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Attorney for Plaintiff:
CLARENCE BUTLER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLARENCE BUTLER,

Plaintiff,

vs.

THE BARONA BAND OF MISSION
INDIANS OF CALIFORNIA;
BARONA TRIBAL GAMING
AGENCY; BARONA RESORT AND
CASINO, and DOES 1 through 50 ,
inclusive

Defendants.

Case No. 5:16-cv-00268-RSWL (KKX)

1. **OPPOSITION TO DEFENDANTS'
12 (b) MOTION TO DISMISS**

**Filed Concurrently with
2. Appendix of authority.**

Date: May 3, 2016
Time: 10:00 am
Dept: 21
Judge:
Honorable Roland S. W. Lew

TO: ALL PARTIES, THEIR ATTORNEYS AND THE COURT

Please Take Notice that Lotfy Mrich, attorney for Plaintiff Clarence Butler [“Butler”,] will and hereby oppose the motion to dismiss pursuant to Rule 12(b) (1, 2, 3 and 6, filed by Defendants The Barona Band Of Mission Indians Of California; Barona Tribal Gaming Agency; Barona Resort And Casino [“Barona”]

INTRODUCTION

I.

FACTUAL AND PROCEDURE IN SUPPORT OF PLAINTIFF'S OPPOSITION

A. The Plaintiff's injury:

On February 16, 2014, Butler was at the Barona Resort and casino, standing in line to cash his chips, when the stanchion collapsed, through no fault of his, and fractured his knee cap. As a result of this injury, Plaintiff had to miss months of work and undergo surgery.

B. Plaintiff Complied with the Notice Requirement.

On February 20, 2014 Plaintiff gave Barona Notice of his of claim. Barona responded by furnishing the required form to make a claim under Barona' tribunal torts claim.

On or about April 22, 2014, Plaintiff's counsel mailed the claim form.

On May 4, 2015 Barona rejected Plaintiff's claim..

On May 26, 2015 Plaintiff mailed out the appeal and the \$50 filing fee to Barona.

Plaintiff has not received a response of any kind to his appeal.

Plaintiff has complied with all the procedural steps required through Barona's tribunal. Barona has not acted on his appeal.

Plaintiff has filed with the Federal Court as a last resort.

MEMORANDUM OF POINTS AND AUTHORITY

LEGAL ARGUMENT

**A) PLAINTIFF HAS COMPLIED WITH THE PROCEDURAL
REQUIREMENTS OF BARONA'S TORT CLAIM ORDINANCE
AND HAS NO OTHER RECOURSE.**

1) The Tribal-State Compact Between California and Barona.

Barona Band of Mission Indians is a federally recognized Indian tribe that owns and operates the Barona Resort & Casino (Barona).

Barona executed a compact with the State of California through its then Chairman Clifford La Chappa on April 2, 1992 and Approved on June 23, 1992, pursuant to the Indian Gaming Regulatory act of 1988, codified at 18 U.S.C. §1166 et seq. and 25 U.S.C. § 2701 et seq.

In the Compact, Barona agreed to maintain public liability insurance for claims made by patrons of the Resort and to adopt a tort liability ordinance setting forth the terms and conditions under which it would waive immunity to suit for damages resulting from injuries at the Resort. Section 10.2 of the Compactⁱ:

“(d) Carry no less than five million dollars (\$5,000,000) in public liability insurance for patron claims, and [Barona] shall provide reasonable assurance that those claims will be promptly and fairly adjudicated, and that legitimate claims will be paid; provided that nothing herein requires [Barona] to agree to liability for punitive damages or attorney’s fees. On or before the effective date of this Compact or not less than (30) days prior to the commencement of Gaming Activities under this Compact, whichever is later, [Barona] shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which

1 *[Barona] waives immunity to suit for money damages resulting from*
 2 *intentional or negligent injuries to person or property at the Gaming*
 3 *Facility or in connection with [Barona's] Gaming Operation, including*
 4 *procedures for processing any claims for such money damages; provided*
 5 *that nothing in this Section shall require [Barona] to waive its immunity to*
 6 *suit except to the extent of the policy limits and insurance coverage set out*
 7 *above."*

8 **2) The Tort Claim ordinance of Barona and the waiver of sovereign**
 9 **immunity:**

10
 11 As required by the Compact, Barona adopted a tort claims ordinance.ⁱⁱ Under
 12 that ordinance Amended April 15, 2003 , there are several provisions discussing
 13 the limited extent to which Barona waives its tribal sovereign immunity to permit
 14 tort claims to be filed pursuant to the ordinance:

15
 16 *"IV. Limited Waiver of Sovereign Immunity:*

17 *A. The sovereign immunity of [Barona] shall continue except to the extent*
 18 *that it is expressly waived by this Ordinance. Officers of [Barona], including*
 19 *members of the Tribal Council, remain immune from suit for actions arising*
 20 *within the course and scope of their authority and duties.*

21 *B. [Barona] and its enterprises, agencies and officers may be sued solely in*
 22 *Barona Tribal Court. [Barona] does not waive immunity from suit in any*
 23 *state or federal court.*

24 *C. The sovereign immunity of [Barona] and its enterprises is waived solely*
 25 *in Barona Tribal Court, and in no other court whatsoever, in the following*
 26 *instances:*

1. Injuries proximately caused by the negligent acts or omissions of [Barona], its enterprises, agencies and officers;
2. Injuries proximately caused by the condition of any property of [Barona] at its enterprises and agencies, provided that the Claimant established that the property was in a dangerous condition and [Barona] and/or its personnel had actual knowledge or constructive notice of the dangerous condition and sufficient time prior to the injury to take measures to remedy or protect against the dangerous condition;
3. Negligent acts or omissions of Tribal employees or agents within the course and scope of their employment or agency.

V. Exclusive Remedy:

This Ordinance provides the exclusive procedure, forum and remedy for claims against [Barona], its enterprises, agencies, employees and officers."

3) Analysis of Barona amended tort Claim Ordinance of 2003.

The plain reading of this ordinance clearly shows Barona waiver of Sovereign immunity does not exist outside the Barona's tribunals as it retains the "unfettered discretion" to determine whether Plaintiff has complied with the procedural requirement which renders its obligation under the Compact "totally illusory."

In *Compo Band of Missions Indians v. Superior Court* (2006) 137 Cal. App. 4th 175, 39 Cal. Rptr. 3d 875

*"The **tribe** entered into a compact with the State relating to its operation of gambling facilities in which it agreed to comply with certain standards relating to public health and safety at its facilities. The **tribe** also adopted a regulation that required a claimant to comply with certain procedures and, subject to such compliance, provided for arbitration of the patron's claim.*

1 The court held that the compact included **a** waiver of the **tribe's** tribal
 2 sovereign immunity relating to patron claims for negligence resulting
 3 **inpersonal injury** up to the limits of the insurance it was required to
 4 maintain under the compact, and thus the superior court had limited subject
 5 matter **jurisdiction** over the patron's claim against the **tribe**. Having
 6 consented to waive its tribal sovereign immunity **in** the compact, the **tribe**
 7 could not, **in** drafting its regulation, render its obligations totally illusory by
 8 retaining the sole and unfettered discretion to determine whether **a** claimant
 9 had complied with the procedural requirements set forth **in** the regulation.
 10 However, the superior court erred **in** determining the compliance issue itself
 11 rather than submitting that issue for determination **in** arbitration.”

12 In our case as in Campo the Court has a limited jurisdiction to order
 13 arbitration.

14 **B. DEFENDANTS' VENUE OBJECTION IS WELL TAKEN**

15 As an initial matter, the objection to the venue is well taken, but because
 16 Defendant is Sovereign, it should be subject to venue analysis

17 1) **Foreign State**, under 28 U.S.C. 1391f(3) venue is proper:

18 “in any judicial district in which the agency or instrumentality is licensed to
 19 do business or is doing business, if the action is brought against an agency
 20 or instrumentality of a foreign state as defined in section 1603(b) of this
 21 title; “

22 A “foreign state”, except as used in section 1608 of this title, includes a
 23 political subdivision of a foreign state or an agency or instrumentality of a
 24 foreign state as defined in subsection (b).

25 **(b)**An “agency or instrumentality of a foreign state” means any entity—
 26 **(1)**which is a separate legal person, corporate or otherwise, and
 27
 28

1 *(2)which is an organ of a foreign state or political subdivision thereof, or a*
 2 *majority of whose shares or other ownership interest is owned by a foreign*
 3 *state or political subdivision thereof..”*

4
 5 Since Defendant is licensed to do business in California. In facts, since
 6 Barona advertises and does business with our County, Riverside is the proper
 7 venue.

8 **2) Objection to Forum non Conveniens**

9 Plaintiff looks to this Court to adjudicate his claim in light of the severe
 10 injury to him, which brought about both hardship of his mobility and the additional
 11 cost of travel and the future cost of travel of his witnesses, the bulk of whom is
 12 medical brass, doctors, anesthesiologist, physical therapist, MRI specialist, and
 13 nurses.

14
 15 **3) Transfer pursuant to 1406(a)**

16 If the Court is not inclined to keep the case in our County, Plaintiff prays
 17 the Court to transfer it in the interest of justice to the nearest Federal Court in san
 18 Diego.

19 **4) Dismissal of this action will irreversibly prejudice Plaintiff**

20 Plaintiff's claims may not be able to reincarnate his claims as they would
 21 have already fallen, moreover already under the statute of limitation.

22 Moreover, Plaintiff is suffering substantial financial hardship so as to afford
 23 paying the fee for his complaint and service all over again. There is no prejudice
 24 to Barona since it gave assurances to people of California that it would fairly and
 25 promptly adjudicate claims and ii this case to it failed to do so.

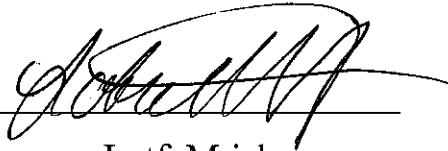
26 **CONCLUSION**

27 For All Foregoing, Plaintiff prays this Court to:
 28

- 1) Deny defendant's 12 (b) motion, and in the alternative grant Plaintiff leave to amend.
- 2) Overrule Defendant's venue objection or in the alternative, and in the interest of justice, transfer the case to the nearest Federal Court in Riverside
- 3) For any other remedy the Courts deems just and proper.

RESPECTFULLY SUBMITTED

Date: 04/18/2016



Lotfy Mrich

Attorney for Plaintiff

ⁱ Appendix of authority, exhibit 1, Compact page 30
ⁱⁱ Appendix of Authority, exhibit 2 Tort Claim Ordinance]