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SHINGLE SPRINGS BAND OF MIWOK INDIANS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Plaintiff,

v.

CESAR CABALLERO,

Defendant.

CESAR CABALLERO, on behalf of himself and those similarly situated,

Counter-Plaintiff,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Counter-Defendant.

Case No. 2:08-CV-03133-JAM-DAD

REPLY BRIEF IN SUPPORT OF SHINGLE SPRINGS BAND OF MIWOK INDIANS' MOTION TO DISMISS OR, ALTERNATIVELY, TO STRIKE CESAR CABALLERO'S COUNTERCLAIMS

Date: May 20, 2009
Time: 9:00 a.m.
Courtroom: 6

Judge: Hon. John A. Mendez

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I. INTRODUCTION

The counter-complaint filed by Cesar Caballero — and now the opposition brief designed to avoid its dismissal — gives life to why the United States Congress enacted the "List Act" in 1994 to protect Indian tribes from challenges to their federal recognition as sovereign "tribal entities." Mr. Caballero, a claimed descendent of Miwok Indians for whom El Dorado County lands were once set aside but apparently later terminated, claims that *his* tribe is more deserving of federal recognition than the entity he has sued — to wit, a tribal entity that owns and operates a federally-sanctioned gaming facility on Shingle Springs Rancheria and that the United States recognizes as the "Shingle Springs Band of Miwok Indians" (hereinafter, "the Tribe" or "Shingle Springs Band"). Mr. Caballero further argues that he and his ancestors are "Indigenous Miwok Indians" who "enjoyed a continuous political existence since historic times," and that his group has "a far better claim for federal recognition than do the Casino Indians [at Shingle Springs Rancheria] who have no legitimate claim." (Opposition Brief ("Opp."), 3:10-16.) The argument is a false one, since it assumes the Shingle Springs Band's federal recognition is mutually exclusive with that of Mr. Caballero's "tribe," when in fact, Mr. Caballero's group is free to seek federal recognition if it desires. Its entitlement to such recognition, however, has no bearing on the Shingle Springs Band's status.

At its core, Mr. Caballero's opposition — which is replete with distortions of law, albeit few legal citations — launches the kind of attack Congress sought to forestall when it enacted the List Act, by arguing the Shingle Springs Band is not the kind of Indian tribe worthy of federal recognition, consisting of persons of different Indian ethnicities who did not have a "continuous political existence since historic times" and no "meaningful political structure" until recent times. (Opp., 1:16-19, 14:5-12.) Of course, Mr. Caballero's theory would leave countless California tribes without federal recognition, given the manner in which many Indians came to be settled on Rancherias, and recognized as "tribal entities," in the wake of a federal Indian policy that left their Indian communities devastated, disbanded and landless. His theory of "tribalness," and his challenge to Shingle Springs' federally-recognized status, also lacks basis in reason or law, providing him no possibility of relief as a matter of law.

Mr. Caballero's opposition not only rests on baseless legal theories, but hyperbole and misstatements of irrelevant fact. Contrary to Mr. Caballero's assertion, the Shingle Springs Band does have members of Miwok descent (along with Maidu, Paiute and Hawaiian ancestries), but such is legally irrelevant to whether the Tribe could be federally recognized as a "tribal entity." It is likewise irrelevant to whether an individual can challenge the Tribe's federal recognition, or whether the federally-recognized Tribe can be barred from using its own federally-recognized name, as Mr. Caballero seeks to accomplish here.

Mr. Caballero's rhetoric aside, he cannot deny that the U.S. government has recognized the Tribe as a sovereign "tribal entity." He also cannot deny that the U.S. government has recognized the Tribe as the "Shingle Springs Band of Miwok Indians," listing it by that name in the Federal Register. And although the Tribe has used that name, and openly governed Shingle Springs Rancheria, for decades, Mr. Caballero suddenly claims the right to that name and the land (and the gaming facility the Tribe operates) on the ground that his ancestors were somehow wrongfully denied the use of the Rancheria in the 1960s, and thereafter excluded from a membership roll by certain members of the Tribe (persons Mr. Caballero calls the "Casino Indians").

In the end, Mr. Caballero's grievance is with the source of the federal recognition — the United States government — and if he has any claim to pursue, it is before the Executive Branch, not this Court. More fundamentally, and irrespective of whether Mr. Caballero claims the right to be a member of the Shingle Springs Band of Miwok Indians over which the Casino Indians have allegedly usurped control (and his position on that point appears to vacillate), this Court simply lacks subject matter jurisdiction to adjudicate his claims.

II. MR. CABALLERO'S ALLEGATIONS

Mr. Caballero contends the Tribe misrepresented the allegations of his Counter-Complaint (Opp., pp.8-9), which the Court can obviously read for itself. However, it bears noting that Mr. Caballero's opposition appears to rewrite his complaint. For example, Mr. Caballero alleged that his ancestors were wrongfully excluded by the "Casino Indians" from a distribution plan in the 1960s, from which the Tribe's membership was formulated in the 1970s,

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and that the Casino Indians took this action to deny the Indigenous Miwoks of "any beneficial interests that may be afforded them from inclusion." (Cesar Caballero's Counter-Complaint ("Cmplt"), ¶¶ 47-55, 89-90.) Given these allegations, and the fact that Mr. Caballero sought damages associated with the denial of benefits that flow to members of the Tribe, the Tribe construed his complaint to allege their wrongful denial of Tribal membership. However, despite these allegations, and in the face of a motion demonstrating the lack of subject matter jurisdiction over membership disputes, Mr. Caballero now argues that this is not a membership dispute and he and his fellow "Indigenous Miwoks" are not seeking membership in the tribal entity the United States recognizes as the "Shingle Springs Band of Miwok Indians." (Opp., 19:24-25; *but see id*., 8-9 (complaining of Casino Indians' "malicious" removal of Indigenous Miwoks' names from distribution plan for Shingle Springs Rancheria).)

Mr. Caballero's counter-complaint also challenged the right of the Tribe to use Shingle Springs Rancheria, upon which the Tribe owns and operates a gaming facility (Cmplt, ¶¶ 21-22, 35, 50-51, 71, 89-94, 97-102), and further contends the Indigenous Miwoks should be entitled to use and reap the benefits of such land. (Cmplt, ¶¶ 8, 52-53, 71; *id*., 26:25, 27:24-27.) Now, in the face of a motion demonstrating that the United States is a necessary and indispensable party in any action seeking an interest in land it owns, Mr. Caballero claims this is not a quiet title action and that he is not seeking an interest in Shingle Springs Rancheria. (Opp., 22:13-15.)

In the end, Mr. Caballero's evolving position is irrelevant, because none of his claims are justiciable under any theory. As here, where amendment of dismissed claims would be futile, leave to amend should be denied. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) ("A district court does not err in denying leave to amend where the amendment would be futile . . . or where the amended complaint would be subject to dismissal."); *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 (9th Cir. 1997) (where the pleadings establish facts compelling dismissal of a claim, the "plaintiff may plead herself out of court").

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III. ARGUMENT

A. In Challenging The Tribe's Federal Recognition, Mr. Caballero Distorts The Tribe's Position, Rewrites His Complaint, And Ignores The Law.

Mr. Caballero does not (and cannot) effectively dispute that the United States views the Tribe to be a sovereign "tribal entity." The United States has, among other things, listed the Tribe in the Federal Register as one of 562 "tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes." (*See* Tribe's Request for Judicial Notice ("RFJN"), Exh. 13-23.) Mr. Caballero instead disputes the validity of such recognition (Opp., 10:12-15), contending the Tribe's members are imposters posing as the Indigenous Miwoks for whom Shingle Springs Rancheria was originally set aside, and who supposedly are "more deserving" of the federal government's recognition. The argument is factually inconsistent with Mr. Caballero's own allegations, it distorts the record (including the Tribe's position) and it reveals a fundamental misunderstanding of the law.

First, Mr. Caballero has already conceded that the Shingle Springs Rancheria was at least partially set aside for the Casino Indians, some of whom he admits descend from the homeless Indians from the Sacramento and Verona areas, specifically, members of the Sacramento-Verona Band of Homeless Indians. (Cmplt, ¶¶ 34-37, 45-49.) He concedes that the Verona Tract was set aside for this band of Indians (Cmplt, ¶ 34), and indeed, that they were included on the list of persons entitled to receive the Verona Tract in a distribution plan the federal government prepared (but never implemented) pursuant to the Rancheria Act. (Opp., 2:12-16, 2:19-23, 3:20-22, 8:25-27; Cmplt, ¶¶ 42-44.) This fact necessarily means the United States concluded those persons were entitled to the trust land, had it been terminated. *See* Tribe's Memorandum in Support of Motion to Dismiss ("Tribe's Mem."), 28:20-28.

Likewise, having acknowledged that at least some members of the tribal entity he calls the "Casino Indians" were settled on (and entitled to) the Shingle Springs Rancheria (Opp., 8:22-9:4), and having conceded the federal government approved the Casino Indians' governing document (Opp., 11:22-27, 12:10-16), it is hard to understand where the balance of Mr. Caballero's arguments take him. He states, for example, that the Federal Register's reference to

the "Shingle Springs Rancheria (Verona Tract) of Miwok Indians, California" (44 Federal Register 7235, 7236 (January 31, 1979), simply refers to "the property not the Band." (Opp., 11:22-24, 12:13.) Of course, this cannot be true, since the 1979 title of the Register is "Indian tribal entities that have a government-to-government relationship with the United States." Land is not a government, and it has no "relationship" as such with the United States. *See also* 73 Fed. Reg. 18553 (April 4, 2008) (listing "*tribal entities recognized* and eligible for funding and services from the Bureau of Indian Affairs *by virtue of their status as Indian tribes*." (emphasis added)); *and see Williams v. Clark*, 742 F. 2d 549, 554 n.4 (9th Cir. 1984) ("there is no suggestion that the geographical or reservation designations [in titles of reservations], which are not listed for all of the tribes, were included for any purpose other than assisting in identifying the tribes").[1]

Second, contrary to Mr. Caballero's assertions, the Tribe does not claim it was "allowed to bypass the administrative process" for federal recognition (Opp., 1:11); rather, it is simply indisputable fact that the Shingle Springs Band enjoyed federal recognition before any administrative procedures were developed in connection with the List Act's enactment, and it did so by virtue of a course of dealing vis-à-vis the United States. Many sovereign tribal entities enjoyed a relationship with the federal government in this manner, before the List Act's enactment in 1994, and the tribal entity for which Shingle Springs Rancheria was set aside — originally identified as the "Shingle Springs Rancheria (Verona Tract) of Miwok Indians, California" and thereafter as the "Shingle Springs Band of Miwok Indians" — was one of them. This is hardly a novel concept, as recognized by courts and commentators:

---

[1] Notably, by Mr. Caballero's own admissions, this is not a case of mistaken identity; his grievance is that the "tribal entity" for whom Shingle Springs Rancheria was set aside was not sufficiently inclusive, since certain of the "Casino Indians" "maliciously" excluded his ancestors. Disavowals aside (Opp., 19:24-26), such amounts to a tribal membership dispute. In addition, having acknowledged that at least some members of the tribal entity he calls the Casino Indians were settled on (and entitled to) the Shingle Springs Rancheria (Opp., 8:22-9:4), Mr. Caballero cannot be heard to complain that the entity's membership includes persons Mr. Caballero deems unworthy (persons of Hawaiian descent), since a federally-recognized Indian tribe has the ultimate power to determine its own membership. *United States v. Bruce*, 394 F. 3d 1215, 1225 (9th Cir. 2005).

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> Congress has approved a variety of mechanisms by which Indian nations can secure federal recognition, including determinations by legislative, executive and judicial bodies. Throughout the history of tribal-federal relations, all three mechanisms have been employed. In addition, court decisions have operated to interpret and affirm the actions of the political branches.

Richmond v. Wampanoag Tribal Court Cases, 431 F. Supp. 2d 1159, 1163 n.5 (2006) (quoting *Cohen's Handbook of Federal Indian Law* ("*Cohen*") § 3.024, at 143 (2005 ed. Nell Jessup Newton, et al., eds.)); *see also* William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed. 2004) ("Federal recognition may arise from treaty, statute, executive or administrative order, *or from a course of dealing with the tribe as a political entity*." (emphasis added)).

While Mr. Caballero suggests that an Indian tribe may not be properly federally recognized unless it is racially "pure" (Opp., 2:21-22, 3:22-23, 4:5), with a "meaningful" political structure in place (*id.*, 1:16-19, 14:7-8), whose existence dates back to "historic times" (*id.*, 1:17, 3:14, 9:11, 10:21), the federal government's view of what entities deserve its recognition as sovereign "tribal entities" is not so constrained:

> "In light of the deference given to congressional and executive determinations in this area," . . . it would appear that "the only practical limitations on congressional and executive decisions as to tribal existence are the broad requirements that: (a) the group have some ancestors who lived in what is now the United States before discovery by the Europeans, and (b) the group be a "people distinct from others."

Richmond v. Wampanoag, *supra*, 431 F. Supp. 2d at 1163-64 (quoting *Cohen*, *supra*, § 3.024, at 143). Even Mr. Caballero does not dispute that the Tribe consists of persons whose ancestors lived in what is now the United States before discovery by Europeans, and that, as homeless Indians from Sacramento and Verona, they were a people distinct from others. (Opp., 2:19-22, 3:22-23.) The fact that the Shingle Springs Band has members of different ethnicities (Miwok, Maidu, Paiute) has no bearing on its merit to recognition as a sovereign entity. *See Montoya v. United States*, 180 U.S. 261, 268 (1901) ("By a 'tribe,' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a

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common design. While a 'band' does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action….")

Contrary to Mr. Caballero's argument (Opp., 11:25-27), nothing requires an Indian tribe to have had a governing document in order to be recognized by the United States as a sovereign Indian tribe, but of course here, the Tribe had one.[2] Nor must an Indian tribe be organized under the Indian Reorganization Act (Opp., 10:25-11:13; *Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992)), and indeed, many federally-recognized Indian tribes are not so organized. *See* Theodore H. Haas, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.* pp. 13-21 (Dep't of the Interior 1947) (listing "Indians Tribes, Bands and Communities which voted to accept or reject the terms of the I.R.A.") (available at http://thorpe.ou.edu/IRA/IRAbook/tribalgovpt1tblA.htm (last visited May 13, 2009)).

Furthermore, the Shingle Springs Band's sovereign status was not "derived from a Federal Census taken in 1916," as Mr. Caballero contends the Tribe admits (Opp., 6:16-20); rather, that census is *simply evidence of the United States' government-to-government relationship or course of dealing* with the Band. Stated otherwise, it is evidence of the federal recognition the Tribe then enjoyed. However, even if a particular tribal entity's federal recognition did begin with the setting aside of trust lands, such is irrelevant here, since many homeless Indians were assigned to Rancherias during the early 1900s, they were federally recognized as sovereign Indian entities or communities at that time, and they continue to be so recognized today. That is the nature of how many homeless Indians in California came to be settled, after having been forced from their ancestral lands by white settlement and a failed federal Indian policy. Assignment to Rancherias had nothing to do with whether those persons had belonged to sovereign tribes dating back to "historic times." Mr. Caballero improperly conflates the idea of inherent tribal sovereignty with federal recognition. (*See* Opp., 6:16-20 (conflating membership and recognition); Cmplt, ¶ 25 (distinguishing between "created tribe"

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[2] Mr. Caballero incorrectly asserts the Tribe did not enact its Articles of Association until 1979, after the List Act's enactment. In truth, the Tribe enacted its governing document in 1976. Declaration of Nicholas Fonseca, ¶ 3.

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versus "historic tribe" as worthy of federal recognition)). While these concepts are certainly related, they are nonetheless distinct:

> Much of the theory that underpins [federal] Indian law is that the Indian tribes possessed certain sovereign rights based on their existence as distinct political entities exercising authority over their members prior to the incorporation of their territory into the United States. [Citation.]; thus, "tribes retain whatever inherent sovereignty they had as the original inhabitants of this continent to the extent that sovereignty has not been removed by Congress." [Citation]
>
> Despite this general recognition of sovereignty (and, perhaps, the irony), as far as the federal government is concerned, an American Indian tribe does not exist as a legal entity unless the federal government decides that it exists. Federal recognition affords important rights and protections to Indian tribes, including limited sovereign immunity, powers of self-government, the right to control the lands held in trust for them by the federal government, and the right to apply for a number of federal services.

Kahawaiolaa v. Norton, 386 . 2d 1271, 1272-72 (9th Cir. 2004) (citations omitted).

Indisputably, the United States has recognized the Tribe. It is listed in the Federal Register, and it has been so listed since *1979*. The Tribe has enjoyed a government-to-government relationship with the United States Executive Branch for decades, having secured many federal benefits, not to mention, more recently, federal approvals to operate a gaming facility on its land. Irrespective of how the Tribe came to be recognized, it is not for Mr. Caballero, or even this Court, to question the validity of that recognition. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *Miami Nation of Indians of Ind., Inc. v. United States DOI*, 255 F.3d 342, 347 (7th Cir. 2001).

B. Mr. Caballero Apparently Concedes That Any Waiver Of The Tribe's Sovereign Immunity Reaches, At Most, The Issues Necessary To Decide The Tribe's Claims, Not His Own.

Unable to deny that the United States (if not Mr. Caballero) recognizes the Tribe as a sovereign entity, Mr. Caballero also cannot deny that the Tribe possesses sovereign immunity to suit. He apparently accepts that when a federally-recognized tribe files suit, any waiver of that immunity is extremely narrow, for he concedes that, at most, the Tribe has waived its immunity as to "all causes of action and prayer's [sic] for equitable relief the [Tribe] initiated when [it] filed litigation against Cesar Caballero." (Opp., 15:14-15.) On this point, Mr. Caballero is

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correct: The Tribe has submitted to the Court's jurisdiction for resolution — favorable or unfavorable — of its claims against Mr. Caballero. All of the counterclaims of Mr. Caballero and his purported class, however, are barred by sovereign immunity.

Consistent with bedrock law, the Ninth Circuit narrowly construes waiver of tribal sovereign immunity through litigation. *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). Specifically, "[i]nitiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy." *Id.* However, because the "terms of [a tribe's] consent to be sued in any court define that court's jurisdiction to entertain the suit," such a waiver is "limited to the issues necessary to decide the action brought by the tribe." *Id.* (quoting *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). In other words, "tribal initiation of litigation alone does not establish waiver with respect to related matters." *Id.* Accordingly, a tribe's immunity remains intact, even as to counterclaims asserted by defendants relating to a tribe's claims for affirmative relief. *Id.*; *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 723 (9th Cir. 1986); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985). A party asserting claims against a tribe bears the burden of demonstrating a waiver of sovereign immunity. *Garcia v. Akwesasne Hous. Auth.*, 268 F. 3d 76, 84 (2d Cir. 2001); *see also Chayoon v. Chao*, 355 F.3d 141, 142 (2d Cir. 2004).

1. As Mr. Caballero Concedes, The Court Must Strike All Of His Claims For Money Damages As Well As His Claims Relating To The Tribe's Federally-Recognized Status.

By acknowledging that any waiver of the Tribe's immunity extends only to "causes of action and prayer's [sic] for equitable relief the [Tribe] initiated" (Opp., 15:14-15), Mr. Caballero necessarily concedes he cannot demonstrate waiver as to any claims for damages. *See Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 723 (9th Cir. 1986) (immunity remained intact as to counterclaims for money damages even though related to the tribe's claims). Thus, all of Mr. Caballero's claims for money damages should be stricken, including his prayers seeking various damages from the Tribe. (Cmplt, pp. 27-28; *id.*, ¶¶ F-I.)

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In addition, having conceded the Tribe's waiver at most reaches claims for "equitable relief the [Tribe] initiated" (Opp., 15:14-15), all of Mr. Caballero's other claims must be struck a well. Specifically, Mr. Caballero's requested relief seeking injunctive relief relating to the "use, benefit or acknowledgement as to [the Tribe's] federal recognition" and to "operating a gaming casino of any class or type" (Cmplt, 26:21-25) are thus barred by sovereign immunity. Mr. Caballero nowhere argues that the Tribe seeks equitable relief as to its federally-recognized status, any benefits flowing from that status, or its rights to operate a casino. A review of the Tribe's Complaint so confirms. (*See* Tribe's Complaint, pp. 7-8.)

2. Sovereign Immunity Bars Mr. Caballero's Equitable Claims Purporting To Bar The Tribe's Use Of Its Mark.

Mr. Caballero claims that because the Tribe has sought equitable relief against Mr. Caballero, he should be able to seek equitable relief against the Tribe, citing an Eighth Circuit case, *Rupp v. Oklahoma Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995).[3] *Rupp* is factually distinguishable and provides no reason to depart from the Ninth Circuit's well-established rule that "a tribe's waiver of sovereign immunity should be limited to the issues necessary to decide *the action brought by the tribe*." *McClendon*, 885 F.2d at 630 (emphasis added). Essential to the Eighth Circuit's decision in *Rupp* was the existence of an express waiver of the tribe's sovereign immunity vis-à-vis the defendants' claims, apart from its filing of a lawsuit. 45 F.3d at 1244. As the *Rupp* court noted:

> The Tribe did not merely file a quiet title action. The Tribe *affirmatively requested the district court to order the defendants to assert any claims in the disputed lands* they possessed against the Tribe and exercise its equitable powers to, among other things, quiet title in the Tribe's name.

Id. (emphasis added). Given the unique fact that the tribe there had explicitly consented to the court's jurisdiction, the court held that, "[a]lthough waivers of sovereign immunity cannot be implied and are to be strictly construed in favor of the Tribe, this test is satisfied by *the Tribe's*

[3] Mr. Caballero cites *Rupp* as issued by the "9th Cir.," when, in fact, the Eighth Circuit decided the case.

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affirmative request that [defendants] assert their claims in the disputed land." *Id.* at 1245 (emphasis added). By comparison here, the Shingle Springs Band has made no affirmative request that Mr. Caballero bring any claims whatsoever in this proceeding. Nor does Mr. Caballero even suggest that a waiver be found on any basis other than the Tribe's filing of its Complaint. Thus, under controlling law, the Tribe has consented only to be bound by this Court's resolution of the Tribe's claims. *McClendon*, 885 F.2d at 630. Thus, those claims strictly define the maximum extent of any waiver. *Id.*

The Tribe's claims are based on allegations that Mr. Caballero's use of the name "Shingle Springs Band of Miwok Indians" are "false descriptions or representations in commerce." *See* 15 U.S.C. § 1125(a). Therefore, the issue before the Court is whether certain actions of Mr. Caballero, such as filing a fictitious business statement, publishing advertisements in a newspaper, or operating a business, entitle the Tribe to certain equitable or monetary relief. (Tribe's Complaint, ¶¶ 7-10, 15.) Mr. Caballero's Counter-Complaint, on the other hand, even to the extent it seeks equitable relief relating to the "Shingle Springs Band of Miwok Indians" mark, implicates entirely different issues that the Tribe has not placed before this Court. For example, Mr. Caballero's claims turn on whether certain actions of *the Tribe* — operating its tribal government and engaging in certain relationships with state and federal governments under the name "Shingle Springs Band of Miwok Indians" — entitle Mr. Caballero to certain relief. (*See, e.g.*, Cmplt, ¶¶ 69, 74, 80, 83, 91, 100.) In addition, Mr. Caballero's Counter-Complaint seeks, among other things, an order prohibiting the Tribe from using the name "Shingle Springs Band of Miwok Indians," an order requiring the Tribe to "deliver for destruction" any articles bearing that name, and an order requiring the Tribe to provide a detailed report explaining its compliance. (Cmplt, 27:1-23.) Resolution of whether Mr. Caballero is entitled to this — or any other — affirmative relief is not "necessary to decide the action brought by the tribe." *McClendon*, 885 F.2d at 630. Accordingly, the Tribe's sovereign immunity bars Mr. Caballero's claims, including his claims for equitable relief relating to use of the name "Shingle Springs Band of Miwok Indians."

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3. Sovereign Immunity Bars The Claims Of Mr. Caballero's Purported Class.

With Mr. Caballero's concession that, at most, the Tribe's waiver extends only to the equitable claims in the Tribe's Complaint, it is unclear what relief the purported class might still be seeking. In any event, the Tribe's sovereign immunity remains intact as to all class claims.

In *McClendon*, the Ninth Circuit addressed whether litigation initiated by a tribe against one party could constitute consent to suit by a different party concerning related matters arising from the same set of facts. 885 F.2d at 630. That case involved a dispute over ownership of certain lands the Tribe claimed. *Id.* at 628. In settling the litigation, the Tribe obtained title to the land and the other party, the Clarks, obtained a leasehold interest in the land. *Id.* The Clarks assigned their leasehold interest to a third party, McClendon, who signed "a basically identical" business lease with the tribe. *Id.* at 629. McClendon later sued the tribe for damages and equitable relief, claiming the earlier litigation had waived the tribe's immunity as to his claims. *Id.* The Ninth Circuit disagreed, holding the tribe consented, at most, to the court's resolution of claims against the Clarks, not related claims by other parties. *Id.* at 631 & n.4. The Ninth Circuit rejected McClendon's argument that the court had *in rem* jurisdiction of his claims by virtue of resolving the original "traditional private litigation" over ownership of the property. *Id.*

Here, the Tribe sued Mr. Caballero, a natural person, alleging that his use of "Shingle Springs Band of Miwok Indians" entitled the Tribe to damages and injunctive relief against Mr. Caballero. The Tribe sought damages from no other person and asked the Court to foreclose no other person from using the mark. The Tribe could not — even if it desired — structure the litigation as an *in rem* action to determine the rights in the Shingle Springs Band of Miwok Indians mark as to persons not named in its complaint. No such action exists in the trademark context:

> [T]he very nature of trademark rights does not lend itself to any sort of definitive *in rem* declaration. Unlike property or even patents and copyrights, trademark rights depend on use. Strictly speaking, a person does not own a mark per se, and competing rights to a trademark depend on the nature of each party's use, such as market, locality, type of goods, and related factors. *See Hanover Star Milling Co. v. Metcalf,*

> 240 U.S. 403, 413, 60 L. Ed. 713, 36 S. Ct. 357 (1916) ("The right grows out of use, not mere adoption. . . . There is no property whatever in a trademark, as such."). Thus, the abstract nature of trademark rights seems to preclude any general declaration of plaintiff's rights.

Sterling Consulting Corp. v. Indian Motorcycle Trademark, 44 U.S.P.Q.2d (BNA) 1959, 1997 U.S. Dist. LEXIS 21301, at *2 (D. Colo. 1997).[4]

Under bedrock Ninth Circuit law, the contours of the Tribe's litigation set the limits on the Court's jurisdiction, which are limited to "adjudication of the merits of that particular controversy." *McClendon*, 885 F.2d at 630. By suing to preclude Mr. Caballero from using its mark, the Tribe did not consent to, nor could it possibly be deemed to have "unequivocally expressed" its consent to, suits by third parties relating to the mark's use. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Because any waiver is "limited to the issues necessary to decide the action brought by the tribe" and to the party the tribe elects to sue (*McClendon*, 885 F.2d at 631 & n.4), this Court necessarily lacks jurisdiction as to all members of Mr. Caballero's purported class. Accordingly, their claims must be dismissed, and any class allegations stricken, from the Counter-Complaint.

* * *

Given Mr. Caballero's concessions and well established principles of federal Indian law, sovereign immunity bars each claim of Mr. Caballero and the purported class, leaving nothing to remain of the Counter-Complaint. First, all claims for money damages must be dismissed as Mr. Caballero concedes he cannot show any waiver except as to equitable claims. Next, Mr. Caballero's claims for equitable relief are barred — whether or not similar to the Tribe's requested relief — because any waiver as to equitable relief must be strictly "limited to the issues necessary to decide the action brought by the tribe." *McClendon*, 885 F.2d at 630. Finally, by filing a lawsuit against Mr.

[4] *Compare* 15 U.S.C. § 1125(d)(2)(A), permitting a plaintiff to proceed *in rem* against an internet domain name only where personal jurisdiction in unavailable. *Porsche Cars N. Am., Inc. v. Porsche.net*, 302 F.3d 248, 255 (4th Cir. 2002).

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Caballero, the Tribe did not, as a matter of law, consent to suit by other parties, requiring dismissal of all claims of the purported class. *Id.* at 631 & n.4.

C. Mr. Caballero's Argument Reveals This Action To Be A Tribal Membership Dispute, But Even If It Were Not, Mr. Caballero Lacks Standing To Challenge The United States' Recognition Of The Tribe.

Fairly read, Mr. Caballero's cross complaint alleges that he (and his purported class) were wrongfully denied membership in the Shingle Springs Band, since, he alleged (1) the "Casino Indians" purportedly excluded his ancestors from a plan the United States prepared to distribute to the users of the Verona Tract for the Shingle Springs Rancheria in the 1960s (a plan that was never implemented, because Verona was never terminated); and (2) the Shingle Springs Band's membership rolls were developed from that allegedly wrongfully-narrowed distribution plan, resulting in injury to Mr. Caballero and his purported class. (Cmplt, ¶¶ 34, 39, 42, 44, 50-51, 71; *id.*, 27:24-28:6.) Mr. Caballero now disavows any claim to membership in the Tribe (Opp., 19:21-26), perhaps in recognition that this Court lacks subject matter jurisdiction over such claims.

However, Mr. Caballero's claim of mistaken identity — to wit, that the "Indigenous Miwoks," and not the "Casino Indians," are the rightful members of the federally-recognized "Shingle Springs Band of Miwok Indians" — constitutes a variation of the same theme, suffering from the same jurisdictional defects. (Cmplt, ¶¶ 44, 50-51; Opp., 8:22-9:4, 11:18-21, 13:1-5.) Unmistakably, Mr. Caballero's complaint contends the "Shingle Springs Band of Miwok Indians" should include him and his purported class members, and not the "Casino Indians," requiring the Casino Indians' payment to Mr. Caballero and his class of all benefits that have should have inured to them as the real members of the tribal entity operating a gaming facility at Shingle Springs Rancheria. (Cmplt, ¶ 71; *id.*, 27:24-28:6.) In effect, he is contending the Tribal government of the Shingle Springs Band of Miwok Indians has been wrongfully usurped by persons who do not rightfully belong in its ranks (apparently through a mere name change). (Opp., 2:4-3:16; 8:8-9:7; 12:25-27; 16:8-13.) This theory suffers from the same flaw as any other membership dispute, since courts simply lack the power to adjudicate who does —

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and does not — belong within a particular tribal entity, whatever the name of such entity. (*See* Tribe's Mem., 28:1-31:14.) That determination is the essence of Mr. Caballero's claim and simply beyond this Court's jurisdictional reach.[5] (Cmplt, ¶ 71; Tribe's Mem., 29:3-31:7; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *Lewis v. Norton*, 424 F. 3d 959, 960 (9th Cir. 2005).)

Moreover, and even assuming Mr. Caballero is not seeking membership in the "Shingle Springs Band of Miwok Indians," but rather, is simply challenging the recognition of the "Casino Indians" by the United States, his claim is still not redressable and he lacks standing to pursue it. Specifically, Mr. Caballero has sued the Tribe, a tribal entity the United States government recognizes as the "Shingle Springs Band of Miwok Indians," seeking a declaration that the federal government has mistakenly recognized the Tribe. (Cmplt, ¶¶ ¶ 71; *id.*, p. 26:22-24.) It is not for the Tribe, or this Court, to dictate what entities the federal government recognizes as sovereign entities (just as Taiwan, Palestine, or Canada do not control whether the United States recognizes their governments' sovereignty). That is the role of the Executive Branch (and, in the context of Indian affairs, Congress as well). Mr. Caballero's claims regarding the Tribe's federally recognized status are not redressable in this proceeding, and he lacks standing to proceed.

Standing is a jurisdictional prerequisite for a court to resolve a dispute. *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 230-34 (1990). "In order to establish standing to pursue a claim under Article III, a plaintiff must allege personal injury that is fairly traceable to defendant's allegedly unlawful conduct and that the requested relief is likely to redress." *Coakley v. Sunn*, 895 F.2d 604, 606 (1990). "[A] mere demand for declaratory relief does not by itself establish a case or controversy necessary to confer subject matter jurisdiction." *S. Jackson & Son v. Coffee, Sugar & Cocoa Exch.*, 24 F.3d 427, 431 (2d Cir. 1994) (citing *Skelly Oil Co. v. Phillips*

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[5] Mr. Caballero seems to concede that some of the "Casino Indians" are properly entitled to be members of the "tribal entity" for whom Shingle Springs Rancheria is held in trust, since he concedes the Verona Tract's distribution plan from which the Tribe's membership was later devised originally included some "Casino Indians," in addition to the "Indigenous Miwoks" who were allegedly wrongfully excluded. (Opp., 8:22-9:4.)

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Petroleum Co., 339 U.S. 667, 671-72 (1950)). A claim that seeks "a mere declaration of law without implications for practical enforcement upon the parties" must be dismissed. *Id.*

Redressability cannot rest on the assumption that a nonparty to the action will act consistently with a decision in plaintiff's favor, and that such action would ultimately redress plaintiff's injury. *Coakley*, 895 F.2d at 606-07. In *Coakley*, plaintiffs sought a declaration that Hawaii's rules regarding eligibility for aid to families with dependent children discriminated against them. *Id.* at 605-606. Plaintiffs' aid had become unavailable, but not for reasons specified in the rule they challenged. *Id.* at 606. The Ninth Circuit held that plaintiffs' alleged injury was not redressable through a challenge to the allegedly discriminatory rule:

> But even were we to issue an order declaring the Hawaii regulation invalid under federal law, it would not redress the injury from which appellants allegedly are suffering. . . . Striking down the Hawaii rule would merely result in the denial of the exception's application to those who currently receive it… The position of appellants would be unchanged, however, for this case certainly is not an appropriate one for us to compel the state to extend a benefit to an excluded class.

Id. at 607. In other words, the court would not strike down a rule benefiting certain aid recipients (but not plaintiffs) because doing so would not redress plaintiffs' injury, *i.e.*, non-receipt of funds. *Id.* Even if the rule were declared illegal, the state would be free to simply deny aid to persons in the same circumstance as the plaintiffs. *Id.* Thus, where the court lacked the authority to mandate a rule change in favor of plaintiffs, plaintiffs' injuries were not redressable so they lacked standing to challenge the rule. *Id.* at 607-08.

Here, somehow finding in favor of Mr. Caballero that the United States improperly recognized the Tribe as a "tribal entity" would not address any injury of Mr. Caballero and his purported class. Such a finding in this litigation could in no way force the United States or the Secretary of the Interior, neither of which is even a party to this suit, to cease to recognize the Tribe, or alternatively, to recognize Mr. Caballero's group as a sovereign Indian tribe. Rather, per the Secretary's regulations, Mr. Caballero and his purported class would be required to apply for recognition in the same manner as any other Indian group not recognized at the time of the

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regulations' enactment.[6] *See generally* 25 C.F.R. §§ 83.4, 83.6; *see also* 25 C.F.R. § 83.3(a) ("This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department."). Because Mr. Caballero and his class have not suffered any injury that can be redressed through a declaration as to the Tribe's federally-recognized status, they lack standing to bring that challenge, which must be dismissed.

D. Separation Of Powers Principles Prohibit This Court From Second-Guessing The Executive Branch's Recognition Of The Tribe.

The Executive Branch's decision as to whether it should recognize a particular Indian tribe "lies at the heart of the doctrine of 'political questions'" not amenable to judicial resolution. *Miami Nation of Indians of Ind., Inc. v. United States DOI*, 255 F.3d 342, 347 (7th Cir. 2001). So long as an executive agency does not adopt and improperly apply its own explicit regulatory standards, federal courts lack any authority to intervene. *Id.* at 348. On the other hand, where the executive agency has adopted regulations, the Administrative Procedures Act ("APA") permits a claim against the agency to require the agency to comply with its own regulations. *Id.*

Of course, there is no APA claim here, and Mr. Caballero concedes as much. (Opp., 20:8-10.) But even if there were, the statute of limitations for any such claim ran decades ago (*see infra* III.E.1). Moreover, had Mr. Caballero timely sought relief from a proper party, there are no regulations applicable to the decision by the Secretary of the Interior that the Tribe is a federally-recognized Indian tribe.

On August 24, 1978, the Secretary of the Interior first issued its Final Rule governing the procedures for establishing that an American Indian group constituted a federally recognized tribe, which were codified at 25 C.F.R. part 54 (and later redesignated as 25 C.F.R. part 83). 43 Fed. Reg. 39361 (August 24, 1978); 47 Fed. Reg. 13326 (March 30, 1982). Section 54.3 defined the scope of the procedures to exclude "Indian tribes . . . which are already

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[6] In fact, the Tribe's recognized status has no bearing on whether Mr. Caballero's group (or any other) deserves federal recognition. If his group meets the prerequisites for federal recognition (Cmplt, ¶ 68), they can presumably secure recognition from the Executive Branch.

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acknowledged as such and are receiving services from the Bureau of Indian Affairs." 43 Fed. Reg. at 39362. The regulations required the Secretary to publish, within 90 days, "a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs." *Id.* In other words, any tribes on that list — including the Tribe (*see* 44 Fed. Reg. 7235, 7236 (January 31, 1979)) — were already acknowledged by the Secretary to be federally recognized and receiving services from the Bureau of Indian Affairs, and thus, by definition, outside of the scope of the regulations. The regulations did not set forth any qualitative or procedural prerequisites for tribes to be placed on the initial list, and the Final Rule notes the discretionary nature of that decision. 43 Fed. Reg. at 39361 ("Heretofore, the limited number of such requests . . . permitted an acknowledgement of the group's status on a case-by-case basis at the discretion of the Secretary.") The regulations were amended to their current version in 1994, and still explicitly exclude from their scope "Indian tribes . . . which are already acknowledged as such and are receiving services from the Bureau of Indian affairs." 25 C.F.R. § 83.3(b). Because neither the 1978 or 1994 versions of the regulations — or any other regulations — apply to the Secretary's decision to recognize the Tribe, the Secretary's decision constitutes a nonjusticiable political question not subject to challenge under the APA, or otherwise. *Miami Nation*, 255 F.3d at 347-48.

None of Mr. Caballero's cited authorities are to the contrary. *Miami Nation* involved a claim of an unrecognized tribe alleging that the Secretary had erred by denying the tribe federal recognition in violation of its own regulations. 255 F.3d at 349. There was no dispute as to whether the 1978 regulations applied; they did because the tribe was not included on the 1979 list as a tribe already recognized when the regulations were enacted, and the tribe did not petition for recognition until 1980. *Id.* at 345; *see* 44 Fed. Reg. 7235 (January 31, 1979) (not listing "Miami Nation of Indians of Indiana").

Similarly, *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), involved Native Hawaiians (called "Hou") who had never been recognized. *Id.* at 626. Nevertheless, the Hou claimed a special jurisdictional statute applied because they constituted an entity "duly recognized by the Secretary" under 28 U.S.C. section 1362. *Id.* The court found the Secretary

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had not recognized the tribe and that the Hou fell outside the scope of the Secretary's regulations, which only applied to "American Indian groups indigenous to the continental United States." *Id.* at 626-27; 25 C.F.R. § 83.3(a). And, "[i]n the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence." *Price*, 764 F.2d at 628. *Price* does not justify a court's second-guessing of the Secretary's action. Quite the opposite, the Ninth Circuit emphasized the importance of deferring to the Secretary's non-recognition of the Hou. *Id. See also James v. Dep't of Health & Human Services*, 824 F.2d 1132 (D.C. Cir. 1987) (where the tribe seeking relief had not been recognized under the Secretary's regulations, or been included on any of the Secretary's lists, the court refused to act before an agency decision, since Congress had dedicated matters of tribal recognition to the Executive Branch).

Miami Nation, *Price*, and *James* — all involving tribes not recognized when the regulations were promulgated and thus never included on any of the Secretary's lists — fail to support Mr. Caballero's argument that a court can second-guess a determination of the Secretary to include an entity on a list of federally-recognized tribes. Here, the Secretary did not disregard its own regulations, but rather drafted its regulations to specifically exclude from the regulations' scope any tribes it had already listed as acknowledged. *See* 43 Fed. Reg. at 39362; 25 C.F.R. § 83.3(b). Because the Secretary included the Tribe on the list and thereby brought it outside of the scope of its regulations (44 Fed. Reg. at 7236), its decision to do so implicates political questions unsuitable for judicial determination. *Miami Nation*, 255 F.3d at 347.

E. Even Assuming Jurisdiction Existed, Mr. Caballero's Counter-Suit Cannot Survive Federal Rule 12(b)(6).

As shown above, Mr. Caballero has no legally cognizable basis to challenge the federal government's recognition of the Tribe. However, even assuming this Court did possess jurisdiction, Mr. Caballero cannot state a claim upon which relief can be granted, requiring dismissal.

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1. Mr. Caballero Cannot Avoid The Time Bar On His Claims By Failing To Sue The United States.

Without citing any authority, Mr. Caballero asserts that his claim that the United States improperly recognized the Tribe is viable even though at least 30 years have passed since the claim arose. Moreover, the fact that Mr. Caballero has sued the wrong party by challenging recognition in a suit solely against the Tribe — which presents an independent reason for dismissal (*see supra* III.C) — this should not enable him to prevail on a claim challenging an action by the United States, where the statute of limitations ordinarily applicable to Administrative Procedures Act claims has long passed. *See Cloud Foundation, Inc. v. Kempthorne*, 546 F. Supp. 2d 1003, 1012 (D. Mont. 2008); 28 U.S.C. § 2401(a).

Mr. Caballero does not dispute that he and his purported class had notice of his claims in 1979, at the latest, when notice of the Tribe's recognition was published in the Federal Register. 44 Fed. Reg. 7235, 7236 (January 31, 1979). Nor does Mr. Caballero dispute the well-established rule that actual knowledge of the challenged action is irrelevant where it has been documented in the Federal Register. (Tribe's Mem., 32:23-33:10.) Yet somehow, Mr. Caballero asserts, again without authority, that unspecified acts of "concealment" toll the statute of limitations here.

Not surprisingly, constructive notice precludes tolling of a statute of limitations, even where the other party has fraudulently concealed its allegedly wrongful conduct. *Lord v. Babbitt*, 991 F. Supp. 1150, 1163 (D. Alaska 1997) (statute of limitations could not be tolled by fraudulent concealment where the allegedly concealed facts "were contained within public records to which [plaintiff] had access"); *see also Grimmett v. Brown*, 75 F.3d 506, 514-15 (9th Cir. 1996) (no fraudulent concealment where claimant "had available all the facts necessary to discover her cause of action with due diligence" because "[t]he limitations period does not toll simply because a party is ignorant of her cause of action").

It is beyond dispute that claims by Mr. Caballero's against the United States alleging that it improperly recognized the Tribe decades ago would be untimely and barred by the statute of

limitations. These claims cannot be resurrected by simply failing to name any federal entity and instead suing the Tribe.

2. Mr. Caballero Concedes The Tribe's Efforts To Petition The Government Were Objectively Reasonable And Aimed At Obtaining Federal Recognition.

The *Noerr-Pennington* doctrine protects the Tribe's First Amendment right to petition government agencies and prohibits predicating liability for tortious interference on such protected activities. *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 56-57 (1993); *Hi-Top Steel Corp. v. Lehrer*, 24 Cal. App. 4th 570, 577-78 (1994). Because Mr. Caballero's fourth, fifth, and sixth claims for relief purport to predicate liability on activities protected by the *Noerr-Pennington* doctrine, and the Counter-Complaint does not meet the enhanced pleading requirements for such a claim, these claims should be dismissed. *Oregon Natural Resources Counsel v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). Moreover, because an attempt to amend these claims would be futile, leave to amend should be denied. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) ("A district court does not err in denying leave to amend where the amendment would be futile . . . or where the amended complaint would be subject to dismissal.").

Absent from Mr. Caballero's fourth, fifth, and sixth claims — and from his opposition brief — are any allegations of "specific activities" whatsoever, let alone "'specific activities' which bring the defendant's conduct into one of the exceptions to *Noerr-Pennington* protection." *Oregon Natural Resources Counsel*, 944 F.2d at 533 (9th Cir. 1991). In any event, Mr. Caballero could not possibly amend his Counter-Complaint to avoid *Noerr-Pennington* protection, as the Tribe's petitioning activity is protected as a matter of law. Mr. Caballero cites *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), for the proposition that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513. He suggests that this means that allegations the Tribe has engaged in "misrepresentation" or "falsely portrayed" itself render its activities unprotected. (Opp., 21:13-14, 21:18-23.) Not so.

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In *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49 (1993), the Supreme Court elaborated on its holding in *California Motor Transport Co.*, identifying two requirements that must be met before an attempt to petition the government can constitute a "sham" unworthy of protection. 508 U.S. at 60-61. First, the attempt to petition must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60. The Court specifically held that, as a matter of law, a successful attempt to petition the government could not be objectively baseless and so could never be a sham falling within the exception to *Noerr-Pennington* protection. *Id.* at 61 n.5 ("A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham."). Second, "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation" to determine whether the defendant engaged in " 'an attempt to interfere directly with the business relationships of a competitor,' . . . through the 'use [of] the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon.' " *Id.* at 60-61 (citations omitted).

Mr. Caballero's Counter-Complaint establishes that neither of the two required elements of a sham petition apply. Mr. Caballero admits the Tribe's efforts to petition the government succeeded, acknowledging the Tribe "managed to induced [sic] the Bureau of Indian Affairs ("BIA") to take them to be the historically referenced Shingle Springs Band of Miwoks." (Cmplt, ¶ 20.) In fact, the injuries Mr. Caballero claims to have suffered in the fourth, fifth, and sixth causes of action are predicated directly on the Tribe's successful efforts to obtain federal recognition (which Mr. Caballero alleges somehow precluded recognition of his own tribal entity). (Cmplt, ¶¶ 83, 92, 100 (The Tribe "fraudulently assumed and took control of the federal recognition of the 'Shingle Springs Band of Miwok Indians.' ")). This admitted success of the Tribe's recognition efforts confirms the objective reasonableness of their actions as a matter of law, justifying First Amendment protection. *Prof'l Real Estate Investors,* 508 U.S. at 61-62 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."). Notwithstanding any "misrepresentations" or evil motives Mr. Caballero might conceivably attempt to allege, the Tribe's efforts to obtain federal recognition

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were successful, and therefore, by definition, not a sham. *Id.* at 61 n.5; *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980) (*Noerr-Pennington* protected "false derogatory rumors" where the misrepresentations were part of a successful effort to lobby a government agency); *Blank v. Kirwan*, 39 Cal. 3d 311, 325 (1985) (defendants' success in convincing city to legalize poker clubs and implement certain zoning restrictions demonstrated that their actions were not a sham and were protected under *Noerr-Pennington*).

Second, Mr. Caballero's complaint makes clear that he was injured in the Tribe's recognition proceedings, if at all, by the Tribe's efforts to avail itself of the "outcome of that process." *Id.* at 60-61 (citations omitted); *Hi-Top Steel Corp. v. Lehrer*, 24 Cal. App. 4th 570, 577 (the sham exception "involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all" not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*' " (emphasis in original)). Here, there is no suggestion that the Tribe did not "genuinely seek to achieve" the recognition it secured, and Mr. Caballero himself contends the Tribe has availed itself of the benefits of federal recognition. (Cmplt, ¶ 71; *id*., 27:24-27; Opp., 4:5-7.) Thus, in addition to being objectively reasonable, the Tribe's efforts were not a sham, as a matter of law, because the Tribe's undisputed goal was to convince the government to grant it federally-recognized status.

Finally, Mr. Caballero does not dispute that, as a matter of California law, tortious interference claims cannot rest on disruptions of relationships with a governmental entity. *Blank*, 39 Cal. 3d at 330; *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1136-1137 (1990); *Sessions Tank Liners v. Joor Mfg.*, 17 F.3d 295, 302 (9th Cir. 1994), *cert. denied.*, 513 U.S. 813 (1994) ("We conclude, therefore, that the California courts would not permit recovery in this case for tortious interference with prospective economic advantage, where the damages all flow from governmental decisions of disinterested public officials."). The tort does not lie where the "economic relationship" allegedly interrupted relates to government relationships or anticipated government benefits. *Blank*, 39 Cal. 3d at 330 (as a matter of law, defendants' acts preventing the city from granting plaintiff a license to operate a poker room did not support a claim for tortious interference with a prospective economic advantage); *Pac. Gas*

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& Elec. Co., 50 Cal. 3d at 1136-37; *see also Sessions Tank Liners*, 17 F.3d at 302 (citing *Pac. Gas. & Elec. Co.*, 50 Cal. 3d at 1136-37 (citing *Blank*, 39 Cal. 3d at 330)). Because California law does not support an intentional interference claim based on an economic relationship with the government, Mr. Caballero's fifth and sixth claims must be dismissed on this additional ground as well.

Mr. Caballero's fifth and sixth claims for relief should be dismissed with prejudice because any attempt to amend them would be subject to dismissal. In addition, Mr. Caballero's fourth claim should be dismissed, or in the alternative, any allegations based on the Tribe's petitioning of government entities should be struck, as *Noerr-Pennington* precludes liability as a matter of law.

3. No Court Can Enjoin A Federally-Recognized Tribal Entity From Using Its Federally-Recognized Name.

In a throw-away argument consisting of three sentences, Mr. Caballero argues this Court can prevent the "Casino Indians" from using the name the United States government calls them — the "Shingle Springs Band of Miwok Indians" — because they "do not own a federally registered trademark" and because they "cannot be a federally recognized tribe…" (Opp., 22:5-9.) Of course, the Tribe has the inherent right to use its own name apart from any trademark rights.[7] More fundamentally, no court can preclude a federally-recognized Indian tribe from using the name the United States attaches to it, as such would necessarily interfere with that government-to-government relationship. Because Mr. Caballero has no legal ability to

[7] Trademark law, too, jealously protects of names of recognized entities, and it is especially hostile to those who would garner goodwill by creating deception as to their identity or origins. *See* 15 U.S.C. § 1052(a) (prohibiting registration of marks that "falsely suggest a connection with persons, living or dead, institutions, beliefs or national symbols"). Not surprisingly, the United States Patent and Trademark Office refuses to bestow trademark rights upon individuals whose marks suggest a connection to a federally-recognized tribe. *In re Julie White (White I)*, 73 U.S.P.Q.2d (BNA) 1713 (Trademark Tr. & App. Bd. 2004) ("[W]e have no doubt that the record supports refusal of registration of APACHE as a mark for cigarettes because use of the name of the federally recognized Apache tribes would falsely suggest a connection between applicant and those persons or institutions."); *In re White (White II)*, 80 U.S.P.Q.2d (BNA) 1654 (Trademark Tr. & App. Bd. 2006) (refusing to register "MOHAWK as a mark for cigarettes because use of the name of the federally recognized St. Regis Band of Mohawk Indians of New York would falsely suggest a connection between applicant and the Mohawk tribe").

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challenge the Tribe's federal recognition, he cannot secure the requested relief as a matter of law.

F. As Mr. Caballero Concedes, Any Claims Relating To Interests In Indian Land Must Be Dismissed For Failure To Join The United States.

Mr. Caballero does not dispute that his claims are subject to dismissal for failure to join an indispensable party to the extent they relate to property rights in Indian land. Accordingly, any allegations asserting relief within the scope of the Quiet Title Act must be dismissed or struck from the Mr. Caballero's Counter-Complaint.

Mr. Caballero also does not take issue with the broad scope of the Quiet Title Act as described in the Tribe's opening brief, which is not limited to quiet title actions but rather encompasses all actions touching upon property rights in Indian land. (Tribe's Mem., 41:22-42:14.) Nor does Mr. Caballero disagree that certain provisions in the Counter-Complaint relate to property rights in Indian land. (*Id.*, 43:18-44:1.) Numerous claims in Mr. Caballero's Counter-Complaint, in fact, relate to an interest in Indian trust lands, including the following:

- the "Class Description" whereby Mr. Caballero purports to "represent a class consisting of all those members of the indigenous tribe of the true Shingle Springs Band of Miwoks whose members *have been denied beneficiary interest in the 240 acres of land in Shingle Springs*, California, owned in fee by the United States purchased for the use and occupancy of the El dorado [sic] Indians and the Sacramento-Verona Band of Homeless Indians" (Cmplt, ¶ 8 (emphasis added));
- allegations that the Tribe is "not eligible for a Gaming Compact" because United States "does not hold [the land] in trust for the [Tribe]" and that it "is not 'Indian Land.' of a type which would render its occupant eligible for said gaming compact" (Cmplt, ¶ 32);
- the claim for declaratory relief alleging that the Tribe is "not benefitted [sic] by . . . sole occupancy of the Casino Land" (Cmplt, ¶ 71); and
- the claim that the Tribe be enjoined "[f]rom operating a gaming casino on any class or type" on its trust land (Cmplt, p. 26:25).

Because Mr. Caballero has conceded that any allegations falling within the scope of the Quiet Title Act are not viable without joining the United States, which enjoys immunity and cannot be joined, any claims relating to an interest in the Tribe's land are subject to dismissal with prejudice.

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IV. CONCLUSION

Like his Counter-Complaint, Mr. Caballero's opposition to the Tribe's motion to dismiss constitutes a sad recount of the tragic consequences of the United States' policy of termination towards California Indian tribes. Mr. Caballero blames the tribal entity the federal government recognizes as the Shingle Springs Band of Miwok Indians for this predicament. In truth, the fact that Mr. Caballero's forebears lost their own federally-recognized status through termination has no bearing on the Shingle Springs Band's status vis-à-vis the United States. To the extent Mr. Caballero has any grievance, it is with the Executive Branch, not this Court, which cannot provide the requested redress. And because Mr. Caballero cannot possibly amend his Counter-Complaint to provide a basis for federal subject matter jurisdiction, it should be dismissed with prejudice.

Dated: May 13, 2009

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