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9 **Superior Court of the State of California**
10 **For the County of Mendocino**
11 **100 North State Street**
12 **Ukiah, CA 95482**

13 FORSTER-GILL, INC., a California
14 Corporation,
15 Plaintiff,

16 v.

17 PINOLEVILLE POMO NATION individually
18 and d/b/a PINOLEVILLE RANCHERIA OF
19 POMO INDIANS OF CALIFORNIA, and
20 PINOLEVILLE BAND OF POMO INDIANS
21 OF CALIFORNIA; PINOLEVILLE
22 ECONOMIC DEVELOPMENT, LLC; and
23 DOES 1 THROUGH 20, INCLUSIVE,

24 Defendants.

25 **Case No. : SCUK-CVG-2016-68514**

26 **NOTICE OF REQUEST TO APPEAR**
27 **SPECIALLY TO SUBMIT NOTICE OF**
28 **MOTION, MOTION TO QUASH SERVICE**
OF SUMMONS AND COMPLAINT AND
DEMURRER; MOTION TO QUASH;
DEMURRER TO COMPLAINT; AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

HEARING DATE: April 7, 2017

TIME: 9:30 am

DEPT: Unlimited Civil, Courtroom E

ACTION FILED: Dec. 16, 2016

29 **NOTICE OF REQUEST TO APPEAR SPECIALLY TO SUBMIT NOTICE OF MOTION,**
30 **MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT, DEMURRER, AND**
31 **MEMORANDUM OF POINTS AND AUTHORITIES**

32 TO: This Honorable Court, Plaintiff Forster-Gill, Inc., and Gregory A. Connell, Plaintiff's Counsel:

1 PLEASE TAKE NOTICE that on April 7, 2017 at 9:30 am in the Civil Department,
2 Courtroom E of the above entitled court, located at 100 North State Street, Ukiah, CA 95482,
3 Defendants, the Pinoleville Pomo Nation (the "Tribe")¹, a federally-recognized Indian tribe, and
4 Pinoleville Economic Development, LLC ("PED, LLC") will appear in a special and limited capacity
5 for the sole purpose of moving and hereby do move the Court to issue an order quashing the service
6 of summons and complaint for lack of personal jurisdiction, sustaining a Demurrer to the complaint
7 in its entirety filed by Plaintiff without leave to amend, and thus dismissing the action.
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9 This Motion to Quash is made on the ground that the Court lacks personal jurisdiction over
10 the Defendants due to their sovereign immunity, which has not been lawfully or properly waived.
11 Code Civ. Proc. §418.10(a)(1). Pursuant to Code Civ. Proc. § 430.10 (a), (d) and (e), this demurrer is
12 made on the basis that the Court has no jurisdiction for the subject of the cause of action alleged in
13 the pleading, there is a misjoinder of PED, LLC, and the pleading does not state facts sufficient to
14 constitute a cause of action, and thus it is fatally defective and will not support the action. The
15 Motion and Demurrer are filed simultaneously pursuant to Code Civ. Proc., Section 418.01(e).
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18 This Motion to Quash and Demurrer is based upon this Notice, the Motion to Quash, the
19 attached Demurrer, the memorandum of points and authorities, the pleadings, papers, records and
20 files in this action, and upon such oral and documentary evidence as may be presented by specially
21 appearing Defendant upon the hearing of the Motion and Demurrer.
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27 ¹ "PINOLEVILLE POMO NATION individually and d/b/a PINOLEVILLE RANCHERIA OF POMO INDIANS OF
28 CALIFORNIA, and PINOLEVILLE BAND OF POMO INDIANS OF CALIFORNIA" apparently all as different names
for the Tribe. The Tribe's name is the Pinoleville Pomo Nation. It is a federally recognized Indian tribe. It does not "do
business" under any other name; it does business under its own name.

1 Respectfully submitted this 7th day of March, 2017.

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DATED: March 7, 2017

Padraic I. McCoy
California Bar #223341
Attorney for Defendants Pinoleville Pomo Nation and
Pinoleville Economic Development, LLC

1 **MOTION TO QUASH AND DEMURRER TO PLAINTIFF’S COMPLAINT**

2 Defendant, Pinoleville Pomo Nation (the “Tribe”), a federally-recognized Indian tribe, *see*
3 *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian*
4 *Affairs*, 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017), and Pinoleville Economic Development, LLC
5 (“PED, LLC”) hereby make a special and limited appearance solely for the purpose of bringing this
6 Motion to Quash and Demurrer to the Complaint filed by Plaintiff, Forster-Gill, Inc. (“Plaintiff”) as
7 follows:
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9 **MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT**

10 Specially appearing Defendants hereby request a Motion to Quash Service of Summons and
11 the Complaint on the following ground: The Court lacks personal jurisdiction over the Defendants.
12 Code Civ. Proc. (“CCP”) §418.10(a)(1).
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14 **FIRST GROUND FOR DEMURRER**

15 Pinoleville Economic Development, LLC (“PED, LLC”) generally demurs to the Complaint
16 for lack of subject-matter jurisdiction, misjoinder, and failure to state facts sufficient to constitute a
17 cause of action. The Complaint and attachments nowhere directly implicate PED, LLC in this
18 controversy, other than the cursory and unsupported allegation, at paragraph 6 of the Complaint, that
19 PED, LLC is the “alter ego” of the Tribe.
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21 **SECOND GROUND FOR DEMURRER**

22 The Tribe generally demurs to the Complaint filed by Plaintiff on the grounds of this Court’s
23 lack of jurisdiction for the subject of the cause of action alleged in the pleading due to the Tribe’s
24 sovereign immunity from suit, which PED, LLC shares, and which deprives this Court of jurisdiction,
25 is a complete defense, and has not been waived at all or properly and consistent with Tribal law as to
26 the Lease, as attached to the Complaint as Exhibits A-C, and the Promissory Note, as attached to the
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1 Complaint as Exhibit D; and Plaintiff has failed to attach the purported Tribal Resolution(s)
2 documenting said purported waivers, which are required to demonstrate the legal sufficiency of the
3 waivers. CCP § 430.10 (a).

4 THIRD GROUND FOR DEMURRER

5 The Tribe generally demurs to the Complaint pursuant to CCP § 430.10(a) and (e) because to
6 the extent that the Lease or Promissory Note attached to the Complaint include purported waivers of
7 the Tribe's sovereign immunity from suit, that waiver was improper, not apparently authorized by the
8 Tribe, and inadequate as a matter of Tribal law. Thus, the pleading does not state facts sufficient to
9 constitute a cause of action, and thus it is fatally defective and will not support the action. CCP §
10 430.10(e). The purported waivers of sovereign immunity in Exhibit C and Exhibit D are not
11 compliant in their express terms with the Tribe's Constitution. Additionally, both purported waivers
12 refer to "attached" Tribal resolutions authorizing the waivers, but no such resolutions were attached
13 to the Exhibits to the Complaint. The party asserting a waiver of tribal sovereign immunity has the
14 burden to establish that an effective waiver exists.
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18 FOURTH GROUND FOR DEMURRER

19 The Tribe generally demurs to the Complaint for Plaintiff's failure to attach to the Complaint
20 a copy of the purported Third Amendment to the Lease Agreement and copies of the Tribal
21 resolutions purportedly authorizing the Tribe's waivers of sovereign immunity in the Lease and the
22 Promissory Note. And to the extent that the Third Amendment to Purchase Agreement includes a
23 purported waiver of sovereign immunity, such a waiver—contained and specified for a different
24 agreement—cannot be deemed to waive the Tribe's and PED, LLC's sovereign immunity. Because
25 of the failure to attach the Third Amendment to the Lease Agreement, demurrer should be sustained
26 pursuant to CCP § 430.10(e).
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WHEREFORE, Defendants request that:

1. The Motion to Quash Service of Summons and Complaint be sustained;
2. The Demurrer be sustained without leave to amend; and
3. The Court enter an order dismissing the action in its entirety.

DATED: March 7, 2017



Padraic I. McCoy
California Bar #223341
Attorney for Defendants Pinoleville Pomo Nation and
Pinoleville Economic Development, LLC

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
2 OF MOTION TO QUASH AND DEMURRER

3 **I. INTRODUCTORY STATEMENT**

4 This Court lacks jurisdiction over this matter because the Pinoleville Pomo Nation (the
5 “Tribe”), which is a federally-recognized Indian tribe, see *Indian Entities Recognized and Eligible to*
6 *Receive Services From the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4915, 4917 (Jan. 17,
7 2017) and which has entered a special and limited appearance here solely for the purpose of bringing
8 this Motion to Quash and Demurrer, enjoys tribal sovereign immunity from suit that it has not waived
9 here and, to the extent that the Lease attached to Plaintiff’s complaint includes a purported waiver of
10 the Tribe’s sovereign immunity from suit, that waiver was improper, not apparently authorized by the
11 Tribe, and inadequate as a matter of Tribal law. Defendant Pinoleville Economic Development, LLC
12 (“PED, LLC”), which is wholly owned by the Tribe and therefore enjoys the Tribe’s sovereign
13 immunity from suit, should be dismissed from this matter for failure to state sufficient facts against
14 PED, LLC, an entity that is nowhere mentioned in or named as a party to any of the agreements
15 attached to the Complaint as Exhibits A-D that purport to provide the basis for Plaintiff’s causes of
16 action.
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20 For these reasons, this Motion to Quash and Demurrer should be granted in its entirety
21 without leave to amend.

22 **II. ARGUMENT**

23 **A. THE COURT IS AUTHORIZED TO GRANT THIS DEMURRER**

24 This hybrid motion to quash and to demur to the Complaint is procedurally proper. Code of
25 Civil Procedure §418.10(e); *Boisclair v. Superior Court* (1990) 51 Cal. 3d 1140 (“[A]lthough a
26 motion to quash is normally directed at defects in personal, as opposed to subject matter jurisdiction,
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1 [w]e have recognized the hybrid motion to quash/dismiss as a proper means of challenging the
2 court's authority without making a general appearance.”). *See also Cosentino v. Fuller*, 2015 Cal.
3 App. LEXIS 475, *17-18 (“Because sovereign immunity deprives a court of subject matter
4 jurisdiction, California courts have authorized Indian tribes and their officials to specially appear and
5 invoke their immunity from suit by using a “hybrid motion to quash/dismiss.” (*Boisclair, supra*, 51
6 Cal.3d at p. 1144, fn. 1; *Great Western Casinos, supra*, 74 Cal.App.4th at p. 1417.)”). By this
7 procedure, Defendants are making a special and limited appearance. *Fidelity Bank v. Kettler* (1968)
8 264 Cal. App. 2d 481, 485-486 (if a party appears to object to consideration of any aspect of the case
9 on the ground the court lacks jurisdiction, the appearance is special).

10
11 Section 418.10(a)(1) of the Code of Civil Procedure provides that a Motion to Quash
12 Service of Summons and Complaint (“Motion to Quash”) may be filed on the grounds that the Court
13 lacks jurisdiction over a defendant. As a result of a challenge to personal jurisdiction, the burden
14 shifts to the plaintiff to establish that jurisdiction lies in this Court. *Ziller Electronics Lab GmbH v.*
15 *Superior Court* (1988) 206 Cal. App. 3d 1222, 1232-1233 (“when a defendant challenges personal
16 jurisdiction, the burden shifts to the plaintiff to prove the necessary jurisdictional criteria are met by
17 competent evidence”); *see also Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74
18 Cal. App. 4th 1407, 1418. Section 430.10 of the Code of Civil Procedure sets forth the grounds for
19 which a party against whom a complaint is filed may object, by demurrer or answer, which include
20 instances where: “(a) the court has no jurisdiction of the subject of the cause of action alleged in the
21 pleading; ... (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts
22 sufficient to constitute a cause of action.” A demurrer may be sustained without leave to amend if it
23 appears from the complaint that under applicable substantive law there is no reasonable possibility or
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1 probability that the defect can be cured by amendment.” *Vater v. Glenn* (1958) 49 Cal. 2d 815, 821;
2 *Sackett v. Wyatt* (1973) 31 Cal. App. 3d 592, 603.

3 The failure of the pleading to state a cause of action results from the fact that the complaint
4 appears deficient on the face of the pleading or from judicially noticed matter. *Hall vs. Chamberlin*
5 (1948) 31 Cal.2d 673, 679-680. If a defendant negates any essential element of a particular cause of
6 action, a judge should sustain the demurrer as to that cause of action. *See Cantu v. Resolution Trust*
7 *Corp.* (1992) 4 Cal.App. 4th 857, 880. Tribal sovereign immunity from suit is a threshold
8 jurisdictional issue which must be addressed in the first instance. *Middletown Rancheria v. Workers’*
9 *Comp. Appeals Bd.* (1998) 60 Cal.App. 4th 1340, 1354. Here, because the Tribe enjoys tribal
10 sovereign immunity from suit, has not waived its tribal sovereign immunity generally nor properly, in
11 the purported waiver provisions of the Lease and Promissory Note upon which this action rests, the
12 Court is authorized to grant this Demurrer and Motion to Quash. Additionally, the Complaint
13 entirely fails to state a claim against PED, LLC, which is nowhere mentioned in or named as a party
14 to any of the agreements attached to the Complaint as Exhibits A-D that purport to provide the basis
15 for Plaintiff’s causes of action.
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19 **B. GROUND ONE: ALL CLAIMS AGAINST PED, LLC SHOULD BE DISMISSED FOR**
20 **FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF**
21 **ACTION AND/OR MISJOINDER.**

22 A demurrer to a complaint must be sustained where the complaint fails to specifically allege
23 any conduct on a defendant’s part or the harm that was caused by the defendant’s conduct. *Falahati*
24 *v. Kondo* (2005) 127 Cal.App.4th 823, 829 (“The third amended complaint plainly fails to state a
25 cause of action against Kondo because it does not allege any conduct on his part caused any harm,
26 loss or damage on the plaintiffs’ part. Although the complaint contains a boilerplate allegation each
27 defendant was the agent and employee of the others and contains some charging allegations
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1 respecting 'defendants and each of them' these allegations do not result in the complaint stating a
2 cause of action against Kondo because he is nowhere mentioned in the body of the complaint.”).
3 And, “[i]n order to prevail in a cause of action against individual defendants based upon disregard of
4 the corporate form, the plaintiff must plead and prove such a unity of interest and ownership that the
5 separate personalities of the corporation and the individuals do not exist, and that an inequity will
6 result if the corporate entity is treated as the sole actor.” *Vasey v. California Dance Co.* (1977) 70
7 Cal.App.3d 742, 749 (finding that Respondent's pleadings and the evidence he presented at the
8 default hearing fell far short of meeting these requirements).

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10 Demurrer is appropriate for all claims against Defendant PED, LLC. CCP § 430.10(e). The
11 sole mentions of PED, LLC in the Complaint are at paragraphs 3 and 6, under preliminary
12 allegations, where Plaintiffs allege, without any apparent basis and despite the fact that one entity is a
13 federally-recognized Indian tribe and the other entity is a limited liability company, that the Tribe and
14 PED, LLC “are each and all the alter ego of each other.” The Complaint provides no basis for the
15 reason it has lumped PED, LLC together with the Tribe and other purported names for the Tribe in
16 the allegations, particularly given that the documents attached to the Complaint, which provide the
17 sole basis for purported relief, nowhere mention PED, LLC. The Lease attached as Exhibit A
18 identifies the Tribe and the Canales Group, LLC as the “Tenants”; Exhibit A nowhere mentions PED,
19 LLC. The Second Amendment to the Lease attached as Exhibit B identifies the Tribe and the
20 Canales Group LLC as the “Tenant”; Exhibit B nowhere mentions PED, LLC. The Third
21 Amendment to Commercial Property Purchase Agreement and Joint Escrow Instructions attached as
22 Exhibit C identifies the Tribe as the “Buyer”; Exhibit C nowhere mentions PED, LLC. The Note
23 attached as Exhibit D identifies the Tribe as the “Maker”; the Note nowhere mentions PED, LLC.
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1 It is not at all clear how, why, or with what precedent the business law theory of alter ego can
2 be applied to an Indian tribe and its wholly owned limited liability company. The California Court of
3 Appeals has explained the alter ego theory as follows:

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5 “The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing
6 party is using the corporate form unjustly and in derogation of the plaintiff’s interests.... In
7 certain circumstances the court will disregard the corporate entity and will hold the individual
8 shareholders liable for the actions of the corporation: ‘As the separate personality of the
9 corporation is a statutory privilege, it must be used for legitimate business purposes and must
10 not be perverted. When it is abused it will be disregarded and the corporation looked at as a
11 collection or association of individuals, so that the corporation will be liable for acts of the
12 stockholders or the stockholders liable for acts done in the name of the corporation.’”

13 *Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1451 (internal
14 quotations omitted). Here, though, the entity that entered into the agreements purported to serve as
15 grounds for this action was the Tribe rather than PED, LLC. PED, LLC is not implicated in the
16 agreements, so there is no need to employ the alter ego doctrine to pierce PED, LLC’s corporate
17 form. In any event, the “certain circumstances” where the doctrine may be applied are not pled here.
18 *See id.* (“For example, a few of the factors that must be considered are (1) whether there was
19 commingling of funds; (2) whether the individual treated corporate assets as his own; and (3) whether
20 the individual held himself out as being personally liable for the debts of the corporation.”).

21 For the foregoing reasons, Demurrer is appropriate for all claims against Defendant PED,
22 LLC under CCP § 430.10(e).

23 **C. GROUND TWO: THE TRIBE AND PED, LLC ENJOY SOVEREIGN IMMUNITY
24 FROM SUIT AND HAVE NOT WAIVED THEIR IMMUNITY HERE.**

25 It is well known and established that Indian tribes are sovereign entities with all of the
26 inherent powers of sovereignty, which have not been taken away. *United States v. Wheeler*, 435 U.S.
27 313, 322-23 (1978); *Great W. Casinos*, 74 Cal. App. at 1419. Tribes “remain separate sovereigns
28 pre-existing the Constitution.” *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030

1 (2014). Immunity from suit is a “necessary corollary to Indian sovereignty and self governance.”
2 *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 890 (1986); see
3 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“Indian tribes have long been recognized as
4 possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”); *C& L*
5 *Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)
6 (*C&L*); *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498
7 U.S. 505 (1991)

9 “Sovereign immunity is not a discretionary doctrine that may be applied as a remedy
10 depending on the equities of a given situation’[;] ... rather it presents a pure jurisdictional question.”
11 *Warburton/Buttner v. Superior Court*, 103 Cal.App. 4th 1170, 1182 (2002) (quoting *Chemehuevi*
12 *Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir. 1985)).

14 A tribe’s enumeration on the Federal Register list of recognized tribes is sufficient to establish
15 entitlement to sovereign immunity. See *Ingrassia v. Chicken Ranch Bingo and Casino*, 676
16 F.Supp.2d 953, 957 (E.D.Cal. 2009). The Tribe is included in the tribes enumerated on the Federal
17 Register. *Indian Entities Recognized and Eligible To Receive Services From the United States*
18 *Bureau of Indian Affairs*, 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017).² Thus, as a matter of law, the
19 Tribe is entitled to sovereign immunity.

21 An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has
22 waived its immunity. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014).
23 California courts recognize that only Congress or the Tribe may expressly and unequivocally waive a
24 tribe’s sovereign immunity. E.g., *Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council*

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27 ² Courts can take judicial notice of the contents of the Federal Register. *Black v. Fin. Freedom Senior Funding Corp.*
28 (2001) 92 Cal.App.4th 917, 934 n.13 (“Evidence Code section 451 mandates judicial notice of “[a]ny matter made a
subject of judicial notice by ... Section 1507 of Title 44 of the United States Code.” (Evid.Code, § 451, subd. (b).) That
federal statute provides that “[t]he contents of the Federal Register shall be judicially noticed....” (44 U.S.C. § 1507.)”).

1 (1985) 170 Cal. App. 3d 489, 495. Neither has done so here. “[T]o relinquish immunity, a tribe’s
2 waiver must be ‘clear.’” *C & L, supra* (citing *Oklahoma Tax Commission v. Citizen Band of*
3 *Potawatomi Indian Tribe of Oklahoma, supra*); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509
4 F.3d 1085, 1091 (9th Cir. 2007) (waivers of tribal sovereign immunity must be explicit and
5 unequivocal); *Pan American Co. v. Sycuan Band of Mission Indians* (9th Cir. 1989) 884 F.2d 416,
6 419 (“...tribal sovereignty remains intact unless surrendered in express and unequivocal terms.”);
7 *Great W. Casinos*, 74 Cal. App. at 1419. “In the absence of a clearly expressed waiver by either the
8 tribe or Congress, the [U.S.] Supreme Court has refused to find a waiver of tribal immunity based on
9 policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of
10 a case.” *Ute Distribution Corporation v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).
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13 Here, the Tribe is a federally-recognized Indian tribe listed in *Indian Entities Recognized and*
14 *Eligible to Receive Services From the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4915,
15 4917 (Jan. 17, 2017). As such, it is entitled to tribal sovereign immunity, which—as explained in
16 Section II(D) below, the Tribe has not waived here.
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18 And to the extent that this Court determines that Plaintiff has failed to state a claim upon
19 which relief can be granted against PED, LLC, that entity is nonetheless protected by the Tribe’s
20 sovereign immunity as a limited liability company wholly-owned by the Tribe. *See Cook v. AVI*
21 *Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (“the settled law of our circuit is that
22 tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe
23 itself”). The Complaint fails to allege that PED, LLC in any way waived its Tribal sovereign
24 immunity from suit, and thus, this Court lacks jurisdiction over PED, LLC.
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1 **D. GROUND THREE: THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO**
2 **CONSTITUTE A CAUSE OF ACTION BECAUSE THE TRIBE DID NOT WAIVE**
3 **ITS TRIBAL SOVEREIGN IMMUNITY FROM SUIT IN THE LEASE AND**
4 **PROMISSORY NOTE PROVIDED FOR AS THE BASIS OF THIS ACTION**

5 Here, a demurrer is also appropriate because the Complaint filed by Plaintiff “does not state
6 facts sufficient to constitute a cause of action,” and thus it is fatally defective. CCP § 430.10(e). As
7 explained above, the Tribe enjoys sovereign immunity from suit and to the extent that the lease
8 and/or promissory note attached to Plaintiff’s Complaint include purported waivers of the Tribe’s
9 sovereign immunity from suit, those waivers were improper, not apparently authorized by the Tribe,
10 and inadequate as a matter of Tribal law.

11 Tribal officials cannot effectively waive a tribe’s sovereign immunity without gaining
12 authorization from the tribe’s governing body. *Hydrothermal Energy Corp*, 170 Cal.App.3d at 496,
13 (holding that a tribal chairwoman’s signature on a contract could not operate to waive the tribe’s
14 immunity from suit unless the tribe expressly delegated the chairwoman that power). “[T]o justify
15 the exercise of California jurisdiction [] [c]ontractual waivers of sovereign immunity are enforceable
16 where they were executed by persons authorized to do so and where the necessary formalities were
17 adequately observed.” *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201
18 Cal.App.4th 190, 214.

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20 The 2009 Lease, attached as Exhibit A to the Complaint, is purportedly signed by Leona
21 Williams for the Pinoleville Pomo Nation, but contains no provision purporting to waive the Tribe’s
22 sovereign immunity. See Exhibit A to Complaint, page 6. Similarly, there is no waiver of sovereign
23 immunity in the Second Amendment to the Lease, attached as Exhibit B to the Complaint. And
24 Exhibit C to the Complaint is the “Third Amendment to Commercial Property Purchase Agreement
25 and Joint Escrow Instructions” (“Third Amendment to the Purchase Agreement”), not the purported
26 Third Amendment to the Lease. Exhibit C, therefore, is not a part of the Lease.
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1 Even if this Court interprets Exhibit C as having some connection to the Lease, which it does
2 not, it is not at all clear whether the purported waivers of the Tribe's sovereign immunity, at page 2 of
3 Exhibit C and page 10 of Exhibit D, were authorized or approved by the Tribal Council as required
4 by the Tribe's Constitution and consistent with the provisions of the Constitution. The Tribe's
5 Constitution³, attached hereto as Exhibit A, at Article X, Sec. 2, provides that "The Tribal Council
6 may waive the sovereign immunity of the Tribe ... in accordance with the Constitution. Such waiver
7 shall be specific, limited in time, and limited in amount." On their face, neither of the purported
8 waivers of sovereign immunity are sufficiently specific, limited in time, and limited in amount.
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10 Additionally, Plaintiff has failed to meet its burden to present evidence that either purported
11 waiver of sovereign immunity was approved by the Tribal Council, and fails to attach a copy of the
12 purported Tribal Council resolutions authorizing the waiver of sovereign immunity. *Yavapai-Apache*
13 *Nation*, 201 Cal.App.4th at 205 (plaintiff bears the burden to prove that court has jurisdiction); *Ziller*
14 *Elects. Lab GmbH v. Super. Ct.*, 254 Cal. Rptr. 410, 416 (Cal. App. 2d Dist. 1988) (when a defendant
15 challenges personal jurisdiction the burden shifts to the plaintiff to demonstrate that all necessary
16 jurisdictional criteria are met). Under the Tribal Constitution and Tribal law, the Tribal
17 Chairperson's signature alone does not evidence "Tribal Council" approval. Such approval requires
18 adoption and signature by the other Tribal Council members (or, at least a quorum) at a duly called
19 meeting of the Tribal Council. See Tribe's Constitution, Exhibit A, at Article X, Sec. 2. This
20 generally results in a Tribal Council resolution, ordinance, or other instrument indicating compliance
21 with applicable tribal constitutional, legal, or regulatory standards. Such a resolution was apparently
22 required to effectuate the purported waiver(s) of tribal sovereign immunity, as those provisions
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27 ³ Courts can take judicial notice of a Tribe's constitution. *Big Valley Band of Pomo Indians v. Super. Ct.* (2005) 35
28 Cal.App.4th 1185, 1192 ("Several documents presented by the Tribe are properly the subject of judicial notice. The Tribe's
constitution and bylaws, the Big Valley Rancheria Gaming Act of 1994, and the Resolution of the General Community
Council of the Big Valley Rancheria No. 03-0197-1 are judicially noticeable respectively as a constitutional law, the

1 expressly refer to such resolutions as exhibits to the Lease and Promissory Note. See paragraph 4 of
2 Exhibit C to the Complaint, and paragraph 10 of Exhibit D to the Complaint. Moreover, any such
3 waiver must be expressly limited in time and amount and express specificity, which the purported
4 waiver in the Lease does not. See *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*
5 (1999) 74 Cal.App.4th 1407, 1421 (“In short, it appears the conditions under which the tribe agreed to
6 waive its sovereign immunity and consent to arbitration and suit to resolve contract disputes were not
7 satisfied in this case.”).

9 **E. GROUND FOUR: PLAINTIFF FAILED TO ATTACH TO THE COMPLAINT THE
10 THIRD AMENDMENT TO THE LEASE, WHICH PURPORTS TO PROVIDE A
11 LEGAL BASIS FOR BRINGING THIS ACTION**

12 Demurrer is also appropriate here for Plaintiff’s failure to attach to the Complaint the Third
13 Amendment to the Lease to the Complaint. *Dey v. Contl. Cent. Credit* (2008) 170 Cal.App.4th 721,
14 728 (affirming the sustaining of defendant’s demurrer where contract was implicated in complaint,
15 but plaintiff “fail[ed] to attach or refer to any contract that is at issue in this case and fails to describe
16 any liquidated damages provision in such a contract.”). Although the Complaint, at paragraph 9,
17 states that the Third Amendment to the Lease is attached as Exhibit C, the document attached as
18 Exhibit C is the Third Amendment to the Purchase Agreement. A lease agreement is distinct from a
19 purchase agreement. Plaintiff’s Complaint seems to recognize this, as Exhibit B to the Complaint is
20 the “Second Amendment to Commercial Lease Agreement.” Perplexingly, however, the Third
21 Amendment to the Purchase Agreement is then attached as Exhibit C.

22
23 To the extent that Plaintiff means somehow to argue that the purported waiver of sovereign
24 immunity in the Third Amendment to the Purchase Agreement, at page 2, can be employed to waive
25 the Tribe’s sovereign immunity from suit under the Lease, this argument does not withstand scrutiny.
26
27


28 legislative enactment of a public entity, and the official act of a “state” within the United States. (Evid.Code, § 452,
subds. (a), (b), (c) ...”).

1 This is because under principles of tribal sovereign immunity and the Tribe's Constitution, the
2 purported waiver here must have been clear and clearly specific to the Lease, not the Purchase
3 Agreement. *Ameriloan v. Super. Ct.*, 86 Cal. Rptr. 3d 572, 582 (Cal. App. 2d Dist. 2008), as
4 modified (Jan. 14, 2009) ("Waivers ... are 'strictly construed' and there is a 'strong presumption'
5 against them. 'Because a waiver of immunity is altogether voluntary on the part of [a tribe], it follows
6 that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner
7 in which the suit shall be conducted.' (*Big Valley Band of Pomo Indians v. Superior Court* (2005)
8 133 Cal.App.4th 1185, 1193, 35 Cal.Rptr.3d 357 (lead opn. of Corrigan, J.); see also *World Wide*
9 *Minerals v. Republic of Kazakhstan* (D.C.Cir.2002) 296 F.3d 1154, 1162 ["waivers of sovereign
10 immunity are narrowly construed 'in favor of the sovereign' and are not enlarged 'beyond what the
11 language requires'"].)") (internal quotations and citations omitted).

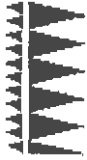
14 III. CONCLUSION

15 Based on the foregoing facts, arguments, and points of law, the Court is urged to grant the
16 Motion to Quash, sustain the Tribe's general Demurrer to the Complaint filed by Plaintiff without
17 leave to amend, and order that the Tribe have Judgment against Plaintiff for costs, and if applicable,
18 attorney fees.
19

20
21
22 DATED: March 7, 2017

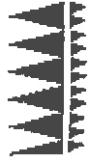


23 Padraic I. McCoy
24 California Bar #223341
25 Attorney for Defendants Pinoleville Pomo Nation and
26 Pinoleville Economic Development, LLC
27
28



PINOLEVILLE POMO NATION

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CONSTITUTION OF THE PINOLEVILLE POMO NATION

PREAMBLE

We the Pomo People of the Pinoleville Pomo Nation, pursuant to our inherent and historic sovereignty, in order to form a more perfect government, establish justice, ensure tranquility, promote culture, traditions, education, and language, advance the general welfare, secure the blessings of liberty, exercise dominion over the Territory, provide for the common defense, and secure our rights, powers, and privileges, do ordain and establish this Constitution for the Tribe.

ARTICLE I – TERRITORY AND JURISDICTION

Section 1. Territory

The Territory of the Tribe shall include all lands within the original boundaries of the Pinoleville Reservation, any lands held by the United States for the benefit of the Tribe or the Pinoleville people, historical lands, fee lands, water and natural resources as may be here after acquired by the Tribe, whether within or without said boundary lines, under any grant, transfer, purchase, adjudication, treaty, Executive Order, Act of Congress or other acquisition, notwithstanding the issuance of any private property interest including patents or right-of-way. The Territory shall include all surface and subsurface, submerged land under navigable or non-navigable waters, all air and water, and all natural resources.

Section 2. Jurisdiction

To the fullest extent permitted by Federal Law, the Jurisdiction of the Tribe shall extend to all persons, subjects, property, and activities within the historical lands, fee lands, water and natural resources as may be here after acquired by the Tribe. Any person who enters the Territory shall, by entering, be deemed to have consented to the Jurisdiction of the Tribe.

Section 3. Supremacy of the Constitution

This Constitution shall be the "Supreme Law" over all Territory and persons within the Jurisdiction of the Tribe.

ARTICLE II – TRIBAL CITIZENSHIP

Section 1. Citizenship and Naturalization Code

The Tribal Council shall adopt a Citizenship and Naturalization Code within one (1) year after the ratification of this Constitution.

Section 2. Citizenship Requirements

- A. A person who has at least one-quarter (1/4) degree of Pomo Indian Blood, and who is related by blood to a member of the base roll. The base roll consists of the Captains and Councilmen listed on the Mendocino County Indenture, dated 1878, 1893, and 1897, for the purchase of land for Pinoleville Indians: Charley, Sam Hale, Napoleon Bonaparte, Jim Reeve, Fuller Williams, Jack Mace, and John Stevenson. (Burden of proof is on the applicant).
- B. Naturalization: One-quarter (1/4) degree of Native American Indian blood and has close social ties to the Pinoleville Indian Reservation. (Burden of proof is on the applicant).
 - a. The Tribe will not accept an applicant from a person enrolled in another tribe; nor can any person be enrolled that owns land within the jurisdiction of another tribe.

ARTICLE III – GOVERNING BODY-TRIBAL COUNCIL

Section 1. Tribal Council

The governing body of this Tribe shall be the Tribal Council. The Tribal Council shall consist of seven (7) members elected from the general citizenship of this Tribe, including four (4) officers: Chairperson, Vice Chairperson, Secretary, Treasure and three (3) members-at-large.

Section 2. Qualifications

- A. The Tribal Council members shall be registered voters of the Pinoleville Pomo Nation
- B. Be at least eighteen years old and be of ¼ degree Native American Indian blood.

Section 3. Tribal Council Powers

A. Tribal Chairperson:

The Chairperson shall have the power to represent the Tribe in all matters with any other governments. The Chairperson shall negotiate any treaty, compact, or contract subject to ratification by the Tribal Council. She/he shall have supervision over the Tribal Council and Committees. When the Tribal Council is not in session, the Chairperson shall serve as the official spokesperson of this Tribe.

B. Tribal Vice Chairperson:

The Vice Chairperson shall assist the Chairperson when called upon by the Chairperson. In the absence of the Chairperson, she/he shall preside, and when so presiding, shall have all the rights, privileges, duties and responsibilities of the Chairperson.

C. Tribal Secretary:

The Tribal Secretary shall keep the minutes of all meetings and shall attest to the enactment of all Minutes, Resolutions, Ordinances and Codes.

D. Tribal Treasure:

The Tribal Treasure shall carry out, or cause to be carried out, financial reports to the Tribal Council. Any elected or appointed Tribal Council person may be designated and authorized by the Tribal Council to sign checks on behalf of this Tribe. All checks must be executed by at least two of the authorized signatories.

E. Tribal Council Members:

The Tribal Council shall have three (3) members-at-large. Their duties shall be to assist the Tribal Council in all duties, attend all duly called meetings, serving on designated committees, and attending trainings that directly benefit the tribal government.

Section 4. Compensation

The Tribal Council shall be paid reasonable compensation as established by Tribal Law.

**ARTICLE IV – POWERS OF THE TRIBAL COUNCIL OF THE PINOLEVILLE
POMO NATION**

Section 1. Enumerated Powers

The Tribal Council shall have powers and responsibilities hereinafter provided through its inherent sovereignty and as recognized by Federal law:

- (a) To consult, negotiate, contract or compact with federal, state and local governments on activities, which may affect this Tribe;
- (b) To employ legal counsel;
- (c) To receive advice from and make recommendations to the Secretary of the Interior with regard to all appropriations estimates for all projects which will benefit the citizens of this Tribe prior to the submission of such estimates to the Office of Management and Budget and Congress;
- (d) To manage, lease or otherwise operate all unassigned Tribal property and to regulate the use of, and development of assigned Tribal lands.
- (e) To acquire property and to accept gifts for this Tribe.
- (f) To establish corporations and business, to charter and regulate corporations, joint ventures, cooperatives, associations, special districts, housing authorities, educational and charitable institutions, political subdivisions and other entities;
- (g) To prescribe codes and regulations regarding future citizenship, loss of citizenship and naturalization of citizens;
- (h) To establish business codes to approve contracts with public or private enterprises, businesses, or corporations on behalf of the Tribe, and to borrow money from public and private sources that will promote the economic well-being of the Tribe and its citizens;
- (i) To promulgate and enforce codes, ordinances and regulations as are deemed necessary to safeguard and promote the peace, safety, health and general welfare for the citizens of the Pinoleville Reservation.
- (j) To promulgate and enforce codes and ordinances to assure the complete jurisdiction available to the Tribe pursuant to the Indian Child Welfare Act of 1978, (25 U.S.C. Section 1918);

- (k) To levy taxes and fees, on all persons, property and business activities;
- (l) To have the authority to establish a judiciary;
- (m) To condemn property for public purposes so long as just compensation is paid, provided, that all condemnation proceedings are conducted in accordance with applicable law;
- (n) To enact codes and ordinances providing for the exclusion of any person whose activities jeopardize the peace and safety of the members of the tribe, tribal operations, or tribal businesses, and to pass laws governing the conditions under which members and non-members may enter and remain within the territory of the tribe;
- (o) To regulate the domestic relations of all citizens of the Tribe wherever they are located and all persons within Tribal jurisdiction; and
- (p) To regulate the inheritance of all lands tithing Tribal jurisdiction and all property or interest therein owned by persons within Tribal jurisdiction; and to provide for escheat of property to the Tribe.

Section 2. Necessary and Proper Powers

The Tribal Council shall have all powers necessary and proper to effectuate any specific power enumerated in Section 1. The Tribal Council's determination as to whether any such necessary and proper power is an appropriate and lawful power shall be determinative so long as the power does not violate any provision of this Constitution.

Section 3. Contracts Inviolable

The Tribal Council shall not have the power to terminate, abrogate, or impair a contract or agreement that was lawfully and duly entered into by the Tribe unless there is cause therefore, or nonperformance by the other contracting party.

ARTICLE V – ELECTIONS

Section 1. General

The General Elections for the Tribal Council shall be held on the first Tuesday of September. Terms of office for each Tribal Council member shall be elected for a term of four (4) years. Terms of office for the seven (7) Tribal Council members shall be staggered, in a manner prescribed in the Election Code. Persons who are members of the Tribal Council at the time this Constitution is adopted and approved shall continue to serve on the Tribal Council until the regular annual elections for their respective offices. Elected members shall hold and remain in

office until their successors are duly elected and installed. Installation shall be made at the next duly called regular Tribal Council meeting within thirty (30) days following their election. There shall be no limit as to a number of times a person can be re-elected to the Tribal Council.

Section 2. Special Elections

Special Elections shall be held when called by law or as required by this Constitution or the Election Code.

Section 3. Election Board

There shall be an Election Board to regulate and conduct all elections in accordance with the Election Code. Each Election Board member shall serve a four-year term or until a successor has been confirmed in accordance with the Election Code.

Section 4. Election Code

The Tribal Council shall have the power to enact an Election Code in order to govern elections. The Election Board shall have the power to determine whether potential candidates meet the qualifications to run for and hold office. The Election Board shall have the power to certify election results and require all elected officials to swear an oath and allegiance to uphold the Constitution of the Tribe.

Section 5. Voters

Citizens of the Tribe who are eighteen years or older shall be eligible to register to vote, and only registered voters may vote in elections.

Section 6. Recall

Any recall referendum and any election subsequent to the referendum shall conduct pursuant to the Tribal Election Code.

ARTICLE VI - TRIBAL ENACTMENTS

Section 1. Codes

The Tribal Council shall manifest all governmental, regulatory and governmental administrative action in Tribal Codes. Such enactments shall be available for inspection by the enrolled members of the Tribe.

Section 2. Resolutions and Motions

All Tribal Council governmental, administrative, and regulatory actions shall be embodied in resolutions. All resolutions shall include a certification showing the presence of a quorum and the number of Tribal Council members voting for or against the proposed enactment. Other decisions of a temporary nature shall be put in the form of Motions and noted in the Minutes.

ARTICLE VII – JUDICIAL BRANCH

Section 1. Establishment of Courts

The Tribal Council may establish General Courts, Appeals Courts, Supreme Courts, Special Courts, or Courts of Special Jurisdiction pursuant to the Judicial Code. In establishing such courts, the Tribal Council shall set forth the jurisdiction of such courts, set forth qualifications of judges, and rights of appeals and procedures.

Section 2. Appointment of Judges

Pursuant to the Judicial Code, the Tribal Council shall establish the means of appointing judges, as well as the process and requirements for them to take office.

ARTICLE IX – BILL OF RIGHTS

Tribal members shall have all of the rights as set forth in Federal law generally applicable to tribes and Indians, enforceable in accordance with Federal law.

ARTICLE X – SOVEREIGN IMMUNITY

Section 1. Sovereign Immunity

The Tribe, as a sovereign government, is immune from judicial suit of any kind or administrative action.

Section 2. Waiver of Immunity from Suit

The Tribal Council may waive the sovereign immunity of the Tribe, its executive officials, employees, or departments in accordance with this Constitution. Such waiver shall be specific, limited in time, and limited in amount.

ARTICLE XI – AMENDMENTS

Section 1. Requirements

The Constitution may be amended by a majority vote of the registered voters who vote an election called for that purpose, provided that at least 51% of those registered to vote shall vote in such election.

Section 2. Request for an Election

- A. The Tribal Council may by law call for an election to amend the Constitution.
- B. Fifty-one percent of all citizens registered to vote in Tribal elections may upon presentation of a petition call for an election to amend the Constitution.

ARTICLE XII – ADOPTION

Section 1. This Constitution shall be initially adopted, and subsequently revoked or amended, by a majority vote of the registered voters of the General Membership of this Tribe voting at an election for initial adoption, revocation, or amendment.

ARTICLE XIII – EFFECTIVE DATE AND INITIAL ELECTION

Section 1. Approval

This constitution shall become effective when approved by an election of The Tribal Voting Membership of the Tribe. The initial election for Tribal Chairperson, Vice Chairperson, and Tribal Council Members shall occur within one-year of ratification of this Constitution. The Tribal Chairperson, Vice Chairperson, and Tribal Council shall take office upon certification of the election by the Election Committee.

ARTICLE XIV – CERTIFICATION

This is to certify that this Constitution was adopted June 26, 2005 at a duly called Election of the Tribal Voting Membership of the Pinoleville Tribe. This Constitution was adopted by a vote of 106 for, 22 Against, and 0 Abstentions.