Docket No. 13-55152

In the

United States Court of Appeals

For the

Ninth Circuit

GREGORY F. MULLALLY,

Plaintiff-Appellant,

v.

JACKIE GORDON, et al.,

Defendants-Appellees,

Appeal from a Decision of the United States District Court for the Central District of California, No.5:07-CV-01626-VAP-DTB ● Honorable Virginia A. Phillips

OPPOSITION BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES and REGULATIONS

OTHER AUTHORITIES

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for Federal Defendants-Appellees is not aware of any prior or related appeals.

JURISDICTIONAL STATEMENT

1. The United States District Court for the Central District of California ("District Court") had jurisdiction over the claims of Appellant based upon the following:

(a) 28 U.S.C. § 1331, in that Appellant's claims arose under the Constitution and laws of the United States, specifically the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA"); and

(b) the District Court's pendant jurisdiction with regard to Appellant's contract and tort claims.

2. The Court of Appeals has jurisdiction over this appeal based upon 28 U.S.C. § 1291, in that Appellant is appealing a final judgment of the District Court.

STATEMENT OF ISSUES

1. Did the District Court err in recognizing the Chemehuevi Tribal Court's March 23, 2010, Opinion and Order based on the doctrine of comity?

(a) Did the Tribal Court have subject matter jurisdiction over the claims set forth in the complaint filed in the Tribal Court by Appellant?

(b) Did Tribal Court afford Appellant due process of law in the course of the proceedings before that Court?

2. Can the Appellant challenge, for the first time on appeal, the Tribe's Tribal Attorney's status as a tribal official or employee, for purposes of determining whether the Tribal Court had jurisdiction over Appellant's claims, for the first time on appeal?

3. Is the District Court's factual finding that Appellant did not rely on the alleged intentional misrepresentations of Defendants Gordon and Petersen to his detriment clearly erroneous?

4. Is the District Court's factual finding that Defendants Gordon's and Petersen's actions did not cause a disruption of Appellant's disability insurance contract clearly erroneous?

STATEMENT OF THE CASE

On December 6, 2007, Plaintiff Gregory F. Mullally ("Mullally") filed a complaint in the District Court ("Complaint"), asserting claims for: (1) violation of the FMLA against Jackie Gordon ("Gordon"); (2) violation of the FMLA against the Havasu Landing Casino ("Casino"); (3) defamation against Jacques Vasquez a.k.a. Manual Jacques ("Vasquez"); (4) intentional

interference with contractual relations against Mary Petersen ("Petersen") and Does 1-5; and (5) conversion against Does 6-10.

On January 18, 2008, Defendants filed a motion to dismiss. On March 3, 2008, the Court dismissed the claims against the Casino and Gordon, for lack of subject-matter jurisdiction under the doctrine of sovereign immunity. The Court denied Defendants' motion to dismiss as to Mullally's remaining claims, and stayed the action to allow Mullally to exhaust tribal remedies.

Mullally filed tribal administrative claims under the Tribe's Claims Ordinance with the Chemehuevi Tribal Council and, when those claims were denied, filed an action in the Chemehuevi Tribal Court asserting claims for: (1) defamation against Jacques, (2) defamation against Charles Wood ("Wood") and Ronald Escobar ("Escobar"); (3) fraud against Jay Hill ("Hill"), Gordon, and Peterson; (4) interference with contract against Gordon and Peterson; and (5) conversion against Lester Marston ("Marston") and Ve'la'aa White ("White").

On March 23, 2010, the Tribal Court issued an "Opinion and Order." The Tribal Court found that while the defendant employees were entitled to sovereign immunity generally, the Tribe had waived employee sovereign

immunity as to intentional torts. As Mullally alleged only intentional torts, the Tribal Court addressed the merits of each claim. The Tribal Court found that Mullally had failed to state legally cognizable claims as to Mullally's third claim for fraud and Mullally's fourth claim for intentional interference with contractual relations, because the Tribal Council had not enacted ordinances establishing such torts. The Tribal Court noted that even if it were "to draw upon the common law from other sources to define such actions, the Third and Fourth claims [we]re not pl[ed] with the factual specificity to make out a claim for relief sufficient to survive a motion to dismiss." As to Mullally's defamation and conversion claims, the Tribal Court found Mullally failed to state a claim under the applicable Tribal Ordinances. As additional alternative grounds, the Tribal Court found Mullally's fraud, defamation, and conversion claims (claims two, three, and five) were subject to dismissal for failure to exhaust tribal administrative remedies.

On September 9, 2010, Mullally filed an ex parte motion to reopen the District Court case, which the District Court granted on September 22, 2010. Mullally filed a motion to amend ("Motion to Amend") and supporting documents on November 15, 2010, seeking leave to file a first

amended complaint ("FAC") asserting the following claims: (1) defamation against Jacques and Gordon; (2) defamation against Wood, Escobar, and Marston, (3) intentional interference with contractual relations against Peterson and Gordon; (4) intentional misrepresentation against Petersen, Gordon, and Hill; (5) promissory fraud against Petersen, Gordon, and Hill and (6) conversion against Marston and White.

On November 19, 2010, Defendants filed an opposition to the motion and supporting documents. On December 7, 2010, Mullally filed a declaration in response to Defendants' opposition. Pursuant to the District Court's order, the parties subsequently filed supplemental briefs and supporting documents on the subject of the Tribal Court's jurisdiction.

On December 14, 2010, Defendants filed a motion to dismiss for lack of jurisdiction and supporting documents. On January 10, 2011, Mullally filed a response to the Motion to Dismiss and supporting documents. On January 19, 2011, Defendants filed a Reply and supporting documents. On January 21, 2011, Mullally filed a "Supplement" to the Opposition.

On May 4, 2011, the Court granted in part and denied in part the Defendants' motion to dismiss. The Court: (1) dismissed Mullally's defamation and conversion claims without leave to amend, (2) granted

Mullally's motion to amend as to Mullally's proposed claims for intentional interference, intentional misrepresentation, and promissory fraud, and (3) denied Mullally's motion as to all other claims.

On May 16, 2011, Mullally filed a first amended complaint ("FAC"), asserting claims for: (1) intentional interference with contractual relations against Petersen and Gordon; (2) intentional misrepresentation against Petersen, Gordon, and Hill; (3) negligent misrepresentation against Petersen, Gordon, and Hill, and (4) promissory fraud against Petersen, Gordon, and Hill.

On June 6, 2011, Defendants filed a motion to dismiss and to strike and supporting documents. Mullally filed an opposition to the motion and supporting documents on June 13, 2011. On June 27, 2011, Defendants filed a reply.

On September 8, 2011, the District Court granted in part and denied in part the motion to dismiss filed by the Defendants. The Court: (1) denied the motion to dismiss as to Mullally's first claim for intentional interference with contractual relations; and (2) dismissed Mullally's second claim for intentional misrepresentation, third claim for negligent misrepresentation, and fourth claim for promissory fraud, all without leave

to amend. After the District Court's September 8, 2011, Order, the only claim left to adjudicate was Mullally's first claim for intentional interference with contractual relations against defendants Gordon and Petersen.

On October 25, 2012, Defendants filed a Motion for Summary Judgment and supporting documents. On November 7, 2012, Mullally filed an opposition to the motion and supporting documents. On December 3, 2012, Defendants filed a reply and supporting documents.

On December 20, 2012, the Court granted the Defendants' motion for summary judgment.

I.

STATEMENT OF FACTS

1. The Chemehuevi Indian Tribe ("Tribe") is a federally recognized Indian Tribe. (65 Federal Register 13299.) The Tribe is a quasi-sovereign governmental entity that exercises inherent powers of self-government. The Tribe is organized under a written constitution, which, as subsequently amended, was approved by the Secretary of the Interior under the provisions of the Indian Reorganization Act, 25 U.S.C. §476

("IRA"). Under the Tribe's Constitution, the Chemehuevi Tribal Council is the governing body of the Tribe. E.R. pp. 220-221, ¶ 2.

2. The Tribe is the beneficial owner of approximately 32, 487 acres of land ("Reservation") adjacent to the Colorado River and Lake Havasu in San Bernardino County, California. The Reservation was created by Order of the Secretary of the Interior dated February 2, 1907. Title to the Tribe's Reservation lands is owned by the United States of America in trust for the Tribe. E.R. p. 223.

3. In June of 1976, the Tribe purchased the assets and facilities of the Havasu Landing Resort, Inc., a functioning resort complex located on the lakeshore and entirely on trust lands within the boundaries of the Reservation. Shortly thereafter, the Tribe expanded the resort and began operating the business as a tribal economic development enterprise under the fictitious business name "Havasu Landing Resort." E.R. p. 432, ¶ 4.

4. In 1995, the Tribe remodeled the resort's existing restaurant and constructed a casino. The casino consists of a bar, lounge, restaurant, and gaming floor area where a variety of Class II and Class III games, as defined by the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq. ("IGRA"), are conducted. E.R. p. 432, ¶ 5.

5. The Tribe, d.b.a. the Havasu Landing Resort and Casino ("Casino"), is not a corporation under either state or federal law. Specifically, the Casino was not chartered as a corporation under the provisions of Section 17 of the IRA, 25 U.S.C. §477, and the Tribe, d.b.a. the Havasu Landing Resort, has never waived its sovereign immunity by virtue of a "sue and be sued" clause included in any corporate charter. E.R. p. 432, ¶ 6.

6. Under its Constitution and the IRA, the Tribe has the power to enact its own laws and ordinances. E.R. p. 433, ¶ 7.

7. The Tribal Council enacted Ordinance No. 96-02-24-A, entitled: "An Ordinance of the Tribal Council of the Chemehuevi Indian Tribe to Establish a Tribal Court" ("Tribal Court Ordinance"). E.R. p. 447.

8. Pursuant to the Tribal Court Ordinance, the Tribe has established a tribal court ("Tribal Court") and appointed Robert Moeller as its Chief Judge. Judge Moeller is not a member of the Tribe, is not married or related to any member of the Tribe, owns no real or personal property on the Reservation, resides in Phoenix, Arizona, and is a retired solicitor for the United States Department of the Interior. E.R. pp. 434-435, ¶ 18.

9. Pursuant to the Tribal Court Ordinance, the Chief Judge has

adopted uniform rules of evidence and procedure governing how cases are processed through the Tribal Court. E.R. p. 435, ¶ 19.

10. The Tribal Court's procedures are governed by the "Rules of Pleadings, Practice and Procedure of the Tribal Court of the Chemehuevi Indian Tribe" ("Court's Rules"). E.R. p. 335.

11. The admission of evidence in Tribal Court proceedings is governed by the "Rules of Evidence of the Tribal Court of the Chemehuevi Indian Tribe" ("Rules of Evidence"). E.R. p. 358.

12. The admission to practice and conduct of attorneys before the Tribal Court is governed by the "Rules of Admission and Professional Conduct Governing the Practice of Attorneys in the Tribal Court of the Chemehuevi Indian Tribe" ("Rules of Admission and Professional Conduct"). E.R. p. 394.

13. The conduct of the judges in the Chemehuevi Tribal Court is governed by the "Rules of Judicial Conduct Governing the Conduct of Judges of the Tribal Court of the Chemehuevi Indian Tribe" ("Rules of Judicial Conduct"). E.R. p. 405.

14. The conduct of the court clerks in the Chemehuevi Tribal Court

is governed by the "Rules Governing the Conduct of Clerks for the Tribal Court of the Chemehuevi Indian Tribe" ("Rules Governing the Conduct of Clerks"). E.R. p. 417.

15. The Chemehuevi Tribal Council enacted Ordinance No. 97.7 entitled: "Tribal Tort Claims Ordinance." E.R. p. 442.

16. The Tribe enacted Ordinance No. 99-02-27-E entitled "Limitation on Tribal Officers' and Employees' Liability" ("Limited Liability Ordinance"). E.R. p. 436. The Limited Liability Ordinance provides that the Tribe does not consent to be sued and is not subject to suit in any administrative or court proceeding absent a duly enacted ordinance of the Chemehuevi Tribal Council or a resolution of the Chemehuevi Tribal Council adopted pursuant to such authorizing ordinance explicitly waiving the Tribe's sovereign immunity from unconsented suit or otherwise authorizing a claim or lawsuit to be filed against the Tribe. E.R. p. 433, ¶ 8.

17. Section 2.080 of Ordinance No. 99-02-27-E includes tribal employees within the scope of the Tribe's immunity from suit. E.R. p. 433, ¶ 10.

18. The Tribal Council has never adopted an ordinance or resolution waiving its immunity from suit with respect to any action brought by Mullally. E.R. p. 433, ¶ 9.

19. On September 10, 1999, the Tribe entered into the "Tribal-State Compact Between the State of California and the Chemehuevi Indian Tribe" ("Compact"), pursuant to which the Tribe is permitted to conduct gaming on trust lands. E.R. p. 267.

20. Between July 1, 2003 and November 6, 2007, Mullally was an employee of the Casino. E.R. p. 117, ¶ 2.

21. The Tribal Council has approved a personnel, policy and procedures manual ("PPM") that defines and governs the relationship between the Tribe and the employees of the Casino. The PPM provides that there shall be a Human Resources Manager and a Security Manager for the Casino. The PPM sets forth a description of the duties and responsibilities of the Security Manager and the Human Resources Manager. E.R. pp. 440-441.

22. On March 25, 2006, the Tribal Council appointed Gordon, an enrolled member of the Tribe and a member of the Chemehuevi Tribal Council, as the General Manager of the Casino. E.R. pp. 460-461 ¶¶ 1-2.

23. Peterson is employed by the Casino as the Human Resources Manager, and Jacques is employed by the Casino as its Security Manager. E.R. p. 433, ¶ 11.

24. As the General Manager of the Casino, Gordon was delegated authority to manage and operate the Casino including, but not limited to, the authority to hire and fire employees and the authority to delegate management duties and authority to Peterson, in her capacity as Human Resources Manager, and Jacques, in his capacity as Security Manager. As a governmental entity, the Tribe can only act through its authorized officers and employees. At all times relevant to this action, Gordon, Jacques, and Peterson were acting within the scope and course of their employment at the Casino in the exercise of the management authority delegated to them by the Tribal Council. E.R. p. 434, ¶ 13.

25. The Tribe has never adopted an ordinance or resolution waiving the Tribe's sovereign immunity from suit or given its consent to Mullally to sue Gordon, Jacques, or Peterson. E.R. p. 434, ¶ 14.

26. On or about September 20, 2007, Mullally forwarded to Petersen a request for leave under the Family Medical Leave Act of 1993 ("FMLA") based on a mood disorder. E.R. p. 118, ¶ 3.

27. Mullally claimed that his condition arose from stress resulting from his being suspended from work at the Casino on September 16, 2007, because he allegedly moved slot machines on the Casino's gaming floor without the Commission's permission, in violation of the Commission's minimum internal control standards. E.R. p. 118, ¶ 4.

28. Shortly after receiving Mullally's request for leave under the FMLA, Petersen informed Gordon of the request. After learning of Mullally's FMLA request, Gordon instructed Petersen not to process Mullally's request for leave and other claims for benefits until Gordon had received an opinion from the Casino's legal counsel on whether Mullally was eligible for FMLA and other benefits based on a disability that arose from Mullally's own actions, his unauthorized moving of the machines. E.R. pp. 96-97, ¶ 5.

29. On October 31, 2007, Mullally forwarded a claim form ("Claim Form") for the Colonial Life and Accident Insurance Company ("Colonial") to Petersen asking that she fill out the employer information section of the form and return it to him. E.R. pp. 118-119, ¶ 7.

30. Because Peterson understood Gordon's instruction not to file Mullally's claims until Gordon had received the legal opinion as including

all of Mullally's claims, and because the Casino's legal counsel had instructed Mullally to have no contact with the employees of the Casino, Petersen did not immediately complete the employer information section of the Colonial benefits application form submitted to her by Mullally. E.R. pp. 118-119, ¶¶ 6-7.

31. On or about November 1, 2007, Gordon denied benefits to Mullally under the FMLA upon the advice of the Tribe's attorney, Marston, the Tribe's Tribal Attorney and the Casino's legal counsel, based on his opinion that the FMLA does not apply to federally recognized Indian Tribes. E.R. p. 98, ¶¶ 1-3; p. 461, ¶ 4.

32. On November 5, 2007, Peterson e-mailed Mullally that she was "only following orders not to complete the PDF form" and that if he had any questions about it, he could e-mail Gordon. After November 5, 2007, Mullally did not contact Peterson about the completion and return of the Claim Form. E.R. p. 119, ¶¶ 8 & 11.

33. On or about November 6, 2007, Petersen informed Gordon that Mullally had submitted the Colonial Claim Form to her, and Peterson asked Gordon how she wanted her to respond. Gordon told her not to complete

the form until she had consulted with the Casino's legal counsel. E.R. p. 119, ¶¶ 9-10.

34. Mullally never informed Peterson that he had filed, on or about November 7, 2007, the Claim Form with Colonial for disability benefits based on a mood disorder. In addition, Colonial never contacted Peterson, Gordon, or any other representative of the Casino seeking the employer information section of the Claim Form. E.R. p. 119, ¶ 12.

35. Based upon Marston's legal opinion, Gordon directed: (1) Peterson not to complete the paperwork for benefits on behalf of Mullally under the FMLA; and (2) Marston to send a letter to Mullally explaining why he was not eligible for FMLA benefits. E.R. p. 461, ¶¶ 4-5.

36. Upon receiving the request from Gordon, Marston instructed Mullally to contact him, as the Casino's legal counsel, and not the employees of the Casino about any questions or claims he had arising from his employment at the Casino. E.R. p. 99, ¶ 4.

37. On November 6, 2007, Gordon, in her capacity as General Manager of the Casino, terminated Mullally's employment at the Casino because he failed to apply for a permanent gaming license after the

expiration of a temporary gaming license of which he had held. E.R. p. 461, ¶ 3.

38. On or about November 7, 2007, Mullally filed a claim for disability benefits with Colonial for a mood disorder arising from stress, pursuant to the Disability Insurance Policy he had with Colonial. E.R. p. 124.

39. Mullally submitted, with the claim form, a cover letter stating that representatives of the Casino refused to complete the employer information section of the claim form with attached copies of correspondence with Petersen, Gordon, and Marston. In the letter, Mullally requested that Colonial process his claim without the Casino completing the employer information section of the claim form. E.R. p. 132.

40. On November 8, 2007, Colonial denied Mullally's claim for disability benefits based on a mood disorder, because his condition was not covered by his disability insurance policy. E.R. pp. 160-162.

41. Mullally never informed Petersen, Gordon or any other supervisor at the Casino that his claim for disability benefits based on the diagnosis of a mood disorder had been denied by Colonial. E.R. pp. 97, ¶ 11; 119, ¶ 12.

42. Some time in the second or third week of November, 2007, after consulting with Marston, Gordon instructed Petersen to complete and return the Colonial claim form. E.R. p. 97, ¶ 10.

43. On November 28, 2007, Petersen faxed the completed employer information section of the Colonial Claim form to Colonial. E.R. p. 120, ¶ 15.

44. On December 6, 2007, Mullally filed suit against the Havasu Landing Casino, Gordon, Jacques, Petersen, and ten Doe Defendants. Among the claims alleged in the Complaint was a claim for deliberate interference with contract against Petersen, based on her alleged failure to complete the employer information section of his Colonial disability claims form. E.R. p. 191, ¶ 34.

45. On or about February 13, 2008, Mullally filed a claim for disability benefits with Colonial, based on a knee operation that occurred on February 11, 2008. E.R. p. 163.

46. Mullally included with the application form a letter stating that he had not included the completed employer information section of the claim form because his employment had been terminated and he was carrying the insurance as a individual, with copies of correspondence with

the Casino relating to his termination as an employee. E.R. p. 172.

47. Mullally did not contact Petersen, Gordon or any other employee of the Casino requesting that a representative of the Casino complete the employer information section of the claim form for the February 13, 2008 claim. E.R. p. 120 ¶ 19.

48. Mullally sent a demand letter to Colonial dated April 8, 2008, relating to his February 13, 2008 application for benefits. The April 8, 2008, letter stated that "My former employer will not complete any form whatsoever, as they are the defendants in a Federal Lawsuit that I have filed against them. E.R. p. 176, ¶ 5.

49. The Tribe enacted Ordinance No. 08-03-29-B, entitled: "An Ordinance of the Tribal Council of the Chemehuevi Indian Tribe Granting to the Tribal Court the Authority to Hear Conversion Cases" ("Conversion Ordinance"). E.R. p. 253.

50. The Tribe enacted Ordinance No. 08-03-29-A, entitled: "An Ordinance of the Tribal Council of the Chemehuevi Indian Tribe Granting to the Tribal Court the Authority to Hear Defamation Cases" ("Defamation Ordinance"). E.R. p. 259.

51. On or about April 9, 2008, a Colonial representative called Petersen seeking the employer information for Mullally's February 13, 2008 claim. E.R. p. 183.

52. On April 9, 2008, Petersen faxed to Colonial the completed Employer Information section of Mullally's claim form. E.R. p. 180.

53. On April 9, 2008, Mullally was awarded benefits arising from his February 13, 2008 claim. E.R. p. 184.

54. On June 29, 2009, the Tribal Court issued a Minute Entry and Order, noting that Mullally failed to provide a proof of service with his motion for default judgment and providing Mullally ten (10) days to file such a document. E. R. p. 424.

55. On October 16, 2009, the Tribal Court issued a Minute Entry and Order, noting that the Tribal Court had not received a copy of the proof of service required by the Court's June 29, 2009, Order, by allowing Mullally to submit proof of service within ten (10) days since Defendants had indicated the Tribal Court overlooked the proof of service in error. E. R. p. 426.

56. On November 30, 2009, the Tribal Court issued an "Order to Show Cause Why Default Judgment Should Not Be Entered," stating that it

may have initially misplaced Mullally's proof of service, but that the defendant Jay Hill had since filed an answer. E. R. p. 428.

STANDARD OF REVIEW

The Ninth Circuit Court of Appeals reviews de novo a district court's grant of summary judgment. *Shelley v. Geren*, 666 F.3d 599, 604 (9th Cir. 2012). Viewing the evidence in the light most favorable to the non-moving party, the Court must determine whether there are any genuine issues of material fact, and whether the District Court applied the relevant substantive law. *Id.* When conducting that review, the Court may affirm on any ground supported by the record, and affirm the District Court on the grounds of res judicata. *Olson v. Morris*, 188 F.3d 1083, 1085 (9th Cir. 1999). The Court may also affirm the District Court on any ground supported by the record, even if the ground is not relied on by the District Court. *Perry v. U.S. Bank*, 143 Fed. Appx. 40, 41 (9th Cir. 2005).

The Court reviews a grant of a motion to dismiss de novo. *Beets v. County of L.A.*, 669 F.3d 1038, 1041 (9th Cir. 2012); *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d. 1049, 1053-1054 (9th Cir. 2008); *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129, 1133 (9th Cir. 2006).

The Court may not set aside the District Court's factual finding unless those findings are clearly erroneous. Federal Rule of Civil Procedure 52(a); *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009); *Anderson v. Bessemer*, 470 U.S. 564, 573 (1985). A finding is clearly erroneous when, although there is evidence to support it, the Court based on all the evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 (1948). The District Court's choice between two permissible views of the evidence cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Any "definite and firm conviction" by the Court must still include some measure of deference to the District Court's factual determinations." *United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009) (en banc).

SUMMARY OF ARGUMENT

In this brief, the Appellees will demonstrate that the District Court's recognition of the Tribal Court's March 23, 2010 Opinion and Order, pursuant to the doctrine of comity is fully consistent with the legal authorities setting forth the requirements for Federal Court recognition of Tribal Court judgments and orders. *Wilson v. Marchington*, 127 F.3d 805

(9th Cir. 1997). The Chemehuevi Tribal Court afforded Mullally due process pursuant to rules and procedures that mirror those of the federal courts and Mullally failed to demonstrate that he was denied any due process rights. The Tribal Court had subject matter jurisdiction over Mullally's claims, as his employment at the Tribe's casino and his voluntary application for a tribal gaming license fall within the first exception to the general prohibition on the extension of tribal court jurisdiction over nonmembers set forth by the Supreme Court in *Montana v. United States*, 450 U.S. 544, 465-66 (1981).

Appellees will also demonstrate that the Tribal Court had jurisdiction over Mullally's claim against Appellee Marston, who is the Tribe's Tribal Attorney, and therefore an official of the Tribe. *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968).

Finally, Appellees will demonstrate that the District Court's factual findings relating to Mullally's claims of intentional misrepresentation and intentional interference with contract are fully supported by the allegations and evidence before the Court and no interpretation of those allegations or evidence would support a conclusion that District Court's factual findings were clearly erroneous.

ARGUMENT

I.

THE DISTRICT COURT HAD JURISDICTION OVER MULLALLY'S CLAIMS AND AFFORDED HIM DUE PROCESS.

Mullally argues that the District Court, in its May 4, 2010 Order, "erred by dismissing my allegations of defamation against Defendant Vasquez and conversion against Marston, as it is clear that I was not afforded due process of law in Tribal Court." Opening Brief, p. 16. Mullally appears to argue that the District Court should not have dismissed the two claims, based on the recognition of the Chemehuevi Tribal Court's Judgment dismissing those claims. Citing *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), Mullally argues that the Tribal Court's judgment was not entitled to recognition by the District Court, because he was denied due process of law by the Tribal Court, and the Tribal Court did not have subject matter jurisdiction over his claims.

In its May 4, 2011 Order, the District Court thoroughly addressed all of the arguments Mullally presents in his Opening Brief and concluded, based upon its thorough analysis, that Mullally clearly was not denied due process by the Tribal Court and that the Tribal Court's judgment was

entitled to recognition. E. R. p. 63.

There is no question that the failure to afford a litigant due process is a proper ground for denying recognition of a tribal judgment under the doctrine of comity. "A federal court must . . . reject a tribal judgment if the [party] was not afforded due process of law." *Marchington,* 127 F.3d at 811. "[O]ur precedents make clear that a district court cannot properly give comity to a tribal court judgment if the tribal court proceedings violated due process." *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136, 1142 (9th Cir. 2001). "It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a matter that did not accord with the basics of due process." *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995).

The *Marchington* Court defined due process in the following terms:

> Due process, as that term is employed in comity, [requires] . . . . that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws.

Marchington, 127 F.3d at 811.

Due process violations that would provide a basis for denying recognition to a tribal court judgment, however, cannot be a peripheral or

minor violation. In discussing recognition of foreign court judgements under the doctrine of comity, this Court stated "[W]e have held that 'unless a foreign country's judgments are the result of outrageous departures from our notions of civilized jurisprudence, comity should not be refused.'" *Bird*, 255 F.3d at 1142, citing *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974). The *Bird* Court further stated that the Court also "analyzed the foreign tribunal for deviations from 'basic principles of due process' and 'civilized jurisprudence.'" *Bird*, 255 F.3d at 1142 (citing *Pahlavi,* 58 F.3d at 1413).

This Court, furthermore, favors the recognition of tribal court judgments: "The importance of tribal courts and the dignity we accord their decisions will weigh in favor of comity in any case where we have discretion to recognize and enforce a tribal court judgment." *Bird*, 255 F.3d at 1142. The recognition of tribal court judgments does not require that tribal court procedures mirror procedures in federal and state courts:

> Comity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. Foreign-law notions are not per se disharmonious with due process by reason of their divergence from the common-law notions of procedure. Indeed, *Hilton* [*v. Guyot*, 159 U.S. 113 (1985)] rejected challenges to a judgment based on lack of adequate cross-examination and unsworn testimony. Federal courts must also be careful to respect tribal jurisprudence along with the

> special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.

Marchington, 127 F.3d at 811 (internal quotation marks and citations omitted).

Marchington listed a number of examples of due process violations that could provide a basis for denying recognition: "[E]vidence' that the judiciary was dominated by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witness, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition.'" *Id.*, citing Restatement (Third) of Foreign Relations Law of the United States § 482 cmt. b (1986)).

> As to the 'inquiry into whether a party had full and fair opportunity to litigant an issue . . . we focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.'

Burrell v. Armijo, 456 F.3d 1159, 1172 (10th Cir. 2006), citing *Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 689 (10th Cir. 1992).

In its May 4, 2011 Order, the District Court thoroughly addressed all of the arguments Mullally presents in his Opening Brief and conclued, based upon its thorough analysis, that Mullally was not denied due process by the Tribal Court and that the Tribal Court's judgment was entitled to recognition. The District Court analyzed the Chemehuevi Tribal Court's rules of procedure and the proceedings that took place based on Mullally's tribal court lawsuit against the background of the foregoing standards. The District Court concluded:

> As in *Bird*, the Chemehuevi Tribal Court's rules and procedures are "very similar to our federal court procedures" and accordingly are "based on Anglo-Saxon law." 255 F.3d at 1144. Moreover, "concerns for respecting a sovereign's procedures and avoiding paternalism are reduced when tribal court laws and procedures governing trials . . . track those of our federal courts." *Id.* at 1143. Thus, the Tribe's rules and procedures support a finding that the Tribal Court conducted the proceedings in accordance with due process.
>
> Furthermore, the record submitted to the Court does not reveal that the Tribal Court failed to follow these rules and procedures or otherwise acted in a manner that denied Plaintiff due process. Indeed, the record shows that the Tribal Court provided Plaintiff notice, the opportunity to present evidence, the opportunity to submit motions and respond to motions, and the opportunity to be represented by legal counsel. The Tribal Court's lengthy opinion also indicates that it fully considered and weighed the evidence before it in reaching its decision.

E.R. p. 84.

The only potential basis for concluding that Mullally was denied due process was the fact that the Chemehuevi Tribal Court does not have a court of appeals. Because of budgetary limitations, the Tribe has never established a tribal court of appeal, although the Tribal Court Ordinance would permit it to do so. The Tribal Council has established a procedure pursuant to its Tort Claims Ordinance by which the Tribal Council, sitting as an adjudicatory body, reviews and renders a decision on a claimants claims. E.R. p.442. Mullally filed claims with the Tribal Council, pursuant to the Tort Claims Ordinance, before he filed suit in Tribal Court. The District found this sufficient to remove any concerns arising from the lack of a Court of Appeals:

> The *Marchington* court listed a variety of protected rights, however, only one of which -- the right to appeal -- is absent here. . . . Moreover, the lack of the right to appeal cannot be characterized as an "outrageous departure" "from our notions of civilized jurisprudence," as described in *Bird*, especially in the context of a civil action, 255 F.3d at 1142, nor does it rise to the level of deprivation described in *Pahlavi*, in which the Ninth Circuit refused to enforce a judgment obtained in Iran where "the defendant could not personally appear before those courts, could not obtain proper legal representation . . . , and could not even obtain local witnesses on her behalf," 58 F.3d at 1413 (citations omitted).
>
> Here, Plaintiff first filed tribal administrative claims under the Tribe's Claim Ordinance with the Tribal Council, and when those claims were denied, filed an action in Tribal Court. .. Plaintiff accordingly had the opportunity for his case to be

> heard before two different bodies. The extensive rules and procedures governing proceedings, as well as the notice accorded Plaintiff, the opportunity to present evidence, the opportunity to submit motions and respond to motions, and the opportunity to be represented by legal counsel, as well as the Tribal Court's lengthy opinion, all support the conclusion that the Court fully considered and weighed the evidence before it in reaching its decision. These factors weigh heavily in favor of finding that the proceedings were conducted in accordance with due process.

E.R. pp. 85-86.

The District Court concluded that the factual allegations that were presented in support of Mullally's other asserted bases for his claim of deprivation of due process on the part of the Tribal Court were not admissible in the District Court.

> Plaintiff's allegations are largely unsupported by the evidence in the record. First, Plaintiff fails to include a declaration with the evidence he submits in support of his Opposition, and instead merely attaches the evidence to his Opposition. . . . Secondly, by failing to include a declaration, Plaintiff fails to authenticate the documents adequately. Accordingly, the Court cannot consider them.

E.R. p. 89.

In his Opening Brief, Mullally provides no legal argument demonstrating that the District Court's ruling that the factual allegations were inadmissible was in error. His only argument is that he was a pro se plaintiff and the District Court was unfair in requiring that he meet the

technical requirements for the submission of evidence. Opening Brief, p. 17. Mullally misrepresents the response of the District Court to his procedural failings:

> I was given no opportunity by the Court to correct my error in failing to provide a Declaration. Had the Court allowed me to file a simple piece of paper authenticating my documents, numerous examples of due process violations would have been place before the Court.

Opening Brief, p. 17.

In a footnote, Mullally then states:

> I have done my best to read, understand and obey all of the Court rules. Unfortunately, in this case I overlooked the necessity of submitting a declaration attached to the voluminous evidence I presented to the Court regarding lack of due process. In this case it appears like one strike and you're out, as the Court refused to give me permission to correct this error and tossed out all my supporting evidence based on my omission.

Opening Brief, footnote 8, pp. 17-18

These assertions are evidently intended to give the impression that Mullally applied to the District Court for permission to file a declaration setting forth his factual allegations and authenticating his documents and the District Court denied that request. In fact, Mullally never moved the District Court for permission "to file a simple piece of paper authenticating [his] documents," and the District Court never "refused to give [him]

permission to correct this error." As the Court's docket reveals, no motion or application to file a declaration was filed in the District Court record. The District Court's record further reveals that Mullally did not file a motion for reconsideration of the District Court's May 4, 2011 Order.

Revealingly, Mullally did file a supplemental brief in response to the Defendants reply brief, in support of the Defendants motion to dismiss, that identified numerous procedural errors committed by Mullally, including: the failure to timely file his opposition brief, the failure to present his factual allegations in a declaration, and his failure to authenticate the documents he submitted to the Court. In his supplemental brief, Mullally neither discussed the issues of the failure to file a declaration and authenticate the documents he submitted, nor did he request that the Court allow him to file a declaration. E. R. p. 211. Mullally's assertion that the District Court denied him the opportunity to file a declaration and to authenticate documents allegedly demonstrating that he was denied due process is a fabrication.

Furthermore, although the District Court ruled that factual allegations were not admissible, the District Court nevertheless analyzed Mullally's allegations of due process violations and found that the factual

allegations did not support the claim that he had been denied due process. The District Court found that: "Plaintiff's representations regarding the events at the Tribal Court are not entirely accurate."[1] E.R. p. 89. After further discussion of Mullally's assertions and the evidence he submitted, the District Court stated, "considering the evidence in the record before it, the Court concludes that the Tribal Court comported with due process." E.R. p. 90.

Mullally's challenge to those factual conclusions can only be overturned if they rise to a level of clear error. Federal Rule of Civil Procedure 52(a); *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009); *Anderson v. Bessemer*, 470 U.S. 564, 573 (1985). The District Court record, the District Court's careful analysis of the evidence submitted by Mullally, Mullally's failure to properly submit his factual allegations and authenticate his alleged evidence, and the factual allegations themselves make it clear that the District Court did not commit clear error in determining that the Tribal Court proceedings comported with the requirements of due process.

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[1]Note as one of the examples of Mullally lying: Mullally claims that Marston is the alternate Judge of the Tribal Court; however, Marston has never served as a judge for the Tribal Court in any capacity.

Finally, the lion's share of the alleged violations of due process cited by Mullally concern an application Mullally made to the Tribal Court for a clerk's default and default judgment against Hill, the former General Manager of the Casino. At the time that the Court ruled on the Appellees' motion to dismiss, Hill was not a party to the District Court proceedings. The Tribal Court proceedings in which Mullally attempted to have the default entered against Hill were and are entirely irrelevant to the issue of whether Mullally received due process from the Tribal Court with regard to the Tribal Court judgment that the District Court recognized. The District Court, furthermore, found that the confusion arising from the application for a default was corrected by the Tribal Court:

> This does not appear to be a case, therefore, in which the Tribal Court deliberately ignored Plaintiff's motions, but rather one in which Plaintiff's initial filings were procedurally deficient and the Tribal Court later may have misplaced Plaintiff's proof of service. The Tribal Court addressed its error and sought to remedy it in the order to show cause.

E.R. p. 90.

Mullally's claim that the Tribal Court lacked subject jurisdiction may be dispensed with summarily. Mullally does not present any argument in support of his assertion. He merely states that the "Tribal Court did not have subject matter jurisdiction regarding several of my causes of action."

Opening Brief, p. 16. He does not identify which claims do not fall within the Tribal Court's subject matter jurisdiction. It is, therefore, impossible to determine with any certainty which causes of action he believes the Tribal Court lacked jurisdiction over and whether those are the same claims that form the basis for his challenge to the District Court's May 4, 2011, Order.

Assuming that Mullally is asserting that the Tribal Court lacked subject matter jurisdiction over his claim of defamation against Jacques and conversion against Marston, his argument has no merit. Mullally provides no argument whatsoever in support of his assertion, so there is no way to identify what Mullally regards as the legal error committed by the District Court.

There is no basis for concluding that the Tribal Court lacked subject matter jurisdiction over the defamation claim against Jacques and the conversion claim against Marston. Both conversion and defamation are causes of action over which the Tribal Court has been granted subject matter jurisdiction under Tribal Law. E. R. pp. 253; 259. It is, therefore, beyond debate that, under Tribal law, the Tribal Court has subject matter jurisdiction over claims of conversion and defamation.[2]

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[2]To the degree that Mullally intended to challenge the Tribal Court's personal jurisdiction, that issue, too, can be summarily rejected. Mullally

Moreover, the District Court's careful and detailed discussion of the issue of subject matter jurisdiction leaves no room for doubt that the Tribal Court had subject matter jurisdiction. As the District Court concluded, Mullally's claims fall within the first exception to the general prohibition on the extension of tribal court jurisdiction over nonmembers set forth by the Supreme Court in *Montana v. United States*, 450 U.S. 544, 465-66 (1981) ("consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements."):

> Here, Mullally was a nonmember employee of the Tribe's Havasu Landing Casino, which is located on the Chemehuevi Indian Reservation. . . . As a condition of his employment at the Casino, Plaintiff was required to obtain a gaming license from the Chemehuevi Gaming Commission. . . . Plaintiff accordingly entered into a consensual employment contract with the Tribe's Havasu Landing Casino and obtained a gaming license from

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filed suit in the Chemehuevi Court and did not challenge that court's jurisdiction. As the District Court noted:

> The Court agrees that Plaintiff's filing of a suit in Tribal Court constitutes consent to that court's exercise of personal jurisdiction over him. . . . Moreover, though the Tribal Court based its finding on consent, the Tribal Court also properly exercised personal jurisdiction over Plaintiff on the basis of Plaintiff's 'minimum contacts' with the Chemehuevi Tribe and the Reservation, because Plaintiff obtained a gaming license from the Tribe and was employed at the Tribe's Havasu Landing Casino, located on Chemehuevi tribal lands.

E.R. pp. 74-75.

> the Chemehuevi Gaming Commission. Both the employment contract and gaming license fall squarely within the *Montana* exception for consent.

E.R. p. 79.

Finally the District Court concluded:

> Here, the Tribe is not seeking to assert jurisdiction over non-Indian fee land. . . . Instead, all the events giving rise to Plaintiff's claims occurred at the Casino, which was located on tribal trust land.. . . The Casino is located on tribal trust land, which properly is considered part of the reservation for the purposes of subject-matter jurisdiction. . . . Thus, the Court finds the Tribal Court properly exercised subject-matter jurisdiction over Plaintiffs claims.

E.R. p. 79.

Mullally offers no argument to support his assertion that the Tribal Court lacked jurisdiction. In light of the District Court's detailed analysis of the issue, there is no basis whatsoever for overturning the District Court's recognition of the Tribal Court' jurisdiction over Mullally's claims.

II.

MARSTON IS AN OFFICIAL OF THE TRIBE AND THE DISTRICT COURT'S REQUIREMENT THAT MULLALLY EXHAUST TRIBAL COURT REMEDIES WITH REGARD TO CLAIMS AGAINST HIM WAS CORRECT.

Mullally's challenge to the District Court's denial of his motion to amend his complaint to add claims of defamation and conversion against

Marston appears to be based on the argument that exhaustion of tribal court remedies are not required where the defendant is not a tribal employee:

> Marston is not a Tribal member, nor is he a Tribal employee in the sense of the 'employee' Marston is an independent contractor who bills the Tribe on an hourly basis for services he performs for the Tribe. Accordingly, Tribal Exhaustion has nothing to do with the Complaint I sought to bring against defense attorney Marston.

Opening Brief, p. 20.

Mullally provides no argument or citation to legal authority to support the conclusion that tribal courts lack jurisdiction over a non-member independent contractor:

> When defense attorney improperly took my private property and published or caused to be published defamatory remarks about me he was not a tribal member, tribal employee, or, in the case of defamation on tribal land. The matter between defense attorney Marston and me is properly a matter to be heard in the Federal Court.

Opening Brief, p.21.

Given the complicated issues surrounding determinations of tribal court personal and subject matter jurisdiction, as exemplified by the District Court's discussion of the issue of tribal court jurisdiction,

Mullally's statement of his objection simply does not provide the Court or the Appellees with a sufficient basis for addressing Mullally's objection. Counsel for the Appellees is unaware of any federal or state court decision in which the issue of tribal court jurisdiction was determined solely on the basis of a defendants status as an independent contract or full time employee.

Mullally supports his argument with a citation to the definition of "Tribal Employee" contained in an Internal Revenue Service publication entitled, "Tribal Federal Employee's Health Benefits Handbook." Opening Brief, pp. 20-21. An internet search using that term reveal a draft document bearing that title. The Handbook states, "This Handbook provides the policies, procedures, and guidance for tribal employees enrolled in the FEHB Program and their tribal employers." The Handbook only relates to the qualifications for the FEHB program, not to the legal status of tribal employees and officials in general. It does not constitute a legal precedent or other legal authority. It clearly has no relevance to the issue of tribal court jurisdiction.

More important, at all times relevant to Mullally's claims, Marston was the Tribe's and the Casino's attorney acting in his official capacity. E.R.

p. 98, ¶ 1. Federal courts have long recognized that tribal attorneys are tribal officials who enjoy the protection of sovereign immunity from suit. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996); *Stock West Corp. v. Taylor*, 942 F.2d 655, 664-65 (9th Cir. 1991), modified on rehearing, 964 F.2d 912 (9th Cir. 1992); *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968). Moreover, under the Chemehuevi Administrative Code, the Tribe's Tribal Attorney is specifically identified as a tribal official.[3] Under the Tribe's Limited Liability Ordinance, tribal officials are protected by the Tribe's sovereign immunity.

Mullally's argument that the District Court erred in requiring that Mullally exhaust his tribal court remedies with regard to his defamation claim against Marston and in recognizing the Tribal Court's judgment with regard to his claim of conversion because Marston was not a "tribal

[3]Pursuant to Federal Rule of Appellate Procedure 32.1(b), the Tribe has attached a copy of the Tribe's Administrative Code to this Opposition Brief as Exhibit A.

employee" is unsupported and unsupportable by any legal authority. [4] It must be summarily rejected.

III.

THE DISTRICT COURT'S DETERMINATION THAT MULLALLY DID NOT RELY ON FALSE REPRESENTATIONS MADE BY PETERSEN, GORDON AND HILL IS NOT CLEARLY ERRONEOUS.

Mullally's third ground for appeal is a challenge to the District Court's factual conclusion in its September 8, 2011 Order that Mullally did not rely on the alleged false representations made by Petersen, Gordon and Hill.

Mullally's challenge to the District Court's judgment fails for several reasons. First, the District Court's factual conclusion that Mullally had not relied on false representations to his detriment, because the alleged misrepresentations occurred after he had accepted employment with the Casino can only be overturned if the conclusion is "clearly erroneous." Federal Rule of Civil Procedure 52(a); *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009); *Anderson v. Bessemer*, 470 U.S. 564, 573 (1985).

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[4] Mullally never raised this before the District Court below. As a general rule, this Court has stated that it declines to consider arguments raised for the first time on appeal. *Spurlock v. F.B.I.,* 69 F.3d 1010, 1017 (9th Cir. 1995); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 673 (9th Cir. 1993).

Because Mullally's claim was based on allegations of fraud, furthermore, he was required to meet the higher pleading standard set forth in Fed. R. Civ. P. Rule 9(b): "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." As the District Court pointed out, allegations of fraud must be "'specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir), (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, at 1106 (9th Cir. 2003), (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Swartz v. KPMF LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007); *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437, 1439 (M.D. Fla. 1998).

The Court's conclusion that Mullally had failed to plead with sufficient specificity to meet the requirements of Rule 9(b) is clearly based on a reasonable analysis of Mullally's pleadings. Fundamentally, the District Court found: "Plaintiff fails to state how he relied on the misrepresentations to his detriment." E.R. p. 57. The Court then lists Mullally's failures in pleading the claim of fraud:

> By Plaintiff's own admission, the alleged misrepresentations occurred at his employee orientation, after he already had accepted a position with the Casino... Further, within the allegations for his fourth claim for promissory fraud, Plaintiff alleges that the "promise of the [FMLA] . . . was important in convincing [Plaintiff] to accept [his] position with the Casino. Had Plaintiff reason to believe that some of the promises contained in that publication were false, he most certainly would have questioned all of the promises contained therein."... This statement fails to establish reliance for two reasons. First, Plaintiff's other factual allegations belie this statement, i.e., if the employee orientation was the first time Casino employees advised Plaintiff that he was entitled to FMLA leave, Plaintiff already had begun his employment with the Casino before he learned about the FMLA leave. Therefore, whether or not Plaintiff was entitled to FMLA leave could not have influenced his decision to accept employment with the Casino. Plaintiff does not allege that Defendants promised Plaintiff FMLA benefits before he accepted employment with the Casino. Furthermore, Plaintiff's statement, on its face, does not allege that he would have rejected employment with the Casino if he knew the truth about the FMLA leave, but only that he "most certainly would have questioned the promises" in the employee handbook. This simply is not enough to establish reliance. Plaintiff accordingly fails to allege that he relied on Defendants' alleged misrepresentations to his detriment. Thus, Plaintiff has

> failed to state a claim for intentional misrepresentation with the specificity required under Rule 9(b).

E.R. p. 57.

This careful analysis of Mullally's allegations demonstrates that, unless Mullally can demonstrate that the District Court misquoted his own allegations, which he cannot, the Court's conclusion was not clearly erroneous. Mullally's challenge to the District Court conclusion fails to provide any citation to allegations he made that would rebut the District Court's conclusion. His arguments themselves reveal that the District Court's conclusion is correct. While he claims that "[He] specifically plead that the false representations were made before [he] was hired, and made to [him] to induce [him] to take the offered position," he does not cite to the basis in the record for this statement. Even if he had, this statement does not meet the Rule 9(b) requirement that Mullally "state with particularity the circumstances constituting fraud or mistake." It is merely a general statement of some of the elements of a claim for fraud.

The only fact Mullally specifically cites to in attempting to contradict the District Court's analysis is actually an attempt to fudge the facts:

> The inducement was made to me in writing in the employees's handbook. These false representations were repeated when a revised employee handbook was adopted.

> The Court's reasoning that I was not improperly induced to take the position because I had already taken that position when the intentional misrepresentation took place does not square with the facts. I was not hired until after I agreed to and signed a statement that the offer of employment was contingent upon my acceptance of the rules and provisions in the handbook.

Opening Brief, p. 22.

Mullally is careful not to say when he received the handbook or when he read the handbook. He only makes reference to his agreement to and signing of "a statement that the offer of employment was contingent upon my acceptance of the rules and provisions in the handbook," before he was hired. The fact that he signed a statement agreeing to accept the terms and conditions in the handbook, even if true, is not a statement that, before he was hired, he received and read the handbook and made his decision to accept the job in part because he would receive FMLA benefits. Nor is it a statement that he would not have taken the job if he knew that he would not receive those benefits. As the Court points out, Mullally's allegations on this point only state that, his

> "statement, on its face, does not alledge that he would have rejected employment with the Casino if he knew the truth about the FMLA leave, but only that he most certainly would have questioned all of the promises contained therein."

E.R. pp. 57-58.

He does not allege that he took any action based on the representations or that he would not have taken the job, had he known that the he would not receive FMLA benefits.

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The District Court's factual conclusion was indisputably based on a reasonable analysis of the evidence and allegations before the District Court, and the conclusion that he failed to meet the Rule 9(b) standard is the only reasonable conclusion the District Court could have reached.

Importantly, the District Court's dismissal of this claim was based on multiple grounds.[5] Beyond Mullally's failure to plead sufficient facts to meet the Rule 9(b) standard, the District Court found that Mullally's claim failed because it was based on a claim of a violation of the FMLA:

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[5] Although the District Court did not address it, Gordon could not have made any misrepresentations for Mullally to rely on for agreeing to employment because Mullally was hired on July 1, 2003, and Gordon was hired as the Casino's General Manager nearly three years later on March 25, 2006. E.R. pp. 117, ¶ 2; 460, ¶ 1.

> In its March 2, 2008, Order, the Court held that the Casino was immune from suit for violations of the FMLA under the doctrine of sovereign immunity. . . Plaintiff fails to allege how Defendants, as Casino employees, could be held liable under a fraud theory for making representations related to violations of the FMLA coverage, when the Tribe itself is immune from suit related to the same.

E.R. p. 58.

The District Court also pointed out that Mullally's FLMA-based claim sought money damages, but "the FMLA does not entitle Plaintiff to any monetary benefit. Accordingly, it is unclear from the FAC how Plaintiff's alleged damages for the alleged misrepresentation related to FMLA coverage could amount to $100,000.00. The Court accordingly also finds dismissal appropriate on this basis." E.R. p. 59.

Thus, even if Mullally was able to demonstrate that the District Court's conclusion that he failed to meet the pleading requirements for a claim for fraud under Rule 9(b) was clearly erroneous, his claims would still be subject to dismissal because the claim was barred by tribal sovereign immunity and the relief that Mullally sought based on the claim was not authorized under the FMLA.

Mullally's failure to demonstrate that the Court's conclusion that he had failed to state a cause of action for fraud was clearly erroneous

combined with the unchallenged conclusion that Mullally's claims were barred by tribal sovereign immunity and that the damages he sought were not authorized under the statute, compel the Court to uphold the District Court's September 8, 2011, dismissal of Mullally's claim based on intentional misrepresentation.

IV.

THE DISTRICT COURT'S CONCLUSION THAT PETERSEN AND GORDON DID NOT INTERFERE WITH MULLALLY'S DISABILITY INSURANCE CONTRACT IS SUPPORTED BY MULLALLY'S OWN PLEADINGS AS WELL AS THE EVIDENCE SUBMITTED TO THE COURT.

Mullally's final ground for appeal is also a challenge to the factual conclusions of the District Court in its Decmeber 20, 2012 Order. E.R. p. 284.

> The Court incorrectly determined that there was no evidence to show that Defendants refused to send me the form I requested from them in a timely manner so I might file an Insurance claim with Colonial Insurance, thereby intentionally interfering with my ability to collect under my disability policy with them.

Opening Brief, p. 22.

As was demonstrated in the previous section, in order to succeed on this claim, Mullally would have to demonstrate that the District Court's factual conclusions on this claim were clearly erroneous.

Mullally offers nothing more than generalities, without any citation to the District Court record, in attempting to challenge the conclusions of the District Court. The District Court's conclusions that neither of the two disability claims filed by Mullally was disrupted by Gordon or Petersen's conduct, that Mullally attempted to conflate his two claims, and the analysis that led to those conclusions leave no doubt that there is no support for Mullally's position.

With regard to the first disability claim, the District Court's stated:

> [T]here is no genuine dispute of material fact as to whether Defendants disrupted Plaintiff's contract by failing to timely submit the employer information section. Plaintiff alleges that Defendants waited eight months before submitting the employer information, resulting in the denial of benefits. This allegation is unsupported by the evidence. It is undisputed that Plaintiff submitted the November Claim on November 7, 2007. It is undisputed that, the very next day – November 8, 2007 – the November Claim was denied for reasons unrelated to the employer information section. Specifically, the November Claim was denied because Plaintiff's condition was not covered by his disability insurance policy. Defendants' conduct did not cause a disruption here.

E.R. p. 40.

Nothing Gordon or Petersen did had any effect on Mullally's November Claim. It was rejected immediately because his claim was not covered by his policy. Mullally admits this: "it is factually correct that the

denial of my first claim had to do with the nature of the claim itself . . ." Opening Brief, p. 22.

With regard to the second disability claim the District Court's conclusions are equally incontestable. In the course of addressing that claim, the District Court lays bare Mullally's efforts to hide the deficiencies in his claims:

> Plaintiff's allegation that Defendants' conduct in failing to provide the employer information in a timely manner for the February Claim constituted an intentional interference with Plaintiff's contractual relations is not alleged in the FAC [First Amended Complaint]. The original Complaint was filed before the February Claim was filed. The FAC, filed on May 16, 2011, was filed after the February Claim was approved. Neither the original Complaint nor the FAC specifically refer to either the November Claim or the February Claim. Plaintiff, conflating the two claims, alleges that Defendants took "eight months" to submit the paperwork after Plaintiff initially requested them to do so. That "eight month" period presumably begins in October, 2007, when Plaintiff submitted the First Claim form to Defendants for the November Claim. That period presumably ends in April, 2008,[6] when Defendants submitted the employer information section for the February Claim. These two claims are distinct. Plaintiff's attempt to blur and conflate the two into some larger scheme is without support, and indicates that the original complaint and the FAC were only referring to the First

[6] The District Court did not bother to point out that Mullally's math does not add up. The alleged eight month period before Petersen provided the employer the information form in April, 2008, would put the initiation of the delay in August, 2007. The events leading to his initial claim did not occur until September 17, 2007.

> Claim Form and the November Claim, and not the Second Claim Form and the February Claim.

E.R. pp. 42-43.

The District Court further demonstrated that, even if Mullally had included allegations in his First Amended Complaint that included the February Claim, the evidence before the Court revealed that Mullally never informed Gordon and Petersen that he had filed the February Claim and that they could not have disrupted his contractual relations with Colonial:

> Until Defendants were contacted by Colonial on April 9, 2008, with Colonial requesting that Defendants submit the employer information section for the February Claim, Defendants had no way of knowing that Plaintiff had his knee replacement surgery on February 11, 2008, and filed the claim for this with Colonial on February 13, 2008. As soon as Defendants became aware of the February Claim, when they were contacted by Colonial, they immediately returned the employer information that same day. Accordingly, Defendants could not be found to have intentionally acted to disrupt the contract when they did not know that the February Claim was filed until they were contracted by Colonial on April 9, 2008.

E.R. pp. 43-44.

The District Court's analysis of Mullally's claims and his pleading games requires little discussion. It is clear from the District Court's analysis and the District Court record that there is no factual basis whatsoever for concluding that Gordon or Petersen interfered with Mullally's disability

insurance contract, resulting in any damage to Mullally. Mullally's conflation of the two claims was the only way in which he could attempt to claim that there was a significant delay in his receipt of benefits. His effort to disguise his claims in an attempt to fool the District Court was, predictably, unsuccessful. The District Court's determination that there is no factual support for a conclusion that Gordon and Petersen's actions caused a disruption of Mullally's disability insurance contract is entirely supported by the record, and there is no rational analysis of Mullally's factual allegations or the evidence before the District Court that could lead to the conclusion that the District Court's factual conclusions were clearly erroneous.

Characteristically, Mullally states, in response to the District Court's conclusion that he attempted to "blur and conflate" his two insurance claims: "It is incomprehensible to me how the Court could arrive at such a conclusion." Opening Brief, p. 23. Mullally is undoubtedly alone in his incomprehension. In challenging the District Court's careful and detailed analysis, Mullally offers only unsupported, and demonstrably false, assertions.

Mullally's argument boils down to the repeated assertion that the processing of his claim was delayed by Gordon's and Petersen's alleged refusal to submit the employer information form. "[I]t is uncontroverted that Colonial's delay in processing my second claim was caused by the Defendants' refusal to send me the form so I might file it with Colonial." Opening Brief, p. 22. "It is also factually correct that the defendants' deliberate refusal to send me the paperwork required of me by the insurance company substantially delayed my ability to collect under the policy." Opening Brief, p. 23. "[T]he Court erred by overlooking the fact that had the defendants not refused to fill out the form and return it to me when I requested them to, my claim with Colonial would have been honored in a timely fashion." *Id.*

The District Court demonstrated that this argument is based on the conflation of the November Claim and the February Claim, that neither Mullally's original Complaint nor his First Amended Complaint contained allegations that he filed two claims for disability benefits with Colonial, that Mullally never informed Gordon or Petersen that he had filed the February Claim, and that Petersen provided the employer information form the same

day that Colonial requested it.[7] The Court's conclusions cannot be overturned based on the metronomic repetition of Mullally's demonstrably false assertions. Mullally's continued insistence that there was a delay in the processing of his claim is simply frivolous.

Mullally has failed to provide any legally cognizable basis to support his challenge to the Court's factual conclusions in the December 20, 2012, Order, let alone provided grounds for a determination that the District Court's conclusions were clearly erroneous. This ground for his appeal should also be summarily rejected.

CONCLUSION

Mullally has lied all along about the facts of this case. Mullally knew at the time that he filed his original Complaint that his claim for Colonial disability benefits had already been denied by Colonial on the grounds that his disability, mood disorder, was not covered by the policy. He also knew,

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[7]The District Court record includes further evidence that supports the District Court's conclusion. For example, correspondence between Colonial Insurance and Mullally filed with the Court reveals that, to the extent that the time lapse between the February 13, 2008 filing of his claim and April 9, 2008 award of benefits could be considered a delay in processing his claim, Colonial Insurance delayed the approval of his claim because Mullally failed to provide certain medical records to Colonial, not because Colonial had not received the employer information form. E.R. p. 176.

that any delay by Gordon or Petersen in completing the employer section of his claim form did not cause him any harm. Mullally nevertheless pursued his cause of action for intentional interference with contract, wasting the District Court's time and resources and forcing the Tribe to incur significant attorneys' fees and costs.

The District Court relied on substantial evidence in the record to support its factual findings. Its legal conclusions were also supported by the overwhelming precedent from this Court and that of the United States Supreme Court.

For these reasons and the reasons stated above, this Court should affirm the judgment of the District Court dismissing all of Mullally's claims against the Appellees.

Dated: July 25, 2013

Respectfully submitted,

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
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CERTIFICATE OF COMPLIANCE
WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7) of the Federal Rules of Appellate Procedure. Excepting the portions described in Rule 32(a)(7)(B), the brief contains 11,402 words.

Dated: July 25, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 25, 2013.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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