No: 13-57113

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENEDICT COSENTINO,
Petitioner and Appellant,

vs.

PECHANGA BAND OF LUISENO MISSION INDIANS;
PECHANGA GAMING COMMISSION;
and DOES 1 through 10, inclusive
Respondents and Appellees

Appeal from the United States District Court for the
Central District of California
Civil Case No. 5:13-cv-00912-R-OP
(Honorable Manuel L. Real)

APPELLANT BENEDICT COSENTINO'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because, Cosentino's 9 U.S.C. § 4 Petition raises controlling questions of federal law that involve Native American affairs and the controlling force of the Federal Indian Gaming Regulatory Act ("IGRA.") *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1994) (federal common law confers jurisdiction in actions concerning gaming operations on Native American land.) Specifically, Cosentino's Petition to Compel arbitration presented the District Court with the controlling question of whether a Tribe may adopt and enforce a Tribal Ordinance that violates the requirements specifically imposed upon that Tribal Ordinance by the Tribe's Tribal-State Compact. *See* 25 U.S.C. § 2710(d)(1)(C) (tribal gaming is lawful only if conducted in conformance with a Compact); *see also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) ("The Compacts are quite clearly a creation of federal law....")

Additionally, the District Court had jurisdiction because "A federal court may 'look through' a § 4 petition to determine whether it is predicated on an action that 'arises under' federal law " *See Vaden v. Discover Bank*, 556 U.S. 49, 61-62, 129 S.Ct. 1273 (2009). Cosentino's underlying tort claims in this case also involve the Federal interest in Native American Affairs because his claims for interference

with Prospective Economic Advantage, interference with his right to pursue a lawful occupation, and violation of California Civil Code section 52.1 are premised on the Pechanga Gaming Commission's unlawful threat to revoke, and unlawful revocation of his gaming license without any finding of moral unfitness, and in retaliation for Cosentino's assistance as a confidential informant to law enforcement. [*See* ER/28-36"][1] That conduct violated the Federal Indian Gaming Regulatory Act; the Tribal-State Compact; and the Pechanga Gaming Act which are all federal in character, *see* 25 U.S.C. § 2710(d)(1), and which all mandate that revocation of a gaming license be based upon evidence of moral unfitness tested at a hearing. *See* 25 U.S.C. § 2710(c)(2); 25 C.F.R. § 558.5 (2011); PGA §§ 10(p)(1), 10(m), & 10(j) [A-127, A-126, A-124]; Compact §§ 6.4.3, 6.4.8, § 6.5.1 [A-019, A-022, A-024].[2] Thus, the underlying arbitration tort claims turn on controlling questions of federal law that involve Indian affairs and in which the Federal government has a compelling interest. *See* 25 U.S.C. § 2702 (purpose of IGRA includes establishing federal standards for gaming on Indian lands); *see also Sycuan Band of Mission Indians v. Roache*, *supra*, 54 F.3d at 538.

This Court has jurisdiction under 28 U.S.C. § 1291, because the appeal is from the District Court's order granting Respondents' Motion to Dismiss—which

[1] Cites to Excerpts of Record at pages 28 through 36.

[2] All citations to the Compact and Tribal Ordinances in this Brief are followed by bracketed guides to the page number of Appellant's C.R. 28-2.7 Addendum such that the guide "[A-126]" directs the Court to page A-126 of the Addendum.

disposes of all parties' claims. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A) because the Order Dismissing Cosentino's Petition was entered on November 25, 2013, [*see* ER/03], and Cosentino filed his Notice of Appeal on December 16, 2013. [*See* ER/01].

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Does Pechanga Tort Liability Act section 5(d), which purports to bar arbitration of any claim if the claimant files a concurrent claim arising from the same injuries against another party in another venue, conflict with Compact section 10.2(d)(ii)'s requirement that the Tribe waive its sovereign immunity and consent to arbitration of "*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...." ?

ISSUE TWO: Does Pechanga Tort Liability Act section 5(h), which purports to bar "employment-related claims of any kind" conflict with Compact section 10.2(d)(ii) if TLA section 5(h) is read, as the District Court read it, to bar Cosentino's personal injury and property damage claims against Respondents for injuries inflicted by the PGC (which never employed Cosentino)?

ISSUE THREE: In light of the Federal Indian Gaming Regulatory Act's requirements that Pechanga Tribal Gaming "shall be lawful only if conducted in

conformance with a Tribal-State Compact...." *see* 25 U.S.C. § 2710(d)(1)(C), can the Tribe invoke provisions of its Tort Liability Ordinance that conflict with the requirements of the Compact, or, as Cosentino contends, are those conflicting TLA provisions void *ab initio* as a matter of law?

III. STATEMENT OF ADDENDUM

Pursuant to Circuit Rule 28-2.7, Cosentino has filed herewith a tabbed Addendum with the verbatim text of: (A) the 1999 Tribal-State Compact between the State of California and the Pechanga Band of Luiseno Mission Indians, (B) the 2006 Amendment to the Tribal-State Compact between State of California and the Pechanga Band of Luiseno Mission Indians; (C) the Pechanga Band's Tort Liability Act of 2008, and (D) the Pechanga Gaming Act. The Addendum is consecutively paginated A-001 through A-141. For ease of reference, citations to the above-listed Compact and Tribal ordinances in this Brief will be followed by references to appropriate page numbers in Appellant's C.R. 28-2.7 Addendum.

IV. STATEMENT OF THE CASE

This is an appeal from a final order dismissing with prejudice Cosentino's Petition to Compel Arbitration. Respondents moved to dismiss under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) based on sovereign immunity.

A. The Pechanga Band's Gaming Activities

The Pechanga Band of Luiseno Mission Indians (the "Pechanga Band"), is a federally-recognized Indian Tribe [ER/51 ¶ 14.] The Pechanga Band owns and operates the Pechanga Resort and Casino (the "Pechanga Casino"). [ER/52 ¶17.] The Pechanga Casino conducts "class III gaming" as that term is defined by IGRA. *See* [ER/52 ¶ 18.]; 25 U.S.C. § 2703(8).

B. IGRA

IGRA is found at Title 25 sections 2701 *et. seq.* of the United States Code. IGRA's stated purposes include, "provid[ing] a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences,..." and establishing "independent Federal regulatory authority," and "Federal standards for gaming on Indian lands." 25 U.S.C. § 2702. To that end, IGRA allocates regulatory jurisdiction over class III gaming among the Federal Government, the States, and the Tribes.

Under IGRA, Class III gaming activities may be conducted on Indian lands only if (1) authorized by a tribal gaming ordinance, (2) located in a state that permits such gaming, and (3) conducted in conformance with a Tribal-State Compact. 25 U.S.C. § 2710(d)(1).

IGRA further provides that, upon the publication of the Tribe's gaming ordinance in the Federal Register, "class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact...." 25 U.S.C § 2710(d)(2)(C).

C. The Compact

In 1999, the Pechanga Band and the State entered a Tribal-State Compact pursuant to IGRA. *See* Cal. Gov. Code § 12012.25(a)(31) (the "1999 Compact"). In 2006, the Pechanga Band and a handful of other California tribes entered Amended Compacts with the State. *See* Cal. Gov. Code §§ 12012.46; 12012.47; 12012.48; 12012.46; 12012.51 (the "Amended Compact.") The 1999 Compact and the Amended Compact are collectively referred to herein as "the Compact."

In the Amended Compact, the Pechanga Band agreed to broadly waive its sovereign immunity and consent to arbitrate any tort claim arising out of, connected with, or relating to the operation of the Pechanga Casino or the Pechanga Band's gaming activities. Specifically, section 10.2(d) of the Tribal-State Compact provides, in relevant part, as follows:

> (i) The Tribe shall obtain and maintain a commercial general liability insurance policy … which provides coverage of no less than ten million dollars ($10,000,000.00) 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,....

(ii) The Tribe shall maintain in continuous force its Tort Liability Ordinance which shall, prior to the effective date of this Amendment and at all times hereafter, continuously provide at least the following:

(A) That California tort law shall govern all claims for 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,....

(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;....

(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 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 the United States District Court where the Tribe's Gaming Facility is located and the Ninth Circuit Court of Appeals (and any successor 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, including courts of appeal, to (1) enforce the parties' obligation to arbitrate,….

(iii) Upon Notice that a claimant claims to have suffered an injury or damage covered by this Section, 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 Tribal Dispute Resolution Process, if any, and if

> dissatisfied with the resolution, is entitled to arbitrate his or her claim before a retired judge.
>
> (iv) Failure to comply with section 10.2, subdivisions (d)(i); (d)(ii); or (d)(iii) shall be deemed a material breach of the Compact.

(Compact § 10.2(d) [A-086 to A-089].)

D. The Pechanga Gaming Commission

The Compact requires the Pechanga Band to create a "Tribal Gaming Agency" to carry out the Tribe's regulatory responsibilities under IGRA. *See* Compact §§ 2.20, 6.4.1 [A-011, A-017].

Pursuant to IGRA, the Pechanga Band adopted its Pechanga Gaming Act (the "PGA") in 1992. [*See* A-113.] PGA Section 4(a) created the Pechanga Gaming Commission (the "PGC"). [*See* A-116.] The PGC acts under the authority of the Pechanga Band and serves as the Tribal Gaming Agency identified in Compact sections 2.20 and 6.4.1.

The PGC is a five-member elected body. *See* PGA § 4 (a) [A-116]. The PGC is tasked with licensing all "key employees" as required by IGRA. *See* 25 U.S.C. §§ 2710(b)(2)(F); (d)(1)(A)(ii); 25 C.F.R. § 558.2 (2011); Compact §§ 2.20, 6.4.1 [A-011, A017]; and PGA § 10 [A-121].

Under Compact section 2.20, "No person employed in, or in connection with, the management, supervision, or conduct of any gaming activity may be a

member or employee of the Tribal Gaming Agency." Compact § 2.20 [A-011.] Thus, by law, the PGC is a separate and independent entity from the Pechanga Casino. The PGC cannot hire or fire Pechanga Casino employees. *See id.* However, the Pechanga Casino may not employ any person who does not hold a license from the PGC. *See* PGA § 10(a) [A-121].

The PGC is authorized to revoke a licensee's gaming license where the PGC has evidence showing that the licensee is morally unfit. 25 U.S.C. § 2710(c)(2); PGA §§ 10(p)(1), 10(m) [A-126 to A-127]. If the PGC has such evidence, the PGC is required to suspend the licensee's license, provide the licensee with a hearing, revoke or reinstate the licensee's license, and report the PGC's decision to the National Indian Gaming Commission. *See* 25 U.S.C. § 2710(c)(2); 25 C.F.R. § 558.5(c) and (d) (2011).

E. The Tort Liability Act

In or about February 2008, pursuant to Compact section 10.2(d)(ii), the Pechanga Band adopted its Pechanga Gaming Facility Tort Liability Act of 2008 (the "TLA"). Pursuant to Compact § 10.2(d)(ii)(D), TLA section 10 provides for a tribal dispute resolution process whereby tort claimants must follow enumerated procedural requirements to notice tort claims. *See* Compact § 10.2(d)(ii)(D) [A-088 to A-089]; TLA § 10 [A-136 to A-137]. Pursuant to Compact § 10.2(d)(iii),

the TLA further provides that, if the Pechanga Band denies a Notice of Claim or there has been no resolution of the claims, then the tribal remedies set forth in the TLA are exhausted, and the claimant may request arbitration. *See* Compact § 10.2(d)(iii) [A-089]; TLA § 12(c)(i)-(ii) [A-139]. The claimant must timely file the Request for Arbitration which must comply with enumerated procedural requirements. *See* TLA § 12(c)-(d) [A-139 to A-140.]

TLA Section 12(i) in turn provides that:

> Provided that the claimant has fully complied with this Act and exhausted the Tribal Dispute Resolution Process as set forth herein and determined by the Claims Administrator, the Tribe waives its right to assert its sovereign immunity in connection with the arbitrator's jurisdiction and in any action brought in the United States District Court for the Central District of California and the Ninth Circuit Court of Appeals (or any successor court), or, if the federal court declines to hear the action, in any action brought in the courts of the State of California for the County of Riverside, including courts of appeal, to (1) enforce the parties' obligation to arbitrate,....

TLA § 12(i) [A-140].

In language echoing the Compact, the TLA defines the term "Claim" as "a petition for an award under this Act based upon bodily injury, property damage or personal injury arising out of, connected with or relating to the operation of the Gaming Facility." TLA § 3(d) [A-133].

As set forth above, Compact section 10.2(d) requires that the "Tribe" (which the Compact defines as "the Pechanga Band of Luiseno Mission Indians, a

federally-recognized Indian tribe, or an authorized official or agency thereof." Compact § 2.21 [A-011]) waive its sovereign immunity and consent to arbitration for all such "Claims." However, the TLA purports to exclude tort claims against Respondents, the Pechanga Band and the PGC, from its purview. Specifically, section 5(b) of the TLA provides in relevant part as follows:

> Tort claims against the Tribe which are cognizable under this Act shall be brought against the Tribe's Gaming Operation and may be pursued solely through the Tribal Dispute Resolution Process as outlined in this Act and, if not satisfied thereby, through arbitration as provided herein. The Tribe has not waived its immunity for any purpose including, but not limited to arbitration or enforcement of arbitration awards, except as specifically provided herein. ***No claim of any kind is authorized under this Act against the Pechanga Band, the Pechanga Gaming Commission, the Pechanga Development Corporation or their respective officials.***

TLA § 5(b) [A-134] (emphasis added.)

TLA section 5 also purports to bar the arbitration of any claim if the claimant has sought damages in another venue against any other party for injuries arising out of the same incident for which he seeks to arbitrate against the Tribe. Specifically, TLA section 5(d) provides as follows:

> [n]o claim shall be pursued or sustained pursuant to this Act if a concurrent or alternate action seeking damages for injury arising from the same incident has been filed in any other forum or venue. If such an action is filed in any other forum or venue during the pendency of a claim pursuant to this Act, the claim pursuant to this Act is and shall be considered to have been abandoned and shall not be eligible thereafter for an award of any kind. Abandoned claims shall not be eligible for arbitration. This provision shall not be construed to confer any right to bring an action in any other forum,

> nor as acquiescence by the Tribe or its Gaming Operation to a claim of jurisdiction by a court or agency of any other sovereign.

TLA § 5(d) [A-134 to A-135].

TLA section 5(h) also purports to bar "employment-related claims of any kind" as follows:

> Employment-related claims of any kind by employees or former employees of the Gaming Operation, or of any other instrumentality, entity or department of the Pechanga Band, may only be brought under the grievance procedures of the employing entity and shall in no case be cognizable under this Act. Employee workplace injuries occurring at the Gaming Facility are subject to the Pechanga Workers Compensation Ordinance and are not cognizable under this Act.

TLA § 5(h) [A-135].

F. The PGC Wrongfully Threatens to Revoke, Then Wrongfully Revokes, Cosentino's Gaming License.

Cosentino commenced employment at the Pechanga Casino in April 2007. [ER/65 ¶ 48.] Prior to starting work at the Pechanga Casino, the PGC licensed Cosentino as required by IGRA and the PGA. *See* 25 U.S.C. §§ 2710(b)(2)(F), (d)(1)(A)(ii); PGA § 10(a) [A-121]. Shortly after he started work at the Pechanga Casino, Cosentino began to witness rampant criminal activity at the Pechanga Casino including an illegal online casino being operated from the floor of the Pechanga Casino; loan sharking; extortion and bribery; rampant employee theft; and collusion between corrupt dealers, supervisors and players. [ER/65-66 ¶ 49.]

Cosentino reported what he saw to his licensing agent and he was referred to internal investigators Walter McKinney and Martin Hughes of McKinney Investigations, LLC. [ER/60 ¶ 50.] In or about May 2007, the Pechanga Band hired McKinney Investigations to conduct an internal investigation into corruption associated with the Pechanga Casino. [ER/60 ¶ 51.]

Mr. Hughes asked Cosentino if Cosentino would assist the California Department of Justice as a confidential informant. Cosentino agreed to do so. [ER/60 ¶ 52.] Thereafter, Cosentino assisted the Department of Justice as an informant on numerous successful criminal investigations. [ER/60 ¶ 53.]

On or about March 29, 2011, the PGC informed the Pechanga Casino that it wished to meet with Cosentino at 11:00 a.m. on April 1, 2011. [ER/66-67 ¶ 55.] The PGC requested that the Pechanga Casino have Cosentino report to the PGC's offices at that time. [ER/67 ¶ 56.]

The PGC did not inform Cosentino of the meeting. [ER/67 ¶ 57.] On March 31, 2011, the Pechanga Casino scheduled Cosentino to work a shift commencing at 10:00 a.m. on April 1, 2011. [ER/67 ¶ 58.] On April 1, 2011, at 11:00 a.m., Cosentino was at his assigned table working his scheduled shift with chips in play. [ER/67 ¶ 59.] The Pechanga Casino did not relieve him from his table and did not send him to meet with the PGC. [ER/67 ¶ 60.] At approximately 11:25 a.m. another dealer relieved Cosentino and Cosentino's floor supervisor told

Cosentino to report to the Pechanga Casino's table games office where Cosentino was informed that the PGC had suspended his license pending an investigation. Cosentino was escorted from the Pechanga Casino and informed that he was barred from the premises until further notice. [ER/67 ¶ 61.]

For the next month, Cosentino was left without any income and without any certainty as to whether he would be returning to his job at the Pechanga Casino. [ER/67 ¶ 62.] Finally, the PGC summoned Cosentino to its offices for a May 11, 2011 meeting, assuring him that the PGC simply wanted to talk to him. [ER/67 ¶ 63.] Upon his arrival at that May 11, 2011 meeting, PGC Commissioners, Stella Fuller, Robert Vargas, Jason Maldonado, John Magee, and William Ramos proceeded to interrogate Cosentino for over an hour about Cosentino's assistance to McKinney Investigations and the Department of Justice as a confidential informant. [ER/68 ¶ 64.]

On May 13, 2011, PGC Commissioner Ramos telephoned Cosentino and told Cosentino that, if Cosentino would not resign from his employment at the Pechanga Casino, the PGC would revoke Cosentino's gaming license—effectively preventing Cosentino from ever getting another job in any tribal casino. [ER/68 ¶ 65.] Ramos also stated that the PGC had received an email from the Pechanga Casino explaining that the Pechanga Casino had not relieved Cosentino from his table, thus causing him to miss the April 1 meeting. [ER/68 ¶ 66.] Cosentino

stated that he had done nothing wrong, and he refused to resign. [ER/68 ¶ 67.]

On or about May 25, 2011, the PGC sent Cosentino a letter informing him that his license was revoked. [ER/68 ¶ 68.] The letter did not provide (and other than his refusal to resign, Respondents have never provided) Cosentino with any reason why the PGC revoked his gaming license. [ER/68 ¶¶ 65, 69.] As a result of the PGC's baseless and unlawful revocation of Cosentino's license, the Pechanga Casino was required to terminate Cosentino's employment. [ER/68-69 ¶ 70]; *See also* Tribal-State Compact § 6.4.1 [A-017]; 25 U.S.C. §§ 2710(b)(2)(F)(ii)(I) and 2710(d)(1)(A)(ii).

On or about March 11, 2012, almost one year after the PGC revoked Cosentino's gaming license, McKinney Investigations was invited to present the results of its internal investigation of criminal corruption at the Pechanga Casino to the general membership of the Pechanga Band. [ER/69 ¶ 71.] During that presentation (without disclosing Cosentino's identity) McKinney Investigations informed the general membership of the PGC's baseless revocation of Cosentino's gaming license. *Id.* The Chairwoman of the PGC, Ms. Stella Fuller, then rose to speak and repeatedly identified Cosentino by name to the shock and dismay of the audience. [ER/69 ¶ 72.] Under pressure from the Pechanga General Council, Fuller resigned from the PGC the day after McKinney Investigations' presentation. *See* [ER/69 ¶ 73.]

Days later, on March 16, 2012, PGC Commissioner Vargas presented Cosentino with a letter stating that the PGC had reconsidered the revocation of his license and that his license is now no longer considered to be revoked. [ER/69 ¶ 74.]

Nevertheless, the Pechanga Casino has not re-hired Cosentino and he cannot secure employment at any other casino because when he interviews for such a position, and is asked why he left the Pechanga Casino, he must truthfully state that he was terminated because his license was revoked—effectively ending any such job interview. [ER/69-70 ¶ 75.]

The PGC, thus, effectively robbed Cosentino of his lawful occupation as a table games dealer—a trade to which Cosentino had devoted 13 years of his working life. [ER/70 ¶ 76.] Moreover, by exposing Cosentino's identity as a Department of Justice confidential informant, the PGC has left Cosentino in fear for his personal safety and the welfare of his young child. [ER/70 ¶ 77.]

G. Cosentino Files a Civil Suit in State Court against Fuller, Vargas, Magee, Maldonado, and Ramos in Their Individual Capacities.

On March 25, 2013, Cosentino filed a state civil action Entitled *Cosentino vs. Fuller, et. al.*, Riverside Superior Court civil case No MCC 1300396 (the "Civil Suit"). [ER/70¶ 78.] The Civil Suit alleges causes of action against Fuller, Vargas, Magee, Maldonado, and Ramos (each in their individual capacities) for injuries arising from (1) their unlawful threat to revoke Cosentino's license if he did not resign, (2) their baseless, retaliatory, and unlawful revocation of Cosentino's license, (3) and the their malicious and/or negligent disclosure of Cosentino's identity as a Department of Justice confidential informant. [ER/70 ¶ 79.] In that case, Cosentino argues that the five individual Defendants are personally liable for money damages for that tortious and unauthorized conduct. *See Turner v. Martire*, 82 Cal.App.4th 1042, 1055 (2000) (a Tribal officer acting in his or her official capacity is not cloaked with sovereign immunity if he or she acts beyond the scope of his or her delegated authority) *accord Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *see also Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013) (tribal officers are not cloaked with sovereign immunity when sued in their individual capacities for money damages.)

The Civil Suit states personal injury and property damage tort claims for

Intentional and Negligent Interference with Prospective Economic Advantage; Common Law Intentional Interference with Cosentino's Right to Pursue a Lawful Occupation; Interference with Cosentino's Constitutional Rights to Free Speech and Pursuit of a Lawful Occupation in Violation of California Civil Code section 52.1; and Intentional and Negligent Infliction of Emotional Distress. [ER/71 ¶ 80.][3]

H. Cosentino Notices Arbitration Claims against Respondents.

Respondents are also liable to Cosentino (both directly and under the theory of *respondeat superior*). However, Cosentino did not name the PGC or the Pechanga Band as defendants in the civil suit because he anticipated that those parties would assert sovereign immunity to shield themselves from the civil suit. [ER/71 ¶ 81]; *Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir. 2006) (tribe's sovereign immunity extends both to tribal governing bodies and to tribal agencies which act as an arm of the tribe.)

Instead, on March 26, 2013, pursuant to Compact section 10.2(d)(ii)(D), and section 10 of the TLA, Cosentino's counsel, acting on Cosentino's behalf, sent a Notice of Claims to the Pechanga Band's Claims Administrator and the Pechanga

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3 On July 27, 2013, the Riverside Superior Court dismissed Cosentino's Civil Suit holding that the individual defendants are immune as tribal officials. Cosentino's appeal of that dismissal is pending in California Court of Appeals case number E059691.

Band's General Counsel stating the same causes of action and the same facts as Cosentino stated against Fuller, Vargas, Magee, Maldonado, and Ramos in his Civil Suit. [ER/26-38.]

In strict compliance with the procedural requirements of section 5(b) of the TLA, Cosentino's Notice of Claims is stated against the "Gaming Operation." (*See* TLA § 5(b); *see also* TLA § 3(i) (broadly defining the term "Gaming Operation" as "the Tribe's governmental project which offers and operates Class III gaming activities, whether exclusively or otherwise, and which project shares all aspects of the sovereign immunity of the Tribe.") [ER/72 ¶ 87.] The Notice of claims states tort claims against the PGC. It does not state those tort claims against the individual Defendants who Cosentino sued in the Civil Suit. [*See* ER/26-38.]

Cosentino's Notice of Claims notes that the PGC is a governmental subdivision of the Pechanga Band and is part of the "Gaming Operation" and the "Tribe" as those terms are defined at TLA section 3(i) and Compact section 2.21 respectively [*See* ER/27.] The Notice of Claims also states Cosentino's objections to section 5 of the TLA because section 5 purports to bar tort claims that fall within the scope of the Tribe's waiver of sovereign immunity and consent to arbitration under Compact section 10.2(d). [*See* ER/26.]

J. Respondents Refuse to Arbitrate Cosentino's Tort Claims.

By letter dated April 9, 2013, the Pechanga Band's Claims Administrator responded to Cosentino's attorney. That letter states in relevant part as follows:

> After careful review of the contents [of the Notice of Claims] it is clear that all of your client's perceived grievances described therein are directed towards and take exception to alleged actions of the Pechanga Gaming Commission and/or individual Gaming Commissioners.
>
> As this filing is not related to nor does it allege any tortious actions on the part of The Pechanga Resort & Casino, the Gaming Operation of the Pechanga Band of Luiseno Mission Indians, this matter is not cognizable under the Gaming Facility's *Tort Liability Act*.
>
> Further, as your submission identifies the alleged tortfeasors as the Pechanga Gaming Commission and its individual Gaming Commissioners, please be advised that your submission requesting compensation via the Tribal Dispute Resolution Process provided by the Gaming Facility's *Tort Liability Act* is not eligible to be filed as a Claim and is hereby rejected pursuant to Section 5(b) of said Act....

[ER/39] (italics original).

On April 22, 2013, Cosentino's attorney responded to the Claims Administrator and Pechanga General Counsel again explaining that, under the Compact, the term "Tribe" means "the Pechanga Band of Luiseno Mission Indians, a federally-recognized Indian tribe, or an authorized official or agency thereof." Compact § 2.21. Therefore, the PGC, as an authorized agency of the Tribe, plainly falls within the "Tribe's" waiver under Compact section 10.2(d). Cosentino's

attorney thus concluded, "Mr. Cosentino can only interpret your rejection of his claims as a denial and hereby requests Arbitration pursuant to Section 12(c)(i) of the Tort Liability Ordinance." [ER/40-41.]

By letter dated April 26, 2013, Pechanga's Claims Administrator responded to Cosentino's Request for Arbitration stating:

> As previously advised in my letter of April 9, 2013, since your client's grievances are not related to nor allege any tortious actions on the part of The Pechanga Resort & Casino, the Gaming Operation of the Pechanga Band of Luiseno Mission Indians, this matter is not cognizable under the Gaming Facility's *Tort Liability Act*. Any and all remedies described in the *Tort Liability Act* pertain only to the Gaming Facility and are not available for redress of grievances against individual elected officials of the Pechanga Tribe. Accordingly, please be advised that your requests for arbitration are hereby rejected.
>
> Additionally since the date of submission of the Notice of Claim in this matter on March 26, 2013, I have come to find out that one day prior to that, on March 25, 2013, you filed a lawsuit in the Superior Court of the State of California against the same Gaming Commissioners seeking compensation for the exact same grievances. [The remainder of the letter simply quotes section 5(d) of the Tort Liability Ordinance in its entirety.]

[ER/42-43](italics original).

Accordingly, the PGC and the Pechanga Band unequivocally refused to arbitrate Cosentino's claims.

K. Cosentino Petitions the District Court to Compel Arbitration against Respondents.

Having exhausted any and all tribal remedies set forth in the TLA, Cosentino's only recourse was to seek an order in the Federal District Court compelling Respondents to arbitrate his tort claims as set forth in both the Compact and the TLA. *See* Compact § 10.2(d)(ii)(C) [A-087 to A-088]; TLA § 12(i) [A-140]. Therefore, on May 20, 2013, Cosentino filed his Petition to Compel Arbitration (9 U.S.C. § 4) (the "Petition"). The Petition alleges that Cosentino's claims fall within the scope of the Pechanga Band's waiver of sovereign immunity and consent to arbitration under the Compact. *See* Compact §§ 10.2(d)(ii)(A) and (B), [A-087]; [ER/72 ¶ 86.]

On October 7, 2014, Respondents moved to dismiss the Petition under Federal Rule of Civil Procedure sections 12(b)(1); 12(b)(2); and 12(b)(6) arguing that they are immune from suit under the doctrine of tribal sovereign immunity.

L. The District Court Dismisses the Petition Finding that TLA Sections 5(d) and 5(h) Bar Cosentino's Claims and Do Not Conflict with the Compact.

The District Court heard the Motion to Dismiss on November 4, 2013. The District Court dismissed the Petition holding that Cosentino's claims are barred by TLA section 5(d) (which purports to bar any claim if a concurrent claim has been filed against another party in another venue) because Cosentino filed the Civil Suit.

[*See* ER/19 lines 4-18.]

The District Court further held that, although all of Cosentino's Tort claims are stated against the PGC (which never employed Cosentino), those claims are, nevertheless, barred under TLA section 5(h) (which purports to bar "employment-related claims of any kind") because the claims "relate to his employment at the casino and his subsequent discharge." [ER/19, line 19 through ER/20, line 13.]

Despite the Compact's requirement that the Tribe waive its sovereign immunity and consent to arbitration of all tort claims arising out of, connected with or relating to the Pechanga Band's casino and its gaming activities, *see* Compact § 10.2(d)(ii)(A) & (B), the District Court concluded that both TLA section 5(d) and TLA section 5(h) are "clearly in harmony with the compact." [*See* ER/18, line 24 through ER/19, line 1.] Therefore, the District Court concluded that the PGC and the Pechanga Band had not waived their sovereign immunity or consented to arbitrate Cosentino's claims. [ER/20 lines 9-15.] Having concluded that Cosentino's tort claims are barred by TLA provisions that are in harmony with the Compact, the District Court concluded that it did not need to consider whether TLA section 5(b) (which bars claims against the PGC) conflicts with the Compact. [*See* ER/18 lines 21-25.] The District Court also made no ruling as to whether TLA provisions that conflict with the Compact are enforceable. [*See id.*]

The District Court directed Counsel for Respondents to prepare the order of dismissal. [*See* ER/21.] Counsel for Respondents prepared and submitted the dismissal order to the Court, and the Court signed and entered that Order on November 7, 2013. [*See* ER/14-16.]

That November 7, 2013 Order contained material misquotations and mischaracterizations of both the TLA and Cosentino's pleadings. [*See* ER/10-11.] Counsel for Respondents agreed to stipulate to a joint motion under Federal Rule of Civil Procedure 60 to seek a corrected Order. [*See* ER/10-11.] On November 25, 2013, the District Court granted the parties' Joint Motion to Correct Errors and entered the Amended Order of Dismissal. [*See* ER/03-08.]

IV. SUMMARY OF ARGUMENT

Cosentino's Tort claims arise out of, are connected with, and related to the operation of the Pechanga Band's Gaming Facility and its Gaming Operations. Therefore, under Compact section 10.2(d)(ii)(A) and (B), Respondents, are required to waive sovereign immunity and consent to the arbitration of Cosentino's claims.

Respondents, however contend, and the District Court held, that TLA section 5(d) (which purports to bar any claim if the claimant has sued another party in another forum for injuries arising from the same incident) bars Cosentino's

claims because Cosentino filed the Civil Suit against Fuller, Vargas, Magee, Maldonado, and Ramos prior to demanding arbitration against the PGC and the Pechanga Band. Cosentino argues that TLA section 5(d)'s limitation violates the broad waiver of sovereign immunity and consent to arbitration required by Compact section 10.2(d). Section 5(d) does not shield Respondents from having to litigate in two forums. They are immune from suit in any other forum—that is why Cosentino *has to* arbitrate against Respondents. Thus, section 5(d) stands as a capricious and arbitrary bar to arbitrable tort claims. It plainly conflicts with the requirements of Compact section 10.2(d)(ii).

Respondents also contend, and the District Court held, that TLA section 5(h) (which purports to bar "employment-related claims of any kind") bars Cosentino's claims because Cosentino claims injury to his occupation and that the PGC interfered with his economic relations with the Pechanga Casino. Respondents have unilaterally designated Cosentino's tort claims as "employment-related" despite the fact that Cosentino seeks to arbitrate torts only against the PGC (who never employed him) for torts that were not inflicted at Cosentino's workplace, and were inflicted more than six weeks after his last day of employment. Respondents' read TLA § 5(h) so expansively that it can be invoked to bar virtually any tort claim. A tort claim is a tort claim, whether or not it is "employment-related." By barring *any* tort claim, TLA section 5(h) plainly conflicts with Compact section

10.2(d)(ii).

Under federal law, an act occurring in violation of a statutory mandate is void *ab initio*. Since both TLA sections 5(d) and 5(h) violate the Compact, they also violate IGRA. Therefore both 5(d) and 5(h) are void and unenforceable. The California Court of Appeal exactly so held in the only case counsel has found which considers the issue at bar—namely, in the event of a conflict between a Tribal-State Compact and a Tribal Tort Liability Ordinance, the Compact controls.

V. LEGAL ARGUMENT

A. Standard of Review

The District Court did not make clear whether it dismissed under Federal Rule of Civil Procedure 12(b)(1), 12(b)(2), or 12(b)(6). However, a motion to dismiss on tribal sovereign immunity grounds is properly brought under Rule 12(b)(1) as a motion to dismiss for lack of subject matter jurisdiction. *See, e.g., Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). Moreover, a Rule 12(b)(6) motion that attacks the substance of the complaint's jurisdictional allegations is construed as a Rule 12(b)(1) motion. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) (12(b)(6) dismissal based on political question doctrine reviewed on appeal as a Rule 12(b)(1) dismissal.)

Appeal of a dismissal under Rule 12(b)(1) is subject to *de novo* review. *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir. 2002). The Court must

accept all uncontroverted factual assertions regarding jurisdiction as true. *Id.* Those assertions that are contested must be construed in favor of Cosentino. *Id.* "The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* quoting *Roberts v. Corrothers*, 812 F.2d 1172, 1177 (9th Cir. 1987). The Court's review is not limited to the Petition itself, but may also include "affidavits or other evidence properly before it." *Corrie v. Caterpillar, Inc.*, *supra*, 503 F.3d 974, 980 (9th Cir. 2007).

In considering a petition to Compel Arbitration under 9 U.S.C. section 4, a Court's inquiry is limited to only the two issues of whether there is an arbitration agreement and whether a party to that agreement has failed to perform it. *See* 9 U.S.C. § 4*; Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Absent language in the arbitration agreement to the contrary, procedural questions as to arbitrability, such as time limits, notice, laches, estoppel and other conditions precedent to the obligation to arbitrate are for the arbitrator to decide, substantive

issues of arbitrability are for the Court. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S.Ct 588, 154 L.Ed.2d 491 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003).

B. Respondents Have Expressly Waived Sovereign Immunity and Consented to Arbitration of All Claims for Personal Injury and Property Damage that Arise out of, Relate to, or Connect with the Pechanga Band's Gaming Activities.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) Where a tribe's waiver of sovereign immunity is clearly expressed, it is effective and enforceable. *See C&L Enterprises, Inc. v. Citizen's Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414-420, 149 L.Ed.2d 623, 121 S.Ct. 1589 (2001). Indeed, the Court may find an enforceable waiver of tribal immunity even in the absence of explicit language of waiver, if, to find no waiver would render an arbitration clause meaningless. *See id.*, 532 U.S. 411, 414-420.

In this case, Respondents' waiver of sovereign immunity and consent to arbitration is explicitly expressed. Compact section 10.2(d) requires the Tribe to waive sovereign immunity and consent to arbitration of "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…." *See*

Compact § 10.2(d)(ii)(A) & (B) [A-087]; *see also* Compact § 10.2(d)(ii)(C) [A-087 to A-088] (providing that the Tribe shall waive its right to assert sovereign immunity in any action brought in the United States District Court to enforce the Tribe's obligation to arbitrate.); *accord* TLA § 12(i) [A-140]. Respondents' waiver is enforceable. *See C&L Enters.*, *supra*, 532 U.S. at 414-420.

C. Cosentino's Arbitration Tort Claims Fall Squarely within the Scope of the Waiver Required by Compact Section 10.2(d)(ii).

To determine whether the Compact requires the PGC and the Pechanga Band to waive sovereign immunity and consent to arbitration of Cosentino's claims, the Court must simply answer the following two questions: (1) does Cosentino seek to arbitrate claims for bodily injury, property damage, or personal injury? And, (2) do Cosentino's claims arise out of, connect with, or relate to the operation of the Pechanga Casino or the Pechanga Band's gaming activities?

Cosentino respectfully submits that the answer to both questions is plainly 'yes.' Therefore, Respondents are required to arbitrate Cosentino's claims and the District Court should not have dismissed Cosentino's Petition.

1. Cosentino's Claims Are for Personal Injury and Property Damage.

Compact section 10.2(d)'s waiver is drafted so expansively that all torts recognized in California fall within its scope—whether injuries to the body, or a

personal right, or to property. *See* Compact § 10.2(d)(ii)(A), [A-087]; *see also* TLA § 2, [A-132] ("This Act covers only those claims which would be considered actions in tort were they to arise under the laws of the State of California.")

All of Cosentino's claims of are recognized tort actions in California. Intentional and Negligent Interference with Prospective Economic Advantage are recognized torts. *See, Blank v. Kirwan*, 39 Cal.3d 311, 330 (1996); *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 803-04, 808 (1979). Common law intentional interference with the right to pursue a lawful occupation is a recognized tort. *See Willis v. Santa Ana Community Hosp. Ass'n*, 58 Cal.2d 806, 810 (1962) (overruled on other grounds in *Cianci v. Sup. Ct.*, 40 Cal.3d 903 (1985).); *see also Chrysler Corp. v. New Motor Vehicle Bd.*, 89 CalApp3d 1034, 1040 (California recognizes right to pursue a lawful occupation as a property right of Constitutional dimension.) Intentional and negligent infliction of emotional distress are recognized torts. *See, Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA*, 129 Cal.App.4th 1228, 1259 (2005); *Burgess v. Superior Court*, 2 Cal.4th 1064, 1074 (1992). Finally, Violation of California Civil Code section 52.1 is a statutory tort in California. *See* Cal. Civ. Code § 52.1; *Austin B. v. Escondido Union Schl. Dist.*, 57 Cal.Rptr.3d 454, 471 (2007).

Accordingly, all of Cosentino's claims fall within the scope of Compact section 10.2(d)(ii) and TLA section 2 as long as those claims "arise out of, are

connected with, or relate to" the operation of Pechanga Casino or the Pechanga Band's Gaming Activities. *See* Compact § 10.2(d)(ii)(A), [A-087].

2. Cosentino's Claims Arise out of, Are Connected with, and, Relate to the Operation of the Band's Gaming Facility, and the Band's Gaming Activities.

The Compact defines "Gaming Facility" in relevant part as: "any building in which Class III gaming activities or operations occur,...." Compact § 2.8 [A-010.] Thus, the Pechanga Casino clearly falls within the definition of "Gaming Facility."

The Compact defines "Gaming Activities" as: "the Class III gaming activities authorized under this Gaming Compact." Compact § 2.4 [A-009]. Cosentino was employed at the Pechanga Casino as a table games dealer. [ER/51 ¶ 13.] Accordingly, Cosentino was employed in "Gaming Activities" at the "Gaming Facility." *See* Compact §§ 2.4, 2.8, *supra*; *see also* 25 U.S.C. § 2703(7)(B) & 2703(8) (Defining class III gaming to include any banking card games.) To maintain that employment, Cosentino was required to hold a class III gaming license from the PGC. *See* 25 U.S.C. §§ 2710(b)(2)(F); 2710(d)(1)(A)(ii).

The PGC would not exist were it not for the Pechanga Band's Gaming Facility and its Gaming Activities. *See* Compact § 2.20, 6.4.1 [A-011, A-017]; PGA § 4, [A-116]. Thus, Pechanga Gaming Licenses would not exist were it not for the Pechanga Casino and the Pechanga Band's Gaming Activities. *See id.*

Likewise, but for the Pechanga Casino and the Gaming Activities, Cosentino could not have assisted the Department of Justice with criminal investigations at the Pechanga Casino. [ER/66 ¶¶ 50-54.]

Accordingly, Cosentino's claims against Respondents for injuries resulting from the PGC's wrongful threat to revoke his license, the PGC's baseless, retaliatory, and unlawful revocation of his license, and the PGC's malicious disclosure of his identity as a confidential informant all arise out of, are connected with, and relate to both the Gaming Facility and the Gaming Activities. *See* Compact § 10.2(d)(ii)(A) [A-087].

Plainly, Cosentino's claims all fall within the scope of Compact section 10.2(d)'s required waiver of "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...." Compact § 10.2(d)(ii)(A), *supra*. The inquiry should end there.

D. TLA Section 5(d) Conflicts with Compact Section 10.2(d).

Despite the fact that Cosentino's claims plainly fall within the scope of Compact section 10.2(d)(ii)'s waiver, the District Court dismissed Cosentino's claims holding that they are barred by the TLA. But to the extent the Pechanga Band has drafted and seeks to enforce *any* section of the TLA to exclude tort

claims related to Pechanga Gaming, the Pechanga Band is in "material breach" of the Compact, *see* Compact §§ 10.2(d)(ii), *supra*; 10.2(d)(iv) [A-089], and, therefore, the Pechanga Band's TLA violates federal law. *See* 25 U.S.C. § 2710(d)(1)(C); *see also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) ("The Compacts are quite clearly a creation of federal law....")

As set forth below, Mr. Cosentino respectfully submits that TLA sections 5(d) and 5(h) are void and unenforceable because they conflict with the Compact and, therefore, violate IGRA.[4]

1. The Compact Requires Waiver of All Tort Claims, Therefore, Section 5(d) Can Not Be Read to Bar Any Tort Claim—Whether or Not the Claim Has Been Stated Against Another Party in Another Forum.

TLA section 5(d), in relevant part provides as follows: "No claim shall be...sustained pursuant to this Act if a concurrent or alternate action seeking damages for an injury arising from the same incident has been filed in any other

4 Having dismissed Cosentino's Petition based on TLA sections 5(d) and 5(h), the District Court did not reach the question of whether TLA section 5(b) also violates the Compact. It clearly does conflict because it purports to bar arbitration against the Pechanga Band and the PGC. *See* TLA § 5(b) [A-134]. Compact section 2.21 expressly includes the Pechanga Band and any authorized agency thereof within the Compact's definition of the waiving "Tribe." Therefore, both the Pechanga Band and the PGC (as the Band's authorized Tribal Gaming Agency) are required to waive sovereign immunity and consent to arbitration under Compact section 10.2(d)(ii).

forum or venue." TLA § 5(d) [A-134 to A-135].

Cosentino respectfully submits that, if TLA § 5(d) bars his personal injury and property damage claims, (which all arise out of, relate to, and are connected with the Pechanga Casino and Pechanga gaming) then, plainly, section 5(d) conflicts with the Compact's requirement that the PGC waive sovereign immunity and consent to arbitration of "all" such claims. *See id., compare* Compact § 10.2(d)(ii)(A) and (B) [A-087]. The inquiry with respect to whether or not TLA section 5(d) conflicts with the Compact should end there. "All claims" conflicts with "No claim." *See* Compact § 10.2(d)(ii)(A) & (B), *compare* TLA § 5(d).

2. Cosentino Has Not Sued Respondents in Two Forums.

Respondents' have repeatedly misquoted Cosentino's Notice of Pendency of Other Action in this case. [*See* ER/45, line 18 (Notice of Pendency informing the District Court that Cosentino filed the Civil Suit against "Defendants" Fuller, Vargas, Magee, Maldonado, and Ramos)]; *compare* [ER/15, line 26 (Respondent's Original Order of Dismissal misquoting the Notice of Pendency by replacing the word "Defendants" with "Respondents.")]; *see also* [ER/23, line 11 (Respondents' Motion to Dismiss with same misquote.)]

Those misquotes may give the Court the false impression that Cosentino has sought claims against Respondents in two forums. Therefore, to eliminate the

possibility of confusion, Cosentino wishes to make doubly clear herein that, in the Civil Suit, Cosentino sued *only* Fuller, Vargas, Maldonado, Magee and Ramos in their individual capacities, [*see* ER/45-46], and Cosentino has not sought arbitration against any of those individuals.

Thus, Respondents do not invoke TLA section 5(d) in this case to shield themselves from having to litigate in two forums, but rather, they invoke TLA section 5(d) to bar Cosentino's tort claims against Respondents in the only forum available to Cosentino to bring his claims against Respondents—simply because Cosentino has also sued liable third parties for those injuries in another forum.

TLA section 5(d) thus purports to unilaterally restrict when (and conceivably even *whether*) a tort claimant can sue another party in civil court. There is no basis in the Compact (or anywhere) for imposing such restrictions upon a tort claimant. The Compact merely provides that the Tribe may require a claimant to exhaust the Tribe's administrative remedies according to standards the Compact enumerates before demanding arbitration. *See* Compact § 10.2(d)(ii)(D) [A-088 to A-089.]

TLA section 5(d), as Respondents have employed it in this case, is a capricious, and arbitrary unilateral narrowing of the broad waiver of sovereign immunity required by the Compact. The Band and the PGC are required to waive sovereign immunity and consent to arbitration of all tort claims related to Pechanga Gaming. *See* Compact § 10.2(d)(ii)(A) & (B), *supra*. Cosentino respectfully

submits that "all claims" *means* "all claims." *See id.* Cosentino's Civil Suit against other parties, in another forum, has no bearing on the Respondents' obligation under the Compact and IGRA to arbitrate their own liability for Cosentino's tort claims.

3. Even if Cosentino Had Sued Respondents in the Civil Action, TLA section 5(d), Still Could Not Operate to Bar Arbitration of His Tort Claims.

TLA Section 5(d) has the ring of a legitimate bar on duplicative litigation to the extent it appears to prevent Respondents from being subjected to litigation in two forums—which, as shown above, has not happened in this case. But, in fact the Respondents face no such danger *in any case*, for, any civil suit against Respondents will be summarily dismissed based on the Tribe's sovereign immunity. *See, Allen*, *supra*, 464 F.3d. at 1046. Indeed, TLA section 5(d) so states in its final sentence declaring that TLA section 5(d) cannot be read as consent on the part of the Tribe to the jurisdiction of any other forum. *See* TLA § 5(d). Therefore, as a bar to duplicative litigation, TLA section 5(d) is internally inconsistent and wholly unnecessary. Instead, TLA section 5(d)'s only purpose is to arbitrarily winnow, and unlawfully bar tort claims in violation of the Compact—precisely as Respondents have used TLA section 5(d) in this case. The Court should refuse to enforce TLA section 5(d) under any circumstance.

E. TLA Section 5(h) Conflicts with Compact Section 10.2(d).

1. The Compact Requires Waiver of All Tort Claims, Therefore, Section 5(h) Can Not Be Read to Bar Any Tort Claim—Whether or Not Respondents Label the Tort Claim as "Employment-Related."

As set forth above, the Compact broadly requires Respondents to waive sovereign immunity and consent to arbitration of all "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...." Compact §§ 10.2(d)(ii)(B) and (A) [A-087].

TLA section 5(h) purports to bar "Employment-related claims of any kind." Under TLA section 5(h), so-called employment-related claims "may only be brought under the grievance procedures of the employing entity...." TLA § 5(h) [A-135]. But, as noted above, "all claims" *means* "all claims." Cosentino respectfully submits that a claim for property damage is a claim for property damage—whether or not the claim is "employment-related." A personal injury claim is a personal injury claim—whether or not the claim is "employment-related." Therefore, if TLA section 5(h) bars *any claim* for personal injury or property damage, then TLA section 5(h) plainly conflicts with the section 10.2(d)(ii)'s required waiver of sovereign immunity and consent to arbitration of *all such claims*. *See* Compact § 10.2(d) (ii)(A) & (B) [A-087].

2. If TLA section 5(h) Can Be Read to Bar Any Claim, It Can Only Be Claims against the Pechanga Casino Compensable under Workers Compensation.

TLA section 5(h) also has an air of legitimacy to the extent it could be read to distinguish claims that would fall within the scope of California's workers' compensation system. Compact section 10.3(a) expressly permits the Tribe to create a Workers' Compensation program for such injuries "[i]n lieu of permitting the *Gaming Operation* to participate in the state statutory workers' compensation system...." *See* Compact § 10.3(a) [A-089 to A-090] (emphasis added). The "Gaming Operation" referred to in section 10.3(a) is the Pechanga Resort and Casino. *See* Compact § 2.9 at [A-010]. Thus, at most, TLA section 5(d) can be read to require work-related injuries *against the Pechanga Casino* to be subjected to the Pechanga Casino's grievance procedures and/or the Pechanga Workers Compensation Ordinance. *See* Compact § 10.3 [A-089 to A-090]; TLA § 5(h) [A-135].

But that is not how TLA section 5(h) has been used in this case. Cosentino has stated no work-related claims, nor any claims, against the Pechanga Casino. Cosentino has stated only claims for personal injury and property damage inflicted by the PGC—a third-party to his employment relationship. As shown above, Cosentino's claims fall within Compact section 10.2(d)'s required waiver, therefore they are arbitrable. It is nonsensical to read TLA section 5(h) to require

Cosentino to bring his claims under the Pechanga Casino's grievance procedure. He has no grievance with the Pechanga Casino!

3. Cosentino's Claims Are All Against the PGC, Which Never Employed Him, Therefore, if TLA section 5(h) Is Read to Bar Cosentino's Claims as "Employment-Related," then TLA section 5(h) Can Bar Virtually any Tort Claim.

Cosentino's claims are all for injuries inflicted by the PGC. The PGC never employed him. *See* Compact § 2.20 [A-011]. Cosentino's claims are for injuries that did not take place in the Pechanga Casino—where he *was* employed. *See* [ER/67-69, ¶¶ 62-72.] Indeed, Cosentino's claims are for injuries that all took place between *six_weeks* and *eleven months* after his last day of work at the Pechanga Casino. [*See* [ER/68-69, ¶¶ 65, 68, and 71-72.] Thus, Respondents and the District Court read TLA section 5(h)'s bar on "employment-related claims of any kind" so expansively that it bars:

(1) claims for personal injury and property damage;

(2) that are not inflicted by the claimant's employer;

(3) that are not inflicted at the claimant's workplace; and

(4) that are inflicted after the claimant's last day of employment.

In other words, according to Respondents and the District Court, TLA section 5(h)'s bar on "employment-related claims" does not simply bar claims for workplace injury, or even wrongful termination, or even intentional torts inflicted

by a claimant's employer, it bars *any* claim for personal injury or property damage relating to Pechanga Gaming, so long as such a claim has any relationship (however attenuated) to the claimant's former employment. Cosentino respectfully submits that if TLA section 5(h) is that expansive, then it is clearly in conflict with the Compact section 10.2(d)(ii)'s requirement that the PGC and the Tribe waive sovereign immunity for "all claims of bodily injury, property damage, or personal injury...." *See* Compact § 10.2(d)(ii)(B) [A-087] (emphasis added.)

F. TLA Section 5 Is Void as a Matter of Law to the Extent It Conflicts with the Compact.

"Under federal law an act occurring in violation of a statutory mandate is void *ab initio*." *Cabazon Band of Mission Indians v. City of Indio, Cal.*, 694 F.2d 634, 637 (9th Cir 1982) *citing Ewert v. Bluejacket,* 259 U.S. 129, 138, 42 S.Ct. 442, 444, 66 L.Ed. 858 (1922). Here, IGRA plainly mandates that Pechanga gaming is lawful only if conducted in conformance with the Compact. *See* 25 U.S.C. § 2710(d)(1)(C) and (d)(2)(C). The Compact, in turn, mandates the creation of the TLA, and explicitly mandates the required contents and permissible scope of the TLA in the strictest of terms—i.e., failure to comply with the Compact's strictures is defined as a "material breach of the Compact." *See* Compact § 10.2(d)(ii)-(iv) [A-086 to A-089]. Therefore, to the extent TLA sections 5(d), and 5(h) violate the requirements imposed upon the Tribe by

Compact section 10.2(d)(ii), TLA sections 5(d) and 5(h) violate IGRA, and, therefore, are void and unenforceable. *See Cabazon Band of Mission Indians*, *supra*, 694 F.2d at 637; *Ewert*, *supra*, 259 U.S. *at* 138.

This case presents the Court with a remarkably simple issue of first impression. To Counsel's knowledge, no federal court in this circuit has addressed whether a Tribe may adopt and enforce a Tort Liability Ordinance that unilaterally narrows the broad waiver of sovereign immunity required by the 2006 Amendments to Compact § 10.2(d). The District Court in this case did not consider that question—finding no conflict between the Compact and the TLA. The only similar case counsel is aware of is *Campo Band of Indians v. Superior Court*, 137 Cal.App.4th 175, 184-85, 39 Cal.Rptr.3d 875, 882 (2006) [certiorari denied.] In *Campo Band*, the California Court of Appeal considered the narrower version of section 10.2(d) that existed in the 1999 Compact. That former section 10.2(d) required the signatory tribes to:

> [c]arry no less than five million dollars ($5,000,000) in public liability insurance for patron claims, and that the Tribe provide reasonable assurance that those claims will be promptly and fairly adjudicated,...[T]he tribe shall 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;...

See Campo, *supra*, 137 Cal.App.4th at 178.

Just as in this case, the Campo Band argued that its own Tort Liability Ordinance controlled the scope of its waiver of sovereign immunity under the 1999 Compact. *See id.* Cal.App.4th at 184. Not surprisingly, the *Campo* court rejected that argument holding that the Compact controlled over the Campo Band's conflicting Tort Liability Ordinance. *See id.* at 184-85. The *Campo* court wrote, "the Tribe cannot, in drafting [its Tort Liability Ordinance], render its obligation totally illusory…." *Id.* at 185. In reaching its holding, the *Campo* court wrote, "In accordance with the terms of the Compact, the compact is controlling over the Tribe's regulation in the event of a conflict between them." 137 Cal.App.4th at 185. The *Campo* court was not referring to an explicit supremacy clause in the 1999 Compact. There is no such clause. [*See* Clerk's Record, Docket No. 13-1, Exh. "C."] Instead, the *Campo* court was simply reaching the logical conclusion that Cosentino's case dictates—to wit, because the Compact mandates the TLA and defines the TLA's permissible scope, in the event of a conflict between the Compact and the TLA, the Compact necessarily controls. IGRA militates that conclusion as well because IGRA expressly confers supremacy upon the Compact. *See* 25 U.S.C. §§ 2710(d)(1)(C) and (d)(2)(C); *Cabazon Band of Mission Indians*, *supra*, 694 F.2d at 637; *Ewert*, *supra*, 259 U.S. *at* 138.

The Court should reach the same conclusion in this case. The Pechanga Band can not in drafting the TLA unilaterally bar tort claims that arise out of and

relate to Pechanga Gaming, because, to do so violates Federal Law. *See* Compact § 10.2(d)(ii); 25 U.S.C. § 2710(d)(1)(C) & (d)(2)(C); *Cabazon Band of Mission Indians*, *supra*, 694 F.2d at 637; *Ewert*, *supra*, 259 U.S. *at* 138.

TLA section 5(b), 5(d), and 5(h) are all void and unenforceable—as is any other section of the TLA which purports to bar any tort claim arising out of, connected with or related to Pechanga Gaming.

Respondents are bound by their Compact to arbitrate Cosentino's tort claims. *See id.* The Court should reverse.

VI. CONCLUSION

For all of the foregoing reasons, Petitioner and Appellant Benedict Cosentino respectfully requests that the Court reverse the dismissal of Cosentino's Petition to Compel Arbitration and to remand this case with instructions to grant the Petition.

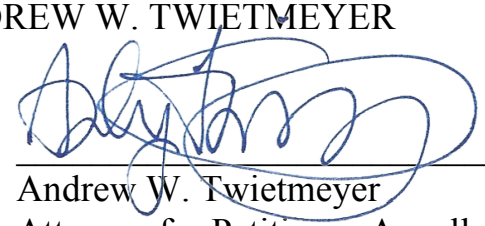
VI. STATEMENT OF NO RELATED CASES

Counsel is aware of no cases pending before the Ninth Circuit that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

DATED: June 1, 2014

Respectfully submitted,

THE LAW OFFICE OF
ANDREW W. TWIETMEYER



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 9,977 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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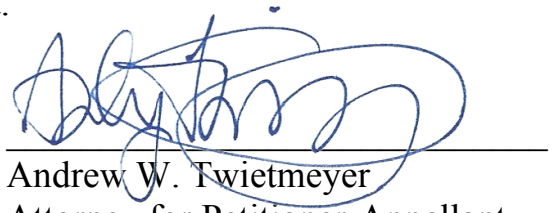
DATED: June 1, 2014



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PROOF OF SERVICE

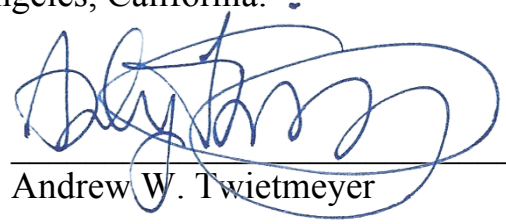
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10780 Santa Monica Blvd. Suite 401, Los Angeles, California 90025.

On June 1, 2014, I served the foregoing documents described as **APPELLANT BENEDICT COSENTINO'S OPENING BRIEF** on Counsel for Respondents, Frank Lawrence

[X] By Electronic Service: Pursuant to Circuit Rule 25-5, the above referenced document was electronically filed and thus served upon all interested parties via a "Notice of Electronic Filing" ("NEF") that is automatically generated by the CM/ECF system and sent by email to all CM/ECF Users who have consented to receive service through the CM/ECF system. Service with this electronic NEF constitutes service pursuant to the Federal Rules of Appellate Procedure, and the NEF itself will constitute proof of service for individuals so served.

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

Executed on June 1, 2014 at Los Angeles, California.



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