

1 KAMALA D. HARRIS
Attorney General of California
2 SARA J. DRAKE
Senior Assistant Attorney General
3 NEIL D. HOUSTON
Deputy Attorney General
4 State Bar No. 168058
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 322-5476
7 Fax: (916) 322-5609
E-mail: neil.houston@doj.ca.gov
Attorneys for Real Parties in Interest
8

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
11 EASTERN DIVISION

13 **CITY OF TEMECULA, a municipal**
14 **corporation,**
Plaintiff,
15
16 v.
17 **PECHANGA BAND OF LUISENO**
18 **INDIANS,**
Defendant.
19

CV 10-07378 DSF (VBKx)
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS
COMPLAINT OF THE CITY OF
TEMECULA AS TO STATE
PARTIES NAMED AS REAL
PARTIES IN INTEREST
[Fed. R. Civ. P. 12(b)(6)]

20 **STATE OF CALIFORNIA,**
21 **ARNOLD SCHWARZENEGGER,**
Governor of the State of California;
22 **EDMUND G. BROWN JR., Attorney**
General of the State of California;
23 **CALIFORNIA GAMBLING**
CONTROL COMMISSION; and
24 **ROES 1-10, inclusive,**
Real Parties in Interest,
25

Date: February 14, 2011
Time: 1:30 p.m.
Courtroom: 840
Judge The Honorable Dale S. Fischer
Trial Date: None Set
Action Filed: October 1, 2010

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

Plaintiff City of Temecula has named the State of California, the Governor and Attorney General of the State of California, and the California Gambling Control Commission (State Parties) as real parties in interest in this litigation concerning a dispute between the City of Temecula (City) and the Pechanga Band of Luiseno Indians (Tribe) arising from the expansion of the Tribe’s gaming activities under the Tribe’s (2006) amended Tribal-State Gaming Compact with the State (Compact).¹

The State’s right to seek relief against the Tribe in the district court is circumscribed by an express provision of the Compact that requires the satisfaction of certain conditions precedent before an action is filed. The State has not complied with these conditions and therefore has no present right of action against the Tribe. Accordingly, the State cannot participate in, and should not be bound by, this action. On this basis, the State Parties request that they be dismissed from this action as real parties in interest.

SUMMARY OF ARGUMENT

Section 9.1 of the Compact requires that all disputes between the Tribe and State arising under the Compact be subjected to a process of meeting and conferring in good faith before resorting to resolution in the United States District Court. The only exception to this requirement is when the circumstances of the dispute are deemed to require immediate injunctive relief. The complaint alleges no such emergency between the State and the Tribe in this matter, nor does the complaint allege that such an emergency exists between the City and Tribe.

¹ The Compact consists of two documents: 1) Tribal State Compact Between the State of California and the Pechanga Band of Luiseno Mission Indians (1999); and 2) Amendment to the Tribal State Compact Between the State of California and the Pechanga Band of Luiseno Indians (2006) (adopted pursuant to Proposition 94, 2008). These documents are attached as exhibits 1 and 2 to the accompanying Declaration of Neil D. Houston in Support of Request For Judicial Notice.

1 The complaint does not allege that the State has provided the Tribe with notice
2 of any dispute arising under the Compact, nor does the complaint allege that the
3 State has engaged in the mandated meet and confer process with the Tribe
4 concerning any dispute associated with the City's claims in this lawsuit.
5 Accordingly, if the State were to file suit against the Tribe alleging any breach of
6 the Compact, including those alleged by the City in this action, the State's action
7 would be subject to dismissal on the basis of the State's failure to satisfy the
8 conditions precedent to its right to bring an action against the Tribe in the district
9 court. On the basis of the facts alleged in the complaint, the State has no present
10 right of action against the Tribe, and therefore is not a real party in interest as to the
11 claims made by the City in this action. The State Parties should be dismissed as
12 real parties in interest.

13 RELEVANT FACTS

14 The following facts are alleged in the City of Temecula's Complaint for
15 Breach of Tribal-State Gaming Compact and For Declaratory and Injunctive Relief,
16 filed October 1, 2010 (Complaint):

17 1. The Tribe "failed to prepare the required TEIR [Tribal Environmental
18 Impact Report] for the increase in Class III gaming devices, and thereby violated
19 and breached the 2006 Amended Compact." (Complaint ¶ 31.)

20 2. The Tribe "failed to negotiate and finalize an Intergovernmental
21 Agreement with the City, and thereby violated and breached the 2006 Amended
22 Compact." (Complaint ¶ 32.)

23 3. "An actual controversy exists between the City and the Tribe in that the
24 Tribe has failed to prepare a TEIR . . . and has failed to negotiate with the City and
25 to finalize an Intergovernmental Agreement." (Complaint ¶ 36.) "Consequently,
26 the City contends that the Tribe has acted in violation of its obligations under the
27 2006 Amended Compact." (*Id.*)
28

1 favorable to the plaintiff. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140
2 (9th Cir. 1996). A matter that is properly the subject of judicial notice may be
3 considered along with the complaint when deciding a motion to dismiss for failure
4 to state a claim. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.
5 1986.)

6 **II. THE STATE PARTIES ARE NOT REAL PARTIES IN INTEREST BECAUSE**
7 **THE COMPLAINT FAILS TO ALLEGE THAT THE STATE HAS SATISFIED**
8 **THE CONDITIONS PRECEDENT TO ITS RIGHT TO BRING SUIT AGAINST**
9 **THE TRIBE IN THE DISTRICT COURT.**

9 The right of either party to the Compact to bring an action in district court is
10 conditioned upon compliance with the meet and confer requirement provided under
11 section 9.1 of the Compact. “A condition is an event, not certain to occur, which
12 must occur, unless its non-occurrence is excused, before performance under a
13 contract becomes due.” Restatement (Second) of Contracts § 224 (1981). “Unless
14 it has been excused, the non-occurrence of a condition discharges the duty when the
15 condition can no longer occur.” *Id.* at § 225(2). “Under the law of contracts,
16 parties may expressly agree that a right or duty is conditional upon the occurrence
17 or nonoccurrence of an act or event.” *Platt Pacific, Inc. v. Andelson*, 6 Cal. 4th
18 307, 313 (1993).

19 Section 9.1 of the Compact provides, in part:

20 [W]ithout prejudice to the right of either party to seek injunctive
21 relief against the other when circumstances are deemed to require
22 immediate relief, *the parties hereby establish a threshold*
23 *requirement that disputes between the Tribe and the State first be*
24 *subject to a process of meeting and conferring in good faith* in
25 order to foster a spirit of cooperation and efficiency in the
26 administration and monitoring of performance and compliance by
27 each other with the terms, provisions, and conditions of this
28 Gaming Compact, as follows:

1 (a) Either *party shall give the other*, as soon as possible
2 after the event giving rise to the concern, *a written notice setting*
3 *forth, with specificity, the issues to be resolved.*

4 (b) The parties shall meet and confer in a good faith
5 attempt to resolve the dispute through negotiation not later than
6 10 days after receipt of the notice, unless both parties agree in
7 writing to an extension of time.

8 (c) If the dispute is not resolved to the satisfaction of the
9 parties within 30 calendar days after the first meeting, then either
10 party may seek to have the dispute resolved by an arbitrator in
11 accordance with this section, but neither party shall be required to
12 agree to submit to arbitration.

13 (d) *Disagreements that are not otherwise resolved by*
14 *arbitration or other mutually acceptable means as provided in*
15 *Section 9.3 may be resolved in the United States District Court*
16 *where the Tribe's Gaming Facility is located The disputes to*
17 *be submitted to court action include, but are not limited to, claims*
18 *of breach or violation of this Compact*

19 (Compact § 9.1 (emphasis added), ex. 1 to Houston Decl. pp. 27-28.)

20 The Complaint alleges that the Tribe has breached the terms of the Compact
21 by failing to prepare the required TEIR for the increase in class III gaming devices
22 (e.g., slot machines) (Complaint ¶ 31), and by failing to negotiate and finalize an
23 Intergovernmental Agreement with the City (Complaint ¶ 32). The Complaint
24 seeks declaratory and injunctive relief based upon these alleged breaches. To the
25 extent, if any, that the State may be deemed to have an interest in these breaches,
26 the alleged breaches constitute a dispute between the Tribe and State within the
27 meaning of Compact section 9.1, above, and are therefore subject to the mandatory
28 dispute resolution provisions of that section before recourse may be sought in the
district court.

The Complaint does not allege that the State has provided the Tribe with
notice of these disputes pursuant to section 9.1(a) of the Compact, nor does the

1 Complaint allege that the State has engaged in the meet and confer process required
2 under section 9.1(b). These facts, which are predicates for an action by the State
3 against the Tribe for breach of the Compact, cannot be inferred from the facts
4 alleged in the Complaint. For this reason the Complaint fails to establish that the
5 State has any present right of action against the Tribe—indeed, if the State, its
6 officers, or its agencies were to file an action against the Tribe in the district court
7 based upon the City’s allegations, the State’s action would be subject to dismissal
8 for failure to comply with the requirements of section 9.1 of the Compact.
9 Accordingly, the Complaint fails to establish that the State, Governor, Attorney
10 General, or Gambling Control Commission are real parties in interest in this action.

11 **CONCLUSION**

12 For the reasons stated above, neither the State of California, nor its officers
13 and agencies, has any present right of action against the Tribe for any alleged
14 breach of the Tribe’s Compact. The Compact specifically provides a mandatory
15 dispute resolution procedure that must be followed as a prerequisite to seeking
16 relief in the district court. The Complaint does not allege that the State has
17 complied with that required procedure, and therefore fails to establish that the State
18 has a present right to assert the claims made by the City in this action.
19 Accordingly, the Complaint fails to establish that the State Parties are real parties in
20 interest in this action, and the action should be dismissed as to the State Parties for
21 failure to state a claim upon which relief may be granted to the State Parties.

22 The State Parties respectfully request that the Court enter an order dismissing
23 the complaint of the City of Temecula as to the State Parties as real parties in
24 interest, with leave to amend.
25
26
27
28

1 Dated: January 17, 2011

Respectfully submitted,

2

KAMALA D. HARRIS
Attorney General of California

3

SARA J. DRAKE
Senior Assistant Attorney General

4

5

/s/ NEIL D. HOUSTON

6

NEIL D. HOUSTON
Deputy Attorney General
Attorneys for Real Parties in Interest

7

8

SA2010303468
31179155.doc

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Case Name: City of Temecula v. Pechanga Band of Luiseno Indians	Court United States District Court Central District
	Case No. CV 10-07378 DSF (VBKx)

I hereby certify that on **January 17, 2011**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT OF THE CITY OF TEMECULA AS TO STATE PARTIES NAMED AS REAL PARTIES IN INTEREST [Fed. R. Civ. P. 12(b)(6)]

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

I further certify that some of the participants in the case are not registered CM/ECF users. On **January 17, 2011**, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

David M Snow
Richards Watson & Gershon APC
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101

Peter M Thorson
Richards Watson & Gershon APC
355 South Grand Avenue 40th Floor
Los Angeles, CA 90071-3101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 17, 2011**, at Sacramento, California.

_____ Linda Thorpe Declarant	_____ /s/ Linda Thorpe Signature
------------------------------------	--