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2010 OCT 26 PM 3:36

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ARMAND SAROLI, an individual)
Plaintiff,)
v.)
AGUA CALIENTE BAND OF CAHUILLA)
INDIANS, and DOES 1 to 50,)
Defendants)

CASE NO. 10-CV-01748-BEN (NLS)

PLAINTIFF'S OPPOSITION TO SPECIALLY
APPEARING DEFENDANT'S MOTION TO
DISMISS FOR LACK OF JURISDICTION
[F.R.C.P. 12(B)(1) & (2)]

Date: November 15, 2010
Time: 10:30 a.m.
Judge: Honorable Roger T. Benitez
Location: Courtroom 3 (4th Floor)
U.S. Courthouse
940 Front Street, San Diego, CA

20 COMES NOW, Plaintiff ARMAND SAROLI, by and through his attorneys Spencer S. Busby &
21 Associates, and submits the following Opposition to Specially Appearing Defendant's Motion to Dismiss
22 for Lack of Jurisdiction. In support of Plaintiff's motion, Plaintiff respectfully submits heretofore: Table
23 of Contents; Table of Authorities; Points and Authorities; Declaration of Daniel S. Klein; Exhibits "1"
24 through "8" attached thereto.
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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 ARMAND SAROLI, an individual,

10
11 Plaintiff,

12 v.

13 AGUA CALIENTE BAND OF CAHUILA
INDIANS, and DOES 1 to 50,

14 Defendants.

CASE NO. 10-CV-01748-BEN (NLS)

POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFF'S OPPOSITION TO
SPECIALLY APPEARING DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
JURISDICTION [F.R.C.P. 12(B)(1)&(2)]

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Location: Courtroom 3 (4th Floor) U.S.
Courthouse 940 Front Street, San
Diego, CA 92101

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19 Plaintiff ARMAND SAROLI (hereinafter "Plaintiff") hereby respectfully submits the
20 following memorandum of points and authorities in opposition to Defendant AGUA CALIENTE
21 BAND OF CAHUILA INDIANS' (hereinafter "Tribe") Motion to Dismiss for lack of subject
22 matter jurisdiction.

23 **I.**

24 **INTRODUCTION**

25 This lawsuit arises from an accident at Defendant's Casino and Resort on January 21,
26 2009. On this date, Plaintiff notified Tribe of mechanical problems with the Jacuzzi-tub in
27 Plaintiff's room at Defendant's Casino and Resort. Tribe sent a maintenance crew to Plaintiff's
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1 room to repair the condition. The maintenance crew notified Plaintiff that the tub was repaired
2 and safe for use. When Plaintiff attempted to turn on the water, the pressurized metal water spout
3 broke off and shot out striking Plaintiff in the head, above his right eye, knocking him backwards
4 against the wall of the Jacuzzi-tub, causing serious injury.

5 The Tribe owns and operates Agua Caliente Casino and Resort which is a tribal entity, and
6 which is not incorporated under the laws of California, or any other state. (First Amendment to
7 the Tribal-State Compact Between The State of California and the Tribe, pertinent portions of
8 which are attached hereto as, Exhibit 1, and referred to hereinafter as "Compact".)

9 Plaintiff submitted the Tribe's "Incident Claim Form" to the Tribe on February 18, 2009.
10 (Exhibit 2) Plaintiff's counsel sent a notice of representation and explanation of the claim to Tribe
11 on February 19, 2009. (Exhibit 3.) On September 17, 2009, Plaintiff's counsel sent a settlement
12 demand package to the Defendant Tribe accompanied with all pertinent medical records, reports
13 and billing statements. (Exhibit 4.) After speaking with the claims handler, Plaintiff sent a
14 second letter dated December 1, 2009, requesting an informal mediation to attempt to settle the
15 subject claim. (Exhibit 5.) Ten months after Plaintiff sent the notice of representation, Tribe, by
16 and through their insurer Tribal First, sent a first letter of formal acknowledgment of receipt of the
17 notice of representation of Plaintiff. (Exhibit 6.) After receiving this letter, Plaintiff's counsel did
18 not hear from Defendant Tribe for months and contacted the Tribe several times regarding the
19 same with no response. Plaintiff then sent an unequivocal "Demand for Arbitration" dated June
20 14, 2010 via certified mail requesting the Tribe hear the matter in Arbitration pursuant to the
21 Tribe's Compact. (Exhibit 7.) The Tribe responded shortly thereafter in a letter dated June 21,
22 2010 in which they denied the claim based on a conclusory and unilateral assertion that the Tribe
23 was not negligent as they "did not have prior notice the bathtub spout had any mechanical issues."
24 (Exhibit 8.) Tribe made this assertion despite the fact the Tribe sent a maintenance crew to
25 Plaintiff's room to repair mechanical issues in the tub spout just prior to the incident in response
26 to Plaintiff reporting mechanical issues with the bathtub. In the same letter, Tribe further
27 contends arbitration is not applicable as "[Plaintiff] was not engaging in gaming activities when
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1 the accident occurred.” (Exhibit 8.) Tribe misinterprets its own ordinance, because the ordinance
 2 clearly states that arbitration applies broadly to, “A claim to a Patron for negligent or intentional
 3 injury to person... sustained by the Patron *at the Gaming Facility or in connection with Tribe’s*
 4 *Gaming Operation...*” (Exhibit 8, p. 1) [Emphasis added].

5 As a result of Tribe’s denial and refusal to submit the matter to arbitration pursuant to their
 6 Compact, Plaintiff was forced to file the instant action in this Court pursuant to the following
 7 language in Tribe’s compact, “the Tribe shall, in the exercise of its sovereignty, *waive its right to*
 8 *assert its sovereign immunity* in connection with the arbitrator’s jurisdiction *and in any action*
 9 *brought in federal court* or, if the federal court declines to hear the action, in any action brought
 10 in the courts of the State of California that are located in Riverside.” (Exhibit 1 at pages 20-21)
 11 [Emphasis added].

12 Now, Tribe brings this boilerplate motion to dismiss, which lacks any facts germane to the
 13 instant Complaint, for the purposes of intimidation, willful delay, and needlessly driving up the
 14 costs of this litigation. Tribe seems to be asserting that they may in their own discretion both deny
 15 arbitration and disallow a lawsuit against them in any Court of law, despite their own Compact
 16 indicating the contrary, and thereby leaving no forum for adjudication of Plaintiff’s claim. The
 17 law is clear, however, the Tribe cannot have it both ways, and they are not above the requirement
 18 of due process.

19 Plaintiff herein files his opposition contending that (1) the Tribe has waived its sovereign
 20 immunity under the Compact, (2) the Compact directly contradicts the Tribe’s interpretation of
 21 Ordinance 32B, and the Tribe’s assertions in their motion, (3) this court not only has the
 22 jurisdiction to hear the case pursuant to Compact, but may also order the case to arbitration as a
 23 matter of law, as initially requested by Plaintiff prior to filing his complaint, and as requested in
 24 Plaintiff’s complaint.

25 Plaintiff respectfully requests that the honorable Court order the matter to arbitration.

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II.

LEGAL HISTORY

In 1988, Congress enacted the Indian Gaming Regulatory Act (hereinafter "IGRA") as the federal statute governing Indian gaming in the United States. 18 U.S.C. 1166 et. seq. and 25 U.S.C. 2701 et seq. The system of regulation of Indian gaming fashioned by Congress in IGRA rests on an allocation of regulatory jurisdiction among the three sovereigns involved: the federal government, the state in which a tribe has land, and the tribe itself. IGRA makes gambling lawful on the lands of federally-recognized Indian tribes only if such activities are: (1) authorized by tribal ordinance, (2) located in a state that permits such gaming, and (3) conducted in conformity with a gaming compact entered into between the Indian tribe and the state and approved by the Secretary of the Interior. The gaming compact is a trilateral contract negotiated and entered into between federal, state, and tribal sovereigns.

On September 14, 1999, the defendant Tribe and the State of California entered into a the Compact allowing for lawful gambling on the lands of the defendant Tribe. The Compact was signed by Gray Davis, approved by the Secretary of the Interior, and shall remain in effect through all applicable dates. A true copy of pertinent portions of the Compact is attached hereto as Exhibit 1.

At issue in this case, Section 10.2(d) of the Compact (as also cited in Plaintiff's Complaint) states in relevant part that,

The Tribe shall maintain in continuous force its Tort Liability Ordinance which shall, prior to the effective date of this Amendment and at all times hereafter, continuously provide at least the following: (A) That California tort law shall govern all claims *arising out of, connected with, or relating to the operation of the Gaming Facility or the Gaming Activities, including, but not limited to, injuries resulting from entry onto the Tribe's land for purposes of patronizing the Gaming Facility...* provided that any and all laws governing punitive damages need not be a part of the Ordinance... (C) The ordinance shall provide that *the Tribe consents to binding arbitration before a single arbitrator, who shall be a retired judge, in accordance with the comprehensive arbitration rules and procedures of JAMS* to the extent of the limits of the Policy, that discovery in the arbitration proceedings shall be governed by section 1283.05 of the California Code of Civil Procedure, *that the Tribe shall initially bear the cost of JAMS and the arbitrator*, but the arbitrator may award costs to the prevailing party not to exceed those allowable in a suit in California Superior Court, and that any party dissatisfied with the award of the arbitrator may at the party's election invoke the

JAMS Optional Arbitration Appeal Procedure (or if those rules no longer exist, the closest equivalent), provided that the party making such election must bear all costs and expenses of JAMS and the arbitrators associated with the Appeal Procedure, regardless of the outcome. To effectuate its consent to the foregoing arbitration procedure, the *Tribe shall, in the exercise of its sovereignty, waive its right to assert its sovereign immunity in connection with the arbitrator's jurisdiction and in any action brought in federal court or, if the federal court declines to hear the action, in any action brought in the courts of the State of California that are located in Riverside County, including courts of appeal, to (1) enforce the parties' obligation to arbitrate, (2) confirm, correct, modify, or vacate the arbitral award rendered in the arbitration, or (3) enforce or execute a judgment based upon the award. The Tribe agrees not to assert, and will waive, any defense alleging improper venue or forum non conveniens as to such state courts. Id. at pages 20-21 [Emphasis added].*

Indeed, the very language and the Compact cited above and included as Exhibit 1 to this opposition is absent from and not even acknowledged in Tribe's motion despite this information being readily available to Tribe. As such, it is within this Court's discretion to hear the case and/or enforce the parties' obligation to arbitrate. Plaintiff respectfully requests the Court enforce Tribe's obligation to arbitrate this claim.

III.

LEGAL ARGUMENT

A. This Court Should Maintain Jurisdiction over this Action to Allow Discovery on the Issue of Whether the Tribe Has Waived Sovereign Immunity.

California courts have adopted the federal procedural approach to this specific type of jurisdictional problem by allowing a trial court faced with a claim of sovereign immunity to "engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case' before trial." *Great Western Casinos v. Morongo Band of Mission Indians* (1999), 74 Cal.App.4th 1407, 1417-1418, citing *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan* (D.C. Cir. 1997) 115 F.3d 1020, 1027-1028; *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 7, fn. 8 (Smith). The reason for this rule is that the lack of subject matter jurisdiction can be raised at any time, and no specific procedural method is required to bring the matter to the court's attention. *Great Western Casinos, supra*, 74 Cal.App.4th at p. 1418; see *Gould, Inc. v. Pechiney Ugine Kuhlmann* (6th Cir. 1988) 853 F.2d 445, 451: where sovereign immunity issues are presented, putting subject matter jurisdiction into question, "discovery and

1 fact-finding should be limited to the essentials necessary to determining the preliminary question
 2 of jurisdiction." Thus, a court considering a jurisdictional question regarding sovereign immunity
 3 may go beyond the pleadings and/or contract language to consider testimonial and documentary
 4 evidence relevant to that issue. *Great Western Casinos, supra*, 74 Cal.App.4th at p. 1418; *Smith,*
 5 *supra*, 95 Cal.App.4th at p. 7, fn. 8.

6 As mentioned previously, the Compact is a trilateral contract between the State of
 7 California, the Tribe, and the Federal Government. As such, this Court may go beyond the
 8 language of the Compact and the pleadings to consider various testimonial and documentary
 9 evidence to determine the question of jurisdiction. Federal case law and California law both allow
 10 for discovery into fundamental questions of subject matter jurisdiction, in order that the court may
 11 be satisfied of its authority to act in a particular dispute. *Great Western Casinos, supra*, 74
 12 Cal.App.4th 1407 at p. 1418. Merely because there is no waiver of immunity in the form of a
 13 written tribal resolution does not mean that no state law discovery on the waiver issue, i.e., if any
 14 waiver was permissibly accomplished through contract, may be ordered. *Warburton/Buttner v.*
 15 *Superior Court* (2002) 103 Cal.App.4th 1170. Therefore, it would be premature at this time for
 16 this Court to grant the defendant's motion to dismiss without allowing thorough discovery on the
 17 issues.

18 **B. The Tribe Has Waived Sovereign Immunity Through its Contract with the State of**
 19 **California and the Federal Government Because the Compact Expressly Waives**
 20 **Such Immunity**

21 Although Plaintiff does not dispute that a motion to dismiss is a proper method to
 22 challenge jurisdiction based upon claims of sovereign immunity, the Tribe has waived sovereign
 23 immunity as a result of its contract with the State and Federal Government. Defendant argues that
 24 the Tribe may only be sued in either Federal or State court unless Congress or the Tribe consents
 25 to such suit. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509
 26 (1991) (sic.) Defendant then goes so far as to state that, "In fact, Plaintiff fails to state a basis for
 27 the Court's jurisdiction over the suit." (Tribe's Points and Authorities in Support of Motion to
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1 Dismiss, p. 3 para. 26-27, hereinafter "TMD") Tribe, however, never applies the facts of this case
2 to any of the law cited. Indeed, Plaintiff cited the very language above in his Complaint, which
3 unequivocally states the basis for the Court's jurisdiction.

4 Thus, the threshold issue for purposes of this motion is whether the Tribe has waived its
5 sovereign immunity by entering into a trilateral contract (the Compact) with the State and the
6 Federal Government. Of critical importance to this analysis is the relationship between Section
7 10.2(d) of the Compact and Tribe's unilateral denial of arbitration and non-waiver of immunity to
8 be sued in federal court pursuant to Tribe's Ordinance 32B. (Exhibit 8.) It is important to note
9 that the Compact is a trilateral agreement negotiated between the Tribe, the State, and the Federal
10 Government. Tribe's position is a unilateral interpretation by the Tribe, not negotiated with or
11 signed by the State or the Federal Government, and any inconsistency or conflict with the
12 Compact should result in the provisions of the Compact prevailing. Plaintiff contends that Tribe's
13 denial of both arbitration and Plaintiff's right to sue Tribe in this honorable Court is so
14 contradictory to the language, intent, and spirit of the Compact that it should not stand.

15 The written provision of Section 10.2(d) of the Compact, as cited above, specifically states
16 that, "[t]he Tribe shall, in the exercise of its sovereignty, waive its right to assert its sovereign
17 immunity in connection with the arbitrator's jurisdiction and in any action brought in federal court
18 or, if the federal court declines to hear the action, in any action brought in the courts of the State
19 of California that are located in Riverside County." Compact §10.2(d).

20 "Under statutory rules of contract interpretation, the mutual intention of the parties at the
21 time the contract is formed governs interpretation. Cal. Civ. Code, § 1636. Such intent is to be
22 inferred, if possible, solely from the written provisions of the contract. Cal. Civ. Code, § 1639.
23 The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular
24 sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by
25 usage' (Cal. Civ. Code § 1644), controls judicial interpretation." *Id.*, section 1638. *AIU Ins. Co.*
26 *v. Superior Court* (1990) 51 Cal.3d 807, 821-822. The "overriding goal of interpretation is to
27 give effect to the parties' mutual intentions as of the time of contracting. . . . Where contract
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1 language is clear and explicit and does not lead to absurd results, we ascertain intent from the
 2 written terms and go no further.'" *Shaw v. Regents of University of California* (1997) 58
 3 Cal.App.4th 44 at 53 "Although the intent of the parties determines the meaning of the contract
 4 (Cal. Civ. Code, §§ 1636, 1638), the relevant intent is 'objective' - that is, the objective intent as
 5 evidenced by the words of the instrument, not a party's subjective intent." *Shaw* at pp. 54-55.

6 Section 10.2(d) of the Compact states that the Tribe waives its immunity to suit for money
 7 damages resulting from negligent injuries to person while at their resort casino. The State, in its
 8 negotiations and agreement with the Tribe, did not intend to allow the Tribe to take away a
 9 person's negotiated right to sue the Tribe in court even when they deny Plaintiff the right to
 10 arbitration.

11 One can conclude from an objective review of the Compact that when the State and the
 12 Tribe negotiated and entered into the Compact, they contemplated using arbitration as a method of
 13 resolving disputes between the State and the Tribe, and they were not shy about using the word
 14 "arbitration." When the State negotiated and entered into the Compact with the Tribe, both parties
 15 objectively intended that patrons would have a right to arbitration to resolve tort claims against
 16 the Tribe, and if the Tribe would not agree to arbitration, to sue in either federal court, or state
 17 court in Riverside. Had the State and the Tribe intended otherwise, they would have so stated. As
 18 such, the provisions of the Compact must prevail, and this matter should proceed to arbitration.

19 **C. Tribe's Position Cannot Stand Because it Violates Constitutional Principles of Due**
 20 **Process**

21 In addition to conflicting with the Compact, Tribe's denial of arbitration is flawed for
 22 several other reasons. Plaintiff has requested arbitration in compliance with the Compact. The
 23 Tribe has denied arbitration alleging that the Tribe was not negligent as they "did not have prior
 24 notice the bathtub spout had any mechanical issues," and that "[Plaintiff] was not engaging in
 25 gaming activities when the accident occurred, therefore the incident does not fall under the Tribe's
 26 Gaming Ordinance and arbitration is not applicable." This Court is the logical forum to resolve
 27 such a dispute.
 28

1 The Tribe alleges in its motion that it has not waived sovereign immunity, but does not
 2 address the merits of their denial of arbitration. As argued above, these assertions directly conflict
 3 with the Compact which states in Section 10.2(d) (Exhibit 1) and with the plain language of
 4 Ordinance 32B. (Exhibit 8, p. 1). While the Compact waives the Tribe's sovereign immunity and
 5 proscribes a claimant's legal rights to suits for money damages, the Tribe's position contradicts the
 6 Compact by entirely taking away a person's right to suit against the Tribe in return for a legally
 7 flawed claims process.

8 Moreover, this issue has already been adjudicated in the case of *Campo Band of Mission*
 9 *Indians v. Superior Court* (2006) 137 Cal.App.4th 175 [certiorari denied], which was
 10 coincidentally litigated by Plaintiff's counsel's office. Although admittedly a state case, Plaintiff
 11 respectfully requests this Court take note of the holding as persuasive authority for the similar
 12 issue in the instant case. In *Campo*, a woman was injured while a patron at an Indian tribe's
 13 gaming facility and hotel, and brought a personal injury and premises liability action against the
 14 gaming facility. The Indian tribe unilaterally concluded that the plaintiff failed to comply with the
 15 procedural requirements to arbitrate as stated in the tribe's compact with the state in regards to tort
 16 claims, and refused to participate in the arbitration of the plaintiff's claims. Plaintiff then filed
 17 suit in state court even though such lawsuit was not allowed pursuant to a unilaterally adopted
 18 regulation by the tribe. *Id.* at 177-178. The trial court dismissed the claims based on sovereign
 19 immunity, but issued an order requiring arbitration of the claims. The tribe filed a writ of
 20 mandate, and the Court of Appeals held that: (1) the tribe unambiguously waived its sovereign
 21 immunity through the Compact relating to patron claims for negligence resulting in personal
 22 injury, which stated in pertinent part that the tribe was required to,

23 [c]arry no less than five million dollars in public liability insurance for patron
 24 claims, and that the Tribe provide reasonable assurance that those claims will be
 25 promptly and fairly adjudicated...[T]he tribe shall adopt and make available to
 26 patrons a tort liability ordinance setting forth the terms and conditions, if any,
 27 under which the tribe waives immunity to suit for money damages resulting from
 28 intentional or negligent injuries to persons or property at the Gaming Facility or in
 connection with the Tribe's Gaming Operation, including procedures for
 processing any claims for such money damages... *Id.*;

1 (2) that the superior court had subject matter jurisdiction over the patron's claim against the tribe;
2 but (3) that the superior court erred in determining the procedural compliance issue itself rather
3 than submitting that issue for determination at arbitration. *Id.* The California Supreme Court
4 denied the tribe's petition for certiorari.

5 Here, the issue is similar, however, the language in the Compact is even more clear as to
6 the waiver of sovereign immunity by the Tribe, "Tribe shall, in the exercise of its sovereignty,
7 waive its right to assert its sovereign immunity in connection with the arbitrator's jurisdiction and
8 in any action brought in federal court..." Moreover, Tribe raises no issue with Plaintiff's
9 compliance under the Compact, and rather, states the provision of the compact does not apply as
10 Plaintiff was not engaging in gaming activities. In order to dispense with Tribe's claim that the
11 arbitration provision does not apply to this case, the Court need only look at the plain language of
12 the ordinance, "A claim to a Patron for negligent or intentional injury to person... sustained by the
13 Patron *at the Gaming Facility or in connection with Tribe's Gaming Operation...*" (Exhibit 7, p.
14 1) [Emphasis added]. The plain language of this ordinance is intentionally broad enough to cover
15 any injury at the gaming facility or even having a "connection" with the facility. If Tribe intended
16 the ordinance only to be applicable to patrons actively "engaging in gaming activities" at the time
17 of the incident, it would so state. Further, it does not make sense that the State of California
18 would intend the Compact with Tribe to allow for redress of personal injuries to patrons only
19 while they are actively gambling. Plaintiff concedes, however, that the Compact's arbitration
20 provision may not apply to injuries to persons that have no connection with the resort casino
21 gaming facility or gaming activities (such as, for example, a vagrant injuring himself while
22 squatting in the casino parking lot), but such is not the case here.

23 Here, Plaintiff was a patron of Tribe's gaming facility for the purpose of utilizing Tribe's
24 gaming activities, i.e. gambling. Plaintiff paid for a room at the casino resort for the purpose of
25 utilizing the gaming tables and activities. Like nearly all hotel/casino's in California and Las
26 Vegas, the Tribe's resort hotel is physically connected to the casino, so patrons can easily access
27 the casino from their rooms. At the time of the injury, Plaintiff was bathing in a Jacuzzi tub in his
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1 room at the hotel/gaming facility and in connection with such facility. As such, both the Compact
 2 as well as the ordinance should apply to mandate arbitration. Just as the court did in *Campo*,
 3 Plaintiff is only requesting that this Court order the matter to arbitration pursuant to the Tribe's
 4 own Compact.

5 The Tribe argues, however, that they can both deny arbitration and cannot be sued in this
 6 Court, which would leave no forum for adjudication of plaintiff's claim, and would violate due
 7 process under the United States Constitution. Section 10.2(d) of the Compact and the State of
 8 California never contemplated that claimants would lose their rights to a trial by jury, an appeal,
 9 and the plethora of legal rights surrounding lawsuits in our courts of law. If the Compact stands,
 10 the Tribe, by the plain language of Section 10.2(d) of the Compact, waives its immunity to
 11 arbitration, and suits in federal and Riverside State Court.

12 **D. Public Policy Supports the Fair and Impartial Adjudication of Personal Injury**
 13 **Claims Against Indian Tribes**

14 By hiding behind erroneously claimed "sovereign immunity" and embarking on a
 15 unilateral and contradictory claims process, thereby taking away from Plaintiff her Compact-given
 16 right to suit, the Tribe's refusal to settle and to arbitrate meritorious claims increases the burden on
 17 the State and private individual health insurance and disability programs to pay medical bills and
 18 other benefits which, in many cases, should be rightfully paid by the Tribe. The Tribe's refusal to
 19 pay their fair share through their unilateral interpretation of a claim in direct conflict with the
 20 Tribe's mutually negotiated Compact with the State further burdens the already overburdened
 21 State and private health and disability insurance programs.

22 Furthermore, it is no secret that most attorneys in California refuse meritorious cases
 23 involving Indian Tribes, because of the overly burdensome, one-sided and unconscionable claims
 24 practices of these tribes. This has the result of stifling otherwise meritorious claims often leaving
 25 injured parties wardens of this State, which is already entrenched in a fiscal crisis. Indeed, in the
 26 *Campo* case, *supra*, Plaintiff's counsel spent seven years litigating that case based on a similar
 27 denial by the Indian tribe. The case went all the way to the California Supreme Court, which
 28

1 denied the tribe's petition for certiorari. Ultimately, plaintiff prevailed and obtained a large sum
2 settlement against the tribe [confidential], but not before being forced to waste countless time,
3 money and court resources.

4 IV.

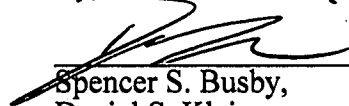
5 CONCLUSION

6 For the above-mentioned reasons and arguments, (1) the Tribe has waived its sovereign
7 immunity under the Compact, (2) the tribe's position and denial of arbitration directly contradicts
8 the Compact and is therefore inapplicable, (3) the Tribe's denial of arbitration is unduly
9 restrictive, unilateral, not contemplated by the Compact, and an unconscionable abrogation of
10 Plaintiff's legal rights under the United States Constitution. Plaintiff respectfully requests that this
11 Court deny Tribe's Motion to Dismiss and that this Court order the matter to arbitration, or in the
12 alternative, maintain subject matter jurisdiction over this matter.

13 Dated: October 22, 2010

14 SPENCER S. BUSBY & ASSOCIATES

15 By,

16 

17 Spencer S. Busby,
18 Daniel S. Klein,
19 Attorneys for Plaintiff, ARMAND SAROLI

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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 ARMAND SAROLI

) CASE NO. 10CV1748
)
)

12 v.
13

14 AGUA CALIENTE BAND OF CAHUILLA
15 INDIANS, AND DOES 1 TO 50

) DECLARATION OF DANIEL S. KLEIN IN
) SUPPORT OF PLAINTIFF'S OPPOSITION
) TO SPECIALLY APPEARING
) DEFENDANT'S MOTION TO DISMISS FOR
) LACK OF JURISDICTION
)

16 [F.R.C.P. 12(B)(1) &(2)]
17)
18)

19 Date: November 15, 2010
20 Time: 10:30 a.m.
21 Judge: Honorable Roger T. Benitez
22)
23 Location: Courtroom 3 (4th Floor)
24 U.S. Courthouse
25 940 Front Street, San Diego, CA
26)
27)
28)

20 I, Daniel S. Klein, declare as follows:

21 1. I am an attorney licensed to practice before all the courts in the state of California, and am an
22 attorney with SPENCER S. BUSBY & ASSOCIATES, attorneys of record in the above-entitled action
23 for Plaintiff, Armand Saroli ("Plaintiff").
24

25 2. I am familiar with this case and declare that the matters herein are within my personal
26 knowledge, and that I can testify to those facts if called upon to do so in court.

27 3. This declaration is submitted in support of Plaintiff's opposition to specially appearing
28

1 defendant's motion to dismiss for lack of jurisdiction.

2 4. Exhibit "1" is a true and correct copy of pertinent portions of the First Amendment to The
3 Tribal-State Compact Between The State of California and the Agua Caliente Band of Cahuilla Indians.

4 5. Exhibit "2" is a true and correct copy of Plaintiff's Incident Claim Form dated February 18,
5 2009.

6 6. Exhibit "3" is a true and correct copy of Plaintiff's Notice of Representation dated February
7 19, 2009 sent via facsimile and certified mailed to defendants.

8 7. Exhibit "4" is a true and correct copy of Plaintiff's Settlement Demand to Defendants dated
9 September 17, 2009.

10 8. Exhibit "5" is a true and correct copy of Plaintiff's Request for Mediation dated December 2,
11 2009.

12 9. Exhibit "6" is a true and correct copy of Defendant's first formal acknowledgment of receipt
13 of Plaintiff's Notice of Representation dated December 17, 2009.

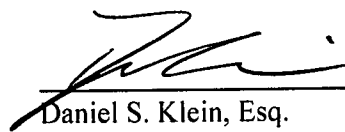
14 10. Exhibit "7" is a true and correct copy of Plaintiff's Demand for Arbitration dated June 14,
15 2010.

16 11. Exhibit "8" is a true and correct copy of Defendant's determination of non liability dated
17 June 21, 2010.

18 I declare under penalty of perjury under the laws of the state of California that the foregoing is
19 true and correct.

20 DATED: October 25, 2010

LAW OFFICE OF SPENCER S. BUSBY

21
22
23
24
25
26
27
28

Daniel S. Klein, Esq.
Attorney for Plaintiff ARMAND SAROLI

FIRST AMENDMENT TO

THE TRIBAL-STATE COMPACT

BETWEEN

THE STATE OF CALIFORNIA

AND THE

AGUA CALIENTE BAND

OF CAHUILLA INDIANS

**FIRST AMENDMENT TO THE TRIBAL-STATE
GAMING COMPACT**

Between the

Agua Caliente Band of Cahuilla Indians

and the

STATE OF CALIFORNIA

This First Amendment ("Amendment") to the Tribal-State Gaming Compact between the Agua Caliente Band of Cahuilla Indians, a federally-recognized sovereign Indian tribe (hereafter "Tribe"), and the State of California, a sovereign State of the United States (hereafter "State"), is jointly entered into by the Tribe and the State, pursuant to Section 12 of the Tribal-State Gaming Compact between the Tribe and the State, dated September 10, 1999 (hereafter "1999 Compact").

PREAMBLE

- A. On September 14, 1999, the State entered into the 1999 Compact with the Tribe, which was approved by the State Legislature and the United States Secretary of the Interior.
- B. The Tribe now operates two (2) Gaming Facilities, on its Indian lands in Riverside County, which offer Gaming Activities pursuant to the 1999 Compact.
- C. The Tribe has a history of working with the County of Riverside and local cities within the Reservation on land use, economic development, and other matters of mutual interest.
- D. The State and the Tribe have agreed to revise the 1999 Compact to promote continued good relations between state, local, and tribal governments and to enhance tribal economic development and self-sufficiency.

enforce the parties' obligation to arbitrate, (2) confirm, correct, modify, or vacate the arbitral award rendered in the arbitration, or (3) enforce or execute a judgment based upon the award. The Tribe agrees not to assert, and will waive any defense, alleging improper venue or forum non conveniens as to such state courts. The cost and expenses of such arbitration shall be initially borne by the Tribe but the arbitrator shall award to the prevailing party its costs and expenses (but not attorney fees). Any party dissatisfied with the award of the arbitrator may at the party's election invoke the JAMS Optional Arbitration Appeal Procedure (and if those rules no longer exist, the closest equivalent); provided that the party making such election must bear all costs and expenses of JAMS and the arbitrators associated with the Appeal Procedure regardless of the outcome.

(ii) At such time that the Tribe establishes a tribal court system, the Tribe may give notice to the State that it seeks to renegotiate in good faith this subdivision (d), in which case, the State shall be obligated to negotiate in good faith the arrangements, if any, by which the tribal court system will adjudicate patron claims covered under this subdivision. In so negotiating, the State shall give due respect to the sovereign rights of the Tribe, and due consideration to the due process safeguards established in the tribal court system, the transparency of the tribal court system, and the appellate rights afforded under the system.

VII. PUBLIC AND WORKPLACE HEALTH, SAFETY, AND LIABILITY

A. Sections 10.2 (a), (b), and (c) of the 1999 Compact are repealed and replaced by the following:

(a) Adopt and comply with standards no less stringent than state public health standards for food and beverage handling. The Gaming Operation will allow inspection of food and beverage services by state or county health inspectors, during normal hours of operation, to assess compliance with these standards, unless inspections are routinely made by an agency of the United States government to ensure compliance with equivalent standards of the United States

Public Health Service. Any report or writing by any inspector shall be transmitted to the State Gaming Agency and the Tribal Gaming Agency within twenty-four (24) hours of its issuance to the Gaming Operation. Nothing herein shall be construed as a submission of the Tribe to the jurisdiction of those state or county health inspectors, but any alleged violations of the standards may be treated by the State as violations of this Amended Compact.

(b) Adopt and comply with standards no less stringent than federal water quality and safe drinking water standards applicable in California; the Gaming Operation will allow for inspection and testing of water quality by state or county health inspectors, as applicable, during normal hours of operation, to assess compliance with these standards, unless inspections and testing are routinely made by an agency of the United States pursuant to, or by the Tribe under express authorization of federal law, to ensure compliance with federal water quality and safe drinking water standards. Any report or writing by any inspector shall be transmitted to the State Gaming Agency and the Tribal Gaming Agency within twenty-four (24) hours of its issuance to the Gaming Operation. Nothing herein shall be construed as submission of the Tribe to the jurisdiction of those state or county health inspectors, but any alleged violations of the standards may be treated by the State as violations of this Amended Compact.

(c) Comply with the building and safety standards set forth in Section 6.4, as amended herein.

B. Section 10.2(d) of the 1999 Compact is repealed and replaced by the following:

Section 10.2(d)

(i) The Tribe shall obtain and maintain a commercial general liability insurance policy consistent with industry standards for non-tribal casinos and underwritten by an insurer with an A.M. Best rating of A or higher ("Policy") which provides coverage of no less than ten million dollars (\$10,000,000.00) per occurrence for bodily injury, property damage, and personal injury arising out of, connected with, or relating to the operation of the Gaming Facility or Gaming

Activities. In order to effectuate the insurance coverage, the Tribe shall waive its right to assert sovereign immunity up to the limits of the Policy in accordance with the tribal ordinance referenced in subdivision (d)(ii) below in connection with any claim for bodily injury, property damage, or personal injury arising out of, connected with, or relating to the operation of the Gaming Facility, including, but not limited to, injuries resulting from entry onto the Tribe's land for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility; provided, however, that nothing herein requires the Tribe to agree to liability for punitive damages or to waive its right to assert sovereign immunity in connection therewith. The Policy shall acknowledge that the Tribe has waived its right to assert sovereign immunity for the purpose of arbitration of those claims up to the limits of the Policy referred to above and for the purpose of enforcement of any ensuing award or judgment and shall include an endorsement providing that the insurer shall not invoke tribal sovereign immunity up to the limits of the Policy; however, such endorsement or acknowledgement shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity beyond the Policy limits.

(ii) The Tribe shall maintain in continuous force its Tort Liability Ordinance which shall, prior to the effective date of this Amendment and at all times hereafter, continuously provide at least the following:

(A) That California tort law shall govern all claims of bodily injury, property damage, or personal injury arising out of, connected with, or relating to the operation of the Gaming Facility or the Gaming Activities, including, but not limited to, injuries resulting from entry onto the Tribe's land for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility, provided that any and all laws governing punitive damages need not be a part of the Ordinance.

(B) The ordinance shall expressly provide that the Tribe waives its right to assert sovereign immunity with respect to the arbitration and court review of such claims

but only up to the limits of the Policy; provided, however, such waiver shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity beyond the Policy limits.

(C) The ordinance shall provide that the Tribe consents to binding arbitration before a single arbitrator, who shall be a retired judge, in accordance with the comprehensive arbitration rules and procedures of JAMS (or if those rules no longer exist, the closest equivalent) to the extent of the limits of the Policy, that discovery in the arbitration proceedings shall be governed by section 1283.05 of the California Code of Civil Procedure, that the Tribe shall initially bear the cost of JAMS and the arbitrator, but the arbitrator may award costs to the prevailing party not to exceed those allowable in a suit in California Superior Court, and that any party dissatisfied with the award of the arbitrator may at the party's election invoke the JAMS Optional Arbitration Appeal Procedure (or if those rules no longer exist, the closest equivalent), provided that the party making such election must bear all costs and expenses of JAMS and the arbitrators associated with the Appeal Procedure regardless of the outcome. To effectuate its consent to the foregoing arbitration procedure, the Tribe shall, in the exercise of its sovereignty, waive its right to assert its sovereign immunity in connection with the arbitrator's jurisdiction and in any action brought in federal court or, if the federal court declines to hear the action, in any action brought in the courts of the State of California that are located in Riverside County, including courts of appeal, to (1) enforce the parties' obligation to arbitrate, (2) confirm, correct, modify, or vacate the arbitral award rendered in the arbitration, or (3) enforce or execute a judgment based upon the award. The Tribe agrees not to assert, and will waive, any defense alleging improper venue or forum non conveniens as to such state courts.

AGUA CALIENTE CASINO
RANCHO MIRAGESPA RESORT CASINO
PALM SPRINGS

INCIDENT CLAIM FORM

Patron: Armand Saroli

Claimant (if different): _____

Address: 1434 Fifth AvenuePhone: (619) 230-1434City: San DiegoState: CA Zip Code: 92101Type of Incident: Personal Injury Date of Incident: 1/21/09 Location: ACCH Rm # 206

Description of the event on which the claim is based:

levers/

Patron contacted housekeeping to report a broken drain in tub. Housekeepi
sent maintenance to room to fix tub; maintenance reportedly resolved the
problem and advised patron everything was fixed. Patron proceeded to get
into tub and bathe, when turning the temperature levers, the water spout
Describe the act, omission or other circumstance for which you feel the Tribe is (see reverse)
responsible and on which the claim is based:

General Negligence; Premises Liability

Amount of monetary damages sought, the calculation and basis thereof:

AMOUNT UNKNOWN AT THIS TIME. MR. SAROLI IS STILL TREATING.**

****IF TRIBAL LAW REQUIRES A SPECIFIC AMOUNT, TO PRESERVE PATRON'S RIGHTS,
AMOUNT OF DAMAGES= \$500,000+. (AMOUNT CALCULATED BASED ON MEDICAL BILLS
(SEE REVERSE**

Attorney (if any) Spencer S. BusbyFirm: Law Offices of Spencer S. BusbyAddress: 1434 Fifth AvenuePhone: (619) 230-1434City: San DiegoState: CA Zip Code: 92101

I hereby certify that the above information regarding this matter is true and correct, and
that all statements are made under penalty of perjury.

Signature of Claimant

Armand Saroli

Print Name

San Diego, CA

Place of Signature

2/18/09

Date

Description (continued)...

broke off and struck patron on his head above his right eye. He was transported to the ER by ambulance, which was called by Casino Resort security.

Amount of Damages (continued)...

pain and suffering, loss of earnings.

SPENCER S. BUSBY
A PROFESSIONAL LAW CORPORATION

Spencer S. Busby *

* (Admitted in California and Florida)

1434 Fifth Avenue
San Diego, California 92101
(619) 230-1434 or Fax (619) 230-1181

February 19, 2009

SENT VIA FACSIMILE & U.S. MAIL (CERTIFIED)
(760) 202-2698

Agua Caliente Casino, Rancho Mirage
32-250 Bob Hope Drive
Rancho Mirage, CA 92270
Attn: George A. Palomares, Investigator

RE: NOTICE OF REPRESENTATION

My Client: Armand Saroli
Date of Injury: 1/21/09
Reference No.: 0901A-0068

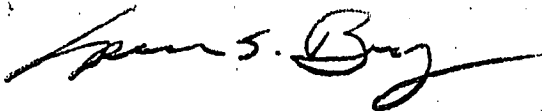
Dear Mr. Palomares:

Please be advised that this office has been retained by the above referenced client to represent him for personal injuries and related damages received in incident that occurred at your Casino and Resort on January 21, 2009.

I would appreciate a letter from you confirming coverage of the above-named insured and providing me with the policy number as well as a certified copy of the coverage endorsement page indicating the policy limits thereunder.

Thank you for your anticipated courtesy and cooperation throughout the process of this claim. If you have any questions regarding this claim. If you have any questions regarding this matter, please feel free to contact me. You are reminded that all future inquiries shall be directed to this office.

Very truly yours,



Spencer S. Busby, Esq.

SSB: cp

Encl.

INCIDENT CLAIM FORM

SPENCER S. BUSBY
A PROFESSIONAL LAW CORPORATION

Spencer S. Busby *

(Admitted in California and Florida)

1434 Fifth Avenue
San Diego, California 92101
(619) 230-1434 or Fax (619) 230-1181

February 20, 2009

SENT VIA CERTIFIED MAIL

Tom Kieley Insurance and Financial Services
P.O. Box 3275
Palm Springs, CA 92263

RE: **NOTICE OF REPRESENTATION**

My Client: Armand Saroli

Your Insured: Agua Caliente Casino Resort and Spa

Date of Injury: 1/21/09

Reference No.: 0901A-0068

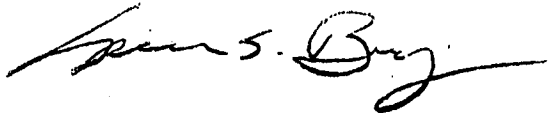
To whom it may concern:

Please be advised that this office has been retained by the above referenced client to represent him for personal injuries and related damages received in incident that occurred at your insured's Casino and Resort on January 21, 2009. I am enclosing my client's Incident Claim Form.

I would appreciate a letter from you confirming coverage of the above-named insured and providing me with the policy number as well s a certified copy of the coverage endorsement page indicating the policy limits thereunder.

Thank you for your anticipated courtesy and cooperation throughout the process of this claim. If you have any questions regarding this claim. If you have any questions regarding this matter, please feel free to contact me. You are reminded that all future inquiries shall be directed to this office.

Very truly yours,

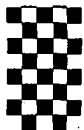


Spencer S. Busby, Esq.

SSB: cp

Encl.

INCIDENT CLAIM FORM



George A. Palomares
Investigations

Agua Caliente Casino Resort and Spa

Phone: 760.202.2685
Fax: 760.202.2698
Email: gpalomares@accmail.net
32-250 Bob Hope Dr.
Rancho Mirage, CA 92270



Facsimile Transmittal

To: **Spencer Busby, Esq.**

Fax: **(619) 230-1181**

From: **George Palomares**

Date: **February 20, 2009**

Re: **Saroli/0901A-0068**

Pages: **1**

Cc:

☐ Urgent

☐ For review

☐ Please comment

☐ Please reply

☐ Please recycle

Hi Mr. Busby, I received your fax regarding Armand Saroli. I immediately forwarded it to the Tribal Risk Manager, Tom Kieley. He will respond immediately. I sent Armand an Incident Claim Form which he has not returned. Make sure he sends it so the case can progress. The contact info for Kieley is below. Thanks

Tom Kieley Insurance and Financial Services

P.O. Box 3275

Palm Springs CA 92263

(760) 327-9160

CERTIFIED MAIL RECEIPT

(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To
 Agua Caliente Casino - George Pal
 Street, Apt. No.,
 or PO Box No. 32-250 Bob Hope Dr.
 City, State, ZIP+4
 Rancho Mirage, CA 92270

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Agua Caliente Casino, Rancho Mirage
 32-250 Bob Hope Drive
 Rancho Mirage, CA 92270
 Attn: George A. Palomares, Investigator

2. Article Number

(Transfer from service label)

7006 2150 0003 2453 4251

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-16

COMPLETE THIS SECTION ON DELIVERY

A. Signature *R. Palomares* ☒ Agent ☐ Address

B. Received by (Printed Name) *Rosemary Gonzalez* C. Date of Delivery *2-23-07*

D. Is delivery address different from item 1? ☐ Yes ☒ No
 If YES, enter delivery address below:

3. Service Type

- ☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

U.S. Postal Service CERTIFIED MAIL RECEIPT

(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To
 Tom Kieley Ins. & Fin. Serv.
 Street, Apt. No.,
 or PO Box No. P.O. Box 3275
 City, State, ZIP+4
 Palm Springs, CA 92263

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Tom Kieley Insurance & Financial Services
 P.O. Box 3275
 Palm Springs, CA 92263

2. Article Number

(Transfer from service label)

7007 1490 0001 8007 3250

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-16

COMPLETE THIS SECTION ON DELIVERY

A. Signature *Tom Kieley* ☐ Agent ☐ Address

B. Received by (Printed Name) *Kieley* C. Date of Delivery *2/24/07*

D. Is delivery address different from item 1? ☐ Yes ☒ No
 If YES, enter delivery address below:

3. Service Type

- ☒ Certified Mail ☐ Express Mail
☒ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

SPENCER S. BUSBY
A PROFESSIONAL LAW CORPORATION

Spencer S. Busby *

*(Admitted in California and Florida)

1434 Fifth Avenue
San Diego, California 92101
(619) 230-1434 or Fax (619) 230-1181

September 17, 2009

Kieley Insurance and Financial Services
P.O. Box 3275
Palm Springs, CA 92263
Attn: Thomas Kieley

RE: SETTLEMENT DEMAND

My Client: Armand Saroli
Your Insured: Agua Caliente Casino and Resort
Date of Loss: 1/21/09

Dear Mr. Kieley:

This letter serves as my demand for settlement on behalf of my client, Armand Saroli, for injuries resulting from your insured's negligence. Enclosed please find all pertinent medical records, reports and billing statements to support my client's personal injury claim.

FACTS

On January 21, 2009, my client was a patron at your insured's Casino and Resort. Mr. Saroli was in his Room #206 at the time that the incident occurred. He prepared his bath and noticed the drain/lever was broken. Mr. Saroli contacted housekeeping to report the problem; housekeeping sent maintenance to the room to fix the tub. Resort maintenance workers told Mr. Saroli the problem was resolved and advised him it was fixed and ready to use. Mr. Saroli proceeded to get into the tub and bathe. As he turned the levers to adjust the water temperature, the water spout broke off and struck Mr. Saroli on his head, above his right eye, knocking him backwards, striking his back against the wall of the jacuzzi tub.

SPECIAL DAMAGES

Immediately after the incident, my client experienced pain to his head and neck. He was transported to the nearby emergency room by ambulance, which was called by Casino Resort security. Mr. Saroli was evaluated for blunt trauma to the frontal area and concussion. The CT-scan of the head showed a mild right forehead soft tissue hematoma. He returned to the ER for a few follow-up visits, with complaints of numbness to the right hemisphere of his head, headaches, and blurred vision. Mr. Saroli was evaluated by Douglas Roger, M.D., who diagnosed him with a closed head injury, sprain and strain of cervical spine with possible internal derangement. He advised client to continue therapy with Dr. Nelson.

Thomas Kieley
Page 2
September 17, 2009

As a direct result of this accident, my client incurred the following reasonable and necessary medical expenses:

Eisenhower Medical Center	\$ 3,498.00
Springs Ambulance	\$ 1,171.00
Desert Medical imaging	\$ 3,710.00
Prescriptions	\$ 67.95
Douglas Roger, M.D.	\$ 996.50
Barry Nelson, D.C.	\$ 420.00
Compound Central Pharmacy	\$ 254.43
Emergency Medical Physicians	\$ 795.00
Dr. Ali, M.D.	\$ 2,811.85
Total Medical Specials	\$ 18,724.73

LOST WAGES

At the time of the incident, my client was employed as a Supervisor/Foreman for Phoenix Construction. He was unable to work from January 21, 2009 to June 17, 2009 and has \$27,000 in loss of earnings (see attached employer documentation).

Please contact me upon receipt and evaluation of this claim to discuss potential settlement of this matter.

Very truly yours,


Spencer S. Busby, Esq.

SSB: cp
Enclosures

SPENCER S. BUSBY
A PROFESSIONAL LAW CORPORATION

Spencer S. Busby *

* (Admitted in California and Florida)

1434 Fifth Avenue
San Diego, California 92101
(619) 230-1434 or Fax (619) 230-1181

December 2, 2009

SENT VIA FACSIMILE

760-327-6450

Kieley Insurance & Financial Services
P.O. Box 3275
Palm Springs, CA 92263
Attn: Thomas Kieley

RE: **REQUEST FOR MEDIATION**

My Client: Armand Saroli

Your Insured: Agua Caliente Casino and Resort

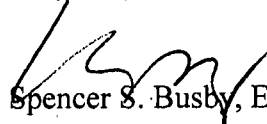
Dear Mr. Kieley:

This letter is in follow-up to our telephone conversation of December 1, 2009, in which I proposed scheduling an informal mediation, in an attempt to resolve this case pre-litigation.

Please discuss this option with your insured. If your insured agrees to mediate this matter, please contact my Paralegal, Cynthia, who will proceed with the scheduling.

I would appreciate a response by December 9, 2009. Feel free to call me with any questions.

Very truly yours,



Spencer S. Busby, Esq.

/cp

December 17, 2009



Spencer S. Busby, Esq.
A Professional Law Corporation
1434 Fifth Avenue
San Diego, CA 92101

Re: Insured : Agua Caliente Band of Cahuilla Indians
Claimant : Armand Saroli
Date of Loss : 01/21/2009
Claim # : 2009115494

Dear Mr. Busby:

Please accept this letter as our first formal acknowledgement of receipt of your notice of representation of Armand Saroli.

We are the Third Party Claims Administrators handling this matter on behalf of Agua Caliente Band of Cahuilla Indians. All communication and correspondence regarding this matter should be directed to the attention of the undersigned.

We would appreciate you keeping us up to date on your client's injury and treatment in reference to this claim. To this end, we have enclosed two Authorizations for Release of Medical Information forms with a request that you have your client complete and return to our office. Please be sure to include the names, addresses and telephone numbers of your client's treating physicians. We will need one of these forms signed by your client for each facility/doctor your client has treated with. Should you require more forms, please make copies as needed.

We appreciate your continued courtesy and cooperation in this matter.

Sincerely,

Madeleine Carwin
Liability Adjuster, Tribal First
(800)552-8921 x4031
(619) 699-0929 (fx)

Enclosures: Medical Release Forms

cc: Agua Caliente Band of Cahuilla Indians

SPENCER S. BUSBY
A PROFESSIONAL LAW CORPORATION

Spencer S. Busby *
Carree K. Nahama

* (Admitted in California and Florida)

1434 Fifth Avenue
San Diego, California 92101
(619) 230-1434 or Fax (619) 230-1181

June 14, 2010

SENT VIA CERTIFIED MAIL

Tribal First
P.O. Box 609015
San Diego, CA 92160
Attn: Madeleine Carwin

RE: **DEMAND FOR ARBITRATION**

My Client: Armand Saroli

Respondent: Agua Caliente Band of Cahuilla Indians

DOI: 1/21/09

Claim No.: 2009115494

Dear Madam:

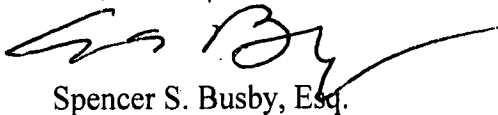
Please allow this letter to serve as a formal request for arbitration. To date, we have not received written notice of the Tribe's "Tribal Dispute Resolution Process," via certified mail or personal service. Please forward

Also, I hereby request that you forward a copy of the 2009 Tort Ordinance, and a copy of the notice as soon as possible, as we are amenable to proceed with the Tribal Dispute Resolution process.

Please respond to this formal request within thirty (30) days. If you fail to grant or deny the request for arbitration within thirty (30) days, this request shall be deemed to have been denied, and our client will avail himself of all legal remedies, including but not limited to, filing suit in the appropriate forum and bringing a motion to compel arbitration.

Please feel free to contact me with any questions or comments. I look forward to hearing from you.

Very truly yours,



Spencer S. Busby, Esq.

Encl.

CERTIFIED MAIL



June 21, 2010

Spencer S. Busby
A Professional Law Corporation
1434 Fifth Avenue
San Diego, CA 92101

Re: Insured : Agua Caliente Band of Cahuilla Indians
Claimant : Armand Saroli
Date of Loss : 01/21/2009
Claim # : 2009115494

Dear Mr. Busby:

Please be advised we have concluded our investigation in regards to your client's unfortunate incident and his claim against the Agua Caliente Band of Cahuilla Indians.

Your client, Armand Saroli, reported that while adjusting the water on the bath tub inside his hotel room the water spout dislodged and struck Mr. Saroli in the head. Our investigation reveals our insured did not have prior notice the bathtub spout had any mechanical issues.

Our investigation showed neither negligence nor liability on behalf of the Agua Caliente Band of Cahuilla Indians. While we regret any incident a patron may have and certainly sympathize for any difficulty this incident may have caused Mr. Saroli, we must respectfully deny his claim.

Upon further review as a follow up to our prior conversation and your letter dated April 20, 2010, it has been determined Mr. Saroli was not engaging in gaming activities when this accident occurred, therefore the incident does not fall under the Tribe's Gaming Ordinance and arbitration is not applicable. Per the Agua Caliente Band of Cahuilla Indians Ordinance 32B:

Section 3. Definitions

A claim to a Patron for negligent or intentional injury to person, including death, or property sustained by the Patron at the Gaming Facility or in connection with Tribe's Gaming Operation, but only subject to each and every one of the limitations and conditions of this ordinance. A "Covered Claim" does not include any claim for breach of contract, any claim covered by worker's compensation laws, any claim for indemnity or contribution from or by a third party, or any other kind of tort or other claims whatsoever.

Should you disagree with our determination you may send a letter to our office within 30 days from the date of this letter. Your letter should clearly state why you believe our decision was reached in error and why you believe our insured is responsible for your client's injury.

Please do not hesitate to contact our office should you have questions regarding your claim.

Sincerely,

Madeleine Carwin

Madeleine Carwin
Liability Adjuster, Tribal First
(800)552-8921

Cc: Agua Caliente Band of Cahuilla Indians