No. E050306
SC No. RIC 535124

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION II

CALIFORNIA PARKING SERVICES, INC.

Plaintiff and Appellant
vs

SOBOBA BAND OF LUISENO INDIANS,

Defendant and Respondent

On Appeal from an Order
Riverside Superior Court No. RIC 535124
Hon. Gary B. Tranbarger, Judge

APPELLANT'S OPENING BRIEF

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The appellant California Parking Services submits the following opening brief:

I. INTRODUCTION

This appeal challenges the denial of the petitioner's Petition To Compel Binding Contractual Arbitration and the granting of the respondent's Demurrer to petitioner's Petition To Compel Arbitration by the Trial Court.

The Demurrer raised the issue of whether the respondent, an Indian Tribe, was subject to subject matter jurisdiction based upon a defense of tribal sovereign immunity.

The petitioner, California Parking Services, Inc., claimed the respondent Indian tribe subjected itself to subject matter jurisdiction by reason of:

1. The insertion of the arbitration clause in the Professional Services Agreement; and
2. A limited waiver of the tribes' sovereign immunity.

The question therefore, is did the Trial Court correctly determine if the respondent Indian tribe submitted to subject matter jurisdiction of the dispute under the Professional Services Agreement.

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II. FACTUAL SUMMARY

On March 2, 2007, the petitioner California Parking Services, Inc. dba California Parking Services and Soboba Band Of Luiseno Indians doing business as the Soboba Casino entered into the Professional Services Agreement. That agreement is on Soboba Casino letterhead. (CT 15-22).

Under the Agreement, the petitioner was to provide valet parking services at the casino beginning at 8:00 a.m., on March 15, 2007 and continue to for three (3) years ending on February 16, 2010. In addition, the petitioner had two (2) options of renew the Agreement for additional three (3) year terms. (CT 15-22).

The Professional Services Agreement provided that:

> "Any disputes under this Agreement that cannot be resolved amicably through a negotiated agreement **shall** be submitted for resolution to an arbitrator acceptable by both parties. If the parties cannot agree upon a single arbitrator, the dispute **shall** be submitted for resolution to a panel of arbitrators, . . . The arbitration need not take place through the

American Arbitration Association unless the parties cannot otherwise agree. It shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (September 2005 edition or later) excluding Rule 48(c). The decision may include an award of costs and attorney's fees to the prevailing party, shall be limited to the resources of the Casino . . . and **shall** be final and binding on both parties."

[Bold added].

(CT 20, paragraph 7)

On June 30, 2009, the respondent Indian tribe unilaterally terminated the Professional Services Agreement. (CT 24)

The petitioner disputed any basis to terminate the Agreement and claims the termination is in violation of the Agreement.

On July 14, 2009, the petitioner California Parking Services, Inc. dba California Parking Services demanded Arbitration pursuant to paragraph 7 of the Professional Services Agreement. (CT 26).

Thereafter, the respondent refused to submit the disputes to and/or participate in Arbitration, thereby necessitating the Petition To

Compel Binding Contractual Arbitration. (CT 1 to CT 27).

The Petition To Compel Binding Contractual Arbitration was set for hearing on October 2, 2009. (CT 1). No opposition to the Petition To Compel Binding Arbitration was filed. (See CT 1 to 82).

On September 15, 2009, the respondent Soboba Band of Luiseno Indians filed the Demurrer to the Petition To Compel Binding Contractual Arbitration. (CT 29-38).

On the October 2, 2009 hearing date of the Petition To Compel Binding Contractual Arbitration, the Trial Court continued the same until the October 29, 2009 hearing of the Demurrer. (CT 81).

The petitioner California Parking Services, Inc. filed an opposition to the Demurrer on October 14, 2009. (CT 43-54).

On October 29, 2009, the Court denied the Petition To Compel Binding Arbitration and on that basis, ruled the Demurrer was moot. (CT 82).

On December 22, 2009, the Order dismissing the entire action was filed. (CT 83).

On February 9, 2010, notice of filing proof of service of the December 22, 2009 Order of dismissal was filed (CT 83).

A timely Notice of Appeal was filed on February 22, 2009. (CT 77-78).

An order of dismissal is appealable. *Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1359, 128 Cal.Rptr.2d 200; *Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 756, 62 Cal.Rptr.2d 778, 781.

An order denying a petition to compel arbitration is appealable. Code of Civil Procedure §1294, subd. (a).

III. ARGUMENT

1. THE STANDARD OF REVIEW

A de novo standard of review applies where the trial court's denial of a petition to arbitrate presents a pure question of law. *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425, 34 Cal.Rptr.3d 547.

Interpretation of a written instrument becomes solely a judicial function when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence or when a determination was made on incompetent evidence. *City of Hope Nat'l Med. Ctr. v.*

Genentech, Inc. (2008) 43 Cal.4th 375, 395–397, 75 Cal.Rptr.3d 333, 350-352.

When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law ... This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence ... or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126–1128, 76 Cal.Rptr.3d 585, 602–604.

Civil Civil §1639 provided that "[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible". *Civil Code* §1638 provides the "language of a contract is to govern its interpretation".

Therefore, the issue of whether the Arbitration clause constituted a limited waiver of the Indian tribe's sovereign immunity is a legal question reviewed de novo.

2. THE INDIAN TRIBE WAIVED ITS SOVEREIGN IMMUNITY BY CLEAR AND EXPRESS AGREEMENT TO SUBMIT DISPUTES TO BINDING ARBITRATION

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States,* (1919) 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game,* 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed.2d 667 (1977).

"It is settled that a waiver of sovereign immunity ' "cannot be implied but must be unequivocally expressed." ' *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976), quoting, *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969); *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58-59, 98 S.Ct. 1670, 56 L.Ed.2d 106.

The petitioner California Parking concedes that as a general matter the respondent Soboba Band of Luiseno Indians enjoys sovereign immunity.

However, California Parking claims the Trial Court erred in finding the doctrine of sovereign immunity was a bar to compelling

Arbitration, because the Indian tribe waived its sovereign immunity and consented to Arbitration by expressly agreeing to Arbitration. (See paragraph 7 of the Professional Services Agreement, CT 20).

The Arbitration clause in paragraph 7 states:

"Any disputes under this Agreement that cannot be resolved amicably through a negotiated agreement **shall** be submitted for resolution to an arbitrator acceptable by both parties. If the parties cannot agree upon a single arbitrator, the dispute **shall** be submitted for resolution to a panel of arbitrators, . . . The arbitration need not take place through the American Arbitration Association unless the parties cannot otherwise agree. It shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (September 2005 edition or later) excluding Rule 48(c). The decision may include an award of costs and attorney's fees to the prevailing party, shall be limited to the resources of the Casino . . . and **shall** be final and binding on both parties." [Bold added for emphasis].

The Indian tribe attempted to avoid this express waiver of

immunity by slipping the phrase "excluding Rule 48(c)"at the end of the sentence "It shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (September 2005 edition or later)". In other words, the Indian tribe is trying to claim the ENTIRE Arbitration provisions of the contract it wrote are illusory and unenforceable because it slipped in two (2) words at the end of one (1) sentence. In effect, the tribe seeks to weasel out of the clear language of the Arbitration provisions by saying the tribe agreed to waive its sovereign immunity and consent to Arbitration, but only when we want to arbitrate. Simply put, this is wrong and improper.

American Arbitration Association Rule 48 (c) provides:

> "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."

The Trial Court confused the issue of ENTERING a judgment upon an Arbitration award in an appropriate Court with OBTAINING an Arbitration Award from the American Arbitration Association to

determine that it should not compel Arbitration. In doing so the Trial Court let the cart lead the horse. This was error.

Entering a judgment upon an Arbitration award after Arbitration is not the same as denying the parties the right to obtain an Arbitration award.

"An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration." *Code Civil Procedure* §1287.6.

Obtaining an Arbitration award is separate and apart from enforcing it after entry of a judgment based on that award. Therefore, the Court should have interpreted the Arbitration clause of the contract to compel Arbitration, regardless of any consent by the Indian tribe to entry of a judgment upon any American Arbitration Association award in a federal or state Court. This was what the contract stated and what the intent of the parties was under the Arbitration clause of the contract.

3. THE WAIVER BY THE TRIBE OF ITS SOVEREIGN IMMUNITY WAS A LIMITED WAIVER

When a tribe consents to arbitration it makes **a limited waiver of its sovereign immunity.** See *C & L Enterprises,Inc. v. Citizen Band Potawatomi Tribe of Okla.* (2001) 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623.

In this case, the respondent tribe, by inserting the Arbitration clause in the Professional Services Agreement, has consented to Arbitration and thus, waived its sovereign immunity.

A California case has recognized that an Indian tribe's Arbitration agreement subjects it to a petition to compel Arbitration and/or an action to enforce an Arbitration award. See *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 35 Cal.Rptr. 3d 357.

The Court stated in the *Big Valley* case, at page 1193:

"Because a waiver of immunity ' " 'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.' " ' " (See *Missouri River Services v. Omaha Tribe of Nebraska* (8th Cir.2001) 267 F.3d 848, 852.)

Consistent with this rule, the Eleventh Circuit Court of Appeals has interpreted a waiver of tribal immunity **in an arbitration clause** to effectuate waiver only for purposes of compelling arbitration or entering judgment on an arbitration award. (*Tamiami Partners,* supra, 177 F.3d at pp. 1224-25.)"

(Bold added for emphasis)

In the *Big Valley* case, employment contracts did not expressly limit the immunity waiver, but instead simply contain arbitration clauses, which provided: "Any claim or controversy arising out of or relating to any provisions of this Agreement, or breach thereof, shall upon written demand be resolved by arbitration under the rules of the American Arbitration Association in San Francisco, California, and judgement [*sic*] on any award by the arbitrators may be entered in any court having such jurisdiction. Arbitration costs shall be paid, one-half by each party and the party losing the award will reimburse the prevailing party their half."

The Court held that the Arbitration clauses did not effect a general waiver of the Tribe's sovereign immunity even though the clauses were not explicitly self-limiting. The Court held however,

that they indicated an Arbitration award may be entered in a court of competent jurisdiction. Even though the Arbitration clause did not expressly provide that a party may file a petition to compel arbitration, the arbitration clause necessarily permitted state court actions to compel compliance with the agreement to arbitrate. The United States Supreme Court in *C & L Enterprises* interpreted similar language to constitute a waiver of limited scope, including the consent to arbitration and enforcement of arbitration awards in state court. (*C & L Enterprises, supra,* 532 U.S. at p. 423, 121 S.Ct. 1589.)

So to, the Trial Court in this action should have compelled the Indian tribe to arbitrate its dispute with the petitioner California Parking. The petitioner's ability to have any Arbitration award entered as a judgment in a state or federal Court should not have been used to deny the petitioner the right to arbitrate its disputes with the Soboba Band of Luiseno Indians.

4. CALIFORNIA LAW MUST BE USED TO INTERPRET THE WAIVER OF SOVEREIGN IMMUNITY

Finally, California law must be used to decide the issues presented by this appeal.

The Professional Service Agreement provides in provision 8, at page 7, subparagraph "g" that:

"This agreement **shall** be governed by the laws of the State of California and, where applicable, Tribal and Federal law." [Bold added for emphasis]. (CT 21).

By the use of the word "shall", this clause is mandatory and California law must be applied.

With respect to the issue of enforcing any Arbitration award, California law provides for enforcement of any arbitration award regardless of exclusion of any American Arbitration Association rule.

Code of Civil Procedure §1285 provides for enforcement as follows:

"Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award.".

Therefore and once again, the Trial Court should not have used the excluded provision of any Arbitration rule to deny the petitioner the right to arbitrate the disputes with the Indian tribe under the Arbitration provisions of the contract.

/ / /

5. CONCLUSION

The Trial Court erred in failing to compel Arbitration under the waiver the Indian tribe consented to in the Professional Services Agreement. The Indian tribe must be held to the terms of the contract it drafted and must not be allowed, by sleight of hand, to avoid Arbitration of its disputes with California Parking Services, Inc. An order should be issued reversing the Trial Court and ordering the Trial Court to issue an order compelling the respondent Soboba Band of Luiseno Indians to arbitrate any disputes with California Parking Services, Inc. with respect to the Professional Services Agreement.

WHEREFORE, the appellant respectfully prays for judgment of this Court as follows:

1. That the Trial Court's order, dated December 10, 2009, dismissing the Petition To Compel Contractual Arbitration be reversed with directions to issue an order compelling Arbitration;

2. For costs of and attorney's fees for the appeal; and

/ / /

3. For general relief.

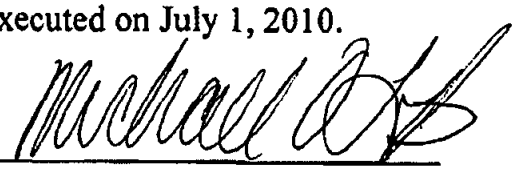
DATED: July 1, 2010

MICHAEL A. LOTTA
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant of Rule 8.204(b)(4)(c)(1) of the California Rules of Court, I certify that this document is double spaced and is 14 point Times New Roman Font and contains 2896 words. I have relied on the word counter in Corel Word Perfect, a word processing program, for this conclusion.

I declare, under penalty of perjury, the foregoing is true and correct and that this Declaration was executed on July 1, 2010.



MICHAEL A. LOTTA
Declarant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)SS
COUNTY OF LOS ANGELES)

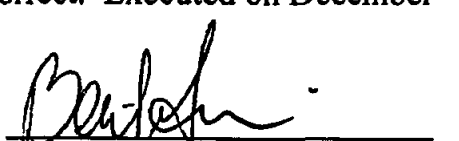
I am have my business address in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 4244 East 4th Street, Long Beach, CA 90814. On July 1, 2010, I served the within **APPELLANT'S OPENING BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Long Beach, California as follows:

Samuel David Hough, Esq.
Luebben, Johnson & Barnhouse
7424 4th St. NW
Los Ranchos De Albuquerque, N. M. 87107

Hon. Gary Tranbargar, Judge
Riverside Superior Court
4050 Main Street
Riverside, CA 92501

On said date, I also a copy of the aforesaid Appellant's Opening Brief to the Supreme Court of the State of California by transmitting the same electronically as a searchable PDF file,

I declare under penalty of perjury under the laws of the State of California, the foregoing is true and correct. Executed on December 4, 2009.



Beatriz Garcia, Declarant