

## **Tentative Rulings –August 3, 2006**

**To request a hearing on any matter on this calendar, you must call the Court at (209) 223-6360 by 4:30 p.m. today. Notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.**

### **Mendez v. Jackson Rancheria Casino, et al.: 06CV4306**

Defendants' demurrer to the complaint is sustained with 20 days leave to amend.

#### **1. JUDICIAL NOTICE:**

Judicial Notice is essentially a substitute for formal proof. (Witkin, Cal. Evid., Judicial Notice §§1,3.) Judicial notice only serves as a substitute to formal proof because matters judicially noticed are not reasonably subject to dispute. (Kilroy v. State of California (2004) 119 Cal.App.4th 140, 146 (adding that it is insufficient for judicial notice purposes for the facts sought to be made the subject of judicial notice generally possess an assurance of accuracy).)

Relevance is still an important consideration, i.e. evidence may still be excluded on the basis of relevance. (Witkin, Cal. Evid., Judicial Notice §1.) In fact, even material of which judicial notice appears mandatory may be excluded based upon relevancy. (Witkin, Cal. Evid., Judicial Notice §1.)

The court may take judicial notice of any court record in the United States. (Evid. Code §452.) This includes any orders, findings of fact and conclusions of law, and judgments within court records. However, while the courts are free to take judicial notice of the existence of each document in a court file, including the truth of the results reached, they may not take judicial notice of truth of hearsay statements in decisions and court files. Courts may not take judicial notice of allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof. (Kilroy v. State of California (2004) 119 Cal.App.4th 140, 145 [internal citations omitted]; see also Witkin, Cal. Evid., Judicial Notice, §§25, 24 (noting that a court may take judicial notice of the fact that a judge made a particular ruling, but the court cannot take judicial notice that the ruling and facts supporting the ruling are necessarily true).)

For example, the factual findings in a prior judicial opinion are not a proper subject of judicial notice. (Kilroy, supra, at 148.) This is because taking judicial notice of the truth of a judge's factual findings would be tantamount to taking judicial notice that the judge's factual finding must necessarily be correct, which would essentially render the judge infallible. (Ibid.)

Judicial notice of the truth of the content of court records is only appropriate when the findings of fact are binding upon a party for the purposes of res judicata and collateral estoppel. (1 Witkin, Cal. Evid., Judicial Notice, §24.)

Judicial notice is also appropriately taken in connection with legislative acts. ( Evid. Code §452.)

Therefore, Judicial Notice is taken of the following documents: (1) The Constitution of the Jackson Rancheria Band of Miwuk Indians; (2) Gaming Ordinance No. 98-1 of the Jackson Rancheria Band of Miwuk Indians; (3) Tribal-State Gaming Compact Between the State of California and the Jackson Rancheria Band of Miwuk Indians; (4) Complaint for Money Damages in Amador Case No. 06CV4306; (5) Defendants' Notice of Motion and Motion for Assessment of Fees and Sanctions Against Plaintiff's Counsel Pursuant to C.C.P. §396b(b); (6) Plaintiff's Opposition to Request for Sanctions; (7) The Order of the Court of San Mateo County granting Defendant's Motion for Change of Venue; and (8) Tribal Relations Ordinance enacted on September 25, 1999.

The request for Judicial Notice is denied as to (1) the Memorandum of Points and Authorities in Support of Motion for Assessment of Fees and Sanctions Against Plaintiff's Counsel Pursuant to C.C.P. §396b(b); (2) Declaration of Jill C. Peterson in Support of Defendants' Motion for Assessment of Fees and Sanctions Against Plaintiff's Counsel Pursuant to C.C.P. §396b(b); (3) Declaration of Counsel in Support of Plaintiff's Opposition to Request for Sanctions.

## **2. DEMURRER:**

### **a. Waiver of Right to Contest Sovereign Immunity:**

The plaintiff contends that the defendants waived any arguments pertaining to sovereign immunity by filing the motion for sanctions. However, as noted in C.C.P. §430.80, subdivision (a), which provides:

If the party against whom a complaint or cross-complaint has been filed fails to object to the pleading, either by demurrer or answer, that party is deemed to have waived the objection unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action.

A challenge to the court's power to adjudicate a matter is never waived. Therefore, as sovereign immunity is an issue of subject matter jurisdiction, it cannot be waived. Defendants can raise this issue regardless of whether a general appearance was made.

### **b. Sovereign Immunity:**

Tribal sovereign immunity provides immunity from lawsuit. (Big Valley Band of Pomo Indians v. Superior Court (2005) 133 Cal.App.4th 1185, 1189.) An Indian Tribe is only subject to suit if Congress has authorized the suit or the Tribe has waived immunity. (Id. at 1191.) Absent a waiver of immunity, the courts do not have subject matter jurisdiction over any lawsuit against a Tribe. (Campo Band of Mission Indians v. Superior Court (2006) 137 Cal.App.4th 175, 181-182.)

Tribal immunity extends to the Tribe's commercial activities. (Ibid.; see also Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384, 388.) Moreover, a tribal entity is treated as the tribe for immunity purposes (Redding, supra at 388 (noting that an Indian Casino has been determined to be entitled to immunity because of the importance of gaming in promoting self-determination, the close link between the tribe and the casino, and the existence of federal law promoting Indian gambling).)

To relinquish its immunity, the Tribe's waiver must be clear and unequivocal. (Big Valley, supra, at 1193.) Waivers are strictly construed. (Ibid.; see also Id. at 1194-1195 (stating that waivers of sovereign immunity are narrowly construed in favor of the sovereign and are not enlarged beyond what the waiver language requires).) If the tribe has consented to any suit, any conditional limitations placed upon its consent must be strictly construed. (Campo, supra, at 183.)

In considering whether there is a waiver of immunity upon demurrer, it is improper to consider evidence outside of the complaint (other than those documents subject to judicial notice). (Big Valley, supra, at 1190 (noting that if the defendants file a motion to dismiss, then the court may go beyond the pleadings and consider documentary evidence in determining whether there was a valid waiver).)

The Complaint in this action does not contain any allegations regarding waiver of immunity. It is a suit for money damages resulting from alleged breach of contract.

The Compact contains a limited waiver of immunity in Section 10.2 (d) in cases of patron injury claims and a limited waiver in Section 10.3 in connection with Unemployment

Compensation Claims. Neither waiver applies to employee claims or to contract claims. It does not appear that an express waiver in connection with breach of contract or employment discrimination claims is contained in any of the documents subject to judicial notice.

Therefore, the demurrer is sustained. Leave to amend is granted because, at this juncture, it is not impossible, as a matter of law, for the plaintiff to amend her complaint to demonstrate subject matter jurisdiction and state a valid cause of action against Defendants.

Unless a hearing is requested, this minute order is effective immediately. No formal order per California Rules of Court, Rule 391 is needed, nor is further notice of this ruling required.