IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION 1

ROBERT CHISLEY AND GLORIA CHISLEY
Plaintiffs and Appellants,

vs.

ORKIN EXTERMINATING COMPANY, INC., et al.
Defendants and Respondents.

FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D057208
APPEAL FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY
(37-2009-00085477-CU-OR-CTL)
Honorable Yuri Hofmann

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION 1	Court of Appeal Case Number: D057208
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Steven A. Ehrlich (SB#: 070742) LAW OFFICES OF STEVEN A. EHRLICH 18881 Von Karman Avenue, Suite 370 Irvine, CA 92612 TELEPHONE NO.: 949-476-7095 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Orkin Exterminating Co., Inc./Kenneth Montoyer, Jr.	Superior Court Case Number: 37-2009-00085477-CU-OR-CTL
APPELLANT/PETITIONER: Robert Chisley and Gloria Chisley RESPONDENT/REAL PARTY IN INTEREST: Orkin Exterminating Co., Inc., et al	FOR COURT USE ONLY Court of Appeal Fourth District FILED DEC 10 2010 Stephen M. Kelly, Clerk DEPUTY
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1. This form is being submitted on behalf of the following party (*name*): Orkin Exterminating Co., Inc. & Kenneth Montoyer

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Date: December 7, 2010

Steven A. Ehrlich
(TYPE OR PRINT NAME)

▶ [signature]
(SIGNATURE OF PARTY OR ATTORNEY)

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RESPONDENTS' BRIEF

I. INTRODUCTION

Plaintiffs and Appellants Robert Chisley and Gloria Chisley commenced this action against Defendants and Respondents ORKIN EXTERMINATING COMPANY, INC. and KENNETH METOYER, JR., sued erroneously as KENNETH MONTOYER, JR., by filing a complaint for damages on March 18, 2009. (Clerk's Transcript (CT) 1-19.)

Appellants allege that they were bitten by bed bugs and/or other pests during a stay at the Barona Valley Ranch Resort and Casino (hereinafter Barona) August 3-5, 2005. (CT 4:12-13.) The Barona Valley Ranch Resort and Casino is owned and operated by the Barona Band of Mission Indians a sovereign Native American Tribal Nation (hereinafter the Tribe). (CT 2:21-26.)

Respondents ORKIN EXTERMINATING COMPANY, INC. and KENNETH METOYER, JR. performed pest control services at Barona. Appellants filed this action against said Respondents some 3 years and 7 months after the alleged injury producing event and well after the applicable statute of limitations had expired. (CT 262.)

The ruling of the Trial Court, in sustaining the Respondents' Demurrer to Plaintiffs' Second Amended Complaint on the grounds that the action was barred by the applicable statute of limitations is correct and should be affirmed by this Court. (CT 260-262.)

Appellants are not entitled to the benefit of equitable tolling as they are unable to meet the requirements for application of that rule. Appellants' previous litigation against the Tribe does not toll the

applicable statutes of limitation with regard to the causes of action set forth in Appellants' Second Amended Complaint.

Appellants' factual allegations demonstrate repeated dilatory conduct in pursuing their alleged claim of injuries which is unreasonable and not in good faith. Appellants allege they learned Respondents performed pest control services at Barona on March 19, 2007 during litigation they initiated against the Tribe. (CT 110:16-18.) Appellants did not file an action against Respondents at that time. While litigating the matter in the Tribal Court, Appellants simultaneously filed an action against the Tribe in the San Diego Superior Court which resulted in the tribal action being dismissed. (CT 24-28.) Appellants did not name Respondents as defendants in that state court action. In fact, Appellants waited one day short of two years before filing the complaint underlying this appeal. (CT 156:8-11.)

Delayed discovery does not assist Appellants in extending the accrual date for their Third Cause Of Action For Fraud and Deceit - Negligent Misrepresentation. Appellants allege that they were injured on August 3-5, 2005 and admitted such when they filed a claim against the Tribes' liability insurer. (CT 109:27-28.) The date of accrual for this cause of action commenced when Appellants knew they were injured. Further, the failure to discover the identity of a defendant does not post-pone accrual of the applicable limitations period.

The tribal exhaustion doctrine is not applicable and should not be considered by this Court. Contrary to Appellants' contention in

their Opening Brief, Appellants do raise this issue for the first time in their appeal. This issue was never before the Trial Court.

In any event, tribal exhaustion does not assist Appellants in tolling any period of limitations as to Respondents. Primarily, tribal exhaustion is a concept of comity rather than jurisdiction as between the federal courts and the tribal courts, which allows the tribal court to determine the extent of its jurisdiction in the first instance. Tribal exhaustion applies to defendants such that they must exhaust tribal court remedies before seeking relief in federal court. Further, application of the doctrine contemplates that the action filed in the federal court involve the same parties and the same dispute as pending before the tribal court.

The Trial Court got it right. Appellants were provided with two opportunities to state a viable cause of action against Respondents. They are unable to do so because of their own choice of litigation tactics and not by any unfairness of the judicial system. There is no reasonable possibility that Appellants can amend their complaint to state a viable cause of action which is not barred by the applicable statutes of limitations.

II. STATEMENT OF THE CASE

Appellants filed the action underlying this appeal on March 18, 2009 seeking damages for personal injuries from allegedly being bitten by bed bugs and/or other pests during a stay at Barona August 3-5, 2005. (CT 1; 4:12-13.)

Appellants filed their complaint some three years and 118 days after the injury producing event and after the applicable two-year and

three-year periods of limitation had expired. (CT 262.)

Appellants appealed the Trial Court's March 5, 2010 Order of Dismissal by filing their Notice of Appeal on April 16, 2010. (CT 268.) Said Order followed the Trial Court's Minute Order which sustained Respondents' Demurrer to the Second Amended Complaint without leave to amend. (CT 260-262.)

The Trial Court ruled that the First Cause of Action for Negligence and Second Cause of Action for Intentional Infliction of Emotional Distress are time-barred pursuant to Code of Civil Procedure section 335.1 and that the Third Cause of Action for Fraud and Deceit - Negligent Misrepresentation and the Fourth Cause of Action for Negligence - Injury to Personal Property are time-barred pursuant to Code of Civil Procedure section 338(c).

III. PROCEDURAL HISTORY

Appellants filed a Complaint For Damages in the San Diego Superior Court, Central Division on March 18, 2009. (CT 1-8.) Appellants filed an Amended Complaint For Damages March 19, 2009 alleging a First Cause of Action for General Negligence and a Second Cause of Action for Intentional Infliction of Emotion Distress. (CT 11-19.)

Respondents filed a Notice Of Demurrer and Demurrer to the Amended Complaint For Damages on July 14, 2009 on the grounds that the first and second causes of action were barred by the statute of limitations pursuant to Code of Civil Procedure section 335.1 and on the grounds that the second cause of action failed to state facts sufficient to constitute a cause of action. (CT 25-35.) Respondents

additionally filed a Notice Of Motion and Motion To Strike Portions of Amended Complaint. (CT 36-44.) Appellants filed oppositions to the aforementioned motions on September 14, 2009. (CT 50-94.) Respondents filed replies to said oppositions on September 18, 2009. (CT 95-103.)

On September 25, 2009 the Trial Court entertained oral argument and confirmed its tentative ruling sustaining Respondents' demurrer with ten days leave to amend. (CT105-106; RT 1-10.)

Appellants filed a Second Amended Complaint For Damages on October 5, 2009. (CT 108-127.) In an attempt to overcome the applicable two-year statutory limitations bar with regard to personal injuries, Appellants attempted to added two new causes of action. Appellants added a third cause of action for Fraud and Deceit - Negligent Misrepresentation and a fourth cause of action for Negligence - Injury To Personal Property. Both newly added causes of action are subject to a three-year limitations period. (CT 118-123.)

Respondents filed a Notice Of Demurrer And Demurrer to the Second Amended Complaint For Damages on November 4, 2009 on the grounds that each cause of action was barred by the applicable statute of limitations and that the second and third causes of action fail to state facts sufficient facts to constitute a cause of action.. (CT 147-168.) Additionally, Respondents filed a Notice Of Motion And Motion To Strike Portions Of The Second Amended Complaint. (CT 138-146.)

Appellants filed oppositions to both motions on January 7, 2010. (CT 174-238.) Thereafter, Respondents filed replies to the

oppositions on January 14, 2010. (CT 239-251.)

On February 19, 2010 the Trial Court entertained oral argument and took the matter under submission. Thereafter, the Trial Court sustained Respondents' demurrer without leave to amend on the grounds that each cause of action was barred by the applicable statute of limitations. (CT 260-262; RT 11-24.) By virtue of the demurrer ruling, the issues, as to whether the second and third causes of action stated sufficient facts and Respondent's Motions to Strike, were moot. Thus, the Trial Court did not rule in that regard. (CT 260-262.)

Appellants appealed the Trial Court's March 5, 2010 Order of Dismissal by filing their Notice of Appeal on April 16, 2010. (CT 268.)

IV. STATEMENT OF FACTS

Appellants allege that they were injured on or about August 3-5, 2005 during a stay at the Barona Valley Ranch Resort & Casino when they were bitten by bed bugs. (CT 109:22-28.) Barona is owned and operated by the Barona Band of Mission Indians, aka Barona Group of the Capitan Grande Band of Mission Indians. (CT 109:18-23.)

Appellants waited until January 27, 2006 to file a claim for damages against the Tribe's insurance carrier, which was denied. (CT 110:4-12.) Appellants filed a Notice of Appeal to the Barona Tribal Court on or about June 7, 2006. (CT 110:12-15.)

Appellants allege that discovery could commence in the tribal action as early as September 1, 2006 but Appellants did not do so until January 9, 2007. (CT 110:16-28; 111:1-10.) In any event, Appellants allege that on March 29, 2007 through discovery responses, they

learned that the Tribe hired Respondents to perform pest control services at Barona. (CT 111:15-17.)

The Tribal Court matter was scheduled to go to trial in August 2007 when Appellants unilaterally cancelled the trial date. (CT 155:24-25.) On August 2, 2007 Appellants filed a complaint for damages against the Barona Band of Mission Indians in the San Diego Superior Court, East County Division, Case No. 32-2007-00060464-CU-PO-EC. (CT 155:8-11. The Tribal Court then dismissed Appellants' case on September 12, 2007. (CT 155:27-28.)

A Motion To Quash Service of Summons For Lack Of Jurisdiction (based upon sovereign immunity) was filed by attorney Lynn M. Beekman on behalf of the Tribe in response to Appellant's August 2, 2007 complaint. (CT 155:12-16) The Tribe's Motion To Quash was granted on November 30, 2007. (CT 156:1-2.)

According to the Declaration of Ms. Beekman, Appellants filed a claim for over $2 million dollars with the Tribe's insurer in January 2006 claiming they were bitten by bedbugs and/or scabies. (CT 155:16-18.) Appellants submitted invoices totaling less than $1,300 for a skin condition that their treating dermatologist concluded was scabies. The Tribe's insurer conducted an investigation and denied the $2 million dollar claim. (CT 18-20.)

Thereafter, Appellants filed a Writ of Mandate in the Court Of Appeal, Fourth Appellate District, Division One, Case No. D052362 seeking to disqualify the judge that ruled on the Motion To Quash. (CT 156:5-7.) The Writ was denied by order on February 22, 2008. (CT 156:7.)

Appellants also filed an appeal on February 7, 2008 in the Court of Appeal, Fourth Appellate District, Division One, Case No. D052468. The appellate court affirmed the trial court's order granting Barona's Motion To Quash based upon sovereign immunity.

Appellants filed the action underlying this appeal against Respondents on March 18, 2009. (CT 1-8.)

V. STANDARD OF REVIEW

With regard to the appeal of an order sustaining a demurrer without leave to amend, the appellate court employs two separate standards of review. (McClain v. Octagon Plaza, LLC (2008) 159 Cal.App.4th 784, 791.) First, there is a de novo review of the complaint to determine if it contains facts sufficient to state a cause of action. (*Ibid.*) Second, where the complaint is sustained without leave to amend, the reviewing court will determine whether the trial court abused its discretion in doing so. (*Ibid.*)

The appellant has the burden of demonstrating that either (1) the demurrer was sustained erroneously as a matter of law on the facts pleaded, or (2) the court abused its discretion by failing to grant leave to amend. (Kroll & Tract v. Paris & Paris (1999) 72 Cal.App.4th 1537, 1541.)

Under the first standard, the appellate court reviews the complaint admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (Moreno v. Sanchez (2003) 106 Cal.App.4th 1415, 1422.) The appellate court may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. (Ellenberger v. Espinosa

(1994) 30 Cal.App.4th 943, 947.)

Pursuant to the aforementioned standard, this Court will review Appellants' Second Amended Complaint to determine whether sufficient facts are stated to overcome the applicable statute of limitations bar.

Under the second standard of review, the burden falls upon the Appellant to show facts he or she could plead to cure the existing defects in the complaint. (Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857,879.) Where Appellants fail to establish a reasonable possibility the pleading can be cured by amendment, the trial court's decision will be affirmed for lack of abuse. Under this standard, this Court will only reverse if Appellants' establish a reasonable possibility of overcoming the statute of limitations bar by amendment.

VI. THE RULING OF THE TRIAL COURT IN SUSTAINING RESPONDENTS' DEMURRER TO THE SECOND AMENDED COMPLAINT WITHOUT LEAVE TO AMEND IS CORRECT AND SHOULD BE AFFIRMED BY THIS COURT AS THE APPLICABLE STATUTES OF LIMITATION EXPIRED WELL BEFORE APPELLANTS FILED THIS ACTION.

Appellants' First Cause of Action For Negligence and Second Cause of Action for Intentional Infliction of Emotional Distress are governed by a two-year period of limitations pursuant to Code of Civil Procedure section 335.1. Pursuant to that section, an action for assault, battery or injury to, or for the death of, an individual caused by the wrongful act or neglect of another must be brought within two

years.

Appellants mistakenly refer to a cause of action "intentional misrepresentation" which does not exist in their Second Amended Complaint. (Appellants' Opening Brief [OB] p. 10.) Respondents assume Appellants meant to refer to the cause of action for Intentional Infliction Of Emotional Distress.

Appellants Third Cause of Action for Fraud and Deceit - Negligent Misrepresentation Of Fact is governed by a three-year period of limitations pursuant to Code of Civil Procedure section 338(d) which applies to an action for relief on the ground of fraud or mistake.

Appellants Fourth Cause of Action for Negligence - Injury to Personal Property is governed by a three-year period of limitations pursuant to Code of Civil Procedure section 338(c) which applies to an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

The gravamen of Appellant's Second Amended Complaint is alleged damages caused by injuries they sustained to their person and property caused by bed bugs they allegedly encountered during an August 3-5, 2005 stay at Barona. Appellants filed a complaint for damages against Respondents March 18, 2009 well after the aforementioned statutes of limitations expired.

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A. THE TRIBAL EXHAUSTION DOCTRINE SHOULD NOT BE CONSIDERED BY THIS COURT.

1. TRIBAL EXHAUSTION DOES NOT APPLY TO TOLLING THE APPLICABLE STATUTES OF LIMITATION WITH REGARD TO APPELLANTS CAUSES OF ACTION.

Tribal exhaustion does not apply to Appellants so as to toll the applicable statutes of limitation periods. Appellants mistakenly equate the concept of tribal exhaustion, which applies to defendants in a tribal action, with exhaustion of administrative remedies and also with the concept of equitable tolling, which both apply to plaintiffs in bringing an action. Appellants then request that this Court toll the applicable statutes of limitation during the pendency of their prior litigation against Barona. The law does not support such an application.

In National Farmers Union Ins. Cos. v. Crow Tribe of Indians (1985) 471 U.S. 845 (105 S.Ct. 2447) (National Farmers) and Iowa Mutual Insurance Co. v. LaPlante. (1987) 480 U.S. 9 (107 S.Ct. 971) (LaPlante), the United States Supreme Court ruled that defendants in tribal court actions must exhaust available tribal court remedies before proceeding with a parallel action in federal court. At the same time, the Supreme Court held that defendants could challenge the tribal court's exercise of jurisdiction over them in federal court after exhausting tribal court remedies. (National Farmers Union Ins. Cos.

v. Crow Tribe of Indians, supra, 471 U.S. at p. 857; Iowa Mutual Insurance Co. v. LaPlante., supra, 480 U.S. at p. 19.

In National Farmers, the federal court granted an injunction against enforcement of a default judgment entered in a tribal court, on the ground that the tribal court lacked subject matter jurisdiction over the defaulted claim. (National Farmers Union Ins. Cos. v. Crow Tribe of Indians, supra, 471 U.S. at pp. 848-849.) The Supreme Court held that even though tribal court jurisdiction presented a question of federal law, the federal court was required to stay its hand because the examination of the tribal court's jurisdiction "should be conducted in the first instance in the Tribal Court itself." (*Id.* at pp. 850-856.) The request for an injunction could be entertained in federal court, but only after the federal court plaintiff's (defendants in the tribal action) exhausted the jurisdictional argument in the tribal judicial system.

In LaPlante, the Supreme Court considered "whether a federal court may exercise diversity jurisdiction before the tribal court system has [had] an opportunity to determine its own jurisdiction." (Iowa Mutual Insurance Co. v. LaPlante., supra, 480 U.S. at p.11.) The federal court plaintiff was an insurer that had been named as a defendant in an ongoing tribal court proceeding. In the tribal forum, the insurer lost a jurisdictional challenge. While awaiting tribal appellate review, the insurer commenced a federal diversity suit against all the other parties to the tribal court proceeding, and sought a declaration of "tribal law" on an issue that would have been dispositive of an affirmative defense raised in the tribal forum. (*Id.* at pp. 11-3 & n.3.)

That tribal exhaustion applies to defendants is clearly stated in Burlington N. R.R.. Co. v. Crow Tribal Council (9th Cir. 1991) 940 F2d 1239, 1244, "...both the Supreme Court and this circuit have held that non-Indian **defendants** must exhaust tribal court remedies before seeking relief in federal court, even where **defendants** allege that proceedings in tribal court exceed tribal sovereign jurisdiction.

Further, application of the tribal exhaustion doctrine necessarily contemplates that the action filed in District Court involve the same parties and the same dispute as pending before the tribal court. (Iowa Mutual Insurance Co. v. LaPlante., supra, 480 U.S. at p. 11.)

In fact, the cases cited by Appellants with regard to tribal exhaustion, involve the same parties and the same dispute in the tribal action and in the federal action. (Ninigret Dev.Corp. v. Narragansett Indian Wetuomuch Hous. Auth. (1st Cir. 2000) 207 F3d. 21, 26; Burlington N. R.R. Co. v. Crow Tribal Council (9th Cir. 1991) 940 F2d 1239, 1240-1242; National Farmers Union Ins. Cos. v. Crow Tribe of Indians, supra, 471 U.S. at. p. 847; Iowa Mutual Insurance Co. v. LaPlante, supra, 480 U.S. at. p. 9.)

Appellants seem to be confused as there is no similarity between "tribal exhaustion" and "administrative exhaustion". Appellants mistakenly equate the two. The California Supreme Court discussed the California exhaustion doctrine in McDonald v. Antelope Valley Comm. College District (2008) 45 Cal.4th 88, 113. The California exhaustion doctrine comes in two forms: administrative and judicial. Administrative exhaustion refers to the requirement that a party initiate and complete a particular administrative proceeding

before being permitted to proceed in court. (*Ibid.*) Judicial exhaustion is slightly different. It may arise when a party initiates and takes to decision an administrative process whether or not it was required as a matter of administrative exhaustion to even begin the administrative processing in the first place. (*Ibid.*)

2. EVEN IF APPLICABLE, THE ISSUE OF TRIBAL EXHAUSTION SHOULD NOT BE CONSIDERED AS APPELLANTS RAISE THE ISSUE FOR THE FIRST TIME IN THEIR OPENING BRIEF.

Appellate courts generally will not consider new issues or theories of law that a party raises for the first time on appeal, particularly a new theory of recovery or relief. (Johnson v. Greenelsh (2009) 47 Cal.4th 598, 603 [court refuses to hear issue regarding no contest clause not raised in lower court]; Planned Protective Services, Inc. v. Gorton (1988) 200 Cal.App.3d 1, 13 (overruled on other grounds in Martin v. Szeto (2004) 32 Cal.4th 445, 451) [a party may be barred from arguing for the first time on appeal that a different statute applies where parties assume the applicability of a particular statute during trial court proceedings].)

An exception to the general rule precluding a party from raising a new issue or theory for the first time on appeal involves pure questions of law based on undisputed facts in the trial court. (Carman v. Alvord (1982) 31 Cal.3d 318, 324.) Even under this exception, an appellate may consider a new theory on undisputed facts, but is not required to do so. (Souza v. Westlands Water Dist. (2006) 135

Cal.App.4th 879, 897-899.)

Appellants raise the issue of tribal exhaustion for the first time in this appeal. Respondents disagree with Appellants' conclusion that discussion of exhaustion of administrative remedies in their opposition to Respondents' demurrer (CT 186-187) is sufficient to raise the issue of tribal exhaustion. As set forth in section C.1. herein above, tribal exhaustion is a theory distinct from exhaustion of administrative remedies.

For the foregoing reasons, tribal exhaustion does not apply to toll any period of limitations with regard to Appellants causes of action and should not be considered by this Court.

B. THE RULING OF THE TRIAL COURT THAT EQUITABLE DOES NOT APPLY TO TOLL THE APPLICABLE STATUTES OF LIMITATION IS CORRECT AND SHOULD BE AFFIRMED.

1. RESPONDENTS DID NOT RECEIVE TIMELY NOTICE OF THE APPELLANTS' PRIOR ACTION AGAINST THE TRIBE SUFFICIENT TO PUT THEM ON NOTICE THAT APPELLANTS INTENDED TO ASSERT LIABILITY AGAINST RESPONDENTS.

The Trial Court's ruling that equitable tolling is not applicable to toll the statutes applicable to Appellants' causes of action is correct.

Equitable tolling may apply to toll a statute of limitations when a plaintiff has sought an alternative form of relief and a three-pronged test has been satisfied. The three elements are (1) that defendant has

received timely notice of the first claim; (2) that defendant has not been prejudiced in gathering evidence to defend against the second claim; and (3) that plaintiff has acted reasonably and in good faith in filing the second action. (Addison v. State of California (1978) 21 Cal.3d 313, 319.)

The element of timely notice requires the first claim to have been filed within the statutory period. (Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal.App.4th 1047, 1063.) The Trial Court was correct that equitable tolling can only suspend the running of a statute that has time to run, it cannot revive a statute that has already expired. (*Ibid.*) This requirement has led several courts to conclude that, where the first proceeding does not seek relief against the same defendant in the second proceeding, equitable tolling does not apply. (Apple Valley Unified School District v. Vavrinek, Trine, Day & Co. (2002) 98 Cal.App.4th 934, 954.) Appellants completely disregard and minimize this requirement necessary for application of equitable tolling.

In the Butterfield case, a county claimed an easement on certain property, and the property owner initiated a breach of contract action against its title insurer alleging that the title policy was defective. (Butterfield v. Chicago Title Ins. Co., supra, 70 Cal.App.4th at p. 1049) The trial court found for the defendant, concluding that there was no coverage under the policy for the easement and the two-year statute of limitations had expired before plaintiff brought suit. The Court of Appeal affirmed the judgment and that the action was barred by the statute of limitations. (*Ibid.*)

The cause of action accrued when plaintiff received the county's October 1990 letter. Plaintiff, made no claim on the policy until three years later and did not name the title insurer as a defendant until August 1994. The court held that the statute was not tolled. The statute had expired by the time plaintiff tendered its claim. (Butterfield v. Chicago Title Ins. Co., supra, 70 Cal.App.4th at pp. 1051-1052.)

Appellants did not pursue a claim against Respondents until March 18, 2009 some three years and eight months after the accrual of their cause of action on August 3-5, 2005. Appellants took no action against Respondents in or about March 2007 when they claim to have first learned of the identities of Respondents. Further, Appellants did not name Respondents as defendants when they filed a state court action for damages against the Tribe in August 2007. Appellants never attempted to resolve their claims against Respondents at any time during the limitations period. (Butterfield v. Chicago Title Ins. Co., supra, 70 Cal.App.4th at p. 1063.)

McDonald v. Antelope Valley Comm. College Dist., supra, 45 Cal.4th 88, is not helpful to Appellants on the applicability of equitable tolling as that case involved a plaintiff employee who voluntarily pursued an internal administrative remedy prior to filing a California Fair Employment Housing Act against the **same defendant**. Timely notice to the defendant was not at issue in McDonald. The issue was whether a period of limitations was tolled where the administrative proceeding was voluntary rather than mandatory before filing a lawsuit.

In Elkins v. Derby (1974) 12 Cal.3d 410, the California Supreme Court held the statute of limitations on a personal injury action was tolled during the pendency of the plaintiff's workers compensation claim **against the same defendant.**

While there are some decisions applying equitable tolling against defendants who were not parties to the prior actions, those decision involve fact situations in which the defendants clearly had notice of the claims against them. (Apple Valley Unified School District v. Vavrinek, Trine, Day & Co., supra, 98 Cal.App.4th at p. 955.)

Structural Steel Fabricators, Inc. v. City of Orange (1995) 40 Cal.App.4th 459 [Defendant city was clearly on notice of the claim against it within the limitations period because the plaintiff contractor served a stop notice on the city demanding it withhold payment to the contractor and surety named in the first suit]; Stalberg v. Western Title Ins. Co. (1994) 27 Cal.App.4th 925 [Defendant insurer was clearly on notice when plaintiff property owners pursued a quiet title action against upstream property owners with regard to a fictitious easement across plaintiff's properties when they gave timely notice of the action to the insurer, the insurer participated in the quiet title action by partially financing it and receiving frequent updates on its progress from the plaintiff's attorney. At some point the plaintiffs learned that the insurer was responsible for recording the easement and informed the insurer of its culpability].

In Tu-Vu Drive-In Corp. v. Davies (1967) 66 Cal.2d 435, the defendant was at attorney who secured a writ of execution and

wrongfully caused it to be levied on plaintiff's motion picture equipment. Ultimately, the plaintiff secured release of its property through a favorable judgment against a third party. The plaintiff then brought at action against the attorney.

While not the same defendant as in the third party action, the attorney defendant, who brought the writ of execution and wrongfully caused it to be levied, was directly involved in bringing the action against plaintiff and the impetus for the plaintiff's third party action. Further, the plaintiff in Tu-Vu did not have a cause of action until the date of the judgment on its third party claim became final. If the decision had not favored the plaintiff and the writ of execution and levy were proper, the plaintiff would not have had a cause of action against defendant attorney. Under those circumstances, the court in Tu-Vu tolled the statute pending termination of the third-party litigation. Those circumstances are not present as to Appellants.

In Myers v. County Of Orange (1970) 6 Cal.App.3d. 626, the one-year period for filing a claim against the county was tolled during the time consumed by the plaintiff in exhausting administrative remedies against the county. Central to this court's reasoning in tolling the statute was that the "plaintiff's communication with the governmental entity [defendant county] gave ample information well within the one-year claim period to satisfy the purposes of the claims statute." (*Id.* at p. 637.)

Appellants statement that the fact Appellants filed a state court action against the Tribe constituted sufficient notice to Respondents is conclusory and not sufficient to put Respondents on notice that

Appellants intended to assert liability against them. (Apple Valley Unified School District v. Vavrinek, Trine, Day & Co., supra, 98 Cal.App.4th at p. 956.) Respondents were not defendants in that action. Likewise, the fact that Metoyer participated as a witness for the Tribe in Appellants' litigation against the Tribe was also not sufficient to put Respondents on notice that Appellants intended to assert liability against them. (*Ibid.)*

2. RESPONDENTS' ABILITY TO GATHER EVIDENCE TO DEFEND AGAINST THE SECOND SUIT HAS BEEN IMPAIRED AND RESPONDENTS HAVE BEEN PREJUDICED.

Statutory limitations periods on suits are designed to promote justice by preventing surprise through revival of stale claims, to protect defendants and courts from handling matters in which the search for truth may be impaired by loss of evidence to encourage plaintiffs to use reasonable and proper diligence in enforcing their rights, and to prevent fraud. (State Farm Fire and Casualty Co. v. Superior Court (1989) 210 Cal.App.3d 604, 612)

The prejudice to Respondents, if forced to defend this claim is absolute. Respondents were not a party to Appellants two prior actions against the Tribe and were deprived of the ability to timely investigate the claim and find and preserve evidence.

Given that the alleged incident occurred on sovereign Indian territory further exacerbates the prejudice to Respondents as Respondents will not be able to subpoena documents and information from the Tribe. That leaves Appellants as the only source of

documents and information aside from documents filed with the superior court in the prior state court action and Respondents' own documents. This disadvantage is huge.

3. APPELLANTS HAVE NOT ACTED REASONABLY OR IN GOOD FAITH.

Appellants statement that they acted reasonably and in good faith in pursuing litigation against the Tribe is subject to a different interpretation based upon their alleged facts.

Appellants waited over five months to file their a claim with the Tribes Liability insurance carrier. (CT 110:4-7.) Appellants appealed the denial of their claim, proceeded with their action against the Tribe and could have initiated discovery as early as September 1, 2006, but waited until January 9, 2007. (CT 110:26 - 111:9.) Appellants alleged that they learned the identity of Respondents on March 19, 2009, yet they did not proceed against Respondents. (CT 111:15-17.) Appellants filed an action in state court against the Tribe on August 2, 2007 which caused their action before the Tribal Court to be dismissed on September 12, 2007. (CT 155:24-28.) Appellants did not name Respondents as defendants in that suit. Then Appellants waited one day short of two years, until March 18, 2009 to file this action.

Further, Appellants mischaracterize the nature of the suit they filed in state court. In Appellants' Opening Brief, section I. Introduction (OB 1), Appellants state that they "filed suit in state court seeking the courts assistance in getting their claims adjudicated in tribal court." The operative complaint filed in that action is a

complaint for damages only.

Further, it is disingenuous for Appellants to claim that they could elect to pursue their claims against the Tribe in either state court or before the tribal court. (OB 33.) State court was not the proper forum for Appellants action against the Tribe. This was confirmed when the Tribe's Motion to Quash was granted, and later affirmed on appeal, based upon sovereign immunity. (CT 156:1-7.)

The Gaming Compact and Tort Claims Ordinance to which Appellants refer to throughout their Opening Brief was interpreted in Lawrence v. Barona Valley Ranch Resort and Casino (2007) 153 Cal.App.4th 1364. The court held that "Barona's waiver did not constitute a consent to suite in state court on negligence claims against it, but instead specified that the Barona Tribal court was the exclusive forum for the resolution of such claims. Barona did not waive its sovereign tribal immunity, either in the Compact or in its tort claims ordinance, or otherwise consent to a suit against it in state court..." (*Id.* at p. 1370.)

Appellants' statements about the level of participation of Respondents' current counsel with regard to Appellants litigation against the Tribe are speculative and inappropriate. Such statements do not support application of equitable tolling.

Based upon the foregoing, Respondents were not defendants as to the first and second actions Appellants filed against the Tribe; Appellants' dilatory conduct in pursuing their alleged claim against Respondents have prejudiced Respondents ability to investigate and defend the claim; and Appellants' conduct in pursing their alleged

claim against Respondents has not been reasonable or in good faith.

The ruling of the Trial Court that equitable tolling does not apply to toll the applicable statute of limitations is correct and should be affirmed.

C. THE RULING OF THE TRIAL COURT THAT THE STATUTE OF LIMITATIONS BARS APPELLANTS' THIRD CAUSE OF ACTION IS CORRECT AND SHOULD BE AFFIRMED.

In an effort to overcome the statute of limitations bar, Appellants attempted to state a cause of action for Fraud and Deceit - Negligent Misrepresentation based upon a supposed representation of Defendant Metoyer to the Tribe, not to Appellants, on May 6, 2005 that the room Appellants stayed in was free from infestation of bed bugs. (CT 118:23-26.)

The Trial Court was correct that the alleged injury causing event occurred August 3-5, 2005 during Appellants' stay at Barona but in no event after January 27, 2006 when Appellants claimed for damages with the Tribes insurance carrier, not May 9, 2007 as suggested by Appellants.

In order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. (Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 808-809.) If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitation begins to run on that cause of action when the investigation would

have brought such information to light. (*Ibid.*) In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period. (*Ibid.*)

The discovery rule most frequently applies when it is difficult for the plaintiff to observe or understand that there has been an injury. (Shivley v. Bozanich (2003) 31 Cal.4th 1230, 1248.) Appellants knew and understood they were injured. Appellants allege they were bitten while staying at Barona on August 3-5, 2005. (CT 27-28.) Appellants admit that they filed a claim for damages with the Tribe's liability insurance carrier on January 27, 2006. (CT 110:4-6.)

In ordinary tort and contract actions, the statute of limitations begins to run on the occurrence of the last element essential to the cause of action. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 187. For example, it has been said that an action accrues on the date of injury. (Naftzger v. American Numismatic Society (1996) 42 Cal.App.4th 421, 428.) The plaintiff's ignorance of the cause of action or of the identity of the wrongdoer does not suspend the running of the limitation period. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra, 6 Cal.3d at p. 187.

Two common themes run through the cases that apply the discovery rule of accrual. (Mark K. v. Roman Catholic Archbishop (1998) 67 Cal.App.4th 603, 610-611.) First, the rule is applied to types of actions in which the causes or injuries are actually hidden, for

example the erasure of a video tape held in the defendant's custody, when a foreign object is left in a patient's body after surgery. (*Ibid.*) Second, courts rely on the nature of the relationship in explaining the application of the rule. Generally the delayed accrual rule is applicable to confidential or fiduciary relationships. (*Ibid.*)

Neither theme is present in Appellants case. The alleged injury sustained by Appellants was not hidden. Further, there is no confidential or fiduciary relationship between Respondents and Appellants.

Appellants rely on several cases to argue for later accrual of this cause of action which are easily distinguished based upon the respective facts of each case.

First, Appellants' reliance on A.J. Seelenfreund v. Terminex of Northern Calif., Inc. (1978) 84 Cal.App.3d 133, is misplaced because there was a direct contractual relationship between the plaintiff and defendant and because the plaintiff was ignorant of any injury for two years. The plaintiff in Seelenfreund hired a termite inspector to inspect premises he was in the process of buying. In reliance of the report the plaintiff purchased the property. Two years later the plaintiff requested another inspection of the same property from the same inspector that disclosed a number of problems which had not been reported in the earlier inspection. One year later, the plaintiff filed a complaint alleging breach of the parties oral contract. Appellants discovered their alleged injuries immediately August 3-5, 2005, while the plaintiff in Seelenfreund was ignorant of his claim until two years later when the second terminate inspection was

conducted.

Next in Brandon G. v. Gray (2003) 111 Cal.App.4th 29, delayed discovery applied where plaintiff parents inquired with defendant county about a day-care facility and the county failed to disclose prior complaints which plaintiffs did not discover until four months later. The county's misrepresentation was made directly to plaintiffs and plaintiffs relied on that misrepresentation in selecting a day-care facility for their children who were molested at that facility.

In Snow v. A.H. Robins Co. (1985) 165 Cal.App.3d 120, delayed discovery applied where plaintiff sued for personal injuries regarding a therapeutic abortion against the manufacture of an intrauterine device who concealed the actual pregnancy rates which were known to the manufacturer. The plaintiff was able to point to specific affirmative misrepresentations made by the manufacturer about the product's effectiveness which induced her to use the product. (Rivas v. Safety-Kleen Corp. (2002) 98 Cal.App.4th 218, 230.)

Finally, in E-Fab, Inc. v. Accountants, Inc. Services (2007) 153 Cal.App.4th 1308 delayed discovery applied where plaintiff company hired an employee from defendant agency based upon agency's representation that it had conducted a background check and verified credentials. Employee embezzled funds over a period of seven years and plaintiff then discovered that defendant had failed to disclose that employee had criminal convictions, had been incarcerated and falsified the credentials.

The delayed discovery rule is not available to Appellants as the

injury causing event as alleged by Appellants occurred in or about August 3-5, 2005 when Appellants contend they were bitten by bed bugs.

Based upon the foregoing reasons, the ruling of the Trial Court that the applicable period of limitations expired before Appellants filed their action against Respondents is correct and should be affirmed by this Court.

VII. APPELLANTS MAY NOT RAISE ISSUES BEYOND THOSE DEFINED BY THE JUDGEMENT/ORDER FROM WHICH THE APPEAL IS TAKEN.

The issues that may be raised on appeal are defined by the judgement or order from which the appeal is taken as an appellate court will review only issues presented by the judgement and/or order from which the appeal is taken. (Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal.App.4th 612, 625.)

The issues raised by Appellants in sections VII. and VIII. of their Opening Brief (pages 37 and 39 respectively) are beyond the scope of the issues defined in the Minute Order of the San Diego Superior Court, from which this appeal is taken. In section VII., Appellants discuss whether the Second Cause of Action for Intentional Infliction of Emotional Distress states sufficient facts to constitute a cause of action. In section VIII., Appellants discuss whether the Third Cause of Action for Fraud - Deceit Negligent Misrepresentation states sufficient facts to constitute a cause of action.

The Trial Court indicated that the foregoing issues were moot by virtue of the ruling based upon statute of limitations. (CT 262.)

Thus, the aforementioned issues are beyond the scope of the Trial Court's Minute Order from which Appellants' appeal is taken .

However, since Appellants have raised these issues, Respondents will briefly respond.

A. APPELLANTS' SECOND CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FAILS TO STATE SUFFICIENT FACTS TO CONSTITUTE A CAUSE OF ACTION.

A cause of action for intentional infliction of emotional distress consists of the following elements: (1) Outrageous conduct by defendant; (2) The defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) The plaintiff's suffering severe or extreme emotional distress; and (4) Actual and proximate causation of the emotional distress by defendant's outrageous conduct. Hernandez v. General Adjustment Bureau (1988) 199 Cal.App.3d 999, 1007.

A defendant's conduct must be directed at the plaintiff, or occur in the presence of plaintiff of whom the defendant is aware. Christensen v. Superior Court (1991) 54 Cal.3d 868, 903. It is not sufficient the the defendant has to have realized that its misconduct was almost certain to cause severe emotional distress to any person who might foreseeably be affected by the misconduct; the defendant must have been aware of the particular plaintiffs. Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal.4th 965, 1001-1003.

Appellants' Cause of Action For Intentional Infliction Of Emotional Distress fails because the wrongful conduct alleged in the

Second Amended Complaint, namely, negligent inspection, maintenance, and/or treatment of guestrooms, was not conduct that was directed at Appellants and/or which did not occur in the presence of Appellants with Respondents' awareness.

Appellants' reliance on A.J. Sellenfreund v. Terminix , supra, 84 Cal.App.3d 133, is misplaced as that case had nothing to do with assessing sufficiency of factual allegations of a complaint to state a cause of action for intentional infliction of emotional distress. On the contrary, in that case a real property purchaser brought an action against a licensed termite inspector for negligent breach of an oral contract to make a termite inspection and report.

Further, Appellants' vague reference to "statutory duties that the Legislature put on the pest control industry" is insufficient to allege a fiduciary or other special relationship between a pest control provider and any individual who happens to be present on property treated and/or serviced by a pest control company and allegedly is bitten by an insect.

Appellants' factual allegations (CT 112:11-20.) are deficient. At paragraph 15, the supposed representation is by inference only. No representations were made to Appellants. Appellants contend that by virtue of a history of inspections and/or treatment an affirmative representation was made to the Tribe and by inference to every patron ever physically present on the premises of Barona. Further, in paragraph 16 (CT 112:21-113:2.) Appellants refer to the presence of "bed bugs" being found in the room Appellants stayed in on dates **after** the date of the incident on August 3-5, 2005.

Appellants have had two opportunities to sufficiently state a cause of action for intentional infliction of emotional against Respondents and have failed. It is not reasonably possible that the deficiency could be cured by amendment. Appellants' Second Amended Complaint fails to state sufficient facts to constitute a cause of action for Intentional Infliction of Emotional Distress.

B. APPELLANTS' THIRD CAUSE OF ACTION FOR FRAUD AND DECEIT - NEGLIGENT MISREPRESENTATION FAILS TO STATE SUFFICIENT FACTS TO CONSTITUTE A CAUSE OF ACTION.

A cause of action for fraud/deceit consists of the following elements: (a) a false representation or concealment of a material fact) or, in some cases, an opinion) susceptible of knowledge; (2) made with the knowledge of its falsity or without sufficient knowledge on the subject to warrant representation; (3) with the intent to induce the person to whom it is made to act on it; (4) an act by that person in justifiable reliance on the representation; and (5) damages to that person. (South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal.App.3d 750, 765.) A cause of action for fraud/deceit may be based on a misrepresentation that was not known to be false, but that was made by one who had no reasonable ground for believing it to be true. (Gagne v. Bertran (1954) 43 Cal.2d. 481, 487-488.)

To state a cause of action for fraud/deceit Appellants must have actually relied on the false representation. (Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1088.) There is no liability if the plaintiff never

heard or read the false representation before entering into the transaction. (*Ibid.*) Appellants allege that on or about May 6, 2005, Defendant Metoyer represented to the Tribe the room Appellants stayed in while at Barona was free from infestation of bed bugs. (CT 112:11-20.) This alleged false representation, even if made, was allegedly made to the Tribe, not to Appellants. Appellants did not rent a room at Barona based on any representation of Respondents.

There are two exceptions to the requirement that the plaintiff must have actually relied on the false representation. However, neither of the exceptions apply. The first exception exists if the representation was made to a person acting as an agent of the plaintiff. (Grinnel v. Charles Pfizer & Co. (1969) 274 Cal.App.2d 424, 441.) The Tribe was not acting as an agent of Appellants at any time. The second exception exists in the context of a misrepresentation in an employment letter of recommendation. (Randi W. v. Munroc Joint Unified School District (1997) 14 Cal.4th 1066, 1085.) In this case, a school district official wrote a letter of recommendation which contained "unreserved" and "unconditional" praise when the official knew of prior charges and complaints of sexual misconduct of the employee. (*Id.* at pp. 1071-1072.) This exception does not apply to Appellants because the instant facts do not concern an employment-related letter of recommendation which contained representations known to be false and relied upon by the letter's recipient.

In addition, a false representation must be a positive assertion, because the tort of deceit based on a negligent misrepresentation does not apply to implied statements. (Evan F.v. Hughson United

Methodist Church (1992) 8 Cal.App.4th 828, 841.) The misrepresentation alleged by Appellants is implied from the fact Respondent Metoyer conducted inspections. "...on or about March 19, 2007, Plaintiffs first learned that through inspections conducted by defendant Montoyer up till August 2005, Montoyer represented to the tribe that the Resort was free from the infestation of bed bugs..." (CT 112:14-20.)

Appellants allegations as to the supposed representations of Respondent Metoyer are deficient as a matter of law. The facts constituting fraud must be specifically plead so that the court can determine from the complaint whether a prima facie case is alleged. (Cooper v. Leslie Salt. Co. (1969) 70 Cal.2d 627, 636.) The alleged misrepresentation of Metoyer is implied and is not sufficient to state a cause of action for fraud/deceit.

Appellants seem to be recasting their fraud cause of action as a cause of action for negligence involving a physical risk of harm. However, in their Opening Brief, Appellants set forth that the three-year period of limitations with regard to actions for fraud or mistake pursuant to Code of Civil Procedure section 338(d) applies.

In any event, this cause of action also fails.

An action for negligent misrepresentation requires that a plaintiff plead and prove that (1) defendant had a duty to exercise reasonable care in giving information to plaintiff; (2) defendant gave false information to the plaintiff with culpability at least equal to negligence; (3) plaintiff actually and reasonably relied on the alleged misrepresentation; and (4) plaintiff's reliance on defendant's

misrepresentations proximately caused plaintiff's physical injury. (Garcia v. Superior Court (1990) 50 Cal.3d 728, 735-773.)

Appellants cannot successfully allege an action for negligent misrepresentation because the supposed misrepresentation was made by Defendant Metoyer to the Tribe and not to Appellants. Further, Appellants did not rely on the alleged misrepresentation when they rented a room at Barona, and in fact, had no interaction with Respondents prior to their decision to stay at Barona.

Under either theory, Appellants fail to state a viable cause of action.

Appellants' third cause of action is deficient and fails because the alleged misrepresentation was not made to Appellants, Appellants did not hear or read the alleged misrepresentation, and Appellants did not reply on the alleged misrepresentation. Further, the cause of action is also deficient because the alleged misrepresentation is implied and not a positive assertion as required. Appellants have had two opportunities to sufficiently state a cause of action for Fraud and Deceit - Negligent Misrepresentation and have failed.

For the foregoing reasons, it is not reasonably possible that the deficiency could be cured by amendment. Appellants' Second Amended Complaint fails to state sufficient facts to constitute a cause of action for Fraud and Deceit - Negligent Misrepresentation.

VIII. CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Court of Appeals affirm the Trial Courts' ruling sustaining

Respondents' Demurrer to the Second Amended Complaint without leave to amend.

Dated: February 8, 2011

Respectfully submitted,

LAW OFFICE OF
STEVEN A. EHRLICH

By: 

Steven A. Ehrlich
Attorney for Defendants and
Respondents

IX. CERTIFICATE OF WORD COUNT

Text of this brief consists of 8,193 words as counted by WordPerfect version X5word-processing program used to generate this brief.

DATED: February 8, 2011

LAW OFFICES OF
STEVEN A EHRLICH

By: 

Steven A. Ehrlich
Attorney for Defendants and
Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OR ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18881 Von Karman Avenue, Suite 370, Irvine, CA 92612.

On February 8, 2011, I served the following document described as follows:

RESPONDENTS' BRIEF

By placing the true copies thereof enclosed in sealed envelopes as stated below:

BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with the postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Hon. Yuri Hofmann
San Diego Superior Court
Central Division
330 West Broadway
San Diego, CA 92101

BY FEDERAL EXPRESS: By using express mail service and causing to be delivered overnight next day delivery, four copies thereof, to the person(s) at the address set forth below.

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San Francisco, CA 94102-4797
(415) 865-7000

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

Executed on February 8, 2011, at Irvine, California.

Sherry Thomas

Sherry Thomas