The Law Office of
Andrew W. Twietmeyer

July 21, 2015

Via U.S. Mail

Hon. Chief Justice Tani Gorre Cantil-Sakauye, and Associate Justices
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

Re: Opposition to the Request of the Viejas Band of Kumeyaay Indians to Depublish *Cosentino vs. Fuller et al.*, Ct. App. Case No. G050923, Supreme Ct. Case. No. S227157

To the Honorable Chief Justice and Associate Justices:

Pursuant to California Rule of Court 8.1125, I respectfully request that the Court deny the Request of the Viejas Band of Kumeyaay Indians (hereinafter the "Viejas Band" or "Band") to depublish *Cosentino vs. Fuller* (the "Request").

I. Procedural Background

The Court of Appeals filed its decision and certified it for publication on May 28, 2015. The Court modified the decision on June 22, 2015 without changing the judgment, and again on June 25, 2015 without changing the judgment. Therefore, under CRC 8.264(b)(1), (b)(3) and (c)(2), the decision became final on June 27, 2015. *See* CRC 8.264(b)(1) and (c)(1). On June 17, 2015, prior to the decision becoming final, the Lytton Rancheria ("Lytton") filed a depublication request with this Court. I filed an opposition to Lytton's depublication request which I sent by FedEx Overnight on June 26, 2015. On July 16, 2015, the Court received the Viejas Band's Request. I hereby timely oppose. *See* CRC 8.1125(b)(1).

II. Interest of Person Opposing Depublication

I am the attorney of record for Benedict Cosentino, the Plaintiff in *Cosentino vs. Fuller*. I have labored on this case for over two years because I was confident of its merit. As an attorney, I have an interest in ensuring that the substantial fruits of my labor are not swept away by means of depublication. Moreover, as an attorney who dedicates his practice primarily to the vindication of individual and consumer rights, I also have an interest in ensuring that important cases such as *Cosentino vs. Fuller*, which clearly and correctly summarizes and applies

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longstanding judicial precedent defining the limits of tribal official immunity, are not obscured or eliminated from published California law. Miscarriages of justice like that which happened to Mr. Cosentino in the Riverside Superior Court can best be avoided by the Appellate Court's publication of cases like *Cosentino vs. Fuller.* Finally, as a citizen of the State of California with unique expertise in this case, I have an interest, and I believe a duty, to oppose the depublication of *Cosentino vs. Fuller* because this case involves issues of important and continuing public interest that affect all Californians. It is an important case. It was correctly decided. It should remain published.

III. The Viejas Band's Request for Depublication Should Be Denied.

The Viejas Band argues that, because the Court of Appeal purportedly did not fully consider arguments that the Court determined were either not properly raised through a motion to quash, or arguments that were not timely raised during the appeal, the Supreme Court should consider those procedurally improper and/or untimely arguments now as grounds to depublish *Cosentino vs. Fuller*. For all of the reasons set forth below, the Band's Request is meritless.

A. *Cosentino vs. Fuller* Should Remain Published because It Meets the Standards for Certification Set Forth at CRC 8.1105.

Like the Lytton Rancheria, the Viejas Band does not even attempt to argue that *Cosentino vs. Fuller* is inappropriate for publication under the relevant standards for certification set forth in the California Rule of Court 8.1105(c). As explained in detail in my June 26, 2015 Opposition to Lytton Rancheria's depublication request (the "June 26 Opposition"), *Cosentino vs. Fuller* easily meets the requirements of CRC 8.1105(c). For the sake of brevity, I incorporate my arguments from the June 26, 2015 Opposition herein by this reference.

Ironically, the Band argues that *Cosentino vs. Fuller* should be depublished because the Court of Appeal declined to consider arguments that it concluded were procedurally improper on a Motion to Quash/Dismiss. *See* Request at 3. With that argument, the Band *actually* identifies yet another reason why *Cosentino vs. Fuller* should be published. Specifically, I am aware of no other published case that address the procedural impropriety of raising affirmative defenses in an appellate opposition to a successful Motion to Quash/Dismiss based on sovereign immunity. Therefore, Court of Appeals' identification and disposal of Defendants' untimely and procedurally improper affirmative defenses provides useful clarifying precedent with regard to this rarely-seen motion. *See* CRC 8.1005(c)(4) & (7).

B. *Cosentino vs. Fuller* Is Consistent with Longstanding Judicial Precedent.

The Viejas Band, like Lytton before it, contends that *Cosentino vs. Fuller* should be depublished because it purportedly breaks with long-settled judicial precedent—a factor that, even if it were true, would militate *in favor of* publication. *See* CRC 8.1105(c)(1). As set forth in my June 26 Opposition, the contention that *Cosentino vs. Fuller* breaks with judicial precedent

is, clearly, not true. I incorporate my arguments at section III(B) of my June 26 Opposition herein by this reference.

1. The Fact that IGRA, the Compact, and the PGO Do Not Provide Cosentino with a Private Right of Action Is Irrelevant Because Cosentino Did Not Attempt to State a Claim under Any of Those Statutes.

The Viejas Band argues that Cosentino has no private right of action under IGRA, the Tribal-State Compact, and the Pechanga Gaming Act. So what? Cosentino has stated private causes of action under California statutory and common law. He does not need IGRA, the Compact or the Pechanga Gaming Ordinance to provide him with a right of action.

The Defendants in *Cosentino vs. Fuller* made the exact same meritless argument as the Viejas Band now makes. That argument was fully briefed and argued at length during the May 18, 2015 hearing before the Court of Appeal. The Court of Appeal correctly rejected the argument as procedurally improper, and this Court should not consider the argument either. However, even if Defendants could have properly raised an argument that Cosentino lacks a private right of action in their Motion to Quash, that argument, in any case, has no merit.

All of the cases upon which Viejas Band relies (which are the very same cases the Defendants cited) involved plaintiffs who sought to sue directly under IGRA without stating any independent cause of action. *See Hein v. Capitan Grande Band of Diegueno Mission Indians* (9th Cir. 2000) 201 F.3d 1256, 1258 (affirming dismissal of counts "brought directly under…the Indian Gaming Regulatory Act."); *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation* (8th Cir. 2003) 340 F.3d 749, 766 (declaratory relief sought under IGRA alone); *Hartman v. Kickapoo Tribe Gaming Comm'n* (10th Cir. 2003) 319 F.3d 1230, 1232 (every claim premised on a violation of IGRA); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians* (11th Cir. 1995) 63 F.3d 1030, 1049 (11th Cir. 1995) (dismissing direct claim under IGRA that tribal gaming agency refused to issue licenses in violation of IGRA).

Unlike all of the foregoing cases, Cosentino did not come to court with a bare claim that the Defendants violated IGRA. Instead, Cosentino stated causes of action for Tortious Interference with his economic relations, common law tortious interference with his right to pursue a lawful occupation, violation of his constitutional rights under Civil Code section 52.1, and intentional and negligent infliction of emotional distress—all recognized causes of action under California Tort law.

Defendants raised the doctrine of sovereign immunity in their motion to quash/dismiss. Therefore, Cosentino had to prove by preponderance of evidence that the Defendant's tortious conduct violated the scope of Defendants' valid statutory authority. *See Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157-58; *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1054; *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369. Since Defendants derived all of their statutory authority from IGRA, the Compact, and the Pechanga

Gaming Act, Cosentino had to prove by a preponderance of evidence that Defendants' tortious conduct violated one or more of those bodies of law. *See Boisclair, supra* 51 Cal.3d at p. 1157-58; *Lawrence, supra*, 153 Cal.App.4th at p. 1369. Cosentino did so, as the Court of Appeal correctly held. *See* Request, Exh. "A" p. 015. Accordingly, since Cosentino met his burden of demonstrating that the Defendants violated their statutory authority, Cosentino may proceed with his civil tort claims. *See Boisclair*, *supra*; *Turner*, *supra, Lawrence, supra.*

The fact that, to defeat sovereign immunity, Cosentino proved that Defendants violated their statutory authority under IGRA, the Compact, and the Gaming Act does not transform Cosentino's civil tort case into an impermissible action to enforce IGRA, the Compact, or the Pechanga Gaming Ordinance. The defendants in *Toole v. Richardson-Merrell Inc.* (1967) 251 Cal.App.2d 689, 703 attempted substantially the same argument as the Defendants, and now the Viejas Band, makes here. The *Toole* Court soundly rejected it stating that the Plaintiff,

> did not attempt to state a cause of action for damages for breach of the federal statute. He stated a cause of action based upon alleged negligent conduct on the part of appellant which negligent conduct he asserted was the proximate cause of his injuries. In support of this cause of action, as well as others stated, he introduced a great deal of evidence by which he hoped to convince the jury that appellant had falsely stated the results of its tests of MER/29 on rats and dogs and hence had violated section 355(b) [of the Federal Food, Drug, and Cosmetic Act]. This was done, not to support a cause of action based upon the statute, but for the purpose of showing that appellant had violated statutory standards, thus raising a presumption of negligence on its part because of such conduct. This was entirely proper.

Id. at 703, *accord, Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal App 3d 318, 277.

The authorities that the Viejas Band cites simply do not support the argument that the Viejas Band makes. The Viejas Band correctly cites the United States Supreme Court for the undisputed proposition that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington* (1979) 442 U.S. 560. But the Viejas Band argues a fundamentally different proposition from that stated by the Supreme Court above. Namely, the Viejas Band argues that a private litigant who states a civil tort cause of action is *stripped* of his right of action if, as part of his case, he also proves a violation of a federal statute (in this case IGRA) which statute *itself* provides no cause of action. There is no authority for that novel and plainly unjust proposition.

Finally, the Viejas Band Contends that Pechanga Gaming Ordinance section 5(h) bars claims related to employment at the Pechanga Casino. *See* Request at 4. In fact, "section 5(h)" of the Pechanga Gaming Ordinance ***does not even exist.*** Section 5(h) of a *different* tribal ordinance,

the Pechanga Tort Liability Act, purports to bar employment-related *arbitration*. However the Tort Liability Act has no application in this case because, among other reasons, Cosentino did not seek to *arbitrate* his claims against Defendants. The Band's highly misinformed argument provides yet another example of why the Court should not consider the merits-based arguments of third parties at this stage of the proceeding. Put bluntly, the Viejas Band, like Lytton Rancheria, simply does not know what it is talking about. The Gaming Ordinance is available online at <http://www.nigc.gov/Reading_Room/Gaming_Ordinances.aspx>.

2. The Viejas Band Does Not Even Attempt to Support the Argument that "Inherent Sovereign Authority" Should Have Barred Cosentino's Case.

It is fundamental that an argument that is not timely raised is waived. *J.J. v. County of San Diego* (2014) 223 Cal.App.4th 1214, 1230, fn. 5; *People v. Holford* (2012) 203 Cal.App.4th 155, 159, fn. 2. The Defendants had a full and fair opportunity to raise any argument that had merit in the Court of Appeal. If there were any merit to the contention that because of some amorphous concept of "inherent sovereign immunity" Defendants are free to violate federal, state, and tribal statutory laws from which they derive their authority, then Defendants should have raised that argument in their appellate brief. Defendants did not, presumably because the argument has no support. Tellingly the Viejas Band does not even attempt to explain how the Tribe's purported "inherent sovereign authority over tribal gaming licenses" either 1) exists; or 2) would operate to bar Cosentino's case. *See* Request at 4. Nor does the Viejas Band cite any supporting authority. I respectfully submit that, if the Viejas Band cannot identify a single source of law for this untimely and frivolous argument, then the only consideration the Court should give it is whether or not it warrants sanctions under Code of Civil Procedure section 128.7(b)(2).

3. Lower Federal Cases Do Not Bind California Courts, and Even if They Did, Federal Authority Clearly Supports *Cosentino vs. Fuller*.

The Viejas Band contends that the Court of Appeal failed to consider salient federal cases. That is not true. The Briefing before the Court of Appeal included numerous federal cases—including every case that the Viejas Band cites with the exception of *Pistor v. Garcia* (9th Cir 2015) Case No. 12-17095—a case which, as explained below, is highly favorable to Cosentino. Moreover, *Turner vs. Martire,* the principal authority upon which the Court of Appeals relied in *Cosentino vs. Fuller* derived *its* holding almost entirely from federal precedent. *See Turner v. Martire*, *supra*, 82 Cal.App.4th at 1046-1047. So it simply is not true that the Court of Appeal disregarded federal precedent in *Cosentino vs. Fuller*.

Moreover, even if it were true, the Court of Appeal was not required to follow the federal precedents. *See Castaneda v. Dep't of Corr. & Rehab.* (2013) 212 Cal. App. 4th 1051, 1074. Lower federal court cases are, however, persuasive authority. *See Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd.* (1997) 58 Cal.App.4th 200, 206. To the extent this Court would be persuaded by the federal cases that the Viejas Band cites, I more than welcome such persuasion because all of those federal cases are either readily distinguishable from

Cosentino vs. Fuller or strongly support *Cosentino vs. Fuller's* outcome. The Viejas Band cannot identify, any federal case that conflicts with the holding in *Cosentino vs. Fuller*.

The Court in *Imperial Granite Co. v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1259, employed substantially the same analysis, to a similar set of facts, as the Court in *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407. The Court will, recall that the Lytton cited *Great Western* as the principal authority in support of its June 16 depublication request. And, in fact, the *Great Western* Court relied on *Imperial Granite* reaching its holding. *See Great Western, supra,* 74 Cal.App.4th at 1421.

Imperial Granite Co. is unhelpful to the Viejas Band in the same way *Great Western* is unhelpful to the Lytton Rancheria. Namely, in *Imperial Granite Co.* there were no allegations in the Complaint that any of the individual tribal officials violated the scope of their authority. *See* 940 F.2d at p. 1271. Instead, those officials merely voted as they were authorized by the tribe to do. *See ibid.* ("There is no allegations that closing the road to Imperial exceeded the official's authority granted by the Band; quite the contrary, the Band clearly authorized the closure.") Cosentino, by stark contrast, did allege in detail and proved by un-rebutted evidence how each of the Defendants violated the authority granted to them by federal, state, and tribal statutory law. *See* Request, Exh. "A" at p. 15. The Pechanga Band did not authorized Defendants' conduct. It could not lawfully authorize Defendants' conduct. Indeed, the evidence Cosentino presented to the trial and appellate Courts shows that when the tribe itself learned of Defendants' revocation of Cosentino's license, the tribe ordered Defendants to rescind the revocation. *Ibid.*

Hardin v. White Mountain Apache Tribe (9th Cir. 1985) 779 F.2d 476 is equally unsupportive of the Viejas Band. In *Hardin,* the plaintiff challenged a tribal ordinance that permanently excluded him from tribal land. The Court held that his exclusion was within the Tribe's civil powers as an exercise of tribal self-government and territorial management. *Id.* at p. 478. As to tribal official immunity, the *Hardin* court merely observed, "Because all of the individual defendants here were acting within the scope of their delegated authority, Hardin's suit against them is also barred by the Tribe's sovereign immunity." The Court's terse analysis indicates that tribal officials properly exercising the tribe's civil power do not exceed their authority. In *Cosentino vs. Fuller*, by contrast, the Defendants violated the authority granted to them by Federal, State, and Tribal law statutory law. So, unlike the tribal officials in *Hardin,* the Defendants in *Cosentino vs. Fuller* exceeded their authority. In other words, *Hardin* is legally consistent with, and factually distinguishable from, *Cosentino vs. Fuller*.

As to *Pistor v. Garcia* (9th Cir. 2015) Case No. 12-17095, it is truly a mystery why the Viejas Band would even mention that case. Indeed, that opinion is highly favorable to Cosentino and other plaintiffs seeking to sue tribal officials in their individual capacities. Had the *Pistor* opinion come down prior to the close of briefing in this case, I would surely have cited the case as persuasive authority for Cosentino--and Defendants would have surely argued that, as federal

precedent, *Pistor* is not binding.[1] In *Pistor,* the Ninth Circuit held that Tribal Officials could not invoke tribal immunity because they were sued in their individual capacities and the plaintiffs did not seek their remedy from the tribe—just as Cosentino has done. *See Pistor*, *supra*, at p. 4 ("We conclude that the tribal defendants are not entitled to sovereign immunity because they were sued in their individual rather than their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe.")[2] In other words, from Cosentino's perspective, the *Pistor* Court's analysis is at least as favorable as (if not more favorable than) the Court of Appeal's holding in *Cosentino vs. Fuller*. Moreover, even if the holdings in *Imperial Granite* and *Hardin* supported the Viejas Band's arguments (and they clearly do not) *Pistor v. Garcia,* as the most recent statement on the immunity afforded to tribal officials, would, in any case, overrule those prior cases to the extent of any conflict.

Finally, the Viejas Band argues that *Turner v. Martire* (2000) 82 Cal.App.4th 1042 is distinguishable from *Cosentino v. Fuller* because the defendants in *Turner* could personally commit assault, whereas revocation can only be carried out by the Gaming Commission. *See* Request at p. 5. The Band obscures the law with that argument.

Turner v. Martire (consistent with longstanding precedent) held that in considering whether or not a tribal official is liable for his or her official acts, the Court considers whether those acts (1) were taken in the official's official capacity; and (2) whether the acts were within the official's statutory authority. *Turner, supra,* 82 Cal.App.4th at p. 1046; accord *United States v. State of Oregon* (9th Cir. 1982) 657 F.2d 1009, 1012 fn.8. The reason for that analysis is that "where an officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Larson v. Domestic & Foreign Corp.* (1949) 337 U.S. 682, 689. That is precisely what happened in *Cosentino vs. Fuller*. *See* Request, Exh. "A" at p. 17 (explaining that un-rebutted evidence before the Trial Court showed that by revoking Cosentino's license without cause, Defendants violated 25 U.S.C. § 2710(b)(2)(F) & (d)(1)(A)(ii); Tribal-State Compact § 6.4.3; Pechanga Gaming Ordinance § 10(j) & (m).) In other words, the Defendants acted outside

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[1] Defendants argued in their successful Motion to Quash/Dismiss in the Riverside Superior Court that *Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075 (the case upon which *Pistor* bases its holding) was not binding on California Courts. Cosentino argued that *Maxwell* was persuasive authority that, in addition to controlling California precedent, supported denying Defendants' Motion.

[2] The *Pistor v. Garcia* Court did not "re-affirm" *Hardin v. White Mountain Appache Tribe. See* Request at p. 5, fn.3. In fact, the *Pistor* Court distinguished *Hardin. See Pistor v. Garcia,* at p. 14-15 (summarizing *Maxwell vs. San Diego's* treatment of *Hardin*, and concluding, "*Maxwell's* caution about masked official capacity suits aside, *it remains 'the general rule that individual officers are liable when sued in their individual capacities*'" (emphasis added).)

the scope of their authority. Defendants' statutorily-unauthorized acts are individual acts; they are not the acts of the Tribe. *Larson, supra,* 337 U.S. at p. 689

Accordingly, while it is true that only the Gaming Commission can lawfully revoke a license. That observation simply is not relevant to the controlling analysis in *Cosentino vs. Fuller*. Statutes governing the Commission provide for revocation only under specific circumstances. There is no evidence that those circumstances existed in this case. Therefore, Defendants exceeded their authority and they are individually liable. *See* Request, Ex. A at p. 16-17; *Turner*, *supra* 82 Cal.App.4th at pp. 1054-1055; *Boisclair*, *supra,* 51 Cal.3d at p. 1157; *Larson*, *supra,* 337 U.S. at p. 695.

4. Congress's Plenary *Legislative* Authority over Indian Affairs Does Not Restrain the Courts from Ruling on the Boundaries and Application of the *Common Law* Doctrine of Sovereign Immunity.

The Viejas Band argues that, because Congress has plenary authority over Indian affairs, *Cosentino vs. Fuller* invades the exclusive province of Congress. The Band relies upon the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community* (2014) 134 S. Ct. 2024 (Hereinafter "*Bay Mills*") for this highly misguided argument. The Band fails to understand that the doctrine of sovereign immunity is a *common law* doctrine. *See id.* 134 S. Ct. at p. 2027 ("Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the '*common-law* immunity from suit traditionally enjoyed by sovereign powers.'" (emphasis added.)) Congress's plenary authority over Indian Affairs is *legislative. See id.* 134 S. Ct. at p. 2030 ("The Constitution grants Congress powers we have consistently described as plenary and exclusive to *legislate* in respect to Indian tribes." (emphasis added) (internal quotation marks omitted).)

As set forth above and in my June 26 Opposition, the common law has long permitted suit against the officials of a sovereign for acts that violate the scope of that official's authority. *Larson*, *supra,* 337 U.S. at p. 695; *Boisclair*, *supra,* 51 Cal.3d at p. 1157; *Turner*, *supra* 82 Cal.App.4th at pp. 1054-1055. Congress *could* abrogate all of the foregoing common law by enacting legislation that governs the application of sovereign immunity with respect to Indian Tribes. Congress has, so far, never spoken on this issue. The mere fact that Congress has plenary legislative power over Indian Affairs does not bind our courts to refrain from defining the contours of the doctrine of sovereign immunity—indeed, if the Band were correct in that contention, then every case the Band has ever cited in support of its own sovereign immunity was an improper judicial invasion of Congress's authority!

The *Bay Mills* case, unsurprisingly, does not support the Viejas Band's novel argument for judicial impotence. In *Bay Mills* the Supreme Court considered two issues (1) whether Michigan could sue the Bay Mills Tribe pursuant to the statutory abrogation of tribal sovereign immunity found in IGRA at 25 U.S.C. § 2710(d)(7)(A)(ii); and (2) if that section of IGRA did not apply, whether the Court should revisit its prior decision in *Kiowa Tribe of Oklahoma v.*

Manufacturing Technologies, Inc. (1998) 523 U.S. 751 (hereinafter "*Kiowa*") which held that sovereign immunity applied to bar suits against a tribe arising even from the tribe's off-reservation commercial activities. *See Bay Mills, supra,* 134 S. Ct. at pp. 2031-2032.

As to the first question, the *Bay Mills* Court properly concluded that section 2710(d)(7)(A)(ii) of IGRA permitted suit only as related to gaming "on Indian lands," and that, therefore, the Court could not expand the application of 2710(d)(7)(A)(ii) to allow suits related to gaming that *did not* take place on Indian Lands.

> This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan's words) Congress "must have intended" something broader. Brief for Michigan 32. And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because (as explained earlier) "Congress must 'unequivocally' express [its] purpose" to subject a tribe to litigation.

In other words, Congress had spoken by enacting IGRA as it was drafted, and the Court had to defer to Congress as to *the statute's* application. But that analysis is irrelevant in *Cosentino vs. Fuller* because Cosentino did not argue that Defendants are not immune pursuant to a statutory abrogation of sovereign immunity. Therefore, Congressional intent simply does not enter into this case. Instead Cosentino argued (and the Court of Appeal rightly held) *based on common law* that Defendants are not shielded by sovereign immunity. It was entirely proper for the Court to make that determination. If Congress disagrees with the holding in *Cosentino vs. Fuller*, it is free to legislate accordingly.

As to the second question, the *Bay Mills* Court declined to revisit its holding in *Kiowa* as a matter of *stare decisis*.

> this Court does not overturn its precedents lightly. *Stare decisis*, we have stated, "is the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Although "not an inexorable command," *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion,... For that reason, this Court has always held that "any departure" from the doctrine "demands special justification."

Bay Mills, *supra*, 134 S. Ct. at p. 2036 (internal citations omitted).

In other words, where the common law was concerned in *Bay Mills* the Court restrained itself in deference to its own prior case law, the Court was not required to defer to Congress.

The Viejas Band observes that Congress has not passed legislation allowing private plaintiffs to sue tribal officials. That is right, Congress has not spoken on this issue. The doctrine of sovereign immunity is a judicially-created doctrine. Therefore, under the reasoning of *Bay Mills*, since Congress has remained silent on the question of official's individual liability, Congress has deferred to the Courts on this question. The Court of Appeal correctly interpreted and applied the doctrine in *Cosentino vs. Fuller*.

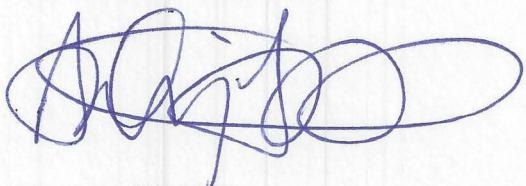
5. *Cosentino vs. Fuller* Will Not Spawn Unmeritorious Litigation.

The Viejas Band argues that *Cosentino vs. Fuller* will spawn unmeritorious litigation against Tribes and their officials. That nonsensical argument is nothing less than an attack on our entire system of common law. First, the Court should note that *Cosentino vs. Fuller* only applies to tribal officials sued in their individual capacities, it provides no authority for a lawsuit against a tribe. With respect to tribal officials, as set forth above, *Cosentino vs. Fuller* correctly applies, and clarifies longstanding precedent. Such reaffirmation and clarification of our judicial law is a good thing. Indeed, that is how the common law has meted out justice in changing times for centuries. And as I noted in my June 26, 2015 Opposition, the Court of Appeal's reaffirmation and clarification was clearly needed. To date, sixteen California Tribes have sought depublication of *Cosentino vs. Fuller*. I respectfully reiterate that the outcry from our state's Tribes at this correctly-decided case is a troubling indication of the misplaced sense of impunity with which Tribal Officials have been acting in our State. The Court should let the disinfecting light of our civil tort law shine just as brightly on the acts of tribal officials as it shines on the officials of any other sovereign. If that gives rise to a "rash" of litigation, then good. That is exactly how this is supposed to work.

IV. Conclusion

The Viejas Band's Request simply re-hashes arguments that the Defendants made and that the Court of Appeal properly rejected, and offers only tiring unsupported pronouncements that *Cosentino vs. Fuller* breaks with long-established precedent. *Where is that conflicting precedent?* It does not exist. *Cosentino vs. Fuller* was correctly decided and it should remain published.

Respectfully Submitted,



Andrew W. Twietmeyer
Attorney for Plaintiff and Appellant
Benedict Cosentino

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 July 21, 2015, I served the foregoing document described as: **Opposition to the Request of the Viejas Band of Kumeyaay Indians to Depublish *Cosentino vs. Fuller et al.*, Ct. App. Case No. G050923, Supreme Ct. Case No. S227157** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as set forth below:

See attached service list.

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

I declare under penalty of perjury under the laws of the State of California and that the foregoing is true and correct. Executed on July 21, 2015 at Los Angeles, California.

Andrew W. Twietmeyer

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