No. E056191

CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT, DIVISION TWO

ALBERT M. CHAVEZ, et al.,
Plaintiffs and Appellants,

v.

MORONGO CASINO RESORT & SPA, et al.,
Defendants and Respondents,

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE
HONORABLE GLORIA C. TRASK
CASE NO. RIC 1112191

RESPONDENTS' ANSWER BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Two	Court of Appeal Case Number: E056191
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): George Forman (SBN 047822), Kimberly A. Cluff (SBN 196139) Jay B. Shapiro (SBN 224100), Jeffrey R. Keohane (SBN 190201) FORMAN & ASSOCIATES 4340 Redwood Highway, Suite E352, San Rafael, CA 94903 TELEPHONE NO.: 415-491-2310 FAX NO. (Optional): 415-491-2313 E-MAIL ADDRESS (Optional): george@gformanlaw.com ATTORNEY FOR (Name): Respondents	Superior Court Case Number: RIC 1112191
	FOR COURT USE ONLY
APPELLANT/PETITIONER: Albert M. Chavez, et al. RESPONDENT/REAL PARTY IN INTEREST: Morongo Casino Resort & Spa, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Respondent Morongo Casino Resort & Spa, et al.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) Albert M. Chavez	Plaintiff/Appellant
(2) Markist Herbert	Plaintiff/Appellant
(3) Rudy Reyes	Plaintiff/Appellant
(4) John R. Stutzman	Plaintiff/Appellant
(5) Michael L. Thompson	Plaintiff/Appellant

☑ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 27, 2012

George Forman
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

ATTACHMENT 2
TO
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

	Full Name of Interested Entity or Person	**Nature of Interest**
(6)	Morongo Casino Resort & Spa, a/k/a Morongo Gaming Agency, a/k/a Morongo Band of Mission Indians	Defendant/Respondent

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INTRODUCTION

At issue in this appeal is whether the Superior Court properly granted the motions of the Morongo Casino Resort & Spa ("MCRS"), the Morongo Gaming Agency and Morongo Band of Mission Indians (collectively referred to in this brief as "Morongo" or "Respondent")[1] to set aside Morongo's prematurely-entered default for lack of proper service, quash service of the summons and complaint pursuant to C.C.P. § 418.10, and dismiss Appellants' action without leave to amend, on the grounds that Morongo, a sovereign Indian tribe possessing sovereign immunity from unconsented suit, has not waived its sovereign immunity to either the causes of action alleged in Appellants' complaint or the Superior Court's exercise of jurisdiction over Morongo.

In their appeal, Appellants contend, as they did in the Superior Court, that the federal statute commonly known as Public Law 83-280, 28 U.S.C. § 1360 (hereinafter "P.L. 83-280), abrogated Morongo's sovereign immunity from their state-law causes of action in state court. In the

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[1] The Complaint named as defendants "Morongo Casino Resort & Spa aka Morongo Gaming Agency a.k.a. Morongo Band of Mission Indians," Jerry Schultze, Ralph Chapman, Robert Ferrell, Rod Mercado, Neal Reed and Does 1-10. As explained *infra*, at note 7, Appellants voluntarily requested dismissal as against all of the individual defendants, and thus they are not parties to this appeal.

alternative, Appellants argue that Morongo waived its sovereign immunity to this action by agreeing in the 2008 Amendment to its Class III Gaming Compact ("Amendment") with the State to abide by specified federal workplace standards and create a more extensive remedy in money damages for persons claiming to have sustained personal injury or property damage in connection with the operation of Morongo's tribal government gaming facility (respondent Morongo Casino Resort & Spa, referred to herein as "MCRS").

For the reasons set forth below, this Court should reach the same conclusion as did the Superior Court about the effect (or lack thereof) on Morongo's sovereign immunity of both P.L. 83-280 and Morongo's Compact: *i.e.*, that the U.S. Supreme Court, the Ninth U.S. Circuit Court of Appeals, the California Supreme Court and California Courts of Appeal, including this Court, all have held that P.L. 83-280 did not abrogate Morongo's sovereign immunity; and that neither Morongo's original Class III gaming Compact with the State of California nor the Amendment to that Compact waived Morongo's sovereign immunity to any direct private actions for money damages, including the causes of action alleged by Appellants in their complaint.

FACTUAL BACKGROUND

The facts relevant to the Superior Court's judgment granting Morongo's motion to set aside the premature entry of its default and dismissing appellants' action for lack of jurisdiction were not disputed in the Superior Court. It is undisputed that the Morongo Band of Mission Indians is the federally recognized Indian Tribe exercising sovereign authority over the Morongo Indian Reservation, that Morongo owns and operates the Morongo Casino Resort & Spa ("MCRS") on the tribal trust lands of its Reservation, and that Morongo is party to a compact with the State of California under which Morongo may conduct what the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C.A. § 2701, *et seq.*, defines as "Class III gaming".[2] Neither is it disputed that Appellants Albert M. Chavez ("Chavez"), Markist Herbert ("Herbert"), Rudy Reyes ("Reyes"), John R. Stutzman, Jr. ("Stutzman") and Michael Thompson ("Thompson") formerly were employed as security officers at MCRS, and that each Appellant at some point was terminated from his employment at MCRS.[3]

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[2] "Class III" gaming includes slot machines and banked or percentage card games such as blackjack or 21, and all other forms of gaming that are not Class I (ceremonial or social gaming for nominal prizes) or Class II (generally, bingo, games similar to bingo, pull-tabs, and non-banked card games if not prohibited by state law). 25 U.S.C.A. §2703(8).

[3] One of the original plaintiffs, George Robinson, did not appeal from the Superior Court's judgment, and thus is not a party to this appeal.

Subsequent to their respective terminations, Appellants filed separate complaints with the California Department of Fair Employment and Housing ("DFEH"), which dismissed those complaints upon being requested to immediately issue "right to sue" letters. *See* Exhibits 1-6 to Complaint, CT: 35-105.

Appellants, plus George Robinson,[4] then joined as plaintiffs in a lawsuit filed in the Superior Court in Riverside County against "Morongo Casino Resort & Spa aka Morongo Gaming Agency a.k.a. Morongo Band of Mission Indians,"[5] Jerry Schultze, Ralph Chapman, Robert Ferrell, Rod Mercado, Neal Reed and Does 1-10. Named individual defendants Schultze, Chapman, Ferrell, Mercado and Reed all are or were employed by the Morongo Band of Mission Indians in its Gaming Agency, and the purported causes of action against them all arose out of those defendants' performance of their supervisorial duties on behalf of the Gaming Agency. Complaint, CT:1-34.

The Complaint alleged eleven causes of action, all purportedly arising under California law (not every cause of action pertained to all Appellants):

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[4] George Robinson did not file a notice of appeal, and thus is not a party to this appeal.

[5] So described in the summons and complaint.

1. Retaliation based on discrimination [Gov. Code § 12940(h)];

2. Discrimination [Gov. Code § 12940(a)];

3. Discrimination based on age [Gov. Code § 12940];

4. Discrimination based on sex [Gov. Code § 12940];

5. Harassment in violation of the California Fair Employment and Housing Act;

6. Wrongful termination in violation of the California Fair Employment and Housing Act and public policy;

7. Failure to prevent discrimination in the workplace;

8. Intentional infliction of emotional distress;

9. Negligent infliction of emotional distress;

10. Defamation;

11. Breach of contract.

Although appellants' process server declared under oath that he had served MCRS, the Morongo Gaming Agency and the Morongo Band itself by personal delivery of the Summons and Complaint to the party or a person authorized to receive service on behalf of the party, CT:107-108, in fact the process server simply left the summons and complaint with an individual whom he did not identify – and who was not authorized to accept service of process on any of the defendants – that he encountered in the tribal

administration building, and Appellants never caused the summons and complaint to be mailed to Morongo. Declaration of Roger Meyer, ¶¶ 3, 4, 6, 7 .[6]

Although Morongo's time to respond to the Complaint had not even begun to run because valid service never had been completed on any defendant except Jerry Schultze,[7] counsel for Appellants sought and obtained entry of the defaults of defendants MCRS, Morongo Gaming Agency and the Morongo Band.

Morongo specially appeared to set aside the entry of default on two grounds: (1) because valid service of the summons and complaint never had been made on Morongo, the Morongo Gaming Agency or MCRS, those defendants' default(s) never should have been entered; and (2) whether or not process ever had been validly served on Morongo, the Superior Court lacked jurisdiction over either the subject matter of Appellants' action or

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[6] Respondent became aware that the Declaration of Roger Meyer was not included in the Clerk's Transcript. A copy of that Declaration, along with its attached exhibits, is attached to Respondent's previously-filed separate motion to augment the record on appeal.

[7] Appellants voluntarily requested the dismissal of their action against Chapman, Ferrell, Mercado and Reed on December 12, 2011, CT:112-118, presumably to avoid imposition of sanctions for failure to timely serve them. Although Schultze had been properly served, Appellants voluntarily requested the dismissal of their action against him on December 21, 2011. CT:289-290.

Morongo itself because Morongo had not waived its sovereign immunity from unconsented suit by Appellants on the causes of action alleged in their Complaint.

The Superior Court orally stated that service on Morongo had not been proper, and thus that the default should be set aside. RT 7:25-27.[8] The Superior Court then orally stated that Morongo's sovereign immunity had neither been abrogated nor waived, and thus that the Superior Court lacked jurisdiction over Appellants' lawsuit. RT 7:28-8:1-17. On March 1, 2012, the Superior Court entered its written orders granting Morongo's motions to set aside the default and to quash service of the summons and complaint, and entered judgment dismissing the action in its entirety, without leave to amend. CT:613-617.

Appellants Chavez, Herbert, Reyes, Stutzman and Thompson timely filed individual notices of appeal. George Robinson did not file a notice of appeal.

ARGUMENT

THE TRIAL COURT CORRECTLY DETERMINED THAT

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[8] "... service was not proper, and so set aside the entry of default. Service wasn't proper. The entry of default wasn't proper." (1/27/12 R.T. p. 7:25-27). Because Appellants' Opening Brief contains no argument that the Superior Court erred in granting Morongo's motion to set aside the default, this Answer Brief will not address that issue.

MORONGO'S TRIBAL SOVEREIGN IMMUNITY HAD NOT BEEN ABROGATED OR WAIVED, AND THUS PROPERLY DISMISSED APPELLANTS' ACTION FOR LACK OF JURISDICTION

As they did in the Superior Court, Appellants contend on appeal that Congress abrogated Morongo's sovereign immunity by enacting P.L. 83-280; and that in any event, Morongo waived its sovereign immunity in its Class III gaming Compact with the State of California. Neither argument has any support in fact or law, and thus should be rejected.

As a federally recognized Indian tribe, Morongo possesses inherent sovereign immunity from suit unless that immunity has been unequivocally abrogated by Congress or expressly waived by the Tribe. (See *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58; *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe* (1991) 498 US 505, 509.) Morongo's sovereign immunity extends to MCRS and the Morongo Gaming Agency. See *Redding Rancheria v. Superior Court* (3rd Dist. 2001) 88 Cal.App.4th 384, 388 ["A tribal entity is treated as the tribe for immunity purposes."]; *Trudgeon v. Fantasy Springs* (4th Dist. 1999) 71 Cal.App.4th 632 [holding that a tribal casino is entitled to sovereign immunity]; *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140 [holding that a tribal official acting in his/her official capacity and within the scope of tribe's authority is immune from suit even for tortious conduct committed on tribal land, and that tribal

sovereign immunity may be asserted as the basis for a jurisdictional challenge under C.C.P. § 418.10].

"Courts construe waivers of a tribe's sovereign immunity strictly and hold a strong presumption against them. This hurdle can only be overcome if a tribe's waiver was clear and unequivocal." (*Cal. Parking Srvcs. v. Soboba Band of Luiseño Indians* (4th Dist. 2011) 197 Cal.App.4th 814, 820.) "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." (*Big Valley Band of Pomo Indians v. Sup. Ct.* (1st Dist. 2005) 133 Cal.App.4th 1185, 1193.) "[A]ny conditional limitation imposed [on a waiver of sovereign immunity] must be strictly construed and applied." (*Lawrence v. Barona Valley Ranch Resort & Casino* (4th Dist. 2007) 153 Cal.App.4th 1364, 1369.)

A. P.L. 83-280, 28 U.S.C. §1360, Did Not Abrogate Morongo's Tribal Sovereign Immunity

Appellants argue that the Superior Court has jurisdiction over their state-law causes of action because P.L. 83-280, 28 USC § 1360, abrogated Morongo's sovereign immunity. The United States Supreme Court has expressly rejected that argument:

> We have never read Pub.L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub.L. 280 to represent an abandonment of the federal interest in guarding Indian

self-governance.

Three Affiliated Tribes v. Wold Engineering (1986) 476 U.S. 877, 892 [citing *Bryan v. Itasca County* (1976) 426 U.S. 373, 387-88].) The U.S. Court of Appeals for the Ninth Circuit has reached the same conclusion. *People of State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153, 1156.[9]

California's appellate courts also have rejected the argument that P.L. 83-280 abrogated tribal sovereign immunity. In *Long v. Chemehuevi Indian Reservation* (4th Dist. 1981) 115 Cal.App.3d 853, 857, this Court observed that

> [n]o case has been cited to us, and we have found none, which concludes or even suggests, that 28 United States Code section 1360 conferred on California jurisdiction over the Indian tribes, as contrasted with individual Indian members of the tribes.

Directly addressing the sovereign immunity question, this Court held:

> In the absence of a clear waiver, we must recognize the sovereign immunity of the Chemehuevi Tribe. Congress, in passing 28 United States Code section 1360, could have easily expressed its intent to grant the listed states complete jurisdiction over its resident tribes. Congress' failure to so act must be read as a purposeful decision to reserve to the federal

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[9] *Quechan* involved 18 U.S.C.A. § 1162, the criminal jurisdictional component of P.L. 83-280, but found no abrogation of tribal sovereign immunity in a federal civil lawsuit brought against the Tribe by the State of California.

government jurisdiction over the tribes themselves.

(*Id.*)

Likewise, in *Great Western Casinos, Inv. v. Morongo Band of Mission Indians* (4th Dist. 1999) 74 Cal.App.4th 1407, 1427, this Court held: "It is settled 28 United States Code section 1360 confers jurisdiction only over individual Indians, and not over Indian tribes or tribal entities." Other appellate districts have concurred. See *Friends of East Willits Valley v. County of Mendocino* (1st. Dist. 2002) 101 Cal.App.4th 191, 202 ["It is also true that, while Congress may abrogate that immunity and subject tribes to state court jurisdiction, it did not do so when it passed Public Law No. 280."]; *Middletown Rancheria of Pomo Indians v. W.C.A.B.* (1st Dist. 1998) 60 Cal.App.4th 1340, 1351 [to same effect]; see also, *Ameriloan v. Superior Court* (2nd Dist. 2008) 169 Cal.App.4th 81.

Various federal statutes relating to employment discrimination provide additional support for Morongo's contention that Congress has not abrogated its sovereign immunity.[10] Because P.L. 83-280 does not

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[10] If anything, relevant federal statutes refute plaintiffs' contention that they can assert any claims based on defendants' alleged discriminatory employment actions, because as a federally-recognized tribal government, the Morongo Band (and by extension its gaming operation and gaming agency) is excluded from the definition of "employer" within the meaning of relevant federal statutes. *See, e.g.*, 42 U.S.C. § 2000e(b); *Dille v. Council of Energy Resource Tribes* (10th Cir. 1986) 801 F.2d 373, 374;

expressly – or even impliedly – abrogate Morongo's sovereign immunity, this Court should affirm the Superior Court's dismissal of Appellants' action unless Appellants can show that Morongo expressly and unequivocally has waived its sovereign immunity to their action. As explained below, no such showing has been or can be made.

B. Morongo's Gaming Compact Amendment Does Not Expressly Waive the Tribe's Sovereign Immunity From Appellants' State Law Claims Pursued in State Court

As an alternative to their baseless contention that P.L. 83-280 abrogated Morongo's sovereign immunity, Appellants also argue that the Amendment to the Class III gaming Compact between Morongo and the State of California that took effect in February 2008 contains or constitutes an express waiver of Morongo's sovereign immunity to the Superior Court's assertion of personal jurisdiction over Morongo and subject matter jurisdiction over the causes of action alleged in Appellants' Complaint.

An examination of the relevant portions of the Amendment demonstrates that the Amendment did nothing of the kind; rather, although it imposes certain requirements on the Tribe that, if not fulfilled, could

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Pink v. Modoc-Lassen Indian Health Project (1999) 528 U.S. 877, 120 S.Ct. 185; *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046; *Dobbs v. Anthem Blue Cross & Blue Shield* (10th Cir. 2010) 600 F.3d 1275; *EEOC v. Cherokee Nation* (10th Cir. 1989) 871 F. 2d 937.

constitute a material breach of the Compact that only the State, not private individuals, may enforce under § 9.1, Dispute Resolution,[11] it does not permit Appellants, or anyone else, to sue the Tribe directly in a California court in an original action for money damages, whether based on a claim of injury to person or property or breach of contract. See *Lawrence v. Barona Valley Ranch Resort and Casino* (4th Dist. 2007) 153 Cal.App.4th 1364; see also, *Florida Paraplegic Ass'n. v. Miccosukee Indian Tribe* (11th Cir. 1999) 166 F.3d 1126 [although the ADA applies to tribe as provider of public accommodation (but not as an employer), it does not create a private right of action for violation of statute].

The Amendment repealed and replaced § 10.2(d) (see Modification No. 6) of the Morongo Band's original Compact.[12] The original Compact had required that the Morongo Band carry no less than $5 Million in public liability insurance for patron claims, and to request its insurer to promptly

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[11] The Amendment did not change the terms of § 9.

[12] The original Compact, a copy of which is attached as Exhibit B to the Declaration of Roger Meyer, also can be viewed on the California Gambling Control Commission's website, as can the Amendment. See, http://www.cgcc.ca.gov/documents/compacts/original_compacts/Morongo_Compact.pdf; http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Morongo%20Amended%20Compact%202006.pdf. Pursuant to Evid. Code § 451(a), (b) and (f), the Court is requested to take judicial notice of both the original Compact and the Amendment.

and fairly settle all valid claims, "provided that nothing herein requires the Tribe to agree to liability for punitive damages, any intentional acts not covered by the insurance policy, or attorneys' fees." That section also required that the Tribe,

> adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which the Tribe waives immunity to suit for money damages resulting from intentional or negligent injuries to person 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; provided that nothing in this Section shall require the Tribe to waive its immunity to suit except to the extent of the policy limits and insurance coverage set out above.

The Amendment increased the Tribe's insurance obligation by requiring the Tribe to,

> obtain and maintain a commercial general liability insurance policy consistent with industry standards for non-tribal casinos ... which provides coverage of no less than ten million dollars ... 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 ...;* 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 ... 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 acknowledgment shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity beyond the Policy limits.* [Emphasis added].

The Amendment also requires the Tribe to enact and maintain in continuous force a Tort Liability Ordinance that shall 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 ... provided that any and all laws governing punitive damages need not be a part of the Ordinance.
>
> (B) 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) 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 ... 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 ... 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 courts.
>
> (D) The Ordinance may require that the claimant first exhaust the Tribe's administrative remedies, if any, for resolving the claim, ...

Finally, as to tort claims, the Amendment provides, in § 10.2(d)(iv), that "Failure to comply with this Section 10.2, subdivision (d) shall be deemed a material breach of the Compact."

Significantly, the Amendment contains a separate section (VIII) that amends § 10.3 of the original Compact so as to state in greater detail the Tribe's obligation to provide "a system that provides redress for Gaming

Facility employees' work-related injuries through requiring insurance or self-insurance" that is comparable to the substantive rights "mandated for comparable employees under state law." The inclusion of this section effectively negates any suggestion that the Tribe's gaming employees, such as the plaintiffs in this action, may seek redress for any bodily or personal injury under the Tribe's Tort Liability Ordinance. Unlike § 10.2(d), § 10.3 does not require the Tribe to enact an ordinance that waives the Tribe's sovereign immunity to arbitration, or to a court action to compel arbitration, confirm, vacate or modify an arbitration award, or enforce a judgment based on an arbitration award on a workers compensation claim.

The only other waivers of the Tribe's immunity that can be found in either the original Compact or the Amendment pertain to actions by the State of California itself (or its agencies) to enforce various specific provisions of the Compact/Amendment in the event of a breach, and by Riverside County to compel the Tribe to arbitrate unresolved disputes over the terms of an intergovernmental agreement that may be required in connection with certain projects involving the modification or expansion of a gaming facility. None of those provisions effect or require a waiver of the Tribe's immunity to private actions for money damages such as that brought by Appellants.

Conspicuous by its absence from the record, and thus completely distinguishing this case from the facts in *Campo Band of Mission Indians v. Superior Court* (4th Dist. 2006) 137 Cal.App.4th 175,[13] is any allegation or evidence that Appellants complied or attempted to comply with either Morongo's Tort Liability Ordinance or its Workers' Compensation procedures before filing their lawsuit.

However, even if Appellants had alleged such compliance, their action still would not have been cognizable by the Superior Court because their claims for money damages for violation of California's Fair Employment and Housing Act were not based on California tort law.[14]

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[13] In *Campo*, the Court of Appeal reversed the Superior Court's judgment that the Tribe's tort liability ordinance waived the Tribe's sovereign immunity to a Superior Court suit for money damages filed by an injured patron, but held that because that Tribe's ordinance specified arbitration as the forum for resolution of such disputes, the Superior Court had jurisdiction to compel the Tribe to arbitrate the question whether the plaintiff had complied with the Tribe's tort claim procedures, but not to arbitrate the merits of the plaintiff's claim. Because Appellants admittedly never invoked – or even attempted to invoke – any remedies under Morongo's Tort Liability Ordinance or Workers Compensation policy, the result in *Campo* should have no bearing on the result in this case, although the decision in *Campo* clearly recognizes that waivers of sovereign immunity must be express, and also must be narrowly construed in favor of the tribal sovereign.

[14] With the possible exception of Appellants' eighth and ninth causes of action for intentional and negligent infliction of emotional distress against Morongo and the individuals dismissed as defendants, and Appellants' tenth cause of action for defamation, asserted only against the individuals whom Appellants voluntarily dismissed prior to the hearing on

Rather, Appellants alleged that Morongo violated plaintiffs' rights under FEHA to be free of acts of workplace harassment and/or discrimination. While FEHA may create remedies for such violations when committed by private employers, the Amendment does not make FEHA directly applicable to Morongo or its agents, submit Morongo or its agents to the jurisdiction of the DFEH, or waive or abrogate Morongo's sovereign immunity or that of its officials, agents or employees to damage or other claims asserted under FEHA, because such claims are not "torts" or workplace injuries at all, and thus are not within the ambit of the Amendment. *See, e.g., Williams v. Horvath* (1976) 16 Cal.3d 834 [although some tortious conduct may violate civil rights, and some violations of civil rights may be tortious, not every tort is a violation of civil rights, and not every violation of civil rights is a tort; thus, the remedies against a governmental entity for torts and violations of civil rights are distinct]; *see also, Great Western Casinos, supra*, 74 Cal.App.4th 1407, 1421 [tribal official cloaked with tribe's sovereign immunity when acting within the scope of authority that tribe may confer, even if official's acts are tortious].

That the Amendment does *not* waive Morongo's sovereign immunity

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Morongo's motions. Appellants did not pursue these claims under either Morongo's Tort Liability Ordinance or its Workers' Compensation procedures.

from claims such as those asserted by Appellants is further demonstrated by what is notably *absent* from either the original Compact or the Amendment: provisions that not only impose a general prohibition against workplace discrimination, harassment and retaliation, but also specifically obligate Morongo to enact an ordinance and policies implementing those prohibitions so as to give employees a right to seek money damages for violations of those policies through binding arbitration and subsequent judicial enforcement of arbitration awards, and also require Morongo to carry employment practices liability insurance and expressly waive its sovereign immunity to damage claims based on employment discrimination, harassment or retaliation.

When the parties to a Class III gaming compact intend to grant employees the right to recover money damages for workplace discrimination, harassment or retaliation, the compact will explicitly so provide. As one example, subsequent to the Amendment the State entered into a Class III gaming compact with the Habematolel Pomo of Upper Lake. While § 12.5 of that compact contains tort liability provisions essentially identical to Morongo's Amendment in terms of controlling law, covered

persons and remedies, Section 12.3(f) of that compact[15] contains detailed provisions that not only prohibit workplace discrimination, harassment and retaliation, but also create enforceable damage remedies for violations. Specifically, that compact requires that Upper Lake:

> (f) Adopt and comply with standards no less stringent than federal laws and state laws forbidding harassment, including sexual harassment, in the workplace, forbidding employers from discrimination in connection with the employment of persons to work or working for t he Gaming Operation or in the Gaming Facility on the basis of race, color, religion, ancestry, national origin, gender, marital status, medical condition, sexual orientation, age, or disability, and forbidding employers from retaliation against persons who oppose discrimination or participate in employment discrimination proceedings (hereinafter "harassment, retaliation, or employment discrimination"); provided that nothing herein shall preclude the Tribe from giving a preference in employment to members of federally recognized Indian tribes pursuant to a duly adopted tribal ordinance.
> (1) The Tribe shall obtain and maintain an employment practices insurance policy consistent with industry standards for nontribal casinos and underwritten by an insurer with an A.M. Best rating of A or higher which

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[15] This Compact may be viewed on the CGCC's website at http://www.cgcc.ca.gov/documents/compacts/original_compacts/Habematolel_Compact.pdf. The section in question is found at pages 80-86. Essentially the same provisions are contained in the State's compact with the Pinoleville Pomo Nation, and the Amendment to the compact with the Shingle Springs Band of Miwok Indians; those documents also can be viewed on the CGCC's website. Pursuant to Evid. Code § 451(a), (b) and (f), the Court is requested to take judicial notice of each of these three compacts.

provides coverage of at least three million dollars ($3,000,000) per occurrence for unlawful harassment, retaliation, or employment discrimination arising out of the claimant's employment in, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities. In order to effectuate the insurance coverage, the Tribe, in the exercise of its sovereignty, shall expressly waive, and also waive its right to assert, sovereign immunity and any and all defenses based thereon up to the greater of three million dollars ($3,000,000) or the limits of the employment practices insurance policy, in accordance with the tribal ordinance referenced in subdivision (f)(2) below, in connection with any claim for harassment, retaliation, or employment discrimination arising out of the claimant's employment in, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities; 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 employment practices liability insurance policy shall acknowledge in writing that the Tribe has expressly waived, and also waived its right to assert, sovereign immunity and any and all defenses based thereon for the purpose of arbitration of those claims for harassment, retaliation, or employment discrimination up to the limits of such policy 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 such policy; however, such endorsement or acknowledgment shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity for any portion of the claim that exceeds such policy limits or three million dollars ($3,000,000), whichever is greater. Nothing in this provision shall be interpreted to supersede any requirement in the Tribe's employment discrimination complaint ordinance that a

claimant must exhaust administrative remedies as a prerequisite to arbitration.

(2) The standards shall be subject to enforcement pursuant to an employment discrimination complaint ordinance which shall be adopted by the Tribe prior to the effective date of this Compact and which shall continuously provide at least the following:

(A) That California law shall govern all claims of harassment, retaliation, or employment discrimination arising out of the claimant's employment in, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities; provided that California law governing punitive damages need not be a part of the ordinance. Nothing in this provision shall be construed as a submission of the Tribe to the jurisdiction of the California Department of Fair Employment and Housing or the California Fair Employment and Housing Commission.

(B) That a claimant shall have one year from the date that an alleged discriminatory act occurred to file a written notice with the Tribe that he or she has suffered prohibited harassment, retaliation, or employment discrimination.

(C) That, in the exercise of its sovereignty, the Tribe expressly waives, and also waives its right to assert, sovereign immunity with respect to the binding arbitration of claims for harassment, retaliation, or employment discrimination, but only up to the greater of three million dollars ($3,000,000) or the limits of the employment practices insurance policy referenced in subdivision (f)(1) above; provided, however, such waiver shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity for any portion of the claim that exceeds three million dollars ($3,000,000) or the insurance policy limits, whichever is greater.

(D) 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), 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. The arbitration shall take place within seventy-five (75) miles of the 11.24 Acre Parcel, or as otherwise mutually agreed by the parties. To effectuate its consent to the foregoing arbitration procedure, the Tribe shall, in the exercise of its sovereignty, waive, and also waive its right to assert, sovereign immunity in connection with the arbitrator's jurisdiction and in any state or federal court action to (i) enforce the parties' obligation to arbitrate, (ii) confirm, correct, or vacate the arbitral award rendered in the arbitration in accordance with section 1285 *et seq.* of the California Code of Civil Procedure, or (iii) 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 any state court located within the County or any federal court located in the Northern District of California in any such

action brought with respect to the arbitration award.

(3) The employment discrimination complaint ordinance required under subdivision (f)(2) may require, as a prerequisite to binding arbitration under subdivision (f)(2)(D), that the claimant exhaust the Tribe's administrative remedies, if any exist, in the form of a tribal discrimination complaint resolution process, for resolving the claim in accordance with the following standards:

(A) Upon notice that the claimant alleges that he or she has suffered prohibited harassment, retaliation, or employment discrimination, the Tribe or its designee shall provide notice by personal service or certified mail, return receipt requested, that the claimant is required to proceed will be Tribe's employment discrimination complaint resolution process in the event that the claimant wishes to pursue his or her claim.

(B) The claimant must bring his or her claim within one hundred eighty (180) days of receipt of the written notice ("limitation period") of the Tribe's employment discrimination complaint resolution process as long as the notice thereof is served personally on the claimant or by certified mail with an executed return receipt by the claimant and the one hundred eighty (180)-day limitation period is prominently displayed on the front page of the notice.

(C) The arbitration may be stayed until the completion of the Tribe's employment discrimination complaint resolution process or one hundred eighty (180) days from the date the claim was filed, whichever first occurs, unless the parties mutually agree upon a longer period.

(D) The decision of the Tribe's employment discrimination complaint resolution process shall be in writing, shall be based on the facts surrounding the dispute, shall be a reasoned

decision, and shall be rendered within one hundred eighty (180) days from the date the claim was filed, unless the parties mutually agree upon a longer period.

(4) Within fourteen (14) days following notification that a claimant claims that he or she has suffered harassment, retaliation, or employment discrimination, the Tribe shall provide notice by personal service or certified mail, return receipt requested, that the claimant is required within the specified limitation period to first exhaust the Tribe's employment discrimination complaint resolution process, if any exists, and if dissatisfied with the resolution, is entitled to arbitrate his or her claim before a retired judge in a binding arbitration proceeding.

(5) In the event the Tribe fails to adopt the ordinance specified in subdivision (f)(2), persons who claim they have suffered prohibited harassment, retaliation, or employment discrimination may proceed to arbitration as provided in this subdivision (f), in which case California employment discrimination law, including applicable statutes of limitations, shall apply to all such claims arising out of the claimant's employment in, in connection with, or relating to the operation of the Gaming Operation, Gaming Facility or Gaming Activities, and the Tribe shall be deemed to have waived, and also waived its right to assert, sovereign immunity up to the greater of three million dollars ($3,000,000) or the limits of the employment practices insurance policy in connection with the arbitration of any such claims, any court proceedings based on such arbitration, including the arbitral award resulting therefrom, and any ensuing judgments. Nothing in this subdivision (f)(5), shall be interpreted as a waiver of the Tribe's sovereign immunity or consent to the jurisdiction of any court other than for the purposes set forth in this subdivision (f).

(6) The Tribe shall provide written notice of the employment discrimination complaint ordinance and the procedures for bringing a complaint in its employee

> handbook. The Tribe also shall post and keep posted in prominent and accessible places in the Gaming Facility where notices to employees and applicants for employment are customarily posted, a notice setting forth the pertinent provisions of the employment discrimination complaint ordinance and information pertinent to the filing of a complaint.

Morongo's Amendment[16] contains nothing remotely similar to the foregoing provisions. Indeed, if the tort liability provisions of the Morongo Amendment and the Upper Lake compact sufficed to waive tribal sovereign immunity to actions such as Appellants', the detailed provisions of § 12.5 of the Upper Lake compact would be completely superfluous, and the Superior Court accorded appropriate significance to the absence of such provisions from the Amendment.

As the numerous controlling authorities cited above establish, there is a strong presumption against waivers of sovereign immunity, such that waivers may not be implied, may be found only if expressly and unequivocally stated, and may be subject to such conditions as the waiving sovereign may impose. Lest there be any doubt about how narrowly circumscribed the scope of the sovereign immunity waivers in both Morongo's original Compact and the Amendment actually is, the State of

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[16] See Compact Amendments §10.2(d)(i)-(ii) & 10.2(l), available at http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Morongo%20Amended%20Compact%202006.pdf.

California and Morongo built the presumption of Morongo's continuing broad immunity from private suit into the Compact:

> Third Party Beneficiaries. Except to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms.[17]

Thus, although the Amendment requires that Morongo adhere to the workplace standards set forth in the federal Fair Labor Standards Act, and not to discriminate in employment, nothing in the Compact Amendment even hints at – much less "expressly provides" for – Morongo's consent to the creation of a private right to sue Morongo for damages if Morongo does not adhere to those Compact admonitions. Accordingly, none exists; rather, if the State of California were to assert that Morongo is violating those – or any other – Compact provisions, the *State's* sole remedy would be to invoke the Compact's dispute-resolution procedures set forth in Compact § 9, based on the contention that Morongo is violating the Compact.

By the Amendment, Morongo has waived its sovereign immunity as to certain claims for money damages brought by individuals other than

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[17] See Morongo's Original Compact §15.1, unchanged by the Amendments, and available at http://www.cgcc.ca.gov/documents/compacts/original_compacts/Morongo_Compact.pdf

employees based on injuries to person or property sustained at or in connection with the operation of Morongo's gaming facility and proximately caused by the negligence of Morongo, its officials or employees acting within the course and scope of employment. Morongo's liability for such claims is to be determined in accordance with substantive California law, but not in the Superior Court. Rather, the Amendment requires Morongo to enact a Tort Liability Ordinance that establishes a multi-step adjudicatory process that begins with filing a claim with the Morongo Tribal Gaming Agency. If the tribal process does not resolve a tort claim to the claimant's satisfaction, or remains unresolved after 180 days, the claimant is entitled to seek *de novo* arbitration of the claim before a JAMS arbitrator who is a retired judge under JAMS rules, but only if the claimant first has resorted to the Tribe's administrative remedies. The only time a damage claimant may directly seek relief in the Superior Court is to enforce an arbitration award entered in a *de novo* proceeding following exhaustion of the tribal process. (See note 16, infra, §10.2(d)(i)-(ii).) Nowhere in the Compact or the Amendment is there any express or even implied waiver of Morongo's immunity to a direct private suit for money damages or other relief in state court on any cause of action. (Cf. *Hein v. Capitan Grande Band of Digueno Mission Indians* (9th Cir. 2000) 201 F.3d

1256, 1260 [dismissing individual plaintiffs' suit to enforce the Indian Gaming Regulatory Act because the Act "provides no general private right of action"].)

As with any condition on a waiver of sovereign immunity, these conditions must be strictly construed and adhered to. Even if the Court were to assume that Appellants could have availed themselves of the remedies created by Morongo's Tort Liability Ordinance or workers compensation procedures, the record is devoid of any evidence that they attempted to do so. Rather, the Complaint makes clear that Appellants simply ignored Morongo's tribal remedies and proceeded to file their action directly in the Superior Court.

CONCLUSION

Appellants have provided this Court with no cognizable basis upon which to find that Morongo has consented to the creation of a private right of action for money damages unanchored in any statute or the terms of either Morongo's original Compact or the Amendment. Accordingly, this Court should affirm the Superior Court's judgment dismissing, without leave to amend, Appellants Complaint and Appellants' entire action for lack of jurisdiction over either Morongo or the causes of action alleged against it.

Dated: December 27, 2012

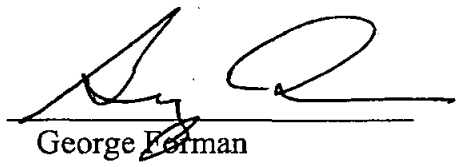
Respectfully submitted,

FORMAN & ASSOCIATES
Attorneys for Morongo Casino Resort & Spa, et al.

By: _____
George Forman

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(b), the attached defendants/appellees' answer brief was prepared in a proportionally spaced typeface using WordPerfect X4 in 13 point Times New Roman, and contains 7,095 words.

Dated: December 27, 2012 By: 

George Forman

PROOF OF SERVICE BY ELECTRONIC &/OR FEDEX DELIVERY

I, Ann Allen, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. I am employed in the County of Marin, California. My business address is 4340 Redwood Highway, Suite E352, San Rafael, California 94903.

On December 27, 2012, I served on the parties listed below true and correct copies of the following document:

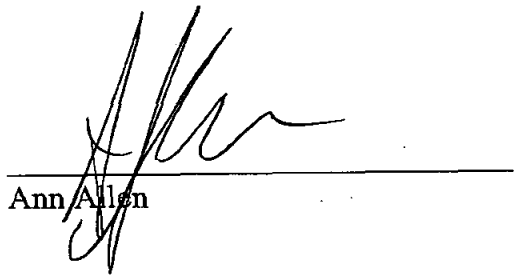
RESPONDENTS' ANSWER BRIEF

by electronic service and/or by placing true and correct copies thereof in sealed Federal Express shipping envelopes or boxes and depositing same for overnight delivery and collection by Federal Express at San Rafael, California, addressed as follows:

Clerk of the Supreme Court Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	[Electronic Service]
Frank E. Marchetti 1155 North Central Ave. Suite 201 Glendale, CA 91101 *Attorney for Appellants*	[1 Copy]

Clerk of the Superior Court [1 Copy]
Superior Court of the State of California
County of Riverside
Riverside Historic Courthouse
4050 Main Street
Riverside, CA 92501

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on December 27, 2012 at San Rafael, California.



Ann Allen