#10 Gabrielino v. Stein BC361307 February 26, 2008
Tentative Ruling on Motion to Enforce Settlement

Deny. Defendants Jonathan Stein ("Stein"), Law Offices of Jonathan Stein ("Stein"), and Santa Monica Development Company ("SMDC"), collectively, "defendants," move to enforce what they believe to be a settlement agreement between SMDC and Stein, on the one hand, and "Gabrielino-Tongva Tribe" on the other. (See, *Motion*, Ex. H.) From the recitals of that document, it is clear that the defendants believe they have an enforceable settlement between them and "Gabrielino/Tongva Tribe a California State Recognized Indian Tribe," the plaintiff in BC361307, hereinafter referred to as "this action" (to distinguish it from SC091644, hereinafter, "the related case").

A. Key Undisputed Facts. From the overly-inclusive record submitted by the parties, the court finds the following to be undisputed. (1) The State Legislature "recognize[d] the Gabrielinos as the aboriginal tribe of the Los Angeles Basin...." (*Opposition*, Ex. 8.) (2) Legislative recognition, at least in the form of Exhibit 8, confers no legal rights, duties or obligations upon the Gabrielinos, nor does the Legislature therein recognize the Gabrielinos as a legal entity capable of acting through a tribal council, nor does the Legislature recognize the Gabrielinos as an unincorporated association, or any other kind of legal "person" with attendant rights, including the right to sue and the burden to be sued. Stated most plainly: Joint Resolution 96 (Ex. 8), does not endow the Gabrielinos with legal "personhood."

(3) The "Gabrielino-Tongva Tribal Nation, a [self described] tribal sovereign for the Gabrielino aboriginal tribe of Los Angeles Basin [etc]" (hereinafter, "the Gabrielino aboriginal tribe") entered into a "Development Agreement" (herein, "the February 2001 agreement") dated February 1, 2001, with St. Monica Development Company. (*Motion*, Ex. I.) Nothing in the February 2001 agreement proves, or tends to prove, that the Gabrielino aboriginal tribe was an unincorporated association, or, for that matter, that the Gabrielino aboriginal tribe was a legal-fictional entity created by statute or otherwise endowed with legal rights and privileges. In other words, it is not self evident that the party to the February 2001 agreement was the same entity recognized by the Legislature, or that the contracting party possessed the legal capacity to enter into a binding contract.

(4) SMDC sued "Gabrielino/Tongva Nation" (hereinafter, "GTN") in the Santa Monica (West District) court of Los Angeles ("the related case"), ***as "a California unincorporated association***." The related case asserts causes of action on behalf of SMDC against an unincorporated association (GTN) arising out of the February 2001 agreement, despite the fact that GTN, an allegedly unincorporated association, is not named as a contracting party in the February 2001 agreement. Again, it is not self evident that the unincorporated association defendant in the related case is the same entity as is named as a contracting party in the February 2001 agreement or that the unincorporated defendant in the related case is the same entity as is named in the Joint Resolution.

(5) A right to attach order (*Motion*, Ex. 35) was issued in the related case on March 21, 2007 in favor of SMDC and against "Gabrielino-Tongva Tribe," "an unincorporated association." (6) The "Gabrielino-Tongva Tribe, a California Indian Tribe historically known as San Gabriel Band of Mission Indians" did not "exist" as an unincorporated association until the "Statement by Unincorporated Association" was filed on behalf of that entity with the Secretary of State on December 18, 2006, almost 6 years after the February 2001 agreement was dated and signed by the contracting parties.

(7) On or about October 30, 2007, "Gabrielino-Tongva Tribe," on one hand, and SMDC, on the other, purported to settle the reciprocal claims of SMDC and the plaintiff in this action, Gabrielino/Tongva Tribe. ("The settlement agreement," *Motion*, Ex. H.) The specific issue joined by the parties is whether the entity purportedly agreeing to the settlement agreement is the same entity named as plaintiff in this action. The evidence offered by SMDC fails to convince the court that there is an identity of parties, and therefore that the plaintiff in this action should be bound by the purported settlement. In addition, as we demonstrate below, the issue as presented by SMDC overlooks the essential question of both the nature and legal power of the party purporting to contract for the Gabrielinos (in connection with the February 2001 agreement).

B. Jurisdiction. Both sides agree not only that this court should abstain from determining who has the power to enter into contracts on behalf of the Gabrielino aboriginal tribe, but also that the court is utterly without jurisdiction to do so. "This court cannot declare that GT Tribe or GT Nation is the sole representative of the historic Gabrielino Tribe." And, "the court cannot abrogate the California Legislature's prerogative to decide which political organizations should form a government-to-government relationship with California." (*Motion*, 6:7 – 11.) "Also in issue is whether this state court has jurisdiction to resolve what is essentially an internal tribal dispute, whether because of the Abstention Doctrine... whether because the Tribe is a sovereign whose internal affairs are not justiciable, or otherwise." (*Opposition*, 14:7 – 9.)

The court is in full agreement with the contention of the parties that it is without jurisdiction to decide who may rightfully bind the Gabrielinos (assuming any person or entity can do so before the Gabrielino Tribe has obtained federal recognition). But that question, as noted below, is central to a determination of the real question: Whether the Gabrielinos, or any entity, including an unincorporated association, had the legal power to enter into contracts, including the February 2001 agreement, and or to sue and be sued for alleged breaches of the February 2001 agreement.

SMDC's argument is premised on the assumption that the Gabrielino tribe can only act through its "tribal council," yet SMDC fails to provide authority for the court to conclude that the Gabrielinos can or should act through a "tribal council." Moreover, there is no authority offered for the court to determine what legal powers, if any, the supposed Gabrielino tribal council possesses particularly where, as here, the Gabrielinos, while recognized by this State as "an aboriginal group," have not been accorded federal recognition as an aboriginal tribe. Presumably, federal recognition would endow the Gabrielinos with enumerated legal rights, among others, the right to enter into contracts

(and to bring an action in its own name). Again, there is no evidence that State recognition, as reflected in Joint Resolution 96, conferred any such legal rights, privileges or immunities.

C. No Enforceable Contract. From this record, the court is inclined to conclude that one of the parties to the February 2001 agreement had no legal status and no legal capacity to enter into a contract. Clearly, the entity that entered into the February 2001 agreement with SMDC was neither an unincorporated association—the unincorporated association came into existence almost 6 years after the agreement was signed—, nor a federally recognized aboriginal group with all attendant powers conferred (presumably) under federal law.

Moreover, whatever entity the State Legislature sought to recognize is not self-evidently the organization that entered into the February 2001 agreement. Joint Resolution 96 said nothing about (a) the governance or membership of the Gabrielinos as an aboriginal tribe, including its power to act through a "tribal council," or about (b) what powers, if any, were conferred upon, or acknowledged as already in the possession of, the Gabrielinos.

In short, there is no legal authority cited by either side for this court to conclude that the plaintiff in this case, or the defendant in the related case, had the legal power and capacity to enter into contracts and to sue or be sued. It follows from this that the group purporting to have settled with SMDC had no power to compromise any claim of the entity purporting to enter into the February 2001 agreement, especially where, as here, it is not evident that the entity purporting to enter into the agreement had the legal capacity to do so.

This conclusion, of course, calls into question the soundness of the right to attach order to the extent (a) that it was based on the agreement between SMDC and an entity without demonstrable legal existence or the legal capacity to enter into contracts and (b) that it purports to reach property, if any, belonging to the Gabrielinos recognized by the State Legislature, assuming the Gabrielinos, an aboriginal tribe, have the right to hold property in the tribe's name.

D. The February 2001 Agreement. A key question, then, is whether the "Gabrielino-Tongva Tribal Nation, a tribal sovereign for the Gabrielino aboriginal tribe of Los Angeles Basin" had the capacity to enter into the February 2001 Agreement. On the question of the power of the Gabrielino aboriginal tribe to speak for the aboriginal group recognized by Joint Resolution 96, the February 2001 agreement is ambiguous.

Paragraph 6(b) of the February 2001 agreement states that "the Council is recognized by the State of California as the governing body for the state-recognized Indian tribe...." But no legal authority, including a Legislative declaration to that effect, is in evidence. (Ex. W to the Motion does not supply it, despite its reference to a "Tribal Council.")

From the four corners of the document, there is considerable ambiguity about the power of the contracting party to speak for the Gabrielinos: "[T]here is no other body or group of persons claiming to be the Tongva or the legitimate governing body of the

Tongva, **except for** the following Tongva Claimants: San Gabriel group, Westside group, Catalina group and Beaumont group." (February 2001 agreement, ¶6(e).) The same paragraph, subsection (f) also clearly admits the lack of federal recognition: "in the event the Tongva is formally recognized as an Indian tribe by the United States of America."

Finally, the contracting party does not guarantee performance of its promises, but only promises in the February 2001 agreement, to make best efforts "to do all things required, necessary or advisable to insure that: [new members; related or unrelated entities that claim to represent the Tribe; or any successor] shall abide by... the terms and conditions... of this Agreement...." This is clear notice that even if the Gabrielino aboriginal tribe had the capacity to enter into a binding agreement, the prospects of performance were contingent and speculative, subject to "best efforts." Under these circumstances, it is arguable that one enters into such a contract at one's peril.

The unincorporated association created in December of 2006 does not retroactively cure the lack of capacity of the purported Gabrielino aboriginal tribe to enter into a contract in February 2001. First, there is no evidence that the unincorporated association "succeeds" to the contractual obligations of the group that purported to enter that agreement on behalf of the Gabrielino aboriginal tribe. Second, it is not apparent that a defect in capacity of a contracting party can be "cured" by substituting the original party with a pretend successor.

Of course, one may argue that an unincorporated association may come into existence *de facto*, and therefore that the recent (December 2006) unincorporated association filing was no more than an unnecessary formality. The problem here is that the supposed unincorporated association happens to be an aboriginal tribe whose status has never been formalized by federal recognition, whose membership is by birthright (based upon, for example, bloodlines), whose capacity to enter into binding contracts has never been declared by legal finding or fiat, and whose governing body is subject to challenge by competing governing bodies. It is at least arguable that the common law rules for deciding whether an unincorporated association exists are wholly inapplicable. Moreover, the belated filing of the unincorporated association statement is an implied concession that the Gabrielino aboriginal tribe lacked the capacity to enter into the February 2001 agreement.

SMDC tacitly acknowledges the Gabrielino's lack of the incidents of legal personhood: "More recently, in December 2007, Senator Jenny Oropeza... submitted new legislation which would establish a Gabrielino State Indian Reservation and recognize GT Tribe as its governing body." (*Motion*, 6:13 – 15.) In other words, "GT Tribe" currently has no governing body with legal capacity or the other incidents of personhood.

SMDC's arguments further reveal a recognition of the lack of the Gabrielino tribe to enter into binding contracts: "It [the Tribe] acted aggressively to better define its identity and accountability to its drastically reduced membership, and to the larger business community. First, it complied more closely with the Corporations Code requirements for unincorporated associations...." (Motion, 10:12 – 16.) In other words,

there had been no thought to the enforceability of any agreements purportedly entered into on behalf of the Gabrielino aboriginal tribe at the time of the February 2001 agreement. Realizing the problem of its lack of capacity to enter into contracts and or to sue and be sued, efforts to create a legal "person" finally got under way in 2006 in an effort to salvage the viability of its on-going, dubious business and contractual relationships.

But again, there is no legal support for the proposition that ex post facto remediation of a party's lack of capacity will resuscitate an agreement made invalid because of a party's lack of capacity or legal personhood. While the court may have commented at one time that the RTAO applied to the plaintiff in this action and the defendant in the related action, those comments were made before the question of capacity or personhood were ever raised, or, for that matter, before the question of whether there was but one organization was submitted for resolution by the parties. SMDC's argument (*Motion*, 10:18) that "GT Tribe is an unincorporated association" does not make it so for the several reasons discussed above. Arguably, an aboriginal tribe is a sovereign that should be able to act in its own name without the artifice of an unincorporated association to give its acts legitimacy. The February 2001 agreement was unwisely made in (optimistic) contemplation of eventual recognition of the Gabrielino tribe as a sovereign with all attendant powers and privileges, a recognition, as SMDC shows in its motion, that still eludes the Tribe.