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

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

15 v.

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

23 Defendants.

Case No.: SCUK-CVG-2016-68514

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

**HEARING DATE: April 14, 2017**  
**TIME: 9:30 am**  
**DEPT: Unlimited Civil, Courtroom E**  
**ACTION FILED: Dec. 16, 2016**

24 **REPLY TO OPPOSITION TO NOTICE OF REQUEST TO APPEAR SPECIALLY TO**  
25 **SUBMIT NOTICE OF MOTION AND MOTION FOR STAY OF DISCOVERY OR**  
26 **PROTECTIVE ORDER PENDING RESOLUTION OF MOTION TO QUASH AND**  
27 **DEMURRER**  
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## I. Introduction

Defendants Pinoleville Pomo Nation (the “Tribe”) and Pinoleville Economic Development, LLC (“PED, LLC”) (together, “Tribal Defendants”<sup>1</sup>) hereby make a special and limited appearance solely for the purpose of submitting this Reply to Opposition to Motion for Stay of Discovery or Protective Order Pending Resolution of the Motion to Quash and Demurrer (“Reply”). Plaintiff has filed an Amended Complaint, which it concedes moots the Tribal Defendants’ Motion to Quash and Demurrer. However, the Motion to Quash and Demurrer is inextricably tied to the Motion for Stay of Discovery and, because Tribal sovereign immunity is the threshold question for both motions, they must be heard together once the Tribal Defendants—and the other newly named defendants—have the opportunity to file their motions to quash and demurrers to the Amended Complaint. Thus, the Tribal Defendants respectfully request this Court grant their Motion for Stay and, if appropriate, grant the concurrently filed Emergency Motion to Extend Hearing to Date of Hearing on Responsive Motion(s) to Amended Complaint to allow the threshold matter of Tribal sovereign immunity to be determined on full briefing responsive to the operative Amended Complaint, with the participation of all defendants named in the Amended Complaint, instead of in the premature and piecemeal way proposed by Plaintiff.

## II. Relevant Procedural History

Plaintiff filed this action on December 16, 2016. The Tribal Defendants were served in January. The parties stipulated to extend Tribal Defendants’ time to respond to the Complaint. The Court’s February 8, 2017 Notice of Case Management Conference schedules the case management conference for June 30, 2017. The Tribal Defendants filed their Notice of Request to Appear

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<sup>1</sup> As explained more fully below, Plaintiff filed an Amended Complaint in this action on the same day it filed its Opposition to the Motion for Stay. The Amended Complaint names as additional defendants Tribal Chairperson Leona L. Williams, Michael R. Canales, and the Canales Group, LLC. This Reply is made by undersigned counsel only on behalf

1 Specially to Submit Notice of Motion, Motion to Quash Service of Summons and Complaint and  
2 Demurrer; Motion to Quash; Demurrer to Complaint; and Memorandum of Points of Authorities in  
3 Support Thereof (“Motion to Quash and Demurrer”) on March 7, 2017. On March 10, 2017, the  
4 Tribal Defendants filed their Notice of Request to Appear Specially to Submit Notice of Motion and  
5 Motion for Stay of Discovery or Protective Order Pending Resolution of Motion to Quash and  
6 Demurrer (“Motion for Stay”). Pursuant to stipulation of the parties, the hearing date for the Motions  
7 was rescheduled to April 14, 2017. Also pursuant to stipulation of the parties, Plaintiff filed its  
8 responses to the Tribal Defendants’ Motions on March 31, 2017. No scheduling conference has been  
9 held in this matter, and no scheduling order has been entered.  
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12 In response to the Tribal Defendants’ Motions, on March 31, 2017 Plaintiff filed, relevant  
13 here, an Amended Complaint, an Opposition to Defendants’ Notice of Request to Appear Specially  
14 and Submit Notice of Motion and Motion for Stay of Discovery or Protective Order Pending  
15 Resolution of Motion to Quash and Demurrer (“Opposition to Motion for Stay”), and Opposition to  
16 Demurrer and Motion to Quash (“Opposition to Demurrer and Motion to Quash”). The Opposition to  
17 Demurrer and Motion to Quash states that “Plaintiff believes that the filing of the First Amended  
18 Complaint moots the Demurrer and Motion [to Quash]” and concedes that the Motion to Quash and  
19 Demurrer and Motion for Stay are “based on the same jurisdictional argument.”  
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21 Notwithstanding, Plaintiff then proposes in its Opposition to Motion for Stay that this Court  
22 allow discovery<sup>2</sup>—which by its nature subjects the Tribal Defendants to the burdens of a lawsuit—  
23 prior to hearing and making a determination on the Tribal Defendants’ assertion of tribal sovereign  
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26 of the defendants originally named in the Complaint, Pinoleville Pomo Nation and Pinoleville Economic Development  
27 LLC.

28 <sup>2</sup> Related, on March 31, 2017, Plaintiff also served two additional Notices of Deposition of Custodian of Records, one  
each on the Tribe and PED, LLC, which Tribal Defendants note are improper given this pending Motion for Stay, and  
which Defendants also request be included in the Court’s consideration of this matter.

1 immunity. Plaintiff's request puts the cart before the horse, and the Motion for Stay should be  
2 granted.

### 3 III. Law

4 "The filing of a first amended complaint renders a demurrer moot, since an amendatory  
5 pleading supersedes the original one, which ceases to perform any function as a pleading." *People ex*  
6 *rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 505-06 (internal quotations  
7 and citation omitted). Thus, when an amended complaint is filed, the hearing on the demurrer must  
8 be removed from the court's calendar. *Id.* A party may seek a protective order that stays discovery  
9 pending resolution of a potentially dispositive motion such as a motion to dismiss. *See, e.g., Wenger*  
10 *v. Monroe*, 282 F.3d 1068, 1077 (9th Cir.2002) (affirming district court's grant of protective order  
11 staying discovery pending resolution of motion to dismiss).  
12

13 "Sovereign immunity is not a discretionary doctrine that may be applied as a remedy  
14 depending on the equities of a given situation'[,] ... rather it presents a pure jurisdictional question."  
15 *Warburton/Buttner v. Superior Court*, 103 Cal.App. 4th 1170, 1182 (2002) (quoting *Chemehuevi*  
16 *Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir. 1985)).  
17 Sovereign immunity is a threshold jurisdictional matter that must be addressed at the beginning of a  
18 case. *See Pan American Company v. Sycuan Band of Mission Indians* (9th. Cir.1989) 884 F.2d 416,  
19 418. A court's ruling on the existence of a valid waiver of a tribe's sovereign immunity is  
20 immediately appealable as an interlocutory order. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509  
21 F.3d 1085, 1091 (9th Cir. 2007). Jurisdictional discovery cannot be permitted where to do so would  
22 pierce tribal sovereign immunity prior to allowing the Court to hear full briefing on dispositive  
23 motions. *See Osage Tribal Council v. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999)  
24 (explaining that tribal sovereign immunity is "not merely a defense to liability"); *Bonnet v. Harvest*  
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1 (*U.S.) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014) (“[A] subpoena duces tecum served  
2 directly on the Tribe, regardless of whether it is a party to the underlying legal action, is a ‘suit’  
3 against the Tribe, triggering tribal sovereign immunity.”).

#### 4 IV. Argument

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6 Plaintiff’s Opposition to Motion for Stay reads more as an opposition to the Motion to Quash  
7 and Demurrer—Plaintiff recites purported facts delving into the history of the relationship between  
8 the parties, interpretation of the Tribe’s Constitution, and California case law on the waiver of tribal  
9 sovereign immunity. All of this argumentation will be heard after the Tribal Defendants and the  
10 additional defendants named in the Amended Complaint have the opportunity to respond to the  
11 Amended Complaint with, as appropriate, motions to quash and/or demurrers. But this Motion for  
12 Stay is not the time for this argumentation. By requesting the Court consider all of the Opposition to  
13 Motion for Stay’s purported facts, law, and argumentation prior to full and fair responsive motions  
14 and briefing on the Amended Complaint, Plaintiff is requesting this Court make a premature decision  
15 on the threshold jurisdictional determination of the issue of Tribal Defendants’ sovereign immunity.  
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18 For example, in its Opposition to Motion for Stay, Plaintiff includes operative purported  
19 factual details that are not only the first mention of these facts, but are specifically relevant to the  
20 Amended Complaint. *See* Opposition to Motion for Stay, p. 2, l. 3 – p. 6, l. 8. The purported facts in  
21 the Opposition to Motion for Stay do nothing to remedy the facial problems alleged in the Motion to  
22 Quash and Demurrer: Plaintiff brings a claim for breach of a lease without attaching the operative  
23 Third Amendment to the Lease; Plaintiff alleges that the Tribe waived its sovereign immunity  
24 through Tribal Council resolutions integral to the purported waiver provisions that Plaintiff fails to  
25 attach to the Complaint; Plaintiff fails to allege how the purported waiver provisions in the contract  
26 comply with the Tribal Constitution’s requirement that they be “specific, limited in time, and limited  
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1 in amount”; and Plaintiff makes no specific allegations against PED, LLC in the Complaint. It  
2 remains to be seen whether Plaintiff has remedied these facial problems by its Amended Complaint—  
3 this shall be determined in the briefing and Court’s determination on Tribal Defendants’ and the other  
4 named defendants’ motions to quash/demurrers to the Amended Complaint. Plaintiff’s efforts to  
5 have this Court make determinations on purported facts not even alleged in the Complaint is  
6 problematic and demonstrates that Plaintiff is making arguments going to the heart of the Motion to  
7 Quash and Demurrer in its Opposition to Motion for Stay.

9 Plaintiff’s first argument is that “[t]he Tribe Waived its Sovereign Immunity.” This is an  
10 issue to be decided at the time dispositive motions responsive to the Amended Complaint are fully  
11 briefed; not at this premature stage. Plaintiff mischaracterizes Tribal Defendants’ arguments  
12 regarding sovereign immunity (which arguments Tribal Defendants’ maintain should only be  
13 addressed in the briefing and determination on a motion to quash and demurrer to the Amended  
14 Complaint). Tribal Defendants do not make “sly and coy” (Opposition to Motion for Stay, at p. 7, l.  
15 6) arguments; rather, Tribal Defendants reasonably argue that a Plaintiff to a contract action must  
16 provide the contract, the express waiver of tribal sovereign immunity that is consistent with the  
17 Tribe’s Constitution<sup>3</sup>, and evidence that the waiver was duly made. Contrary to Plaintiff’s assertion,  
18 *Warburton-Buttner v. Supreme Court*, 103 Cal.App.4<sup>th</sup> at 1190, supports Tribal Defendants’  
19 arguments here that a contract must be “executed by persons authorized to do so and where the  
20 necessary formalities were adequately observed.” Here, the promissory note and contract upon which  
21 Plaintiff’s claims rely expressly incorporate by reference a Tribal resolution. But Plaintiff does not  
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26 <sup>3</sup> Plaintiff’s evidentiary objection in footnote 2 is misplaced, since courts can take judicial notice of a Tribe’s constitution.  
27 *Big Valley Band of Pomo Indians v. Super. Ct.* (2005) 35 Cal.App.4<sup>th</sup> 1185, 1192 (“Several documents presented by the  
28 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 legislative enactment of a public entity, and the official act of  
a “state” within the United States. (Evid.Code, § 452, subs. (a), (b), (c) ...”).

1 have those Tribal resolutions; apparently, Plaintiff determined to execute the contracts without  
2 requiring the resolutions. See *Rosenthal v. Great W. Fin. Securities Corp.*, 926 P.2d 1061, 1079 (Cal.  
3 1996) (“it is generally unreasonable, in reliance on such assurances, to neglect to read a written  
4 agreement before signing it. One party’s making of such an assurance does not, by itself, deprive the  
5 other party to a prospective contract of the reasonable opportunity to discover the character and  
6 essential terms of the agreement.”). However, because the resolutions are referenced as being integral  
7 to the purported waivers of sovereign immunity, they must be provided. See *Otworth v. S. Pac.*  
8 *Transportation Co.*, 212 Cal. Rptr. 743, 747 (Cal. App. 2d Dist. 1985) (“If the action is based on an  
9 alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint  
10 or a copy of the written instrument must be attached and incorporated by reference.”).

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13 As Plaintiff concedes, “Plaintiff has the burden to demonstrate that a waiver was made.”  
14 Opposition to Motion for Stay, p. 7, l. 26 – p. 8, l. 1. Thus, the Tribal Defendants are not required to  
15 provide evidence to the contrary because the burden remains with Plaintiff to provide the contractual  
16 documentation supporting its contractual claims.<sup>4</sup> At present, Plaintiff has filed a lawsuit that fails to  
17 meet Plaintiff’s burden to affirm that there is a proper basis in law and fact to allege the Tribal  
18 Defendants have waived their sovereign immunity. Whether the evidence shows, as Plaintiff  
19 purports, that the Tribe waived its sovereign immunity or ratified the contracts<sup>5</sup> are issues to be  
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22 <sup>4</sup> Plaintiff is incorrect that *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4<sup>th</sup> 1, 10-11 announces the  
23 proposition that “contracts which provide for the application of state law constitutes a waiver of sovereign immunity,”  
24 Opposition to Motion for Stay, p. 8, l. 21-22. Such a proposition is contrary to the fundamental law of tribal sovereign  
25 immunity. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007) (waivers of tribal  
26 sovereign immunity must be explicit and unequivocal). Rather, the *Smith* court merely determined that on the particular  
27 facts of the case, the choice of California law provision in the contract was not limited by one of the tribe’s ordinances.

28 <sup>5</sup> The Tribal Defendants note that the Amended Complaint makes allegations against three new defendants, all of whom  
should have the right in the first instance to respond to the Amended Complaint without being subject to a ruling on  
discovery that was decided in their absence. Of particular note is the deposition of Tribal Chairperson Leona L. Williams  
that was scheduled prior to her being named as a party to the Amended Complaint, which adds a fraud claim. Moreover,  
on information and belief, it is unlikely that all of the newly-named defendants have even been properly served with the  
summons and Amended Complaint, and until such time as they are all properly served, discovery on a lesser number of  
the defendants is inappropriate.

1 determined on briefing of dispositive motions or, should the Court determine there are operative fact  
2 issues in dispute, later. An Opposition to Motion for Stay is not the time to require a determination  
3 on these issues.

4 Similarly, Plaintiff's arguments regarding the sovereign immunity of PED, LLC are  
5 determinations that should be made on full briefing of the Motion to Quash and Demurrer. Plaintiff  
6 fails to allege any specific allegations against PED, LLC in the Complaint other than to assert that the  
7 Tribe and PED, LLC are purported "alter egos" of each other. Now Plaintiff switches horses in the  
8 Opposition to the Motion for Stay, arguing that PED, LLC is not an arm of the Tribe simply because  
9 PED, LLC is a state-chartered entity that purportedly operated the hotel, which was located off-  
10 reservation<sup>6</sup>. These assertions are contrary to law. *Ameriloan v. Super. Ct.* (2008) 169 Cal.App.4<sup>th</sup>  
11 81, 84 86 Cal. Rptr. 3d 572, 575, as modified (Jan. 14, 2009) (*citing Kiowa Tribe of Oklahoma v.*  
12 *Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 754-755) ("As a matter of federal law,  
13 absent congressional authorization or an Indian tribe's consent to suit, a federally recognized Indian  
14 tribe enjoys immunity from any suit in state court, even if the activity that is the subject of the lawsuit  
15 is purely commercial in nature or occurs on nontribal lands. That immunity extends to a tribe's for-  
16 profit business entities when the entity is operating on behalf of the tribe."). Moreover, Plaintiff once  
17 again attempts to prematurely shift the burden to Tribal Defendants. The burden is on Plaintiff in the  
18 first instance to allege actions by the named plaintiff PED, LLC supporting its claims for relief. *See*  
19 *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (denying a discovery request based on  
20 "speculative arguments"); *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (jurisdictional  
21 discovery properly denied when the request was "based on little more than a hunch that it might yield  
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27 <sup>6</sup> Again, Plaintiff provides no legal support for naming PED, LLC in this action—at issue here is not who purportedly  
28 operated the hotel, but rather who entered into the contracts under which Plaintiff brings its claims, and whether those  
entities duly and properly waived their sovereign immunity from suit.



1 jurisdictionally relevant facts”). This, too, is a determination to be made on briefing of a motion to  
2 quash and demurrer.

3 By its Opposition to Motion for Stay, Plaintiff requests far more than jurisdictional  
4 discovery—it expressly requests, throughout its argument, that the Court make a determination on the  
5 Tribe’s and PED, LLC’s sovereign immunity from suit. *See, e.g.*, Opposition to Motion for Stay, at  
6 13, l. 10-12 (“Plaintiff requests that the Court ... make an order finding that Plaintiff has proved by a  
7 preponderance of the evidence that the Tribe, including PED, waived its sovereign immunity, [and  
8 that PED is not entitled to sovereign immunity[.]”). Plaintiff’s effort to make an end-run around the  
9 sovereign immunity analysis by requiring this Court to rule on sovereign immunity prior to full and  
10 fair briefing on the issue is problematic and unnecessary, given that Plaintiff will have its chance to  
11 make its arguments on sovereign immunity in response to dispositive motions on the Amended  
12 Complaint. Moreover, were the Court to deny the Motion for Stay of Discovery but later grant a  
13 dispositive motion to quash and demurrer, the discovery determination would be unduly burdensome  
14 as a clear infringement on the Tribal Defendants’ sovereign immunity from all aspects of suit.  
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#### 18 **V. Conclusion**

19 Tribal Defendants request this Court allow full and fair briefing through timely responses by  
20 all defendants named in the Amended Complaint on the issue of the defendants’ sovereign immunity  
21 and alleged waivers thereof. Plaintiff’s Opposition to Motion for Stay requests this Court make  
22 potentially dispositive findings prematurely and on incomplete briefing and without the participation  
23 of three newly-named plaintiffs. Therefore, Tribal Defendants request this Court grant its Motion for  
24 Stay of Discovery or Protective Order Pending Resolution of the Motion to Quash and Demurrer as  
25 to all discovery requests propounded by Plaintiff in this matter and specify that the stay shall remain  
26 in place until any motions to quash and demurrers to the Amended Complaint have been resolved.  
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DATED: April 7, 2017



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**PROOF OF SERVICE—CIVIL**

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**In the:**

Superior Court of the State of California  
For the County of Mendocino  
100 North State Street  
Ukiah, CA 95482  
Branch: Mendocino County Courthouse, Ukiah

**Petitioner/Plaintiff:** Forster-Gill, Inc.

**Respondent/Defendant:** Pinoleville Pomo Nation and Pinoleville Economic Development, LLC

**Case No. :** SCUJ-CVG-16-68514

1. I am over the age of 18 and not a party to this action. I am a resident of or employed in the county where the mailing took place.
2. My business address is: 1712 Pearl Street, Boulder, CO 80302.
3. On April 7, 2017, I mailed from Boulder, Colorado the following documents: **NOTICE OF REQUEST TO APPEAR SPECIALLY TO SUBMIT NOTICE OF MOTION AND MOTION FOR STAY OF DISCOVERY OR PROTECTIVE ORDER PENDING RESOLUTION OF MOTION TO QUASH AND DEMURRER**
4. I served the documents by causing 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.
5. The envelope was addressed and mailed to: Gregory A. Connell, Esq., Howard Mark Becker, Esq, Roberts & Connell, LLP, 412 Marsh Street, San Luis Obispo, CA 93401.

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

DATED: April 7, 2017

  
Michelle D. Hitchcock