No. D077571

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

Rincon Band of Luiseno Indians; Santa Ynez Band of Chumash Indians, et al., Plaintiffs and Appellants, v. Larry Flynt, et al., Defendants and Respondents.	Court of Appeal No. D077571 (Superior Court No. 37-2018-00058170-CU-NP-CTL)

Appeal from Judgment of
The Superior Court of California, County of San Diego
The Honorable Timothy Taylor, Judge

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Plaintiffs/Appellants, Rincon Band of Luiseno Mission Indians of the Rincon Reservation, a/k/a the Rincon Band of Luiseno Indians ("Rincon Band"), Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, a/k/a the Santa Ynez Band of Chumash Indians ("Chumash Tribe") (together, "Appellant Tribes"), twelve natural persons who are members of the Rincon Band (collectively, the "Tribe Members"), and ten business entities, five of which were formed under California law (collectively, the "Business Entities"),[1] in their Opening Brief, establish that each and all have standing to bring their Second Amended Complaint ("SAC") against Defendants/Appellees, which are comprised of twenty-five businesses and natural persons which offer banked card games at commercial cardrooms outside of tribal lands in violation of California law.

Defendants' Opposition Brief[2] does not take issue with Plaintiffs/Appellants' analysis that this appeal raises the following four issues:

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[1] Appellant Tribes, the Tribe Members, and the Business Entities are collectively referred to herein as "Plaintiffs/Appellants."

[2] Reference to the "Defendants' Opposition Brief" herein is the sixty-five pages in length "Respondents' Brief" filed by the commercial cardroom Defendants. The Third-Party Proposition Players ("TPP") Defendants filed a separate "Respondents' Brief", which is a ten page in length document that merely joins the other "Respondents' Brief," provides no substantive argument, and merely repeats the same state statutes and regulations cited by the

- Whether the Trial Court erred in finding that neither the Appellant Tribes, nor the Tribe Members, nor the Business Entities, are "persons" with standing under applicable California statutes.
- Whether the Trial Court erred in finding that the Second Amended Complaint does not allege the harm required by the applicable public nuisance statute.
- Whether the Trial Court erred in rejecting declaratory and injunctive relief for Defendants/Appellees' violation of Article IV, §19(e) of the California Constitution.
- Whether the Trial Court erred in concluding that Plaintiff/Appellant Chumash Tribe failed to properly allege claims for tortious interference with a contractual relationship and prospective economic advantage.

Plaintiffs/Appellants submit this Reply Brief to address the analysis set forth in the Opposition Brief and to inform this Court of those arguments raised in the Opening Brief that are not addressed in the Opposition Brief. This Reply Brief is deliberately organized to track the analysis as set forth in the Opening Brief, section by section.

Defendants' Opposition Brief begins its Introduction by taking issue with Plaintiffs/Appellants' correct point that the Trial

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cardrooms that apply to lawful commercial card rooms. No separate response to the TPP Defendants' brief is required.

Court's decision, if allowed to stand, declares that Plaintiffs/Appellants are deprived of redress in California courts because they are Indians and that California courts would be able to help Plaintiffs/Appellants if they were not Indians. The Trial Court's misapprehension of the Indian Tribes, the Tribal Members, and the Tribal Business Entities was critical to its analysis of whether the Plaintiff Tribes can be among those political subdivisions of the State of California which may bring unlawful trade practice and public nuisance claims as "public attorneys" on behalf of the People of the State of California. The Trial Court's misapprehension of the role that tribal gaming facilities play in the much broader impact on the tribes, tribal members, tribally-owned non-gaming businesses, tribal employees (the vast majority of which are non-Indian), and the surrounding community resulted in the Trial Court's erroneous rejection of the express allegations of status, injury and harm in the SAC. A discussion of that misapprehension is appropriate.

What is not helpful or relevant to this appeal is Defendants/Appellees' accusation that Plaintiffs/Appellants "blatantly discriminatory" arguments are "inaccurate and insulting" (Opposition Brief at p. 12). Those baseless allegations have no place in this appeal.

Defendants/Appellees are also quick in their Introduction to clarify that the Trial Court did not rule that the twelve Tribal Member named Plaintiffs are not "persons" under the applicable statutes, but rather, that they did not sufficiently allege that Defendants/Appellees' unlawful conduct caused them to be sufficiently harmed or injured (Opposition Brief at 12, 36-37).

Plaintiffs/Appellants will accept that clarification as a concession that the twelve Tribal Member named Plaintiffs qualify as "persons" having standing if such harm or injury is otherwise sufficiently alleged in the SAC, which it is.

II. STATEMENT OF THE CASE

The "Statement of the Case" in each of Plaintiffs/Appellants' and Defendants/Appellees' briefs discusses the history of their respective gaming industries in California, and each provides non-contradicted discussions of the procedural history – namely that the Trial Court dismissed the three versions of the Complaint at the demurrer stage where the Trial Court is required to accept all factual allegations in the Complaint as true. As discussed herein and in the Opening Brief, Defendants/Appellees and the Trial Court dispute or express doubt as to the factual allegations, but seizing on that dispute or doubt to uphold demurrer is clear error.

The Statement of the Case in each brief makes specific reference as to the landmark California State Supreme Court decision in *Hotel Emps. & Restaurant Emps. Int'l Union v. Davis* (1999) 21 Cal.4th 585 (hereinafter "*H.E.R.E.*"), which is the definitive case that makes clear that banked card games, however thinly disguised, cannot be offered off of Indian lands in California:

> Thus, a casino of "the type ... operating in Nevada and New Jersey" may be understood, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California, especially banked table games

> and slot machines. . . .We conclude the card games in question are . . . banking games. . . [A]s in other banking games, the tribe, through the prize pool, simply "pays off all winning wagers and keeps all losing wagers," which are variable "because the amount of money" it "will have to pay out," or be able to take in, "depends upon whether each of the individual bets is won or lost. . . That the tribe must pay all winners, and collect from all losers through a fund that is styled a "players' pool" is immaterial: the players' pool is a bank in nature if not in name. It is a "fund against which everybody has a right to bet, the bank ... taking all that is won, and paying out all that is lost.

(*Id.* at pp. 605–608). "Banked game" as the phrase is used in Plaintiffs/Appellants' pleadings to this Appeals Court means the phrase as defined by the State Supreme Court in the *H.E.R.E.* decision. Defendants/Appellees cite to state statutes and regulations that reference "banked games" to supposedly legitimize their illegal card games, but those statutes and regulations must be interpreted in a manner consistent with the *H.E.R.E.* decision. To the extent that the term "banked" games in such statutes or regulations are not consistent with the definition set forth in the *H.E.R.E.* decision, they are void as unconstitutional.

Defendants/Appellees note (Opposition Brief at p.13) that commercial card rooms have been lawful and operating in California for over 100 years, but they fail to say that for the vast majority of the past century, they have offered only non-banked card games such as traditional poker, *see H.E.R.E.,* 21 Cal.4th at 605, and that the card

rooms' offering of banked games is new, and only since the people of California overwhelmingly voted to pass of Proposition 1A in the Spring of 2000, which amended the California Constitution to allow for banked games *only* on Indian lands, and kept the Constitutional prohibition against such gaming off of Indian lands otherwise intact. Defendants look to 100 years of California statutes and regulations allowing for commercial card rooms, but those statutes and regulations must be interpreted in a manner consistent with the California State Constitution, which prohibits banked card games being offered off of Indian lands. Moreover, even if the Constitutional prohibition was not in place, the SAC sufficiently alleges that Defendants/Appellees fail to adhere to those statutes and regulations in the operation of their games.

III. STATEMENT OF APPEALABILITY

Defendants/Appellees do not address or dispute Plaintiffs/Appellants' Statement of Appealability in their Opposition Brief.

IV. STANDARD OF REVIEW

Both the Opening and Opposition Briefs cite the same applicable *de novo* standard of review. This case was decided at the demurrer stage where the facts alleged in the SAC are deemed to be true, however improbable the Trial Court misunderstood them to be.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THAT NEITHER THE APPELLANT TRIBES, NOR THE TRIBE MEMBERS, NOR THE BUSINESS ENTITIES ARE "PERSONS" WITH STANDING UNDER APPLICABLE CALIFORNIA STATUTES.

In the first paragraphs of Section V(A) (pp. 13-15) of the Opening Brief, Plaintiffs/Appellants lay out the statutory provisions at the center of this appeal. First, the unfair trade practices statute:

> Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by (among others) a person who has suffered injury in fact and has lost money or property as a result of the unfair competition;

(Bus. & Prof. Code § 17204);

> As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

(Bus. & Prof. Code § 17201.) Second, the public nuisance statute:

> A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

(Civ. Code § 3493);

> An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the judgment in that action the

> nuisance may be enjoined or abated as well as damages recovered therefor.

(Civ. Code § 731.) Plaintiff/Appellants lay out the fundamental canons of statutory construction that govern in this appeal (Opening Brief at pp.14-15). Defendants/Appellees, in their Opposition Brief, do not dispute either the recitation of the relevant statutes or the applicable canons of construction.

Plaintiffs/Appellants in their Opening Brief established the basis for standing for each of four different types of "persons" which qualify for protection under the unfair trade practices and public nuisance statutes: (1) Indian Tribes; (2) tribal members; (3) business entities created under tribal law; and (4) business entities created under California law. Defendants/Appellees' refutation of each is unavailing. Moreover, Defendants/Appellees fail to respond to the Plaintiffs/Appellants' analysis in Section V(A)(4) of the Opening Brief that the legislative intent to provide redress in state court to all persons or entities, broadly defined, that have been injured by unfair trade practices or specially injured by a public nuisance, is not advanced by and is inconsistent with the Trial Court's decision on demurrer.

1. APPELLANT TRIBES ARE "PERSONS" WITH STANDING UNDER THE APPLICABLE CALIFORNIA STATUTES.

¶ 1 and ¶ 2 of the SAC expressly allege regarding both and each the Plaintiff Rincon Band of Luiseno Indians and Plaintiff Santa Ynez Band of Chumash Indians, *inter alia*:

> is a federally recognized Indian tribe, a separate **organized community of persons** of Indian descent….

(AA 402.) (emphasis added). Plaintiffs/Appellants establish (Opening Brief at pp. 15-20) that these allegations are consistent with the plain meaning of "Tribe" as defined in mainstream dictionaries, consistent with the definitions of "Indian Tribe" commonly found in the United States Code, and consistent with the reality that Indian Tribes are groups of individuals of common Native American descent and an organized community of persons, rich and diverse in cultural tradition, with an omnipresent sense of family and community, and with commonality and cooperation that has allowed them to survive centuries of atrocity and hardship.

Plaintiffs/Appellants also establish (Opening Brief at p.16) that these allegations are consistent with the definitions of "Indian Tribe" embraced by federal courts. Since the Trial Court's decision in this matter, the United States Supreme Court has very recently ruled that the fact that Alaska Native Tribal Village Corporations are formed under Alaska state law, and possess no

governmental powers or authorities, does not negate the fact that they are "tribes" eligible to receive federal funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. *Yellen v. Confederated Tribes of the Chehalis Reservation*, (June 25, 2021), 141 S.Ct. 2434. The Court concluded, "[U]nder the plain meaning of ISDA (Indian Self-Determination and Education Assistance Act) , ANCs (Alaska Native Corporations) are Indian tribes, regardless of whether they are also federally recognized tribes" *Id.* at 2443, citing with approval D. Case & D. Voluck, *Alaska Natives and Americans Laws* 30 (3d ed. 2012) ("[T]he federal government has, at least since the end of the nineteenth century, provided a wide variety of programs and services to Alaska Natives solely because of their status as Natives"). The Court noted that establishment as a federally recognized tribal government "is one way to qualify as an Indian tribe under ISDA; it is just not the only way." *Id.* at 2444. That same analysis should apply here. No one disputes that qualifying as a political subdivision of the State of California eligible to file a public action on behalf of the People of California, "is one way to qualify" for standing to bring public nuisance and unfair trade practice claims; "it is just not the only way." To conclude that the two Plaintiff Tribes are not such political subdivisions, or 'governments,' for standing purposes does not negate the fact that they are "groups of persons" for standing purposes.

Defendants/Appellees, in their Opposition Brief, do not challenge or otherwise dispute the definition of Indian Tribe as an

organization of persons. Rather, they contend that because the two Plaintiff Tribes have governments or governmental attributes, that such governmental status requires the Court to ignore the fact that they are also organizations of persons and instead, to determine whether the Tribes are among the delineated political subdivisions that may serve as "public attorneys" on behalf of the People of the State of California. (Opposition Brief at pp. 25-32, 42-43). The Trial Court accepted Defendants/Appellees' invitation to go down this rabbit hole. This Appeals Court should reject it.

Defendants/Appellees deliberately and improperly conflate tribal governments with governments that are political subdivisions of the State. Notably, the statutes on which Defendants/Appellees rely do not even use the word, much less define "government." Rather, they delineate which state agencies or political subdivisions may bring public lawsuits sounding in unfair trade practices or public nuisance. It is the Defendants/Appellees and the Trial Court that reason that a Tribe must be considered a "government" along with state agencies or other political subdivisions such that this case turns on whether Plaintiff Tribes are among those governments with standing to bring public lawsuits. Plaintiffs/Appellants have never alleged that Tribes are qualified political subdivisions to bring a "public action" on behalf of the People of the State of California. Tribal governments have both inherent and federal statutory powers and are completely different from political subdivisions of the State that are the sole creation of California state law.

Defendants/Appellees offer no argument or evidence that the State Legislature or Proposition 64 considered tribal governments when delineating which political subdivisions of the state, or which 'governments', may bring a public action for unfair trade practices or public nuisance, and which may not. Defendants/Appellees fail to respond to this analysis in their Opposition Brief. Two statements underscore the gravamen of the Trial Court's error. First, Defendants/Appellees concede "the trial court merely treated them (the Tribes) the same as any other governmental entity in California" (Opposition Brief at 12). Second, the Trial Court further reasoned that it "defies common sense" to accept Tribes as "separate organized communities of persons." Both statements reveal the misapprehension of the status of Tribes, how they exists, and who they are that permeates the Trial Court's decision. Both statements fail to accept the allegations in ¶¶ 1and 2 of the SAC as true.

Defendants/Appellees argue that if one accepts the premise that the Tribes are organizations of persons, then all governments have standing as they too are organizations of persons (Opposition Brief at p. 27). Defendants/Appellees also argue that allowing Tribes standing would render meaningless the delineation of which political subdivisions (or "governments") of the State have standing, and which do not (Opposition Brief at pp. 27-28). These arguments are disingenuous. Political subdivisions of the state are solely creatures of state law and have no authority or existence independent of state law. That stands in stark contrast to the

definition of a Tribe set forth above and alleged in the SAC, all of which accept the existence of a Tribe separate and apart from its government or governmental attributes. Moreover, Defendants/Appellees make the point that the Legislature, when delineating which political subdivisions of the state may bring a public lawsuit on behalf of the People of the State, may also exclude such political subdivisions or governments from the definition of person (Opposition Brief at pp. 25-26).

Defendants/Appellees also argue that the lists in the two statutory definitions of persons should be read to limit "other organizations or persons" to private persons, and accordingly, to the exclusion of tribes. (Opposition Brief at pp.28-29). But nothing in the lists suggest such a limitation, much less evidence the intent of the Legislature. Moreover, Defendants/Appellees do not even offer up a definition of "private," much less establish that a Tribe, properly defined, fails to meet such a definition.

Neither Plaintiffs/Appellants nor Defendants/Appellees could meet the Trial Court's challenge to present California state court precedent that answers the question of whether injured Tribes have standing to sue for unfair trade practices or public nuisance. The Legislature could have expressly included or expressly excluded Tribes in crafting legislative language – they did neither. Acknowledging the lack of case law directly on point, in the absence of any such case law or an express directive from the Legislature, the Trial Court should have proceeded with traditional standards of statutory construction to apply the plain

meanings of "person" and "organization of persons," and "Indian Tribe," as alleged in the SAC and set forth in the briefing below, to find the Appellant Tribes have standing. The absence of controlling case law is not a valid reason for demurring Plaintiffs/Appellants' claims.

Plaintiffs/Appellants offer several examples in California courts where a party's disqualification for standing or liability under one theory or avenue, does not prevent such party from qualifying under another, different theory or avenue absent an express exclusion in the relevant statute (Opening Brief at 18 – 19). Defendants/Appellees take issue with four of those citations (Opposition Brief at pp. 29-31). None of Defendants/Appellees distinctions/clarifications refute the fact that Tribes, defined as organizations of persons, fall within the scope of parties with standing under the relevant statute. Plaintiff Tribes have standing without regard to the fact that they are not a political subdivision or government of the State with authority to bring a public lawsuit. Defendants/Appellees try to distinguish *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization* (9th Cir. 1985), 757 F.2d 1047, by noting the tax code provision at issue included state political subdivisions as entities that may be taxed (Opposition Brief at 29). But the court in *Chemehuevi* did not find that the Tribe could be taxed because it was within the list of California political subdivisions that could be taxed. Indeed, the court in *Chemehuevi* did not go down the rabbit hole of ascertaining whether the Tribe was a taxable government or

political subdivision of the State, because that discussion was inapplicable and irrelevant. Rather, the *Chemehuevi* court reasoned that the Tribe qualified as "any other group acting as a unit." *Id.* at 1054-56. Defendants try to distinguish *Wells v. One2One Learning* (2006) 39 Cal.4th 1164, because the charter school at issue was not a public entity (Opposition Brief at 30). The court in *Wells* reasoned that even though charter schools cannot be sued under the False Claim Act as public entities, which are not liable under the Act, they may be sued as corporations, which are liable under the Act. *Id.* at 1199-1203. Defendants try to distinguish *Regents of University of California v. Superior Court* (1976) 17 Cal. 3d 533, and *Fair Political Practice Com. v. Suitt* (1979) 90 Cal.App.3d 126, on the grounds that the statutes at issue were intended to apply to *all* loans in the context of *Regents* litigation and to apply to *all* money donated to campaigns in the context of the *Suitt* litigation (Opposition Brief at pp. 30-31). Defendants/Appellees' characterization of these two cases supports and reinforces Plaintiffs/Appellants' position that the unfair trade practice statute at issue here is intended to provide redress in state courts for *all* who have suffered injury, and the public nuisance statute at issue here is intended to provide redress for *all* who have suffered special injury separate from the injury suffered by the general public. The point to be made by all of these cases is that even if the Plaintiff Tribes are properly considered as organizations of persons without regard to their governmental

attributes, being a government or having governmental attributes does not negate the fact that they are, and always have been, organizations of persons.

2. PLAINTIFF/APPELLANT TRIBE MEMBERS ARE "PERSONS" WHO HAVE SUFFICIENTLY ALLEGED INJURY TO HAVE STANDING UNDER APPLICABLE CALIFORNIA STATUTES.

As stated above, Defendants/Appellees are quick to clarify in their "Introduction" that the Trial Court did not rule that the twelve Tribal Member named Plaintiffs are not "persons" under the applicable statutes, but rather, that they did not sufficiently allege that Defendants/Appellees unlawful conduct caused them to be sufficiently harmed or injured (Opposition Brief at pp.12, 36-37). Plaintiffs/Appellants accept that clarification as a concession that the twelve Tribal Members named Plaintiffs have standing if such harm or injury is otherwise sufficiently alleged in the SAC, which it is.

Plaintiff/Appellants set forth (Opening Brief at pp. 20-23) well-settled state case law that establishes a very low threshold for the injury required for a plaintiff to bring these actions, both as to the amount and type of injury. An "identifiable trifle" is sufficient. Defendants/Appellees do not dispute that analysis. The SAC allegations, accepted as true, far exceed this low threshold.

Among other harms and injuries, the SAC alleges Tribe Members suffered direct financial losses due to Appellees' illegal

gaming activities—financial losses that are traceable *to the dollar* by virtue of Revenue Allocation Plans. As the SAC alleges, pursuant to the Revenue Allocation Plans, Appellant Tribal Members in accordance with federal law and the Revenue Allocation Plan, receive direct distributions of gaming revenue. (AA 419 ¶ 119.) Hence, Appellant Tribal Members "suffer direct and indirect losses from [Appellees'] illegal gaming activity," and the "injury is traceable to each individual [Appellant] by virtue of the Revenue Allocation Plan." (AA 420 ¶ 123.)

As the allegations in the SAC make clear, in accordance with federal law and the Revenue Allocation Plan, portions of the Gaming Revenue are "allocated to [Appellant] Tribes to fund Tribal government operations, general welfare programs, charitable contributions, health insurance, life insurance, educational scholarships, financial assistance, youth summer programs, housing programs, employment opportunities, and per capita cash distributions." (AA at 419 ¶ 118.). Contrary to Defendants/Appellees' misapprehension (Opposition Brief at p.38) – these are not programs available to or rights held in common with the general public – these are programs that are specifically available to Tribal Members because they are Tribal members – the harm is specific, identifiable and traceable. Defendants/Appellees are free to pursue their argument at trial, but their misapprehension of tribal programs is not grounds for rejecting the allegations in the SAC and sustaining demurrer.

There is no merit to Defendants/Appellees' insistence that

Plaintiffs/Appellants Tribal Members "failed to allege 'injury in fact' because it is inherently conjectural whether they would have received more or greater distributions if Tribal members earned greater gaming revenues." (Opposition Brief at 40). Defendants/Appellees' position might otherwise have traction if the SAC alleged Tribal Members *might* receive, *could* receive, or are *eligible* to receive Gaming Revenue generated by Appellant Tribes, but the SAC makes no such allegations. To the contrary, the SAC alleges that Appellant Tribal Members *do* receive direct "distributions of Gaming Revenue" "[p]ursuant to [federal law] and the Revenue Allocation Plans" (SAC ¶ 119; AA 419). These allegations, which the Trial Court was required to accept as true, adequately allege an "identifiable trifle of injury . . . sufficient to withstand a demurrer," *Law Offices of Mathew Higbee v. Expgm't Assist. Servs.* (2013) 214 Cal. App. 4th 544, 554. The Trial Court and Defendants/Appellees may doubt the veracity of the Tribal Members' claims, but that doubt does not justify dismissal on demurrer. It is the Trial Court that engaged in faulty conjecture, however. How plausible is it that a Tribe that routinely distributes revenue from its gaming operations to fund a variety of governmental programs and services that benefit tribal members, to fund non-gaming businesses, and to make per capita distributions to Tribal members, all as mandated by the Indian Gaming Regulatory Act (IGRA) and as set forth in a federally-approved Revenue Allocation Plan, 25 U.S.C. §2710(b)(3); 25 C.F.R. Part 290, would allocate the additional revenue resulting

from the elimination of Defendants/Appellees' cannibalization of that revenue differently? The SAC allegations are sufficient in alleging that the Tribal Members receive less revenue than they otherwise would if Defendants/Appellees did not operate illegal banked games. As discussed in section V(b)(3), below, where the nuisance at issue is a public nuisance *per se,* a separate showing of harm is not required. But if required Plaintiffs/Appellants establish (Opening Brief at pp. 31-34) that the allegations in the (SAC ¶¶ 107–10, AA 417–18) sufficiently allege both that Defendants/Appellees' public nuisance is specially injurious to the Tribal Members and the Tribal Members also suffer the same harms suffered by the public. Defendants/Appellees do not dispute Plaintiffs/Appellants' analysis (Opening Brief at p. 32) as to what is required for the harm or injury to be "specially injurious."

The allegations of the harm suffered by the twelve Tribal Members as alleged in the SAC being sufficient, the Tribal Members have standing to bring their claims in this litigation because they qualify as persons under the applicable statutes.

3. PLAINTIFF/APPELLANT BUSINESS ENTITIES ARE "PERSONS" WITH STANDING UNDER THE APPLICABLE CALIFORNIA STATUTES.

The SAC includes, as party plaintiffs, ten Business Entities, five of which are created under tribal law (SAC ¶¶ 16–19, 24, AA 404–05), and five of which are created under California law. (SAC ¶¶ 20–23, 25, AA 404–05). The SAC alleges that the Business Entities "operate in the same manner as other corporations, limited liability companies, and unincorporated entities" "[a]side from their affiliation with or being operated by members of federally recognized Indian tribes," (SAC ¶ 26, AA 405), which the Trial Court should have—but did not—accept as true when ruling on Defendants/Appellees' demurrer.

Defendants/Appellees' assert that the Plaintiff Business Entities are "arms of the Tribes" and therefore cannot qualify as "persons" on the same grounds and principles that the two Plaintiff Tribes cannot qualify as "persons". According to Defendants/Appellees, the latter proposition is established by "judicially noticed facts" contained in "judicially noticed materials" in the form of filings from other cases (Opposition Brief at 32, 35–36). In support of their request for judicial notice, Appellees requested judicial notice of selected court filings, government filings, and webpages (collectively, the "Documents"). Defendants/Appellees assert that the effect of the Documents'

contents is to establish all elements of the five-factor "arm-of-the-tribe test" set forth in *People v. Miami Nation Enterprises.*, (2016) 2 Cal. 5th 222. That is far from correct. Although the Trial Court granted Defendants/Appellees' request for judicial notice, it did so only after explaining "the limited purposes for which a court may take judicial notice of a court record," which includes limiting courts to taking judicial notice of the "*existence* of judicial opinions and court documents." (AA 597 (quotation marks omitted) (quoting *People v. Harbolt* (1997) 61 Cal. App. 4th 123, 126–27).) Moreover, the Trial Court stated that the Order granting judicial notice is "limited by the[se] . . . precepts," *id.*, indicating that it *did not* take judicial notice of the matters asserted in the Documents as Defendants/Appellees claim.

The Trial Court was correct to limit the granting of judicial notice to only the Documents' existence. "Judicial notice may not be taken of any matter unless authorized or required by law," Cal. Evid. Code § 450, which means the only "[m]atters that are subject to judicial notice are listed in Evidence Code [S]ections 451 and 452," *Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal.*, (2016) 245 Cal. App. 4th 821, 835. "Further, although the *existence* of a document, such as a document recorded in the official records of a government body, may be judicially noticeable, the truth of statements contained in the document and their proper interpretation are not subject to judicial notice." *Id.* at 836 (emphasis added). This rule applies with special force at the demurrer stage, which "tests the sufficiency of the complaint as a

matter of law; as such, it raises only a question of law." *Berg & Berg Enterprises, LLC v. Boyle*, (2009) 178 Cal. App. 4th 1020, 1034. Indeed, "[t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." *Fremont Indem. Co. v. Fremont Gen. Corp.*, (2007) 148 Cal. App. 4th 97, 114; *see also, e.g.*, *Middlebrook-Anderson Co. v. Sw. Sav. & Loan Assn.*, (1971) 18 Cal. App. 3d 1023, 1038 ("To go beyond notice of the existence of a document to an interpretation of its meaning constitutes improper consideration of evidentiary matters.").

In view of the foregoing principles, Defendants/Appellees' assertion that the Trial Court took judicial notice of the facts contained in the Documents is inaccurate, and if true, would be additional grounds for vacating the Trial Court's decision. Thus, the Trial Court could not take judicial notice of the Documents' disputable content and interpretation as establishing that Appellant Business Entities are arms of the Tribe. To conclude otherwise would allow the Trial Court to "go beyond [taking] notice of the existence of a document to an interpretation of its meaning [, which] constitutes improper consideration of evidentiary matters." *Middlebrook-Anderson Co.*, 18 Cal. App. 3d at 1038. *See also Fremont Indem. Co.*, 148 Cal. App. 4th at 114 (stating that the hearing on a demurrer must not be transformed into a "contested evidentiary hearing through the guise of having

the court take judicial notice of documents whose truthfulness or proper interpretation are disputable").

Plaintiffs/Appellants establish (Opening Brief at pp. 23-26) that the "arm of the Tribe" analysis entails a "a five-factor test that considers (1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity." *People v. Miami Nation Enterprises* (2016) 2 Cal. 5th 222, 236. In adopting this modified test, the California Supreme Court "emphasize[d] that no single factor is universally dispositive . . . [and] [e]ach case will call for *fact-specific inquiry into all the factors*." *Id.* at 248 (emphasis added). Indeed, the doctrine "must not become [one] of form over substance[;] [t]he ultimate purpose of the inquiry is to determine 'whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe.'" *Id.* at 250 (quoting *Allen v. Gold Cty. Casino*, (9th Cir. 2006) 464 F.3d 1044, 1046). Moreover, five of the Plaintiff Business Entities were created under California law, not tribal law, a factor that weighs heavily against the entity being an arm of the Tribe, and factors 2 through 5 of this analysis involve issues of disputed fact that cannot be resolved on a demurrer.

In further embrace of the notion that the Trial Court concluded the Plaintiff Business Entities are "arms of the Tribes," Defendants/Appellees assert that the Trial Court did not err because the SAC "does not allege any facts establishing that

[Plaintiff Business Entities] were *not* mere arms of the tribes" (Opposition Brief at p.36). Defendants/Appellees further insinuate that Plaintiff Business Entities are required to present "facts in the complaint" pertaining to "the five-factor test." These propositions are based on the incorrect assumption that Plaintiff Business Entities must overcome a presumption that they are "arms of the Tribes." But there is no such presumption, and Defendants/Appellees provide no support for it. The Trial Court erred in so concluding, such that its decision should be reversed and the case remanded. Because these fact questions were not, and cannot be, resolved on demurrer, the Trial Court erred in sustaining the Defendants/Appellees' demurrers on these grounds.

4. THERE IS NO AUTHORITY TO SUGGEST THAT THE CALIFORNIA LEGISLATURE INTENDED TO DEPRIVE PLAINTIFF/ APPELLANTS OF THE RIGHT TO SEEK RECOURSE IN CALIFORNIA COURTS FOR PUBLIC NUISANCES AND UNFAIR TRADE PRACTICES.

As set forth above, interpretation of the statutes at issue should reflect the intent of the Legislature. Plaintiff/Appellants reason (Opening Brief at pp. 23-26), that applying traditional canons of statutory construction, the Indian canon of construction, and concepts of Constitutional prohibitions to excluding tribes from those able to seek redress for unfair trade practices and public nuisance in state courts all support inclusion as proper plaintiffs with standing to bring such claims. There is no evidence that the California Legislature

intended to exclude Indian Tribes by use of "persons" and "organizations of persons" in the pertinent statutes. To the contrary, the plain language suggests the Legislature intended that any person or entity, without regard to their status as, or affiliation with, an Indian Tribe, harmed by unfair trade practices, or "specially injured" by a public nuisance, may seek redress in California courts. Defendants/Appellees fail to respond to this analysis in their Opposition Brief.

Plaintiffs/Appellants establish (Opening Brief at p.26) that the Trial Court erred in speculating that the Legislature would have expressly included Indian Tribes in its definition of "person" (Opinion, AA 597). Plaintiff/Appellants note that such inclusion would be redundant because Plaintiff Tribes, Tribal Members and Business Entities each and all fall within the plain meanings of the definitions of "persons" and "organizations of persons." Plaintiffs/Appellants further note that the Legislature could have expressly excluded Indian Tribes. It did not. The Trial Court erred by reading such exclusionary language into the statutes at issue here. Defendants/Appellees fail to respond to this analysis in their Opposition Brief.

In reviewing each of the four types of Plaintiffs/Appellants and whether they possess standing in this case, neither the Trial Court nor any Defendant/Appellee could articulate a purpose or intent of the California Legislature to deprive any Plaintiff/Appellant of the ability to seek redress in California state courts for grievances sounding in unfair trade practices or public

nuisance. Nor could the Trial Court nor any Defendant/Appellee cite to any language, legislative history or other extrinsic evidence to support such legislative intent.

B. THE TRIAL COURT ERRED IN FINDING THAT THE SAC DOES NOT ALLEGE THE HARM REQUIRED BY THE PUBLIC NUISANCE STATUTE.

Regarding the Plaintiffs/Appellants' public nuisance claims, in addition to challenging whether Plaintiffs/Appellants are persons, or organizations of persons, eligible to bring public nuisance claims, addressed in Section V(A)(2) above, the Trial Court erred in finding that the SAC fails to allege the harm required to state a claim for public nuisance. Plaintiffs/Appellants establish (Opening Brief at pp. 28-31) that the Trial Court committed legal error in requiring Plaintiffs/Appellants to show that they suffer both the same harm as the general public, and they suffer special harm, caused by Defendants/Appellees' unlawful banked card games. Plaintiffs/Appellants establish (Opening Brief at pp. 31-34) that even if allegations of both harms are required, the SAC makes the requisite allegations. The Trial Court erred. Defendants/Appellees do not address the Plaintiffs/Appellants' analysis that they need not allege or prove they suffer the same harm as the general public. Instead, Defendants/Appellees dispute whether the allegations of such harm are sufficient (Opposition Brief at pp. 43-49) and assert that the allegations of special harm are too conjectural (Opposition

Brief at pp. 49-50). Neither is correct. But even if Plaintiffs/Appellants are required to show that they suffer both the same harm as the general public and special harm, the allegations in the SAC are sufficient.

1. NO ALLEGATION OF PUBLIC HARM IS REQUIRED BECAUSE DEFENDANTS/APPELLEES' ILLEGAL BANKED GAMES ARE A PUBLIC NUISANCE *PER SE* UNDER CALIFORNIA LAW.

Plaintiffs/Appellants establish (Opening Brief at pp. 28-31) that the Trial Court erred in applying a same-but-different-harm standard to determine whether Plaintiffs/Appellants allege the requisite harm in connection with their nuisance claims—a standard that contradicts binding authority. A plaintiff does not need to prove that it suffered the same harm as the general public to have standing to bring a public nuisance claim; it need only allege to have suffered a special harm—in other words, a harm different from what the general public suffered. Defendants/Appellees assert otherwise (Opposition Brief at p.44), but they provide no analysis, applicable case law or authority to support their assertion.

Plaintiffs/Appellants establish (Opening Brief at pp. 29-30) that they need not even allege public harm because California law already establishes that illegal gambling houses are public nuisances, *per se*:

> Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, . . . and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance . . . are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(Penal Code § 11225(a)(1).) "As a nuisance *per se*, no proof beyond the fact of the actual existence of the nuisance is required." *City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 385; *Beck Dev. Co.*, *supra*, 44 Cal.App.4th at p. 1206 ("Where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made.").) Thus, under this doctrine, and applying the standard on demurrer, "no [allegation] beyond the fact of the actual existence of [Defendant's illegal gambling] is required." (*City of Costa Mesa*, *supra*, 11 Cal.App.4th at p. 385; accord, e.g., *Beck Dev. Co.*, *supra*, 44 Cal.App.4th at p. 1206.). Defendants/Appellees assert that the per se nuisance only excuses Plaintiffs/Appellants from establishing the existence of the nuisance, and not the public harm (Opposition Brief at p. 46), but that assertion is both nonsensical – of course the existence of the nuisance must be alleged - otherwise the court's deliberation is only existential and not justiciable - and inconsistent with the undisputed case law cited by Plaintiffs/Appellants.

2. THE SAC SUFFICIENTLY ALLEGES THAT PLAINTIFFS/APPELLANTS SUFFERED THE SAME HARM AS THE GENERAL PUBLIC AND WERE SPECIALLY INJURED.

The SAC alleges that Plaintiffs/Appellants suffer from the same harm as the general public (SAC ¶ 126, 420–21), alleges/informs that the California Legislature has declared that illegal banked card games are "inimical to the public health, safety welfare and good order" (SAC ¶ 127, AA 421), alleges that the Defendants/Appellees' nuisances create conditions in their communities that are harmful to the public's health, safety and welfare (SAC ¶ 131, AA 421), and expressly alleges that "Plaintiffs, including the Tribe Members, are part of those communities and also suffer from this public harm" (SAC ¶ 128; AA 421). Defendants/Appellees engage in a fact- based contradictory analysis by arguing that the "remoteness" of the Plaintiff Tribes' Indian lands renders the allegations in the SAC to be untrue, and that the ten Tribe Members, who reside in the same communities where the Defendants cardrooms are located live in municipalities other than those where the Defendant card rooms are located (Opposition Brief at 46-48). Whether the remoteness of Plaintiff Tribes' Indian lands is too remote for Plaintiff Tribes to allege common injury with the general public is incapable of being resolved on demurrer – Defendants/Appellees are free to assert their baseless allegation at trial. Whether Tribe

Members' status of residing over the lines drawn in the sand in the myriad of municipalities that comprise Ventura, Los Angeles, Riverside and San Diego Counties excludes them from suffering the same harm as the general public is also incapable of being resolved on demurrer - Defendants/Appellees are free to assert their baseless allegation at trial. The SAC allegations are sufficient.

The SAC alleges that the nuisances are specially injurious to the Plaintiffs/Appellants, (SAC ¶ 136, AA 421–22 ("will continue to cause harm different from and in addition to the type of harm suffered by the general public"). The SAC's Paragraph 136 (AA 421–22) expressly incorporates Section X of the SAC. Section X is comprised of 14 allegations (SAC ¶¶ 110–23, AA 418–19) that spell out how the nuisances cause a loss of gaming revenues, which in turn causes a loss of funding to governmental operations and social programs upon which the Tribe Members and Business Entities rely, and a loss of direct payments pursuant to the Appellant Tribes' federally-approved Revenue Allocation Plans. The SAC, at Paragraph 119 (AA 419), alleges, "distributions of Gaming Revenue *are made* directly to [Appellant] Tribal Members." (emphasis added). The SAC sufficiently alleges that Plaintiffs/Appellants suffered specially injurious harms that are not suffered by the general public. The SAC expressly alleges that the Tribe Members and Business Entities receive funds pursuant to federally-approved Revenue Allocation Plans, and that the amount they receive is reduced because of Defendants/Appellees'

unlawful conduct. (SAC at ¶¶ 119–22, AA 419–20.) Again, the Trial Court erred.

Defendants/Appellees fail to explain why or how the allegations that the public nuisance is specially injurious to Plaintiffs/Appellants are insufficient other than to simply restate (Opposition Brief at 49) the Trial Court's erroneous analysis that the SAC fails to connect the illegal gaming conducted by the Defendants to an actual loss of revenue and other injuries. As discussed in the Opening Brief at pp.12-13, the SAC allegations are sufficient to establish that each and all four and are to be accepted as true that each and all four classes of Plaintiffs/Appellants suffer special injury stemming from the loss of revenue cannibalized by Defendants/Appellees' wrongful conduct.

C. THE TRIAL COURT ERRED IN REJECTING DECLARATORY AND INJUNCTIVE RELIEF FOR DEFENDANTS/APPELLEES' VIOLATION OF ARTICLE IV, SECTION 19(e) OF THE CALIFORNIA CONSTITUTION.

The SAC seeks declaratory and injunctive relief (SAC at ¶¶ 171–78, AA 426–27) pursuant to Civ. Code § 1060:

> Any person . . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties;

and pursuant to Bus. & Prof. Code § 17202:

> Any person . . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties.

Plaintiffs/Appellants establish (Opening Brief at pp. 34-39) that the Trial Court's conclusion that Article IV, § 19(e) is "not self-executing" is incorrect as a matter of law, contrary to the decision in *H.E.R.E.*, and not a basis for denying injunctive or declaratory relief. Plaintiffs/Appellants (Opening Brief at 35) properly cite *Katzberg v. Regents of Univ. of California* (2002) 29 Cal.4th 300, 307, where the California Supreme Court stated:

> As we observed more than a century ago, **"[e]very constitutional provision is self-executing to this extent, that everything done in violation of it is void."**

(emphasis added.) Despite this clear language and the Court's use of "every" in qualifying the scope of its ruling, Defendants/Appellees incorrectly assert (Opposition Brief at p.50) that the Plaintiffs/Appellants concede that Article IV, Section 19 is not self-executing, while acknowledging that Plaintiffs/Appellants rely on *Katzberg*'s holding that every provision is self- executing to the extent that actions done in violation of Constitutional provisions are void.

Defendants/Appellees insist (Opposition Brief at pp. 53-54) that *Katzberg* held that only some, not all constitutional provisions are self-executing to the extent that an action in violation of a constitutional provision is void. That analysis contradicts the unambiguous language in *Katzburg*.

Defendants/Appellees also attempt to diminish the clear holding in *H.E.R.E.* that the California Constitution clearly prohibits cardrooms from operating banked games:

> Similarly, "the type" of casino "operating in Nevada and New Jersey" presumably refers to a gambling facility that did *not* legally operate in California; something other, that is, than "the type" of casino "operating" in California. The type of casino then operating in California is what has commonly been called a "card room" or "card club," a type that did *not* offer gaming activities including banking games and gaming devices. A California card room or card club was *not* permitted to offer gaming activities in the form of: (1) lotteries; (2) banking games, whether or not played with cards; (3) percentage games, whether or not played with cards; (4) slot machines; or (5) games proscribed by name, including twenty-one-all of which were prohibited at least by statute.

21 Cal.4th at 605(citations omitted). Applying the California State Supreme Court's decisions in both *Katzburg* and *H.E.R.E.*, it is clear that the operation of banked card games off of Indian lands is void as a matter of the self-execution of Article IV, Section 19(e). Defendants/Appellees attempt to cite to a lower court decision, *Bautista v. State of California* (2011) 201 Cal.App.4th 716, to contravene Plaintiffs/Appellants' analysis (Opposition Brief at pp.

55-56), but such court decisions are inconsistent with the State's highest court's analysis and holdings.

Defendants/Appellees also attempt to distinguish *H.E.R.E.* as a writ action in contrast to Plaintiffs/Appellants claims for declaratory and injunctive relief (Opposition Brief at p.53). That is a distinction without a difference – both the Plaintiffs in *H.E.R.E.*, and the Plaintiffs in this litigation are seeking to invoke the equitable jurisdiction of this Court to enjoin activities that violate Article IV, Section 19 of the California Constitution.

Plaintiffs/Appellants establish (Opening Brief at pp. 6-9) that those provisions in the Gambling Control Act and in the Penal Code that Defendants/Appellees contend allow banked games to be conducted off of Indian lands in commercial cardrooms controlled by Defendants/Appellees (*see* Penal Code § 330.11, Bus. & Prof. Code § 19984(a) do not authorize games to be conducted in a manner in violation of Article IV, Section 19. Defendants/Appellees fail to address or respond to that analysis.

Plaintiffs/Appellants establish (Opening Brief at pp. 38-39) that the Trial Court erred by concluding "There is no basis for declaratory relief where only past wrongs are involved," ignoring that the SAC alleges that Defendants/Appellees' conduct is ongoing and continuing. Defendants/Appellees fail to address or respond to that analysis.

Defendants/Appellees argue (Opposition Brief at 56-58) that equitable relief is not available because Plaintiffs/Appellants are attempting to enforce a penal law. According to

Defendants/Appellees, "equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and *in the absence of a legislative declaration to that effect*, courts should not broaden the field in which injunctions against criminal activity will be granted." (Opposition Brief at p.57) (emphasis added) (quotation marks omitted) (quoting *People v. Lim* (1941) 18 Cal. 2d 872, 880). To further support their position, Defendants/Appellees cite Section 3369 of the Civil Code, which provides that "[n]either specific nor preventative relief can be granted . . . to enforce a penal law, *except in a case of nuisance or as otherwise provided by law*." Cal. Civ. Code § 3369 (emphasis added). Defendants/Appellees simply ignore that the Penal Code expressly authorizes courts to award injunctive relief when, as here, the plaintiff seeks to enjoin illegal gambling operations.

Consistent with Section 3369 of the Civil Code, Section 11225 of the Penal Code declares "[e]very building or place used for the purpose of illegal gambling, . . . and every building or place in or upon which acts of illegal gambling . . . are held or occur, is a nuisance" and mandates that the same "*shall be enjoined, abated, and prevented, and for which damages may be recovered*." (Opening Brief at 29–30) (emphasis added) (quoting Penal Code § 11225(a)(1)). Likewise, Section 11226 of the Penal Code states when "there is reason to believe that a nuisance," including illegal gambling, "is kept, maintained, or is in existence in any county, . . . *any citizen of the state* resident [sic] within the county in his or her own name *may . . . maintain an action in equity to abate and*

prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it." Penal Code § 11226 (emphasis added). In other words, any resident of the county in which a business is offering illegal gambling may bring an action for injunctive relief against the business. *Id.*

In addition to Section 11225, the Penal Code also outlines the relief courts are authorized to award in an action to abate illegal gambling, including injunctive relief. For example, Section 11227 of the Penal Code mandates entry of a temporary restraining order when "the existence of a nuisance is shown . . . to the satisfaction of the court or judge thereof." Penal Code § 11227(a). Likewise, Section 11230 of the Penal Code provides that when "the existence of a nuisance is established . . . , *an order of abatement shall be entered as part of the judgment in the case*, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution." *Id.* § 11230(a)(1) (emphasis added). These broad remedies, all of which are set forth in the Penal Code, show that the California Legislature vested trial courts with broad authority to abate illegal gambling operations in actions brought by private plaintiffs.

Here, the SAC contains numerous paragraphs setting forth in detail how Defendants/Appellees disregard applicable laws and regulations and offer illegal gambling. (¶¶ 75–100, AA 411–16). The SAC also alleges that Appellee Cardrooms' illegal gaming operations are located in four counties—Los Angeles, San Diego, Riverside, and Ventura, and at least one Appellant resides in each such county, (*see* ¶¶ 2-19, 27–38, AA 401–06). The SAC further alleges that Defendants/Appellees TPPs are "individuals and companies that contract with [Appellee] Cardrooms to bank card games *offered in* [*Appellee*] *Cardrooms' establishments*," (¶ 39, AA 406) (emphasis added), such that they are conducting acts of illegal gambling in these same four counties. Lastly, the SAC expressly requests injunctive relief in connection with Defendants/Appellees' violation of Section 11225 of the Penal Code (¶¶ 135, 141–146, AA 421–23). The twelve Plaintiff/Appellant Tribe Members are California citizens who reside in the counties in which Defendants/Appellees conduct their illegal gambling, Plaintiffs/Appellants are authorized to seek injunctive relief and all other remedies provided for in Sections 11225 through 11227 and 11230 of the Penal Code.

Plaintiffs/Appellants establish the Trial Courts' error in dismissing Plaintiffs/Appellants claims for declaratory and injunctive relief. Such relief is authorized as seeking equitable redress for violations or Article IV, Section 19 of the California Constitution. Separately, such relief is authorized by the Penal Code. Defendants/Appellees fail to respond to much of

Plaintiffs/Appellants analysis , and the "self-executing" analysis embraced by the Trial Court and advanced by Defendants/Appellees is unavailing.

D. THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFF/APPELLANT CHUMASH TRIBE FAILED TO ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP AND PROSPECTIVE ECONOMIC ADVANTAGE.

Counts Seven and Eight of the SAC, pled in the alternative, sought recovery for Defendants/Appellees' "tortious interference with the Plaintiff Santa Ynez Band of Chumash Indian's contractual relations (Count Seven) and economic advantage (Count Eight)". Both are recognized causes of action in California. Plaintiffs/Appellants cite California case law (Opening Brief at pp. 39-41) that, in order to survive demurrer, the plaintiff need only allege a so-called "prima facie tort" by showing the defendant's awareness of the economic relationship, a deliberate interference by conduct that was wrongful by some legal measure, and the plaintiff's resultant injury. Plaintiffs/Appellants establish that an act is independently wrongful if it proscribed by a constitutional, legal standard. Plaintiffs/Appellants identify and allege the elements of the causes of action to include: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the

relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action. Defendants/Appellees do not dispute this case law or analysis in their Opposition Brief.

Rather, Defendants/Appellees embrace (Opposition Brief at pp.58-63) that the faulty analysis of the Trial Court that the factual allegations in the SAC are insufficient because they do not allege that Defendants/Appellees intended to disrupt and did disrupt the Chumash Tribes and the State's contractual relationship. Specifically, Defendants/Appellees incorrectly cite (Opposition Brief at p. 61) a recent federal District Court decision, *Yocha Dehe Wintun Indians v. Newsom,* 2019 WL 2513788, which was affirmed by the Ninth Circuit Appeals Court prior to the belated submission of the Opposition Brief, (9th Cir. Dec. 3, 2020) 830 Fed.Appx. 549, for the proposition that the cardrooms cannot interfere with tribal/state gaming compacts because the compacts do not obtain an affirmative obligation of the State to take enforcement action against activity that violates the exclusivity granted to Tribes in Article IV, Section 19. The Ninth Circuit acknowledged Tribes' exclusivity to banked card games, 830 Fed.Appx. at 551 and the District Court expressly noted that the Tribes agreed to the provisions therein "in consideration of the exclusive rights enjoyed by the Tribe" 2019 WL 2513788 at *4.

The Ninth Circuit reasoned that the compact's consideration, in part, for such exclusivity, does not rise to the level of imposing

or create an affirmative duty of the State to exercise its discretionary prosecutorial discretion to take action against recalcitrant gaming operations off Indian lands. 830 Fed.Appx. at 551. That the compact does not impose such a prosecutorial duty on the State is irrelevant to the allegations here. Defendants/Appellees were aware that the consideration of the Tribe's obligations under the compact was expressly based on the Tribe's exclusivity, and they deliberately and intentionally acted to disrupt the Tribes' enjoyment of that exclusivity, which allegations are sufficient to survive demurrer.

Plaintiffs/Appellants note that Defendant/Appellee Flynt, the lead Defendant/Appellee here, in a separate proceeding, expressly acknowledged "the exclusive rights" of Indian Tribes to offer banked card games in seeking to have the amendments to Article IV, Section 19 of the State Constitution declared unconstitutional in violation of the United States Constitution. *Flynt v. California Gambling Control Comm.* (2002) 104 Cal.App.4th 1125, 1145.

Defendants/Appellees try to discount the glaring inconsistencies between Flynt's prior representations to California courts and those representations made in the instant litigation, but they cannot and should not be discounted, especially in this context where the Chumash Tribe is alleging that Flynt, amongst the other Defendant cardroom operators, was acutely aware that his actions of engaging in banked card games was cannibalizing the Tribe's gaming revenue and disrupting the Tribe's exclusivity.

The other pleading requirements are all met in that damages are properly alleged (SAC at ¶¶ 185, 193, AA 427–28), as is the causation by Defendants/Appellees' unlawful and unfair conduct. (SAC at ¶¶ 186, 194, AA 427–28.) The Trial Court erred in dismissing Plaintiff/Appellant Chumash Tribe's claims for tortious interference with a contractual relationship and prospective economic advantage.

VI. CONCLUSION

Plaintiffs/Appellants ask this Court to reverse and remand the case to proceed on the merits. The Trial Court's rulings, if allowed to stand, will create the untenable situation where Defendants/Appellees' illegal gaming can continue unabated while they continue to harm Plaintiffs/Appellees in the form of lost revenue (diverting tens of millions of dollars away from Tribal Treasuries), in causing essential health, housing, education and social programs to be underfunded, and in causing lost income, business opportunity and employment opportunity. Affirmance of the Trial Court would signal to Tribes throughout California that its Courts are not available to them, their tribal members and their business entities for the proper redress of their grievances sounding in unfair trade practices, public nuisance, or for Defendants/Appellees' violation of Article IV, § 19(e) of the State Constitution. The premise that Plaintiffs/Appellants will be denied their requested relief without even considering the merits of their claims is untenable. When done in the context here, of being deprived of their day in court because they are Indians (or in

the case of the Business Entities, businesses owned by Indians), is unconscionable.

Through the analysis in the Opening Brief and extended and clarified above, and the pleadings filed in opposition to demurrers below, Plaintiffs/Appellants establish that the Trial Court erred: (1) in finding that neither Plaintiffs/Appellants Rincon Band of Luiseno Indians nor Santa Ynez Band of Chumash Indians, nor the ten Plaintiffs/Appellants Business Entities, are "persons" with standing under applicable California statutes; (2) in finding that the twelve Plaintiffs/Appellants Tribe Members failed to allege harm or injury sufficient to pursue their claims sounding in unfair trade practices and public nuisance; (3) in finding that the SAC does not allege the harm required by the applicable public nuisance statute; (4) in rejecting declaratory and injunctive relief for Defendants/Appellees' violation of Article IV, § 19(e) of the California Constitution; and (5) in concluding that Plaintiff/Appellant Chumash Tribe failed to properly allege claims for tortious interference with a contractual relationship and prospective economic advantage.

This case is on appeal from demurrer, where all allegations in the SAC are deemed to be true. Plaintiffs/Appellants are only seeking their day in court on the merits. Defendants/Appellees are free to challenge the veracity of Plaintiffs/Appellants' claims as alleged, but not on demurrer. Any one of the above errors, standing alone, warrants reversal of the Trial Court's Judgment and remand with instructions to proceed on the merits. As

demonstrated, this Court should rule in favor of Plaintiffs/Appellants on each and all of the issues presented in this appeal.

Dated: August 6, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing Respondents' Brief was produced on a computer in 14-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief, is 9,779 words, exclusive of the matters that may be omitted under rule 8.204(c)(3).

Dated: August 6, 2021

CROWELL LAW OFFICE-
TRIBAL ADVOCACY
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s/ Scott Crowell
Scott Crowell

Counsel for Appellants

CERTIFICATE OF SERVICE

I, Tannya Hurley, am a citizen of the United States, am over the age of eighteen (18) years, and not a party to the within-entitled action. My business address is Crowell Law Office-Tribal Advocacy Group, 627 B. Street, Cheney, WA 99004.

On August 6, 2021, I served the within document on all counsel of record via the Court's electronic filing system, operated by TrueFiling.

On the same date, I served the within document via email to the Hon. Timothy Taylor, San Diego County Superior Court at Appeals.Central@SDCourt.CA.Gov and also by first class U.S. mail:

San Diego County Superior Court, 330 West Broadway, San Diego, CA 92101.

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

Executed on August 6, 2021, at Cheney, WA.

Tannya Hurley

Tannya Hurley