REDACTED, and Person B REDACTED, approached the Tribe on behalf of Company 1 to suggest that the Tribe partner with Company 1 to develop a business enterprise. Id. 10. Persons A and B described Company 1 as a top REDACTED firm with significant real estate development experience and connections with local, state and federal politicians. They proposed that Company 1 help the Tribe develop a business that would allow the Tribe to become self-sufficient. Id. 3891:1-7.

A. The Company 1 Contract

On March 2, 2002, the Tribe entered into a contract with Company 1 (“Company 1 Contract”), which stated that Company 1 had the “experience, qualifications, staff and expertise to perform” services for the Tribe to assist with the “acquisition of land” and “development of economic activities.” Ex. 468, p. 1. Company 1 was designated as the Tribe’s “exclusive agent,” with the “right of first refusal” to partner with the Tribe in any business opportunity it pursued. Ex 468.

Company 1’s contractual obligations were to:

- Provide the Tribe with “strategic advice and consultation”
- Develop “political” visibility to introduce the Tribe to leading Federal and California elected officials
- Assist the Tribe in becoming economically sufficient by identifying and evaluating various risks and rewards of identified business opportunities and by becoming a Business Development Partner with the Tribe

Id., pp. 1, 2, ¶¶ 1, 1a, 1b.

The contract stated that Company 1 owed no fiduciary duty to the Tribe and would not conduct “lobbying” services on behalf of the Tribe within the meaning of the Political Reform Act of 1974. Id. ¶¶2, 7. In exchange for the services that Company 1 would provide, the Tribe agreed to pay Company 1 a monthly retainer of \$1,000 from January 1, 2002 through December 31,

2003, and \$5,000 from January 1, 2004 through December 31, 2004. Payment of the retainer was deferred, however, until the “conclusion” or “termination” of the contract. If no significant progress was made “toward securing a viable business development package” for the Tribe by the end of the original term, the Tribe’s obligation to pay **Company 1** was “reduced to zero.” Id. ¶4.

B. Performance under the **Company 1** Contract

1. Investigating and Recommending Business Opportunities

Under the **Company 1** Contract, **Company 1** agreed to investigate and evaluate all potential business opportunities for the Tribe and to recommend which opportunity best met the Tribe’s goals and objectives. RT.3887:20-3888:1; RT 3902:15-24. The evidence established, however, that **Company 1** intended to steer the Tribe toward developing a gaming casino, with **Company 1** receiving a significant share of the profits. Exs. 407¹, 469².

In August 2002, three months before the Tribe authorized the acquisition of land for homes, a school, a cultural center, and “the possibility of a casino,” **Person A** was investigating the acquisition of a specific tract of land in the area of California Highways 37 and 116 (the “Highway 37 Site”). Ex. 541. The Tribe was unaware of these efforts and did not authorize **Kenwood No. 2** to search for real estate on its behalf until November 2, 2002. Ex 473. By September 2002, **Kenwood No. 2** had obtained a letter of intent for **Kenwood No. 2** to acquire the Highway 37 Site, and by January 30, 2003 **Kenwood No. 2** entered into the “Purchase and Sale of Option to Purchase” the Highway 37 Site. Exs. 703, 953³

¹**Person B** writes that his effort will be to show the Tribe that “gaming offers them the most substantial opportunity out there.”

²**Person B** writes that we need to show how “much of a home run a casino would be” rather than organic food processing, grape growing, strip mall, or senior assisted living facility.

³These contracts were not disclosed to the Tribe until months after they were executed.

On February 15, 2003, Company 1 presented its investigation into possible business enterprises to the Tribal Council. Ex. 477. Company 1 described eight ventures to the Tribe, but concluded that a gaming casino would be the most profitable. Id., p. 25. Although Company 1 described four potential locations for the casino, Company 1 stated that the Highway 37 Site, the property on which Kenwood No. 2 had purchased an option just six weeks prior, was the strongly “Preferred Option.” Id., p. 17-23. Company 1 did not inform the Tribe of any potential developmental issues associated with the Highway 37 Site and did not disclose that it held an option to purchase the land. Id. The Tribe accepted Company 1 recommendation and chose the Highway 37 Site as the location for the casino.

2. Selection of Casino Operator

a. Request for Proposals Issued to Casino Operators

In late 2002, Persons A and B began communicating with casino operators regarding potential management contracts with the Tribe, informing the operators that the Tribe was represented by Kenwood No. 2.⁴ Kenwood No. 2 communicated with Station, Harrah’s, Maloof, and MGM, and, in February of 2003, Person A sent a formal Request for Proposals (“RFP”) to each operator. RT 1983:21-1987:3; *see also, e.g.*, Ex. 465. The RFPs stated that Kenwood No. 2 was the “exclusive development partner” and “financial advisor” for the Tribe, and informed operators that Kenwood No. 2 would evaluate the proposals and make the selection for the Tribe. Ex. 465, p. 2. The evidence established that the Tribe was not aware that Kenwood No. 2 had sent an RFP to operators, and had not approved the contents of the RFP drafted by Kenwood No. 2.

Kenwood No. 2 asked operators to include several “assumptions” in their proposals. First, operators would buy the option on the Highway 37 Site from Kenwood No. 2 and would then fund the

⁴This statement was untrue when made. At the time, the Tribe’s contract was with Company 1, not Kenwood No. 2. The Company 1 contract was eventually assigned to Kenwood No. 2, but not until March 7, 2003. Ex 488

purchase price and closing costs to obtain the property from the seller. Kenwood No. 2 would be the designated “titleholder” of the property. Ex. 465, p. 2-3. The RFP mentioned no other possible locations for the casino and stated that operators should assume that the casino would be located on the Highway 37 Site. Id. Second, operators were to “assume a management fee to Kenwood No. 2 of 10% of Net Gaming Revenues,” and were to attribute no more than 20% of revenues to the operator. Id., p. 3. Third, operators would pay Kenwood No. 2 \$5 million in non-refundable “development fees:” \$2.5 million to purchase Kenwood No. 2’s option on the Highway 37 Site and \$2.5 million when the property was conveyed into trust. Id., p. 4. Lastly, operators were required to pay Kenwood No. 2 “pre-development fees” of \$8.4 million (\$200,000 per month) for advisory and consulting services. Ex. 465, p. 3; Ex. 482, pp. 1, 3.

The RFP did not provide for any upfront payments to the Tribe and did not require operators to pay any specific amounts to the Tribe’s maintenance costs. The RFP only stated that operators should “address Tribal maintenance costs.” Ex. 482, p. 3; Ex. 466; Ex. 465, p. 3.

b. Proposals Received by Company 1 Kenwood No. 2

Kenwood No. 2 received four responses to the RFP. Harrah’s, a successful, well-established operator with experience in managing tribal casinos, submitted a proposal that differed significantly from the terms in Kenwood No. 2’s RFP and raised several important issues regarding Kenwood No. 2’s structure of the plan to develop and manage the casino. Ex. 482.

Harrah’s response did not allocate management fees to Kenwood No. 2 because, as Harrah’s later explained, if the contract provided Kenwood No. 2 with a percentage of net revenues, the National Indian Gaming Commission (“NIGC”) would have to approve the agreement. Id., p. 2. Instead, Harrah’s proposed that it would receive management fees of 20-24% of net gaming revenue, the Tribe would retain the remaining revenues (76-80%), and Kenwood No. 2 would collect a consulting

fee directly from the Tribe. Id. Harrah's offered to pay Kenwood No. 2 (on behalf of the Tribe) \$50,000 per month for consulting services instead of \$200,000, and offered \$100,000 to the Tribe for tribal maintenance. Id., 1-2, 8. The monthly payments to Kenwood No. 2 and the Tribe were guaranteed for 42 months, after which Harrah's could elect to continue paying monthly fees or "walk away as the potential operator of the project." Id., 1-2, 8.

Harrah's proposal provided that Kenwood No. 2, not Harrah's, would initially purchase the Highway 37 Site, but Harrah's would reimburse Kenwood No. 2, at a premium, after the land was placed in trust, the compact with the State of California was executed, and the NIGC approved a management contract between the Tribe and Harrah's. Ex. 482, p. 7. Harrah's criticized Kenwood No. 2's compensation in the RFP, noting that it was "front end loaded," and questioned the justification for Kenwood No. 2's request to receive \$5 million in pre-development fees. Id., p. 2. Harrah's stated that its proposal offered a "balanced approach" that was "more beneficial to the Tribe" Id., p. 2. Harrah's reduced Kenwood No. 2's share of the pre-development fees to \$1.25 million instead of \$5 million, and instead provided additional compensation to the Tribe that was not requested in the RFP, including \$4 million in pre-development fees, \$100,000 per year for a tribal Education Scholarship Fund, and a \$25 million Quality of Life loan for the Tribe. Id., p. 3, 4. Harrah's also predicted that Sonoma County would object to the development of a new casino within its borders, and suggested that the Tribe offer Sonoma County 3% of its gaming revenues to possibly lessen resistance to the project. Id., p. 5.

Harrah's expressed concern that the Tribe had made conflicting public statements as to whether it wished to develop a casino, and requested a meeting with the Tribal Council to confirm the Tribe's commitment to the project and agreement with the terms in the RFP. Harrah's observed that Kenwood No. 2's RFP process differed from the customary practice of

negotiating a casino management contract, and stated that it had never “progressed this far [in a deal] without meeting the Tribe, having an open dialogue about the future of the Tribe” and discussing “where [the Tribe] wants to go and how it wants to get there.” Id.

Station’s response to the RFP suggested that Kenwood No. 2 and Station form a limited liability company to manage the casino. The LLC would contract with the Tribe and receive 30% of the casino revenues, which would be divided 20% to Kenwood No. 2 and 80% to Station. Station and Kenwood No. 2 would manage the LLC under an operating agreement containing “terms mutually satisfactory to Station and Kenwood No. 2 d.” Ex. 480, p. 38. During the pre-development phase, Kenwood No. 2 would receive \$15,000 per month for its “consulting” services and \$10 million in development fees, or \$5 million *more than* Kenwood No. 2 requested in the RFP. Ex. 480, p. 41. Station did not offer to pay development fees to the Tribe. Under Station’s proposal, the only compensation the Tribe would receive prior to opening the casino was \$100,000 per month for Tribal maintenance. Id.

c. Kenwood No. 2 Rejects Harrah’s Proposal

Kenwood No. 2 apparently informed Harrah’s that its offer was “not competitive”⁵ because on March 3, 2003, Harrah’s General Counsel, Clayton Rice, emailed Kenwood No. 2 arguing that Harrah’s proposal was the “best over the long term for you and the Tribe,” and seeking an explanation for Kenwood No. 2’s rejection. Ex. 483. On March 7, 2003, Clayton Rice, Harrah’s General Counsel, sent Kenwood No. 2 a six-page, detailed letter describing Harrah’s view of the project. Ex. 485.

Mr. Rice identified three issues with Kenwood No. 2 proposed structure of the contracts. First, Mr. Rice stated that it was unclear whether the Tribe had approved the terms requested by

⁵ The record contains only Harrah’s communications with Kenwood No. 2; for some reason, Kenwood No. 2’s responses to Harrah’s were neither located nor produced.

Kenwood No. 2 in the RFP. Harrah's questioned the rationale behind Kenwood No. 2's requirement that operators communicate directly with Kenwood No. 2 and not the Tribe to negotiate the terms of the agreements, particularly since Kenwood No. 2 was a self-interested advisor.

Second, Harrah's questioned Kenwood No. 2's requirement that the project utilize the Highway 37 Site. Harrah's wanted confirmation that the site was chosen by the Tribe, not Kenwood No. 2, and asked Kenwood No. 2 to obtain a Tribal Resolution authorizing the purchase of the site for casino development. Harrah's also questioned whether Kenwood No. 2 had adequately evaluated the suitability and value of the property. Given the property's history, Harrah's was concerned that the parties might be unable to place the land in trust for casino development. If the Highway 37 Site could not be used for a casino, Harrah's wanted Kenwood No. 2 to confirm that it had identified alternative locations, and had performed an analysis of the value of the Highway 37 Site to ensure that the parties could resell the land for the price they paid for it.

Third, Harrah's expressed concern over the structure and amount of Kenwood No. 2's proposed compensation. Because Kenwood No. 2 was the Tribe's consultant, Harrah's believed Kenwood No. 2 should be compensated for services rendered over the lifespan of the project. Under the RFP, however, Kenwood No. 2 would receive millions of dollars in "front-loaded," up-front payments before its services were rendered and Kenwood No. 2 proposed fees "far exceed[ed] any fees paid to the Tribe," as the Tribe received nothing for five years.

Finally, Harrah's questioned Kenwood No. 2's proposed share of casino revenues, because it was Harrah's experience that in the casino industry, consulting firms were not customarily paid a percentage of the casino profits.

Mr. Rice's March 7, 2003 letter was not given to the Tribe until shortly before this arbitration hearing. When Person B was asked at the hearing if Rice's letter should have been provided to the Tribe, he responded, "I don't have an opinion about that today." RT 1236:8-15.⁶

d. Assignment of Company 1 Contract to Kenwood No. 2

On March 7, 2003, a few days before Kenwood No. 2 presented its operator recommendations to the Tribal Council, Persons A and B asked the Tribe to assign the Company 1 Contract to Kenwood No. 2. According to the Tribe, Persons A and B stated that the assignment changed only the names of the parties by replacing Company 1 with Kenwood No. 2 but did not change any material terms of the agreement. RT 3956:24-3958:5. An actual reading of the "Assignment & Assumption of Company 1, LLC Agreement" ("Assignment") indicates, however, that while most of the provisions of the original Company 1 contract remained in force, Kenwood No. 2 was given new authority to "identify and negotiate preliminary terms and conditions with potential gaming management companies as the exclusive agent of" the Tribe. Ex. 169. The Assignment also permitted Kenwood No. 2 to advance "reasonable and necessary Pre-Development Expenses" to the Tribe, which would constitute a loan from Kenwood No. 2 to the Tribe that would be repaid by either the management company or by the Tribe from its gaming revenues. If the Tribe did not open a gaming facility, the Tribe was not obligated to repay any loans issued by Kenwood No. 2. Lastly, the Assignment stated that Kenwood No. 2 was a "partner, member, or otherwise enjoy[ed] an

⁶At the arbitration Kenwood No. 2 indicated that Sarris rejected Harrah's as a potential casino operator for the Tribe. Person B testified that Sarris "didn't like the way that Harrah's facilities were designed" like "cookie cutters." RT 834:12-835:6; see also RT 1227:23-1228:5. But Sarris testified that he had never even seen a Harrah's facility and did not know the design was "cookie cutter." RT 3189:12-3191:16; see also, Ex. 489. Both Sarris and Rice testified that Rice and the Tribe never communicated directly with each other (RT 3191:1-13 (Sarris); Ex. 881 (Rice Witness Statement) at ¶ 17), and although Rice repeatedly requested in writing that Kenwood No. 2 arrange meetings between Station and the Tribe, Kenwood No. 2 never communicated these requests to the Tribe and never arranged for direct meetings. Finally, as Nielson's notes of his March 13, 2003 call with Person A make clear, Person A preferred Station as the casino operator and Kenwood No. 2 had to convince Sarris to accept Station. Ex. 650. Thus, despite Kenwood No. 2's suggestion that Sarris rejected Harrah's, the evidence indicates that Harrah's was eliminated by Kenwood No. 2, Company 1, not by the Tribe.

economic interest in any management fee paid pursuant to any management contract entered into by and between the Tribe and any gaming management company, the precise interest thereof to be negotiated solely and exclusively between Kenwood No. 2 and the selected gaming management company” and required Kenwood No. 2 to make one non-refundable payment of \$30,000 to the Tribe. Ex 488, p. 2.

e. Kenwood No. 2 Advises the Tribe to Contract with Station

Person B testified that he sent the draft RFP to the Tribe prior to its submission to the operators, but the Tribe’s witnesses testified that Kenwood No. 2 drafted and sent the RFP to operators without informing the Tribe or seeking the Tribe’s review and approval of the contents. RT 3178:18-3181:17; 3958:14-3959:25. The Assignment gave Kenwood No. 2, for the first time, contractual authorization to approach potential operators regarding the casino project, but made no mention of the fact that Kenwood No. 2 had already approached potential operators in late 2002, sent out RFPs February 2003, and had received and evaluated responses.

It was not until early March that Kenwood No. 2 informed Chairman Sarris (“Sarris”) that the RFP had been sent to operators, and the Tribe did not see a copy of the RFP until March 11, 2003 when Brian Campbell (“Campbell”), a tribe member who had been providing legal services to the Tribe, asked Person B to provide a copy. Ex. 1427; RT 840:9-22 Person B gave Campbell a copy of the RFP on March 12, 2003, but did not give Campbell copies of the proposals received by the operators, nor did he inform Campbell of the March 7, 2003 letter Kenwood No. 2 received from Harrah’s. When he read the RFP, Campbell was surprised by the amount of compensation Kenwood No. 2 demanded, particularly Kenwood No. 2 requirement that it receive 10% of net gaming revenue and \$5 million in upfront development fees. Campbell Depo. Tr. 132:24-133:6, 143:1-12, 144:21-145:12, 147:1-16, 150:4-15, 160:1-161:5.

On March 14, 2003, Kenwood No. 2 presented the results of the RFP process to the entire Tribal Council. Ex. 489. Although Kenwood No. 2 acknowledged that Harrah's was the most experienced operator of Indian casinos, Kenwood No. 2 stated that Harrah's proposal had a "[r]igid approach to [the] deal" and that Harrah's adopted a "we know best attitude." Id., p. 10. Kenwood No. 2 also represented that Harrah's offered the "[w]eakest overall economics," an "[i]neffective fee structure" proposal, and expressed "[d]ifficulty with proposed land acquisition." Id., p. 16. Kenwood No. 2 did not disclose the contents of Harrah's March 7 letter to the Tribe, nor did it disclose that Harrah's requested to meet with the Tribe and offered to pay the Tribe \$4 million in up-front fees, \$100,000 per year in a Tribal Educational Fund and a \$25,000 Quality of Life Loan. RT 1997:4-15.

Kenwood No. 2 described Station's proposal as having "[s]uperior overall economics," because Station forecasted higher gross gaming revenue for the casino. Ex. 59, p. 20. Furthermore, Kenwood No. 2 informed the Tribe that Station offered a high level of involvement by top management, and a "[h]igh level of Tribal support costs during development." Id., p. 19.

Meanwhile, Campbell had reviewed the contents of the RFP and informed the Tribal Council that he was concerned about its terms. RT 99:6-100:18. Tribal members testified that they were "outraged" when they discovered the compensation that Kenwood No. 2 requested for itself under the RFP and were "furious" that Kenwood No. 2 failed to consult the Tribe prior to submission of the RFPs to potential operators. RT 3178:18-3181:17; 3958:14-3959:25; 3960:17-23 (Ross: "we were all pretty outraged because the RFP had all of these provision in it that were to the benefit of Kenwood No. 2, but there was no equal provision for the Tribe. The RFP was . . . supposed to be on the Tribe's benefit but it had provisions that would allow for Kenwood No. 2 to get money and

no provision for the Tribe to get money . . .” and the contents of the RFP “was all about what [Kenwood No. 2] wanted,” but there was “nothing” for the Tribe.)

The Tribe nonetheless accepted [Kenwood No. 2]’s recommendation that Station be selected as its casino operator, but insisted that [Kenwood No. 2] renegotiate the terms of the contract based upon “12 points” that the Tribe set forth as its demands.⁷ Ex. 491. [Kenwood No. 2] renegotiated the deal with Station and the Tribe received each of the “12 points,” with the exception of the amount of the signing bonus (the Tribe requested a \$2 million signing bonus, but Station refused to offer more than \$1 million.) Ex. 490, 492; RT: 4105:4-9. [Kenwood No. 2] ultimately delivered copies of the proposals from each operator to the Tribe’s lawyers, but continued to conceal Harrah’s March 7, 2003 letter.

C. The [Kenwood No. 2] “Consulting Agreement”

The conflict between the Tribe and [Kenwood No. 2] regarding the RFP process caused the Tribe to hire attorneys Jim Cohen and John Maier from California Indian Legal Services (“CILS”). Ex. 568; RT 4104:8-25. In an April 4, 2003 conference between [Kenwood No. 2] Station and the Tribe, the CILS attorneys objected that there was an “inherent conflict of interest” in [Kenwood No. 2]’s role in the project because it was negotiating with Station on behalf of the Tribe while simultaneously negotiating with Station on behalf of itself. Ex. 494. Both CILS and Sarris insisted that [Kenwood No. 2] “remove the conflict of interest.” Id. [Person A] agreed to remove [Kenwood No. 2] from the management agreement and draft a separate agreement with the Tribe to set forth [Kenwood No. 2]’s compensation for its work on the project. Ex. 658. CILS and the Tribe also negotiated to reduce [Kenwood No. 2]’s total compensation. Ex. 26B; RT 3451:17-3452:3.

⁷The Tribe’s “12 Points” memorialize the *first* formal communication between [Kenwood No. 2] and the Tribe regarding the terms that the Tribe required from a contract with its casino operator.

On April 22, 2003, Kenwood No. 2 and the Tribe executed the "Land Acquisition and Governmental Relations Consulting Agreement" ("Consulting Agreement"). Ex. 35. The Consulting Agreement states that the Tribe wished to "operate a tribal government gaming enterprise." Id., p. 1. Kenwood No. 2 represented that it had "experience in real estate acquisition, development, land use, and federal, state and local government relations necessary" to develop "a gaming enterprise," and promised to "provide consulting services to the Tribe to assist the Tribe" in achieving its goals. Id. Kenwood No. 2 was to "provide the technical assistance, advice, training and consulting services required by the Tribe to consummate" the plan to build a gaming facility, "while respecting the sovereign rights and authority of the Tribe." Id. Kenwood No. 2 also agreed to "consult with and provide advice and assistance to the Tribe regarding real estate acquisition, development, land use and federal, state and local government relations necessary to the development of the Enterprise." Id., p.3. The specific tasks performed by Kenwood No. 2 would be determined "exclusively by the Tribe" and "under the direction" of the Tribe. Id., p. 4.

Kenwood No. 2 would receive 4% of the net gaming revenues generated by the casino for seven years, provided that within twelve months, the Tribe had a signed gaming compact with the State of California by October 31, 2003, and the Tribe's trust application was accepted by the federal government. Id., p. 5. If neither condition was met, the Tribe could reduce Kenwood No. 2's compensation to 3% of gaming revenues. Id.

The Consulting Agreement stated that Kenwood No. 2 "shall not manage, direct, control any aspect of the Enterprise, the management of which shall be exercised exclusively by the Tribe through its management contractor – Stations Casinos." Id., pp. 4 (§1(E) "No Management Services Provided") & 5. Section 8(A) of the Consulting Agreement stated that "all prior agreements" between the Tribe and Kenwood No. 2 were "rescinded, void, and unenforceable," and §

21 stated that the Consulting Agreement constituted the “entire agreement between the parties” and superseded and voided “all prior agreements.” *Id.*, pp. 6, 11. Kenwood No. 2 forgave all moneys owed by the Tribe under any prior agreements, although Kenwood No. 2 was still entitled to reimbursement for any expenses. *Id.*, p. 6-7. Kenwood No. 2 also agreed to donate \$25,000 to the UCLA College of Law Indian Law Program. *Id.*

D. The Station Kenwood No. 2 Agreement

On April 23, 2003, the day after Kenwood No. 2 and the Tribe executed the Consulting Agreement, Kenwood No. 2 and Station entered into a separate contract entitled “Acquisition of Real Property Rights and Consulting Agreement” (“Station Kenwood No. 2 Agreement”). Ex. 64.

The Station Kenwood No. 2 Agreement stated that “to perform its duties pursuant to” its agreement with the Tribe, Station required “expert strategic advice and consultation pertaining to real estate acquisitions, land-use issues, public relations and federal, state and local governmental relations.” Ex. 64, p. 1. Kenwood No. 2 agreed to “[a]ssist Station in maintaining its relationship with the Tribe,” and to provide to Station services related to the Tribe’s casino project as well as other Indian gaming development projects in the Sonoma and Marin counties. *Id.*, p. 6-7. In exchange, Station agreed to pay Kenwood No. 2 \$20,000 per month for the first twelve months of the contract term, and \$15,000 for the remainder. *Id.*, p. 8. Kenwood No. 2 agreed to sell its option on the Highway 37 Site (described as the “desired site” for the casino project) to Station for \$750,000. Ex. 64, pp. 1-2.

Station further agreed to pay Kenwood No. 2 a total of \$9.5 million for “achieving major events” in the Tribe’s casino project. Specifically, Kenwood No. 2 would receive \$2 million upon executing an MOU between the Tribe and Sonoma County and a compact between the Tribe and the State of California, \$2.5 million upon the acceptance of the Highway 37 Site into a federal

trust for gaming purposes, and \$5 million upon the opening of the Tribe's casino. Id., p. 8. "[I]n the event that the Tribe and Station" did not enter into a development agreement "by April 24, 2003," the agreement between Kenwood No. 2 and Station was "automatically terminated." Id., p. 5.

The Tribe was not a party to this contract and neither Kenwood No. 2 nor Station informed the Tribe of this agreement before or at the time it was executed. RT 3452:4-8. In fact, the Tribe did not learn of the existence of the Station/Kenwood No. 2 Agreement until June of 2003, when Station delivered a copy of the agreement to CILS during negotiations to amendment to the Consulting Agreement. Exs. 573 & 574; RT 3452:9-14.

E. Attempts to Develop the Highway 37 Site

On the same day that Kenwood No. 2 executed its side agreement with Station, Kenwood No. 2 and Station publicly announced that the Tribe planned to develop a casino on the Highway 37 Site. RT 3944:14-17. The response was very negative. As CILS attorney, John Maier, described it, "it went from bad to really, really bad." RT 34549:13.

Local environmental groups were "outraged" because the site was part of 50,000 acres of tidal wetlands that conservationists had been trying to protect and restore since the 1970's. RT 34892:2-17. In 1998, a coalition of environmentalist started the Bay Delta Restoration Plan, a project to restore local wetland habitat, and the Highway 37 Site was "a keystone piece of property" of that plan. RT 3491:24-3492:3, 3946:6-14. By 2003, attempts to develop this area had "come to a stop" because environmentalists won a lawsuit to block a major developer from developing 10,000 acres of similar land. Id. 3493:7-22. The Tribe's attempts to appease these groups by offering to restore hundreds of acres of wetlands on the property were unsuccessful, as environmentalists believed that any "development on . . . adjacent property would be significantly harmful to the wetland areas." RT 2943:1-2944:8; 3498:6-22.

Environmental leaders held press conferences to publicize opposition to the Tribe's plan to develop the Highway 37 Site, and "dozens and dozens of people" contacted California

██████████ elected officials

██████████ and Sonoma and Marin County supervisors to oppose to any type of development on the property. RT 3495:17-3496:21; 3497:18-19.

In June of 2003, **Kenwood No. 2** arranged for the Tribe **Kenwood No. 2** and Station to meet with both **██████████ elected officials** to garner support for the development. The meetings did not go well. **██████████ elected officials** were demonstratively angry and threatened to redraft the Tribe's restoration language to obstruct the Tribe's ability to open a casino anywhere. Ex. 8, pp. 5, 7; Ex. 15, p. 2; RT 2946:7-9; RT 4032:10-16. The Tribe and CILS were sufficiently concerned by the representatives' reactions that they decided to abandon the Highway 37 Site and find an alternative location. RT 2944:23-2946:9, 3455:15-3456:3.

The Tribe's witnesses testified that Station and CILS had to search for a new site "from scratch" because **Kenwood No. 2** had failed to identify alternative locations for the casino and subsequently provided very little assistance in locating a new site because it was still advocating for development on the Highway 37 Site. **Kenwood No. 2** testified that one of its employees met with "dozens" of people to locate a new site. RT 1858:14-1866:5. Ultimately, CILS and Station found a viable alternative property in Rohnert Park. Ex. 677. The Tribe donated the option to buy the Highway 37 Site to the Sonoma Land Trust, and environmentalists purchased the Highway 37 Site and restored it into seasonal wetlands. RT 3504:1-22.

F. Amendments to the Consulting Agreement

In July and August of 2003, the Tribe and **Kenwood No. 2** made two amendments to the Consulting Agreement. In Amendment No. 1, executed on July 14, 2003, the parties agreed that

any amounts Station paid for “Government Relations Consultants invoices” would be deducted from the consulting fees the Tribe owed to Kenwood No. 2. Ex. 516. In Amendment No. 2, the parties removed specific references to the Highway 37 Site as that location could no longer be tied to the casino project. Amendment No. 2 also reduced Kenwood No. 2’s compensation to 3% of the Tribe’s Net Gaming Revenues for seven years, unless the Tribe did not sign a compact before October 31, 2003, in which case Kenwood No. 2’s fee was further reduced to 2.5%. Ex 549. All “prior agreements” between the Tribe and Kenwood No. 2 were “rescinded, void and unenforceable” under Amendment No. 2, and all monies owed to Kenwood No. 2 as of that date were forgiven. Id., p. 3.

G. Kenwood No. 2’s Performance from 2004 – 2014

The parties disagree regarding Kenwood No. 2’s participation in the casino project after the Highway 37 Site was abandoned and the new property was located. The Tribe’s witnesses testified that the Tribe stopped working with Kenwood No. 2 by the end of 2005. Kenwood No. 2 asserts that its employees periodically communicated with the Tribe throughout the years, and notes that the Tribe invited Persons A and B to the casino opening in 2014.

Kenwood No. 2 apparently assisted the Tribe in opposing a 2004 bill authored by California State Assemblyman REDACTED that would require gaming tribes to negotiate with local governments to mitigate the impact of casinos. RT 4036-4039 Person B informed the Tribe that he “killed” the REDACTED bill by talking with various state politicians.) After 2005, however, there is no indication that Kenwood No. 2 performed any work for the Tribe, and the parties agree that the Tribe obtained an MOU from Sonoma County, a compact from the State, federal approval to transfer the new property into trust for gaming purposes, and developed and opened the casino without any assistance from Kenwood No. 2

III. Analysis

A. Scope of this Arbitration

Section 10B of the Consulting Agreement requires the parties to arbitrate “[a]ll disputes, controversies or claims arising out of or relating” to the Consulting Agreement before a panel of three arbitrators, who shall “apply the laws of the State of California” and the Commercial Arbitration Rules of the AAA. Scheduling Order No. 2, ¶¶4, 6. Kenwood No. 2 alleges that the Tribe breached the Consulting Agreement and Kenwood No. 2 seeks 2.5% of the Tribe’s net gaming revenue for the first seven years of the casino’s operation, plus interest, and attorneys’ fees and expenses (estimated to be more than \$40,000,000). Kenwood No. 2 Statement of Claim, 1:28-2:4. Alternatively, Kenwood No. 2 alleges claims for *quantum meruit* and unjust enrichment based on services provided. Kenwood No. 2 Supplement to Statement of Claim, 1:16-28.

Kenwood No. 2 argues that the Panel lacks jurisdiction to determine two affirmative defenses raised by the Tribe because the Tribe waived these defenses in the state court proceeding. In its Answer to Kenwood No. 2’s Amended Cross-Complaint to Compel Arbitration (“Tribe’s Answer”), the Tribe asserted that Kenwood No. 2’s motion was “barred by the doctrine of illegality” because the Consulting Agreement was “void and unenforceable as violating public policy.” Ex. 1057, p. 15. Specifically, the Tribe argued that the Consulting Agreement was an unenforceable contingency fee lobbying contract and violated certain provisions of the Indian Gaming Regulatory Act (“IGRA”). In its ruling, the state court noted that “the parties raised a number of affirmative defenses and issues in their pleadings” that were not briefed in the parties’ proposed statements of decision, and thus the court concluded that “the parties waived their request for the Court to rule on them.” SOD, 48:3-5.

California Code of Civil Procedure § 1281.2 states that when a written agreement to arbitrate exists, the court shall compel the parties to arbitrate their dispute “unless it determines that: [¶] ... [¶] (b) Grounds exist for the revocation of the agreement.” Kenwood No. 2 claims that California law⁸ further requires “a party opposing a petition to compel arbitration pursuant to Code of Civil Procedure Section 1281.2” to “*allege* the contract as a whole is illegal or the party waives the defense of illegality for the resulting arbitration.” Claimant’s Post Trial Brief, 32:6-8 (*emphasis added*).

Kenwood No. 2’s argument that the Tribe waived its illegality defenses fails for four reasons. First, the Tribe did *allege* that the contract was void due to illegality. See, Tribe’s Answer, Ex. 1057, p. 15. The trial court declined to rule on those defenses, as well as several other arguments raised by the parties, because neither party addressed the defenses in their proposed statements of decision. *SOD*, 48:3-5.

Second, it is not clear that California law prohibits arbitrators from determining whether a contract is void in its entirety due to an illegality. Kenwood No. 2 relies upon *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 32 (1992), but *Moncharsh* is not controlling. In *Moncharsh*, the California Supreme Court defined the appropriate standard for judicial review of an arbitration ruling when a party alleges that a portion of an otherwise enforceable contract, rather than the contract as a whole, is illegal or unenforceable. The Court held that if an illegality defense attacks only a portion of a contract containing an arbitration clause, the defense must be determined *by an arbitrator*, not a court. *Id.* at p 33. If the party asserting the illegality failed to raise the issue *in*

⁸ The parties disagree as to whether California or federal law applies to this matter. Under the Federal Arbitration Act, issues of illegality, even if they void the entire contract, including the arbitration clause, are to be determined by the arbitrator. *Duffens v. Valenti*, 161 Cal. App. 4th 434, 448 (2008). Under the California Arbitration Act, as is discussed below, the law is unclear. *Sheppard, Mullin, Richter & Hampton v. J-M Manufacturing*, 198 Cal.Rptr.3d 253, 2016 (*review granted*), which interpreted *Moncharsh* in accord with Kenwood No. 2’s argument, has been de-published pending California Supreme Court review.

the arbitration proceeding, they cannot raise the issue subsequently and for the first time on judicial review of the arbitrator's ruling. *Id.* The Court reasoned that any other conclusion would frustrate the "basic purpose of private arbitration, which is to finally decide a dispute between the parties." *Id.* at 31. Although the Court also stated that "the rules which give finality to the arbitrator's determination . . . are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award," (*Id.* at 32), this statement does not support Kenwood No. 2's assertion that a party is barred from *raising* its illegality defenses in an arbitration proceeding if the trial court declined to resolve those defenses on a motion to compel arbitration. Any other conclusion would thwart the "basic purpose of private arbitration" to "finally decide a dispute between the parties." *Id.* at 31.

Third, Kenwood No. 2's argument that *res judicata* and collateral estoppel bar the Tribe from raising the illegality defenses also fails because the Tribe's defenses were not "actually litigated and determined" in the state court proceeding, as is required for these principles to apply. *See, e.g., Rymer v. Hagler*, 211 Cal. App. 3d 1171, 1178 (1989). The trial court's ruling rested solely upon the court's determination that the Tribal Resolution to waive sovereign immunity applied to disputes arising out of both the Consulting Agreement and the subsequent amendments to that agreement. The court stated only that, with regard to "a number of affirmative defenses and issues" raised by the parties "in their pleadings," but not briefed in the proposed statements of decision, "the parties waived their request for the Court to rule on them." SOD, 48:3-5 (*emphasis added.*) The court clearly acknowledged that it had not made any determination regarding the Tribe's affirmative defenses other than sovereign immunity.

The Panel concludes that no claims or defenses were "waived" in the state court proceeding. The Panel has jurisdiction to determine all arguments raised in this proceeding.

B. Kenwood No. 2's Breach of Contract Claim

To prevail on its claim for breach of contract, Kenwood No. 2 must prove that: (1) Kenwood No. 2 and the Tribe entered into a valid and enforceable contract; (2) Kenwood No. 2 performed all, or substantially all, of the "significant things that the contract required" Kenwood No. 2 to do; (3) the Tribe failed "to do something that the contract required" the Tribe to do; (4) Kenwood No. 2 suffered harm; and (5) the Tribe's breach was a substantial factor in causing the harm suffered by Kenwood No. 2. See, CACI No. 300.

1. The Tribe and Kenwood No. 2 Entered into a Contract

Although the parties executed the Company 1 Agreement, the Assignment Agreement, the Consulting Agreement, and the two amendments, Kenwood No. 2's breach of contract claim is premised solely upon the April 22, 2003 Consulting Agreement and the two subsequent amendments.

Under the "Land Acquisition and Governmental Relations Consulting Agreement," Kenwood No. 2 represented that it had expertise and skills in "real estate acquisition, development, land use and federal, state and local government relations necessary to develop" the Tribe's gambling casino. Ex. 35. Kenwood No. 2 stated that it could provide "technical assistance, advice, training and consulting services required" to "consummate" the Tribe's casino project.⁹ The Tribe would determine the "specific consulting services" that Kenwood No. 2 would provide and the format of Kenwood No. 2 reports and recommendations. Id., p. 4. In exchange, the Tribe promised to pay Kenwood No. 2 a set percentage of gaming revenues for seven years after the casino opened. Id.

⁹ Kenwood No. 2 also promised to make annual donations to the UCLA College of Law Indian law program. Id., p. 7, § 9.

The Tribe argues that the Consulting Agreement violates the Indian Gaming Regulatory Act (IGRA) and constitutes an illegal contingency fee lobbying contract, and thus is invalid and unenforceable.

a. Indian Gaming Regulatory Act (“IGRA”)

The Tribe claims that the Consulting Agreement is unlawful under the IGRA because the terms violate the sole proprietary interest rule and because the agreement is an unapproved management contract. ^{Kenwood No. 2} argues that the NIGC reviewed and approved the Consulting Agreement, and thus both arguments are irrelevant.¹⁰ ^{Kenwood No. 2} submitted evidence that the NIGC received a copy of the Consulting Agreement during the approval process for the Tribe’s contract with *Station*, but this evidence is insufficient to show that the NIGC issued an opinion, positive or negative, regarding the terms of the Consulting Agreement. Furthermore, none of the parties sought a declination letter¹¹ from the NIGC regarding the Consulting Agreement. The record does not indicate that the NIGC reviewed and affirmatively approved the terms of the Consulting Agreement, and thus the Panel must address the Tribe’s arguments that the agreement is unlawful under the IGRA.

1) Sole Proprietary Interest Rule

The “sole proprietary interest” rule was drafted into the IGRA to ensure that Indian tribes remain the primary beneficiaries of gaming operations. 25 U.S.C. §2702. The statute mandates that Indian tribes “have the sole proprietary interest and responsibility for . . . any gaming activity.” 25 U.S.C. §2710 (b)(2)(A). Although Section 2710 refers to gaming ordinances and

¹⁰NIGC approval of tribal management contracts is entitled to *Chevron* deference. See, *Miami Tribe of Okla. v. United States*, 5 F. Supp. 2d 1213, 1216 (D. Kan. 1998).

¹¹On request, the General Counsel’s Office of the NIGRA will review drafts of agreements and issue an opinion as to whether a contract or an agreement implicates management of a tribe’s gaming operation or violates the sole proprietary interest requirement. See, <https://www.nigc.gov/general-counsel/management-review-letters>.

resolutions adopted by a tribe, certain types of contracts are also subject to the rule. *See*, 58 Fed.Reg. 5804 (Jan. 22, 1993).

The parties' respective experts agreed that the NIGC considers the following factors when determining whether a contract violates the "sole proprietary interest" rule: the length of the term of the contractual obligation; the amount of compensation paid to the third party and whether that amount reflects the fair market value of the services provided; and the degree of control that the third party exerts over the gaming operation. Ex. 874, ¶54; RT:153:1-1535:18 [Washburn]; RT 1813:1-16 [Coleman]. Both experts opined that the second factor (compensation paid for the services provided) is the most significant, and case law on the issue supports these opinions. *See, e.g., Cabazon Band of Mission Indians*, 2016 WL 3438920.

The Tribe argues that the Consulting Agreement violates the sole proprietary interest rule because the contractual obligations extended for seven years and because Kenwood No. 2 would obtain over \$42 million for the services it provided. The Panel finds that the seven-year length of the Consulting Agreement is not *per se* invalid because the IGRA has approved contracts for longer than five years provided that the applicants submit separate, written justification for the extended terms; indeed, the IGRA approved of Station's contract with the Tribe, which included a term length of seven years. *See, Written Report of Expert Witness Professor Kevin Washburn*, ¶¶ 55-56. It is unknown whether the IGRA would have approved the Consulting Agreement if the parties had provided sufficient justification for the extended term, and thus the Panel cannot presume that the agreement was invalid merely because it provided for a seven-year term.

Regarding Kenwood No. 2's compensation under the Consulting Agreement, the record does not support a finding that the agreement violated the "sole proprietary interest" rule at the time it was drafted. The Tribe's argument that the Consulting Agreement overcompensated Kenwood No. 2

because Kenwood No. 2 would obtain an hourly rate of \$10,000 per hour is based upon hindsight. If Kenwood No. 2 received the compensation it now seeks for the hours it *actually* worked for the Tribe, the amount would, indeed, be exorbitant. But Kenwood No. 2's participation in the casino project was terminated before Kenwood No. 2 completed the majority of tasks assigned to Kenwood No. 2 under the agreement. The number of hours Kenwood No. 2 would have worked had Kenwood No. 2 remained on the project and completed all the tasks envisioned under the Consulting Agreement is unknown. Therefore, it is unclear whether the fair market value of the services Kenwood No. 2 was *expected* to perform for the Tribe exceeded the amount Kenwood No. 2 would obtain under the agreement. It is highly unlikely that the NGIC would have approved the amount Kenwood No. 2 now seeks based upon the services it did, in fact, provide to the Tribe, but it is unclear whether the NGIC would have approved the Consulting Agreement in 2003 when it was originally drafted.

Lastly, the Tribe asserts that Kenwood No. 2 exerted an illegal degree of control over the Tribe's gaming operations because under the agreement, Kenwood No. 2 had full access to the casino's records and book Kenwood No. 2's right to access the casino records is not *per se* evidence that Kenwood No. 2 had control over the gaming operation. Given that Kenwood No. 2's fees were based upon a percentage of revenues, the provision appears to be an appropriate safeguard against possible underreporting of gaming proceeds.

For these reasons, the Panel finds that the record is insufficient to support the Tribe's argument that the Consulting Agreement violated the sole proprietary interest rule.

2) *Illegal Management Contract*

Under the IGRA, any contract that purports to vest management authority for any part of an Indian gaming casino with any party other than a tribe must be reviewed and approved by the NIGC. Unapproved management contracts are "void." 25 C.F.R. § 533.7. The NIGC defines

the term “management contract” as “any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.” 25 C.F.R. §

502.15. An informal bulletin released by the NIGC provides further guidance:

Management encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling). The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval.

NIGC Bulletin No. 94–5, at 1 (Oct. 14, 1994); *see also*, *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Devel. Corp.*, 658 F.3d 684, 696 (7th Cir. 2001).

Certain provisions in the Consulting Agreement support the Tribe’s argument that the agreement constitutes a management contract, but certain other provisions suggest the opposite conclusion. Section 7 of the Consulting Agreement states that the Tribe cannot terminate the agreement unless it also terminates its management contract with Station. Ex. 505.

Additionally, the Station/Kenwood No. 2 Agreement required Kenwood No. 2 to assist Station in “maintaining its relationship with the Tribe.” Ex. 874, ¶40. When viewed together, these contracts indicate that Kenwood No. 2’s work on the project was at least linked to Station’s role as manager.

Nonetheless, the Consulting Agreement states that Kenwood No. 2 “shall not manage, direct, control any aspect of the [casino], the management of which shall be exercised exclusively by the Tribe through its management contractor – Station Casinos,” and Kenwood No. 2 “shall not engage in any management activities.” Ex. 505, p. 1, §(1)E. Additionally, Kenwood No. 2’s participation in the casino project is described under the Consulting Agreement as helping the Tribe to “develop” and “consummate” the casino project; there is no indication that Kenwood No. 2’s duties extended to

assisting with the management of the casino after it opened. Lastly, the services provided by Kenwood No. 2 were “determined exclusively by the Tribe,” and were to be performed in “accordance with and under . . . Tribal direction,” indicating that the Tribe maintained ultimate control over the casino. The only terms that pertain to operations after the casino opened are the provisions that allow Kenwood No. 2 to access the casino’s books and records, but, as noted above, these provisions are reasonable given that Kenwood No. 2’s fees were based upon casino revenues. Furthermore, the ability to inspect records does not equate to the ability to control the operation of the casino.

The Panel finds that the Tribe did not meet its burden of proof to establish that the Consulting Agreement is an unapproved management contract.

b. Contingency Fee Contract for Lobbying Services

Kenwood No. 2’s fees under the Consulting Agreement were conditioned upon several events. Sections 5(A) and (B) of the agreement state that Kenwood No. 2 would receive a higher percentage of net gaming revenues if the Tribe and the State of California signed a Gaming Compact by October 31, 2003 and if the Tribe’s “Fee to Trust Application” was accepted by the federal government within 12 months of the execution of the Consulting Agreement. Additionally, the Consulting Agreement states that Kenwood No. 2’s fees, generally, were “contingent upon the Tribe commencing operations on the Gaming Enterprise Site.” *Id.* §5(G). The Tribe argues that Kenwood No. 2’s compensation was therefore contingent upon Kenwood No. 2’s success in lobbying federal and state officials, and thus the agreement is a contingency fee contract for lobbying services in violation of federal and state law.

1) *Federal Lobby Laws*

Federal law regarding the legality of contingency fee lobbying contracts is somewhat unclear. As the Tribe points out, federal case law from the late 1800s to the mid-1950s holds that any lobbying contract under which payment is contingent upon the passage of specific legislation is void as against public policy. *See, e.g., Trist v. Child*, 88 U.S. 441 (1874); *Luff v. Luff*, 267 F.2d 643, 646 (1959); *McNeill v. Nevius*, 187 F.2d 81, 81 (1950).

Kenwood No. 2 argues that federal courts object only to contingency fee lobbying based upon personal influence, not lobbying that was, in essence, a “professional service,” such as providing research and data to educate lawmakers. There is some support for Kenwood No. 2’s interpretation. In *Trist*, the court refused to enforce a lobbying contract because it involved “the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits,” and not “professional services,” such as “drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them . . . to a committee or other proper authority . . . intended to reach only the understanding of the persons sought to be influenced.” *Id.* at 443. In *Jacobsen v. Oliver*, 555 F. Supp. 2d 72 (2008), the court noted that “[w]hile under some circumstances courts will invalidate contingent fee agreements for lobbying services, [citations omitted], ‘not all contingent fee contracts . . . for the procuring of legislation [are] void as against public policy.’” *Id.* at 81.

In 1994 Congress enacted the Federal Lobbying Disclosure Act (“LDA”), and, as Kenwood No. 2 points out, the LDA does *not* ban contingency fee lobbying contracts. The United States Congress Guide to the Lobbying Disclosure Act states that there is a “general prohibition on the payment of contingent fees in connection with the award of government contracts,” but in

non-government contracts, “assuming . . . the agreement is not contrary to law or public policy,” a “contract[] for a contingent fee, like any other fee arrangement, triggers a registration requirement at inception.” U.S. Senate: Legislation and Records Home Historic, Lobbying Disclosure Act Guidance Ch. 5, §5. The implication, therefore, is that there is no *per se* ban on contingency fee lobbying contracts under federal law, unless the contract involves a government entity, and contingency contracts are enforceable unless they violate public policy.

The Panel does not need to decipher federal law on this issue, however, because the Tribe failed to demonstrate that **Kenwood No. 2** engaged in lobbying as that term is defined under federal law. The LDA defines a “lobbyist” as:

any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.

2 U.S.C. §1602(10). The LDA defines a “lobbying contract” as:

any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the formulation, modification, or adoption of Federal legislation (including legislative proposals) . . . the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government . . . the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or . . . the nomination or confirmation of a person for a position subject to confirmation by the Senate.

Id. at §1602(8).

The Tribe states that **Company 1** is a lobbying firm, but the Tribe did not demonstrate that **Kenwood No. 2** (the entity that contracted with the Tribe under the Consulting Agreement) is a lobbying firm under §1602(8). Although **Person A** is a lobbyist, **Person B** is not, and most of the communications between **Kenwood No. 2** and federal politicians were initiated by **Person B**. Furthermore, the Tribe failed to demonstrate that twenty percent of the work performed by either

Persons A and B for the Tribe over a 3-month period involved lobbying. Thus, the Tribe failed to demonstrate that Kenwood No. 2 is a lobbyist under federal law.

The Tribe failed to prove that the Consulting Agreement is void and unenforceable under federal law.

2) *California Lobby Laws*

Unlike federal law, California law clearly prohibits contingency fee lobbying contracts:

No lobbyist or lobbying firm shall:

...
(f) Accept or agree to accept any payment *in any way* contingent upon the defeat, enactment, or outcome of any proposed legislative or administrative action.

Cal. Gov't Code §86205(f) (*emphasis added*). California law also defines the term "lobbying firm" broadly. Government Code § 82038.5 states that a "lobbying firm" is any business entity that "receives . . . compensation . . . for the purpose of influencing legislative or administrative action on behalf of any other person, and any partner, owner, officer, or employee of the business entity is a lobbyist." The code defines "influencing legislative or administrative action" as:

... promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including but not limited to the provision or use of information, statistics, studies or analyses.

Cal. Gov't. Code §82032. The term "administrative action" is defined as:

drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding

Cal. Gov't Code §82002(a). "Quasi-legislative proceedings have as their purpose the creation of rules and regulations which establish standards for future conduct . . . [and] embrace . . . any prescribed standard of conduct to which private interests must conform in the future." *In re Leonard*, 2 FPPC Ops. (1976).

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. Tribe's Post-Trial Brief, 71:1-4. Under the Consulting Agreement, the Tribe agreed to pay Kenwood No. 2 4% of the casino's net gaming revenues provided that the Tribe obtained a gaming compact with the State of California by October 31, 2003. Consulting Agreement, §5(A). Under the California Constitution, the Governor is authorized to enter into gaming compacts with federally recognized Indian tribes, subject to the Legislature's ratification. California Constitution, Art. IV, §19(f); *see, also*, Ex. 921, p. 4. Thus, Kenwood No. 2's compensation was contingent upon the Governor's determination to enter into a compact with the Tribe and the California legislature's determination to ratify that compact. Efforts by Kenwood No. 2 to encourage the Governor to agree to a gaming compact or to influence the legislature to ratify the compact constitute "acts intended to influence quasi-legislative acts," and are acts of lobbying under California law. Thus, the Consulting Agreement is a contingency fee lobbying contract under California law, and as such, it violates California Government Code §86205(f).

Kenwood No. 2 argues that the Consulting Agreement cannot be interpreted as a lobbying contract because the Company 1 Agreement specifically states that Company 1's services would "not include any activity related to the defeat, enactment, or outcome, of proposed legislative or state administrative action." Ex. 71, p. 2. Kenwood No. 2 has not alleged a breach of the Company 1 Agreement, however. Kenwood No. 2 alleges a breach of the Consulting Agreement, which does not contain a similar prohibition against lobbying services. Kenwood No. 2 points out that tribal members testified that Kenwood No. 2 told the Tribe that Kenwood No. 2 would provide the same services under the Consulting Agreement that Company 1 provided under the Company 1 Agreement, but this testimony is irrelevant. Kenwood No. 2's representations regarding the legal import of the terms of the Consulting Agreement are not controlling. Furthermore, even if the Consulting Agreement

included a disclaimer against lobbying, if Kenwood No. 2 nonetheless lobbied on behalf of the Tribe, Kenwood No. 2's actions would still violate §82025(f).

Kenwood No. 2 then argues that Amendment No. 2 clarified or “cured” any agreement between the parties regarding lobbying because the amendment states that Kenwood No. 2 agreed to “take all reasonable, *lawful* and appropriate actions, to obtain a Tribal-State Gaming Compact,” and thus Kenwood No. 2 did not agree to violate §82025(f). Ex. 20 (*emphasis added*). The mere fact that Kenwood No. 2 promised to act in accordance with the law is insufficient to demonstrate that Kenwood No. 2 did, in fact, comply with the law. Kenwood No. 2 also notes that it was not registered to lobby and the Tribe did not authorize it to lobby, but Kenwood No. 2's reasoning is circular. If Kenwood No. 2 lobbied on behalf of the Tribe without complying with registration laws or obtaining the Tribe's permission, these acts may constitute additional violations, but they do not shield Kenwood No. 2 from §82025(f).

Kenwood No. 2 next asserts that its fees were not, in fact, contingent upon obtaining a gaming compact, but rather were contingent only upon the opening of a casino, which, narrowly construed, is not a legislative act. Kenwood No. 2 claims that constitutional law requires the Panel to construe the terms of the Consulting Agreement narrowly to avoid infringing upon Kenwood No. 2's First Amendment rights to free speech. See Claimant's Post-Arbitration Brief, pp. 71-76.

The Consulting Agreement states that Kenwood No. 2's fees are “contingent upon the Tribe commencing operations on the Gaming Enterprise Site,” but this phrase merely adds another contingency to the Tribe's performance, it does not modify or alter any other contingencies set forth in the agreement. Constitutional law does not require the Panel to narrowly construe these contingencies to the point that they are entirely disregarded because §82025(f) does not infringe

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The Tribe demonstrated that the Consulting Agreement violated California law. Thus, Kenwood No. 2 failed to establish that a valid and enforceable contract exists between the parties and therefore failed to establish the first element of its breach of contract claim.

2. Kenwood No. 2's *Performance under the Contract*

California Civil Code §1439 states that “[b]efore any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent . . . imposed upon himself . . .” “[W]hen there are a number of performances for each party to the contract, a breach by a party of one, if material, allows the other party to treat the contract as discharged.” 15 Williston on Contracts (4th ed. 2000) § 44:46, pp. 200–201. Whether defects or omissions in a party’s performance are material or “merely unimportant mistakes that have been or may be corrected, is generally a question of fact,” but any defect in performance must “be easily remedied or compensated,” so that each party “may get practically what the contract calls for.” *Connell v. Higgins*, 170 Cal. 541, 556-57 (1915); *see also, Posner v. Grunwald-Marx, Inc.*, 56 Cal.2d 169, 186 (1961). Thus, Kenwood No. 2 has the burden of proving that it fulfilled each of its material obligations under the Consulting Agreement.

The Tribe acknowledges that Kenwood No. 2 worked on the casino project, but asserts that Kenwood No. 2's performance was so defective that the Tribe's obligations should be discharged. According to the Tribe, although Kenwood No. 2 promised to provide expert advice to help the Tribe open its casino, Kenwood No. 2 did an "incompetent and dishonest job" and "misguided the Tribe in every major decision." RT 123:15-21.

Many, if not most, of the tasks Kenwood No. 2 performed for the Tribe occurred prior to the parties' execution of the Consulting Agreement, and Kenwood No. 2 is not seeking compensation for work performed prior to April 22, 2003. Ex. 959, 13:12-16. Kenwood No. 2 performed two crucial tasks for the Tribe after the parties executed the Consulting Agreement, however, and the evidence indicates that Kenwood No. 2's performance was, indeed, inadequate.

a. Kenwood No. 2's Advice Regarding the Station Contracts

On April 22, 2003, the Tribal Council met to determine whether the Tribe should enter into eight separate agreements with Station. Ex. 5, pp. 2-3. Kenwood No. 2 was present and participated at that meeting. Id. Under the agreements with Station, the Tribe would be bound to use Station as its developer and casino operator. Id. These contracts cemented Station's agency relationship with the Tribe and determined the revenues the Tribe would receive from the enterprise, and thus the decision to enter these contracts was one of the most significant decisions of the casino project.

As part of its deliberations, the Tribal Council received advice and consultation from Kenwood No. 2. Person A told the Tribe that Station "exceeded his expectations in philosophy and willingness to work with" the Tribe, and provided the Tribe with "the greatest percentage [of profit]." Id., p. 1. Kenwood No. 2 advised the Tribe to contract with Station, and the Tribal Council minutes indicate that the Tribe relied upon this advice in making its decision to execute the

contracts. Kenwood No. 2's decision to reject and denigrate Harrah's proposal and conceal the contents of Harrah's March 17, 2013 letter from the Tribe, and to instead advise the Tribe to contract with Station was flawed and demonstrates that Kenwood No. 2 failed to adequately perform significant obligations under the Consulting Agreement.

As detailed in above, Harrah's initial proposal provided compensation to the Tribe that greatly exceeded the compensation Station initially offered. Ex. 485. Additionally, on March 7, 2013, Harrah's informed Kenwood No. 2 that it was willing to meet with the Tribe to negotiate further, with the goal of providing "the best deal for the Tribe." Id., p. 4. Harrah's was not just focused on the Tribe's percentage of profits, Harrah's also sought to control any fees paid, including fees to consultants like Kenwood No. 2, to ensure that the Tribe (which would eventually reimburse the operator for these fees) did not incur unnecessary expenses. Furthermore, Harrah's offered to ensure that proper due diligence was performed on the Highway 37 Site to prevent the Tribe from suffering any losses if that location could not be used for the casino.

Kenwood No. 2 failed to respond to Harrah's offer to continue negotiations. Thus, when Kenwood No. 2 advised the Tribe that Station provided the best deal, this advice was misleading and incomplete and thus inadequate to satisfy its obligations under the Consulting Agreement and the two amendments. Without further negotiation with other interested operators, it was premature for Kenwood No. 2 to conclude that Station offered the "greatest" deal or to advise the Tribe to bind itself to Station. Instead, Kenwood No. 2 ceased communicating with Harrah's, selected Station, informed the Tribe that the deal with Station was the best available, and advised the Tribe to execute legally binding agreements with Station. Kenwood No. 2's flawed and conflicted advice was not in the best interest of the Tribe and therefore Kenwood No. 2 breached its contract.

Kenwood No. 2 argues that these actions cannot constitute a breach of performance because Kenwood No. 2 was not, in fact, obligated to do anything under the Consulting Agreement. Kenwood No. 2 points to Section D of the Consulting Agreement, which states that the “specific consulting services” performed by Kenwood No. 2 would be determined by the Tribe. Kenwood No. 2’s interpretation of the Consulting Agreement contradicts the terms of the contract that obligate Kenwood No. 2 to “consult with and provide advice and assistance to the Tribe regarding real estate acquisition, development, land use, and federal, state and local governmental relations necessary to the development of the Enterprise.” Id. § B. Furthermore, although Kenwood No. 2’s services were to be “provided at [the] discretion of the Tribe,” the evidence indicates that the Tribe authorized Kenwood No. 2 to communicate with casino operators and determine a recommendation regarding which operator the Tribe should select. Ex. 473. Kenwood No. 2’s attendance at the Tribal Council meeting and its advice to the Tribe regarding the Station contracts at that meeting also demonstrate that the Tribe directed Kenwood No. 2 to perform this task, and thus Kenwood No. 2 was obligated to perform the task adequately. Ex. 489; *see also*, Ex. 477, p. 4.

Kenwood No. 2 next argues that the parties do not know if further negotiations with Harrah’s would have resulted in better terms for the Tribe. This is true, but this is also why Kenwood No. 2’s advice to the Tribe was inadequate. No one, including Kenwood No. 2, knew if Harrah’s would have provided the Tribe with a better deal because Kenwood No. 2 failed to even attempt to find out. Kenwood No. 2 did not inform the Tribe that Harrah’s wished to negotiate further and never informed the Tribe of either the existence or the contents of Harrah’s March 7, 2003 letter. Nonetheless, Kenwood No. 2 advised the Tribe to contract with Station, thus terminating all negotiations prematurely and preventing the Tribe from determining whether it might have received greater profits from its casino had negotiations continued.

Kenwood No. 2 also points out that it worked to negotiate terms from Station that matched those initially offered by Harrah's. If Kenwood No. 2 had recommended that the Tribe accept Harrah's deal instead of Station's, it could have saved itself the effort. Kenwood No. 2 further notes that it convinced Station to agree to most of the Tribe's "12 points," but Kenwood No. 2 misses the point. Regardless of what Station offered, Kenwood No. 2 should not have advised the Tribe to legally bind itself to Station before the Tribe determined whether better terms could be obtained, from either Station or Harrah's, if the Tribe continued negotiations. This is particularly true given that Harrah's initial offer was better for the Tribe than Station's.

Furthermore, Kenwood No. 2 failed to convince Station to give the Tribe each of the "12 Points" requested. The Tribe sought a \$2 million signing bonus, but Station refused to offer more than \$1 million. If Kenwood No. 2 had given the Tribe the opportunity to negotiate with Harrah's, perhaps one of the operators would have relented and agreed to increase the bonus to \$2 million, but Kenwood No. 2 eliminated that possibility.

Kenwood No. 2 claims that it did not recommend Harrah's because Sarris told Kenwood No. 2 that he did not like Harrah's. The evidence established that this claim is false,¹³ but regardless, such a statement would not discharge Kenwood No. 2's duty under the contract. Kenwood No. 2 was hired to provide consulting services to *the Tribe*, not to Sarris personally. Even if Kenwood No. 2 is correct and Sarris did not like the "cookie cutter" appearance of Harrah's casinos, Kenwood No. 2 still had a duty to advise the Tribal Council that it might obtain better terms from either Harrah's or Station if it continued to negotiate.

Lastly, Kenwood No. 2 claims that it is not responsible for its advice and consultation because by the time the Tribe executed the Station contracts, CILS represented the Tribe, and thus CILS,

¹³ Sarris testified that he had never set foot inside a Harrah's casino and never informed Kenwood No. 2 that he did not want Harrah's to be the Tribe's operator. RT 3189:12-3191:16; *see also*, Ex. 489.

not Kenwood No. 2, was responsible for advising the Tribe regarding the terms. Kenwood No. 2 is correct that CILS had a duty to provide adequate legal advice to the Tribe, but once again, Kenwood No. 2's argument is irrelevant. CILS' duties to the Tribe do not discharge or extinguish Kenwood No. 2's separate duties to the Tribe under the Consulting Agreement. Kenwood No. 2 was independently obligated under the Consulting Agreement to provide the Tribe with "technical assistance, advice, training and consulting services." The advice and consultation that Kenwood No. 2 provided was inadequate, however, and as a result, the Tribe did not get the benefit of its bargain under the Consulting Agreement. Kenwood No. 2's actions resulted in the Tribe executing contracts prematurely, before the Tribe had negotiated sufficiently to determine the best deal available, and thus it is not "easily remedied or compensated."

b. Kenwood No. 2's Advice Regarding the Highway 37 Site

Kenwood No. 2 also breached its duty when it advised the Tribe to purchase the Highway 37 Site based on Kenwood No. 2's determination that it was the best location for a casino. The environmental and political obstacles for development on the Highway 37 Site were not adequately investigated and there is no evidence that any other site was seriously considered by Kenwood No. 2. Apparently, Kenwood No. 2's purported connections with local, state and federal politicians were not utilized or were insufficient to determine, prior to the purchase of the option on the Highway 37 Site, that the local community, interested politicians, and environmental activists would not support casino development on that location. The Highway 37 Site simply was unworkable, but Kenwood No. 2 advised the Tribe to purchase the property regardless. As a result, the Tribe was saddled with land it could not use for its objectives and the entire casino project was endangered when elected officials threatened to block the Tribe from opening any casino. Kenwood No. 2's faulty advice and consultation cost the Tribe over \$4 million and nearly

derailed the entire casino project. This was a material breach of Kenwood No. 2's obligations under the Consulting Agreement.

Kenwood No. 2 claims that it was not responsible for selecting the Highway 37 Site because Sarris "directed Kenwood No. 2 to focus its attention on Highway 37." Kenwood No. 2 also claims that it was not obligated to warn the Tribe regarding the property's troubled developmental history because the Tribe already knew that Sonoma County would oppose development on the site based on the Tribe's familiarity with the Hopland Tribe's failed attempts to develop the property in 2000. Kenwood No. 2 Reply Brief, 29:21-22.¹⁴ The terms of the Consulting Agreement state otherwise. Kenwood No. 2 promised to "consult with and provide advice and assistance to the Tribe" with regard to "real estate acquisition, development, land use, and federal, state and local government relations . . . necessary to" develop a casino. Ex. 35 pg. 3. Kenwood No. 2 represented that it was an "expert" on real estate acquisition and development, and it was clear that neither the Tribe nor Sarris had such expertise. As such, Kenwood No. 2 was obligated to advise the Tribe against selecting any property that was unsuitable for the Tribe's objective.

Regardless, the evidence indicates that it was Kenwood No. 2, not the Tribe, who championed the selection of the Highway 37 Site. Kenwood No. 2 expressed interest in obtaining an option on the property in the summer of 2002, before the Tribe had even decided to open a casino. Kenwood No. 2 then encouraged the Tribe to select the Highway 37 Site in its February 18, 2003 presentation when Kenwood No. 2 described the property as the "preferred" location because all other sites had

¹⁴The Tribe may have been on notice that some in Sonoma County would oppose development, but the Tribe had no notice that various politicians and numerous environmental groups would be as opposed to developing the Highway 37 site as was the case.

significant developmental issues. Ex. 477, p. 17-23. Indeed, Kenwood No. 2 neglected to warn the Tribe of *any* potential developmental issues associated with the Highway 37 Site.¹⁵ Id.

Alternatively, Kenwood No. 2 argues that the Highway 37 Site was *not* a poor choice, and thus it had no duty to warn the Tribe against purchasing it. Kenwood No. 2 claims that the site was an appropriate choice because it was the largest parcel of land available at the time and contained wetlands that the Tribe could restore. Kenwood No. 2's job, however, was to locate land on which the Tribe could develop a casino. The size of the lot and the presence of wetlands were irrelevant if the land could not be developed for the Tribe's purposes.

Kenwood No. 2 argues that the property was "not undevelopable" from an "environmental standard" because the NIGC indirectly approved the site. See, Kenwood No. 2 Arbitration Brief, p. 71:16; *see also*, Ex. 218. Again, the Tribe did not instruct Kenwood No. 2 to obtain property that was "not undevelopable" from an "environmental standard." The Tribe instructed Kenwood No. 2 to find land on which the Tribe could build a casino, and Kenwood No. 2 failed to fulfill that instruction.

Kenwood No. 2 claims that opposition to development on the Highway 37 Site was not due to the site selected, but due to general opposition to the presence of a casino in the area. Kenwood No. 2 suggests that the Tribe might have succeeded in building a casino on the site if Sarris had not lost his resolve after his meeting with a federal politician. Kenwood No. 2 Post Trial Brief, 109:23-26. The evidence indicates otherwise. Environmentalists and politicians stated that they were opposed to *any* type of development on the Highway 37 Site. RT: 2943:1-2944:8; 3498:6-22. Furthermore, the Tribe eventually opened a casino a few miles north of the property, demonstrating that the

¹⁵ Kenwood No. 2 claims that it did warn the Tribe that it might face opposition to developmental on the site. Kenwood No. 2 points to statements it made during the February 18, 2003 presentation that the Tribe might face "local and political resistance" to gaming and development. These statements were general warnings regarding challenges the Tribe might face if it chose to develop a casino, not specific warnings regarding the Highway 37 Site, and were insufficient to warn the Tribe of the significant risks of utilizing the Highway 37 Site for the casino project. Ex. 477, pp. 17-23.

community was not significantly opposed to the development of a casino elsewhere. Had the Tribe refused to abandon the Highway 37 Site, the Tribe might have been barred from opening a casino anywhere.

Kenwood No. 2 failed to substantially perform its obligations under the Consulting Agreement when it advised the Tribe to purchase the Highway 37 Site. The consequences of Kenwood No. 2's inadequate performance were substantial and not "easily remedied," and the breach was material.

The Panel finds that Kenwood No. 2 failed to satisfy its burden to prove all elements required by CACI 300 to establish a breach of contract claim.

3. *The Tribe Did Not "Waive" Its Objections to Kenwood No. 2's Performance*

Kenwood No. 2 argues that under the August 2003 Amendment to the Consulting Agreement ("Amendment No. 2"), the Tribe waived its right to object to Kenwood No. 2's inadequate performance between April 22, 2003 and August 14, 2003. Section 13 of Amendment No. 2 altered § 8(A) of the Consulting Agreement by stating that "[a]ll prior agreements between the Tribe and [Kenwood No. 2]" were "rescinded, void, and unenforceable upon the execution" of Amendment No. 2. This language does not, as Kenwood No. 2 asserts, constitute a broad waiver of all prior breaches of duty. Amendment No. 2 alters the prior obligations of the parties, but it does not contain language indicating that the Tribe waived its right to object to Kenwood No. 2's prior inadequate performance. Kenwood No. 2 claims that it agreed to reduce its payment under Amendment No. 2 only because the Tribe agreed to release Kenwood No. 2's prior breaches, but the plain terms of Amendment No. 2 indicate no such agreement. Although Kenwood No. 2 submitted extrinsic evidence that the Tribe and Kenwood No. 2 met and discussed the Tribe's dissatisfaction with

Kenwood No. 2's performance prior to the execution of Amendment No. 2, there is no evidence that the Tribe knowingly and intentionally waived any of its rights or claims.¹⁶

Kenwood No. 2 also argues that under Section 10(A) of the Consulting Agreement, Kenwood No. 2's breach cannot excuse the Tribe's own failure to perform. Section 10(A) of the Consulting Agreement, entitled "Remedies and Dispute Resolution: Notice and Right to Cure," states that before any party to the contract can invoke the dispute resolution mechanisms set forth in the agreement, "a party claiming breach . . . shall give written notice of the alleged breach to the other party, and both shall make a reasonable effort to meet, cure any breach, and otherwise make a good faith effort to resolve any differences." Kenwood No. 2 argues that the Tribe has not fulfilled its obligations under §10(A) because it failed to give Kenwood No. 2 written notice of the Tribe's allegations that Kenwood No. 2 failed to perform. The Tribe has not claimed a breach, however. Kenwood No. 2 invoked the Consulting Agreement's dispute resolution mechanism by claiming that the Tribe breached. Thus, it is Kenwood No. 2, not the Tribe, who is required to give notice and an opportunity to cure under §10(A). Kenwood No. 2's burden to prove that it substantially performed arises under California law as element of Kenwood No. 2's breach of contract claim, and §10(A) of the Consulting Agreement does not relieve Kenwood No. 2 from that burden.

Kenwood No. 2's argument that §26 of the Consulting Agreement excuses Kenwood No. 2's obligation to prove that it substantially performed fails for similar reasons. Section 26, entitled "Indemnity, Limitation of Liability," states that "[i]n no event shall [the] Tribe make any claim against [Kenwood No. 2] on account of any alleged errors of judgment made in good faith in connection with the performance by [Kenwood No. 2] of the obligations and duties set forth herein."

¹⁶The evidence established that the Tribe was unwilling to continue to work with Kenwood No. 2 unless its fees were reduced because the Tribe felt that Kenwood No. 2's performance had been inadequate and that the Tribe was "doing all the work." Ex. 210.

Kenwood No. 2 asserts that under Section 26, the Tribe must prove that Kenwood No. 2's failure to perform was in "bad faith." Kenwood No. 2 Arbitration Brief, 72:17-21. Section 26 does not apply, however, because the Tribe has not made a claim against Kenwood No. 2 in this proceeding.¹⁷

Lastly, Kenwood No. 2 argues that the Tribe should be estopped from asserting Kenwood No. 2's breach "as a defense" because "the Tribe notified Kenwood No. 2 of every alleged breach [that] the Tribe now asserts," and "represented to Kenwood No. 2 that [the Tribe] would be 'ok with everything' if Kenwood No. 2 reduced its fee." Kenwood No. 2 Post-Arbitration Brief, 101:25-28. The Consulting Agreement was tied to the Highway 37 Site; after the Tribe abandoned the property, the terms of the contract were uncertain. The Tribe agreed to amend the Consulting Agreement to be applicable to "any location situated in Marin or Sonoma counties" in exchange for economic concessions from Kenwood No. 2. Ex. 10. Ultimately, the parties agreed to Amendment No. 2. Although it is true that the Tribe also complained about Kenwood No. 2's inadequate performance prior to the execution of Amendment No. 2, the evidence indicates that the Tribe offered only to continue working with Kenwood No. 2 at the new location in exchange for Kenwood No. 2's fee reduction. There is no indication that the Tribe stated it would waive any objections to Kenwood No. 2's prior inadequate performance. Additionally, Kenwood No. 2 failed to inform the Tribe of Harrah's March 7th letter, and thus the Tribe was unaware of Kenwood No. 2's inadequate advice regarding the execution of the Station contracts and could not have waived its objections to that breach.

Kenwood No. 2 has not proven that it substantially performed under the Consulting Agreement and has not proven that the Tribe waived its objections to Kenwood No. 2's performance, and therefore

Kenwood No. 2 has failed to prove its claim for breach of contract.

¹⁷ Even if Section 26 did require the Tribe to prove "bad faith" in support of its defenses to Kenwood No. 2's claims, as detailed below, the Tribe has adequately demonstrated that Kenwood No. 2's "errors of judgment" were made in bad faith.

C. Kenwood No. 2's Claims for Equitable Relief

Kenwood No. 2 seeks both *quantum meruit* and unjust enrichment as alternatives to its breach of contract claim. See, Kenwood No. 2's Supplement to Statement of Claims, 1:16-28.

1. *Quantum Meruit*

"To recover on a claim for the reasonable value of services under a *quantum meruit* theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant." *Ochs v. PacificCare of California*, 115 Cal. App. 4th 782, 794 (2004); see also, CACI 371 (under *quantum meruit*, a plaintiff must prove: (1) defendant requested that plaintiff perform services to benefit defendant; (2) plaintiff performed the services as requested; and (3) defendant did not pay for the services.) "A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." *Utility Audit Co. v. City of Los Angeles*, 112 Cal. App. 4th 950, 958 (2003).

Kenwood No. 2 alleges that the Tribe asked Kenwood No. 2 to perform services under the Consulting Agreement, Kenwood No. 2 provided services that benefitted the Tribe, and the Tribe did not render payment. Kenwood No. 2's Supplement to Statement of Claims, 1:16-28. Kenwood No. 2 submitted evidence indicating that it did, indeed, perform many tasks on behalf of the Tribe. Kenwood No. 2 was in regular contact with the Tribe and attended at least 45 tribal meetings. RT 3955:20-3956:10 (Ross Testimony); Witness Statement of Person B, March 31, 2017, 2:18-20. Kenwood No. 2 created media and publicity campaigns, assigned tasks to lobbyists, and prepared briefing materials for the Tribe to present to government officials. RT: 4114:12-15; 4118:2-9 (Ross Testimony); RT 434:6-21 (Nielson Testimony); Person B Witness Statement, 8:15-9:6. Kenwood No. 2

implemented plans to garner community support for the casino and to oppose the recall of Rohnert Park council members who backed the casino project. RT 435:17-436:16; 441:2-5 (Nielson Testimony) [Kenwood No. 2] arranged meetings with various government officials and helped form the Friends of the Federated Indians of the Graton Rancheria, which interacted with state and local officials in support of the Tribe. Brian Campbell Testimony, November 10, 2016, 91:10-92:20; [Person B] Witness Statement, 6:24-8:8. [Kenwood No. 2] also performed ministerial tasks for the Tribe, such as finding office space, arranging travel plans, helping the Tribe to establish a budget, and assisting tribal members in securing personal loans. [Person B] Witness Statement, 5:1-21. [Kenwood No. 2] estimates that it worked a total of 11,106 hours on behalf of the Tribe. Ex. 464, p. 1. The Tribe claims that [Kenwood No. 2] “grossly overstate[s] the number of hours” it worked on behalf of the Tribe, and that the Tribe stopped working with [Kenwood No. 2] by early 2006 because its services were “counter-productive.” Initial Post Trial Brief of Respondent Federated Indians of Graton Rancheria, 32:20-21. Both parties admit that [Kenwood No. 2] was not involved in the major milestones of transferring the tribal land into trust, obtaining a gaming compact, or developing the casino.

Even if [Kenwood No. 2]’s estimate of time worked is accurate, [Kenwood No. 2]’s request for *quantum meruit* must be denied. Although the Tribe benefitted from some of the services provided by [Kenwood No. 2], [Kenwood No. 2]’s net impact on the project was detrimental to the Tribe. [Kenwood No. 2]’s recommendation that the Tribe contract with Station without completing negotiations with Harrah’s may have caused the Tribe to lose fees and/or profits, and [Kenwood No. 2]’s recommendation that the Tribe purchase the Highway 37 Site resulted in over \$4 million in losses to the Tribe. By July 2003, the Tribe felt that [Kenwood No. 2] was providing little to no value as the Tribe was “doing everything,” and the Tribe wanted to sever its relationship with [Kenwood No. 2] entirely, but was afraid

that if it did so, Kenwood No. 2 might retaliate and use its political connections against the Tribe. RT 3089:4-13, 3222:6-21 (Sarris); 3965:20-3966: (Ross).

Furthermore, Kenwood No. 2 was compensated for the work it performed on behalf of the Tribe. Under the Station/Kenwood No. 2 Agreement, Kenwood No. 2 received \$750,000 for its option on the Highway 37 Site (for which Kenwood No. 2 only paid \$100,000 to secure), and Kenwood No. 2 received \$20,000 per month (or a total of \$510,00) in compensation for Kenwood No. 2's consulting services. Although Station provided the funds to pay Kenwood No. 2, the source of the payment is irrelevant for the purposes of Kenwood No. 2's request for *quantum meruit*. The salient point is that Kenwood No. 2 was compensated for its services.

Additionally, *quantum meruit* is a claim based in equity, and it is inappropriate to grant equitable relief to a party who, like Kenwood No. 2, engaged in fraud and breached its fiduciary duties. See, e.g., *Fair v. Bakhtiari*, 195 Cal. App. 4th 1135, 1169 (2011) (trial court properly determine that a serious breach of fiduciary duty warrants the denial of *quantum meruit* recovery); see also, *Lauriedale Associates, Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (1992). Kenwood No. 2 defrauded the Tribe by promising to remove all conflicts of interests from its role as negotiator of the Tribe's operator contract, and by suggesting that it would obtain compensation for its services only from its separate contract with the Tribe. In March of 2003, Kenwood No. 2's conflicted role and inadequate performance caused the Tribe to question whether it should continue to work with Kenwood No. 2. CILS justifiably accused Kenwood No. 2 of engaging in "inherent conflict[s] of interest," and Sarris instructed CILS and Kenwood No. 2 to "get rid of [the] conflict[s] of interest." Ex. 494, pp. 1, 3. In response, Kenwood No. 2 agreed to get out of the development deal with Station (and lower its fees), and, in return, the Tribe agreed to execute the Consulting Agreement. RT 858:2-17; 3445:19-3447:22; 4234:22-4235:6; see also, Exs. 494, 658.

The parties removed Kenwood No. 2 from the management contract between the Tribe and Station so that Kenwood No. 2 would not be compensated by Station while simultaneously advising the Tribe regarding its relationship with Station. Nonetheless, the day after Kenwood No. 2 executed the Consulting Agreement with the Tribe, Kenwood No. 2 executed a side agreement with Station. In the Station/Kenwood No. 2 Agreement, Kenwood No. 2 stood to receive millions of dollars in additional compensation from Station, including lucrative pre-development fees similar to the fees Kenwood No. 2 sought under the RFP. Kenwood No. 2 also promised Station that it would assist in “maintaining” Station’s relationship with the Tribe, despite having promised the day before, under the Consulting Agreement, to provide *the Tribe* with advice and consultation on its casino project with Station. Thus, Kenwood No. 2 did nothing to address its conflicted role in the project other than to hide that conflict from the Tribe.¹⁸ By falsely promising to rid itself of its conflicted interests, Kenwood No. 2 fraudulently induced the Tribe to enter into the Consulting Agreement. It would be unfair to allow Kenwood No. 2 to obtain reimbursement for services it provided under a contract that it fraudulently induced.

There is also sufficient evidence to demonstrate that Kenwood No. 2 owed a fiduciary duty to the Tribe, and that Kenwood No. 2 breached this duty on numerous occasions. A fiduciary relationship is “any relation . . . between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party.” *Wolf v. Superior Court*, 107 Cal. App. 4th 25, 29 (2003). Fiduciary relationships “ordinarily arise[] where a confidence is

¹⁸ Kenwood No. 2 argues that the Tribe knew Kenwood No. 2 would separately contract with Station to transfer Kenwood No. 2’s option on the Highway 37 Site, and thus, Kenwood No. 2 disclosed its side agreement with Station to the Tribe. There is no evidence that Kenwood No. 2 informed the Tribe that it would receive over \$600,000 in profit from Station for the Highway 37 Site, nor is there any evidence that Kenwood No. 2 informed the Tribe that Station would also pay Kenwood No. 2 \$10 million in development fees and monthly consulting fees. Person C Testimony, June 8, 2017, 4318:11-22. Kenwood No. 2 claims that it asked Station to disclose the development fees and consulting fees to the Tribe, but there is no evidence that Kenwood No. 2 or Station did disclose this information to the Tribe. Id. 4326:21-25. To the contrary, the evidence indicates that Kenwood No. 2 intentionally kept information regarding the Station/Kenwood No. 2 Agreement secret from the Tribe. Ex. 490 Person B notation: “don’t tell Sarris: negotiation.”)

reposed by one person in the integrity of another.” *Id.* “[T]he party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter’s knowledge or consent.” *Id.* A “fiduciary relationship is a recognized legal relationship such as . . . principal and agent . . .” *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 271 (2003).

Kenwood No. 2 now denies that it owed the Tribe a fiduciary duty,¹⁹ but the **Company 1** Agreement clearly designates **Company 1** as the Tribe’s “exclusive agent.” Ex. 468, p. 3. Furthermore, **Kenwood No. 2** represented to potential operators that it was the Tribe’s “exclusive development partner” and “financial advisor,” and informed operators that **Kenwood No. 2** would evaluate the proposals and make the selection on behalf of the Tribe. Ex. 465, p. 2. **Kenwood No. 2** reiterated that it was the Tribe’s “financial advisor” in its correspondence with Mr. Rice. Ex. 486. Although the **Company 1** Agreement stated that **Company 1** owed “no fiduciary duty to [the Tribe] under the Agreement,” exculpatory provisions are disfavored and unenforceable as against public policy. “All contracts which have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” Cal. Civ. Code, § 1668. The rule applies “with added force when the exculpatory provision purports to immunize persons charged with a fiduciary duty from the consequences of betraying their trusts.” *Newbauer v. Goldfarb*, 108 Cal. App. 4th 47, 56 (2003)

¹⁹The **Kenwood No. 2** principals were, in fact, divided as to whether **Kenwood No. 2** was the Tribe’s fiduciary. **Person B** disclaimed any fiduciary relationship. RT 583:24-584:5. **Person C** admitted that **Kenwood No. 2** was obligated to act “in the best interests of [its] partners.” RT 4188:25-4189:9. However, **Person A**, the founder and principal owner of **Kenwood No. 2** admitted that **Kenwood No. 2** was the Tribe’s fiduciary. RT 4611:3-4613:5.

As the Tribe's agent, Kenwood No. 2 owed the Tribe a duty of loyalty.²⁰ Restat. 3d of Agency, §§8.01-15 (3rd 2006). Kenwood No. 2 breached this duty by failing to disclose to the Tribe that it had procured an option to purchase the Highway 37 Site, and thus was self-interested and conflicted when it advised the Tribe to select that site, as the "preferred location," for the casino. Kenwood No. 2 also breached that duty when it sold the option to Station for a significant profit (over 600%), because an agent may not use its authority or its principal's property to obtain a profit. See, Restat. 3d of Agency, §§8.01-15 (3rd 2006). Kenwood No. 2 breach its duty again when it delivered the RFP to potential operators without the Tribe's knowledge or consent, and when it drafted terms in the RFP that profited Kenwood No. 2 at the Tribe's expense. Kenwood No. 2 breached its duty yet again when it recommended that the Tribe select Station as the casino operator without first disclosing the contents of Harrah's March 7, 2003 letter, and again when it promised to abstain from its conflicted relationship with Station, and then secretly contracted with Station to maintain those conflicts. Indeed, Kenwood No. 2's relationship with the Tribe was likely conflicted from its inception, as Kenwood No. 2 apparently approached the Tribe with the intent of convincing the Tribe to open a casino so that Kenwood No. 2 could secure a percentage of the proceeds.

Kenwood No. 2's argument that many of these breaches were subsequently excused or ratified by the Tribe, even if correct, is irrelevant to Kenwood No. 2's claim for *quantum meruit*. Even if the Tribe was willing to overlook Kenwood No. 2's unethical behavior, the courts and these arbitrators will not. We simply will not grant equitable relief to a party that has behaved inequitably.

²⁰ Kenwood No. 2 also owed the Tribe a duty of care. Restat. 3d of Agency, §§8.01-15 (3rd 2006). Evidence that Kenwood No. 2 failed to adequately perform under the Consulting Agreement (discussed in § III.B.2 of this Award) also supports a conclusion that Kenwood No. 2 breached its duty of care.

2. *Unjust Enrichment*²¹

Recovery for “unjust enrichment” is based on the theory that “one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution . . . for . . . benefits received,” provided that restitution does not violate or frustrate the law or public policy. *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (2007) (citing *Dinosaur Development, Inc. v. White*, 216 Cal. App. 3d 1310, 1315 (1989)). Restitution is allowed only when one party receives a benefit and it would be unjust to allow that party to keep it. *First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1662-63 (1992). Thus, a party who provided services, but breached its fiduciary duties while doing so, may not obtain restitution against persons harmed by that breach. *Lauriedale Associates, Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (1992).

Kenwood No. 2’s claim for unjust enrichment fails because the evidence indicates that the Tribe was not unjustly enriched by Kenwood No. 2’s services. The Tribe was harmed rather than enriched by Kenwood No. 2’s performance under the Consulting Agreement. Kenwood No. 2’s advice and consultation regarding “business enterprises” caused the Tribe to lose the opportunity to negotiate a better management contract with either Harrah’s or Station. Kenwood No. 2’s advice and consultation regarding “real estate acquisitions” caused the Tribe to lose millions of dollars from the purchase of the Highway 37 Site. Kenwood No. 2’s advice and consultation regarding “federal and state government relations” nearly resulted in a redrafting of the Tribe’s Restoration Act, under which the Tribe could have lost its right to open a casino.

²¹As the Tribe points out, some courts have opined that “Unjust Enrichment” is not a cause of action, but a request for remedy. “‘Unjust Enrichment’ does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.” *Lauriedale Associates, Ltd. v. Wilson*, *supra*, 7 Cal. App. 4th at 1448.

Kenwood No. 2's claim for unjust enrichment also fails because granting restitution would frustrate the laws that protect fiduciary relationships and prohibit fraud. As noted above, Kenwood No. 2 breached both its duty of care and duty of loyalty to the Tribe, and Kenwood No. 2 fraudulently induced the Tribe to enter into the Consulting Agreement. A party that engages in fraud or breaches its fiduciary duties cannot avail itself of equitable relief, as it is against public policy to reward such behavior.

Kenwood No. 2's requests for *quantum meruit* and unjust enrichment are denied.

IV. Conclusion

1. Kenwood No. 2 shall recover nothing on its claims for breach of contract, *quantum meruit* and unjust enrichment.
2. This Interim Award does not decide the issue of entitlement, if any, to attorneys' fees or costs.
3. If the parties believe that outstanding issues remain unresolved, including the issue of entitlement to attorneys' fees or costs, the parties may notify the Panel of these issues by letter brief filed and served on or before January 26, 2018. Any response or opposition to a submission of unresolved claims or issues shall be submitted, by way of letter brief, on or before February 2, 2018.
4. If the Panel needs further briefing or oral argument on the issues raised it will notify the parties, otherwise the case will be submitted for final decision on all issues.

IT IS SO ORDERED.

DATED: January 17, 2018

A handwritten signature in black ink, appearing to read "William Cahill", written over a horizontal line.

Judge William Cahill (Ret.)

JAMS Arbitrator

A handwritten signature in blue ink, appearing to read "Read Ambler", written over a horizontal line.

Judge Read Ambler (Ret.)

JAMS Arbitrator

A handwritten signature in blue ink, appearing to read "Richard A. Kramer", written over a horizontal line.

Judge Richard A. Kramer (Ret.)

JAMS Arbitrator