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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LUNA GAMING - SAN DIEGO LLC, a Michigan Limited Liability Company,

Plaintiff,

v.

DORSEY & WHITNEY, LLP, HOLLAND & KNIGHT, LLP, BLEDSOE DOWNES & ROSIER P.C., JAMES TOWNSEND, PHILIP M. BAKER-SHENK, AND BRADLEY GRANT BLEDSOE DOWNES, jointly and severally,

Defendants.

Case No. 06 CV-2804 (BTM) (WMC)

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS HOLLAND & KNIGHT, LLP AND PHILIP M. BAKER-SHENK'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, ADJUDICATION

Date	2/1/08
Time:	11:00 a.m.
Dept:	Room 15
Judge:	Barry T. Moskowitz
Complaint Filed:	12/28/06
Trial Date:	None set

No Oral Argument – Unless Requested By The Court

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I.

INTRODUCTION

Plaintiff's Complaint is based on the assertion that the Defendant attorneys were responsible for jointly representing both sides of a business deal between Luna Gaming – San Diego ("Plaintiff") and the Ewiiaapaayp Band of Indians ("the Tribe"). Holland & Knight, LLP and Philip Baker-Shenk ("Defendants") respectfully ask this Court to grant summary judgment in their favor for the following reasons:

- The undisputed facts show that these Defendants ***never*** agreed to and never did represent Plaintiff in connection with the matters at issue -- their ***only*** client was the Tribe. As such, Defendants owed no legal duty to Plaintiff and are entitled to judgment as a matter of law.
- Plaintiff should be estopped from asserting that these Defendants jointly represented Plaintiff and the Tribe, due to the countless times that Plaintiff, through its own representations and omissions, encouraged and allowed others to believe that these Defendants represented only the Tribe.
- The statute of limitations for Plaintiff's claims against these Defendants expired more than two years before this suit was filed.

II.

STATEMENT OF FACTS

In 1997, the Tribe formally retained Dorsey & Whitney ("Dorsey") to serve as its general counsel. To that end, Dorsey and the Tribe entered into an express agreement for legal services which was reviewed and approved by the Bureau of Indian Affairs (BIA). As general counsel for the Tribe, Dorsey handled different matters for the Tribe. One such matter was the representation of the Tribe in its attempts to develop a casino. [UF 1]

Initially, the Tribe entered into an agreement with Alliance Gaming to construct and operate a casino on the Tribe's land. Two years later, Alliance Gaming was looking for a third-party to buy out its agreement with the Tribe. [UF 2] Thomas Celani ("Celani"), a seasoned businessman and successful casino developer, heard about this opportunity through his consultant, Donald Buch ("Buch"). In January, 2000, Celani and Buch traveled to California to meet with James Townsend ("Townsend"), one of the Tribe's attorneys at Dorsey. [UF 9] After the meeting with Townsend, Celani extended an offer to buy out Alliance Gaming's interest.

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[UF 10] In order to facilitate the casino development, Celani formed Action Gaming, LLC, a business entity that he owned and managed (Action Gaming later became Luna Gaming, LLC and then Luna Gaming-San Diego, LLC, all of which are collectively referred to herein as "Plaintiff"). [UF 8, 13, 38]

Through its independent counsel, Dykema Gossett ("Dykema"), Plaintiff negotiated and participated in the drafting of a Management Agreement and a corresponding Development Agreement with the Tribe. [UF 13-15, 18, 30-31] These Agreements, executed on March 29, 2000, set forth the parties' rights and obligations with respect to the casino development project ("the Project"). [UF 13] While the Dykema attorneys represented Plaintiff's interests in drafting the Agreements, Dorsey represented only the Tribe. [UF 14-15]

Pursuant to the Development Agreement, Plaintiff agreed to pay "***the Tribe's attorneys' fees***." [UF 18] However, there was no mention in this Agreement or elsewhere, of any joint representation. No written retainer agreement or engagement letter was ever drafted, and no express oral agreement was ever made to indicate any joint representation by Dorsey attorneys of the Tribe and Plaintiff. [UF 33] In fact, all correspondence and documents regarding the Project, including formal disclosures made to federal authorities, consistently reflected the truth of the matter: that Dorsey attorneys represented the Tribe while attorney James Oegema ("Oegema") represented Plaintiff. [UF 34, 39-45]

Although he was employed with Dorsey at the time, Defendant Philip Baker-Shenk ("Baker-Shenk") was not involved in any of the discussions, negotiations, or drafting that preceded Plaintiff's decision to pursue a relationship with the Tribe. Accordingly, Plaintiff admits that it did not rely upon any representations of Baker-Shenk in deciding to invest in the Tribe's casino development venture or in deciding to execute the Management and Development Agreements. [UF 11, 16]

Baker-Shenk did not begin working on the Project until late 2000 or early 2001. [UF 23] By this point, Plaintiff had already realized that the Project faced substantial political opposition and legal challenges at the federal, state and local levels. [UF 23, 35-36] In or about June 2003, Baker-Shenk notified his partners at Dorsey that he would be leaving Dorsey for a competing

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law firm. [UF 46]

Shortly thereafter, on July 15, 2003, Celani and Oegema attended a "secret" meeting in Las Vegas with other Dorsey attorneys involved in the Project. [UF 47] Baker-Shenk was intentionally excluded. [UF 48] At the meeting, the Dorsey attorneys allegedly advised Plaintiff that Baker-Shenk had mishandled the Project and created unnecessary expense and delays with an ineffective strategy. [UF 49] These reports only served to "reassure" Celani's pre-existing belief that unnecessary legal fees had been incurred in connection with the legislative affairs and lobbying efforts Baker-Shenk and others at Dorsey had been undertaking on behalf of the Tribe. [UF 50]

Baker-Shenk formally concluded his employment with Dorsey on September 17, 2003 and he began working with Holland & Knight LLP ("H&K") approximately one week thereafter. During this one-week interval, Baker-Shenk performed no work in connection with the Project. [UF 55] Baker-Shenk later agreed to represent the Tribe through H&K. However, in order to do so, he requested and secured a written Conflict Waiver and Consent Agreement from Plaintiff. [UF 62] He did this because another attorney with a different H&K office had been approached by one of the Luna entities in 2002 concerning a potential engagement in connection with the Project. That prior involvement between H&K and Plaintiff was very limited, having occurred and ended in 2002, without any Luna entities even receiving any bills in connection with the potential engagement.[1] [UF 63] Nevertheless, Baker-Shenk and H&K erred on the side of caution and sought Plaintiff's consent. Even though Celani had been unhappy with Baker-Shenk's work, Plaintiff consented because the Tribe wanted to retain Baker-Shenk and his new firm to represent its interests in the Project. [UF 56]

The Conflict Waiver and Consent Agreement that was drafted included verbatim language proposed by Plaintiff's counsel. The Conflict Waiver indicated that H&K (and Baker-Shenk) ***would not*** represent Plaintiff in connection with the Project but would ***only*** represent the Tribe's interests. The document also confirmed that any prior representation of Plaintiff by

[1] H&K's 2002 involvement in this Project is not at issue in this litigation, as no complaint or allegation has been raised in connection therewith. [UF 64]

H&K in connection with the Project had terminated back in 2002. [UF 65-68]

When H&K and Baker-Shenk began representing the Tribe in 2003, they were working on a new, alternative development plan different from the Project contemplated in the original March 29, 2000 Management and Development Agreements. [UF 71] Plaintiff had recently urged the Tribe to consider an alternative project involving a joint venture between the Tribe and Viejas (the primary objector to the original Project). [UF 59] On September 23, 2003 (approximately one week after Baker-Shenk left Dorsey), the Tribe informed Plaintiff that it would pursue the Viejas joint venture alternative with Plaintiff, in lieu of the initial Project. [UF 61] The work that Baker-Shenk and H&K later performed for the Tribe was paid for by Plaintiff pursuant to the 2000 Development Agreement and, was done to seek federal approvals and new legislative authority required for the Viejas joint venture alternative. [UF 71]

In sum, Defendants were not involved in any of the underlying representations which allegedly induced Plaintiff to invest in the Project or induced it to enter binding, financial agreements with the Tribe. Baker-Shenk was only brought on board after Plaintiff had already discovered that any alleged representations that the Project would proceed with "ease" and "speed" were not accurate. Acknowledging this, Plaintiff does not even attempt to allege that Baker-Shenk in any way induced its investment or involvement in the Project. Instead, Plaintiff alleges that, after it was already invested and bound by its March 2000 legal agreements with the Tribe, Baker-Shenk incurred excessive and unnecessary legal expenses pursuing unsuccessful lobbying and legal strategies. (See Complaint at para. 42, 46-47, 62 and 63). These are the same allegations which Plaintiff alleges it was given express notice of in July, 2003 – three years before suit was filed. [UF 50] Furthermore, when Baker-Shenk left Dorsey, he ceased all representation in connection with the matter for a period of at least one week. [UF 55] Later, when Baker-Shenk and H&K represented the Tribe in an effort to gain federal approval of the Project which had been re-shaped into the Viejas joint venture, they did so with a Conflict Waiver and Consent Agreement in place. As stated therein, any representation by H&K of Plaintiff in connection with the Project had terminated in 2002. [UF 62]

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III.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Where relevant facts are undisputed, the court may grant summary judgment as to the entire action, or where certain issues are disputed but the facts as to other issues are undisputed, the Court may grant summary judgment as to those issues. Fed. R. Civ. Proc. 56(a), (b).

To meet its initial burden on summary judgment, the moving party is not required to produce evidence disproving the plaintiff's claim, but need only point to the absence of evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). While argument alone is sufficient for the movant to meet this burden, the moving Defendants on this Motion have presented substantial evidence for the Court. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). The burden therefore shifts to Plaintiff to offer specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENTS JUSTIFYING SUMMARY JUDGMENT

IV.

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE WAS NO ATTORNEY-CLIENT CONTRACT WITH AND, THEREFORE, NO DUTY OWED TO PLAINTIFF

Plaintiff's Complaint asserts three separate counts, styled as Professional Negligence, Negligent Misrepresentation, and Breach of Fiduciary Duty. Each of the alleged claims is grounded in the fundamental assertion that Defendants agreed to represent Plaintiff in connection with the Project. If, as Defendants maintain, there was no such agreement, then all of Plaintiff's claims must fail. See, e.g., *Fox v. Pollack*, 181 Cal.App.3d 954, 959-960 (1986) (attorney owes no duty to, and cannot be sued by, a non-client for negligence or breach of fiduciary duty); *Mattco Forge v. Arthur Young & Co.*, 38 Cal.App.4th 1337, 1355-1357 (1995) (affirming dismissal of negligence and negligent misrepresentation causes of action because no duty was owed to non-client).

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A. Whether An Attorney-Client Relationship Existed Is A Question Of Law That Is Properly Decided By The Court As A Matter Of Law, Based The Relevant Facts And Circumstances

An attorney-client relationship can be formed only by contract, express or implied. *Sky Valley v. ATX Sky Valley LTD*, 150 F.R.D. 648, 651-652 (ND Cal. 1993); *Responsible Citizens v. Superior Court*, 16 Cal.App.4th 1717, 1732; *Fox*, 181 Cal.App.3d at 959. In this case, there is no allegation or evidence of any express contract between Plaintiff and Defendants regarding legal representation for the Project. [UF 33] Rather, the allegation is that Defendants *impliedly* agreed to jointly represent both Plaintiff and the Tribe in connection with the Project.

"An implied contract…in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being the mere mode of proof by which they are to be respectively established….Although an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." *Zenith Ins. Co. v. Cozen O'Conner*, 148 Cal.App.4th 998, 1010 (2007) (internal citations omitted); California Civil Code section 1621.

Whether an attorney-client contract existed in a given case is a question of law and is resolved through an objective test. See, e.g., *Responsible Citizens*, 16 Cal.App.4th at 1733; *Sky Valley*, 150 F.R.D. at 652. A plaintiff's subjective belief that an attorney represents it is ***not*** sufficient to create an implied attorney-client contract, or a duty of care owed by the attorney to that plaintiff. *Zenith Ins. Co.*, 148 Cal.App.4th at 1010. In fact, since a plaintiff cannot unilaterally establish an attorney-client relationship, its hindsight "beliefs" that such a relationship existed are legally irrelevant. *Id.*

Sky Valley v. ATX Sky Valley LTD, 150 F.R.D. 648 (1993 ND Cal.), is a case with striking similarities to the instant case. As is the case here, *Sky Valley* involved a large real estate development project where the project developer claimed to have been jointly represented (along with the project owner) by a law firm hired by the project owner. In order to resolve the privilege objections to discovery requests directed at the law firm, the court had to determine

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whether there was in fact a joint representation as alleged by the developer.

In its decision, the Court noted that even while the analysis involves consideration of a many factual issues,[2] that does not change that the determinative question – whether there was an attorney-client contract – "is a question of law that is resolved through an objective test." *Sky Valley*, 150 F.R.D. at 652. The court determined that the evidence did not support a reasonable inference of a joint attorney-client relationship. The court accepted as true the developer's purported belief that the law firm jointly represented both parties, but concluded that "a reasonable person in these circumstances could not have harbored any such belief." *Id* at 654.

Given all of the facts and circumstances here, as in *Sky Valley*, it would have been unreasonable for Plaintiff to have concluded that Defendants agreed to jointly represent both parties to the Project and, therefore, Defendants are entitled to summary judgment.[3]

B. Plaintiff Was Never Defendants' Client

1. The Agreements And Written Expressions Of The Parties Reflect An Attorney-Client Relationship *Only* Between Defendants And The Tribe

In deciding whether there was an intent to form an implied agreement, one of the key items to examine is the written and oral expressions of the parties regarding the subject matter. See, e.g., *Sky Valley*, 150 F.R.D. at 652. Written expressions, particularly contracts, carry significant weight when ascertaining a party's intentions on a given subject. In this case, the various contracts and other written expressions all show that Defendants represented the Tribe, but none show any intention to jointly represent Plaintiff, as well.

First, there was never any written or oral agreement that Dorsey or any of the other Defendants would jointly represent Plaintiff and the Tribe in connection with the Project. [UF

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2 In *Sky Valley*, the court acknowledged that several facts were in dispute. The parties "submitted hundreds of pages of documents and scores of pages of declarations in support of their clients' respective positions," including declarations from the project developer's officers who claimed that they subjectively believed that the law firm jointly represented both the project owner and the developer. Even with conflicting declarations, the court was nevertheless able to make its decision, as a matter of law, applying the "reasonable person" standard. *Sky Valley*, 150 F.R.D. at 645.

3 Since the allegation in this case is a joint representation, it requires evidence of an implied joint agreement between three parties – Plaintiff, Defendant and the Tribe. Thus, the ultimate question is whether a reasonable person viewing the circumstances of this case would reasonably conclude that all of these parties agreed to the joint representation as alleged in the complaint. See, *Zenith Ins. Co.*, 148 Cal.App.4th at 1008.

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33] At the same time, it is undisputed that Dorsey expressly agreed to represent the Tribe in connection with its desired casino development, well before Plaintiff ever entered the picture. Dorsey began serving as attorneys for the Tribe in 1997. [UF 1] This relationship was re-affirmed on May 23, 2001 with a written General Counsel Contract. [UF 25] Baker-Shenk, who began providing services in connection with the Project in late 2000 or early 2001, did so under Dorsey's attorney-client contract(s) with the Tribe. [UF 23]

The Dorsey General Counsel Contract contemplates an attorney-client relationship involving ***only*** the Tribe. [UF 26] Thereby, Dorsey agreed "to act as general counsel for and on behalf of the Tribe, and to perform legal services for and on behalf of the Tribe, including gaming and business development, drafting codes, necessary representation of the Tribe before the Department of the Interior, Committees of Congress…and other governmental agencies…" [UF 27] Dorsey's Contract was executed more than one year after Plaintiff says the alleged joint representation began. If the parties genuinely intended that Defendants represent both the Tribe and Plaintiff, there would be some indication in the General Counsel Contract. However, there is absolutely no mention of Plaintiff nor any implication that Dorsey had agreed to or was expected to jointly represent or perform services on behalf of Plaintiff. [UF 26] To the contrary, the Contract specifically provides that Dorsey would serve at the exclusive direction of the Tribe: "Dorsey shall only act on such matters as they are specifically directed to act upon either by resolution of the Council or by direction of the Chairperson or his designated representative." [UF 27]

Dorsey and the Tribe submitted their General Counsel Contract to the BIA for approval. [UF 25] In contrast, there was never any disclosure made by anyone to the BIA indicating any joint representation involving Plaintiff and the Tribe or the Project. [UF 34, 43] All written submissions to the BIA and other government entities indicated that Defendants only represented the Tribe, not Plaintiff. [UF 34-35, 40-42, 44]

In September, 2003, Baker-Shenk left Dorsey for H&K. Later, he and his new firm expressly agreed to establish an attorney-client relationship with the Tribe. [UF 62] Again, there was no written or oral agreement that Baker-Shenk and H&K would represent Plaintiff in

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connection with the Project. To the contrary, there was a written acknowledgment from Plaintiff that H&K and Baker-Shenk ***did not*** represent Plaintiff in connection with the Project, but would only represent the Tribe alone in connection with the Project. [UF 62-69]

The December 2003 Conflict Waiver and Consent, was drafted in significant part by James Oegema, Plaintiff's General Counsel. [UF 64-66] By executing the waiver on behalf of Plaintiff, Celani confirmed that Plaintiff "consents to the Firm's representation ***of the Tribe***" and specifically agreed that Baker-Shenk and H&K were authorized to "undertake the representation ***of the Tribe*** in its gaming and health development efforts [the Project]." [UF 67-68] Celani also specifically acknowledged that any representation of Plaintiff in connection with the Project had "terminated" and had Baker-Shenk and H&K confirm that they "***will not undertake in the future any specific representation of Luna Entertainment in gaming project matters that are related to those now or to be undertaken by the Tribe.***" [UF 67] In other words, not only did Plaintiff specifically disclaim the joint representation it now alleges, it also secured a written agreement from Baker-Shenk and H&K that there would not be any joint representation in the future.

This written Conflict Waiver and Consent completely undermines Plaintiff's case against Baker-Shenk and H&K. Plaintiff cannot claim to have reasonably believed that Baker-Shenk and H&K impliedly agreed to a joint representation that was specifically disclaimed in a document that Plaintiff drafted and signed.

2. The Factual Circumstances And The Parties' Conduct Were Inconsistent With The Alleged Joint Representation And Show That Plaintiff And The Tribe Did Not Consider Themselves To Be Joint Clients Of Defendants

Where an implied contract is alleged, the court must examine all of the facts and circumstances, including the parties' conduct and the surrounding context, to determine whether they show mutual assent, or a meeting of the minds, on the essential elements of the alleged contract. See, e.g., *Sky Valley*, 150 F.R.D. at 651; *Zenith Ins. Co.*, 148 Cal.App.4th at 1010; Civil Code section 1621 ("An implied contract is one, the existence and terms of which are manifested by conduct"). Where one alleges an implied contract for a joint legal representation, it is not

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sufficient "simply to ask whether each of two persons sought legal service or advice from a particular lawyer." *Sky Valley*, 150 F.R.D. at 651. Instead, the proper inquiry is whether it would have been *reasonable*, taking into account all the relevant circumstances, for the plaintiff to have inferred that he was in fact a "client" of the lawyer. *Id.*

This case does not involve a situation where two parties jointly came to an attorney seeking assistance in putting together a business deal. To the contrary, Plaintiff stepped into a situation with a pre-existing attorney-client relationship and a pre-existing casino development deal where Plaintiff took the place of a business partner who had dropped out. There is no dispute that Dorsey represented the Tribe before Plaintiff was ever involved in the Project. [UF 1] Indeed, when Celani first got involved, he was advised that Defendants had been representing the Tribe in a proposed development deal with another party and there was an opportunity for him to "step into" that other party's position. [UF 2-3, 21-22] Under these circumstances, it would be unreasonable for the newcomer, Celani, to assume that the Tribe's attorneys would automatically jointly represent his interests, as well as the Tribe's, in a deal that the Tribe and its attorneys had been working on for months.

3. Plaintiff's Retention Of Separate Counsel Was Inconsistent With An Alleged Joint Representation Involving Defendants

It is significant that Celani and Plaintiff maintained their own separate counsel in connection with the Project. In addition to the Dykema firm, which represented Plaintiff in the drafting of the Management and Development Agreements, and Oegema, who became Plaintiff's in-house general counsel, Celani and Plaintiff also retained at least four other law firms (including Akin Gump; Brownstein, Hyatt & Furber; Mazzarella, Dunwoody & Caldarelli; and Kerr, Russell and Weber) to provide services and advice in connection with the Project. [UF 15, 17, 24, 29-32] The additional expense of these various lawyers should have been unnecessary if Plaintiff had genuinely intended to rely on the asserted joint representation by Defendants. As noted by the court in *Sky Valley*, a party's employment of its own separate counsel is inconsistent with an implied joint representation. *Sky Valley,* 150 F.R.D. at 652-653. With all of these lawyers looking out for Plaintiff's interests, it cannot genuinely claim that it also needed

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Defendants to do so as well.

In addition, Plaintiff also admits it understood that Dorsey represented ***only*** the Tribe while drafting the Development and Management Agreements. [UF 14-15] This admission makes Plaintiff's entire theory even more incredible. Plaintiff claims to have believed that during some portions of the casino development process (e.g., before 2000 and during the March 2000 drafting process), Defendants separately represented ***only*** the Tribe, however, at other times (including the period in early 2000 before the Agreements were drafted), Defendants jointly represented both Plaintiff and the Tribe. This incredible, "on again-off again" joint representation is not only completely unsupported by the evidence, it is manifestly unbelievable. If Plaintiff genuinely believed that this was the arrangement to which the parties had jointly agreed, then it was certainly not a reasonably-held belief.

4. Plaintiff's Insistence On A Written Confidentiality Agreement From Defendants Was Inconsistent With The Purported Expectation Of A Joint Representation

In February 2000, when Celani was providing information to the Tribe to confirm that he could meet the financial commitments being discussed, he insisted that both the Tribe and Dorsey sign Confidentiality and Nondisclosure Agreements. [UF 12] The parties' conduct in connection with this request is telling.

That Plaintiff even requested such an agreement from Defendants is inconsistent with any purported understanding or expectation of a joint representation. If Defendants had truly agreed to represent Plaintiff, they would automatically be subject to an ethical duty of confidentiality. See, e.g., Cal. RPC, 3-100; B&P Code § 6068; Model Rules of Professional Conduct, 1.6. Celani and Plaintiff would not have needed a confidentiality agreement from their own attorneys. As an experienced consumer of legal services and someone interested in maintaining his confidences, Celani had to know that his attorneys automatically owed him the highest duty of confidentiality, which would not be enhanced by a written confidentiality agreement. This also had to be known by Oegema, Plaintiff's attorney and the person who actually sent the Confidentiality and Nondisclosure Agreement to Dorsey.

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Celani's request for confidentiality agreement shows there was no implied joint representation agreement. In fact, the request ***only*** makes sense if there was ***no*** joint representation. It would be natural for Celani to extract a confidentiality agreement from a prospective development partner and that partner's attorneys, but it makes no sense to demand such an agreement from your own lawyer.

5. The Parties' Communications With Each Other And With Outside Parties Were Inconsistent With The Purported Joint Representation

In addition to all the facts and circumstances discussed above, the parties' communications provide persuasive evidence of their true intentions and expectations. See, *Sky Valley*, 150 F.R.D. at 655 (rejecting claim of implied joint representation where plaintiff "received copies of letters sent … to third parties in which [the attorney] explicitly identified its client as [another party] and did not even intimate that [the plaintiff] might also be its client").

The alleged joint representation in this case covered a period of several years and involved extensive communication, both oral and written. Over the many years and many discussions, meetings, letters, e-mails, and telephone calls, it was consistently communicated that Defendants represented the Tribe. [UF 34, 40-45] However, there was never a single instance where anyone, *including Plaintiff*, expressed the understanding that Defendants represented Plaintiff in this Project. [Id.]

The entire history of the parties' communications is discussed further in Section V, below. But a review of the record over the course of years, demonstrates the following key facts:

- From the days of Plaintiff's first contact with the Tribe, Plaintiff was advised that Defendants represented only the Tribe. [UF 21- 22]
- Likewise, from the beginning of its discussions with Celani, the Tribe repeatedly informed Plaintiff that Defendants represented the Tribe and not Plaintiff. [Id.]
- E-mails and letters exchanged consistently state that Dorsey's attorneys were representing just the Tribe, while Oegema was representing Plaintiff. [UF 34, 39-45]
- By contrast, Plaintiff admits it is not aware of any documents stating that any

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Dorsey attorneys represented Plaintiff in connection with the Project. [UF 45]

- Over the years, Plaintiff made and approved countless statements to the government and other third parties, all of which stated that Dorsey attorneys, including Baker-Shenk, represented the Tribe – *and only the Tribe*. [UF 34, 39-45]

If Plaintiff (or Celani or Oegema) truly believed that any of the aforementioned communications were false or incomplete, they had ample opportunity to correct or clarify the statements. They never did so. [UF 35, 39-45] Instead, Plaintiff repeatedly acquiesced to and often gave advance approval of, these repeated statements that Defendants only represented the Tribe.

A particularly glaring example is the parties' submissions to the NICG. As part of its review of the Management and Development Agreements, the NIGC asked for a list of all the attorneys and lobbyists representing the parties to the Agreements. Dorsey prepared a draft response, indicating that Dorsey represented the Tribe, but not Plaintiff. The draft response was forwarded to Plaintiff's General Counsel for review.

Oegema made some revisions to the document, but, significantly, did not revise (or raise any questions about) the list of counsel. Plaintiff knew that providing the NIGC with full disclosure was critical. [UF 41-42] If Plaintiff had genuinely believed that Defendants were jointly representing Plaintiff and the Tribe in connection with the Project, then Plaintiff's own general counsel should have so indicated rather than allowing Dorsey and the Tribe to "inaccurately" report the parties' representation. The reality is that Plaintiff did not believe there was a joint representation.

The parties' repeated statements (described above and in more detail in section V, below) are wholly inconsistent with the pending allegation that there was a joint representation. See, *Sky Valley*, 150 F.R.D. at 661. A client believing itself to be jointly represented by a law firm would not continually ignore the repeated contrary statements from its alleged attorneys and its alleged joint client without making some attempt to clarify.

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6. Plaintiff's Asserted Belief In An Implied Joint Representation Was Unreasonable Given The Significance Of The Project And Plaintiff's Sophistication And Experience

Plaintiff's asserted assumption that Defendants impliedly agreed to represent both sides of the Project is manifestly unreasonable given the nature of the Project and the parties involved. "[T]he more sophisticated the party, and the more significant the interests affected, the more skeptically courts should view arguments that it was reasonable to rely on an implied attorney-client relationship." *Sky Valley,* 150 F.R.D. at 652.

The joint relationship allegedly assumed by Plaintiff would have been unusual in almost any business transaction. Even if this had been a small real estate transaction, one would typically have expected both parties to have separate counsel. See, e.g., *Fox*, 181 Cal.App.3d at 954. But this was not a simple business transaction. To the contrary, this case involved a large, complicated, multi-million dollar casino development project.

The Agreements between Plaintiff and the Tribe called for advances of large sums of money, construction and relocation of a healthcare facility, navigation through layers of political and regulatory approvals, and construction and operation of a casino projected to generate hundreds of millions of dollars in revenue. It is unthinkable that Plaintiff would enter into such a deal with the assumption that the opposing party's attorneys also represented Plaintiff in the transaction. If that had genuinely been the understanding, certainly a sophisticated businessman like Celani would have required written confirmation of the joint representation rather than simply trusting millions of dollars to an assumption. Rejecting a similar claim by the *Sky Valley* project developer, the Court summarized the absurdity of Plaintiff's position:

> "The absence of any kind of express contract between [the project developer] and [the law firm] takes on added significance in light of the alleged magnitude of [the project developer's] economic interest in the project and [the project developer's] sophistication in the business world generally. We question whether a commercially sophisticated party that allegedly has a multi-million dollar interest in a project would form an attorney-client relationship without a shred of paper memorializing even the most basic terms of that alleged relationship."

Id. at 655.

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Simply stated, no reasonable person looking at the circumstances of this case would have assumed that Defendants agreed to jointly represent both sides of the transaction.

7. The Nature Of The Project Makes Any Alleged Implied Joint Representation Less Reasonable

In support of their asserted joint representation relationship, Plaintiff points to the fact that Defendants communicated directly with Plaintiff, providing what Plaintiff considered to be legal advice. The fact that Defendants communicated with Plaintiff and the Tribe regarding issues affecting the Project (a matter in which Plaintiff and the Tribe had a common interest) is not surprising nor does it reasonably lead to an inference that Defendants represented both Plaintiff and the Tribe. *Sky Valley,* 150 F.R.D. at 652-653 (when evaluating the reasonableness of an alleged joint attorney-client relationship, it is important to examine the context and the nature of any contractual relationships between the alleged joint clients).

Like Plaintiff, the project developer in *Sky Valley* also sought and received legal advice from the law firm retained by the project owner. *Id.* at 656. Nevertheless, those communications did not indicate the existence of a joint client relationship. Examining the nature of the project and the parties' contractual relationships, the court concluded that the advice provided by the law firm was "not as a result of voluntarily made decisions to form a new professional relationship, but as a result of independent contractual obligations that [the developer] and [the law firm] separately had to [the project owner]." *Id.* As the project lawyer for the owner, the law firm "was obligated to meet the project's legal needs as identified by [the project developer]." *Id.* Thus, "[w]hen [the project developer] sought assistance from [the law firm]… it was not for [the developer]'s own legal needs, but only for the needs of the project," which project the law firm's client owned. *Id.* at 657.

Just like in *Sky Valley*, Defendants in this case communicated and worked closely with Plaintiff's management and in-house attorneys. But they did so not because there was a joint attorney-client relationship, but because Plaintiff and Defendants each owed separate but related contractual obligations to the Tribe to advance the Project.

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8. The Written Development And Management Agreements Both Reflect A Relationship Between Defendants And The Tribe, But Not With Plaintiff

In this case, the alleged "joint relationship" and the basis for Plaintiff's claimed damages were created by the written Development and Management Agreements. The nature of the Agreements and several terms are inconsistent with Plaintiff's present allegation of a joint representation. For example, both Agreements require that any notices to the Tribe be sent directly to the Tribe and also to "James E. Townsend, Esq. at Dorsey & Whitney LLP." By contrast, any notices to Plaintiff were to be sent to "Action Gaming LLC/Thomas Celani" at the address provided, with a copy to Plaintiff's attorney, Oegema. [UF 20] If Townsend and Dorsey were jointly representing both parties to the transaction, the Agreements would not have them listed as a notice recipient for only one of their "joint clients."

In addition, the Agreements specifically contemplated that the Tribe had and would continue to have its own counsel and incur attorneys' fees in connection with the Project. As a term of the Development Agreement, Plaintiff, as Developer, explicitly agreed to pay the fees and costs incurred by "the Tribe's attorneys." [UF 18]

This provision explicitly recognizes that the Tribe had employed and would continue to employ attorneys to represent its own interests. If the parties had, in fact, contemplated a joint representation, Section 3.1.8 would have been the perfect place to explain that agreement. To the contrary, the Agreements do not mention ***anything*** about any purported joint representation. The Development Agreement did not call for Plaintiff to pay the fees incurred by any alleged "joint venture" and did not contemplate legal expenses incurred jointly by the Tribe and Plaintiff. Rather, it explicitly discussed Plaintiff's agreement to pay for "***the Tribe's attorneys***."

It is undisputed that Defendants are the attorneys whose bills were submitted, approved, and paid as "the Tribe's attorneys" under this provision. [UF 18] However, Plaintiff now incredibly claims to have understood that the attorneys designated and paid as "the Tribe's attorneys" were also representing Plaintiff. It is completely disingenuous for Plaintiff to now claim that its payment of these fees evidences an implied agreement for a joint representation. The fees were charged by and paid to Defendants serving as "the Tribe's Attorneys" – this was

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the unambiguous language of the Development Agreement which Plaintiff's separately-retained attorneys helped draft. If Plaintiff genuinely understood that Defendants jointly represented both sides, then it should have had Oegema draft the paragraph to reflect that understanding. However, the only reasonable reading of the provision is that Defendants represented the Tribe, not Plaintiff. By honoring its contractual obligation to pay Defendants' fees, Plaintiff did not establish attorney-client contract with the Tribe's attorneys (or become the intended beneficiary of the legal services performed by them). *Zenith Ins. Co.*, 148 Cal.App.4th at 1006.[4]

9. The Alleged Implied Agreement For Joint Representation Is Belied By The Parties' Conflicting Interests

Finally, Plaintiff's claim is also refuted by the apparent and unwaived conflicts of interest between Plaintiff and its alleged joint client. Celani testified that he assumed Defendants represented the Tribe and Plaintiff (despite the lack of any express agreement and all the contrary evidence). However, it is not the standard "default" position for an attorney to represent both opposite sides of a large business transaction; typically, an attorney's ethical obligations would prohibit such a joint representation. See, e.g., Cal. Rules of Professional Conduct, 3-310.

There is no question that, while they had some common interests, Plaintiff and the Tribe also had clearly divergent interests as well. [See, e.g., Complaint ¶78 (alleging that Defendants undertook a joint representation "when the interests of Plaintiff and the Tribe appeared to be divergent")] At best, the asserted joint representation would require a full, written disclosure of all potential conflicts of interests and written consent by all involved parties. Cal. Rules of Professional Conduct, 3-310. The existence of these unwaived conflicts effectively precludes an implied joint representation agreement or any implication of third party beneficiary status. *Zenith Ins. Co.*, 148 Cal.App.4th at 1009. Contrary to Plaintiff's assertion, an attorney "cannot be held to be under a duty to protect the interests of … a nonclient, where, as here, the nonclient's interests were, at the very least, potentially adverse to those of the client." *Id.*

The California Court of Appeal has noted that "it would be inappropriate to hold an

4 California courts have repeatedly rejected similar arguments that a party's agreement to pay another party's attorneys' fees creates an implication of a joint representation. See, e.g., *Zenith Inc. Co.*, 18 Cal.App.4th at 1010 ("the mere payment of attorneys' fees does not necessarily establish an attorney-client relationship").

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attorney liable to a third party for a legal opinion which the third party could not, under the Rules of Professional Conduct, have contracted to obtain from that attorney." *B.L.M. v. Sabo & Deitsch* 55 Cal.App.4th 823, 839 (1997).[5] "This rule stems from salutary public policy considerations holding that an adverse party cannot be the intended beneficiary of the attorney's services provided for his client, because any other rule would eradicate the attorney's undivided, fiduciary duty of loyalty owed to his client." *Zenith Ins. Co.*, 148 Cal.App.4th at 1008.

Moreover, as a factual matter, the lack of any conflict waiver, or even any discussion of the subject, undermines the reasonableness of Plaintiff's assertion of an implied joint representation. If Plaintiff and Plaintiff's in-house counsel, Oegema, genuinely believed that Defendants had agreed to represent both sides of this deal, surely they would have raised a question about the conflicts of interests and the need for a waiver. The fact that Oegema, Plaintiff's in-house counsel, was involved and separately representing Plaintiff allows for only two possible conclusions:

(1) Oegema and Plaintiff did not consider the conflict of interests issue because there was no genuine belief of a joint representation; or

(2) They did consider, but chose not to raise the issue, permitting Defendants and the Tribe to proceed, blissfully unaware that Plaintiff expected Defendants to serve as its attorneys.

In conclusion, given these unwaived conflicts, combined with the parties' express agreements, their communications and conduct, and all facts and circumstances of this case, it was simply not reasonable for Plaintiff to have inferred that it was a joint client of Defendants.

V.

IN EQUITY, LUNA MUST BE ESTOPPED FROM ARGUING THAT DEFENDANTS WERE REPRESENTING ITS INTERESTS IN CONNECTION WITH THE PROJECT

A. Plaintiff Made Representations That It Was In Compliance With Various Laws Which Precluded Legal Counsel From Jointly Representing Both the Tribe and Its Developer

[5] See also, *Fox*, 181 Cal.App.3d at 961 ("an attorney has no duty to protect the interests of an adverse party [citation] for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client").

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Any entity which engages in gaming on Indian land is required to comply with the Federal Indian Gaming Regulation Act (IGRA). 25 U.S.C. 2701 et seq. Apparently recognizing this mandate, Plaintiff expressly represented and warranted, through statements made in its Management and Development Agreements, that it would remain compliant with "all applicable laws and regulations" and all "Legal Requirements," including, without limitation, IGRA.

Plaintiff's representations work to estop it from now arguing that the Tribe's attorneys were also representing Plaintiff at the very same time those Management and Development Agreements (the Agreements) were negotiated and entered between the Tribe and Plaintiff. Such an arrangement, if it had ever existed, would have been contrary to IGRA's intent and purpose, and would also, therefore, have been contrary to Plaintiff's statements that,

> "[Plaintiff] and the Tribe shall not be construed as joint venturers or partners of each other…" (Mgmt. Agrmt. Para. 9.4; Devlp Agrmt. Para. 14.5)
>
> "[Plaintiff] agrees not to unduly interfere in or attempt to influence the internal affairs … of the Tribe …" (Mgmt. Agrmt. Para. 10.2)
>
> "This Management Agreement ("Agreement") is entered into pursuant to the Indian Gaming Regulatory Act of 1988…" (Mgmt. Agrmt. Page 1)
>
> "The Manager [Plaintiff] covenants that it will at all times comply with … all Legal Requirements, including IGRA." (Mgmt. Agrmt. Para. 3.4)

These statements were made and then signed by Thomas Celani on behalf of Plaintiff because neither the National Indian Gaming Commission (NIGC) nor the Secretary of Interior would have allowed joint legal representation.

IGRA was enacted to promote tribal economic development, self-sufficiency, and strong tribal government. The intent was to shield tribes from fraud and corrupting influences, and to ensure that the tribes would be the primary beneficiaries of the gaming operations. 25 U.S.C. §2702. In order to effectuate those objectives and generally protect the tribes' interests, IGRA imposed strict restrictions on management contracts entered between tribes and third-party developers, like Plaintiff. Such management contracts are considered void if not approved by the NIGC. 25 CFR 533.7. In order to achieve the required approval, management contracts must comply with various procedural and substantive regulations. Furthermore, the NIGC must be satisfied that the management contractor has not "attempted to unduly interfere or influence

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for its gain or advantage any decision or process of tribal government." 25 U.S.C. §2711.

In its Complaint, Plaintiff alleges that it hired its own, prior counsel to represent both Plaintiff and the Tribe for the purpose of "establishing a joint venture gaming project and thereby effectuate an ongoing gaming investment on Plaintiff's behalf." Such an arrangement would have been inequitable to the Tribe, would have violated Plaintiff's Management and Development Agreements with the Tribe, and would have violated IGRA's express intent and purpose to promote Tribal independence and prevent undue influence. Well aware of these issues and restrictions, Plaintiff's own gaming consultant, Buch, advised Plaintiff when it was first presented with the opportunity to become involved with this casino development, that Plaintiff "obviously" could not use the same law firm the Tribe had already retained. [UF 21] As Buch stated, Dorsey was the Tribe's "outside legal counsel." [UF 22].

The Tribe at issue in this case had eight members and no financial wherewithal. [UF 6] Plaintiff admits the Tribe needed this casino development just to become self sufficient and to allow the Tribe to provide adequate medical care for members, including members dying from diabetes [UF5-6]. The chairman of the Tribe at that time was an 80-year old man, who cared to do business based upon a handshake, with people he believed he could trust through a look in the eye. [UF 7] Plaintiff, the developer in this case, was a business entity of changing form, essentially owned, funded and driven by [UF 8] an experienced businessman with several years' experience in commercial gaming ventures, and an understanding of what it takes to make deals with Indian tribes. [UF 4]

It is apparent the Tribe and Plaintiff did not stand in equal bargaining positions. That inequality is exacerbated by the fact that Plaintiff hired additional counsel to confidentially represent Plaintiff's interests only. To that end, Plaintiff had a three-attorney team with the law firm of Dykema Gosset representing its interests at the outset [UF 29]. When Plaintiff and the Tribe closed on the Management and Development Agreements in March, 2000, Plaintiff had two of its Dykema attorneys present, including James Oegema who was subsequently hired to serve as Plaintiff's in-house, general counsel throughout the duration of the project. [UF 30] Subsequently, Plaintiff hired a team of lawyers from Akin Gump working, confidentially, on its

behalf to provide, to provide legal analysis in connection with this development. [UF 31] In 2002, Plaintiff contacted attorney Jerry Levine of H&K, and had the benefit of his expertise and consult on this project, albeit for a brief time within that same year. [UF 63]. Plaintiff also hired the San Diego firm Mazzarella, Dunwoody & Caldarelli, the Denver firm Brownstein, Hyatt & Furber and the Detroit firm Kerr, Russell and Weber. [UF 32]

Plaintiff, who had several other attorneys representing its interests confidentially, is taking the incredible position in its Complaint that it nevertheless provided no funds through the Management and Development Agreements for the Tribe to hire independent counsel (as required by the Development Agreement). Beyond that, Celani has stated that Dorsey, in reporting to him on the status of the project, was supposed to have been "representing me first, and then they represented the Tribe second." [UF 28]

As a practical matter, IGRA codifies a heightened scrutiny which applies whenever outside, non-Indian parties seek to engage in casino development and management on Indian lands. Consistent with this regulatory scheme, there was a long-standing federal statutory requirement that any attorney engagements entered by a tribal government had to first be approved by the Department of Interior. 25 U.S.C. 476(e); Pub.L 106-179. This requirement was in effect until March 14, 2000, and was in effect in 1997, when Dorsey's attorneys were retained in connection with this matter and when the potential Development and Management Agreements were first being negotiated.

In order for the Tribe to retain Dorsey, it had to first present its resolution and proposed retainer agreement to the Secretary of the Interior for approval. 25 U.S.C. 476(e); Pub.L 106-179; *See also*, Tribe's Constitution Article VI(c). Absent the federal government's approval, Dorsey's attorneys would not have been able to represent the Tribe in connection with this casino project. The Federal Government's objective in enacting this requirement was to protect Tribes from fraud. See Fed. Reg. Vol. 66, No. 144. Taken in the context of the heightened scrutiny applied to third-party casino development and management contracts, it is clear that Dorsey's attorneys could not have legally owed a dual obligation to both the Tribe and Plaintiff, particularly considering the unequal bargaining power between the parties.

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Plaintiff knew, through its consultant if not through its several independent attorneys, that it could not have the Tribe's only counsel jointly representing it interests as well. [UF 21-22]. If Plaintiff had openly (as required) indicated any such joint representation, the likely result would have been the Federal government's rejection of the Tribe's attorney engagement agreement. It most certainly would have resulted in the NIGC's rejection of the Plaintiff's Proposed Management and Development Agreements with the Tribe. Perhaps for these reasons, Plaintiff never indicated to anyone – until filing this lawsuit – that Plaintiff believed there was any sort of joint or even simultaneous representation. To the contrary, Plaintiff consistently represented to the federal authorities, to Dorsey, to Baker-Shenk, to H&K, and to everyone else involved, that the Tribe and Plaintiff each had independent counsel in connection with the Project. [UF 34, 39-45]

B. Plaintiff Made Representations, And Allowed The Tribe To Make Representations, That The Tribe's Attorneys Were Representing *Only* The Tribe, And That Plaintiff Had *Separate* Legal Representation

Plaintiff did not merely represent that it was in compliance with IGRA. It also approved and made countless statements, over the course of years, all of which consistently and clearly stated that Dorsey attorneys, including Philip Baker-Shenk, were representing the Tribe – *and only the Tribe*. [UF 34]

While Plaintiff participated in making these statements to third parties and to federal regulatory agencies, Plaintiff never undertook to conform these statements to the allegations Plaintiff now makes in its Complaint. Despite repeated opportunities, Plaintiff never took any action to clarify its supposed belief that Dorsey, H&K and/or Baker–Shenk were somehow representing Plaintiff's interests. Instead, Plaintiff not only acquiesced in, but in some instances gave advance approval of the Tribe's repeated statements that these attorneys were only representing the Tribe.

In October, 2002, the NICG asked for additional information to assist in its determination whether it should approve the Proposed Management and Development Agreements. [UF 39] In particular, the NIGC asked for a list of all the attorneys and lobbyists representing the Tribe and

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of all attorneys and lobbyists representing Plaintiff, including information on who was paying the fees for each such attorney or lobbyist. [Id.] Dorsey drafted a response and forwarded it to Plaintiff's General Counsel for review, revision and execution before submitting it to the NIGC. [UF 41]. Although the document was reviewed and revised by Plaintiff's General Counsel, Plaintiff's General Counsel made no revisions and raised no questions in connection with the list of counsel. The list of counsel contained no mention or indication of any joint or shared representation and plainly identified the Dorsey attorneys, including Baker-Shenk, only as the Tribe's counsel. [UF 41] In fact, Plaintiff disclosed in its response to NIGC that it was advancing legal fees for Dorsey (including Baker-Shenk) on behalf of the Tribe, explaining that the fees it was paying were funds it was lending to the Tribe for which the Tribe would be required to repay to Plaintiff. [UF 44].

Plaintiff's current allegation that Baker-Shenk or any other Dorsey attorneys represented its interest in connection with the underlying casino development is directly contrary to the statements Plaintiff made to the federal government in an effort to secure approvals for the casino. Plaintiff not only knew these representations were being made, but also agreed with and acquiesced in making these statements to NIGC. Plaintiff did so knowing, as its principals have testified, how important it is to provide full disclosure to the NIGC in seeking these approvals. [UF 42]. Despite this, Plaintiff admits that it never undertook any measures to disclose the alleged joint representation to any regulatory agencies. [UF 43]

The statements made to the NICG are *inconsistent* with Plaintiff's pending allegation that there was a joint representation, but are entirely *consistent* with countless other statements made to various third parties and counsel over the course of years. While Plaintiff admits that it is not aware of any documents stating that any Dorsey attorneys, including Baker-Shenk, were representing Plaintiff in connection with this project, e-mails and letters exchanged from 2000 to present consistently state that Dorsey's attorneys, including Baker-Shenk, were representing just the Tribe, while attorney Jim Oegema was representing only Plaintiff. [UF34-45]. Again, Plaintiff was involved with and/or copied on all this correspondence, but never indicated any of the Tribe's attorneys were jointly representing Plaintiff's interests as well.

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As such, Plaintiff cannot now allege that Baker-Shenk was simultaneously representing both Plaintiff and the Tribe. Assuming there was a dual or joint legal representation of both Plaintiff and the Tribe, Plaintiff should have made sure that material fact was disclosed in response to NIGC's request for "a list of attorneys and lobbyists for each party and which party is responsible for payments and reimbursement." Not only was there no such disclosure, but statements to the contrary were expressly made with Plaintiff's involvement and acquiescence in the same.

Prior to filing this lawsuit, Plaintiff never disclosed to anyone that it considered the Defendants to be representing it as a client. Even since the filing of this lawsuit, Plaintiff still has not undertaken any effort to make its position on this supposed joint representation known to the NIGC or BIA. [UF 43]

VI.

PLAINTIFF'S CLAIMS AGAINST BAKER-SHENK AND H&K WERE NOT BROUGHT WITHIN THE STATUTE OF LIMITATIONS

Even if there had been an implied joint representation agreement, Defendants Baker-Shenk and H&K would still be entitled to summary judgment because all claims asserted against them are time-barred.

California Code of Civil Procedure section 340.6 provides that:

> An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services, shall be commenced ***within one year after the plaintiff discovers, or through the use of reasonableness should have discovered, the facts constituting the wrongful act or omission***. . .

Code of Civil Procedure section 340.6(a) (emphasis added).

This one-year statute applies to ***each*** of the three claims alleged in Plaintiff's Complaint. *Levin v. Graham & James* 37 Cal.App.4th 798, 805 (1995) ("whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, the one-year statutory period applies"). Moreover, the limitations period begins to run once the plaintiff suffers actual injury and suspects that the injury was caused by the attorney's wrongdoing.

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Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co., LLP, 98 Cal.App.4th 934, 943 (2002) (internal citations omitted); *Gutierrez v. Mofid*, 39 Cal.3d 892, 898 (1985) (when a person comes to "suspect he is a victim of malpractice," discovery of the negligence has occurred, thus triggering the statute of limitations). In this case, based on the allegations in the complaint and the testimony of Plaintiff's own witnesses, it is clear that the limitations period began, no later than July, 2003, and possibly as early as 2000.

A. Plaintiff Suffered Actual Injury, Including The Bulk Of Its Alleged Damages, Prior To July 2003.

The core allegation in Plaintiff's Complaint is that it was injured when it agreed to commit itself to the Project based on false representations as to the "ease and speed" with which the Project could be realized. [*See* Complaint, ¶¶ 74-78] In other words, Plaintiff's alleged damages began when it entered into the Management and Development Agreements and began providing the agreed-upon financing for the Project. This alone is sufficient to satisfy the actual injury prong of the statute of limitations.

In addition, California law is clear that a legal malpractice plaintiff does not have to have suffered all, or even most, of its damages to trigger the start of the limitations period; it is the fact of damage, not the amount, that is relevant. *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 743 (1998). The cause of action accrues, and one-year limitations period commences, as soon as there is ***any*** appreciable or actual harm flowing from an attorney's negligent conduct. *Foxborough v. Van Atta*, 26 Cal.App.4th 217, 226 (1994); see also, *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 743 (1998). For example, the expenditure of attorney's fees or other costs as a result of attorney error is sufficient to constitute the requisite injury. *Adams v. Paul*, 11 Cal.4th 583, 592 (1995).

Here, Plaintiff suffered its alleged actual injury, inter alia, when it paid attorneys to review and negotiate the terms of the Management and Development Agreements, when it executed the Agreements and committed its financial resources to the Project, and immediately

began incurring large expenditures of cash. Furtheremore, by July, 2003, Plaintiff had incurred millions of dollars more than it had ever anticipated. [UF 51]

B. Plaintiff Discovered the Facts Which It Now Alleges as the Basis of This Lawsuit, No Later Than July, 2003, and Possibly As Early As 2000

Plaintiff learned very early on – as early as April or May 2000 – that the Project was not going to be realized as quickly and as easily as it had been led to believe:

> Q: At what point in year 2000 was it clear to you that accomplishing this project was not going to be as easy, simple, and quick as Mr. Townsend had led you to believe, back during the timeframe before you entered into the management and development agreements?
> Celani: I felt that early on in the first few months.[6]

[UF 36]

Thus, Celani's own testimony establishes that, by the middle of 2000, Plaintiff knew that the representations it allegedly relied upon in entering into this transaction had proven wrong, costing the company several million dollars. This alone is enough to trigger the statute of limitations and require summary judgment in favor of Baker-Shenk and H&K, but, with respect to Baker-Shenk and H&K, the events of July, 2003, as alleged by Plaintiff, trigger anew the statute of limitations and provide sufficient and independent cause for summary judgment.

On July 15, 2003, Celani and Oegema attended a "secret" meeting in Las Vegas called by some of the Dorsey attorneys. [UF 47] However, Baker-Shenk (who had just recently notified Dorsey that he would be leaving Dorsey to work with a competing law firm) was intentionally excluded. [UF 46, 48] At this meeting, the Dorsey attorneys allegedly told Celani and Oegema that (1) they were "unhappy" with the way Baker-Shenk had handled the San Diego gaming project; (2) the political and legislative strategy pursued under Baker-Shenk's direction "had clearly not been effective"; and (3) Baker-Shenk should be removed from the engagement. [UF 49] In other words, during this July 2003 meeting, Plaintiff specifically discussed the facts and

[6] Celani went on to explain that he did not abandon the Project at that point because, "I had so much money in this day one, I couldn't fathom walking away from 5 or 6 million dollars within the first few months of a deal." [UF 51]

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criticisms that are at the very core of the allegations asserted against Baker-Shenk.

Celani was not surprised by any of these statements. Rather, it simply "reinforced" the beliefs he already held. [UF 50] Even before that meeting, Celani had been "unhappy with the lawyering that was going on" and was "frustrated with Phil Baker-Shenk." His company was 43 months into a project that had been represented would be done in "24 months" and had total expenditures that "were closing in on $15 million." He was unhappy about "[t]he direction and the time frame that the team had led [him] to believe that we were going to be able to get this project done and open" and had suspected that his company, had suffered due to "waste" and "needless lobbying activities and expenses" under Baker-Shenk's direction. [UF 49-54]

A few months later, when Baker-Shenk joined H&K, Celani did not want him to work on the Project; indeed, Baker-Shenk became involved only because the Tribe wanted him on board. [UF 56]

It is clear then, that by July 2003, Plaintiff possessed more than sufficient facts to trigger the statute of limitations and, in fact, believed that it had already suffered injury as a result of poor performance by Baker-Shenk. Nevertheless, Plaintiff waited more than three years – until December 28, 2006 – to file its Complaint. [*See* Request for Judicial Notice]

C. The Limitations Period Could Not Have Been Tolled Beyond December 12, 2003 When Plaintiff Expressly And Unequivocally Disclaimed Any Joint Representation By Baker-Shenk And H&K

The one-year statute of limitations is tolled during the time that the allegedly negligent attorney "continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." CCP section 340.6(a)(2); see also, *Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal.4th 503, 508 (2007) (tolling applies only where the specific attorney defendant continues to represent the plaintiff with respect to the specific subject matter at issue). However, it is indisputable in this case, that Baker-Shenk and H&K did not represent Plaintiff in connection with the Project at anytime after December 12, 2003.

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In September 2003, Defendant Baker-Shenk left Dorsey and began, approximately one week later, working at H&K. Baker-Shenk did not perform any work in connection with the Project during this time frame. [UF 55] According to the Complaint, after this transition, Baker-Shenk and H&K "continued to represent Plaintiff and the Tribe" on the Project. [Complaint ¶44-47] However, this allegation is refuted by the express agreements and representations set forth by Plaintiff in its December 12, 2003 Conflict Waiver and Consent Agreement.

This Conflict Waiver and Consent was drafted in significant part by Oegema, Plaintiff's General Counsel, and executed by Celani on behalf of Plaintiff. The document specifically acknowledged that while Jerry Levine of H&K had previously represented Plaintiff in connection with the Project, any and all such representation had terminated. Plaintiff specifically consented to and waived any conflicts arising from Baker-Shenk and H&K's representation of the Tribe. In addition, the parties confirmed that Baker-Shenk and H&K "will not undertake in the future any specific representation of Luna Entertainment in gaming project matters that are related to those now or to be undertaken by the Tribe." [UF 64-69]

This signed, written agreement, which was reviewed and drafted by Plaintiff's own in-house counsel, conclusively defeats any claim of continuing representation after December 12, 2003. Thus, even if Baker-Shenk and H&K had represented Plaintiff in connection with the Project, such representation was unequivocally terminated with the December 12, 2003 "Conflict Waiver and Consent." As such, Plaintiff was required to file any claim against these Defendants no later than December 12, 2004. However, the Complaint in this case was not filed until December 28, 2006 – ***more than two years after the statutory deadline***. As a consequence, Plaintiff's claims are time-barred and these Defendants are entitled to summary judgment.

VII.

CONCLUSION

Based upon the facts and arguments presented herein, it is clear Plaintiff could not have reasonably believed that it had an attorney-client relationship with Baker-Shenk at any time, or with H&K anytime after 2002. The documents make this clear, and Plaintiff has not presented any specific evidence showing a genuine issue for trial. To the contrary, Plaintiff has made and

participated in so many statements to the contrary, including representations to various government officials, that it should be barred from now, suddenly arguing otherwise in order to support this litigation.

The evidence and documents in this case also demonstrate that, in the incredible event any attorney-client or fiduciary relationship might have existed between Plaintiff and these Defendants, the one-year statute of limitations for the filing any claims against either Baker-Shenk or H&K began running no later than December 12, 2003, as that is the date Plaintiff, on advice of his own in-house and outside counsel, executed the Conflict and Waiver and Consent Agreement with H&K.

For these reasons, summary judgment or adjudication should be granted in favor of Defendant Baker-Shenk and/or Defendant H&K.

Respectfully submitted,

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DATED: December 28, 2007

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