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EL DORADO CO. SUPERIOR CT.

FILED MAR 12 2007

BY


Deputy

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF EL DORADO

9 SHARP IMAGE GAMING, INC., a
10 California corporation,

11 Plaintiff,

12 v.

13 SHINGLE SPRINGS BAND OF MIWOK
INDIANS; and DOES 1-50, inclusive,

14 Defendants.
15

CASE NO **PC 20070154**
COMPLAINT

16 INTRODUCTION

17 In and around 1996, Plaintiff Sharp Image Gaming, Inc. and Defendant Shingle Spring
18 Band of Miwok Indians (the "Tribe") entered into a series of contracts designed to allow the
19 Tribe to open a casino on its reservation near Shingle Springs, California. The casino plan was
20 intended to secure the Tribe a source of revenue so that it could provide its members with many
21 services, including healthcare, utilities, housing, and other benefits, that had previously been out
22 of the Tribe's and its members' reach. However, since the Tribe did not have the resources to
23 pursue a casino on its own, it joined forces with Sharp Image Gaming.

24 Sharp Image Gaming invested millions of dollars for casino construction and access
25 development, and advanced funds to cover myriad other needs of the Tribe and its members while
26 the casino project was in process. Sharp Image agreed to (and did) provide gaming machines
27 necessary for casino operation. In exchange, the Tribe agreed that after opening a casino (which
28 has yet to occur), it would pay back the advances and remit to Sharp Image Gaming a percentage

1 of the casino's revenues for a number of years.

2 Unfortunately, the efforts of Sharp Image and the Tribe did not bear immediate fruit.
3 More unfortunately, the Tribe then turned its back on Sharp Image.

4 For several years now, Sharp Image's regular attempts to communicate with the Tribe and
5 to ensure that the Tribe would live up to its promises upon opening the tribal casino have been
6 met with empty promises, followed by silence. Now, at last, the Tribe expects to open its casino
7 very soon. Accordingly, the Tribe's performance under its contracts with Sharp Image is finally
8 slated to begin. Unfortunately – and unlawfully – the Tribe continues to reject or ignore its
9 obligations to Sharp Image. The Tribe has therefore forced Sharp Image to bring this action to
10 ensure that the Tribe delivers on the promises it made in 1996 and 1997, when Sharp Image
11 invested in the Tribe's and its members' future.

12 Now, therefore, Plaintiff Sharp Image Gaming, Inc., a California corporation ("Plaintiff"),
13 alleges as follows:

14 **GENERAL ALLEGATIONS**

15 1. Plaintiff Sharp Image Gaming, Inc. is and at all relevant times has been a
16 California corporation, duly authorized to conduct business within the state and a corporation in
17 good standing.

18 2. Defendant Shingle Spring Band of Miwok Indians (the "Tribe" or "Defendant") is
19 an Indian Tribe. Its headquarters are at the Shingle Springs Rancheria in El Dorado County,
20 California. Defendant has expressly waived its sovereign immunity for purposes of this lawsuit
21 and has consented to the jurisdiction of the California courts.

22 3. Plaintiff does not know the true names and capacities of defendants sued in this
23 Complaint as Does 1 through 50, inclusive, and therefore sues those defendants by these fictitious
24 names. Plaintiff will amend this Complaint to allege their true names and capacities when
25 ascertained. Plaintiffs are informed and believe, and on that basis allege, that each of these
26 fictitiously named defendants is responsible in some manner for the breaches, acts, or omissions
27 alleged in this Complaint, and that Plaintiff's injuries were proximately caused by the breaches,
28 acts, or omissions of these defendants.

1 4. Plaintiff is informed and believes, and based thereon alleges, that at all relevant
2 times herein, each defendant, including the Doe defendants, was the agent, employee, or partner
3 of each of the other defendants, and was at all times acting within the purpose and scope of his,
4 her, or its agency, employment, or partnership.

5 5. On or about May 24, 1996, Plaintiff and Defendant entered into a contract known
6 as the Gaming Machine Agreement. The basic terms of the Gaming Machine Agreement were
7 substantially as follows:

- 8 a. Plaintiff agreed to lease to Defendant up to 400 gaming machines for
9 Defendant's casino.
- 10 b. Plaintiff agreed to advance funds necessary for and related to the
11 construction and opening of Defendant's casino.
- 12 c. Defendant agreed that Plaintiff would have the exclusive right to provide
13 gaming machines for Defendant's casino for the term of the agreement.
- 14 d. Defendant agreed to pay Plaintiff thirty percent of the net revenues derived
15 from the casino's operations for the term of the agreement.
- 16 e. Defendant agreed to repay all funds advanced by Plaintiff.
- 17 f. Defendant agreed to "waive[] any and all defenses to enforcement of this
18 Agreement on its sovereignty as an Indian nation."
- 19 g. The parties agreed that the contract was to be governed by and interpreted
20 under the laws of the State of California.
- 21 h. The term of the agreement was to begin upon installation of gaming
22 devices in the casino "for operation."

23 6. In or about October 1996, Defendant opened a casino facility at the Shingle
24 Springs Rancheria for a number of hours. Sharp Image provided the gaming devices that were
25 installed in the facility. However, due to access, health, and other issues, the facility closed
26 immediately. The gaming devices were therefore never in operation as contemplated by the
27 Gaming Machine Agreement.

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1 7. About a year after the unexpected closure of Defendant's casino, Plaintiff and
2 Defendant entered into a second agreement, on or about November 15, 1997, known as the
3 Equipment Lease Agreement. That agreement was intended to supersede the Gaming Machine
4 Agreement with respect to equipment leasing. The basic terms of the Equipment Lease
5 Agreement were substantially as follows:

- 6 a. Plaintiff agreed to lease to Defendant 400 gaming machines for
7 Defendant's casino.
- 8 b. Defendant agreed that Plaintiff would have the exclusive right to provide
9 gaming machines for Defendant's casino for the term of the agreement.
- 10 c. Defendant agreed to pay Plaintiff thirty percent of the net revenues derived
11 from the casino's operations for the term of the agreement, as well as
12 attorneys' fees and other costs and expenses incurred in collection of
13 payments under the agreement.
- 14 d. Defendant "expressly waive[d] its sovereign immunity from any suit,
15 action or proceeding to enforce [Defendant's] obligations under this
16 Lease," and "expressly consent[ed] to the exercise of jurisdiction by the
17 courts of the State of California"
- 18 e. Defendant expressly agreed that it would "not plead or raise as a defense
19 the requirement of exhaustion of tribal court remedies," and waived "any
20 claim or right to tribal court jurisdiction."
- 21 f. The parties agreed that the contract was to be governed by and interpreted
22 under the laws of the State of California.
- 23 g. The term of the agreement was to begin upon installation and operation of
24 gaming devices in any casino owned and operated by Defendant.

25 8. On or about November 15, 1997, Plaintiff and Defendant entered into a third
26 agreement known as the "Promissory Note." The basic terms of the Promissory Note were
27 substantially as follows:

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- a. Plaintiff promised to lend Defendant up to \$3,167,692.86.
- b. Interest at 10 percent per annum was to begin accruing at the time funds were first advanced under the note.
- c. Defendant was to begin payment of the principal and interest following the opening of Defendant's casino.
- d. Defendant agreed to waive its sovereign immunity and any defenses based on exhaustion of tribal remedies for purposes of enforcement of Plaintiff's rights under the Promissory Note.

9. Plaintiff and Defendant later orally agreed that further advances by Plaintiff would be handled consistent with the terms of the Promissory Note.

10. Plaintiff has performed all its obligations under the contracts, or was excused from performance by reason of Defendant's acts and omissions or otherwise.

11. Since entering into the agreements described above, Defendant has failed and refused to perform. Moreover, Defendant has acted inconsistently with the terms of the agreement. For example, Defendant has entered into an agreement with a third-party for purposes of leasing or purchasing gaming equipment for Defendant's casino, despite the exclusivity provisions in the contracts between Plaintiff and Defendant.

12. Although the time for Defendant's payment of monies under the contracts has not yet commenced, Defendant has unequivocally repudiated its obligations under the contracts. Moreover, Defendant has acted in a manner wholly inconsistent with its obligations under the contracts. In short, Defendant has anticipatorily breached its agreements with Plaintiff.

13. In or about August 2006, Plaintiff requested a meeting with Defendant for the purposes of conferring about Defendant's failure to meet its obligations under the contracts. Defendant failed to make itself available for resolution of the issues.

14. Based on the above allegations and those pled below, Defendant alleges the following claims together and in the alternative:

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FIRST CAUSE OF ACTION
(Breach of Contract)
(Against Shingle Springs Band of Miwok Indians and Does 1-50)

15. Plaintiff realleges and incorporates by reference each and every allegation of the paragraphs above.

16. The Gaming Machine Agreement is a valid and binding contract insofar as it addresses advances made by Plaintiff for expenses necessary for and related to the construction and opening of Defendant's casino, other than those addressed by the Promissory Note.

17. Since the parties entered into the Gaming Machine Agreement, Defendant has given notice that Defendant would not perform the contract and, by its acts and omissions, has demonstrated a complete repudiation of the agreement. Defendant's repudiation has not been retracted.

18. At all material times, Plaintiff had performed all of the conditions and things on its part to be done and performed, and/or was ready, able, and willing to perform those terms and conditions on its part to complete performance.

19. As a result of Defendant's breach of the contract, Plaintiff has suffered damages in an amount exceeding \$5 million, with the actual amount to be proven at trial.

SECOND CAUSE OF ACTION
(Breach of Contract)
(Against Shingle Springs Band of Miwok Indians and Does 1-50)

20. Plaintiff realleges and incorporates by reference each and every allegation of the paragraphs above.

21. The Equipment Lease Agreement is a valid and binding contract.

22. Since the parties entered into the Equipment Lease Agreement, Defendant has given notice that Defendant would not perform the contract and, by its acts and omissions, has demonstrated a complete repudiation of the agreement. Defendant's repudiation has not been retracted.

23. At all material times, Plaintiff had performed all of the conditions and things on its part to be done and performed, and/or was ready, able, and willing to perform those terms and conditions on its part to complete performance.

1 24. As a result of Defendant's breach of the contract, Plaintiff has suffered damages in
2 an amount to be proven at trial, but greatly exceeding \$100 million.

3 **THIRD CAUSE OF ACTION**
4 **(Breach of Contract)**
5 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

6 25. Plaintiff realleges and incorporates by reference each and every allegation of the
7 paragraphs above.

8 26. The Promissory Note is a valid and binding contract. The amounts advanced
9 thereunder are approximately \$3.2 million.

10 27. Since the parties entered into the Promissory Note, Defendant has given notice that
11 Defendant would not perform the contract and, by its acts and omissions, has demonstrated a
12 complete repudiation of the agreement. Defendant's repudiation has not been retracted.

13 28. At all material times, Plaintiff had performed all of the conditions and things on its
14 part to be done and performed, and/or was ready, able, and willing to perform those terms and
15 conditions on its part to complete performance.

16 29. As a result of Defendant's breach of the contract, Plaintiff has suffered damages in
17 an amount to be proven at trial, but exceeding \$3.2 million.

18 **FOURTH CAUSE OF ACTION**
19 **(Breach of Contract)**
20 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

21 30. Plaintiff realleges and incorporates by reference each and every allegation of the
22 paragraphs above.

23 31. Plaintiff and Defendant entered into a series of oral agreements under which
24 Plaintiff advanced funds to and for the benefit of Defendant, with such funds to be paid back
25 under the terms and conditions set forth in the Promissory Note. These agreements are valid and
26 binding contracts. The amounts advanced thereunder exceed \$5 million.

27 32. Since the parties entered into the oral contracts, Defendant has given notice that
28 Defendant would not perform its obligations under the contracts and, by its acts and omissions,
has demonstrated a complete repudiation of the agreements. Defendant's repudiation has not
been retracted.

1 33. At all material times, Plaintiff had performed all of the conditions and things on its
2 part to be done and performed, and/or was ready, able, and willing to perform those terms and
3 conditions on its part to complete performance.

4 34. As a result of Defendant's breach of the contracts, Plaintiff has suffered damages
5 in an amount to be proven at trial, but exceeding \$5 million.

6 **FIFTH CAUSE OF ACTION**
7 **(Breach of Covenant of Good Faith and Fair Dealing)**
8 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

9 35. Plaintiff realleges and incorporates by reference each and every allegation of the
10 paragraphs above.

11 36. Plaintiff and Defendant entered into the Gaming Machine Agreement, a contract;

12 37. Plaintiff did all, or substantially all of the significant things that the Gaming
13 Machine Agreement required it to do, or was excused from having to do those things;

14 38. All conditions required for Defendant's performance had occurred;

15 39. Defendant unfairly interfered with Plaintiff's right to receive the benefits of the
16 contract; and

17 40. By Defendant's actions, Plaintiff was harmed.

18 **SIXTH CAUSE OF ACTION**
19 **(Breach of Covenant of Good Faith and Fair Dealing)**
20 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

21 41. Plaintiff realleges and incorporates by reference each and every allegation of the
22 paragraphs above.

23 42. Plaintiff and Defendant entered into the Equipment Lease Agreement, a contract;

24 43. Plaintiff did all, or substantially all of the significant things that the Gaming
25 Machine Agreement required it to do, or was excused from having to do those things;

26 44. All conditions required for Defendant's performance had occurred;

27 45. Defendant unfairly interfered with Plaintiff's right to receive the benefits of the
28 contract; and

 46. By Defendant's actions, Plaintiff was harmed.

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1 **SEVENTH CAUSE OF ACTION**
2 **(Breach of Covenant of Good Faith and Fair Dealing)**
3 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

4 47. Plaintiff realleges and incorporates by reference each and every allegation of the
5 paragraphs above.

6 48. Plaintiff and Defendant entered into the Promissory Note, a contract;

7 49. Plaintiff did all, or substantially all of the significant things that the Promissory
8 Note required it to do, or was excused from having to do those things;

9 50. All conditions required for Defendant's performance had occurred;

10 51. Defendant unfairly interfered with Plaintiff's right to receive the benefits of the
11 contract; and

12 52. By Defendant's actions, Plaintiff was harmed.

13 **EIGHTH CAUSE OF ACTION**
14 **(Breach of Covenant of Good Faith and Fair Dealing)**
15 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

16 53. Plaintiff realleges and incorporates by reference each and every allegation of the
17 paragraphs above.

18 54. Plaintiff and Defendant entered into a series of oral contracts by which Plaintiff
19 advanced funds to Defendant that were to be paid in accordance with and otherwise subject to the
20 terms and conditions set forth in the Promissory Note, a contract;

21 55. Plaintiff did all, or substantially all of the significant things that the oral
22 agreements required it to do, or was excused from having to do those things;

23 56. All conditions required for Defendant's performance had occurred;

24 57. Defendant unfairly interfered with Plaintiff's right to receive the benefits of the
25 contract; and

26 58. By Defendant's actions, Plaintiff was harmed.

27 **NINTH CAUSE OF ACTION**
28 **(Restitution/Unjust Enrichment)**
(Against Shingle Springs Band of Miwok Indians and Does 1-50)

59. Plaintiff realleges and incorporates by reference each and every allegation of the
above paragraphs.

1 60. Defendant unilaterally and without justification terminated the agreement(s)
2 between the parties whereby Plaintiff advanced funds to Defendant and on Defendant's behalf.

3 61. Despite Plaintiff's demand that Defendant perform its obligations under the
4 agreement(s), Defendant has failed and refused, and continues to fail and refuse, to complete the
5 transaction between the parties and, in fact, has repudiated the agreement(s) between the parties.
6 Defendant's repudiation has not been retracted.

7 62. Defendant's failure and refusal to perform has damaged Plaintiff in an amount to
8 be proven at trial.

9 63. Plaintiff will suffer substantial harm and injury under the agreement(s) if they are
10 not rescinded in that as a result of Defendants' conduct, Plaintiff will be deprived of its bargain
11 and will receive nothing of value in exchange for the advances made to and on behalf of
12 Defendant.

13 64. Plaintiff intends service of the Summons and Complaint in this action to serve as
14 notice of rescission of the agreement(s) to advance funds and hereby demands that Defendant
15 restore to Plaintiff the consideration furnished by Plaintiff, specifically, the advances made by
16 Plaintiff to and on behalf of Defendant.

17 65. As a result of entering into the agreement(s) with Defendant, Plaintiff has incurred
18 expenses in addition to those alleged above. Plaintiff has incurred, and/or continues to incur,
19 such expenses in an amount unknown to Plaintiff at this time. Plaintiff requests leave of the
20 Court to amend this Complaint to insert the true amount of those expenses when they are
21 ascertained.

22 **ELEVENTH CAUSE OF ACTION**
23 **(Money Had and Received)**
24 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

25 66. Plaintiff realleges and incorporates by reference each and every allegation of the
26 above paragraphs.

27 67. Plaintiff transferred several million dollars to Defendant pursuant to its obligations
28 under the agreement(s).

 68. Defendant is obligated to repay the monies transferred to Plaintiff.

1 69. Defendant has made no payment to Plaintiff pursuant to the terms of their
2 agreement(s).

3 70. Defendant and Does 1 through 50 are now in possession of money received from
4 Plaintiff, which in equity and good conscience should be paid over to Plaintiff, in an amount to be
5 proven at trial.

6 **TWELFTH CAUSE OF ACTION**
7 **(Conversion)**
8 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

9 71. Plaintiff realleges and incorporates by reference each and every allegation of the
10 above paragraphs.

11 72. Plaintiff transferred several million dollars to Defendant.

12 73. Defendant is obligated to repay the monies transferred to Plaintiff.

13 74. Defendant has made no payment to Plaintiff pursuant to the terms of their
14 agreement(s).

15 75. Defendant and Does 1 through 50 have exercised dominion wrongfully over an
16 ascertainable amount of money rightfully belonging to Plaintiff. The precise amount, constituting
17 principal and interest, can and will be proven at trial.

18 **THIRTEENTH CAUSE OF ACTION**
19 **(Open Book Account)**
20 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

21 76. Plaintiff realleges and incorporates by reference each and every allegation of the
22 above paragraphs.

23 77. Plaintiff and defendant entered a series of financial transactions;

24 78. Plaintiff kept an account of the debits and credits involved in the transaction(s);

25 79. Defendant owes Plaintiff money on the account, in a sum of more than \$14
26 million, including principal and interest.

27 **FOURTEENTH CAUSE OF ACTION**
28 **(Declaratory Relief)**
29 **(Against Shingle Springs Band of Miwok Indians and Does 1-50)**

30 80. Plaintiff realleges and incorporates by reference each and every allegation of the
31 above paragraphs.

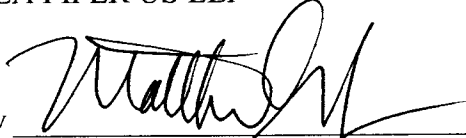
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4. For a declaration of the rights and duties of the parties to the contracts and any successors in interest or affiliated parties later named as Doe defendants; and

5. For such other and further relief as the Court may deem proper.

Dated: March 12, 2007

DLA PIPER US LLP

By 

MATTHEW G. JACOBS
Attorneys for Plaintiff
SHARP IMAGE GAMING, INC.,
a California corporation