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Ione Band of Miwok Indians

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS
EQUAL RIGHTS ALLIANCE,

Plaintiffs,

vs.

S.M.R. JEWELL, in her official capacity as
Secretary of the UNITED STATES
DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and

IONE BAND OF MIWOK INDIANS,

Intervenor-Defendant.

Case No. 2:12-cv-01748-TLN-CMK

**INTERVENOR-DEFENDANT IONE
BAND OF MIWOK INDIANS' REPLY
IN SUPPORT OF ITS MOTION TO
STRIKE THE PRO HAC VICE
APPLICATION OF ATTORNEY MARK
J. KALLENBACH, SET ASIDE THE
COURT'S ORDER GRANTING SUCH
APPLICATION, AND CORRECT THE
RECORD, AND IN OPPOSITION TO
THE PAPERS FILED BY NON-
PARTIES NICOLAS VILLA, JR. AND
THE NON-FEDERALLY
RECOGNIZED HISTORIC IONE BAND
OF MIWOK INDIANS OPPOSING
SUCH MOTION**

Date: December 11, 2014

Time: 2 p.m.

Judge: Hon. Troy L. Nunley
(Courtroom No. 2)

I. INTRODUCTION

Intervenor-Defendant Ione Band of Miwok Indians, a federally recognized Indian tribe, files this reply in support of its motion and supporting documents thereto (ECF Docket 77, 77-1, 77-2,

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77-3, 77-4, collectively, the “Intervenor-Defendant’s Motion to Strike”), which seek to strike the *pro hac vice* application (including the ECF registration and consent to electronic service therein) of attorney Mark J. Kallenbach filed in this matter on October 21, 2014; to set aside the Court’s Order granting the application; and to correct the record as it relates to the application and Order, which record incorrectly describes the Intervenor-Defendant Ione Band of Miwok Indians as the client of Mr. Kallenbach and his designated local counsel Randy E. Thomas and incorrectly describes Nicolas Villa, Jr. and the “Historic Ione Band of Miwok Indians” as “Intervenors-Defendants.”

Intervenor-Defendant Ione Band of Miwok Indians also files this reply in opposition to the documents opposing its Motion to Strike (ECF Docket 79, 79-1, 80, 81, 81-1 through 81-8 inclusive, 82, 83, 83-1, collectively, the “Non-Parties’ Opposition Papers”). The Non-Parties’ Opposition Papers were filed by Nicolas Villa, Jr. and an entity calling itself the “Historic Ione Band of Miwok Indians” (collectively, the “Non-Parties”), neither of whom is a party to this action but both of whom falsely represent themselves in their Opposition Papers to be “Intervenors-Defendants.” The case record is clear – the Non-Parties have not filed any request to intervene in this case in any capacity, much less been granted permission to do so by the Court, and any such motion would be vigorously opposed by the Intervenor-Defendant. The Non-Parties’ self-ascribed title as “Intervenors-Defendants” does not amount to the granting of such status. The Opposition Papers also falsely represent that the entity that calls itself the “Historic Ione Band of Miwok Indians” is “a Federally Recognized Tribe.” Mr. Kallenbach, as legal counsel to the Non-Parties, perpetuates this misrepresentation when he identifies himself in the cover pages of the Opposition Papers as the attorney for the non-federally recognized “Historic Ione Band of Miwok Indians” in their self-ascribed status as “a Federally Recognized Tribe.” Notwithstanding these false statements and the self-serving and fictional storytelling of their purported history, the Non-Parties have failed to rebut the factual assertions and bases for relief requested in the Intervenor-Defendant’s Motion to Strike. That failure cannot be overcome by either the statements made in the declaration of Nicolas Villa, Jr. (ECF Docket 81), or the legally-invalid and irrelevant “declaration” ascribed to long-deceased Al Logan Slagle filed, if at all, for purposes of an entirely separate case (ECF Docket 82),

1 or the irrelevant library catalog that forms the basis of a declaration by Mr. Kallenbach (ECF
2 Docket 83, 83-1), the contents of which Mr. Kallenbach concedes he has not reviewed (ECF Docket
3 83, 3 at ¶9).

4 As a threshold matter, the Court should note that the Non-Parties' Opposition Papers once
5 again attempt to confuse the Court by using similar names to describe distinct individuals or
6 entities, as has been the past practice of Nicolas Villa, Jr. ECF Docket 77, 3:25-4:19. For example,
7 Mr. Kallenbach's amended *pro hac vice* application asserted him to be an attorney for "the
8 Historical Band of Ione Miwok Indians[.]" ECF Docket 76, 1. Nicolas Villa, Jr., has signed his
9 supporting opposition declaration, as both "Chief" and in an individual capacity, as part of the
10 slightly different "Historical Band of Miwok Indians." ECF Docket 81, 6:7-11. In the attorney
11 designation and incorrect case caption contained on the cover page of all of the Non-Parties'
12 Opposition Papers, Mr. Kallenbach's client is referenced by a third slightly different name, the
13 "Historic Ione Band of Miwok Indians." And Nicolas Villa, Jr.'s declaration states that the sole
14 purpose of this "Historic Ione Band of Miwok Indians" in bringing an as-yet-unfiled motion to
15 intervene is to seek this Court's recognition of a fourth-named entity, the "Historic Ione Tribe of
16 Miwok Indians." ECF Docket 81, 3 at ¶12. None of these purported entities or individuals
17 represented by Mark Kallenbach are parties to this litigation, unlike the Intervenor-Defendant Ione
18 Band of Miwok Indians, and the only tribe in this case recognized by the federal government and
19 deemed as such in the official listing of recognized tribes in the Federal Register (79 Fed. Reg. 4748
20 (Jan. 29, 2014)) is the Intervenor-Defendant, as further explained below.

21 **II. ARGUMENT**

22 The Court should strike and disregard the Non-Parties' Opposition Papers in their entirety
23 because the Non-Parties have no standing or party status before this Court in this matter. The
24 Intervenor-Defendant Ione Band of Miwok Indians' Motion to Strike seeks relief only as to the
25 amended *pro hac vice* application of Mr. Kallenbach (and the resulting Court Order and effects on
26 the case record). That application only pertains to Mr. Kallenbach's appearance in this particular
27 matter on a temporary basis. He has presented no other documents to the Court for its consideration
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in conjunction with that application. The application should not be confused with a motion to intervene by his clients the Non-Parties, and to the extent his clients seek to do so now in their Opposition Papers they should be disregarded. This proceeding is not yet directed at his clients since they have yet to make any effort to file a motion to intervene pursuant to Federal Rule of Civil Procedure 24 or any subsequent pleading that would follow. Mr. Kallenbach is the only person or entity within the jurisdiction of this Court for purposes of this case besides the named plaintiffs, defendants, and the Intervenor-Defendant. *See* E.D. Cal. Local Rule 180(b)(2)(iv) (“If the [*pro hac vice*] application is granted, the attorney is subject to the jurisdiction of the Court with respect to conduct to the same extent as a member of the Bar of this Court.”). Therefore, Mr. Kallenbach is the only person properly before the Court (besides the named plaintiffs and defendants) with any standing to oppose the Intervenor-Defendant’s Motion to Strike. His clients, the Non-Parties, have no such standing. Mr. Kallenbach’s amended *pro hac vice* application only sought to admit him as legal counsel to practice before this Court in this particular matter (ECF Docket 75), but it did not and could not seek to confer any status as to his clients, the Non-Parties. And neither the Court’s Order granting the application (ECF Docket 76) nor anything else in the case record conferred any such status on the Non-Parties.

The Non-Parties’ self-attribution as “Interveners-Defendants” in their Opposition Papers does not change the fact that they have not requested or been granted any status as parties in this case in any capacity, and the Court should strike any reference in the record to the Non-Parties as “Interveners-Defendants.” The Non-Parties are neither named plaintiffs nor defendants and have not sought, much less been granted, intervenor status by the Court, which is the proper method for them to attempt join this action. The Intervenor-Defendant must be given the opportunity to oppose any motion to intervene filed by the Non-Parties and would do so vigorously. The Non-Parties have no basis to be deemed parties to this matter, have no standing before this Court to file the Non-Parties’ Opposition Papers, and the Court should not consider the Opposition Papers or any other document filed by the Non-Parties until such time as they may be granted party status.

To the extent the Court may nevertheless consider the Non-Parties’ Opposition Papers and

1 has granted the Non-Parties request to extend the 20-page limitation with respect to their joint
 2 opposition memorandum (ECF 79, 79-1, 84), it should note that the sole bases presented by the
 3 Non-Parties for their requested page limit extension is that their joint memorandum purportedly
 4 “contains the response of two parties in response to two separate motions to strike.” ECF Docket
 5 79, 2:4-6. Neither of those allegations is correct.

6 As shown above, the Non-Parties are not and have not been granted party status in this case.
 7 There is but one person (besides the named plaintiffs, defendants, and Intervenor-Defendant) with
 8 any standing before this Court to file any papers in this case, including any in opposition to the
 9 Intervenor-Defendant’s Motion to Strike, namely, the Non-Parties’ attorney Mark Kallenbach. To
 10 the extent the Court may deem the Non-Parties’ Opposition Papers to have been filed on behalf of
 11 Mr. Kallenbach rather than the Non-Parties themselves (which the Intervenor-Defendant argues is
 12 not the case¹), the Court should consider them only as asserted by Mr. Kallenbach in his individual
 13 capacity as an attorney and only for purposes of seeking admission *pro hac vice* in this particular
 14 matter, not as representing a party because his clients the Non-Parties have no such status.

15 Furthermore, the assertion by the Non-Parties that the page limitation should be extended
 16 because they are responding to two separate motions to strike is incorrect. Only the Intervenor-
 17 Defendant Ione Band of Miwok Indians filed a Motion to Strike. The Federal Defendants in this
 18 case filed a separate Statement in Support of Intervenor-Tribe’s Motion to Strike (ECF Docket 78)
 19 and a Declaration of Kevin Bearquiver in Support of Intervenor-Tribe’s Motion to Strike (ECF
 20 Docket 78-1). The Federal Defendants’ filings do not separately request a court order, as required
 21 of motions pursuant to Federal Rule of Civil Procedure 7(b), to strike the *pro hac vice* application
 22 of Mr. Kallenbach or set aside the Court’s Order granting the application. Rather, the Federal
 23 Defendants’ filings assert, in support of the Intervenor-Defendant’s Motion to Strike, that the
 24 Intervenor-Defendant’s “Motion should be granted and the Order [granting the *pro hac vice*

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 26 ¹ The Non-Parties in effect concede that their Opposition Papers are filed on behalf of Nicolas Villa, Jr. and the
 27 “Historic Ione Band of Miwok Indians,” not Mr. Kallenbach, by labelling them as, e.g., “Interveners-Defendants
 28 Nicolas Villa, Jr. and the Historic Ione Band of Miwok Indians’ Request to Extend the 20-Page Limitation...” (ECF
 Docket 79) and “Interveners-Defendants Nicolas Villa, Jr. and the Historic Ione Band of Miwok Indians’ Joint
 Memorandum...” (ECF Docket 80). Mr. Kallenbach concedes this point as well with his “Declaration of Mark J.
 Kallenbach in Support of Nicolas Villa, Jr. and the Historic Ione Band of Miwok Indians’ Joint Memorandum...” (ECF
 Docket 83).

1 application] set aside.” ECF Docket 78, 1:11-16.

2 The Court should also strike and disregard in its entirety the document filed by the Non-
 3 Parties alleged to be a declaration of Al Logan Slagle (ECF Docket 82) for several reasons. The
 4 document does not even on its face purport to be filed in support of the Non-Parties, Mr.
 5 Kallenbach, or any of the Non-Parties’ Opposition Papers, and it therefore cannot be considered.
 6 See E.D. Cal. Local Rules 142(a) (“An affidavit ... submitted in support of any motion shall (1)
 7 identify the affiant, the party or parties on whose behalf it is submitted, and the motion to which it
 8 pertains...”) and 101 (defining “affidavit” for Local Rules purposes to include “a declaration
 9 prepared in accordance with federal law”). The document appears to consist of a cover page
 10 apparently prepared by the Non-Parties’ attorney Mr. Kallenbach, including the incorrect caption
 11 for this case used on all of the Opposition Papers falsely listing Nicolas Villa, Jr. and the “Historic
 12 Ione Band of Miwok Indians” as “Intervenors-Defendants,” and titled as the “Declaration of
 13 Professor Al Logan Slagle” but for an entirely different case. ECF Docket 82, cover page.
 14 Attached to that cover page is a document titled “Declaration of Al Logan Slagle” with a case
 15 caption for *Harold E. Burris, Sr. et al. v. Nicolas Villa, Sr. et al.*, Case No. CIV-S-97-0531 DFL
 16 JFM (E.D. Cal.), only dated as “1997” and with no execution by the purported declarant. ECF
 17 Docket 82, second cover page and 42. This purported declaration’s lack of a signature renders it
 18 invalid. See E.D. Local Rules 131(b) (“Affidavits and certifications shall be signed by the person
 19 executing the document.”) and 101 (defining “affidavit” to include “a declaration prepared in
 20 accordance with federal law”); 28 U.S.C. § 1746 (requiring a written unsworn declaration to be
 21 dated and signed as true under penalty of perjury). Furthermore, there is no indication that this
 22 attached purported declaration was ever filed in this Court in the past. Even if filed, the proper
 23 manner for the Non-Parties to seek this Court’s consideration of such a document is by way of a
 24 request for judicial notice. But the Non-Parties have not made such a request or followed the
 25 proper judicial notice procedure because they have not included a copy of the document to be
 26 noticed as alleged to have been previously filed with this Court (see E.D. Local Rule 230(b)), and
 27 Intervenor-Defendant has not been served with any judicial notice request or given an opportunity
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1 to oppose it, which it would do so vigorously. Finally, the Non-Parties' joint opposition
 2 memorandum indicates that the Al Logan Slagle referenced by the Non-Parties is in fact deceased
 3 as of the year 2002 (ECF Docket 80, 10:10-11) and therefore incapable of having submitted a
 4 declaration for use in this case, the operative First Amended Complaint for which was filed in 2012
 5 (ECF Docket 10). For all of the foregoing reasons, the Court should strike and disregard the
 6 document filed by the Non-Parties entitled "Declaration of Professor Al Logan Slagle" (ECF
 7 Docket 82) and not consider it in support of any of the Non-Parties' Opposition Papers.

8 Substantively, nothing in the Non-Parties' Opposition Papers refute the allegations and
 9 claims for relief asserted in the Intervenor-Defendant Ione Band of Miwok Indians' Motion to
 10 Strike. Mr. Kallenbach's declaration concedes that he does not represent Intervenor-Defendant
 11 Ione Band of Miwok Indians (ECF Docket 83, 2 at ¶4), and as a consequence neither does his local
 12 designated counsel Randy E. Thomas. Therefore the record in this case, including the ECF entries
 13 for Mr. Kallenbach's *pro hac vice* applications, the Court's Order granting the amended application,
 14 and the Non-Parties' request to extend the page limitation of their opposition memorandum (ECF
 15 Docket 74, 75, 76, 79) and the case electronic docket indicating that Kallenbach and Thomas
 16 represent the Intervenor-Defendant Ione Band of Miwok Indians, must be corrected, as urged in the
 17 Intervenor-Defendant's Motion to Strike. ECF Docket 77, 5:7-6:20.

18 As previously stated in the Intervenor-Defendant's Motion to Strike regarding Mr.
 19 Kallenbach's *pro hac vice* application and amended application (ECF Docket 74 and 75), and now
 20 as asserted on the cover page of every one of the Non-Parties' Opposition Papers and in their joint
 21 opposition memorandum (ECF 80, 2:2-6), Mr. Kallenbach and his clients mislead the Court when
 22 they state that he is an attorney for a federally recognized tribe. The Federal Register's notice of
 23 Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of
 24 Indian Affairs (79 Fed. Reg. 4748 (Jan. 29, 2014)) constitutes the current statutorily-mandated list
 25 of federally recognized tribes, and Mr. Kallenbach's client (whether referenced as the "Historical
 26 Band of Ione Miwok Indians" or the "Historic Ione Band of Miwok Indians") is not included on
 27 that list. Nothing in the Non-Parties' Opposition Papers refutes these facts.
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Furthermore, the Non-Parties, in their joint opposition memorandum, concede that the non-federally recognized “Historic Ione Band of Miwok Indians has only one purpose in bringing its [yet-to-be-filed] Motion to Intervene. [sic] That the Court recognize that the Historic Ione Tribe of Miwok Indians, and not the [Intervenor-Defendant], is the true, original, and genuine Tribe that the federal government recognizes.” ECF Docket 80, 9:23-26 (citing Nicolas Villa, Jr. Decl., ECF Docket 81, 3 at ¶12). But the Federal Defendants have already rebutted this proposition clearly and unmistakably in their filings (ECF Docket 78 and 78-1) in support of the Intervenor-Defendant’s Motion to Strike, by *inter alia* declaring that the Intervenor-Defendant is the “only federally recognized Ione tribe” (ECF Docket 78-1, 1 at ¶2) and that Chairwoman Yvonne Miller is the currently recognized leader of Intervenor-Defendant (ECF Docket 78-1, 1 at ¶3).

Just as the self-styled and non-recognized “Historic Ione Band of Miwok Indians” is inappropriately attempting to cause this Court to “recognize that the Historic Ione Tribe of Miwok Indians, and not the [Intervenor-Defendant], is the true, original, and genuine Tribe that the federal government recognizes,” (ECF Docket 80, 9:23-26), so too Nicolas Villa, Jr. is doing the same. He has signed his declaration in both a representative capacity -- as “Chief” of the “Historical Band of Miwok Indians” -- and in an individual capacity. ECF Docket 81, 6:5-11. To the extent he purports to act as an official or leader of the non-recognized “Historic Ione Band of Miwok Indians” in filing the Non-Parties’ Opposition Papers, his filings are objectionable on the grounds noted above. The Federal Defendants have declared that the Intervenor-Defendant is the “only federally recognized Ione tribe” (ECF Docket 78-1, 1 at ¶2) and that Chairwoman Yvonne Miller is the currently recognized leader of Intervenor-Defendant (ECF Docket 78-1, 1 at ¶3). To the extent Mr. Villa purports to act in an individual capacity or as the leader of some other group besides the non-recognized “Historic Ione Band of Miwok Indians,” based on the Opposition Papers, he would appear to have the same purpose in seeking intervention as the “Historic Ione Band of Miwok Indians” noted above, and again, that purpose cannot be achieved through intervention in this lawsuit.

As noted in the Intervenor-Defendant’s Motion to Strike, Nicolas Villa, Jr. has long been

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disgruntled by the tribe's leadership and has taken many actions throughout the years to try to undermine that leadership and instate himself as leader. ECF Docket 77-1, 3 at ¶9. Even now, the Non-Parties (i.e., Mr. Villa himself and an alleged group of unnamed individuals) maintain that Villa "has never been ousted from or voted out of his position as Chief and Tribal Chair." ECF Docket 80, 7:6-8. To the extent the Non-Parties claim that Mr. Villa is the "Chief and Tribal Chair" of the federally-recognized Intervenor-Defendant Ione Band of Miwok Indians, that claim is refuted by the declaration of current BIA-recognized Chairperson Yvonne Miller that no position of "Chief" exists (*see* Declaration of Chairperson Yvonne Miller filed in support hereof, 2 at ¶2) and by the December 20, 1995 resolutions of the Intervenor-Defendant's voting members recalling Nicolas Villa Jr. as their Chairman and replacing him with Loren Hill (*see* Declaration of Chairperson Yvonne Miller filed in support hereof, 2 at ¶¶4-5 and the attached Exhibits A and B thereto). Nicolas Villa, Jr. holds no office or position within the tribal government of Intervenor-Defendant Ione Band of Miwok Indians, and has no authority to speak for the Intervenor-Defendant or to take any action on its behalf or represent it in any way or capacity. *See* Declaration of Chairperson Yvonne Miller filed in support hereof, 2 at ¶2. DOI and BIA have long maintained that the Intervenor-Defendant Ione Band of Miwok Indians is the only federally recognized Indian tribe associated with land near the town of Ione in Amador County, California, and that Mr. Villa does not represent any federally recognized tribe, nor is he the leader of the federally-recognized Intervenor-Defendant. ECF Docket 77-2. The Non-Parties' Opposition Papers simply continue a long line of fruitless attempts by Mr. Villa to involve federal agencies and courts in what at best can only be characterized as an intra-tribal political dispute. *Id.* The BIA has consistently informed Villa that he must address his concerns to Intervenor-Defendant. *Id.*

Despite all of the positioning *ad finitum* by the Non-Parties' Opposition Papers and the lapse of nearly three months since the denial of Mr. Kallenbach's initial request to Holland & Knight LLP seeking consent to his clients' permissive intervention in this case (ECF Docket 77-3, 2 at ¶ 3), no intervention request has been filed with the Court on behalf of either of Mr. Kallenbach's clients. Intervenor-Defendant maintains that neither of his clients have any legitimate standing or right to

1 intervene or otherwise participate in this proceeding.

2 Based on the foregoing and the Motion to Strike previously filed with the Court, Intervenor-
3 Defendant Ione Band of Miwok Indians moves this Court to strike the *pro hac vice* application of
4 Mark J. Kallenbach, set aside its order dated October 21, 2014, granting such application, and
5 correct the record in this case by removing any reference to Mr. Kallenbach or Randy E. Thomas as
6 representing Intervenor-Defendant and not permitting their participation in these proceedings and
7 removing any reference in the record to the Non-Parties as "Interveners-Defendants."

8
9 Dated: December 3, 2014

HOLLAND & KNIGHT LLP

10 By: /s/ Jerome L. Levine

11 Jerome L. Levine
12 Timothy Q. Evans
13 Zehava Zevit

14 Attorneys for Intervenor-Defendant
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