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8 AGUA CALIENTE BAND OF CAHUILLA
9 INDIANS

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 ARMAND SAROLI, an individual

13 Plaintiff,

14 v.

15 AGUA CALIENTE BAND OF CAHUILLA
16 INDIANS, and DOES 1 to 50,

17 Defendants.

CASE NO. 10-CV-1748-BEN (NLS)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SPECIALLY APPEARING DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT FOR LACK OF
JURISDICTION [F.R.C.P. 12(b) (1) & (2)]

[NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT]

Date: November 15, 2010

Time: 10:30 a.m.

Judge: Honorable Roger T. Benitez

Location: Courtroom 3 (4th Floor)
U.S. Courthouse
940 Front Street, San Diego, CA

25 The AGUA CALIENTE BAND OF CAHUILLA INDIANS ("Tribe") moves this
26 Court for an order dismissing this action with prejudice under Federal Rules of Civil
27 Procedure 12(b) (1) and (2). Because the Tribe is immune from suit, absent a valid,
28

1 express waiver, this Court lacks jurisdiction over the Tribe and the subject matter of the
 2 action as it pertains to the Tribe. Plaintiff cannot and does not demonstrate otherwise.

3 4 INTRODUCTION

5 On August 31, 2010, Plaintiff Armand Saroli served a Summons and Complaint on
 6 Defendant, the Agua Caliente Band of Cahuilla Indians. The Summons and Complaint
 7 asserts various causes of action in tort against a federally recognized Indian tribe, which
 8 enjoys sovereign immunity and may not be sued without expressed consent. However, this
 9 Court lacks jurisdiction over the Tribe and subject matter jurisdiction over the claims
 10 asserted against the Tribe. As such, the Tribe requests that, pursuant to Federal Rules of
 11 Civil Procedure 12(b)(1) and (2), this action against the Tribe be dismissed with prejudice.
 12

13 STANDARD FOR REVIEWING MOTION TO DISMISS

14
 15 Federal courts are courts of limited jurisdiction and the law presumes that “a cause
 16 lies outside this limited jurisdiction.” (*Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375,
 17 377 (1994). “The party asserting jurisdiction bears the burden of establishing subject
 18 matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction. ...
 19 Dismissal for lack of jurisdiction is appropriate if the complaint, considered in its entirety,
 20 on its face fails to allege facts sufficient to establish matter jurisdiction.” *In re Dynamic*
 21 *Random Access Memory Antitrust Litig. v. Micron Tech., Inc.*, 546 F.3d 981, 985 (9th Cir.
 22 2008).
 23

24 ARGUMENT AND AUTHORITY

25 **A. The Tribe’s Sovereign Immunity Prevents This Court From** 26 **Exercising Its Jurisdiction Over the Tribe And Plaintiff Cannot** 27 **Demonstrate Otherwise.** 28

1 As a matter of federal law, absent a clearly and unequivocally expressed waiver of
 2 sovereign immunity, Indian tribes are not subject to civil suit in any state or federal
 3 tribunal. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505,
 4 509 (1991). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), the Supreme
 5 Court held:

6 Indian tribes have long been recognized as possessing the common
 7 law immunity from suit traditionally enjoyed by sovereign powers.
 8 This aspect of tribal sovereignty, like all others, is subject to the
 9 superior and plenary control of Congress. But without
 10 congressional authorization, the Indian nations are exempt from
 11 suit. It is settled that a waiver of sovereign immunity cannot be
 12 implied but must be unequivocally expressed.

13 (citations omitted); *see also C & L Enter., Inc. v. Citizen Band of Potawatomi Indian*
 14 *Tribe*, 532 U.S. 411, 418 (2001).

15 To effectively invoke a court's jurisdiction over a tribe or causes of action alleged
 16 against a tribe, a complaint must allege facts sufficient to enable the court to find as a
 17 matter of law that the tribe has expressly waived its immunity or that Congress has
 18 abrogated that immunity. The question of tribal sovereign immunity is jurisdictional in
 19 nature. *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 173 (1977). Accordingly,
 20 the issue of sovereign immunity must be addressed and resolved irrespective of the merits
 21 of the claim. *California v. Quechan Tribe*, 595 F.2d 1153, 1154 (9th Cir. 1979). Further,
 22 the recognition of Indian tribes' sovereign immunity is not discretionary. *Pan Am. Co. v.*
 23 *Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

24 The Agua Caliente Band of Cahuilla Indians is a federally recognized Indian tribe.
 25 74 Fed. Reg. 40,218 (August 11, 2009). As a sovereign Indian nation, unless its immunity
 26 is expressly waived, the Agua Caliente Tribe is immune from suit. *C & L Enter., Inc.*, 532
 27 U.S. at 418. Here, Plaintiff's Complaint does not and cannot allege either an express or
 28 implied waiver of the Tribe's sovereign immunity. In fact, Plaintiff fails to even state a
 basis for the Court's jurisdiction over the suit. Because the Agua Caliente Tribe has not
 waived its sovereign immunity, has not consented to this Court's jurisdiction, and does not

1 consent to this lawsuit, the Court does not have jurisdiction to hear this suit. *Puyallup*
 2 *Tribe, Inc.*, 433 U.S. at 173. Accordingly, the Court should grant the Tribe's Motion to
 3 Dismiss. *Pan Am. Co.*, 884 F.2d at 419.

4 **B. Plaintiff Fails to Meet The Burden of Proving This Court Has**
 5 **Jurisdiction Over the Tribe.**

6 On a motion to dismiss for lack of subject matter jurisdiction, Plaintiff bears the
 7 burden of establishing the court's jurisdiction. *In re Dynamic Random Access Memory*
 8 *Antitrust Litig.*, 546 F.3d at 985. The question as to whether a tribe's sovereign immunity
 9 bars suit against a tribe is jurisdictional in nature. *Puyallup Tribe, Inc.*, 433 U.S. at 173. A
 10 Tribe's immunity may only be waived by Congress or the tribe and must be clear and
 11 unequivocal. *Okla. Tax Comm'n*, 498 U.S. at 509.

12 Here, Plaintiff fails to allege facts sufficient to enable the court to find as a matter
 13 of law that the tribe has expressly waived its immunity or that Congress has abrogated that
 14 immunity. *Puyallup Tribe, Inc.*, 433 U.S. at 173. Consequently, Plaintiff fails to meet its
 15 burden of establishing this Court's jurisdiction over the Tribe or the subject matter of the
 16 action against the Tribe.

17 **CONCLUSION**

18 For all the reasons set forth above, the Court lacks jurisdiction over the Tribe and
 19 subject matter jurisdiction over Plaintiff's claims against the Tribe and should therefore
 20 dismiss this action against the Tribe pursuant to FRCP 12(b)(1) & (2).
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22 Dated: September 21, 2010

23 Respectfully submitted,

24 By: s/ Michelle A. Carr

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