

1 Gregory A. Connell, Esquire (SBN 233228)
Howard Mark Becker, Esquire (SBN 116902)
2 ROBERTS & CONNELL, LLP
Attorneys at Law
3 412 Marsh Street
San Luis Obispo, California 93401
4 Telephone: (805) 542-9900
Facsimile: (805) 542-9949
5

6 Attorneys for Plaintiff Forster-Gill, Inc.,
a California Corporation
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ENDORSED-FILED

APR 03 2017

CLERK OF MENDOCINO COUNTY
SUPERIOR COURT OF CALIFORNIA

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF MENDOCINO
13 UKIAH DIVISION

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

17 v.

18 PINOLEVILLE POMO NATION
19 Individually and d/b/a PINOLEVILLE
RANCHERIA OF POMO INDIANS
OF CALIFORNIA, and
20 PINOLEVILLE BAND OF POMO
INDIANS OF CALIFORNIA;
21 PINOLEVILLE ECONOMIC
DEVELOPMENT, LLC; LEONA L.
22 WILLIAMS; MICHAEL R.
CANALES; CANALES GROUP,
23 LLC; and DOES 1 through 500,
inclusive,
24 Defendants.

CASE NUMBER: SCUJ-CVG-16-68514-1

Unlimited Civil Case - Over \$25,000

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' NOTICE OF REQUEST
TO APPEAR SPECIALLY AND SUBMIT
NOTICE OF MOTION AND MOTION FOR
STAY OF DISCOVERY OR
PROTECTIVE ORDER PENDING
RESOLUTION OF MOTION TO QUASH
AND DEMURRER**

DATE: April 14, 2017
TIME: 9:30 a.m.
CTRM: E

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OPPOSITION TO DEFENDANTS'
REQUEST TO APPEAR SPECIALLY...

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I.

INTRODUCTION

Defendant Pinoleville Pomo Nation and its d/b/a (the "TRIBE"), is a federally recognized Indian tribe which has sovereign immunity, unless the TRIBE waived it. Defendant Pinoleville Economic Development, LLC ("PED") is a California corporation affiliated somehow with the TRIBE. It is unlikely that PED has any sovereign immunity. However, unfortunately for the TRIBE and PED, if it even had immunity, the TRIBE specifically and purposely waived its sovereign immunity thereby giving this Court jurisdiction to proceed with the lawsuit and the discovery process. This Court may need to make an initial determination as to whether or not the TRIBE's waiver of sovereign immunity was in fact made, and perhaps whether PED has any sovereign immunity. The Court will need to consider and weigh admissible evidence provided by the TRIBE and PED against the documentary evidence and testimony submitted by Plaintiff Forster-Gill, Inc., a California corporation ("PLAINTIFF") in opposition. Clearly, a preponderance of the evidence clearly demonstrates a waiver of the TRIBE's sovereign immunity and that PED never had immunity.

This Opposition will be supported by the Declaration of Tim Gill, the Request for Judicial Notice and Evidentiary Objections, all filed concurrently herewith.

II.

PROCEDURAL ISSUE

The TRIBE and PED (collectively, "DEFENDANTS") brought its Motion for Stay of Discovery and its Motion to Quash and Demurrer which was set for hearing on the same day. Rather than filing an Opposition to the Motion to Quash and Demurrer, PLAINTIFF has elected to clean up some of its pleading by filing a First Amended Complaint which is being filed concurrently herewith. To the extent that the Demurrer/Motion to Strike is not mooted by the First Amended Complaint, and the Court takes up the Motion to Quash or Demurrer at this time, PLAINTIFF incorporates the arguments and evidence contained herein as opposition to that Motion to Quash and Demurrer.

1 III.

2 FACTS¹

3 On or about January 22, 2009, PLAINTIFF received an offer for the lease and
4 eventual purchase of the Hopland Inn located at 13401 South Highway 101, Hopland,
5 California from the TRIBE and the Canales Group, LLC ("CGLLC"). Prior to the
6 consummation of the purchase and lease agreements, PLAINTIFF's President, Tim Gill
7 ("GILL") met with CANALES and WILLIAMS on several occasions. Both CANALES and
8 WILLIAMS represented to GILL that the TRIBE was in negotiations for a gaming contract
9 and that it wanted to utilize the Hopland Inn as a hotel and restaurant to be operated by
10 Pinoleville Economic Development, LLC ("PED"). CANALES also represented that he was
11 the Chief Executive Officer of the PED, even though he acknowledged that he was not a
12 member of the TRIBE.

13 During the initial meetings, WILLIAMS specifically represented to GILL that she was
14 the Chairperson of the TRIBE and had been granted full authority from the TRIBE to enter
15 the transaction. In fact, the Purchase Agreement at ¶27, specifically indicates that any
16 agent has authority from its principal to enter the contract. Further, pursuant to the
17 Commercial Lease Agreement, the Commercial Property Purchase Agreement is
18 specifically incorporated. See Addendum ¶1. Further, the Commercial Property Purchase
19 Agreement contains a choice of law provision at ¶28. In that agreement, the parties
20 agreed to follow California law as opposed to Tribal law. Full and complete copies of the
21 Commercial Property Purchase Agreement and Commercial Lease Agreement are
22 attached to PLAINTIFF's Exhibit Package ("PEX") as Exhibits "A" and "B."

23 As part of the Commercial Property Purchase Agreement, PLAINTIFF granted
24 CGLLC and the TRIBE temporary possession of the hotel and liquor licenses needed to
25 operate the hotel/restaurant/bar. See Commercial Property Purchase Agreement
26 Addendum. Defendants were to return the hotel and liquor licenses if the sale was not
27

28 _____
¹See Declaration of Tim Gill and Exhibits in support thereof filed concurrently herewith.

1 completed.

2 After the CGLLC and the TRIBE took possession of the property, Mr. Gill was
3 informed by CANALES and WILLIAMS that the TRIBE had ratified and approved the
4 Commercial Property Purchase Agreement and Commercial Lease. Further, the TRIBE
5 and Tribal Council held meetings at the Hopland Inn, as well as ceremonies at a sacred
6 Indian site known as the Hanging Tree located at the property.

7 At all relevant times, it was the intention of the CGLLC and the TRIBE to lease the
8 property until they could complete its purchase.

9 After entry of the original Commercial Property Purchase and Commercial Lease
10 Agreements, the TRIBE, by and through, PED, and CGLLC took possession of the
11 Hopland Inn and operated it using their own personnel, made periodic payments due under
12 the Commercial Lease Agreement and accepted all profits and benefits therefrom. All
13 purchase and lease payments are believed to be received from either the TRIBE or PED
14 (signed by CANALES).

15 On or about April 30, 2010, the parties negotiated and reached a First Amendment
16 to the Commercial Property Purchase Agreement and Joint Escrow Instructions and First
17 Amendment to the Lease Agreement. As set forth in the recitals of the First Amendment
18 to the Commercial Property Purchase Agreement, both the Commercial Property Purchase
19 Agreement and Commercial Lease Agreement were referred to as the Purchase
20 Agreement. True and correct copies of the First Amendments to the Commercial Property
21 Purchase Agreement and Commercial Lease Agreement are attached to PEX as Exhibits
22 "C" and "D."

23 In ¶7 of the First Amendment to the Commercial Lease Agreement, WILLIAMS
24 specifically represents and warrants that she had the full authority to sign the First
25 Amendment to the Commercial Lease Agreement on behalf of the TRIBE.

26 On or about April 27, 2011, the agreements were again amended by Second
27 Amendments to the Commercial Property Purchase Agreement and Commercial Lease
28 Agreement. Again all parties represented they had authority to sign on behalf of their

1 principals, including the TRIBE. True and correct copies of the Second Amendments to
2 the Commercial Property Purchase Agreement and Commercial Lease Agreement are
3 attached to PEX as Exhibits "E" and "F."

4 In January of 2012, a water pipe broke at the Hopland Inn causing substantial
5 damages. By September of 2012, the TRIBE and the CGLLC wrote a letter requesting that
6 the agreements be modified once again due to existing problems. A true and correct copy
7 of the September 2012 letter is attached to PEX as Exhibit "G." Initially the parties were
8 unable to agree on terms to modify the agreements, or on amounts that remained
9 outstanding and due. Also, PLAINTIFF learned for the first time that the TRIBE alleged
10 that although it had authorized and ratified the Commercial Property Purchase Agreement
11 and Commercial Lease Agreement, it had not necessarily waived its sovereign immunity.

12 Therefore, PLAINTIFF filed its initial complaint against the Pinoleville Pomo Nation,
13 CGLLC and WILLIAMS on October 25, 2012, under Case No. SCUJ-CVG-12-061105.
14 The complaint sought \$263,000 in damages against the TRIBE, CGLLC and WILLIAMS,
15 including a cause of action for fraud against CGLLC and WILLIAMS since they represented
16 that the TRIBE, would pay all amounts due under the agreements, and then sought to hide
17 behind its immunity and was not willingly accepting liability.

18 Thereafter, GILL met with CANALES and WILLIAMS on several occasions to
19 negotiate the past due amounts, plus the continued lease and purchase of the building.
20 On or about February 26, 2013, an agreement was reached whereby a Third Amendment
21 to the Commercial Property Purchase Agreement and Joint Escrow Instructions was
22 prepared. The Third Agreement included a specific waiver of sovereign immunity by the
23 TRIBE. PLAINTIFF also received a Promissory Note in the amount of \$250,000 for past
24 amounts due under the purchase agreements, including the Commercial Lease
25 Agreement. The Promissory Note also contained a specific waiver of sovereign immunity.
26 After the TRIBE claimed it had not waived immunity, PLAINTIFF insisted on this clause
27 which was negotiated by the TRIBE's attorney. True and correct copies of the Promissory
28 Note and Third Amendment to the Purchase Agreement are attached to PEX as Exhibits

1 "H" and "I." Both the Third Amendment to the Commercial Property Purchase Agreement
2 and Promissory Note contained specific waivers of the sovereign immunity. Based on the
3 promises of waiving of sovereign immunity and the TRIBE would pay all amounts due or
4 that would become due, PLAINTIFF agreed to release the CGLLC from the Commercial
5 Property Purchase Agreement. Both the Promissory Note and Third Amendment
6 envisioned the attachment of the tribal resolution providing WILLIAMS with authority to
7 enter the agreements, or otherwise ratify the agreements. Those agreements specifically
8 indicate that the TRIBE had already waived its sovereign immunity and WILLIAMS
9 warranted and represented that she had the authority to execute same. See Third
10 Amendment, ¶8.

11 In addition, at the time PLAINTIFF executed the Third Amendment, WILLIAMS
12 specifically represented to GILL that the Tribal Council had already met and passed a
13 resolution authorizing her to execute both the Promissory Note and Third Amendment and
14 that she would be providing GILL with a copy of same. On or about the same time, GILL
15 spoke to CANALES who also represented that he personally attended the Tribal Council
16 meeting in which the Promissory Note and Third Amendment were discussed, ratified and
17 approved by resolution.

18 Based on the waivers contained in the Promissory Note and Third Amendment,
19 PLAINTIFF dismissed its initial lawsuit with prejudice against the TRIBE, CGLLC and
20 WILLIAMS on March 12, 2013.

21 In or about February 2016, the TRIBE, PED and CGLLC vacated the Hopland Inn,
22 leaving it in terrible repair. There was hundreds of thousands of dollars of damages to the
23 buildings. DEFENDANTS also refused to return the liquor license which was worth
24 approximately \$50,000.

25 In preparing for this lawsuit, PLAINTIFF searched its records for a copy of the Tribal
26 Resolution waiving sovereign immunity and have not been able to find it. PLAINTIFF is not
27 entirely sure whether or not it was ever received or simply misfiled. Notwithstanding the
28 foregoing, PLAINTIFF only agreed to resolve the initial lawsuit with the TRIBE based on

1 WILLIAMS' and CANALES' specific representations that they had the authority to act on
2 behalf of the TRIBE and that the Tribal Council had met and specifically authorized
3 WILLIAMS to execute the agreements on behalf of the TRIBE.

4 After the instant lawsuit was filed, PLAINTIFF learned that the TRIBE was taking the
5 position that it had not ratified or adopted a resolution waiving its sovereign immunity for
6 the first time. Had PLAINTIFF known this, it never would have agreed to dismiss the 2012
7 lawsuit or to release the CGLLC, or contracted to lease the Hopland Inn with an option to
8 buy.

9 **IV.**

10 **LEGAL ARGUMENT**

11 A. The TRIBE Waived its Sovereign Immunity.

12 1. The TRIBE passed a resolution or otherwise ratified the Promissory Note and
13 Third Amendment to the Purchase Agreement.

14 It is well established that for a federally recognized Indian tribe to waive its sovereign
15 immunity, the waiver must be clear and express. See *Yavapai-Apache Nation v. Lipay*
16 *Nation of Santa Ysabel* (2001) 201 Cal.App. 4th 190, 206-207. It is clear that the
17 contractual waivers of sovereign immunity are enforceable where they are executed by
18 persons authorized to do so and where the necessary formalities were adequately
19 observed. See *C & L Enterprises, Inc.* (U.S. Supreme Court 2002) 532 U.S. 411, 422-423,
20 as cited by *Yavapai-Apache Nation, supra*, at 213. See also, *Smith v. Hopland Band of*
21 *Pomo Indians* (2002) 95 Cal.App. 4th 1. Further, no magic words are required. An
22 adequate waiver of sovereign immunity need not be phrased with any particular terms. *Id.*
23 When the trial court decides a claim of whether an Indian tribe has waived its tribal
24 sovereign immunity, the court should weigh the testimonial and documentary evidence
25 relevant to the jurisdictional question, as well as the pleadings and contract language with
26 the party seeking to enforce the waiver having the burden of proof. *Id.* at 205. So the
27 question remains was there a valid waiver of the TRIBE's sovereign immunity.

28 2. The TRIBE's argument and evidence in support thereof.

1 The TRIBE does not argue in their brief for Motion for Stay (or its Motion to Quash
2 and Demurrer) that the terms of the waiver were not clear and express. The TRIBE does
3 not argue that WILLIAMS, the Tribal Chairperson, lacked authority to bind the TRIBE.
4 Perhaps most importantly, the TRIBE does not take the position that it never ratified and
5 approved the contracts with PLAINTIFF, including the waiver of sovereign immunity.
6 Instead, the TRIBE makes a sly and coy legal argument only that PLAINTIFF cannot show
7 a waiver because it failed to attach a copy of a resolution adopting or ratifying the
8 contracts. However, the TRIBE provides no legal support that a tribal resolution must be
9 attached to a complaint in order to prove waiver. In fact, the cases including *Yavapai*,
10 *supra*; *C & L Enterprises, supra*; and *Smith, supra*, all require the court to weigh all
11 available evidence. In *Warburton-Buttner v. Supreme Court* (2002) 103 Cal.App. 4th
12 1170, the court stated the waiver can be made even absent a tribal resolution. The court
13 stated:

14 Next, the trial court could not justifiably assume that the language of the tribal
15 constitution must always be literally enforced, so that only a written tribal
16 resolution could satisfy the requirement that only an express waiver occur.
17 Federal law applies, and the recent cases in this area have enforced
18 contractual waivers of sovereign immunity, where they were executed by
19 persons authorized to do so and where the necessary formalities were
20 adequately observed. (*CL, supra*, 532 U.S. 411 at p. 423.) No magic words
21 are required, and the waiver of sovereign immunity need not mention those
22 particular terms. (*Smith, supra*, 95 Cal.App.4th at p. 9.) This was not a case
23 in which an individual entered into a contract without the knowledge of the
24 tribal council who actually had the power to contract. (*Sanderlin, supra*, 243
25 F.3d at pp. 1288-1289.)...

26 Further, the resolutions are all in the TRIBE's possession and were the subject of
27 the discovery requests.

28 In support of its argument that they never waived sovereign immunity because the
29 resolution was not attached, DEFENDANTS offer no evidence other than an
30 unauthenticated copy of their alleged 2005 Constitution (attached to DEFENDANTS'
31 Demurrer / Motion to Quash).² Even though PLAINTIFF has the burden to demonstrate

32 ² PLAINTIFF objects to the unauthenticated Constitution of the TRIBE as they failed to meet the
33 burden of authentication required by Evidence Code §§ 1400 and 1401. See Evidentiary Objections filed
34 concurrently herewith.

1 that a waiver was made, the TRIBE offers no evidence to the contrary.

2 3. PLAINTIFF submits an abundance of evidence that the Promissory Note and
3 Third Amendment to Purchase Agreement, as well as all prior agreements, were adopted
4 and ratified by the TRIBE.

5 The Promissory Note and Third Amended to Purchase Agreement contained
6 specific clear waivers of the sovereign immunity. See Exhibit "H" (¶10) and Exhibit "I" (¶4).
7 Those two waivers of tribal sovereign immunity specifically provide as follows: "Therefore,
8 the PINOLEVILLE POMO NATION, through LEONA L. WILLIAMS, its agent, has adopted
9 a resolution waiving the tribe's sovereign immunity and treaty rights as it relates to this
10 Note and transaction." Although the waiver envisioned the attachment of the actual
11 resolution to the contract as Exhibit A, PLAINTIFF's President, Tim Gill, testifies via
12 declaration that he was told by both WILLIAMS and CANALES that the Tribal Council had,
13 in fact, met and approved the entire transaction and that WILLIAMS was authorized to
14 execute it and that PLAINTIFF would be provided with a copy of the resolution by
15 WILLIAMS afterwards. See Declaration of Tim Gill ¶14. The statements of WILLIAMS and
16 CANALES, the Chief Executive Officer of PED, are declarations against interest and are
17 admissible pursuant to Evidence Code § 1230.

18 Similarly, the original Commercial Property Purchase Agreement, on a California
19 Association of Real Estate form, at ¶28 specifically states that the governing laws shall be
20 the laws of the State of California as opposed to Tribal laws. (Purchase Agreement ¶28,
21 Exhibit "B".) Pursuant to *Smith, supra* at pp. 10 and 11, contracts which provide for the
22 application of state law constitutes a waiver of the sovereign immunity. At the time the
23 original Purchase Agreement was executed, and when it was amended, both the first,
24 second and third times, PLAINTIFF was informed by DEFENDANTS, by and through their
25 agents, WILLIAMS and CANALES, that the TRIBE had adopted and approved said
26 contract. See Declaration of Tim Gill ¶¶5, and 14.

27 In addition, the TRIBE clearly ratified the contracts with PLAINTIFF under California
28 law. It took possession and operated a 21-room hotel, with bar and restaurant. The

1 TRIBE made many payments as required under the Commercial Lease and Purchase
2 Agreement. The TRIBE used the hotel for meetings, including tribal council meetings, and
3 it never disavowed same during the seven years it operated the property. (See Declaration
4 of Tim Gill at ¶¶ 5, 14, and 19.) PLAINTIFF was informed by both WILLIAMS and
5 CANALES that the TRIBE, in fact, held some of its council and general meetings at the
6 Hopland Inn. Clearly, each of these acts demonstrate that the TRIBE had, in fact, ratified
7 the contract. It is well established, under California law, that a principal can ratify a
8 contract made by an agent on its behalf by taking these kinds of actions. See *Rakestraw*
9 *v. Rodriques* (1972) 8 Cal. 3d 67, 74-75.

10 The TRIBE may argue that its unauthenticated Constitution required some type of
11 formal resolution, or otherwise, to waive its tribal immunity. Assuming arguendo, that the
12 TRIBE is able to authenticate its Constitution after the filing of its motion³, it should be
13 noted that the unauthenticated Constitution provides in Section 3(a) that the chairperson
14 shall have the power to represent the tribe in all matters with any governments, that the
15 chairperson shall negotiate any treaty, compact or contract subject to ratification by the
16 tribal council. The unauthenticated Constitution at Article 10, Section 2, provides that the
17 tribal council may waive the sovereign immunity of the tribe, its executives, officials,
18 employees or departments in accordance with the Constitution such a waiver shall be
19 specifically limited in time and limited in amount. The unauthenticated Constitution also
20 provides in Article 4, Section 3 that the tribal council shall not have the power to terminate,
21 aggregate or impair a contract or agreement that was lawfully and duly entered into by the
22 tribe, unless there is cause therefore or nonperformance by the contracting party.

23 What is not included in the unauthenticated Constitution offered by the TRIBE, is
24 any language which would specify how the tribal council was to ratify the contract entered
25 into by the tribal chairperson or specifying that any specific resolution or other document
26 would be required in order to waive sovereign immunity. California law allows express and
27

28 ³All evidence shall be submitted with moving papers. CCP § 1005; Rutter Group, *Civil Procedure Before Trial* § 6:603.

1 implied ratification. See *Rakestraw, supra*.

2 Based on the foregoing, it is clear that WILLIAMS had the authority to enter into the
3 contracts, including the waiver of sovereign immunity, that the TRIBE adopted and ratified
4 all of the contracts with PLAINTIFF, and assuming arguendo that no written ratification or
5 resolution was ever formally passed, the contracts were clearly ratified according to
6 California law.⁴

7 B. PED Has No Sovereign Immunity.

8 The California Supreme Court recently published an opinion in *People v. Miami*
9 *Nation Enterprises* (December 22, 2016) 2 Cal. 5th 222 (*Miami*), addressing whether a
10 corporation affiliated with an Indian tribe has sovereign immunity. In that decision, the
11 Supreme Court declared that a corporation seeking to claim sovereign immunity had the
12 burden of proof (in our case, PED). See *Miami, supra* Opinion and Section III. The court
13 held:

14 III.

15 The main legal question in this case is how to determine whether a tribally
16 affiliated entity shares in a tribe's immunity from suit. We conclude that an
17 entity asserting immunity bears the burden of showing by a preponderance
18 of the evidence that it is an "arm of the tribe" entitled to tribal immunity. In
19 making that determination, courts should apply a five-factor test that
20 considers (1) the entity's method of creation, (2) whether the tribe intended
21 the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's
22 control over the entity, and (5) the financial relationship between the tribe
23 and the entity. As explained below, this test takes into account both formal
24 and functional considerations — in other words, not only the legal or
25 organizational relationship between the tribe and the entity, but also the
26 practical operation of the entity in relation to the tribe. Once the entity
27 demonstrates that it is an arm of the tribe, it is immune from suit unless the
28 opposing party can show that tribal immunity has been abrogated or waived.

22 The first prong of the 5 point test "method of creation" is extremely relevant here.
23 The court in *American Property Management Corp. v. Superior Court* (2012) 206
24 Cal.App.4th 491 (*American Property Management*), a case very similar to the case at
25 hand, held:

28 ⁴ PLAINTIFF believes the records of the TRIBE, if not altered and/or forged, will clearly show that all
contracts were ratified and approved, and that these documents will be received in the discovery process.

1 ...a California limited liability company called U.S. Grant, which was indirectly
2 affiliated with the Sycuan Band of the Kumeyaay Nation, purchased a hotel
3 [an off reservation downtown San Diego hotel]. *Id.* at p. 495–496. The tribe
4 created the Sycuan Tribal Development Corporation under tribal law and
5 then established “several layers of California limited liability companies to
6 stand between it and [U.S. Grant,] the entity that took ownership of the
7 hotel.” (*Id.* at p. 495.) The issue was whether U.S. Grant was entitled to tribal
8 immunity in a contract dispute. The Court of Appeal “agree[d] that the list of
9 factors set forth by the Tenth Circuit [in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d 1173]
10 is helpful and, although the factors overlap somewhat when applied, they
11 accurately reflect the general focus of the applicable federal and state case
12 law.” (*American Property Management*, at p. 501.) The court analyzed each
13 of these factors and, in support of its finding of no immunity, explained that
14 “the dispositive fact throughout our analysis is that U.S. Grant, LLC is a
15 California limited liability company” rather than an entity organized under
16 tribal law.

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1. PED offers no evidence to meet its burden that it is an arm of the TRIBE
entitled to sovereign immunity.

As set forth above, PED has offered no admissible evidence to meet its burden of proof that it is an arm of the Pinoleville Pomo Nation. Instead, PED makes a naked assertion that it is wholly owned by the TRIBE and that it is entitled to immunity.

2. PLAINTIFF’s evidence supports that PED is not an arm of the TRIBE and has no sovereign immunity.

PLAINTIFF offers records from the Secretary of State’s office that it is a California limited liability company. See Request for Judicial Notice, Exhibit “A.” In considering the method of creation of the economic entity, the first prong of the standard, courts have focused on the law under which the entity was formed. Formation under tribal law weighs in favor of immunity, whereas formation under state law has been held to weigh against immunity (*American Property Management*, *supra*, 206 Cal.App. 4th at p. 503) or to constitute a waiver of immunity (*Wright v. Colville Tribal Enterprise Corp.* (2006) 147 P.3d 1275, at p. 1280; *Runyon v. [Association of Village Council Presidents]* (Alaska 2004) 84 P. 3d 437, at p. 441).

PLAINTIFF offers evidence that PED and the hotel operations were managed by PED’s Chief Executive Officer, CANALES, who was not a tribal member. See Declaration

1 of Tim Gill ¶2. See also, Request for Judicial Notice, Exhibit "A" listing Michael Canales
2 as the agent for service of process.

3 Further, the evidence shows that PED was operating the hotel/restaurant/bar off the
4 Indian reservation. The facts are similar to *American Property Management* (U.S. Grant),
5 *supra*, in that a California corporation operated a hotel property off the reservation and
6 managed by non-tribal members, is not an arm of the tribe and not entitled to sovereign
7 immunity.

8 C. Needed Discovery is not Stayed Pending Jurisdiction Questions.

9 The trial court should permit jurisdictional discovery when the plaintiff has provided
10 sufficient evidence suggesting that sovereign immunity was waived. In *Great Western*
11 *Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, the court
12 found that during subject matter jurisdiction disputes, the trial courts have the power to
13 make interim orders and provide for the progress of the case pending resolution of
14 jurisdiction questions. See also *Warburton, supra* at p. 1192. DEFENDANTS rely on
15 *White v. University of California* (9th Cir. 2014) 765 F.3d 1010, 1025 and *Boschetto v.*
16 *Hansing* (9th Cir. 2008) 539 F.3d 1011, that jurisdiction is properly denied and the request
17 that was based on little more than a hunch that it might yield jurisdictionally relevant facts.
18 Those cases are easily distinguishable. In *White v. University of California* (9th Cir. 2014)
19 765 F.3d 1010, the court denied discovery only after it determined the defendant had
20 sovereign immunity. *Boschetto, supra*, involves personal jurisdiction based on an E-Bay
21 sale. Our case involves contracts executed by a tribe's chairperson.

22 In the present case, PLAINTIFF has propounded discovery to obtain evidence that
23 the TRIBE adopted resolutions authorizing WILLIAMS to enter contracts, including
24 contracts with PLAINTIFF, that it held board meetings and entered specific resolutions
25 adopting PLAINTIFF's contracts and that WILLIAMS had authority to enter into said
26 contracts, and/or that the contracts were duly ratified by the conduct of the TRIBE or PED
27 based on their seven-year operation of the hotel/restaurant/bar.

28 It appears that the TRIBE's argument is that PLAINTIFF did not attach a copy of the

1 resolution ratifying the contracts with PLAINTIFF even though the resolution was promised
2 by the TRIBE's chairperson, the TRIBE does not want to let PLAINTIFF have any
3 discovery related to the issue of the waiver of sovereign immunity. PLAINTIFF has met its
4 burden of demonstrating by a preponderance of the evidence that the sovereign immunity
5 was waived and at a minimum is entitled to discovery.

6 V.

7 CONCLUSION

8 Based on the foregoing, PLAINTIFF requests that the Court take DEFENDANTS'
9 Motion to Quash and Demurrer off calendar based on the filing of PLAINTIFF's First
10 Amended Complaint and further, make an order finding that PLAINTIFF has proved by a
11 preponderance of evidence that the TRIBE, including PED, waived its sovereign immunity,
12 that PED is not entitled to sovereign immunity, and the case, including discovery, may
13 proceed.

14 Dated: March 31, 2017

ROBERTS & CONNELL LLP

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16 

17 _____
18 Gregory A. Connell, Esquire
19 Howard Mark Becker, Esquire
20 Attorneys for Plaintiff
21 Forster-Gill, Inc., a California Corporation
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1 PROOF OF SERVICE

2 STATE OF CALIFORNIA
3 COUNTY OF SAN LUIS OBISPO } ss.

4 I, Kourtney L. Milbury, declare as follows:

5 I am a citizen of the United States and an employee in the County of San Luis
6 Obispo. I am over the age of 18 and not a party to the above-entitled action. My business
7 address is 412 Marsh Street, San Luis Obispo, California 93401.

8 On the date set forth below, I caused the document(s) described as:

9 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' NOTICE OF REQUEST TO
10 APPEAR SPECIALLY AND SUBMIT NOTICE OF MOTION AND MOTION
11 FOR STAY OF DISCOVERY OR PROTECTIVE ORDER PENDING
12 RESOLUTION OF MOTION TO QUASH AND DEMURRER**

13 to be served on the interested parties in this action addressed as follows:

14 Padraic I. McCoy, Esquire
15 BERG HILL GREENLEAF & RUSCITTI LLP
16 1712 Pearl Street
17 Boulder, CO 80302

*Attorneys for Defendants Pinoleville
Pomo Nation individually and d/b/a
Pinoleville Rancheria of Pomo Indians
of California, Pinoleville Band of Pomo
Indians of California and Pinoleville
Economic Development, LLC*

18 **BY UNITED STATES MAIL:** I am readily familiar with the firm's practice of collection and
19 processing documents for mailing. Under that practice, the envelopes are sealed and, with
20 postage thereon fully prepaid, deposited with the United States Postal Service on that same
21 day at San Luis Obispo, California, in the ordinary course of business. I am aware that, on
22 motion of the party served, service is presumed invalid if the postal cancellation date or
23 postage meter date is more than one day after the date of deposit for mailing in this
24 affidavit.

25 **BY HAND DELIVERY:** I personally delivered such envelope to the offices of the
26 addressee, following ordinary business practices.

27 **BY FACSIMILE:** I caused the above-described document(s) to be sent via facsimile
28 transmission to the offices of the addressee, following ordinary business practices.

BY OVERNIGHT COURIER: I caused such document(s) to be delivered by overnight mail
to the offices of the addressee by placing it for collection by Federal Express following
ordinary business practices, to wit, that package(s) will either be picked up from the firm by
the courier service, and/or delivered to the courier's office.

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

Executed and served on March 31, 2017, at San Luis Obispo, California.

Kourtney L. Milbury

