No. F052648 KCSC No. CV253969

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

RINALDO CORPORATION
Appellant

vs.

NEVADA GOLD & CASINOS, INC.
Respondent

RESPONDENT'S BRIEF

From the Kern County Superior Court
Honorable Arthur E Wallace, Judge Presiding
Case No. CV 253969

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

Counsel of Record for defendant and respondent Nevada Gold & Casinos, Inc., hereby certifies pursuant to Rule 8.208 of the California Rules of Court the following information:

Clay County Holdings, Inc. is a holder of 10% or more of the outstanding shares of defendant and respondent Nevada Gold & Casinos, Inc. No other entity or person has an ownership interest of 10 percent or more in defendant and respondent Nevada Gold & Casinos, Inc. The following are a list of officers and directors of Nevada Gold & Casinos, Inc., listed for the Court's information under California Rule of Court 8.208(d)(2):

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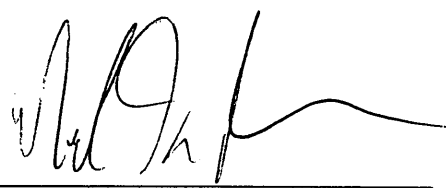
DATED: August 6, 2007

By 

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I. INTRODUCTION

This appeal presents the following issues:

- For a plaintiff to prove tortious interference with contract, California law requires that there be a valid contract. The contract which Plaintiff and Appellant Rinaldo Corporation ("Rinaldo") claims was interfered with by Defendant and Respondent Nevada Gold & Casinos, Inc. ("Nevada Gold") is invalid under Federal Indian Law. The Superior Court correctly held, on summary adjudication, that Rinaldo could not state a claim for tortious interference with contract as a matter of law.

- In order for a plaintiff to prove a claim for tortious interference with prospective economic advantage, California law requires that a defendant have committed (a) an independently illegal act that (b) proximately caused the actual disruption of an economic relationship with a third party. Here, the prospective economic relationship was a "Revised Development Agreement." Rinaldo and the Timbisha Shoshone Tribe (the "Tribe") negotiated this Revised Development Agreement but never executed it. Rinaldo presented no evidence that any independently illegal act by Nevada Gold proximately caused the Tribe to fail to execute the Revised Development Agreement. Nor did it present any evidence that any independently illegal act by Nevada Gold proximately caused the Tribe to terminate its relationship with Rinaldo. Thus, the Superior Court rightly concluded that Rinaldo had not presented evidence sufficient to raise a triable issue of fact on its claim for tortious interference with prospective economic advantage.

Should this Court uphold these rulings by the Superior Court? Nevada Gold respectfully submits that it must do so, and asks that the Superior Court's grant of summary judgment be affirmed.

II. SUMMARY OF ARGUMENT

This dispute arises from the attempts of the Timbisha Shoshone Tribe to develop a casino near Hesperia, California. Rinaldo brought this case based on Nevada Gold's alleged tortious interference with two supposed "relationships" that Rinaldo had with the Timbisha Shoshone Tribe to develop that casino. One of these relationships was contractual; the other was not. First, Rinaldo and the Tribe entered into a purported "Development Agreement and Ground Lease" (the "Development Agreement") in 2002. Later, however, federal regulators called into question the legal validity of the Development Agreement. Accordingly, Rinaldo and the Tribe negotiated a "Revised Development Agreement" designed to address those regulatory concerns. The Revised Development Agreement was approved by vote of the members of the Tribe in late 2004. However, the Tribe's governing body, the Tribal Council, which was required to execute the Revised Development Agreement as a condition of its effectiveness, never executed it. Eventually, the Tribe terminated entirely its economic relationship with Rinaldo in October 2005. To date, no casino has been built.

Fundamental to a cause of action for tortious interference with contract is the existence of a valid contract. *See, e.g., Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 514 & n. 5 (1994). A

cause of action for tortious interference with prospective economic advantage requires that the plaintiff have (a) a reasonable probability of continuing to do business with a third party that (b) was proximately interfered with by an independently illegal act (beyond the mere fact of interference) by the defendant. *See, e.g., Parlour Entrprs. v. Kirin Grp.*, 152 Cal. App. 4th 281, 294 (4th Dist. Jun. 19, 2007). Conceivably, Rinaldo could present its case to the jury if it could show that the 2002 Development Agreement was a valid contract with which Nevada Gold had interfered. Alternately, Rinaldo might be able to try its tortious interference with prospective economic advantage claim if it could put forth competent evidence to support a conclusion that it had (a) a reasonable probability that it would have developed a casino with the Tribe (apart from the void 2002 Development Agreement) and that (b) an independently illegal act of Nevada Gold's was the substantial cause of its failure to develop a casino with the Tribe. But Rinaldo can do neither.

A. Tortious Interference with Contract

Rinaldo's interference with contract claim fails because the 2002 Development Agreement is invalid as a matter of Federal Indian Law. Federal law, embodied at 25 U.S.C. § 81, has long required that contracts, such as Rinaldo's, that "encumber" tribal land for a period of more than seven years be approved by the United States Secretary of the Interior

before they can have any validity whatsoever. The 2002 Development Agreement was never approved by the Secretary of the Interior. Unless and until they obtain Secretarial approval, contracts subject to Section 81 are null, void, and of no effect. *See, e.g., United States of America Ex Rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 904 (9th Cir. 1994); *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 805 (7th Cir. 1993).

Rinaldo suggests that the Development Agreement does not fall within Section 81, either because it did not "encumber" Indian land or because the Tribe *intended* to modify the Development Agreement to shorten it for a period of less than seven years. But the contract itself, by its own terms, expressly encumbers Indian land and has a term of more than seven years. *See* Development Agreement § 14.8(B), Respondent's Appendix (hereinafter "RA") at 89, 90, 105, 109. Rinaldo also argues that, despite the plain language of 25 U.S.C. § 81, the Development Agreement did not require the Secretary of the Interior's approval to be valid. Yet this also ignores well-established Federal Indian Law, which has long held that agreements covered by Section 81 are void, illegal, and invalid if they have not been approved by the Secretary of the Interior. *See A.K. Management Company v. The San Manuel Bank of Mission Indians,* 789 F.2d 785, 789 (9th Cir.1986) ("it is logical to conclude that an

agreement without [Bureau of Indian Affairs] approval must be null and void in its entirety").

Indeed, the United States District Court for the Northern District of California ended any doubt about the validity of Rinaldo's legal argument in a case involving a nearly identical contract entered into with a different Indian Tribe by a company controlled by one of Rinaldo's principals. *See Guidiville Band of Pomo Indians v. NGV Gaming Ltd.*, No. C 04-3955-SC, 2005 WL 550301 (N.D. Cal. Oct. 19, 2005). Remarkably, Rinaldo cites to the *Guidiville* litigation in its own opening brief, without informing this Court that the Federal court in that case later reversed its position and held that a contract nearly identical to the Development Agreement was void *ab initio* and could not support a tortious interference with contract claim.

B. Tortious Interference with Prospective Economic Advantage

Second, Rinaldo argues that even if it cannot show the existence of a valid contract with which Nevada Gold interfered, it is still entitled to pursue a cause of action for tortious interference with prospective economic advantage. To do so, however, Rinaldo must show that that Nevada Gold performed some illegal act that caused the Tribe to terminate the actual economic relationship that existed between Rinaldo and the Tribe. The relevant economic relationship between Rinaldo and the Tribe is the "Revised Development Agreement," which Rinaldo negotiated and which

the Tribe's membership voted to approve in November 2004, but never executed.

Rinaldo's opening brief describes in some detail an intra-tribal dispute and actions taken by Nevada Gold in early 2004, before the Tribe's membership approved the Revised Development Agreement. Rinaldo uses this to suggest that Nevada Gold's actions prevented the execution of the Agreement. Yet Rinaldo's opening brief completely fails to explain to the Court that the inter-tribal dispute had been resolved in Rinaldo's favor by late 2004. The Tribe's decision to renounce the Rinaldo relationship and reject the Revised Development Agreement took place much later, in mid- to late-2005 – at a time when Nevada Gold had no contact with the existing Tribal Government. Rinaldo cannot present competent evidence that an independently illegal act by Nevada Gold affected the Tribal Council's decision to terminate the Rinaldo relationship in 2005, long after Nevada Gold's supposed meddling in tribal politics in 2004.

To the contrary, the Tribal Council expressly stated its rationale for terminating the relationship with Rinaldo at least twice – in a June 2005 letter and in Tribal Resolution 2005-3-7, issued in October 2005. RA 634-35 (June 2005 letter) & RA 637 (Resolution 2005-3-7). These documents mention misconduct by Rinaldo, and in particular a decision by Rinaldo to cut down the amount of land to be allocated to the casino. Although there

is considerable evidence of Rinaldo's misconduct, Rinaldo has proffered no evidence that links any specific act of Nevada Gold with the Tribe's 2005 decision to terminate the Rinaldo relationship, let alone any "illegal" action by Nevada Gold.

Rinaldo's only evidence in support of its tortious interference with prospective economic advantage claim is pure speculation. First, Rinaldo argues that Nevada Gold's actions in early 2004 caused "delay" in the casino project. But Rinaldo does not explain how delay that occurred *before* the Tribal membership approved the Revised Development Agreement with Rinaldo in November 2004 by an overwhelming margin could have affected the Tribal Council's decision to not proceed with that same Revised Development Agreement *much later*.

Second, Rinaldo argues that Nevada Gold, in early 2005, provided loans to fund litigation and other action by the so-called "Shoshone Council" – a group composed of former members of the Tribal Council. The members of the "Shoshone Council" were political opponents of the members of the Tribal Council that terminated the Rinaldo relationship. They attempted to challenge the legitimacy of the elected Tribal Council until their efforts were rejected by the Bureau of Indian Affairs in May 2005. Rinaldo does not explain why these loans to the Shoshone Council were illegal. Nor does Rinaldo provide any specific evidence as to why

and how Nevada Gold's loans to persons who were not on the Tribal Council affected the decision of persons who were on the Tribal Council to terminate the Rinaldo relationship. Rinaldo does suggest (based on a patently incorrect reading of a deposition question, as discussed below) that these loans and activity *may* have caused the tribal council members to fear "repercussions" if they entered into the contract with Rinaldo. Appellant's Opening Brief ("AOB") at 19-20. But Rinaldo never explains what, specifically, those repercussions would be or how they were caused by any specific illegal action of Nevada Gold's. At the same time, Rinaldo admits that its own decision to reduce the casino site's acreage from 57 to 35 acres to offset costs caused the Tribe to end its relationship with Rinaldo. AOB at 21.

Thus, Rinaldo's only evidence that Nevada Gold proximately caused the termination of the relationship with the Tribe boils down to pure speculation about the effect of loans, the illegality of which Rinaldo does not explain. These loans were provided to a different group of Tribesmembers who did not represent – and, indeed, opposed – the official tribal government. And they were combined with a decision by *Rinaldo* to make the terms of the casino project less advantageous to the Tribe. This evidence, such at is it is, does not suffice to raise a triable issue of fact as to

whether an illegal act by Nevada Gold proximately caused the termination of the Tribe's relationship with Rinaldo.

Finally, Rinaldo argues that the Superior Court erred in summarily adjudicating its claim for conspiracy. However, as Rinaldo admits, its claim for conspiracy is entirely dependent on its claims for tortious interference with contract and tortious interference with prospective economic advantage. Thus, since the Superior Court did not err in summarily adjudicating Rinaldo's interference claims, it also did not err in summarily adjudicating Rinaldo's conspiracy claim.

III. FACTUAL BACKGROUND

A. Development of the Tribe's Relationship with Rinaldo

The Timbisha Shoshone Tribe is a federally-recognized Indian tribe. RA 766. The "General Council" of the Tribe, which is composed of the entire adult membership of the Tribe, is the Tribe's governing body. RA 766. A waiver of the Tribe's sovereign immunity requires the approval (by vote) of the General Council. RA 766. For certain other enumerated activities, however, including the negotiation and execution of agreements on behalf of the Tribe, the General Council has constitutionally delegated authority to a "Tribal Council" that is elected by the General Council. RA 621 (2004 election resolution).

In 2002, Rinaldo commenced discussions with the Tribe to develop a tribal casino to be located in Hesperia, California. The idea was to persuade the federal government to take land in Hesperia into trust for the Tribe and for Rinaldo to develop a casino on that land. RA 767.

In November 2002, Rinaldo and the Tribe entered into a purported Development Agreement. RA 767. For its part, Rinaldo agreed to finance and oversee the construction of the Hesperia casino, but did not agree to manage the casino. RA 81-123, 767. The Secretary of the United States Department of the Interior has never approved the Development Agreement. RA 272.

B. Nevada Gold's Involvement with the Tribe

In early 2004, members of the Tribal Council approached Nevada Gold and other casino companies to begin discussions about the management (not the development) of the proposed casino. Members of the Tribal Council continued discussions with Nevada Gold and other casino companies in early 2004, and these discussions culminated in a signed Memorandum of Agreement (the "MOA") in July 2004 under which the Tribe and Nevada Gold agreed to negotiate towards a definitive contract to manage the casino. See Memorandum of Agreement, RA 585-591.

Meanwhile in April 2004, at the request of members of the Tribal Council, the general counsel of the federal agency charged with regulating

Indian Gaming, the National Indian Gaming Commission ("NIGC") issued a determination that the Agreement between Rinaldo and the Tribe was illegal because the excessive compensation it promised to Rinaldo gave Rinaldo an improper "proprietary interest" in the proposed Timbisha casino. RA 139-44.

C. The Tribal Council Splits into Two Factions

Nevada Gold began its business solicitation with members of the Tribal Council in the context of an intra-tribal dispute that was becoming increasingly heated. In July 2004, the Tribal Council split into two rival factions – one Council made up of four of the five existing Tribal Council-members and chaired by Dan Shoshone (the "Shoshone Council"), and a competing Council led by the fifth member, Shirley Summers (the "Summers Council"). Each faction claimed that the other had no authority and was an illegitimate Tribal Council. Appellant's Appendix in Lieu of Clerk's Transcript ("AA") at AA2672-AA2673 (Deposition of Eleanor Jackson at 17:10-24:1), RA 44-46.

After this Council split developed, Nevada Gold dealt exclusively with the Shoshone Council and its representatives, believing it to be the proper Tribal Council. RA 44-46, 768. Rinaldo, on the other hand, dealt exclusively with the Summers Council. RA 769. At the request of the Shoshone Council, Nevada Gold over the next several months loaned funds

to the Tribe to provide funds for tribal administrative expenses. RA 586-87. At the same time, Rinaldo Corporation loaned funds to the Tribe through the Summers Council. AA 2587-2589 (Deposition of Shirley Summers at 66:16-76:6).

D. The Tribe's General Council Meets in Las Vegas Begins Negotiations of a Revised Development Agreement with Rinaldo, and Calls for New Elections to the Tribal Council

In August 2004, the Summers Council called a meeting of the Tribe's General Council – that is, the Tribe's general membership -- in Las Vegas, Nevada. RA 772. During that meeting (the expenses for which were paid by Rinaldo), Rinaldo presented to the Tribe a Revised Development Agreement that it asked the Tribe to enter into. RA 773; AA 2532. The General Council approved the appointment of a negotiating committee to enter into a further revised contract with Rinaldo. RA 772-773.

In addition, at that same meeting, the General Council passed a resolution invalidating the MOA with Nevada Gold and all other actions taken by the Shoshone Council. RA 753; AA 2537. The General Council also called for new elections to the Tribal Council, to be held in November of 2004. RA 773; AA 3539.

In the early autumn of 2004, Rinaldo met with a negotiating committee appointed by the General Council, to negotiate changes to the

invalid 2002 Development Agreement. RA 725. These meetings generated another draft of a revised Development Agreement. Eventually, that draft of the revised Development Agreement between the Tribe and Rinaldo was submitted to members of the Tribe. By absentee ballot, the members of the Tribe overwhelmingly approved the revised Agreement with Rinaldo in October 2004, by a vote of 77 to 13. RA 725.

E. Rinaldo and its Allies Achieve Total Victory in the Intra-Tribal Dispute

As arranged at the August 2004, meeting of the General Council, new elections to the Tribal Council were held in November 2004, in which a new Tribal Council (the "Kennedy Council") was selected. RA 732, 774; AA 2595. No member of the Shoshone Council was a member of the new Kennedy Council. RA 732, 775.

In fact, far from having any direct influence on the members of the Kennedy Council, the Shoshone Council (with whom Nevada Gold had been dealing) contested the validity of the November 2004 elections and the August 2004 General Council meeting. RA 735, 776. In November 2004, the Shoshone Council attempted to call a separate meeting of the General Council of the Tribe. However, that meeting failed to attract enough members of the Tribe to constitute a quorum. No resolution taken at that meeting had any effect. RA 775. Later, in February 2005, the

Bureau of Indian Affairs preliminarily rejected the Shoshone Council's position that the August 2004 meeting and subsequent elections were procedurally improper. RA 772-775. Despite the failure of the November 2004 meeting, Nevada Gold continued to deal exclusively with the Shoshone Council, and had no contact whatsoever with the new Kennedy Council or any of its members. AA 2747.

F. Despite Rinaldo's Victory, the Kennedy Council Does Not Proceed with Rinaldo as a Developer

By the middle of 2005, then, the Tribe's membership had approved a revised development agreement with Rinaldo. The Shoshone Council (the political opponents of the Kennedy Council) was not involved in, and had no influence over, the Kennedy Council's decisions. In short, in spite of the tribal dispute in 2004, by early 2005 the Tribe was poised to enter into an agreement with Rinaldo. Nonetheless, the Kennedy Council never executed the Revised Development Agreement. RA 778. There is nothing in the record to suggest that it did not do so because of any action by Nevada Gold.

Rather, the record evidence (and Rinaldo's own concessions on appeal) indicates that the Kennedy Council's decision was prompted by new conditions imposed by Rinaldo. In a meeting held in June 2005, Rinaldo insisted on a new set of conditions for going forward with the

Revised Development Agreement. According to a letter sent that same day by the Kennedy Council, Rinaldo imposed a series of conditions on the Tribe before it would proceed with the casino project. These conditions included the following:

> 2. The Tribe must authorize Rinaldo to assign Rinaldo's rights under the Definitive Agreements to an entity controlled by Gary Fears and Kevin Flynn;
>
> 3. The Tribe must agree to roll the Development Agreement into a combined Development/Management Agreement subject to the approval of NIGC;
>
> 4. The Tribe must demand the ethnohistorical report from McClurken;
>
> 5. The Tribe must begin compact negotiations with the State of California;
>
> 6. The Tribe must agree to submit a fee to trust application for the Hesperia project for only thirty-five(35) acres of the site in Hesperia, with the understanding that Rinaldo would sell the remainder of the eighty-plus acre parcel at the Hesperia site to lessen its financial exposure, with the understanding that sixty-five (65) acres would be acquired by Rinaldo in the future in the Hesperia region to develop for housing for Tribal members.

RA 634-35. There is no evidence whatsoever that Nevada Gold had anything to do with either prompting Rinaldo to send the June 11 letter, or the Kennedy Council's rejection of Rinaldo's conditions. *Id.*

G. The Kennedy Council Terminates the Tribe's Relationship with Rinaldo

Ultimately, the Kennedy Council terminated the Tribe's relationship with Rinaldo completely. On October 11, 2005, the Kennedy Council adopted an official resolution (Tribal Council Resolution 2005-3-7), which states, in part, as follows:

> WHEREAS, The Tribal Council finds that it is in the best interests of the Tribe to terminate the Agreement based on Rinaldo's actions during the formation of the Agreements and Rinaldo's failure to perform in accordance with the terms of the Agreements.
>
> NOW, THEREFORE, BE IT RESOLVED, that the Tribal Council hereby approves the Termination of the Agreements with Rinaldo based on the information contained herein.

RA 637 (emphasis added). The Tribe sent a copy of the Resolution to Rinaldo, along with a letter stating that the Tribe was terminating the Development Agreement. Rinaldo's written response, dated October 20, 2005, claimed that the Development Agreement was in full force and effect and threatened to sue the Tribe, without mentioning Nevada Gold. RA 639.

H. Nevada Gold's Lack of Influence Over the Tribe's Government in 2005

There is absolutely no evidence in the record that suggests that Nevada Gold's actions had anything to do with the Tribal Council's decisions from the time the Kennedy Council took office in November

2004 until the adoption of Tribal Council Resolution 2005-3-7 in October 2005. AA 2747 (Deposition of Virginia Beck) (Q: Before the Tribe formally terminated its contract with Rinaldo, are you aware of any attempt by Nevada Gold to influence any member of the tribal council that you were on from December of 2004 from October of 2005? . . . A: No, I can only answer it no. They – I mean, we – no, Nevada Gold has not tried to influence this tribal council to my knowledge.")

Neither the resolution itself, nor any other document in the record, mentions Nevada Gold as a reason for the Tribe's decision to terminate its relationship with Rinaldo. Virginia Beck, who was a member of the Kennedy Council at the time Resolution 2005-3-7 was passed, testified as much.

> Q. Did Nevada Gold tell the tribal council to pass Resolution 2005-37?
> A. No.
> Q. Did Nevada Gold ask the tribe to pass Resolution 2005-37?
> A. No.
> Q. . . . . Did Nevada Gold offer any money to any member of the tribal council to pass Resolution 2005-37?
> A. Not to my knowledge.
> . . . .
> Q. Did -- did Nevada Gold threaten to cause any problems in any future tribal election if the tribal council didn't pass Resolution 2005-37?
> A. No.
> . . . . .

> Q. And at any time that you were in the tribal council, the tribal council had the power to execute the revised development agreement with Rinaldo; isn't that correct?
> A. Yes.
> Q. As far as you know, Nevada Gold had nothing whatsoever to do with Tribal Council Resolution 2005-37, did it?. . . .
> A. No.

See RA 617-618 (emphasis added). Instead, as Ms. Beck explained in her deposition, Rinaldo was the reason for the termination of the Rinaldo contract:

> Q. The tribe terminated it. Rinaldo didn't terminate the contract with the tribe?
> A. Correct. But Rinaldo was going hey, hey, hey. And they were less willing -- they thought the tribe was not – didn't want the deal either.
> Q. Well, here, the tribal council in a resolution that you signed said that it was found to be in the best interests of the tribe to terminate the agreement based on Rinaldo's actions during the formation of the agreements?
> A. The agreement, to our knowledge in the beginning, was 83 acres. They cut it down to 58 and then 35. We weren't willing to do that.
> . . . .
> Q: Do you have any reason to think that Nevada Gold forced Rinaldo to cut the acreage from 80 to 58 to 35?
> . . . .
> A: No.

See AA at AA2759.

Thus, while there is no evidence that Nevada Gold prompted Tribal Council Resolution 2005-37, there is considerable evidence that Rinaldo's decision to place only 35 acres into trust prompted the Tribe to terminate its relationship with Rinaldo.

Since the November 2005, election, the Kennedy Council has not sought to revive the Tribe's relationship with Rinaldo or to execute the Revised Development Agreement. Given the backgrounds of the principals of Rinaldo, it is no surprise that the Tribe opted not to continue its association with them.[1]

IV. PROCEEDINGS BELOW

Rinaldo filed its original complaint on October 18, 2004. On November 18, 2005, Nevada Gold filed a motion for summary judgment. On February 21, 2006, the Superior Court granted Nevada Gold's motion for summary adjudication as to Rinaldo's claims for tortious interference with contract and for damages for violations of the unfair competition law.

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[1] The two principals of Rinaldo, Kevin Flynn and Gary Fears, have been also been involved in other casino projects where they were sanctioned by regulators due to their backgrounds and business practices. Mr. Flynn has been involved in two non-Indian casino projects, the Emerald Casino and the Blue Chip casino. In 2005, the Illinois State Gaming Board revoked Mr. Flynn's license to operate the Emerald Casino after it found that Mr. Flynn had, among other things, (1) failed to disclose his associations with individuals connected with organized crime and (2) "flat-out lied" to the Commission. RA 741-752. As for the Blue Chip casino, the Indiana Gaming Commission found that its operator had wrongly failed to disclose a consulting arrangement with Mr. Flynn, for which the operator paid a "significant" fine. *Id.*. Mr. Fears was a principal in another company, discussed below, that attempted to develop a casino with the Guidiville Band of Pomo Indians. RA 131-32. That proposed casino was rejected by that Tribe, and the development agreement found invalid by a federal court. *Id.*

In so doing, the trial court held that "Defendant has produced sufficient evidence to establish that the "contract" plaintiff claims defendant tortiously interfered with was not valid. Plaintiff has failed to raise a triable issue of fact on that issue." RA 333-34.

Throughout discovery, the Timbisha Shoshone Tribe asserted that tribal sovereign immunity prevented its members from being required to give deposition testimony. RA 356, 493. After a series of motions, Nevada Gold was eventually able to obtain the depositions of three tribesmembers -- including important testimony of Virginia Beck cited in the preceding section -- immediately before the trial date, then set for May 22, 2006. After the Court continued the May 22, 2006, trial date on its own motion, Nevada Gold sought a continuance to file a second summary judgment motion based on the testimony it had obtained from Ms. Beck and others, that conclusively established that there was no triable cause of action on Rinaldo's tortious interference with prospective economic advantage claim. RA 335-357. The trial court granted Nevada Gold's motion on August 7, 2006, and Nevada Gold then filed a second motion for summary judgment and summary adjudication on August 22, 2006. RA 507, 509.

The Superior Court granted Nevada Gold's second summary judgment motion, finding that Rinaldo had failed to put forward evidence sufficient to raise a triable issue of fact on its causes of action for tortious

interference with prospective economic advantage, unfair competition, and conspiracy. RA 871-73. Rinaldo filed a notice of appeal on April 3, 2007, and now challenges the trial court's summary judgment and its summary adjudication of its claims for tortious interference with contract, tortious interference with prospective economic relation, and conspiracy. [2]

V. ARGUMENT

A. Rinaldo's Claim for Tortious Interference with Contract Fails Because the Only Contract at Issue – the 2003 Development Agreement – Is Void Under Federal Indian Law

To prevail on its tortious interference with contract claim, Rinaldo must be able to prove the following by competent evidence:

> (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the

[2] Before the Superior Court, Rinaldo also brought claims against Nevada Gold in its complaint for unfair competition under Business & Professions Code § 17200 (for injunctive relief and damages). RA 1, 15-16. These claims are mentioned nowhere in Rinaldo's Opening Brief. Rinaldo appears to concede that the Superior Court did not err in summarily adjudicating these claims in favor of Nevada Gold. Rinaldo cannot assert a claim under Business & Professions Code § 17200 for restitution, because there is no showing that Nevada Gold profited in any way from its dealings with the Tribe. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003). Nor can Rinaldo assert a claim under § 17200 for injunctive relief, because Nevada Gold has no ongoing relation with the Tribe and there is nothing to enjoin. If Rinaldo makes any argument concerning these claims in its reply brief, Nevada Gold asks that the Court permit further briefing concerning these claims.

> contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

Pacific Gas & Electric v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990) (emphasis added). Here, Rinaldo has asserted only one contract as the basis for its claim – the 2002 Development Agreement. However, the 2002 Development Agreement is plainly invalid.

1. The 2002 Development Agreement is Invalid Under 25 U.S.C. § 81

Title 25 U.S.C. § 81 provides that "[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary."[3] Unless and until they obtain Secretarial approval, contracts subject to Section 81 are "null," "void," and "of no effect." See *United States of America Ex Rel. Morongo*

[3]The genesis of 25 U.S.C. § 81 relates back to the arrival of Europeans to lands that are now part of the United States. At that time, fee title to the land occupied by Indians became "vested in the sovereign," but a "right of occupancy" in favor of the tribes was recognized. *Oneida Indian Nation of New York v. County of Oneida, New York*, 414 U.S. 661, 666, 94 S. Ct. 772, 777, 39 L. Ed. 2d 73, 79 (1974). This right was referred to as "Indian Title" and was viewed as "good" against all but the federal government. *Id.* This beneficiary-type relationship evolved into "the historic trust relationship between Indian tribes and the federal government, originally described as 'resembling that of a ward to his guardian.'" *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 546 (1st Cir. 1997). "Congress 'intended § 81 to protect the Indians from improvident and unconscionable contracts.'" *Id.* at 547.

Band of Mission Indians v. Rose, 34 F.3d 901, 904 (9th Cir. 1994); *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 805 (7th Cir. 1993). A contract that is void at the time the supposed interference was caused simply cannot support a claim for tortious interference with contract, regardless of any intent. . *See A-Mark Coin Co. v. Gen. Mills, Inc.*, 148 Cal.App.3d 312, 322 (1983) (interference with contract claim cannot be premised on a void contract).

Here, the Development Agreement is subject to Section 81, and it is undisputed that it never received Secretarial approval. RA 272. Accordingly, the Development Agreement is a nullity, and Rinaldo's tortious interference claim is fatally defective.

a. Both the Secretary of the Interior and the United States District Court for the Northern District of California Have Already Found Identical Agreements To Be Subject to 25 U.S.C. § 81 and Void

The United States District Court for the Northern District of California has already determined that a related development agreement for a different tribe – that is almost identical to the Development Agreement at issue here – was void for failure to obtain Interior Department approval under 25 U.S.C. § 81. *Guidiville Band of Pomo Indians*, RA 133-136. On that basis, the court dismissed a similar claim for tortious interference with

contract. *See Id.* Although this ruling by the Northern District of California is not binding on this Court, the Federal Court's interpretation of Federal Indian Law is entitled to great deference. *See, e.g., Flynt v. Cal. Gaming Control Comm'n*, 104 Cal. App. 4th 1125, 1132 (2002) ("Lower federal court decisions on federal questions, while not binding, are persuasive and entitled to great weight in state court.").

In July 2002, FEGV -- another entity controlled by Rinaldo's President, Gary Fears -- entered into a "Development Agreement and Personal Property Lease" with the Guidiville Indian Rancheria Tribe for the development of a casino on Guidiville tribal lands. *See* Guidiville Development Agreement, RA 146-183. The Guidiville Development Agreement is substantially identical to the Development Agreement at issue here, down to the fonts, headings, and section numbers. *Compare* RA 146-183 *with* RA 81-123.

Just like the Timbisha Tribe, the Guidiville Tribe became disenchanted with its developer and the development agreement. *Guidiville Band of Pomo Indians*, RA 131-32. After the Guidiville Tribe declared the agreement to be null and void, NGV (as Rinaldo did here) promptly filed suit against the companies it claimed had interfered in its contractual relations with the Guidiville Tribe. *Id.*

Meanwhile, the Guidiville Tribe asked the Secretary of the Interior, through the Bureau of Indian Affairs ("BIA") to review the Guidiville Development Agreement and determine whether the agreement was subject to 25 U.S.C. § 81. By letter dated April 13, 2005, the Deputy Assistant Secretary of the Interior responded that the agreement did, in fact, encumber Indian lands and that Secretarial approval was required pursuant to Section 81. *See* April 2005 Department of the Interior Letter, RA 185-86. In making this determination, the Department noted:

> The agreements affirmatively require the Tribe to refrain from selling or disposing of any part of an interest the Tribe has in Indian land so long as the agreements remain in effect. This restriction on alienation is sufficient to constitute an "encumbrance" on Indian land . . . Preventing the Tribe from alienating interests in its own land without first securing the approval of the Developer grants the Developer "exclusive or nearly exclusive proprietary control over tribal land" . . . Since these agreements fall within the scope of Section 81, it is us [sic] determination that they are invalid as a matter of law until such a time as they obtain Secretarial approval.

See id. (emphasis added).

Despite the Department's determination, NGV continued to press its tortious interference lawsuit regarding the Guidiville Development Agreement. In a preliminary decision on a motion to dismiss – the decision

cited by Rinaldo – the Federal Court declined to dismiss NGV's case. *NGV Gaming v. Upstream Point Molate, L.L.C.*, 355 F.Supp.2d 1061 (N.D. Cal. 2005). However, the Guidiville Tribe then brought a declaratory judgment action and filed a motion for summary judgment contending that the Guidiville Development Agreement was void as a matter of law for failure to obtain approval of the Secretary of the Interior. On October 19, 2005, the Federal Court agreed, granting the Guidiville Tribe's motion for summary judgment and dismissing NGV's tortious interference claim. *See Guidiville Band of Pomo Indians*, RA 132-36

In determining that the Guidiville Development Agreement was invalid and could not support a claim for tortious interference with contract, the Federal Court considered precisely the same arguments that Rinaldo is making to this Court. The Federal Court squarely held that the Guidiville Development Agreement encumbered Indian lands and was invalid and void under Section 81. RA 136.

Nonetheless, despite the conclusions of the Department of the Interior and a Federal Court, Rinaldo argues that Section 81 does not prevent it from bringing a claim for tortious interference with contract because (a) the Development Agreement did not "encumber" Indian Land; (b) that Rinaldo and the Tribe *intended* to modify (but did not actually modify) the terms of the Development Agreement so that it would have a

term of less than seven years, and (c) that, despite, the plain language of Section 81, the fact that the Development Agreement had not yet been approved by the Secretary of the Interior does not mean that it was not a valid contract. AOB at 23-26. Rinaldo is wrong on all counts.

b. The Development Agreement "Encumbers" Indian Lands

25 CFR § 84.002 defines "encumber" in the context of Section 81 to mean "to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land." *Id.*

There can be little doubt that the Development Agreement gave Rinaldo exclusive or near-exclusive proprietary control over the Tribe's land. The Development Agreement contains the following language:

> Tribe hereby covenants and agrees to and with Developer that, so long as there is Base Rent payable hereunder, or Tribe's other obligations hereunder . . . Tribe will not, except with the prior written consent of Developer . . . Sell, dispose of, lease, assign, sublet, transfer, mortgage or encumber all or any part of its right, title, or interest in or to the Trust Lands, the Facility, or the Equipment.

See Development Agreement, § 14.8(B), RA 105. As this provision makes clear, the Development Agreement prevented the Timbisha Shoshone Tribe from disposing of the gaming facility's lands without the Rinaldo's consent – thus substantially "encumbering" the land.

As discussed below, this language is almost identical to language that the Court in the *Guidiville* case found sufficient to indicate that the agreement at issue in that case encumbered tribal land. *See Guidiville Band of Pomo Indians*, RA 133-136; Guidiville Development Agreement, RA 171, at Section 14.9(B).; April 2005 Department of the Interior Letter, RA 185. Moreover, the Development Agreement (like the Guidiville agreement) contains numerous additional provisions that encumber the Tribe's activities relating to Tribal lands:

> (1) Section 14.8(B) - The Tribe will not "[s]ell, dispose of, lease, assign, sublet, transfer, mortgage or encumber all or any part of its right, title, or interest in or to the Trust Lands, the Facility, or the Equipment."
>
> (2) Section 4.9 - Rinaldo "shall have complete and unrestricted access to the Trust Lands for the purposes of developing, installing and constructing" the casino and installing the equipment.
>
> (3) Section 7.1 - Rinaldo "is the sole and exclusive owner of the Structure and Equipment" and that, until the expiration of the Lease Term, the Tribe "has only the right to

possession and use as provided for in this Lease."

(4) Section 15.2 - Upon the occurrence of an Event of Default, Rinaldo may "repossess the Structure or the Equipment without legal process free of all rights of the Tribe in and to such Structure or Equipment. The Tribe authorizes Developer or its agent to enter upon the premises of the Trust Lands or any other real property within the Tribe's jurisdiction where the Structure or Equipment is located and repossess and remove such Structure or Equipment."

(5) Section 7.3 - "The rights of the Tribe under this Lease shall be subject and subordinate to certain security interests in the Structure and Equipment that may be granted by the Developer . . .," allowing Rinaldo to encumber the gaming facility on Tribal lands with security interests superior to the Tribe's interests.

(6) Recital G - Incorporates a Ground Lease pursuant to which the Tribe leases the "Trust Lands" on which the casino is developed to Rinaldo.

(7) Section 14.8(G) - "Without the prior written consent of Developer, which consent shall be within the sole and absolute discretion of Developer, the Tribe shall neither establish or conduct, nor license or permit the establishment or conduct of Gaming on the Trust Lands or within San Bernardino County, California, except for Gaming contemplated by and performed in accordance with the terms of this Lease."

See Development Agreement, RA 81, 89, 91, 105, 106, 108

Rinaldo may also attempt in its reply brief to suggest that the Development Agreement did not "encumber" Indian Land because the land for the casino site had not yet been taken into trust by the Tribe at the time the Development Agreement was executed. If the Court were to consider this argument (which it should not do, because Rinaldo has not made it clearly in its opening brief), it should squarely reject it.

The relevant question is whether the Development Agreement itself encumbers Indian Land. The fact that at the time of the execution of the Development Agreement the Tribe had not yet acquired the land that would be governed by the Development Agreement is irrelevant to the contractual question of whether the Development Agreement itself encumbers Indian Land.

The entire Development Agreement is predicated on the Tribe's acquisition of Trust Lands and the operation of a casino on those lands. As Recital B of the Development Agreement provides, "[t]he Tribe intends to develop and operate, pursuant to and in accordance with the terms and provisions of IGRA [i.e., the Indian Gaming Regulatory Act], a gaming facility on a parcel or parcels of real property that the United States accepts into trust status for the Tribe (the 'Trust Lands')." The entire remainder of the Development Agreement is devoted to establishing the terms for the development of a casino on these "Trust Lands." RA 81.

Whether or not the Tribe had taken possession of specific Trust Lands does not alter the fact that the Development Agreement seeks to encumber them. Indeed, IGRA requires that Indian gaming can only be conducted on "Indian Lands." *See* 25 U.S.C. §2703(4). If Rinaldo disputes the applicability of Section 81 because no "Indian Lands" yet exist, then it must likewise concede that the Agreement is an unenforceable impossibility until the acquisition of such lands.

c. The Development Agreement Encumbers Indian Lands for More Than Seven Years

Rinaldo also disputes that the Development Agreement constitutes an encumbrance of Indian lands for seven or more years, as required for application of Section 81. Yet the Development Agreement's language could not be more clear: it has a term of more than seven years. The Development Agreement provides in Section 5.1 that "the term of this Lease shall commence upon its execution by the Parties and shall continue thereafter until the tenth anniversary of the date upon which the total Base Rent is paid in full." RA 89-90. The Base Rent, as set forth in Section 6.1 of the Development Agreement is to be paid over a 60-month period. RA 90. In other words, the Development Agreement covers a five-year Base Rent period, followed by an additional 10-year Lease Term, for a total of 15 years. Lest there be any doubt, Rinaldo's corporate representative,

Gary Fears, acknowledged that the term of the Development Agreement was at least ten years from the completion of the base rent payments. *See* RA 193, Fears Dep. at 160:1-13.

Rinaldo claims that it "intended" to modify the language of the Development Agreement to change the Agreement's term. AOB at 23. But hoping to have a valid contract is different than actually having a valid contract. That fact that Rinaldo hoped to modify the Development Agreement to make it a valid agreement can not mean that it somehow was a valid agreement *without* such modification. Rinaldo cites no cases to support the notion that a tortuous interference with contract case can be made out for a contract that the parties "hope" to execute. Rinaldo also suggests, bizarrely, that somehow the Agreement "would not have been" for a period of more than seven years absent interference by Nevada Gold. But the express language of the Development Agreement clearly states that the relevant lease shall continue for a 15 year period – that is, until the "tenth anniversary" of the date of completion of the 5 year base rent period, and Rinaldo's own principal testified as much. Thus, there can be no legitimate dispute that the Development Agreement encumbered tribal lands for more than seven years.

d. The Development Agreement Was Void *Ab Initio*, and Could Never Have Supported a Claim for Tortious Interference with Contract

Finally, Rinaldo suggests that the approval by the Secretary of the Interior under Section 81 was a mere condition precedent to the performance of the contract that did not necessarily render the contract invalid. However, Section 81 explicitly states that "*[n]o agreement or contract* with an Indian tribe that encumbers Indian lands for a period of 7 or more years *shall be valid* unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary." 25 U.S.C. 81 (emphasis added). The Federal Courts have long held that Section 81 creates a presumption that a contract governed by its provisions is void and invalid in its entirety – in short, a legal nullity – until the Secretary of the Interior has actually approved the contract. As the Ninth Circuit has explained:

> [I]t is doubtful that general contract principles apply to an agreement subject to 25 U.S.C. § 81 (1982). Section 81 explicitly provides that a contract is "null and void" without written approval from the BIA. Therefore it is logical to conclude that an agreement without BIA approval must be null and void in its entirety. No part of it may be enforced or relied upon unless and until BIA approval is given. BIA approval is an absolute prerequisite to the enforceability of the contract. To give piecemeal effect to a contract as urged by AK, would hobble the statute. The plain words of section 81 simply render this contract void in the absence of BIA

> approval. Since it is void, it cannot be relied upon to give rise to *any* obligation.

A.K. Management Company v. The San Manuel Band of Mission Indians, 789 F.2d 785, 789 (9th Cir.1986); *see also Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement,* Inc., 840 F.2d 1394, 1405 (9th Cir. 1987) (contract subject to Section 81 but not approved by the Secretary of the Interior void *ab initio*). In *Bailey v. Banister*, 200 F.2d 683, 685 (10th Cir. 1952), the Tenth Circuit considered a case for tortious interference with contract was brought on the basis of a contract not yet approved by the Secretary of the Interior that required approval. The Tenth Circuit held that "Until the sale was approved, the plaintiff had acquired no legal right . . ., and the defendants or anyone else had the right to compete with the plaintiff for the purchase of the land regardless of their motives. [Citations.] ... [¶] The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a valid enforceable contract."

A.K. Management Company dealt with a prior version of Section 81, which stated that contracts "relating" to Indian land "null and void" without BIA approval. 25 U.S.C. § 81 (1982). Section 81 was amended in 2000 to its current version, which states that no contract that encumbers Indian land for more than seven years "shall be valid" unless approved by

the Secretary of the Interior. However, there is no evidence whatsoever that in the 2000 amendment of the statute Congress intended to alter the basic principle of Section 81 that a contract is a legal nullity until and until approved by the Secretary of the Interior. To the contrary, the governing regulation makes absolutely certain that a contract subject to Section 81 is not valid, as a matter of law, until the Secretary of the Interior approves it.[4]

Despite this clear statutory and regulatory directive, however, Rinaldo insists that the Section 81 requirement for approval of the Secretary of the Interior was akin to a mere "condition precedent" that made a contract hinge on "regulatory approval." It cites to *SCEcorp v. Superior Court*, 3 Cal.App.4th 673, 679 (1992). In that case, a merger agreement between two utility companies contained explicit language that made the regulatory approval of certain state and federal agencies of the merger a condition precedent to the enforcement of the contract. But *SCEcorp* is completely distinguishable. A condition precedent is a condition to the enforceability of the contract. Here, the failure of the

[4] *See* 25 CFR 84.007 (2007) ("What is the status of a contract or agreement that requires Secretarial approval under this part but has not yet been approved? A contract or agreement that requires Secretarial approval under this part *is not valid until the Secretary approves it.*") (emphasis added).

contract to win the approval of the Secretary of the Interior meant that the entire contract was illegal and void under Section 81.

In fact, *SCEcorp* itself distinguishes between contracts subject to a condition precedent and invalid contracts. *SCEcorp* cites to *A-Mark Coin Co. v. General Mills, Inc.*,148 Cal.App.3d 312 , 321(1983), which held that a tortious interference with contract claim could not go forward where a contract had been declared void *ab initio*. In distinguishing *A-Mark,* the *SCEcorp* Court distinguished that situation where a contract is invalid without regulatory approval from one where there is merely a condition precedent requiring regulatory approval for a contract to be enforced. *SCEcorp*, 3 Cal. App. 4th at 679. Thus, *SCEcorp* actually supports Nevada Gold, not Rinaldo.

The other case cited by Rinaldo for the principal that Section 81 did not render the Development Agreement invalid is *NGV Gaming v. Upstream Point Molate, L.L.C.*, 355 F.Supp.2d 1061 (N.D. Cal. 2005). However, the decision in this case was nothing more than a preliminary determination in the Guidiville case, that was later reversed by the Northern District of California for the reasons discussed above. *Guidiville Band of Pomo Indians*, RA 133-136. Rinaldo's reliance on the discredited *NGV Gaming* case demonstrates the weakness of its position.

2. The Development Agreement Is Also Illegal And Void Because It Gives Rinaldo A Proprietary Interest in the Tribe's Gaming Operation.

In addition to its invalidity under 25 U.S.C. § 81, the Development Agreement is also invalid for a separate and independent reason – because it gives Rinaldo a "proprietary interest" in the Tribe's gaming operation, in violation of the Indian Gaming Regulatory Act. Indeed, the federal government has already come to this same conclusion.

a. The NIGC Has Concluded That the Development Agreement Violates the Indian Gaming Regulatory Act

In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). The IGRA established a comprehensive system for regulating gambling activities on Indian lands, and Congress set up the National Indian Gaming Commission ("NIGC") to implement and enforce the IGRA. Among the primary purposes addressed in the IGRA are shielding Indian tribes from organized crime and other corrupting influences and ensuring that the Indian tribe is the primary beneficiary of the gaming operation. 25 U.S.C. § 2702(2). The Chairman of the NIGC will not approve any tribal gaming ordinance that does not contain a provision requiring that the Indian tribe have the "sole proprietary interest" in the gaming activity. 25 U.S.C. § 2710(b)(2)(A); 25 C.F.R. §522.4(b)(1).

In April 2004, the Tribe submitted the Development Agreement and related documents to the NIGC for a determination as to whether the Development Agreement constituted a "management" contract subject to NIGC approval pursuant to 25 U.S.C. § 2711. By letter dated April 22, 2004, the NIGC concluded that the Development Agreement was not a management contract subject to NIGC approval. *See* April 22, 2004 Letter ("NIGC Letter"), RA 139-144. In conjunction with its review, however, the NIGC also analyzed the transaction to determine whether it complied with the other provisions of the IGRA. In so doing, the NIGC concluded that the Development Agreement violated the IGRA because it provided Rinaldo with a "proprietary interest" in the Tribe's gaming operation, rendering the Development Agreement illegal. This determination further supports the dismissal of Rinaldo's claim for tortious interference with contract.

b. The NIGC Relied On Proper Interpretive Principles In Concluding That The Development Agreement Gave Rinaldo a Proprietary Interest In the Tribe's Gaming Operation

Correctly noting that there are no cases defining "proprietary interest" in the context of Indian gaming operations, the NIGC in its April letter utilized legal dictionaries, case law interpreting the phrase in other

contexts, and secondary sources in interpreting the IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operation. *See* NIGC Letter at 2-3, RA140-141. In so doing, the NIGC emphasized the distinction between compensation for services, on the one hand, and a proprietary interest, on the other, in the context of a joint venture:

> Where a contract provides for the payment of a share of the profits of an enterprise, in consideration of services rendered in connection with it, the question is whether it is merely as a measure of compensation for such services or whether the agreement extends beyond that and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits themselves.

Id. at 3-4, RA 141-42 (emphasis in original).

Applying these principles to the Development Agreement between the Tribe and Rinaldo, the NIGC noted that the Development Agreement requires that the Tribe repay all monies expended by the Developer plus interest in the first five years. The NIGC further observed that, even after the Tribe paid back Rinaldo all of the funds Rinaldo had invested plus interest, the Tribe still must pay Rinaldo 18% of its gross revenues for the next 10 years. *Id.*, RA 142-43 Based on the NIGC's experience with California tribal casinos, 18% of gross revenues equates to more than 50% of net revenues. *Id.* Thus, concluded the NIGC, "[a]lthough the 18%

payment is called an 'Incentive Rent' payment, this label mischaracterizes what is really a profit-sharing arrangement . . . This large share of the net revenues indicates an ownership interest in the profits." *Id.* at 4, RA 142.

The NIGC also expressed its "grave concern" over the fact that the Tribe does not even obtain title to the gaming facility, notwithstanding payment of all development costs plus interest. Instead, the Tribe must wait until it has paid Rinaldo 18% of gross revenues for an additional ten years before gaining title to the structure: "The Developer is not merely sharing in the profits of the gaming operation but rather receiving the lion's share of the profits as well as maintaining control over the use of the facility." *Id.* at 5, RA 143 (emphasis added).

Finally, the NIGC analyzed the risk surrounding the transaction. The NIGC first observed the Tribe is federally recognized and, as a result, the Secretary may be required to take land into trust for gaming purposes. In this regard, the NIGC stated that the casino's planned location — as contemplated by the Development Agreement — in the urban area of the City of Hesperia "provides great assurance that the operation will be successful." Ultimately, the NIGC determined that the risk of the project to Rinaldo — in comparison to other California tribal gaming projects — was "minimal" and not commensurate with the financial benefits to Rinaldo under the Agreement. *Id.* at 6, RA at 144.

Considering all these factors, the NIGC concluded:

> The Agreements enable the Developer to collect large amounts of money, over a potentially lengthy period of time, for doing nothing – performing no ongoing services for the Tribe, and, once the original costs of building, equipping and financing are paid, giving the Tribe nothing in return. The level of compensation extends far beyond what is reasonable for the services provided. In this case, the Developer would be receiving a greater percentage of the net revenues than is allowed for a management contractor who would be providing ongoing services.

Id., RA 144. Given the large percentage of the Tribe's profits that are to be paid to Rinaldo in relation to Rinaldo's obligations to the Tribe, the NIGC correctly concluded that the Development Agreement grants Rinaldo an illegal proprietary interest in the Tribe's gaming operation.

The NIGC's determination was correct. The IGRA unequivocally provides that those purposes include "promoting tribal economic development, self-sufficiency and strong tribal governments" through tribal government-sponsored gaming and "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. §2702(1), (2) (emphasis added).

With these purposes in mind, the conclusion that the Development Agreement violates the IGRA's "sole proprietary interest" requirement

becomes obvious. Long after the Tribe repays to Rinaldo all of the funds expended to develop the gaming operation, plus interest, the Development Agreement further requires the Tribe to pay Rinaldo 18% of its gross revenues – an amount that the NIGC equates to more than 50% of the Tribe's net revenues. How then can the Tribe be the "primary beneficiary" of the gaming operation, when more than half of its net revenues are allocated to a developer who is providing no services or tangible benefits to the Tribe?

Thus, the Rinaldo Development Agreement was invalid and void as a matter of law because it violated the IGRA, in addition to having failed to receipt Secretarial approval under Section 81.

B. Rinaldo's Claim for Tortious Interference with Prospective Economic Advantage Must Fail, Because There Is No Evidence that an Independently Illegal Act by Nevada Gold Caused the Termination of Rinaldo's Economic Relation with the Tribe

1. The Tort of Interference with Prospective Economic Advantage Requires a Clear Causal Link Between Independently Illegal Conduct and Harm to a Protected Economic Relationship

Tortious interference with prospective economic advantage is a far more difficult tort for a plaintiff to establish than the tort of interference with contract. "The chief practical distinction between interference with contract and interference with prospective economic advantage is that a

broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990).

Ever since *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376 (1995), it has been clear that a defendant's acts that disrupt an ongoing business relationship must constitute "wrongful" conduct according to some independent legal measure in order to state a claim for tortious interference with prospective economic advantage. *See id.* at 393. A defendant's motivation – however ill-intentioned -- for engaging in disruptive conduct that is not independently wrongful is legally irrelevant. *See Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 477 (1996). Thus, "the act of interference with prospective economic advantage is not tortious in and of itself." "It is [the] independent wrongfulness requirement that makes defendants' interference with plaintiff's business expectancy a tortious act." *Korea Supply Corp. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159-60 (2003).

Moreover, to maintain its economic advantage claim, Rinaldo must also establish "proximate cause." It must meet a "threshold causation requirement" that requires it to prove that there was a reasonable probability that it would have realized an economic advantage absent the

defendants' independently tortious or illegal conduct. As the Supreme Court explained in *Youst v. Longo*, 43 Cal.3d 64 (1987):

> The tort of negligent or intentional interference with prospective economic advantage require proof of various elements as a prerequisite to recovery. However, as a matter of law, a threshold requirement exists for maintaining a cause of action for either tort, namely, proof that it is reasonably probable that the lost economic advantage would have been realized but for the defendant's interference.

Id. at 71; *accord Korea Supply*, 29 Cal.4th at 1154. To make this showing of proximate cause, Rinaldo must offer evidence that could permit a reasonable jury to conclude that at least one independently illegal action by Nevada Gold actions was "the" moving cause of the Kennedy Council's decision to terminate the Revised Development Agreement with Rinaldo. *See Eltolad Music, Inc. v. April Music, Inc.*, 139 Cal. App. 3d 697, 706 (1983) (jury should have been instructed that plaintiff must demonstrate that defendants' conduct was "the" cause of an actual disruption of the relationship, not just "a" cause").

To overcome the strict hurdles of proving a tortious interference with prospective economic relations claim, many plaintiffs have tried to use the strategy favored by Rinaldo here. That is, they have attempted to combine vague allegations of wrongdoing or unrelated torts with an attenuated causal chain, in the hope that by presenting the elements of the tort vaguely and abstractly, they can survive the strict limitations on its

scope. The Courts of Appeal, however, have uniformly rejected these strained attempts at evading causation. For example, in *Arntz Contracting*, the plaintiff claimed that the defendant insurer had interfered by, among other things, putting the plaintiff in its "claim" file and providing false misleading reports to third party reinsurers. 47 Cal. App. 4th at 474. The Court found that evidence insufficient to state a claim, because speculative inferences derived from a vaguely-asserted tort could not support a connection between the supposed misdeed and the economic effect when there was "overwhelming direct evidence" to the contrary. *Id.* at 896-96. Similarly, in *Limandri v. Judkins*, 52 Cal.App. 4th 326, 339-40 (1997), the plaintiff, an attorney, sought to recover for tortious interference with prospective economic advantage from a trust company that had perfected a lien on a client's recovery. The plaintiff alleged that, in so doing, the defendants committed the separate tort of "misappropriation of name." The Court of Appeal held squarely that this was insufficient to state a claim, because this tort alleged was "collateral" to the action that caused the actual interference. "It is insufficient to allege the defendant engaged in tortious conduct distinct from or only tangentially related to the conduct constituting the actual interference." *Limandri*, 52 Cal. App. 4th at 547. Finally, as recently as June 2007, the Fourth District found that a plaintiff could not bring a claim for tortious interference with prospective economic

advantage due to a failure to show proximate cause, in a case discussed below. *Parlour Enterprs.*, 152 Cal. App. 4th 281 at 294.

Thus, it is clear that only an act that is (a) independently wrongful by some separate legal measure and (b) that was a substantial cause of a disruption in a prospective economic relation can give rise to a claim for tortious interference with prospective economic relations. The connection between wrongful cause and disrupting effect is key.

Moreover, in making a showing that Nevada Gold's independently illegal conduct caused the Tribe to terminate its relationship with Rinaldo, it is not enough for Rinaldo to advance mere speculation or to articulate theories that are "not inconsistent" with the evidence. Rather, Rinaldo must present substantial evidence that reasonably suggests that the injury it claims to have suffered was, more likely than not, caused by Nevada Gold's tortious conduct. Where "opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork." *Joseph E. Di Loreto, Inc. v. O'Neill*, 1 Cal. App. 4th 149, 160 (1991).

2. Here, There Is No Evidence of a Causal Link Between an Illegal Act of Nevada Gold and the Tribe's Decision to Terminate its Relationship With Rinaldo

Rinaldo cannot demonstrate that independently illegal conduct by Nevada Gold was a substantial factor in terminating the economic relationship between Rinaldo and the Tribe – the Revised Development Agreement that had been negotiated and agreed to in 2004. *Youst*, 43 Cal.3d at 71. To the contrary, all reasonable inferences lead to precisely the opposite conclusion.

a. There is substantial direct evidence of the reasons for the termination of the Rinaldo relationship, but none of that evidence implicates Nevada Gold

It is undisputed that, in October 2004, Rinaldo and representatives of the Tribe negotiated a draft of that Revised Development Agreement. RA 772 (Rinaldo Statement of Facts). It is also undisputed that the Tribe approved this draft Revised Development Agreement by a vote of the overwhelming majority of its membership in November 2004. RA 774 (Rinaldo Statement, Fact 16). If Nevada Gold had contributed to a political dispute between the members of the Tribe, that dispute was decisively resolved in Rinaldo's favor by the end of 2004, when the Tribe overwhelmingly approved the Revised Development Agreement and

elected the Kennedy Council as the new Tribal Council. Far from a disruption, Rinaldo had solidified its relationship with the Tribe by the end of 2004.

Thus, the question is why the Tribe never executed the Revised Development Agreement. There is direct evidence of the reasons why the Tribal Council terminated the Revised Development Agreement, but none of that evidence points to an illegal act by Nevada Gold. The Tribal Council expressly stated its rationale for terminating the relationship with Rinaldo at least twice – in a June 2005 letter and in Resolution 2005-3-7, issued in October 2005. RA 634-35, 637. These documents mention Rinaldo's misconduct, but do not refer to Nevada Gold at all. Ms. Beck, a member of the Tribal Council, testified that Nevada Gold had nothing whatsoever to do with the adoption Resolution 2005-3-7. RA 616-618. What's more, Rinaldo itself admits that, in April 2005, it stopped paying project-related expenses and informed the Tribal Council that it was reducing the Project Site's acreage –months before the Tribe terminated its relationship with Rinaldo in October 2005. AOB 12-13.

b. Rinaldo presents nothing more than speculation about Nevada Gold's role in the termination of the Rinaldo relationship

To counter this host of testimonial and documentary evidence of the actual reason for the termination, Rinaldo responds with speculation: that Nevada Gold's funding of a rival tribal council must have created a climate that led the actual Tribal Council to its ultimate decision to terminate its relations with Rinaldo. However, this evidence, such as it is, cannot provide a causal link between Nevada Gold's independently illegal conduct and the disruption of the Tribe's relationship with Rinaldo.

(1) There is no evidence that Nevada Gold's loans to the Shoshone Council affected the Kennedy Council's decision to terminate the Rinaldo relationship

First, Rinaldo argues that Nevada Gold, in late 2004 and early 2005, provided loans to the Shoshone Council. AOB 19-22. However, Rinaldo cannot point to competent evidence that links those loans to the Kennedy Council's decision to terminate the Rinaldo relationship. Rinaldo simply cannot explain why loans to members of the Tribe who were not on the Tribal Council and who were indisputably the political enemies of the members of the Kennedy Council caused the Council to terminate the Revised Development Agreement. To the contrary, as explained above, the

only member of the Kennedy Council to provide testimony in this litigation clearly testified that Nevada Gold did not influence the Kennedy Council in 2005. *See* AA 2747 (testimony of Virginia Beck).

Rinaldo also argues that the members of the Shoshone Council used these loans provided by Nevada Gold to pursue litigation before the BIA in an attempt to dispute the legitimacy of the August 2004 tribal resolutions and November 2004 tribal elections. It suggests that this failed pursuit of administrative relief by the Shoshone Council somehow caused the Kennedy Council to terminate the Rinaldo relationship. This argument must fail, for at least two reasons.

First, California law expressly prohibits a plaintiff from basing a claim for tortious interference based on a defendant's funding of litigation or the petitioning of an administrative body by others. *Pacific Gas & Electric.*, 50 Cal. 3d at 1136-37 (1990) (emphasis added). In *Pacific Gas*, the Supreme Court held that the defendant, an investment bank, was immune from liability for tortious interference with contract and economic advantage for providing the funding for a third party's attempt to have a contract declared invalid in litigation. *Id.* The Supreme Court recognized the "danger in allowing a petition for judicial or administrative relief to be the basis for a claim of interference with contract or prospective advantage." *Id.* It held that the act of advancing funds that are used by a

third party for the purpose of conducting litigation or petitioning the government by a third party is entirely immune from an action for tortious interference with contract or prospective economic advantage, except in the unusual situation in which such litigation or petitioning is brought "without probable cause." *Id.*

Here, Nevada Gold's funding of the Shoshone Council's efforts before the BIA falls squarely within the rule of *Pacific Gas*. Rinaldo has not even attempted to show that the Shoshone Council's efforts to the petition the BIA were made "without probable cause." Thus, Nevada Gold's funding of the Shoshone Council's petitioning of the BIA cannot, as a matter of law, serve as the basis for a claim for tortious interference with prospective economic advantage.

Moreover, even disregarding *Pacific Gas*, there is no evidence that the Shoshone Council's unsuccessful efforts to challenge the November, 2004 elections had any effect whatsoever on the Tribal Council's decision to renounce the Rinaldo relationship. In fact, the Bureau of Indian Affairs ruled against the Shoshone Council and in favor of the Kennedy Council in early 2005, without any apparent effect on the Kennedy Council's decision to pursue the Revised Development Agreement with Rinaldo. RA 772-775. Rinaldo cannot point to any evidence suggesting how the Shoshone

Council's failed attempt to petition the BIA affected the Kennedy Council's decision to renounce the Revised Development Agreement.

(2) There is no evidence that an illegal action by Nevada Gold caused the members of the Kennedy Council to fear losing an election if they did not terminate the Tribe's relation with Rinaldo

Rinaldo also suggests that Nevada Gold caused the tribal council members to fear losing an election if they entered into the contract with Rinaldo. *Id.* This, however, is pure speculation, and ill-founded speculation at that. There is no evidence that Nevada Gold caused the members of the Kennedy Council to fear losing their posts if they executed the Revised Development Agreement.

First, as explained above, the members of the Kennedy Council were elected in November 2004, a period when the vast majority of the Tribe had voted to approve the Revised Development Agreement *despite* Nevada Gold's relationship with the Shoshone Council. It makes no sense to infer that the Tribal Council feared losing an election for executing the same Revised Development Agreement with Rinaldo that the Tribe's membership had approved. Nor does it make sense to infer that Nevada Gold had anything to do with creating a fear of losing an election, when the

Shoshone Council, with whom Nevada Gold had a relationship, had just been soundly defeated at the polls.

Rinaldo points to the testimony of Virginia Beck, a member of the Kennedy Council. Rinaldo contends that in deposition, Ms. Beck stated that she feared not being reelected in 2005 if she voted to approve the Revised Development Agreement. AOB at 20-21. But this alone provides no evidence that Nevada Gold's actions generated that supposed fear. Ms. Beck's tribal constituency could have (and did) oppose a Rinaldo contract because, among other reasons, of Rinaldo's 2005 decision to renege on its 2004 acreage deal with the Tribe. True, when asked the (admittedly compound) question of "Do you believe that Nevada Gold had interfered with the general council such that you would not be reelected if you entered into the revised development agreement with Rinaldo?," Ms. Beck responded equivocally "that could be a yes." AA 2786. But Ms. Beck clarified her testimony a few minutes later, emphasizing that she did not mean to say that she feared reelection because of Nevada Gold (stating that "wasn't [the] question") and was only referring in that answer to her belief that Nevada Gold had "interfered" in Tribal affairs by providing funds to the Shoshone Council, not that the funds to the Shoshone Council affected the Tribe's decision to terminate the Rinaldo relationship. AA 2787. In fact, so as to avoid any doubt, Ms. Beck specifically testified that Nevada

Gold never threatened to cause any problem in any future tribal election if the Tribe did not pass Resolution 2005-3-7.. AA 2788 ("Q: Did Nevada Gold threaten to cause any problems in any future tribal election if the Tribal Council did not pass Resolution 2005-3-7? A: No."). Finally, and perhaps most importantly, her clear testimony was that Nevada Gold had nothing to do with the Kennedy Council's decision to terminate the Tribe's Revised Development Agreement with Rinaldo. RA 618. Plainly, no reasonable inference in favor of Rinaldo can be drawn from Ms. Beck's testimony.

(3) Delay before the Revised Development Agreement was approved cannot explain why the Tribe failed to execute the Revised Development Agreement after it was approved

Third, Rinaldo also suggests that the mere fact that the casino project was delayed before November, 2004, when the Tribe approved the Revised Development Agreement, was sufficient by itself enough to cause the Tribe to fail to enter into the Revised Development Agreement. But this argument makes no sense as a matter of law or logic. Rinaldo cannot explain how a delay before the Tribe's approval of the Revised Development Agreement could have affected the Tribe's decision to renounce that very same Revised Development Agreement after approval.

Rinaldo must show that Nevada Gold's supposedly illegal interference was the actual cause of the disruption of Rinaldo's the actual relationship Rinaldo developed with the Tribe – namely, the 2004 Revised Development Agreement. *Pacific Gas & Electric*, 50 Cal. 3d 1118, 1129 n. 9 ("The tort of intentional interference with prospective economic advantage requires an allegation that the interfering conduct has disrupted the relationship . . . We have found no case permitting the cause of action in the absence of some actual disruption."). A relationship is not disrupted when it is still ongoing. For example, in *Kirin Group*, 152 Cal. App. 4th at 294, the plaintiffs, who were subfranchisee restaurant developers, claimed that the defendant, a franchisor, had tortiously interfered with their economic advantage by wrongful conduct including as misrepresenting facts about the franchisor's negotiations with third-parties. The Fourth District found that because the plaintiffs had "continued to move forward" with negotiations for the restaurant lease despite the defendants' supposed bad conduct, the defendants' conduct could not have been the proximate cause of the disruption of the relationship. *Id.* at 295.

In this case, Rinaldo was not only engaged with ongoing negotiations with the Tribe at the time of Nevada Gold's alleged misconduct, but those negotiations blossomed into the Revised Development Agreement with the Tribe that was approved in November

2004. Nevada Gold's conduct that affected the Tribe before the approval of the Revised Development Agreement (which is what Rinaldo has focused upon) plainly did not proximately cause the disruption of the Rinaldo relationship, because the Tribe did in fact approve the Revised Development Agreement. Thus, Rinaldo cannot avoid the lack of evidence of Nevada Gold's illegal interference with the Revised Development Agreement simply by pointing to unspecified "delay."

(4) Rinaldo cannot blame its own unilateral decision to alter the terms of its agreement with the Tribe on Nevada Gold

Finally, Rinaldo claims that based on the totality of the circumstances present in 2005, Rinaldo became frustrated with the Tribe's leadership and so took actions to reduce the amount of acreage allocated to the casino project. AOB at 21-22. Rinaldo claims that this decision was necessary in order to "recoup" its losses. Obviously, however, Nevada Gold cannot be held responsible for Rinaldo's decision to terminate Rinaldo's own relationship with the Tribe. To the extent Rinaldo's claim is that its frustration was the result of Nevada Gold's illegal disruption of the Tribe, this reasoning rests on the same flawed premise described above – namely, that there is any evidence that any alleged illegal Nevada Gold conduct actually caused the Kennedy Council to disrupt its relationship

with Rinaldo. To the extent that Rinaldo is claiming that Nevada Gold can be held responsible for Rinaldo's unilateral decisions, Rinaldo asks this Court to accept an absurdity. Rinaldo presents no evidence that Nevada Gold forced or induced Rinaldo's actions that the Tribe found objectionable or otherwise prevented Rinaldo from carrying through on undertakings it had made. Rather, at most, Rinaldo made a business decision to extract stringent terms from the Tribe. This fact alone cannot make Nevada Gold proximately responsible for causing the dissolution of the relationship between Rinaldo and the Tribe.

3. Rinaldo Has Not Identified Any Independently Illegal Act By Nevada Gold That Caused the Tribe To Terminate The Revised Development Agreement

Just as significantly, Rinaldo has not explained why or how the actions by Nevada Gold that it claims interfered with the Revised Development Agreement were independently illegal. Rinaldo has not even attempted to argue that the facts it alleges in its opening brief demonstrate independently illegal conduct by Nevada Gold. Rinaldo has not explained why any act of Nevada Gold was independently illegal; nor has it even attempted to link an independently illegal act with the termination of its relationship with the Tribe. Thus, Rinaldo has failed to set forth the most

basic element of the tort of interference with prospective economic advantage.

Before the trial court (although nowhere in its briefing on appeal), Rinaldo asserted that it has unspecified evidence that, at an unspecified point in time, Nevada Gold provided "bribes" that violated "California Penal Code Section 7 and 18 U.S.C. § 666." If Rinaldo repeats this argument on appeal (and if the Court considers it, which is should not do), it should be rejected.[5]

California Penal Code § 7 merely defines the words used in the penal code; it does not prohibit anything. 18 U.S.C. § 666 is a federal statute prohibiting gifts made with corrupt intent of more than $5000 made to influence, *inter alia*, "agents" of an "Indian tribal government."

Rinaldo cannot show that Nevada Gold violated these statutes by making loans to the Shoshone Council after the Tribe had approved the Revised Development Agreement. There is no dispute that the members of the Shoshone Council were not "agents" of the Tribe's tribal government after their authority was revoked in August, 2004, and after the November, 2004 election in which the Kennedy Council took office. RA 753, 799; AA

[5] Arguments raised for the first time in a reply brief should not be considered, unless good cause is shown for having failed to present them before. *In re Marriage of Nolte*, 191 Cal.App.3d 966, 975 (1987).

2537. The Revised Development Agreement was approved by the Tribe's membership in November, 2004. RA 725. Thus, during the entire period in which the Revised Development Agreement was in existence, the members of the Shoshone Council were not agents of the Tribe and had no power to bind it. Loans made to non-officials with no ability or authority to bind the Tribe could not possibly be illegal bribes. And loans made to the Shoshone Council prior to August, 2004 cannot have affected the termination of the Revised Development Agreement, which did not even exist until months later. Thus, Nevada Gold's loans do not violate any prohibition against bribery.

4. Political or Regulatory Decisions, Such as the Tribe's Decision to Authorize the 2004 Revised Development Agreement, Cannot Form the Basis of a Tortious Interference Claim

Finally, it is doubtful whether, even if Rinaldo could show proximate causation, it would be entitled to bring a case for tortious interference with prospective economic advantage. California law limits the use of claims for tortious interference in the context of regulatory or governmental determinations, because parties do not have a reasonable expectancy of prevailing in the government licensing process. In *Blank v. Kirwin*, 39 Cal. 3d 311, 330 (1985), the Supreme Court held expressly that a claim for tortious interference with prospective economic relations could

not lie for a third party's interference with a governmental licensing process. In that case, the Supreme Court rejected the plaintiff's claim that a third party had improperly interfered with its ability to obtain a license to operate a poker club within the City of Bell, California. The Supreme Court rejected the plaintiff's attempt to claim tortious interference with prospective economic advantage on those facts, explaining that "The tort has traditionally protected the expectancies involved in ordinary commercial dealings-not the "expectancies," whatever they may be, involved in the governmental licensing process." *Id.* The Court went on to explain that, where a governmental body has broad discretion to issue or approve a license or approval, a third party does have a "reasonable expectancy" of a commercial relationship but "at most a hope for an economic relationship and a desire for future benefit." *Id.*

Here, Rinaldo's only prospective economic relationship with the Tribe was the Tribal Government's potential approval of a casino project with Rinaldo. This was a sovereign, governmental undertaking of the Timbisha Shoshone Tribe; the Tribe undoubtedly had the ability to refrain from entering into any development agreement with Rinaldo. Given that Rinaldo's entire economic relationship with the Tribe hinged upon the discretionary approval of the Tribal Council, it is not entitled to state a

claim for tortious interference with prospective economic advantage under *Kirwin.*

C. As Rinaldo Concedes, Its Conspiracy Cause of Action is Entirely Derivative

Rinaldo concedes that its conspiracy cause of action is entirely derivative. *See Applied Equipment Corp.*, 7 Cal. 4th at 510-513 ("A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve"). Rinaldo's only basis for reversing the Superior Court's summary adjudication of its conspiracy cause of action is its argument that the Superior Court erred in summarily adjudicating the two tortious interference causes of action. AOB at 26. The Superior Court's summary adjudication of the tortious interference causes of action was correct, and so too was the Superior Court's decision to summarily adjudicate the conspiracy claim in favor of Nevada Gold.

VI. CONCLUSION

Rinaldo had no valid contract with the Tribe which could support a cause of action for tortious interference with contract. It has no evidence that any illegal interference from Nevada Gold proximately caused the termination of its economic relationship with the Tribe. Therefore, the Superior Court's grant of summary judgment against Rinaldo was correct. This Court should affirm it.

DATED: August 6, 2007.

Respectfully submitted,

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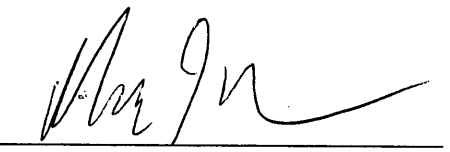
By 
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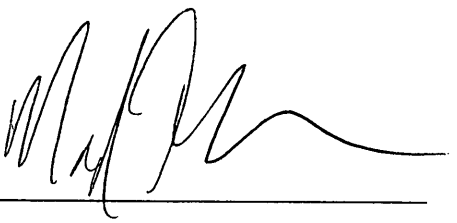
CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rule 8.204(c))

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, the enclosed brief is produced using 13-point Roman type, including footnotes, and contains approximately 13112 words. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: August 6, 2007.

By 

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PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1901 Avenue of the Stars, Suite 950, Los Angeles, California 90067-6029.

On August 6, 2007, I served the foregoing document(s) described as follows:

RESPONDENT'S BRIEF

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached service list, as follows:

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Executed on August 6, 2007, at Los Angeles, California.

__XX__ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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