

1 James K. Kawahara, Esq., SBN 155723
james@kawaharalaw.com
2 KAWAHARA LAW, A PROFESSIONAL CORPORATION
6080 Center Drive
3 Sixth Floor
Los Angeles, California 90045-9205
4 Telephone: (310) 348-0070
Facsimile: (310) 807-9250
5 Attorney for the La Jolla Band of Luiseño Indians
6
7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

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

13 Plaintiff,

14 vs.

15 LA JOLLA BAND OF LUISEÑO MISSION
INDIANS.

16 Defendant.
17

CASE NO. 11CV1750 JM BGS

The Hon. Jeffrey T. Miller

**REPLY 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)**

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

20 Amended Complaint: September 27, 2011

21 Action Filed: August 5, 2011
22
23
24
25
26
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION..... 2

II. ARGUMENT 3

 A. THE COURT IS NOT LIMITED TO ACCEPTING AS TRUE THE CONCLUSORY ALLEGATION OF
 WAIVER OF SOVEREIGN IMMUNITY, BECAUSE THE LA JOLLA BAND CHALLENGES WHETHER A
 VALID WAIVER TOOK PLACE. 3

 B. THE LA JOLLA BAND HAS SUBMITTED UNCONTROVERTED EVIDENCE THAT ESTABLISHES
 THE BAND’S PURPORTED WAIVER OF SOVEREIGN IMMUNITY WAS GIVEN IN UNAPPROVED AND
 VOID WRITTEN CONTRACTS..... 4

**III. 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** 6

IV. CONCLUSION 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

American Vantage Companies, Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1098 (9th Cir. 2002) 2

Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F3d 440, 444 (7th Cir. 2009) 4

Barker-Hatch v. Viejas, 83 F. Supp. 2d 1155, 1157 (S.D.CA. 2000) 2

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 418, 121 S.Ct. 1589, 1595 (2001). 7

Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n, 149 F3d 679, 685 (7th Cir. 1998); 4

Friends of the Wild Swan, Inc. v. United States Forest Service, 910 F.Supp. 1500, 1504 (D.Or. 1995) 3

Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) 7

Morrison v. Amway Corp., 323 F3d 920, 925 (11th Cir. 2003))..... 4

Roberts v. Corrothers, 812 F2d 1173, 1177 (9th Cir. 1987);..... 3

Rogers-Dial v. Rincon Band of Luiseno Indians, 2011 U.S. Dist. LEXIS 71264, *13, (S.D. CA. decided July 1, 2011) 7

Savage v. Glendale Union High School, 343 F3d 1036, 1039, fn. 2 (9th Cir. 2003); 4

United States v. King, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503 (1969) 7

Velasco v. Government of Indonesia, 370 F3d 392, 398 (4th Cir. 2004)..... 3

Williamson v. Tucker, 645 F2d 404, 412 (5th Cir. 1981)..... 4

STATUTES

28 U.S.C. § 1331 2

28 U.S.C. § 1332 2

RULES

Federal Rule of Civil Procedure 12(b)(1) 3

TREATISES

Rutter, Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9 [9:85] 3

Rutter, Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9 [9:86]3, 4

1 **I. Introduction**

2 The Amended Complaint for equitable claims must be dismissed because the La Jolla
3 Band of Luiseño Indians (“La Jolla Band”) is a federally-recognized Indian tribe, and it has not
4 waived its immunity from suit in a clear and unequivocal manner in an enforceable, written
5 contract. Plaintiff’s Opposition to Motion of Defendant to Dismiss Amended Complaint
6 (“Opposition”) relies on two points: (1) that counsel for Defendant “concedes” subject matter
7 jurisdiction in its notice of removal of related case number 11-cv-2290, and (2) no legal
8 authority requires Plaintiff to prove where and how the La Jolla Band provided an express and
9 unequivocal waiver of its sovereign immunity.

10 In reply, the La Jolla Band informs the Court that Plaintiff dismissed -- with prejudice --
11 the removed case number 11-cv-2290 on November 10, 2011, so Plaintiff may not rely on
12 pleadings *in another case* that Plaintiff dismissed itself to establish subject matter jurisdiction *in*
13 *this case*. Moreover, at no time did counsel for Defendant concede subject matter jurisdiction¹ –
14 instead counsel quoted from Plaintiff’s pleadings²; nor did Defendant concede a waiver of tribal
15 sovereign immunity, nor can counsel do so³. Second, because the La Jolla Band has pressed the
16 issue, Plaintiff does have the burden of establishing when and how an express and unequivocal
17 waiver of sovereign immunity was given by the La Jolla Band. Finally, the Court itself must be

18
19 ¹ At most, counsel for Defendant in the Notice of Removal proffered that the Amended
20 Complaint *alleged* that this court has jurisdiction to determine *whether* it has jurisdiction.

21 ² Just because Plaintiff alleges jurisdiction does not mean that the Court has jurisdiction.
22 For example, Plaintiff incorrectly alleges diversity jurisdiction. Amended Complaint ¶ 4. Indian
23 tribes are not “citizens” for purposes of 28 U.S.C. § 1332. *American Vantage Companies, Inc.*
24 *v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002). Federal question
25 jurisdiction under 28 U.S.C. § 1331 does not exist just because an Indian tribe is a party.
26 *Barker-Hatch v. Viejas*, 83 F. Supp. 2d 1155, 1157 (S.D.CA. 2000)

27 ³ The La Jolla Band has consistently asserted that the Court does not have jurisdiction by
28 reason of the doctrine of sovereign immunity. *See*, La Jolla Band’s Motion to Dismiss under
12(b)(6) (ECF No. 4), Page 3, fn. 1, and La Jolla Band’s Demurrer filed in the removed state
court (ECF No. 9) (Plaintiff’s Request for Judicial Notice, Exhibit 1).

certain that it has subject matter jurisdiction before proceeding any further. The La Jolla Band respectfully requests that the Court determine that it does not have subject matter jurisdiction over this case by applying the doctrine of sovereign immunity.

II. Argument

A. The Court Is Not Limited To Accepting As True The Conclusory Allegation of Waiver of Sovereign Immunity, Because The La Jolla Band Challenges Whether A Valid Waiver Took Place.

Because the Court's power to hear this case is at stake on the grounds of sovereign immunity, the Court is not limited to considering only the allegations of the amended complaint or accepting -- as true -- conclusory statements made "upon information and belief." When considering Plaintiff's allegation "upon information and belief" that the La Jolla Band waived its sovereign immunity, the Court may consider the *extrinsic evidence* proffered by the La Jolla Band or attached by Plaintiff as an Exhibit to its Original Complaint; and *determine* the facts in order to satisfy itself as to its power to hear the case: "(T)he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Rutter, Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9 [9:85] (*citing Roberts v. Corrothers*, 812 F2d 1173, 1177 (9th Cir. 1987); *Velasco v. Government of Indonesia*, 370 F3d 392, 398 (4th Cir. 2004) —court may consider evidence outside the pleadings; *Friends of the Wild Swan, Inc. v. United States Forest Service*, 910 F.Supp. 1500, 1504 (D.Or. 1995)). Other than reiterating its unsupported allegation that the La Jolla Band waived its sovereign immunity, the Plaintiff has not disputed the facts put forth by the La Jolla Band.

Unlike a mere "facial attack" in which the allegations of the complaint are taken as true, where the Federal Rule of Civil Procedure 12(b)(1) motion is based on extrinsic evidence, no presumptive truthfulness attaches to plaintiff's allegations: "The presumption of correctness that we accord to a complaint's allegations falls away on the jurisdictional issue once a defendant proffers evidence that calls the court's jurisdiction into question." Rutter, Cal. Prac. Guide Fed.

Civ. Pro. Before Trial Ch. 9 [9:86] (*citing Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F3d 679, 685 (7th Cir. 1998); *Williamson v. Tucker*, 645 F2d 404, 412 (5th Cir. 1981); see *Morrison v. Amway Corp.*, 323 F3d 920, 925 (11th Cir. 2003)). Therefore, Plaintiff must furnish declarations or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *Id.* (*citing Savage v. Glendale Union High School*, 343 F3d 1036, 1039, fn. 2 (9th Cir. 2003); *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F3d 440, 444 (7th Cir. 2009) —plaintiff bears the burden of coming forward with competent proof). However, even after Plaintiff was put on notice that the La Jolla Band was contesting subject matter jurisdiction for lack of a waiver of sovereign immunity, Plaintiff chose not to offer *any* evidence to establish subject matter jurisdiction through a waiver of sovereign immunity. Instead, the Plaintiff has merely reiterated its bald statement in Paragraph 11 of its Amended Complaint that a waiver took place at some time and in some manner upon “information and belief.” Would the Court contemplate finding waiver of the sovereign immunity of the United States of America or the State of California based on “information and belief”? Wouldn’t the Court require a plaintiff to at least allege a waiver by a statute or agreement in a case involving the USA or California? Under federal law, the La Jolla Band’s defense of sovereignty immunity is of equal status to the sovereign immunity belonging to other governments.

B. The La Jolla Band Has Submitted Uncontroverted Evidence That Establishes The Band’s Purported Waiver of Sovereign Immunity Was Given In Unapproved and Void Written Contracts

The La Jolla Band has attacked the Amended Complaint on its face for failing to state where and how an express, unequivocal waiver was given, *and* by extrinsic evidence. The La Jolla Band in its opening brief referred the Court to the previously filed exhibits. (ECF No. 7) (Defendant’s 12(b)(1) Motion to Dismiss, page 5, lines 17 to 21.) Through supporting declarations and exhibits, submitted to the Court in this case, the La Jolla Band (and in some cases the Plaintiff as well) has informed the Court of the following facts:

1. The parties entered into the following nine (9) written contracts, including the opening MOU:
 - a. Memorandum of Understanding, dated May 21, 2004 (ECF No.4, attachments 3-6) (Defendant's Exhibit 1, 122-LJB to 126-LJB);
 - b. Limited Recourse Promissory Note, dated July 29, 2004 (ECF No.4, attachments 3-6) (Defendant's Exhibit 1, 127-LJB to 133-LJB);
 - c. Development Agreement, dated August 9, 2004 (ECF No.4, attachments 3-6) (Defendant's Exhibit 1, 136- LJB to 212-LJB) (*This agreement was also referred to in Plaintiff's Exhibit "A" to the Original Complaint*);
 - d. Security Agreement, dated March 26, 2005 (ECF No.4, attachments 3-6) (Defendant's Exhibit 1, 213-LJB to 224-LJB) (*This agreement was also referred to in Plaintiff's Exhibit "A" to the Original Complaint*);
 - e. Limited Recourse Promissory Note, dated March 26, 2005 (ECF No.4, attachments 3-6) (Defendant's Exhibit 1, 225-LJB to 233-LJB) (*This was also submitted by the Plaintiff as Exhibit "A" to its Original Complaint*);
 - f. Phase I Management Agreement, dated June 22, 2005 (ECF No.4, attachments 3-6) (Defendant's Exhibit 1, 007-LJB to 095-LJB);
 - g. Pre-Opening Consulting Agreement, dated July 30, 2006 (ECF No.4, attachment 9) (Defendant's Exhibit 4, 371-LJB to 401-LJB);
 - h. Post Opening Consulting Services Agreement, dated July 30, 2006 (ECF No.4, attachment 9) (Defendant's Exhibit 4, 402-LJB to 432-LJB); and,
 - i. Development Consulting Services Agreement, dated July 30, 2006 (ECF No.4, attachment 9) (Defendant's Exhibit 4, 433-LJB to 469-LJB).
2. A sovereign immunity waiver provision was contained in the documents For example, Promissory Note, dated March 26, 2005 Article IV (c):

Limitations of Consent to Suit Related to Judicial Forum. The Maker consents [sic] to suit only for purposes identified in this Article IV and subject to all other requirements, conditions, and limitations stated therein, only in the following courts:

The United States District Court for the Southern District of California and all courts to which an appeal therefrom may be available (collectively, the "Federal Courts"); or

If the Federal Courts described in subsection (i) lack jurisdiction, in the Superior Court for the County of San Diego all courts to which an appeal therefrom may be available ("State Courts").

Plaintiff's Exhibit "A" to the Original Complaint; (ECF No.4, attachments 3-6) (Defendant's Exhibit 1, (130-LJB to 131-LJB).

3. The National Indian Gaming Commission's Acting General Counsel, Penny J. Coleman determined that the written documents, itemized above, and as amended by the parties, constituted an unapproved management contract, which is void under federal law, in a letter written to the parties on July 2, 2007. (ECM No. 4, attachment 11) (Defendant's Exhibit 6, 489-LJB to 493-LJB).
4. The United States Department of Interior, Bureau of Indian Affairs' Acting Deputy Assistant Secretary for Policy and Economic Development, George T. Skibine determined that the Development Agreement, dated August 9, 2004, "violate[d] federal law and cannot be approved." (ECM No. 4, attachment 10) (Defendant's Exhibit 5, 488-LJB).

The Amended Complaint abandons and omits any mention of the Promissory Note attached to the Original Complaint, and does not allege any of these void and unenforceable contracts in which the La Jolla Band purported to waive its sovereign immunity or consented to be sued. When, where and how does Plaintiff allege a waiver of sovereign immunity?

III. 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

The Amended Complaint fails to adequately plead a claim against the La Jolla Band, which is a federally-recognized Indian tribe, because it does not allege where and how the La

1 Jolla Band provided an unequivocal, express waiver of its sovereign immunity and consented to
 2 be sued. Most importantly, as demonstrated by the uncontroverted facts, ***Plaintiff cannot prove***
 3 ***that a valid waiver of sovereign immunity exists***. Therefore, “[a]s a matter of federal law, an
 4 Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived
 5 its immunity.” *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140
 6 L.Ed.2d 981 (1998). A waiver of sovereign immunity "cannot be implied but must be
 7 unequivocally expressed." *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503 (1969).
 8 Further, "to relinquish its immunity, a tribe's waiver must be 'clear.' *C & L Enterprises, Inc. v.*
 9 *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1595
 10 (2001). Again, Paragraph 11 of the Amended Complaint fails to meet this standard, a waiver
 11 cannot be implied. Therefore, the Amended Complaint should be dismissed by application of
 12 the doctrine of sovereign immunity. *See, Rogers-Dial v. Rincon Band of Luiseno Indians*, 2011
 13 U.S. Dist. LEXIS 71264, *13, (S.D. CA. decided July 1, 2011) (granting Indian tribe's motion
 14 for dismissal and citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct.
 15 1700, 140 L. Ed. 2d 981 (1998).)

16 **IV. Conclusion**

17 Based on the foregoing, the La Jolla Band respectfully requests that the Court grant its
 18 motion to dismiss this action ***with prejudice***, since Plaintiff has failed to demonstrate a waiver of
 19 sovereign immunity and Plaintiff cannot truthfully prove a waiver.

20 DATED: November 14, 2011

KAWAHARA LAW
 A PROFESSIONAL CORPORATION

21
 22 By /S/ James K. Kawahara

James K. Kawahara

Attorney for La Jolla Band of Luiseno Mission Indians