

James K. Kawahara, Esq., SBN 155723
james@kawaharalaw.com
KAWAHARA LAW, A PROFESSIONAL CORPORATION
6080 Center Drive
Sixth Floor
Los Angeles, California 90045-9205
Telephone: (310) 348-0070
Facsimile: (310) 807-9250

Attorney for the La Jolla Band of Luiseño Indians

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GOLD RIVER , LLC, a Nevada limited
liability company dba Gold River, LLC, a
California limited liability corporation,

Plaintiff,

vs.

LA JOLLA BAND OF LUISEÑO MISSION
INDIANS.

Defendant.

CASE NO. 11CV1750 JM BGS

The Hon. Jeffrey T. Miller

**NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF DEFENDANT LA JOLLA
BAND OF LUISEÑO INDIANS TO
DISMISS THE AMENDED COMPLAINT
UNDER FED R. CIV. PROC. 12(b)(1)**

*[Filed Concurrently with Supporting
Declaration of James K. Kawahara]*

Date: November 21, 2011
Time: 10:00 a.m.
Room 16

Amended Complaint: September 27, 2011

Action Filed: August 5, 2011

1 **TO THE HONORABLE JUDGE OF THE DISTRICT COURT AND**
2 **COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE THAT** on November 21, 2011 at 10:00 a.m. or as soon
4 thereafter as the matter may be heard in Courtroom 16, Fifth Floor of the above-entitled
5 Court located at 940 Front Street, Los Angeles, California 92101-8900, Defendant La Jolla
6 Band of Luiseño Indians (incorrectly named as “La Jolla Band of Luiseño *Mission*
7 Indians”) (“La Jolla Band”) will and hereby does move for dismissal of this action
8 pursuant to *Federal Rules of Civil Procedure* 12(b)(1) against Plaintiff, Gold River LLC
9 dba Nevada Gold River LLC (“Gold River”).

10 This motion is based on the grounds that the facts set out, or referred to, in Gold
11 River’s Amended Complaint fails to establish this Court’s subject matter jurisdiction,
12 because it does not plead an agreement under which the La Jolla Band has expressly and
13 unequivocally, waived its sovereign immunity and consented to this suit. Although
14 Plaintiff’s Original Complaint did allege a purported breach of a written contract, i.e., the
15 March 26, 2005 Promissory Note (“Promissory Note”), and an alleged contractual waiver
16 of sovereign immunity, the Amended Complaint does not allege any contract between the
17 parties at all. Rather, Plaintiff now asserts only quasi-contract claims that seek to invoke
18 this Court’s equitable jurisdiction, as if this were a court of general jurisdiction. In the
19 Amended Complaint, the Plaintiff has abandoned its previous legal contract claim that was
20 grounded in federal law. Therefore, because there is no waiver of sovereign immunity or
21 consent to be sued, the La Jolla Band is entitled to an order of dismissal against Gold
22 River. Specifically, the La Jolla Band seeks dismissal on the following bases:

- 23 1. Plaintiff correctly alleges the fact that La Jolla Band is a federally-
24 recognized Indian tribe that exercises powers of self-government. Amended Complaint,
25 ¶ 2. The Court may also take judicial notice of this fact, since the U.S Department of the
26 Interior publishes a list of federally-recognized tribes in the Federal Register. Defendant

1 requests that the Court take judicial notice of this fact under Federal Rule of Evidence 201,
2 since it is capable of accurate and ready determination by resort to sources whose accuracy
3 cannot reasonably be questioned. (Supporting Declaration of James K. Kawahara
4 “Kawahara Dec.” ¶ 2; Exhibit 7, page 60811 (Bates No. 496-LJB)).

5 2. Because federally-recognized Indian tribes are sovereign entities, they are
6 immune from suit absent a waiver or congressional abrogation. *See Kiowa Tribe of*
7 *Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (“As a matter of federal law, an
8 Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has
9 waived its immunity.”).

10 3. Plaintiff initially alleged that the parties entered into a written agreement
11 whereby the La Jolla Band agreed to waive its sovereign immunity. Original Complaint, ¶
12 5 and ¶ 6, citing Article IV(c) and Article IV(d) of Exhibit “A.” The Original Complaint
13 also alleged a single legal claim of “Breach of Contract.”

14 4. On September 7, 2011, the La Jolla Band noticed and filed a motion to
15 dismiss the breach of contract claim set out in the Original Complaint for the reason that,
16 *inter alia*, the contract was “void” because Plaintiff failed to meet federal statutory and
17 regulatory requirements, including: (a) failure to obtain approval of the National Indian
18 Gaming Commission under the Indian Gaming Regulatory Act under 25 U.S.C.
19 §2711(a)(1) and (b) failure to obtain approval of the Bureau of Indian Affairs, United
20 States Department of the Interior, under Agreements with Indians, 25 U.S.C. § 81.

21 5. Rather than oppose the La Jolla Band’s motion to dismiss, the Plaintiff filed
22 and served an Amended Complaint that contains two claims that seek to invoke this
23 Court’s equitable authority: i.e., (1) unjust enrichment, and (2) a common count of money
24 had and received. Plaintiff does not re-allege or attach the Promissory Note, and has
25 abandoned a legal claim for breach of contract. In Paragraph 11 of the Amended
26 Complaint, Gold River makes a vague allegation that “Plaintiff is informed and believes

1 and herein alleges Defendant has unequivocally and expressly waived Tribal Immunity for
2 the claims asserted herein by Plaintiff.” This is legally insufficient to plead waiver of
3 sovereign immunity and consent to be sued by implication.

4 5. In summary, because Plaintiff has abandoned a legal claim that the La Jolla
5 Band allegedly entered into an agreement, therefore, as a matter of federal law, this action
6 must be dismissed by application of the doctrine of sovereign immunity.

7 This motion is based upon the La Jolla Band’s Notice of Motion, the Memorandum
8 of Points and Authorities, the Declaration of James K. Kawahara, and attached Exhibit in
9 support of the motion, on the records and pleadings on file with the Court, and upon such
10 further evidence that may be submitted in connection with the hearing on this motion.

11
12 DATED: October 11, 2011

KAWAHARA LAW
A PROFESSIONAL CORPORATION

13
14
15 By /s/ James K. Kawahara

JAMES K. KAWAHARA

16 Attorney for the La Jolla Band of Luiseno Indians
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTS

I.	INTRODUCTION	5
II.	STATEMENT OF FACTS	6
A.	THE PLAINTIFF IN THE AMENDED COMPLAINT HAS ABANDONED THE PREVIOUS LEGAL CLAIM FOR BREACH OF CONTRACT.....	6
B.	THE AMENDED COMPLAINT DOES NOT ALLEGE AN AGREEMENT WHEREBY THE LA JOLLA BAND WAIVED ITS SOVEREIGN IMMUNITY AND CONSENTED TO BE SUED.....	6
C.	THE LA JOLLA BAND OF LUISEÑO INDIANS IS A FEDERALLY-RECOGNIZED INDIAN TRIBE THAT EXERCISES POWERS OF SELF-GOVERNMENT	7
III.	LEGAL STANDARD -- UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1), DISMISSAL IS PROPER WHEN THE COURT LACKS SUBJECT MATTER JURISDICTION	8
IV.	AS A MATTER OF LAW, THE LA JOLLA BAND IS ENTITLED TO AN ORDER OF DISMISSAL AGAINST GOLD RIVER BASED ON THE DOCTRINE OF SOVEREIGN IMMUNITY	12
V.	CONCLUSION	12

TABLE OF AUTHORITIES

PageCASES

<i>Andrews v. Metro North Commuter R.R. Co.</i> 882 F.2d 705, 707 (2nd Cir. 1989).....	14
<i>Big Valley Band of Pomo Indians v. Superior Court</i> , 133 Cal.App.4th 1185, 1193, 35 Cal.Rptr.3d 357, 364 (2005)	12
<i>C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma</i> , 532 U.S. 411, 418, 121 S.Ct. 1589, 1595 (2001).	12
<i>Castaneda v. United States</i> , 546 F.3d 682, 684 n. 1 (9th Cir.2008) (overruled on other grounds by <i>Hui v. Castaneda</i> , — U.S. —, 130 S.Ct. 1845, 176 L.Ed.2d 703 (2010))	9
<i>Caterpillar Inc. v. Williams</i> , 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).....	9
<i>Ex parte McCardle</i> , 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)	8
<i>King v. Dogan</i> , 31 F.3d 344, 346 (5th Cir. 1994); <i>Carver v. Condie</i> 169 F.3d 469, 472 (7th Cir. 1999).....	13
<i>Kiowa Tribe of Okla. v. Mfg. Techs., Inc.</i> , 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).....	3, 11
<i>Lawrence v. Barona Valley Ranch Resort and Casino</i> , 153 Cal.App.4th 1364, 1369, 64 Cal.Rptr.3d 23, 26 (2007).....	12
<i>London v. Coopers & Lybrand</i> 644 F.2d 811, 814 (9th Cir. 1981).....	13
<i>Marx v. Loral Corp.</i> 87 F.3d 1049, 1056 (9th Cir. 1996).....	13
<i>McBride v. Boughton</i> 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115] (2004)	7
<i>Missouri River Services v. Omaha Tribe of Nebraska</i> , 267 F.3d 848, 852 (8th Cir. 2001).....	12
<i>Morongo Band of Mission Indians v. California State Board of Equalization</i> , 858 F.2d 1376, 1380 (9th Cir.1988)	10
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274, 278, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)	8
<i>Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 498 U.S. 505, 505–06, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)	11

1	<i>Safe Air v. Meyer</i> , 373 F.3d 1035, 1039 (9th Cir.2004)	10
2	<i>State of California v. Dynegy, Inc.</i> , 375 F.3d 831, 838 (9th Cir.2003)	9
3	<i>Steel Co. v. Citizens for a Better Environ.</i> , 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).....	8
4	<i>Stock West, Inc. v. Confederated Tribes of the Colville Reservation</i> , 873 F.2d 1221, 1225 (9th Cir.1989).....	9
6	<i>Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.</i> , 711 F.2d 138, 139 (9th Cir.1983)	10
7	<i>United States v. King</i> , 395 U.S. 1, 4, 89 S.Ct. 1501, 1503 (1969)	12
8	<i>White v. ARCO/Polymers, Inc.</i> 720 F.2d 1391, 1396, fn. 5 (5th Cir. 1983)	14
9	<i>White v. Lee</i> , 227 F.3d 1214, 1242 (9th Cir.2000)	10

10

STATUTES

12	Agreements with Indians 25 U.S.C. § 81.....	3
13	Indian Gaming Regulatory Act 25 U.S.C. § 2701 et seq.	14
14	Indian Gaming Regulatory Act 25 U.S.C. §2711(a)(1) and (b)	3

15

RULES

17	Federal Rule of Evidence 201	3
18	Federal Rule of Civil Procedure 12(b)(1)	2, 10, 11
19	Federal Rule of Civil Procedure 12(h)(3)	9

20

TREATISES

22	15 C. Wright, A. Miller & E. Cooper, <i>Federal Practice and Procedure</i> § 3844, at 332 (1986)	10
----	---	----

23

24

25

26

27

28

OTHER AUTHORITIES

Federal Register Vol. 75, No. 190, October 1, 2010 page 60810-60814.....	8
Tribal-State Compact of 1999 http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/ La%20Jolla%20Band%20of%20Luiseno%20Mission%20Indians/lajolllacomp0505 00.pdf (last visited September 7, 2011).....	5

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Since 2000, when it was authorized under a Tribal-State Gaming Compact executed with the State of California¹, the La Jolla Band has sought assistance from companies that could help it develop a gaming facility on its federally-created Indian reservation in northern San Diego County. In 2004, the La Jolla Band selected Gold River, a wholly-owned subsidiary of Nevada Gold and Casinos, Inc. After three years, the La Jolla Band terminated its relationship with Gold River for failing to secure federal approval of its agreements with the La Jolla Band and failing to raise adequate funds to develop the gaming facility.

Funds extended on the development were used for project costs that were approved by Gold River, and were not “pocketed” by the La Jolla Band. The La Jolla Band was harmed by this relationship with Gold River and the aborted casino development, including the demolition of its tribal meeting hall at the proposed site, and in many ways the La Jolla Band continues to be harmed, since the Band does not have a gaming facility. The source of repayment of any advanced funds from Gold River was supposed to be net gaming revenue. However, the casino facility was never constructed or put into operation. The La Jolla Band refers the Court to its previously filed 12(b) (6) Motion to Dismiss the Original Complaint (pages 6-10) and that Motion’s Supporting Declaration of James K. Kawahara (paragraph 2, and Exhibits 1-6) for the detail information regarding the proposed agreements between the parties that failed to receive federal approval.

¹ Tribal State Compact 1999
<http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/La%20Jolla%20Band%20of%20Luiseno%20Mission%20Indians/lajolllacomp050500.pdf>
 (last visited September 7, 2011)

1 **II. Statement Of Facts**

2 **A. The Plaintiff In The Amended Complaint Has Abandoned The**
 3 **Previous Legal Claim For Breach Of Contract.**

4 The Original Complaint filed by Gold River sought to enforce **one contract**
 5 executed between the parties and omitted to inform the Court about the **seven other**
 6 **contracts** that were part of one interconnected transaction that proposed to create the
 7 “formal business relationship” mentioned in paragraph 7 of the Original Complaint.
 8 Plaintiff initially alleged that the parties entered into a written agreement whereby the La
 9 Jolla Band agreed to waive its sovereign immunity. Original Complaint, ¶ 5 and ¶ 6, citing
 10 Article IV(c) and Article IV(d) of Exhibit “A.” The Original Complaint also alleged a
 11 single legal claim of “Breach of Contract.”

12 On September 7, 2011, the La Jolla Band brought a motion to dismiss to inform the
 13 Court of the fact that there were seven other proposed contracts, and Plaintiff failed to
 14 obtain federal approval of its contracts, and therefore, in accordance with applicable
 15 federal law, such contracts were “void.” Rather than oppose the motion to dismiss, the
 16 Plaintiff filed and served an Amended Complaint on September 27 2011. The Amended
 17 Complaint abandons and omits any mention of the Promissory Note, and does not re-allege
 18 “breach of contract.”

19 **B. The Amended Complaint Does Not Allege An Agreement Whereby The**
 20 **La Jolla Band Waived Its Sovereign Immunity And Consented To Be**
 21 **Sued**

22 Plaintiff’s Amended Complaint also does not allege that the La Jolla Band entered
 23 into a written agreement to provide a waiver of sovereign immunity and consent to be
 24 sued. Instead, paragraph 11 of the Amended Complaint makes a vague allegation to imply
 25 a waiver be asserting that “Plaintiff is informed and believes and herein alleges Defendant
 26 has unequivocally and expressly waived Tribal Immunity for the claims asserted herein by

1 Plaintiff.” In an apparent effort to plead around the Promissory Note (the subject of the La
 2 Jolla Band’s first motion to dismiss), Plaintiff seeks to un-ring the bell, and asks the Court
 3 to believe Plaintiff is now pleading upon information and belief, not on a voidable written
 4 contract.

5 The Amended Complaint contains two claims. The first claim is based on the
 6 equitable theory of unjust enrichment. Amended Complaint, ¶¶ 12-16. The second claim
 7 is also based on an equitable claim of a common count for “Money Had and Received.”²
 8 Amended Complaint ¶¶ 17-21. In a similar fashion, the prayer for relief in the Amended
 9 Complaint seeks the equitable remedy of restitution or an order “returning” funds that were
 10 “had and received.” Amended Complaint, p. 4.

11 **C. The La Jolla Band Of Luiseño Indians Is A Federally-Recognized**
 12 **Indian Tribe That Exercises Powers of Self-Government**

13 The Amended Complaint acknowledges that the La Jolla Band is a federally-
 14 recognized Indian tribe that exercises powers of self-government. Amended Complaint
 15 ¶ 2. The La Jolla Band of Luiseño Indians is a federally-recognized Indian tribe. The
 16 Department of the Interior publishes a list of federally-recognized Indian tribes in the
 17 Federal Register Vol. 75, No. 190, October 1, 2010 page 60810-60814, and the La Jolla
 18 Band is on that list on page 60811. (Kawahara Dec. ¶ 2, Exhibit 7 (Bates No. 496-LJB).)³
 19

20 ² "A common count is not a specific cause of action, . . . rather, it is a simplified
 21 form of pleading normally used to aver the existence of various forms of monetary
 22 indebtedness, including that arising from an alleged duty to make restitution under an
 23 assumpsit theory. When a common count is used as an alternative way of seeking the same
 24 recovery demanded in a specific cause of action, and is based on the same facts, the
 common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton*
 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115] (2004), internal citations omitted.)

25 ³ Defendant requests that the Court take judicial notice of this fact under Federal
 26 Rule of Evidence 201, since it is capable of accurate and ready determination by resort to
 27 (footnote continued)

1 **III. Legal Standard -- Under Federal Rule Of Civil Procedure 12(b)(1), Dismissal**
 2 **Is Proper When The Court Lacks Subject Matter Jurisdiction**

3 It is well-established that a federal court cannot reach the merits of any dispute until
 4 it confirms its own subject matter jurisdiction. *Steel Co. v. Citizens for a Better Environ.*,
 5 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). “Without jurisdiction the court
 6 cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it
 7 ceases to exist, the only function remaining to the court is that of announcing the fact and
 8 dismissing the cause.” *Id.* (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19
 9 L.Ed. 264 (1868)). Accordingly, federal courts are under a continuing duty to confirm their
 10 jurisdictional power and are “obliged to inquire *sua sponte* whenever a doubt arises as to
 11 [its] existence....” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, 97
 12 S.Ct. 568, 50 L.Ed.2d 471 (1977) (citations omitted).

13 Furthermore, “[a] federal court is presumed to lack jurisdiction in a particular case
 14 unless the contrary affirmatively appears.” *Stock West, Inc. v. Confederated Tribes of the*
 15 *Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.1989). Rule 12(h)(3) of the Federal
 16 Rules of Civil Procedure provides: “If the court determines at any time that it lacks
 17 subject-matter jurisdiction, the court must dismiss the action.” Fed.R.Civ.P. 12(h)(3). In
 18 determining the presence or absence of federal jurisdiction, the court applies the “ ‘well-
 19 pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal
 20 question is presented on the face of the plaintiff’s properly pleaded complaint.” *State of*
 21 *California v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir.2003) (quoting *Caterpillar Inc. v.*
 22 *Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)).

23 When assessing subject matter jurisdiction, the court assumes the truth of all
 24 allegations in the complaint. *See Castaneda v. United States*, 546 F.3d 682, 684 n. 1 (9th

25 _____
 26 sources whose accuracy cannot reasonably be questioned.

1 Cir.2008) (overruled on other grounds by *Hui v. Castaneda*, — U.S. —, 130 S.Ct.
 2 1845, 176 L.Ed.2d 703 (2010)). “If jurisdiction is lacking at the outset, the district court
 3 has ‘no power to do anything with the case except dismiss.’ ” *Morongo Band of Mission*
 4 *Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir.1988)
 5 (quoting 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3844, at
 6 332 (1986)).

7 A Rule 12(b)(1) motion asserting lack of subject matter jurisdiction may be either a
 8 facial attack on the sufficiency of the pleadings or a factual attack on the basis for a court’s
 9 jurisdiction. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000). “In resolving a factual
 10 attack on jurisdiction, the district court may review evidence beyond the complaint without
 11 converting the motion to dismiss into a motion for summary judgment.” *Safe Air v. Meyer*,
 12 373 F.3d 1035, 1039 (9th Cir.2004). “The court need not presume the truthfulness of the
 13 plaintiff’s allegations.” *Id.* (citing *White*, 227 F.3d at 1242). However, “[j]urisdictional
 14 finding of genuinely disputed facts is inappropriate when the jurisdictional issue and
 15 substantive issues are so intertwined that the question of jurisdiction is dependent on the
 16 resolution of factual issues going to the merits of an action.” *Sun Valley Gasoline, Inc. v.*
 17 *Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir.1983).

18 The La Jolla Band’s current Motion to Dismiss is brought pursuant to Federal
 19 Rules of Civil Procedure 12(b)(1) based on a facial analysis of the Amended Complaint,
 20 which does not set out sufficient facts to establish this Court’s subject matter jurisdiction,
 21 because as a federally-recognized Indian tribe, the La Jolla Band cannot be sued without an
 22 express and unequivocal waiver of sovereign immunity. It is undisputed that the La Jolla
 23 Band of Luiseño Indians is a federally-recognized Indian tribe. However, from the
 24 Amended Complaint, it is not known when and how the La Jolla Band is supposed to have
 25 waived its sovereign immunity based on the allegation in paragraph 11 of the Amended
 26 Complaint, which implies that one exists “upon information and belief.”

1 **A. Tribal Sovereign Immunity**

2 “As a matter of federal law, an Indian tribe is subject to suit only where Congress
3 has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Okla. v. Mfg.*
4 *Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). In *Oklahoma*
5 *Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 505–06, 111
6 S.Ct. 905, 112 L.Ed.2d 1112 (1991) the Supreme Court reaffirmed its “longstanding
7 doctrine of tribal sovereign immunity ... in order to promote Indian self-government, self-
8 sufficiency, and economic development” *Oklahoma Tax Comm.*, 498 U.S. at 505–06. In
9 turn, a waiver of sovereign immunity “cannot be implied but must be unequivocally
10 expressed.” *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503 (1969). Further, “to
11 relinquish its immunity, a tribe’s waiver must be ‘clear.’ *C & L Enterprises, Inc. v. Citizen*
12 *Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1595
13 (2001). “Because a waiver of immunity is altogether voluntary on the part of [a tribe], it
14 follows that [a tribe] may prescribe the *terms and conditions* on which it consents to be
15 sued, and the manner in which the suit shall be conducted.” *Big Valley Band of Pomo*
16 *Indians v. Superior Court*, 133 Cal.App.4th 1185, 1193, 35 Cal.Rptr.3d 357, 364 (2005)
17 (citing *Missouri River Services v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir.
18 2001) (emphasis added). “**Where a tribe gives such consent, any conditional limitation**
19 **imposed thereon must be strictly construed and applied.**” *Lawrence v. Barona Valley*
20 *Ranch Resort and Casino*, 153 Cal.App.4th 1364, 1369, 64 Cal.Rptr.3d 23, 26 (2007)
21 (emphasis added).

22 Again, Paragraph 11 of the Amended Complaint fails to meet this standard, a
23 waiver cannot be implied. Therefore, the Amended Complaint should be dismissed by
24 application of the doctrine of sovereign immunity.

25 **B. Amended Complaint Supersedes Original:** The Amended Complaint must
26 stand or fall on its own. Jurisdictional and other allegations essential to the claim must be

1 realleged. The amended complaint supersedes the original complaint and renders it of no
 2 legal effect, unless the amended complaint *incorporates by reference* portions of the prior
 3 pleading. *See King v. Dogan*, 31 F3d 344, 346 (5th Cir. 1994); *Carver v. Condie* 169 F3d
 4 469, 472 (7th Cir. 1999). Again, the Amended Complaint does not incorporate by
 5 reference or reallege the existence of any written agreement between the parties.

6 (1) **Claims Not Realleged Are Deemed Waived:** The Ninth Circuit has long held
 7 that claims in the original complaint that are not realleged in the amended complaint are no
 8 longer before the court. *London v. Coopers & Lybrand* 644 F2d 811, 814 (9th Cir. 1981).
 9 Thus, plaintiff *waives* all causes of action alleged in the original complaint which are not
 10 alleged in the amended complaint. *Id.*, 644 F2d at 814; *Marx v. Loral Corp.* 87 F3d 1049,
 11 1056 (9th Cir. 1996). Therefore, Gold River cannot renew or now replead a claim based
 12 on written contract, since that claim has now been abandoned and waived.

13 (2) **The Original Complaint Allegations May Be Treated As Admissions of**
 14 **Fact:** Although superseded as a pleading, the Original Complaint may be admissible in
 15 evidence against the pleader; e.g., as an admission or prior inconsistent statement by the
 16 pleader: “The amendment of a pleading does not make it any the less an admission of the
 17 party.” *Andrews v. Metro North Commuter R.R. Co.* 882 F2d 705, 707 (2nd Cir. 1989);
 18 see also *White v. ARCO/Polymers, Inc.* 720 F2d 1391, 1396, fn. 5 (5th Cir. 1983).

19 In this motion, the La Jolla Band challenges the sufficiency of facts alleged by
 20 Plaintiff to bring only equitable claims without alleging the existence of a written contract
 21 concerning the financing, development and proposed management of an Indian gaming
 22 facility under federal law. (See Amended Complaint ¶¶ 2, 3, & 6.) Moreover, the
 23 Amended Complaint abandons and waives the claim in the Original Complaint concerning
 24 a Promissory Note connected to the financing, development and management of a gaming
 25 facility under the Indian Gaming Regulatory Act, apparently because Gold River agrees
 26 that it did not obtain the congressional mandated approval from the National Indian

1 Gaming Commission and the Bureau of Indian Affairs. In this case, Plaintiff cannot plead
2 that there is an express, unequivocal waiver of sovereign immunity by implication.

3 **IV. As A Matter Of Law, the La Jolla Band Is Entitled To An Order of Dismissal**
4 **Against Gold River Based On The Doctrine of Sovereign Immunity**

5 The Amended Complaint fails to adequately plead a claim against the La Jolla
6 Band, which is a federally-recognized Indian tribe, because it does not allege where and
7 how the La Jolla Band provided an unequivocal, and express waiver of its sovereign
8 immunity and consented to be sued

9 **V. Conclusion**

10 Based on the foregoing, the La Jolla Band respectfully requests that the Court grant
11 its motion to dismiss this action, since Plaintiff has failed to demonstrate a waiver of
12 sovereign immunity.

13 DATED: October 11, 2011

KAWAHARA LAW
A PROFESSIONAL CORPORATION

14
15 By /S/ James K. Kawahara
16 James K. Kawahara
17 Attorney for La Jolla Band of Luiseno Mission Indians
18
19
20
21
22
23
24
25
26
27