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Cuisine DBA Fortunes A Noodle Bar (a non-legal entity) and  
8 Caesars Entertainment Operating Company Inc. DBA Harrah's  
Rincon Casino and Resort (erroneously named)  
9

10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**

13 LORNA BUTLER,

14 Plaintiff,

15 v.

16 FORTUNES ASIAN CUISINE dba  
FORTUNES A NOODLE BAR; CAESARS  
17 ENTERTAINMENT OPERATING  
COMPANY INC. dba HARRAH'S RINCON  
18 CASINO AND RESORT,

19 Defendants.  
20

Case No. 12CV2409 WQHBLM

Judge: William Q. Hayes

Courtroom: 4

Action Date: June 28, 2012

**SPECIALLY APPEARING DEFENDANTS'**  
**MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT OF**  
**MOTION TO DISMISS PURSUANT TO**  
**F.R.CIV.P. RULE 12(b)(1), (2), (6), AND (7)**

**[NO ORAL ARGUMENT UNLESS**  
**REQUESTED BY THE COURT]**

ACCOMPANYING DOCUMENTS:  
NOTICE; DECLARATION OF RONALD R.  
GIUSSO; REQUEST FOR JUDICIAL  
NOTICE; [PROPOSED] ORDER

Date: November 19, 2012

Time: 11:00 a.m.

Dept.: Courtroom 4

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28 **SPECIALLY APPEARING DEFENDANTS'**  
**MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF MOTION TO DISMISS**  
**CASE NO. 12CV2409**

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I.

INTRODUCTION

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3 Plaintiff LORNA BUTLER (“BUTLER”) has sued *Specially Appearing* Defendants  
4 Fortunes Asian Cuisine dba Fortunes A Noodle Bar (a non-legal entity) and Caesars  
5 Entertainment Operating Company Inc. dba Harrah’s Rincon Casino and Resort for “negligently,  
6 recklessly, willfully and wantonly misrepresent[ing] the food contents” in the chicken lo mein  
7 dish she ordered at Harrah’s Rincon Casino and Resort on July 20, 2010. (Exh. 1.) The casino,  
8 commonly referred to as Harrah's Rincon Casino and Resort (the "Casino"), is located on the  
9 Rincon Indian Reservation in Valley Center and is owned, controlled, and operated by the  
10 Rincon San Luiseno Band of Mission Indians (the "Rincon Tribe"). (Exh. 2. ¶ 2) BUTLER has  
11 not submitted a claim against or with the Rincon Tribe or its Tribal Council as of the date of this  
12 filing. (Giusso Decl., ¶ 7.)

13  
14 *Specially Appearing* Defendants seek an order dismissing BUTLER’s Complaint because  
15 this Court lacks subject matter jurisdiction over BUTLER’s claims which must be brought before  
16 the Rincon Tribe based on both the doctrine of sovereign immunity and the IGRA sponsored  
17 Tribal-State Gaming Compact.

18  
19 In addition, *Specially Appearing* Defendants Fortunes Asian Cuisine and Harrah’s  
20 Rincon Casino and Resort are non-legal entities and therefore, necessarily have insufficient  
21 minimum contacts with the State of California to be subject to general or specific jurisdiction of  
22 this Court. (Exh. 2 at ¶ 2, Decl. Giusso, ¶ 8) Similarly, *Specially Appearing* Defendants Caesars  
23 Entertainment Operating Company Inc. is not a proper party in this lawsuit because it does not  
24 own, operate or manage the Casino at issue. (Exh. 2 at ¶ 5.) Thus, *Specially Appearing*  
25 Defendant Caesars Entertainment Operating Company Inc. cannot be subject to general personal  
26 jurisdiction in California as it lacks any of the requisite contacts with California. Moreover,  
27 *Specially Appearing* Defendant Caesars Entertainment Operating Company Inc., also cannot be

1 subject to specific personal jurisdiction in California in this action because BUTLER has not  
2 articulated, and cannot show by competent evidence, that it has purposefully availed itself any of  
3 the benefits of this forum, or that the alleged harm suffered by BUTLER in any way arises out of  
4 any forum-related contact *Specially Appearing* Defendant Caesars Entertainment Operating  
5 Company Inc. may have with California. Thus, this Court lacks any basis upon which to  
6 exercise personal jurisdiction over any of the *Specially Appearing* Defendants.

7  
8 Additionally, the Rincon Tribe is a necessary and indispensable party which cannot be  
9 joined in this action because of its sovereign immunity. Lastly, BUTLER has failed to state a  
10 claim upon which relief may be granted as none of the *Specially Appearing* Defendants owe  
11 BUTLER a duty of care. Accordingly, all claims asserted by BUTLER in her Complaint against  
12 every *Specially Appearing* Defendant must be dismissed.

13  
14 **II.**

15 **STATEMENT OF FACTS**

16 The following are the facts pertinent to this motion:

17  
18 1. On June 28, 2012, BUTLER filed the instant matter in San Diego Superior Court,  
19 North County Division against *Specially Appearing* Defendant Fortunes Asian Cuisine (a non-  
20 legal entity) dba Fortunes A. Noodle Bar. (Exh. 1.) BUTLER claims *Specially Appearing*  
21 Defendant Fortunes Asian Cuisine owes her \$7,500 because on July 2, 2012, they “negligently,  
22 recklessly, willfully and wantonly misrepresented the food contents” of their chicken lo mein  
23 dish which caused her to “become seriously ill.” (*Id.* at p. 2.) BUTLER claims medical bills  
24 over \$3,000 as well as pain and suffering. (*Id.*) On August 28, 2012, BUTLER amended her  
25 complaint to add *Specially Appearing* Defendant Caesars Entertainment Operating Company  
26 Inc., dba Harrah’s Rincon Casino and Resort. (*Id.* at p. 8.)

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1           2.       The Casino is located on the reservation of the Rincon San Luiseno Band of  
2 Mission Indians, a federally-recognized sovereign Indian Tribe (the "Rincon Tribe"). (Exh. 2, ¶  
3 2.) The Casino is owned, controlled, and its operations are managed by the Rincon Tribe  
4 pursuant to the Indian Gaming Regulatory Act ("IGRA"), as well as the Tribal-State Gaming  
5 Compact (the "Compact") between the Rincon Tribe and the State of California. (*Id.*, at ¶ 3;  
6 Exh. 3.)

7  
8           3.       The Casino's creation was dependent upon government approval at numerous  
9 levels in order for it to conduct gaming activities permitted only under the auspices of the Rincon  
10 Tribe. (Exh. 3.) The IGRA, which establishes the jurisdictional framework that governs Indian  
11 gaming, required the Rincon Tribe to authorize the Casino through a tribal ordinance and an  
12 interstate gaming compact. (25 U.S.C. § 2710(d)(1).) The Rincon Tribe and California entered  
13 into such a compact "on a government-to-government basis." These extraordinary steps were  
14 necessary because the Casino is not a mere revenue-producing tribal business, but pursuant to the  
15 IGRA, the creation and operation of Indian casinos is designed to promote "tribal economic  
16 development, self-sufficiency, and strong tribal governments." (25 U.S.C. § 2701(4); 2702(1).)  
17 One of the principal purposes of the IGRA is "to ensure that the Indian tribe is the primary  
18 beneficiary of the gaming operation." (25 U.S.C. § 2702(2).)

19  
20           4.       As reflected in the IGRA-sponsored Compact that created the Casino, the policy  
21 behind establishing the Casino was to "enable the Tribe to develop self-sufficiency, promote  
22 tribal economic development, and generate jobs and revenues to support the Tribe's government  
23 and governmental services and programs." (Exh. 3, p. 3.) The Rincon Tribe owns and controls  
24 the Casino pursuant to a management agreement between the Rincon Tribe and HCAL, LLC.  
25 (Exh. 2, at ¶¶ 2, 3.)

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1           5.       *Specially Appearing* Defendant Fortunes Asian Cuisine is not a legal entity.  
2 (Giusso Decl. at ¶ 8.)

3  
4           6.       *Specially Appearing* Defendant Caesars Entertainment Operating Company Inc.  
5 is a Delaware corporation with its principal place of business located in Las Vegas, Nevada. (*Id.*  
6 at ¶ 5.) It does not have offices in California; does not own property in California; does not have  
7 employees in California; and, does not conduct business in California. (*Id.*)

8  
9           7.       The IGRA sponsored Tribal-State Gaming Compact between the Rincon Tribe  
10 and the State of California required that prior to the commencement of gaming activities, the  
11 Rincon Tribe was to carry no less than five million dollars (\$5,000,000) in public liability  
12 insurance for patron personal injury and property damage claims, and was to adopt and make  
13 available to patrons a tort liability ordinance setting forth terms and conditions under which the  
14 Rincon Tribe waives immunity to suit for money damages resulting from intentional or negligent  
15 injuries to persons or property at the gaming facility or in connection with the Rincon Tribe's  
16 gaming operation, including procedures for processing any claims for such money damages.  
17 (Exh. 3, p. 31.) The Rincon Tribe has since adopted the Patron Tort Claims Ordinance (the  
18 "Ordinance") which authorizes a *limited* waiver of its sovereign immunity to suit but only the  
19 forum identified in the Ordinance. (Exh. 3, p. 6, § V.) With regard to the proper forum for  
20 commencement of Patrons' claims, the Ordinance states:

21                   The Tribal Court shall have exclusive jurisdiction to adjudicate  
22                   actions commenced pursuant to this Ordinance. At any time after  
23                   the delivery of a Notice of Claim the Patron may commence suit  
                    against the Gaming Operation in Tribal Court.

24 (Exh. 4, p. 8, § VI(F).)

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26           8.       As of the filing of this motion, BUTLER has not filed a claim with the Rincon  
27 Tribe. (Giusso Decl. ¶ 7.)

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III.

**THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO  
ADJUDICATE THIS DISPUTE**

It is BUTLER who bears the burden of establishing subject matter jurisdiction. (*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); *Penteco Corp. Ltd. P'ship--1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519 (10th Cir. 1991); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).) Any party may seek dismissal of an action for lack of subject matter jurisdiction. (*Napoleon Hardwoods, Inc. v. Professionally Designed Benefits, Inc.*, 984 F.2d 821, 822 (7th Cir. 1993).) In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(1), courts are not limited to the facts pleaded in the complaint, but can and should weigh evidence and determine facts in order to satisfy itself as to its power to hear the case. (*Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).)

**A. Indian Tribes Retain Inherent Civil Jurisdiction Over The Conduct Of Non-Indians Within Their Reservation Unless Congress Expressly Divests The Tribe Of Such Jurisdiction.**

The United States Supreme Court has consistently guarded the authority of Indian governments over their reservations. (*Williams v. Lee*, 358 U.S. 217, 223 (1959).) Indian tribes remain a separate people with power to regulate internal and social relations. (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978).) This includes claims and transactions involving the reservation, as well as non-Indians. (*Williams*, 358 U.S. at 223.) In *Montana v. U. S.*, 450 U.S. 544 (1981), the Supreme Court expounded on the *Williams*, 358 U.S. 217 decision, holding that a tribe retains civil authority over the conduct of non-Indians within its reservation which involve: (1) activities of non-members who enter consensual relationships with the tribe or its members; or (2) the activities or conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe. (*Id.* at 565-566.)

///

1 Tribal authority over the activities of non-Indians on reservation lands is an important  
2 part of tribal sovereignty. (*Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).) Unless  
3 affirmatively limited by a specific treaty provision or federal statute, jurisdiction over civil  
4 matters presumptively lies with the tribe. (*Id.*) Federal preemption and infringement upon tribal  
5 autonomy are the two barriers to the exercise of state authority over Tribes, and “[e]ither basis,  
6 standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken  
7 on the reservation.” (*Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143  
8 F.3d 481, 486 (9th Cir. 1998).)

9  
10 In this case, BUTLER, a patron of the Casino, is a non-Indian who engaged in a  
11 consensual relationship with the Rincon Tribe on the reservation by voluntarily entering the  
12 Casino. BUTLER now claims injuries resulting from her consensual relationship with the  
13 Rincon Tribe related to an occurrence at the Casino that is located on the Rincon Tribe's land and  
14 which is owned and operated by the Rincon Tribe. (*Id.*) Thus, BUTLER's claim necessarily  
15 affects the political integrity, economic security, and health and welfare of the Rincon Tribe as a  
16 finding of liability against the Rincon Tribe would certainly trigger a host of financial and legal  
17 consequences. As a consequence, this Court lacks subject matter jurisdiction over this matter,  
18 and BUTLER's Complaint should be dismissed. (*Williams, Youngstown Sheet & Tube Co. v.*  
19 *Bowers*, 358 U.S. 534, 565-566 (1959).)

20  
21 **B. The Determination Of Jurisdiction In This Dispute Must Be Made By The Rincon**  
22 **Tribe.**

23 The determination of whether a tribe has jurisdiction over non-Indians in civil cases must  
24 be made in the first instance by the tribe itself. (*Nat'l Farmers Union Ins. Companies v. Crow*  
25 *Tribe of Indians*, 471 U.S. 845, 856 (1985).) Therefore, this Court must dismiss BUTLER's case  
26 so that her claims can be properly brought before the Rincon Tribe, who can adjudicate this case  
27 pursuant to the Patron Tort Claims Ordinance. (*See generally, Allen v. Gold Country Casino,*

1 464 F.3d 1044 (9th Cir. 2006); *Kaul v. Wahquahboshkuk*, 838 F. Supp. 515 (D. Kan. 1993); Exh.  
2 4.)

3           Indeed, case law recognizes Congress' commitment to a policy of supporting tribal self-  
4 government and self-determination. (*Nat'l Farmers Union Ins. Companies*, 471 U.S. at 856.)  
5 This policy favors a rule that will provide the forum whose jurisdiction is being challenged the  
6 first opportunity to evaluate the factual and legal basis for the challenge. (*Id.*) Therefore, the  
7 Rincon Tribe should have its opportunity to determine its own jurisdiction and implement its  
8 own policy adjudicating claims such as BUTLER's. Indeed, where there is a question of  
9 jurisdiction, no court should exercise jurisdiction until the parties have exhausted their tribal  
10 remedies. (*Kaul*, 838 F. Supp. at 516.) This rule – known as the rule of "tribal exhaustion" –  
11 encourages tribal self-government by requiring that non-Indian litigants pursue their claims  
12 before the tribe. Exhaustion of tribal remedies also encourages tribes to explain to the parties the  
13 precise basis for accepting jurisdiction which provides other courts with the benefit of their  
14 expertise in such matters in the event of further judicial review. (*Nat'l Farmers Union Ins.*  
15 *Companies*, 471 U.S. at 856.)

16  
17           In *Kaul*, 838 F. Supp. 515, the determination of whether tribes have jurisdiction over non-  
18 Indians doing business on a reservation in a civil case was required to be made in the first  
19 instance by the tribe itself. (*Kaul*, 838 F. Supp. at 517.) The court in *Kaul*, 838 F. Supp. 515  
20 noted that a Plaintiff "is not able to escape the exhaustion doctrine by sitting on her tribal  
21 remedies." (*Id.*) The District Court proceeded to dismiss the plaintiff's claim for lack of subject  
22 matter jurisdiction, stating: "The better course is to dismiss the plaintiff's suit so that she can  
23 pursue her tribal remedies." (*Id.* at 518.) Here, BUTLER has not filed a claim with the Rincon  
24 Tribe, and therefore she has not exhausted her tribal remedies despite having been advised of the  
25 availability of those remedies and the Rincon Patron Tort Claims Ordinance. (Giusso Decl., ¶ 7.)  
26 The tribal exhaustion rule requires that BUTLER pursue her claim with the Rincon Tribe.  
27 Therefore, this Court should dismiss BUTLER's Complaint so the issue of jurisdiction may be

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SPECIALY APPEARING DEFENDANTS'  
MEMORANDUM OF POINTS AND IN SUPPORT  
OF MOTION TO DISMISS  
CASE NO. 12CV2409

1 properly decided first by the Rincon Tribe.

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3 **C. The Patron Tort Claims Ordinance Controls BUTLER's Claim.**

4 Where, as here, a compact exists between a State and an Indian Tribe, the courts must  
5 look to the contractual agreement between the entities for direction in determining whether state  
6 or federal law will apply. (*Confederated Tribes of Siletz Indians of Oregon*, 143 F.3d at 485.)  
7 This is so because “the Compact, a direct result of federal authority granted through the IGRA,  
8 serves as the basis for any analysis of federal preemption. Without either the IGRA or the  
9 Compact, there would be simply no question of federal law at stake.” (*Id.* at 484-485.) Indeed,  
10 the Court stated “the Compact itself controls. To the extent the Compact specifically permits or  
11 prohibits the release of the Report, the parties are bound by it.” (*Id.* at 485.)

12

13 The IGRA sponsored Compact negotiated between the State of California and the Rincon  
14 Tribe specifically contemplates how patrons of the Casino will be allowed to adjudicate personal  
15 injury tort claims arising on the Casino. (*See*, Exh. 3.) Indeed, the Tribal-State Gaming  
16 Compact between the Rincon Tribe and the State of California required that prior to the  
17 commencement of gaming activities, the Rincon Tribe was to carry no less than five million  
18 dollars (\$5,000,000) in public liability insurance for patron claims, and was to adopt and make  
19 available to patrons a tort liability ordinance setting forth terms and conditions under which the  
20 Rincon Tribe waives immunity to suit for money damages resulting from intentional or negligent  
21 injuries to persons or property at the gaming facility or in connection with the Rincon Tribe's  
22 gaming operation, including procedures for processing any claims for such money damages.  
23 (Exh. 3, p. 31.) The Rincon Tribe has since adopted the Patron Tort Claims Ordinance (the  
24 "Ordinance") which authorizes a limited waiver of its sovereign immunity to suit but only in the  
25 forum identified in the Ordinance. (Exh. 4, p. 6, § V.) With regard to the proper forum for  
26 commencement of Patrons' claims, the Ordinance states:

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The Tribal Court shall have exclusive jurisdiction to adjudicate actions commended pursuant to this Ordinance. At any time after the delivery of a Notice of Claim the Patron may commence suit against the Gaming Operation in Tribal Court.

(Exh. 4, p. 8, § VI(F).)

Here, BUTLER contends that while she was present at the Casino on July 2, 2010, she sustained a serious asthma attack from the ingestion of “mushrooms” in the chicken lo mein dish she ordered at one of the restaurants. (Exh. 1, at p. 2.) BUTLER has a legal forum in which to pursue her purported damages through the Rincon Tribe, and may file a claim with the Rincon Tribe in order to avail herself of this limited waiver of sovereign immunity. (Exh. 4.) BUTLER has an alternative forum in which she may pursue her claim personal injury damages. Thus, in line with the narrow mandates of the Patron Tort Claims Ordinance, this Court should dismiss BUTLER’s Complaint so the issue of jurisdiction may be properly decided in the first instance by the Rincon Tribe.

**IV.**

**THIS COURT LACKS PERSONAL JURISDICTION OVER  
SPECIALLY APPEARING DEFENDANTS**

**A. Authority on Jurisdiction.**

Fed. R. Civ. P. 12(b)(2) permits a defendant to raise certain defenses by a motion to dismiss, including lack of personal jurisdiction. The starting point for determining whether personal jurisdiction exists for a defendant sued in District Court is the long arm statute in effect in the state in which the district court is located. (*Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974).)

"A State court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process

1 clause of the federal Constitution if the defendant has such minimum contacts with the state that  
 2 the assertion of jurisdiction does not violate 'traditional notions of fair play and substantial  
 3 justice.'" (*Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444 (1996), quoting,  
 4 *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316  
 5 (1945).)

6  
 7 Personal jurisdiction may be asserted by courts in California in one of two ways: general  
 8 or specific. (*Vons Companies, Inc.*, 14 Cal. 4th at 445.) A nonresident defendant may be subject  
 9 to general jurisdiction only if his or her contacts in the forum state are "substantial . . .  
 10 continuous and systematic." (*Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 445-446  
 11 (1952); see also, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-415  
 12 (1984).) Where a nonresident defendant does not have the requisite substantial and systematic  
 13 contacts with the forum sufficient to establish general jurisdiction, it may be subject to the  
 14 specific jurisdiction of that forum. However, specific jurisdiction cannot be found unless it is  
 15 shown by competent evidence that the defendant has purposefully availed itself of forum benefits  
 16 and the "controversy is related to or arises out of a defendant's contacts with the forum." (*Burger*  
 17 *King Corp. v. Rudzewicz*, 471 U.S. 462, 472-473 (1985); *Helicopteros Nacionales de Colombia*,  
 18 *S.A.*, 466 U.S. at 414.)

19  
 20 In order for a forum to assert specific (or "limited") jurisdiction over an out-of-state  
 21 defendant who has not consented to suit there, three requirements must be met:

- 22 1) The nonresident must engage in an act, consummate a transaction, or perform an
- 23 act by which he purposefully avails himself of the privilege of conducting
- 24 2) The lawsuit must arise out of the nonresident's forum-related activities; and
- 25 3) The exercise of jurisdiction must be fair and reasonable.

26 (*Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *Helicopteros Nacionales de*  
 27 *Colombia, S.A.*, 466 U.S. at 414; *Doe v. Am. Nat. Red Cross*, 112 F.3d 1048, 1051 (9th Cir.

28



1 1997); *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1485 (9th Cir. 1993); *Hunt v. Erie*  
2 *Ins. Group*, 728 F.2d 1244, 1247 (9th Cir. 1984).)

3  
4 In determining whether such "minimum contacts" exist for a valid assertion of  
5 jurisdiction over a non-consenting nonresident, who is not present in the forum, a court must  
6 look at "the quality and nature of [the nonresident's] activity in relation to the forum [to  
7 determine whether it] renders such jurisdiction consistent with traditional notions of fair play and  
8 substantial justice." (*Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604,  
9 618 (1990); *International Shoe*, 326 U.S. 316, 319.) A court will also examine the nature and  
10 quality of the defendant's contacts in relation to the cause of action. (*Data Disc, Inc. v. Sys.*  
11 *Tech. Associates, Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977).)

12  
13 The ultimate determination rests on some conduct by which the nonresident has  
14 purposefully availed itself of the privilege of conducting activities within the forum state to  
15 invoke its benefits and protections, and a sufficient relationship or nexus between the nonresident  
16 and the forum state such that it is reasonable and fair to require the nonresident to appear locally  
17 to conduct a defense. (*Kulko v. Superior Court of California In & For City & County of San*  
18 *Francisco*, 436 U.S. 84, 93-94, 96-98 (1978); *Khan v. Superior Court*, 204 Cal. App. 3d 1168,  
19 1175-1176 (Cal. Ct. App. 1988).) This latter "fairness" finding requires a balancing of the  
20 burden or inconvenience to the nonresident against the resident plaintiff's interest in obtaining  
21 effective relief, and the state's interest in adjudicating the particular dispute, which ultimately  
22 turns on the nature and quality of the nonresident's forum-related activity. (*Kulko*, 436 U.S. at  
23 94; *Khan*, 204 Cal. App. 3d at 1179-1180.)

24  
25 As with any standard that requires a determination of "reasonableness," the "minimum  
26 contacts" test of *International Shoe* is not to be applied mechanically. Rather, a court must  
27 weigh the facts of each case. (*Kulko*, 436 U.S. at 92, 98.) Furthermore, as explained by the  
28

1 United States Supreme Court, each individual has a liberty interest in not being subject to the  
2 judgments of a forum with which he or she has established no meaningful minimum "contacts,  
3 ties, or relations." (*Burger King Corp.*, 471 U.S. at 471-472, quoting, *Int'l Shoe Co.*, 326 U.S.,  
4 319.) As a matter of fairness, a defendant should not be "hailed into a jurisdiction solely as the  
5 result of 'random,' 'fortuitous,' or 'attenuated' contacts." (*Id.* at 475.)

6  
7 When jurisdiction is challenged by a nonresident defendant, the burden is on the plaintiff  
8 to demonstrate sufficient "minimum contacts" exist between the defendant and forum state to  
9 justify the imposition of jurisdiction. (*Sibley v. Superior Court*, 16 Cal. 3d 442, 445 (1976).)  
10 Only where a plaintiff is able to meet this burden does the burden then shift to the defendant to  
11 demonstrate that the exercise of jurisdiction would be unreasonable. (*Vons Companies, Inc.*, 14  
12 Cal. 4th at 449.)

13  
14 Finally, motions to dismiss under Fed. R. Civ. P. 12(b)(2) may test either the plaintiff's  
15 theory of jurisdiction or the facts supporting such theory. (*Credit Lyonnais Sec. (USA), Inc. v.*  
16 *Alcantara*, 183 F.3d 151, 153 (2d Cir. 1999).) When the motion to dismiss challenges the facts  
17 alleged, a Fed. R. Civ. P. 12(b)(2) motion must be decided on the basis of competent evidence.  
18 (*Data Disc, Inc.*, 557 F.2d at 1280.) The court cannot assume the truth of allegations in a  
19 pleading that is contradicted by a sworn affidavit. (*Id.* at 1284; *Wenz v. Memery Crystal*, 55 F.3d  
20 1503, 1505 (10th Cir. 1995)(holding only uncontroverted "well pled facts of plaintiff's  
21 complaint, as distinguished from mere cursory allegations, must be accepted as true"); *Dever v.*  
22 *Hentzen Coatings, Inc.*, 380 F.3d 1070, 1074 (8th Cir. 2004).)

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1 **B. Specially Appearing Defendants Utterly Lack Sufficient Contacts With California To**  
2 **Be Brought Before The Court Under Either A Theory of General or Specific**  
3 **Jurisdiction.**

4 **1. Specially Appearing Defendants Lacks Continuous and Systematic**  
5 **Contacts With California.**

6 As noted above, a Court may exercise general jurisdiction over a defendant who has  
7 substantial, continuous, and systematic contacts with the forum state. (*Helicopteros Nacionales*  
8 *de Colombia, S.A.*, 466 U.S. at 414-415.) Here, *Specially Appearing* Defendants utterly lack  
9 sufficient contacts with California to support this Court's assertion of general jurisdiction over  
10 them. Neither *Specially Appearing Defendant Fortunes Asian Cuisine* nor *Specially Appearing*  
11 *Defendant "Caesar's Entertainment Operating Company Inc., dba Harrah's Rincon Casino and*  
12 *Resort"* are even legal entities. (Exh. 2, ¶ 2, Giusso Decl., ¶ 8.) The casino known as "Harrah's  
13 Rincon Casino & Resort" is located on the reservation of the Rincon San Luiseno Band of  
14 Mission Indians, a federally-recognized sovereign Indian tribe. (Exh. 2, ¶ 2.) The Casino is  
15 owned, controlled, and operated by the Rincon Tribe. (*Id.*)

16 Moreover, "Caesars Entertainment Operating Company Inc." is a Delaware corporation  
17 with its principal places of business located in Las Vegas, Nevada. (*Id.* at ¶ 5.) It does not own  
18 property in California; does not have offices in California; does not have employees in  
19 California; and it does not conduct business in California. (*Id.*) Accordingly, *Specially*  
20 *Appearing* Defendants have absolutely no systematic and continuous contacts with California  
21 which would justify this Court's exercise of general jurisdiction over them. (*Helicopteros*  
22 *Nacionales de Colombia, S.A.*, 466 U.S. at 414-415.)

23  
24 **2. This Court May Not Exercise Specific Jurisdiction Over Specially**  
25 **Appearing Defendants.**

26 As pointed out above, none of the *Specially Appearing* Defendants own or operate the  
27 Casino at issue; the Rincon Tribe owns, controls, and manages the Casino in compliance with the

1 IGRA sponsored Tribal-State Gaming Compact. (Exh. 2, ¶¶ 2, 3; Exh. 3.) Moreover, *Speically*  
2 *Appearing* Defendant Fortunes Asian Cuisine is a non-legal entity and therefore, has not and  
3 cannot, purposefully avail itself of the benefits of doing business in California. Similarly, there  
4 is no evidence that *Specially Appearing* Defendant Caesars Entertainment Operating Company  
5 Inc. has purposefully availed itself of the benefits of doing business in California. *Specially*  
6 *Appearing* Defendant Caesars Entertainment Operating Company Inc. has submitted competent,  
7 sworn evidence that its principal place of business is located in Las Vegas, Nevada. (*Id.* at ¶ 5.)  
8 At the risk of being repetitive, it does not own property in California; does not have offices in  
9 California; does not have employees in California; and it does not conduct business in California.  
10 (*Id.*)

11  
12 Furthermore, because neither of the *Specially Appearing* Defendants own, operate or  
13 manage the Casino at issue, BUTLER's claims cannot, and do not, arise of out *Specially*  
14 *Appearing* Defendants' non-existent forum related activities. BUTLER seeks damages against a  
15 non-legal entity and an out-of-state corporation for personal injury damages allegedly sustained  
16 by her as a result of a severe asthma attack after eating mushrooms in a chicken lo mein dish at a  
17 restaurant on the Rincon Tribe's Indian Reservation. (Exh. 1.) Thus, there is no basis for this  
18 Court to exercise specific personal jurisdiction over any of the *Specially Appearing* Defendants.

19  
20 Any exercise of personal jurisdiction over *Specially Appearing* Defendants would  
21 therefore offend notions of fair play and substantial justice for several reasons. (*Burger King*  
22 *Corp.*, 471 U.S. at 477.) This Court should consider the burden on the *Specially Appearing*  
23 Defendants, the forum state's interest in adjudicating the dispute, BUTLER's interest in obtaining  
24 convenient and effective relief, the interstate judicial system's interest in obtaining the most  
25 efficient resolution of controversies, and the shared interest of the several states in furthering  
26 fundamental substantive social policies. (*Id.*)

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SPECIALLY APPEARING DEFENDANTS'  
MEMORANDUM OF POINTS AND IN SUPPORT  
OF MOTION TO DISMISS  
CASE NO. 12CV2409

1           Subjecting *Specially Appearing* Defendants to personal jurisdiction in California under  
2 these circumstances would place an enormous burden on *Specially Appearing* Defendants. Such  
3 a ruling would allow any plaintiff, in any location, to sue a defendant even when that defendant  
4 does not conduct any business in the forum. Furthermore, this result would fundamentally alter  
5 the personal jurisdiction analysis by allowing the location of the plaintiff to control where a  
6 defendant could be sued. Personal jurisdiction must focus on a defendant's contacts with a given  
7 forum, not simply where a plaintiff is located. (*Calder v. Jones*, 465 U.S. 783 (1984);  
8 *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 416-417.) In this case, *Specially*  
9 *Appearing* Defendant Harrah's Rincon Casino and Resort is not even a legal entity, and therefore  
10 has no contacts with California. (Exh. 2, ¶ 2.) The Casino is entirely controlled by the Rincon  
11 Tribe. (*Id.*) Equally important is the fact that *Specially Appearing* Defendant Caesars  
12 Entertainment Operating Company Inc. is a Delaware corporation with its principal place of  
13 business located in Las Vegas, Nevada. (*Id.* at ¶ 5.) *Specially Appearing* Defendant Caesars  
14 Entertainment Operating Company Inc. does not have offices in California, does not own  
15 property in California, does not have employees in California, and does not conduct business in  
16 California. (*Id.*) Additionally, *Specially Appearing* Defendant Caesars Entertainment  
17 Corporation, Inc. does not have an agent for service of process in California. (*Id.*)

18  
19           Where, as here, a defendant does not conduct business in the forum, and its employees do  
20 not engage in the acts alleged in the Complaint, whether in California or otherwise, a plaintiff's  
21 location in the forum cannot reasonably form the basis for personal jurisdiction over that  
22 defendant. California has little, if any, interest in adjudicating this dispute given these facts.  
23 Thus, BUTLER's case must be dismissed for lack of personal jurisdiction.

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SPECIALLY APPEARING DEFENDANTS'  
MEMORANDUM OF POINTS AND IN SUPPORT  
OF MOTION TO DISMISS  
CASE NO. 12CV2409

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V.

**THE RINCON TRIBE IS AN INDISPENSABLE PARTY WHICH  
CANNOT BE JOINED IN THE FEDERAL ACTION**

BUTLER's complaint must also be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(7) because the Rincon Tribe is a necessary and indispensable party which, because of its sovereign immunity, cannot be joined to this action. Under Rule 19, the Rincon Tribe is both a necessary and indispensable party, without which the action cannot proceed. (Fed. R. Civ. P. 19(b); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002), *citing, Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999).) However, the requirement of joining the Rincon Tribe is legally not possible in this case because of the Rincon Tribe's sovereignty and well-established sovereign immunity from the lawsuit brought by BUTLER. There is only one conclusion to draw based on the Rincon Band's necessity and indispensability as a party to this case coupled with its sovereign immunity – the dismissal in its entirety of BUTLER's complaint.

**A. The Rincon Tribe is a Necessary Party.**

Federal Rule of Civil Procedure 19(a) provides for joinder of a party as "necessary" to the action, where any of the following are met:

- (1) in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
  - (i) as a practical matter impair or impede the person's ability to protect that interest, or
  - (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

(Fed. R. Civ. P. 19(a).)

///

1 Here, the Rincon Tribe clearly meets not just one, but both of the criteria of Federal Rules  
2 of Civil Procedure 19(a). The Rincon Tribe owns and controls the Casion where the incident at  
3 issue took place. (Exh 1, Exh. 2, ¶ 2.) Thus, resolution of BUTLER's complaint will turn on  
4 who, if anyone, bears responsibility for her alleged injury at the Casino which is owned and  
5 controlled exclusively by the Rincon Tribe. (Exh. 2, ¶ 2.) Thus, a full and fair adjudication of  
6 liability as to BUTLER's claims, if any, cannot possibly occur in the absence of the Rincon Tribe  
7 being joined as a necessary party. (See, Fed. R. Civ. P. 19(a); *Am. Greyhound Racing, Inc.*, 305  
8 F.3d at 1022; *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150 (9th  
9 Cir. 2002). 1155-1158 (9th Cir. 2002) [Navajo Nation held necessary and indispensable party to  
10 employment discrimination case].)

11  
12 **B. The Rincon Tribe is An Indispensable Party.**

13 Not only is the Rincon Tribe a necessary party to this action, it is an indispensable party,  
14 meaning that the action cannot proceed without it. (*Am. Greyhound Racing, Inc.*, 305 F.3d at  
15 1024.) The following four factors are evaluated to determine whether an absent, necessary party  
16 is indispensable:

- 17
- 18 (1) to what extent a judgment rendered in the person's absence might be prejudicial to the  
19 person or those already parties;
  - 20 (2) the extent to which, by protective provisions in the judgment, by the shaping of relief,  
21 or other measures, the prejudice can be lessened or avoided;
  - 22 (3) whether a judgment rendered in the person's absence will be adequate; and
  - 23 (4) whether the plaintiff will have an adequate remedy if the action is dismissed for  
24 nonjoinder.

(Fed. R. Civ. P. 19(b).)

25 Here, for several reasons, if the Rincon Tribe is not joined to this lawsuit, *Specially*  
26 *Appearing* Defendants will be irreparably prejudiced. First, BUTLER's complaint implicates  
27 negligence and premises safety obligations purportedly owed to BUTLER by the Rincon Tribe.

1 The Rincon Tribe obviously then has an overriding economic interest in the outcome of this  
2 litigation. As noted above, the Rincon Tribe also has its own defenses to suit, including  
3 sovereign immunity. It is not *Specially Appearing* Defendants' obligation to defend those  
4 claims.

5  
6 Second, *Specially Appearing* Defendants may be significantly prejudiced if forced to take  
7 a position potentially in conflict with that of the Rincon Tribe, because the Rincon Tribe is not a  
8 party to this action and is unable to defend itself. BUTLER has clearly targeted the interests,  
9 property and rights of the Rincon Tribe – however, she seeks to get at those interests by way of  
10 *Specially Appearing* Defendants. It begs the question: how can *Specially Appearing* Defendants  
11 defend against those tactics in the absence of the Rincon Tribe, a necessary and indispensable  
12 party?

13 Third, there is a potential that an unfavorable ruling or judgment may be entered against  
14 *Specially Appearing* Defendants if forced to defend not only their own interests, but those of the  
15 Rincon Tribe. This prejudice is, alone, sufficient to warrant dismissal of this action under  
16 Federal Rule of Civil Procedure 19(b). (*Lucero v. Lujan*, 788 F. Supp. 1180, 1183 (D.N.M.  
17 1992); *Dawavendewa*, 276 F.3d at 1150 [tribe necessary and indispensable party based on  
18 prejudice to it and named employer, warranting dismissal of action based on tribe's sovereign  
19 immunity].)

20  
21 Lastly, BUTLER has an alternative forum in which to pursue her claim for personal  
22 injury damages under the established procedures in place pursuant to the Tribal-State Gaming  
23 Compact and the Patron Tort Claims Ordinance. (Exhs. 3, 4.)

24  
25 In sum, the Federal Rule of Civil Procedure 19(b) factors weigh strongly in favor of a  
26 finding that the Rincon Tribe is an indispensable party to this action. Moreover, as set forth  
27 above, the Rincon Tribe has sovereign immunity against the claims alleged and joinder of the

28



1 Rincon Tribe, an indispensable party, is not possible. Therefore, this action cannot proceed in  
2 "equity and good conscience" and must be dismissed. (*Id.*)

3

4

VI.

5

**BUTLER FAILS TO STATE A PROPER CLAIM UPON WHICH RELIEF MAY BE**

6

**GRANTED**

7

Even if the Court did have subject matter jurisdiction over BUTLER's claim, this case  
8 should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), as BUTLER has not  
9 alleged a valid claim upon which relief could be granted against any *Specially Appearing*

10

Defendants. The Casino is located on the Reservation of the Rincon San Luiseno Band of

11

Mission Indians, a federally-recognized sovereign Indian Tribe, and is owned and operated by

12

the Rincon Tribe under the Indian Gaming Regulatory Act, as well as the IGRA-sponsored

13

Tribal-State Gaming Compact between the Rincon Tribe and the State of California. (Exh. 2, ¶

14

2; Exh. 3.)

15

16

*Specially Appearing* Defendants owe BUTLER no duty of care, because as noted above,

17

BUTLER has named a non-legal entity, as well as an entity who does not own, operate, or

18

manage the Casino. (Exh. 2, ¶¶ 2, 5.) The Rincon Tribe owns and operates the Casino which is

19

located on its land, pursuant to a management agreement between the Rincon Tribe and HCAL,

20

LLC. (*Id.* at ¶¶ 2 -3.) BUTLER has named the wrong entities (in the wrong forum). Thus,

21

BUTLER's claims fail as a matter of law against *Specially Appearing* Defendants and her

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Complaint must be dismissed.

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**VII.**

**CONCLUSION**

The law is clear that BUTLER's claims must be brought, not in this Court, but before the Rincon Tribe based on the doctrine of sovereign immunity and the IGRA sponsored Tribal-State Gaming Compact because the Court lacks personal jurisdiction over *Specially Appearing* Defendants. Additionally, the Rincon Tribe is a necessary and indispensable party that cannot be joined in this action. Finally, BUTLER has failed to state a claim upon which relief can be granted. For all of these reasons, *Specially Appearing* Defendants respectfully request that the Court dismiss this action pursuant to

Dated: October 11, 2012

STOKES ROBERTS & WAGNER

By: */s/ Ronald R. Giusso*

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Maria C. Roberts  
Ronald R. Giusso  
Kelly L. McGeehan  
Attorneys for *Specially Appearing*  
Defendants Fortunes Asian Cuisine DBA  
Fortunes A Noodle Bar (a non-legal entity)  
and Caesars Entertainment Operating  
Company Inc. DBA Harrah's Rincon  
Casino and Resort (erroneously named)