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THE CITY OF RICHMOND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THE GUIDIVILLE RANCHERIA OF CALIFORNIA, a federally recognized Indian Tribe; and UPSTREAM POINT MOLATE LLC, a California limited liability corporation,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; SALLY JEWELL, the Secretary of the Department of the Interior; KEVIN WASHBURN, the Assistant Secretary - Indian Affairs; and THE CITY OF RICHMOND, a California municipality,

Defendants.

Caption continues next page

Case No. CV 12-1326-YGR

REPLY OF THE CITY OF RICHMOND IN SUPPORT OF ITS MOTION FOR ATTORNEYS' FEES AND COSTS

Date: April 21, 2015
Time: 2:00 p.m.
Place: Ronald V. Dellums Federal Building, 1301 Clay Street, Oakland, CA

The Honorable Yvonne González Rogers

THE CITY OF RICHMOND, a California municipality, Counterclaimant, v. UPSTREAM POINT MOLATE LLC, a California limited liability corporation, Counterclaim Defendant.	

TABLE OF CONTENTS

Page

SUMMARY OF REPLY TO UPSTREAM 1
ARGUMENT 1
A. The Fee Agreement Is Not Capped 1
B. The City Fully Complied with Its Meet and Confer Obligation 2
C. The City Was Not Required To Submit Billings Records in Its Opening Papers 3
D. The City's Fee Request Is Reasonable 5
1. Upstream Ignores the Law 5
2. Upstream Made Discovery Costly and Difficult 7
3. The City Performed Myriad Legal Tasks 8
E. The City's Cost Bill Is Reasonable 10
F. The City Has Voluntarily Reduced Its Fee Request 11
SUMMARY OF REPLY TO THE TRIBE 11
ARGUMENT 12
A. Sovereign Immunity Does Not Apply as the Tribe Has Consented to the Jurisdiction of This Court 12
1. The Doctrine of Sovereign Immunity Has No Place Here 12
2. The Tribe Has Consented to the Jurisdiction of the Court 13
B. The City Can Claim Attorneys' Fees from the Tribe Pursuant to the LDA 14
CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Alden v. Maine,
527 U.S. 706 (1999) 12

Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.,
886 F.2d 1545 (9th Cir. 1989) 3

In re White,
139 F.3d 1268 (9th Cir. 1998) 13, 14

Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.,
523 U.S. 751 (1998) 12

Martino v. Denevi,
182 Cal. App. 3d 553 (1986) 3

McClendon v. United States,
885 F.2d 627 (9th Cir. 1989) 13

Niederer v. Ferreira,
189 Cal. App. 3d 1485 (1987) 5

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,
498 U.S. 505 (1991) 12

PLCM Grp. v. Drexler,
22 Cal. 4th 1084 (2000) 5

Prison Legal News v. Schwarzenegger,
561 F. Supp. 2d 1095 (N.D. Cal. 2008) 6

Serrano v. Unruh
32 Cal. 3d 621 (1982) 1, 5

Sommers v. Erb,
2 Cal. App. 4th 1644 (1992) 3

United States v. Oregon
657 F.2d 1009 (9th Cir. 1981) 13, 14

United States v. U. S. Fid. & Guar. Co.,
309 U.S. 506 (1940) 12, 13, 14

STATUTES

Fed. R. Civ. P.
Rule 54(d)(1) 11
Rule 54(d)(2)(B)(i) 3

Civil L.R.
L.R 54-5(b)(1) 2
L.R. 54-5(b)(2) 4

The City of Richmond (City) submits this reply in support of its motion for attorneys' fees and costs. In response to the City's motion, Upstream and the Tribe filed separate oppositions. To simplify matters for the Court, the City submits a single reply in response to both oppositions. The contentions advanced by Upstream are addressed first and those by the Tribe second.

SUMMARY OF REPLY TO UPSTREAM

A party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by [the opposing party] in response." *Serrano v. Unruh*, 32 Cal. 3d 621, 638 (1982) (citations omitted). But that is precisely what Upstream is doing here. Upstream aggressively pursued this litigation and claimed damages in excess of ***$750 million***. The City retained lawyers from Morrison & Foerster with substantial experience and expertise in handling complex litigation. To date, the City has paid over $2 million in attorneys' fees and costs because of this litigation. Pursuant to the contract at issue, Upstream is now required to pay those fees and costs.

Significantly, Upstream concedes that the City is the prevailing party and is entitled to recover its attorneys' fees, and that Morrison & Forester's hourly rates are reasonable. However, Upstream disputes the amount of the fee; it claims that the City should either be awarded *nothing* or, in the alternative, no more than $500,000. Using a "throw it at the wall and hope it sticks" strategy, Upstream contends this motion should be denied or the City should be awarded no more than $500,000 because: (a) the City's fee agreement purportedly limited fees and costs to no more than $250,000; (b) the City did not meet and confer in good faith; (c) the City did not submit its complete time records; and (d) the City's fees and costs are excessive and unreasonable. Each contention lacks merit.

ARGUMENT

A. The Fee Agreement Is Not Capped.

Citing a fee agreement entered between the City and Morrison & Foerster in 2011—before this lawsuit was even filed—and an amendment to that agreement made just a few months after this lawsuit was filed, Upstream mistakenly contends that the City is "contractually obligated to pay" no more than $250,000, and that, therefore, its fee request is capped at that

figure. Opp'n at 2-4, Dkt. 270. The fee agreement cited by Upstream is dated and does not address the fee agreements reached by the City and Morrison & Foerster during the course of this litigation. Supplemental Declaration of Christopher J. Carr in Support of the City of Richmond's Motion for Attorneys' Fees and Costs (Supp. Carr Decl.) ¶ 2.

Because the City is a public entity, Morrison & Foerster entered into a special fee agreement with it. *Id.* Morrison & Foerster and the City agreed that the City would pay a blended hourly rate, rather than standard rates. *Id.* There is no cap. *Id.* That is confirmed by the fact that the City has *already paid* over $2 million in legal fees and costs. *Id.*

Moreover, even assuming that there were such a contractual cap (which there is not), Upstream cites no legal authority for the proposition that the terms of a fee agreement limit the amount of fees that are recoverable here. The City is not aware of any such authority and the LDA, which is the predicate for this motion, does not include any such provision.

B. The City Fully Complied with Its Meet and Confer Obligation.

Upstream misstates the facts in contending that the City's meet and confer efforts were inadequate. Opp'n at 4. Civil L.R. 54-5(b)(1) generally requires counsel to meet and confer for the "purpose of attempting to resolve any disputes with respect to the [fee] motion." The City did so.

In December 2014, counsel for the City sent opposing counsel an e-mail to initiate the meet and confer process. Supp. Carr Decl. Ex. A. As Upstream acknowledges, the parties had such a conference, but no agreement on fees and costs was reached. Opp'n at 4. Thereafter, the parties exchanged multiple e-mails on the topic of fees and whether Upstream and the Tribe would stipulate that the City was the prevailing party. Supp. Carr Decl. Ex. B. Again, no agreement was reached—which is confirmed by the proposed form of judgment jointly submitted by the parties to the Court. *Id.* ¶ 3; Dkt. 251. The City also offered to provide Plaintiffs copies of its time records if they first agreed that the City was the prevailing party and was entitled to a reasonable amount in attorneys' fees. Supp. Carr Decl. Ex. B. Upstream did not agree. *Id.* ¶ 3. The Tribe, as shown by its separate opposition, took the position that it enjoyed sovereign immunity and that no legal fees and costs could be collected against it. The City sent the Tribe's

counsel Ninth Circuit case law showing otherwise, but the Tribe still refused to stipulate. *Id*. Ex. C. Upstream ignores these facts.

In short, the City met and conferred in good faith with opposing counsel to resolve the issues presented by this motion, in order both to comply with the Civil Local Rules and to conserve the resources of the Court and the parties. Those efforts did not produce results, and this Court ultimately entered judgment. After judgment was entered, the City only had fourteen (14) days to prepare its motion for attorneys' fees and costs. Fed. R. Civ. P. 54(d)(2)(B)(i). It was clear to the City that the parties would not reach an agreement and that the next step was for it to file its motion for fees and costs within the time provided by law. Supp. Carr Decl. ¶ 4. Upstream's contention that the City failed to meet and confer is inaccurate.

C. The City Was Not Required To Submit Billing Records in Its Opening Papers.

Upstream spends the bulk of its opposition contending that the City's motion should be denied or the requested fee amount should be reduced because the City did not submit detailed time records in its opening papers. This contention lacks merit. The City explained in its opening papers, and Upstream does not dispute, that California law governs this fee motion. MPA at 6, Dkt. 255-1. The California Court of Appeal has made clear that submitting detailed time records is not necessary:

> In California, an attorney need not submit contemporaneous time records in order to recover attorney fees, although an attorney's failure to keep books of account and other records has been found to be a basis for disciplinary action. Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.

Martino v. Denevi, 182 Cal. App. 3d 553, 559 (1986) (internal citations omitted); *Sommers v. Erb*, 2 Cal. App. 4th 1644, 1650 (1992). Nor does the Ninth Circuit require a party to submit detailed time records in support of a fee motion. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) ("The lack of contemporaneous records does not justify

an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation.") (citations omitted). Submitting testimony by way of declaration and secondary documentation is sufficient. The City did both in its opening papers.

The conclusion that the City was not required to submit detailed time records along with its opening papers is further supported by Civil L.R. 54-5. That rule provides that a motion for attorneys' fees need only include:

> A statement of the services rendered by each person for whose services fees are claimed together with a summary of the time spent by each person, and a statement describing the manner in which time records were maintained. Depending on the circumstances, the Court may require production of an abstract of or the contemporary time records for inspection, including *in camera* inspection, as the Judge deems appropriate.

Civil L.R. 54-5(b)(2). The City provided a statement of the services rendered by each person for whose service fees are claimed. Carr Decl. ¶ 18, Feb. 17, 2015 Dkt. 260. The City provided a summary of the time spent by each timekeeper (*id*.) and a statement describing the manner in which the time records were maintained. *Id*. ¶ 15. The City also explained in its opening papers that its time records are not being provided along with its opening papers, in part, out of concern that the time entries may reveal attorney-client confidences. MPA at 3. The City further stated that "if the Court wishes to review those time entries, the City will provide those invoices to the Court for its *in camera* review, as provided by Civil L.R. 54-5(b)(2)." *Id*. at 3-4. Civil L.R. 54-5, on its face, confirms that a party is not required to submit time records in support of a fee motion, as any other interpretation of the law would render the "*in camera* inspection" language of that rule superfluous.

The documentation filed with the opening papers was sufficient to grant the City's motion. That is particularly true given this Court's familiarity with this high-stakes litigation, which has been before the Court for several years. That said, the City is filing its detailed time records as part of its reply papers, in order to belie Plaintiffs' suggestion that the City chose not to

submit time records because they would not support the requested fees. Supp. Carr Decl. Ex. D. The City's time records are detailed and proper—spanning over 250 pages—and confirm that the City incurred a substantial cost in defending this complex matter.[1]

D. The City's Fee Request Is Reasonable.

Upstream has only itself to blame for the fees incurred in defending this action. Again, under California law, a party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by [the opposing party] in response." *Serrano*, 32 Cal. 3d at 638. But as noted above, that is precisely what Upstream is doing here.

1. Upstream Ignores the Law.

Notably absent from Upstream's opposition is any effort to apply the factors used in calculating a lodestar figure. The reason is obvious: applying those factors to the facts of this case shows that the City's fee request is eminently reasonable. The Court may consider a variety of factors in assessing the reasonableness of the number of hours worked, including:

- The amount of money involved in the litigation;
- The nature of the litigation and its difficulty;
- The skill required and employed in handling the litigation;
- The attention given to the case;
- The attorney's success, learning, age and experience in the particular type of work demanded;
- The intricacy and importance of the litigation; and
- The labor and necessity for skilled legal training and ability in trying the case.

PLCM Grp. v. Drexler, 22 Cal. 4th 1084, 1096 (2000); *Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1507 (1987). Those factors confirm that the City expended a reasonable number of hours defending itself in this action.

Perhaps the best evidence of the complex nature of this case is an e-mail from Upstream's own counsel:

> This is ***an extremely sophisticated business litigation***, involving discovery into over 7 years of underlying conduct, conduct of literally hundreds of witnesses, formation and interpretation of

[1] The City has redacted certain time entries because of attorney-client confidence concerns. Supp. Carr Decl. ¶ 5.

> numerous contracts, multiple claims and counterclaims brought under state and federal law, etc. In fact, I understand the City has already produced in the order of tens of thousands of pages of documents, which is just the tip of the iceberg of the City's production.

Supp. Carr Decl. Ex. H (emphasis added).

We could not have said it better. And this case was "extremely sophisticated," in part, because many laws were implicated: federal Indian law, California contract law, California land use and planning laws, the California Environmental Quality Act, and more. Essentially, the case involved a massive universe of government documents spanning many years and presented highly technical questions about environmental regulations embedded in a "bet-the-city" breach of contract action, in which Upstream also alleged fraud. Indeed, had the City lost, it almost certainly would have had to file for bankruptcy.

Upstream and the Tribe are sophisticated entities and purposefully chose to employ an aggressive litigation strategy. Staying on top of this litigation required substantial work on the part of Morrison & Foerster, and the attention given was commensurate with the high-stakes nature of this case. Counsel with specialized backgrounds in environmental and land use law took the lead on legal issues, and that specialization was critical. This action presented a substantial threat to the City and its finances. A claim of damages approaching one billion dollars is serious, and the City responded responsibly by retaining experienced counsel. Taken together, these factors more than support the City's fee request.

As noted above, the City is submitting its time records. Those records further establish that the City's fee request, including the hours worked, is reasonable. Mr. Sandy Rosen—an expert on fee matters—has reviewed the City's time records and states in his declaration that the number of hours worked by Morrison & Foerster was "reasonable and appropriate." Reply Rosen Decl. ¶ 8. Mr. Rosen confirms that the method of billing employed by Morrison & Foerster, commonly referred to as "block billing," is common practice throughout law firms in the San Francisco Bay Area. Reply Rosen Decl. ¶ 11; *see, e.g., Prison Legal News v. Schwarzenegger*, 561 F. Supp. 2d 1095, 1101 (N.D. Cal. 2008) ("the Court will not reduce compensation for the

hours based on Defendants' claim that the time entries are block-billed"). Mr. Rosen further declares that the use of block billing in this case was appropriate because the time entries are "clear, explicit, detailed and informative." Reply Rosen Decl. ¶ 11. Indeed, Mr. Rosen describes Morrison & Foerster's time entries as "models of clarity" (*id*. ¶ 8) and further explains "Morrison & Foerster's practice of billing in increments of .25% of an hour also is consistent with many firms' practices in the San Francisco Bay Area, and in my opinion does not result in overbilling in this matter" (*id*. ¶ 12). In short, based on over 50 years of experience, it is the expert opinion of Mr. Rosen that the time spent on this case was reasonable and that the "Morrison & Foerster billing records are among the very best." *Id*. ¶¶ 8-10.

2. Upstream Made Discovery Costly and Difficult.

Upstream, in conclusory fashion, says that the City should not be able to recover the over $800,000 in legal fees it incurred—and paid—because of discovery in this action. Opp'n at 2. What Upstream does not mention is that the City paid substantial fees for discovery because Upstream employed an aggressive discovery strategy, which included pushing for an enormous number of documents, including electronic documents. Upstream does not dispute that it sent dozens of discovery requests to the City and that the City collected over 500 GB of electronic documents from over 30 custodians and also pulled nearly 6,000 hard-copy documents totaling over 50,000 pages. Carr Decl. ¶ 36. Upstream also does not dispute that the City uploaded over 600,000 documents into a review database, ran a long list of search terms, and ultimately produced over 40,000 pages of documents—bates-stamped in chronological order and ready for review. *Id*. This effort took time and was costly.

But Upstream's discovery onslaught was not limited to the number and scope of document requests, the volume of documents that had to be gathered and reviewed, and the number of depositions sought. That onslaught was intensified by the conduct of Upstream's counsel, which only added to the challenges (and fees and costs). Upstream's lead trial counsel saw fit to deliver ad hominem attacks through e-mails and orally. For example, counsel for Upstream, in the context of meeting and conferring over discovery, on more than one occasion, used profanity and/or vulgarity when addressing the City's counsel and expressions such as "you are shameless"

and "[t]ypical of MoFo lack of shame." Supp. Carr Decl. ¶¶ 7, 8, 10. Such behavior falls far short of meeting the standards of professional conduct.

These attacks were so extreme and concerning that the City's lead trial counsel felt compelled to preclude Upstream's lead trial counsel, Mr. Hanley, from entering Morrison & Foerster's offices. Mr. González wrote Mr. Hanley in an e-mail:

> To be clear, we will agree to meet with any lawyer for Upstream other than you. You have repeatedly demonstrated an inability or unwillingness to communicate in a civil tone. I suppose that telling me in writing that I am "shameless" was the last straw. I just don't feel that anyone in our profession should have to be in the same room with someone who communicates that way, and I would have no problem explaining my position to Judge Gonzalez-Rogers.
>
> We will be prepared to confer with you on Friday via telephone on the issues you have raised below, but do not agree that we have already conferred on those issues. If you again begin to act improperly, we will terminate the call and request that all further meet and confer be accompanied by […] either a magistrate or a discovery referee, at your expense.

Supp. Carr Decl. Ex. E.

Upstream did not limit its abusive behavior to Mr. González. As noted in the opening papers, Ms. Shaye Diveley managed and supervised the discovery in this case for the City. In response to a simple request that Upstream bates-stamp its documents so that there would be no dispute about what was produced, Upstream's lead counsel responded as follows:

> As to the documents produced from Upstream, Shaye can't even sit in that downtown high-rise overlooking our beautiful bay, look me in the eye, and tell me why the MoFo needs me to bates stamp anything for them. I mean literally Shaye, you couldn't look at me. You had nothing to say and you still don't. So stop it.

Supp. Carr Decl. Ex. F. Nothing was easy in this case. Upstream would not even agree to bates-stamp its documents without a fight.

3. The City Performed Myriad Legal Tasks.

Upstream says that it was unreasonable for the City to spend over $1 million dollars on legal research and brief writing. At the threshold, the tasks performed by counsel for the City

were not limited to legal research and briefing writing. Upstream points to the chart provided by the City in its opening papers in which "research legal issues and draft briefs" are listed under the general description of the work performed by some timekeepers. From that, Upstream leaps to the conclusion that counsel for the City did not do any other work. The City prepared the chart to provide the Court with a high-level description of the work performed by various timekeepers. Supp. Carr Decl. ¶ 11. It in no way cabins the actual work performed, and Upstream should know that. *Id*. Again, Upstream is ignoring facts and distorting the record.

For example, in its opening papers, the City explained that its counsel performed many tasks, including researching legal issues, drafting court documents and memoranda, attending meetings and hearings, developing strategy, meeting with clients, meeting and conferring with opposing counsel, and the myriad other tasks that come with modern complex litigation practice. Carr Decl. ¶ 39. The time records submitted by the City set forth, in detail, all of the tasks performed by Morrison & Foerster. Supp. Carr Decl. Ex. D.

Upstream also repeats the mantra that the City's fee request should be reduced because this action only involved a few motions and was dismissed on a motion for judgment on the pleadings. This is misleading. Upstream took a "kitchen sink" approach when it filed its 183-page complaint (including attachments), alleging interactions and communications between and among the parties spanning an eight-year period that it claimed supported eight causes of action against the City (in addition to six causes of actions against the federal government, under federal law). Then, once its complaint was on file, Upstream employed a "moving target" strategy, amending its complaint in response to two motions for judgment on the pleadings filed by the City. Preparing those two motions cost time and money, not least because many of Plaintiffs' theories of liability (and what alleged facts were supposed to support them) were unclear. The City's third motion for judgment on the pleadings—which the Court granted—was heavily briefed: each side submitted two supplemental briefs relating to the merits and additional briefs on the issue of judicial notice. Much ink was spilled on that motion alone, and a tremendous amount of research was involved. As the Court knows, the City was forced to oppose additional motions after its motion for judgment on the pleadings was granted, all of which were denied.

While the City was working hard to end this case by way of motion practice, Upstream was harassing the City with sweeping and costly discovery requests, which required the City, *inter alia*, to review thousands of documents for privilege. Upstream serially amended its complaint to avoid the City's motion for judgment on the pleadings three times so it could continue to drive up litigation costs and bring pain on the City (and its employees and officials) through discovery. Upstream is hardly in a position now to complain that the City's legal bills are too high.

E. The City's Cost Bill Is Reasonable.

The City incurred costs in the amount of $156,259.26 as a direct result of this litigation. Carr Decl. ¶ 26, Dkt. 260. The bulk of those costs were incurred in connection with paying an e-discovery vendor to manage the hundreds of thousands of documents that were swept up by Upstream's extremely broad discovery requests. *Id*. Ex. N. Having served such discovery requests, Upstream now contends that the City's cost bill should be reduced because it was not "necessary" for the City to use an e-discovery vendor. Opp'n at 14. This contention is without merit. If the City had not hired an e-discovery vendor and spent many more hours of attorney time reviewing documents, Upstream would then contend that the City's legal fees are excessive because it could have saved money by hiring an e-discovery vendor.

Upstream also says that it was not reasonable for the City to pay a monthly webhosting and licensing fee of approximately $2,500 per month during the August 2012 through January 2015 time period. Opp'n at 14. This contention also lacks merit. The City spent considerable time and money uploading documents onto a review database. Indeed, as Plaintiffs' counsel well knows, they and the City's lawyers collaborated on developing and refining search terms through iterative "runs" on the database. The City's motion for judgment on the pleadings was granted in December 2013. Then, in 2014, Upstream filed additional motions asking this Court to reconsider its order granting judgment on the pleadings and for leave to file a fourth amended complaint, among other motions. Judgment was just entered by this Court in February 2015. Why would it be unreasonable for the City to pay a fee so it can efficiently access hundreds of

thousands of documents that had to be collected to respond to Plaintiffs' discovery? Upstream does not answer that question.

F. The City Has Voluntarily Reduced Its Fee Request.

As noted in the opening papers, the City has voluntarily reduced the number of hours of attorney time it could otherwise seek. Between March 2012 and April 2012, the City incurred and paid at least $50,000 in legal fees. Carr Decl. ¶ 23. Those fees are not being sought here. *Id*. The City has also excluded from its fee request time for attorneys who billed 15 hours or less on the litigation. *Id*. Nor is the City seeking fees for the hundreds of hours spent by its in-house attorneys—the City Attorney and Assistant City Attorney. *Id*. In total, a conservative estimate of the value of the excluded attorney time, including the time of the City attorneys, is at least $100,000. Supp. Carr Decl. ¶ 12. This time was excluded to eliminate any potential doubt about the reasonableness of the City's fee request that could even theoretically be raised. *Id*.

SUMMARY OF REPLY TO THE TRIBE

The Tribe dragged the City into this litigation. The Tribe alleged, at paragraph 102 of the Third Amended Complaint, that the "Tribe, Upstream, and the City entered into a written contract memorialized in the LDA […] of which The Tribe was an intended third party beneficiary." The Tribe further alleged that the City breached the LDA and that it was entitled to more than $750 million in damages and reasonable attorneys' fees and costs, as provided by the LDA. TAC ¶ 105, Dkt. 91. The Tribe conveniently ignores these facts.

In opposing the City's motion, the Tribe contends that the fee and cost award requested by the City should be denied for the same reasons advanced by Upstream. As shown above, Upstream's contentions lack merit. In addition, the Tribe contends that it should not be ordered to pay the City's attorneys' *fees* because: (1) it enjoys sovereign immunity and (2) it is not a signatory to the LDA. These arguments fail because the Tribe has consented to the jurisdiction of this Court and has admitted that the terms of the LDA apply to it. Moreover, the Tribe does not say in its opposition that these two contentions have any bearing on the City's ability to recover costs. Nor could it. The City, as the prevailing party, is entitled to recover its costs in this case pursuant to the Federal Rules of Civil Procedure. Fed. R. Civ. P. 54(d)(1).

ARGUMENT

A. Sovereign Immunity Does Not Apply as the Tribe Has Consented to the Jurisdiction of This Court.

1. The Doctrine of Sovereign Immunity Has No Place Here.

The Tribe's opposition consists largely of citations to cases that stand for the proposition that lawsuits ***against*** Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *See, e.g.*, Tribe Opp'n at 2-3, Dkt. 271, citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509-10 (1991). Although the City agrees with that basic legal statement, the doctrine of sovereign immunity has no place here.

As explained by the Supreme Court, the doctrine of sovereign immunity protects the financial integrity of a sovereign by providing it immunity ***from*** private suits for money damages. *See Alden v. Maine*, 527 U.S. 706, 750 (1999). It only bars claims asserted ***against*** a sovereign. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe ***is subject to suit*** only where Congress has authorized the suit or the tribe has waived its immunity.") (emphasis added). The Tribe agrees. Tribe Opp'n at 2-3. The flaw in the Tribe's assertion of sovereign immunity here is that the predicate for the application of sovereign immunity is missing; the City's claim for legal fees is not based on a lawsuit ***against*** the Tribe. The City is entitled to legal fees because ***the Tribe sued the City***—and lost.

The Tribe cites a number of cases in its opposition, but none of them supports its position. Opp'n at 2-7. Indeed, the Tribe cites no case that says the Tribe can initiate a lawsuit, lose on its claim, and still enjoy sovereignty immunity in connection with the remedies or damages sought on the basis of that claim. The Tribe relies on *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509-10 (1991), and *United States v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940), but that reliance is misplaced. According to the Tribe, in both of those cases, even though an Indian tribe filed a lawsuit seeking affirmative relief, the Court held that the Indian tribe did not waive its sovereign immunity with respect to

"counterclaims" being asserted against it. But counterclaims are not at issue here. The legal fees were incurred in defending against claims made by the Tribe and Upstream.

2. The Tribe Has Consented to the Jurisdiction of the Court.

Even assuming sovereign immunity applies (which it does not), the Tribe consented to the jurisdiction of this Court by filing suit and thereby waived any claim that it enjoys sovereign immunity. Controlling Ninth Circuit case law dictates as much.

"Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). Further, by initiating a lawsuit, an Indian tribe also assumes the "risk of being bound by an adverse determination." *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998). For example, in *White*, the Ninth Circuit held that an Indian tribe waived sovereign immunity by voluntarily participating in a bankruptcy proceeding. *Id*. The rule that *initiating* suit establishes consent to adjudication of the merits of the particular controversy is not limited to bankruptcy cases. Indeed, in *United States v. Oregon*, the Ninth Circuit held that an Indian tribe waived immunity when it intervened in an action involving the apportionment of fishing rights. 657 F.2d 1009, 1014 (9th Cir. 1981). In reaching that conclusion, Ninth Circuit stated:

> Here, the Tribe intervened to establish and protect its treaty fishing rights; a basic assumption of that action was that there would be fish to protect. Had the original decree found the species to be in jeopardy, and enjoined all parties from future fishing in order to conserve the species, the Yakimas could not have then claimed immunity from such an action. *Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit.*

Id. (emphasis added). The Indian tribe in *Oregon* also invoked the *United States and Fidelity & Guaranty Co.* decision (which the Tribe cites in its opposition at page 5), not to assert that the court could not properly decide how fishing rights should be apportioned, but to resist the equitable relief to effect that apportionment. *Id*. at 1015. The Ninth Circuit rejected the tribe's argument, observing that the Supreme Court in *United States and Fidelity & Guaranty Co.* had not held that sovereign immunity barred a compulsory counterclaim as such, but rather a

compulsory counterclaim *in excess* of the original claim. *Id.* In this connection, the Ninth Circuit pointedly noted that in the *United States and Fidelity & Guaranty Co.* decision, "the immunity only barred tribal liability in excess of the principal claim; the USF&G defendants were allowed to recoup an amount equal to the Indians' primary claim." *Id.* at n.15.

Taken together, *White* and *Oregon* establish that when an Indian tribe brings suit it consents to: (1) a federal court's adjudication of the controversy that is the subject of its suit (that is, its own claim), and (2) the court awarding relief at least of the type and/or amount that the tribe itself requested in its complaint.

Here, as noted above, the Tribe asserted a claim against the City for breach of the LDA and claimed that it was entitled to substantial damages *and* attorneys' fees. By doing so, the Tribe necessarily consented to this Court's adjudication of that controversy, which includes, as alleged by the Tribe, the issue of entitlement to attorneys' fees under the contract. Further, the City's request for legal fees is fully embraced within the claims asserted by the Tribe. In fact, the Tribe concedes, as it must, that it is bound by this Court's determination that the City did not breach the LDA. Opp'n at 7. The Tribe also says that if "money damages had been awarded in favor of the Tribe or Upstream, [the Tribe] does not dispute that the City could argue that such award should be offset, in whole or in part, by monies owing from [the Tribe] to the City." *Id.* In other words, the Tribe is saying it agrees this Court could have awarded a money judgment in its favor. The Tribe nevertheless wants to maintain that a money judgment could not be awarded against it. In effect, the Tribe wants to play by two sets of rules—it seeks to transform tribal immunity into a rule that never allows it to lose a lawsuit. That is not the law.

B. The City Can Claim Attorneys' Fees from the Tribe Pursuant to the LDA.

The Tribe contends that, because it did not sign the LDA, the City cannot recover legal fees from the Tribe pursuant to the LDA. The defect in this contention is that the Tribe, as noted above, affirmatively alleged that the Tribe and the City entered into a "written contract memorialized in the LDA […] of which The Tribe was an intended third party beneficiary." TAC ¶ 102 . The Tribe further alleged that it was entitled to recover attorneys' fees from the City pursuant to section 8.8(a) of the LDA—the same provision under which the City seeks to recover

its legal fees. *Id*. at ¶ 105[2] The Tribe should not be permitted to run away from those allegations now.[3]

CONCLUSION

For all the foregoing reasons, the City respectfully requests it be awarded a reasonable fee amount of $2,228,373.75 and reasonable costs in the amount of $176,380.86.[4] The City further requests that Upstream and the Tribe, jointly and severally, be ordered to pay those fees and costs.

Dated: April 7, 2015

MORRISON & FOERSTER LLP

By: /s/ Arturo J. González
ARTURO J. GONZÁLEZ

Attorney for Defendant and Counterclaimant
THE CITY OF RICHMOND

[2] It is telling that the Tribe makes no mention of its own request for attorneys' fees. The fact that the Tribe prayed for fees pursuant to the LDA in the complaint was front-and-center in the parties' meet-and-confer correspondence concerning the City's request for fees. Supp. Carr Decl. Ex. C.

[3] If the Court were to find that the Tribe enjoys immunity from liability for fees and costs under the LDA, no reduction in the fees and costs sought, based on an apportionment between Upstream and the Tribe, would be appropriate as the Upstream and the Tribe jointly prosecuted the litigation; i.e., both were plaintiffs with respect to the state law causes of action against the City. Nor can any fees and costs incurred on the "federal" part of the case (*i.e*., the first six causes of action), appropriately be attributed to the Tribe alone, as the facts and issues in the "federal" and "state" parts of the case are inextricably bound up.

[4] The requested fee award includes fees already incurred ($2,225,993.75) and a conservative estimate of the time it will take to prepare for and attend the hearing on this motion ($2,380.00). Supp. Carr Decl. ¶¶ 11, 13. The requested costs consist of the amounts claimed in the City's Bill of Costs ($156,259.26) and the work performed by Mr. Sandy Rosen ($20,121.60). Carr Decl. ¶ 26 and Supp. Carr Decl. ¶ 13.