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 REPLY BRIEF

Law Offices of Michael A. Lotta, Inc.
Michael A. Lotta
CSB No.: 94301
4244 E. 4th Street
Long Beach, CA 90814
Telephone: (562) 438-9137
Fax: (562) 438-9138
Attorney for Appellant
CALIFORNIA PARKING SERVICES, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 REPLY BRIEF

Law Offices of Michael A. Lotta, Inc.
Michael A. Lotta, Esq., CSB 94301
4244 E. 4th Street
Long Beach, CA 90814
Telephone: (562) 438-9137
Fax: (562) 438-9138
Attorney for Appellant
CALIFORNIA PARKING SERVICES, INC.

The appellant California Parking Services submits the following reply brief:

I. SUMMARY OF ARGUMENT

The respondent Soboba Band of Luiseno Indians ("Soboba Band") claims that "The question presented by this appeal is whether the trial court correctly determined that the Soboba Band did not waive its sovereign immunity by entering into a professional services agreement with California Parking that contained a dispute resolution clause. by entering into a professional services agreement with California." (Respondent's Response Brief, page 1, last paragraph).

This claim incorrectly states the question presented by this appeal. Simply stated, the question presented is should the Dispute Resolution provisions of the Professional Services Agreement be given their plain meaning or should the plain meaning of the provisions be ignored.

The Court is urged not render the Dispute Resolution provisions in the subject Professional Services Agreement illusory because the Soboba Band included a three (3) word phrase in the twelve (12) line provisions of the Dispute Resolution paragraph.

Put another way, the question presented by this appeal is

whether the ENTIRE Dispute Resolution provisions of the Professional Services Agreement are unenforceable (i.e. The Soboba Band has not waived its sovereign immunity) because by the Soboba Band placed a three (3) word phrase in the one hundred fifty six (156) word Dispute Resolution provisions of the Professional Services Agreement.

The three (3) word phrase the Soboba Band is relying on to suggest the Court should NOT give meaning to the entirety of the Dispute Resolution provisions paragraph of the Professional Services Agreement is the phrase "excluding Rule 48(c)" from the following sentence in the paragraph:

> "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 entire Dispute Resolution paragraph reads as follows:
>
> "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 of which the Tribe shall appoint one member, CPS shall appoint one member, and the two members thus appointed shall appoint a third member. 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 not involve nor purport to encumber any other assets of the Tribe, and shall be final and binding on both parties."

(CT 20, paragraph 7)

For the reasons set forth in the Appellant's Opening Brief and as set below, the Court of Appeal should reverse the Trial Court's decision to dismiss the Petition To Compel Arbitration and enforce the Dispute Resolution provisions of the Professional Services Agreement by giving them their plain meaning.

II. THE COURT SHOULD GIVE THE DISPUTE RESOLUTIONS PROVISIONS THEIR PLAIN MEANING AND ENFORCE THE ARBITRATION PROVISIONS

The Soboba Band of Luiseno Indians claims that it "is not aware of any court having held that the simple inclusion of an arbitration clause in an agreement with a federally recognized Indian tribe affects a waiver of tribal sovereign immunity." (See page 7 of the Respondent's Response Brief).

However, the case of *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1191, 35 Cal.Rptr.3d 357, 362 (Cal.App. 1 Dist.,2005) suggests otherwise. As stated by the Court in *Big Valley*: "When a tribe consents to arbitration it makes a limited waiver of its sovereign immunity. (See C & L Enterprises, supra, 532 U.S. at p. 423, 121 S.Ct. 1589.)".

Additionally, the Dispute Resolution paragraph of the Professional Services Agreement, quoted on pages 2 and 3 above, is NOT a SIMPLE inclusion of an arbitration clause in an agreement. The paragraph is detailed, setting forth how the arbitration is to be conducted, how the arbitrators are to be selected, if attorney's fees and costs can be awarded and if the arbitration award is final and

binding.

The real question this Court should ask is what disputes under the agreement the Dispute Resolution provisions apply to, if the Court adopts the respondent's interpretation of the Dispute Resolution provisions and finds that including the phrase " excluding Rule 48(c)" in one (1) sentence of the paragraphs means the Tribe has not waived its sovereign immunity.

There is nothing ambiguous about the language of the Dispute Resolution provisions in the subject Professional Services Agreement. The tribe agreed to submit disputes arising under the contract to Arbitration, to a procedure to conduct the Arbitration and to be bound by the Arbitration award, which would be final.

The arbitration clause would be meaningless if it did not constitute a waiver of whatever immunity the Tribe possessed because the Tribe has agreed that "Any disputes under this agreement" would be arbitrated. Thus, there was and is an express waiver of the Tribe's sovereign immunity.

The use of the three (3) word phrase "excluding Rule 48 (c)" on one (1) sentence of an entire paragraph are not magic words that

render the entire Dispute Resolution provisions meaningless.

III. THERE IS CASE LAW THAT HOLDS THAT INCLUSION OF THE ARBITRATION PROVISIONS IN THE SUBJECT AGREEMENT WAIVES ANY SOVEREIGN IMMUNITY CLAIM

In addition to the authorities cited by the petitioner in its Opening Brief, the case of *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.* (C.A.8 (S.D.),1995) 50 F.3d 560, 562 further supports enforcing the arbitration provisions of the Professional Services Agreement.

In *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.* (C.A.8 (S.D.),1995) 50 F.3d 560, 562 the Court stated:

> "The first asserted waiver of immunity in this case is an arbitration clause which reads, "All questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." We conclude that this clause is a clear expression that the Tribe has waived its

/ / /

immunity with respect to claims under the contract.

The language of this clause is spare but explicit that disputes under the contract "shall be decided by arbitration." The clause further specifies that the arbitration shall proceed in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . By designating arbitration in accordance with specified arbitration rules as the forum for dispute resolution, the parties clearly intended a waiver of sovereign immunity with respect to resolving disputes under the contract. By definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense. See *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983)."

Applying the reasoning of the *Rosebud* case to the Dispute Resolution provisions of the subject Professional Services Agreement and even if the provisions are spare, the language is clear that "Any disputes under this agreement that cannot be resolved amicably through a negotiated agreement shall be submitted" to arbitration. The Dispute Resolution paragraph then goes on to set forth how the

arbitration is to be conducted, how the arbitrators are to be selected, if attorney's fees and costs can be awarded and that the arbitration award is final and binding.

Just like in *Rosebud*, the parties in this action clearly intended a waiver of sovereign immunity with respect to resolving disputes under the contract.

IV. THE RESPONDENT'S INTERPRETATION OF THE C & L CASE IS ERRONEOUS

In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (U.S.,2001) 532 U.S. 411, 121 S.Ct. 1589, a construction company sued an Indian tribe to enforce an arbitration award. The Oklahoma Court of Civil Appeals affirmed the District Court's judgment for the company, and the tribe petitioned for certiorari. Granting the petition, the Supreme Court remanded for reconsideration in light of intervening case law. On reconsideration, the Court of Civil Appeals held that the tribe was immune from suit, and certiorari was again sought. After granting certiorari, the Supreme Court, held that the arbitration provisions in the contract

constituted a waiver of tribe's sovereign immunity against suit to enforce the arbitration award.

Initially, this case does not involve a suit to enforce an arbitrations award. It involves a suit to compel arbitration.

In addition, the Court in the *C & L* case did not adopt a two prong analysis to determine if the Indian tribe waived its immunity from a suit to enforce an arbitration award. As stated by the Court:

> "The question presented is whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards "in any court having jurisdiction thereof." We hold that, by the clear import of the arbitration clause, the Tribe is amenable to a state court suit to enforce an arbitral award in favor of contractor C & L."

The Court further stated:

> "We are satisfied that the Tribe in this case has waived, with requisite clarity, immunity from the suit C & L brought to enforce its arbitration award . . . In sum, the Tribe agreed, by

express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures."

Applying the above to the Dispute Resolution provisions of the Professional Services Agreement, the Soboba Band of Luiseno Indians agreed, by express contract, to adhere to certain dispute resolution procedures. All the petitioner is seeking to do by this appeal is to enforce those provisions. Additionally and just like in the *C & L* case, the Soboba Band itself tendered the contract to the petitioner California Parking Services, Inc.

The only real difference between the arbitration provisions in the *C & L* case and the arbitration provisions in this case is that the Soboba Band of Luiseno Indians hid the three (3)word exclusion of American Arbitration Association Rule 48 (c) into one (1) sentence of the Dispute Resolution provisions of the contract.

However, this exclusion does not mean the Dispute Resolution provisions should not be enforced.

As explained in Appellant' Opening Brief, the choice of law provision in the Professional Services Agreement provides that

California law applies. California law has provisions for the enforcement of arbitration awards, regardless of any American Arbitration Association rule. American Arbitration Association rule 48 (c) provides for the entry of judgment upon an arbitration award in ANY federal or state court having jurisdiction thereof. The only restriction that the American Arbitration Association rule may require in this case is that petitioner California Parking cannot seek entry of judgment upon the arbitration award in a state OTHER THAN CALIFORNIA or IN CERTAIN FEDERAL COURTS.

In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, supra, 532 U.S. 411, 121 S.Ct. 1589, the Court stated:

> "The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question is the Oklahoma state court in which C & L filed suit."

Likewise, the Soboba Indian Tribe's inclusion of a provision in the Professional Services Agreement that the agreement shall be governed by California law makes it clear enough that the state Court having jurisdiction to enforce any arbitration award against the

Soboba Band of Luiseno Indians is California.

Throwing out the entirety of the Dispute Resolutions provisions of the Professional Services Agreement because of the Tribe's use of three (3) words is not following the holding of the *C & L* case.

In sum, the Soboba Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. It is time to make them keep their word.

V. CONCLUSION

The petitioner concedes that it is unaware of any case that holds that including the three (3) words "excluding Rule 48 (c)" in the arbitration provisions of a contract means that an Indian tribe has not waived its claim of sovereign immunity.

However and likewise, the respondent Soboba Indian tribe fails to offer any case that held that those three (3) words mean the entire arbitration provisions should not be given their plain meaning and/or that an Indian tribe has NOT waived its sovereign immunity.

Therefore and based upon the points and authorities submitted in this Reply Brief and the Opening Brief, 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.

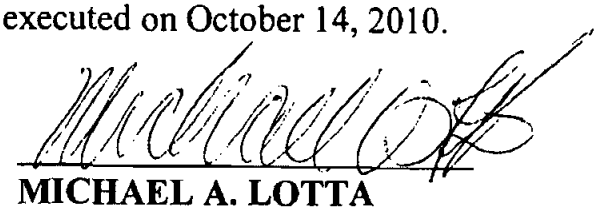
DATED: October 14, 2010

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 2556 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 October 14, 2010.



MICHAEL A. LOTTA
Declarant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)SS
COUNTY OF LOS ANGELES)

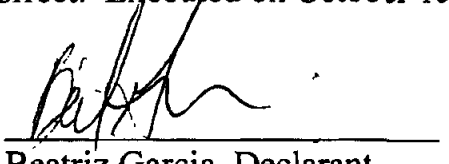
I am have my business address in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 4244 East 4th Street, Long Beach, CA 90814. On October 15, 2010, I served the within **APPELLANT'S REPLY BRIEF** on the interested 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 October 15, 2010.



Beatriz Garcia, Declarant