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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELEM INDIAN COLONY OF POMO INDIANS OF THE SULPHUR BANK RANCHERIA, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Plaintiff,

v.

CEIBA LEGAL, LLP, et. al,

Defendants.

Case No. 3:16-cv-03081-WHA

CEIBA LEGAL, LLP'S:

(1) MOTION TO DISMISS AMENDED COMPLAINT [Fed. R. Civ. P. 12(b)(1), 12(b)(6)]; AND

(2) SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Date: October 6, 2016
Time: 8:00 a.m.
Place: Courtroom 8, 19th Floor
Before: Hon. William Alsup

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF, ITS ATTORNEYS, AND THE CLERK OF THE COURT:

PLEASE TAKE NOTICE that, at 8:00 a.m. on October 6, 2016, or as soon thereafter as the matter may be heard, in Courtroom 8, 19th Floor, of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue in San Francisco, California, defendant Ceiba Legal, LLP ("Ceiba Legal"), will, and hereby does, move under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss Plaintiff's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Ceiba Legal bases its motion upon this notice, the following memorandum of points and authorities, all pleadings, records, and documents on file in this case, including the motion to dismiss and supporting materials filed by the individual defendants, the contents of which are incorporated here by reference, and such additional arguments as may be made in support of the motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Ceiba Legal, LLP ("Ceiba Legal") is a Mill Valley law firm owned by two Native American attorneys who work exclusively in Indian Country. On November 8, 2014, a majority of adult tribal members of the federally recognized Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria ("Tribe") elected five individuals—David Brown (elected as Chairman), Adrian John, Natalie Sedano Garcia, and Kiuya Brown—to serve as the Tribe's governing body, the Executive Committee ("Brown Faction"). Another group—Agustin Garcia, Sarah Brown Garcia, Leora John, Stephanie Brown and Nathan Brown II (hereinafter "Garcia Faction" or "Plaintiff")[1]—claim that they were elected on the same day, albeit without claiming a majority of the Tribe's adult members elected them. Ceiba Legal represented the Brown Faction before the Bureau of Indian Affairs ("BIA"), and on appeal to the Interior Board of Indian Appeals ("IBIA"), in an effort to prove the Brown Faction is the duly elected Executive Committee of the Tribe.

In January and February 2015, in the midst of those administrative proceedings, Ceiba Legal communicated on behalf of the Brown Faction, as it needed to inform federal and state government agencies possessing important relationships with the Tribe, and with banks holding custody over the Tribe's sovereign treasury, that a dispute existed. (Amended Complaint, Ex. A.) The communications detailed the record of what occurred, and why the Brown Faction was duly elected. (*Id.*) The communications to the banks identified the dispute between the two factions and asked that they preserve the status quo by immediately freezing the distribution of any funds to any faction pending resolution of the dispute. (*Id.*)

Earlier this year, as the dispute proceeded through the federal administrative processes, which are still ongoing, the Garcia Faction took the drastic step of purporting to permanently banish and disenroll—without any due process whatsoever—forty-five tribal members who were

[1] Neither Ceiba Legal nor the Brown Faction concedes Plaintiff is the Tribe. When Ceiba Legal refers to *the Tribe*, it is not referring to the Garcia Faction or to Plaintiff. References to "Plaintiff" herein are to the Garcia Faction only.

members of, or sympathetic to, the Brown Faction government. This *ultra vires* action purported to disenroll and evict *every single one* of the families who live on the Tribe's reservation, an unprecedented act in United States history, which, if successful, will leave the reservation completely unoccupied because the Garcia Faction and their supporters live around the state of California. In response, Ceiba Legal filed a petition before this Court demonstrating the purported banishments and disenrollments violated the Indian Civil Rights Act (*see Adrian John Sr., et al. v. Stephanie Brown et al.*, Case No. 3:16-cv-02368-WHA (N.D. Cal. filed June 6, 2016) (the "Habeas Action")). Only then did the Garcia Faction file this retaliatory suit, suddenly claiming Defendants face civil liability for sending correspondence nearly a year and a half ago communicating the Brown Faction's position to third parties in the ongoing intratribal leadership dispute.

Unlike the Habeas Action, which invokes a procedure Congress has expressly authorized (25 U. S. C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)), the Garcia Faction's civil claims in this action are barred by the established prohibition against federal courts resolving issues of tribal law in disputes relating to tribal self governance. The Garcia Faction's claims also fail for lack of standing and based on tribal sovereign immunity if the Brown Faction establishes in pending administrative proceedings that the Brown Faction, and not the Garcia Faction, is the Tribe's duly elected government. This Court is jurisdictionally precluded from reaching that issue. Finally, as a matter of law, the Garcia Faction cannot state a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") or federal trademark law based on the Brown Faction's communications with government agencies and banks identifying the intratribal dispute and urging them to preserve the status quo.

Because established law forecloses the Garcia Faction from using this civil action to draw this Court into a tribal leadership dispute, in an effort to silence political opposition, this Court should dismiss the Amended Complaint with prejudice.

As detailed below, there are several independent grounds supporting dismissal. Specifically:

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- First, this entire matter concerns an intratribal dispute over which the Court lacks jurisdiction; the federal statutes the Plaintiff invokes do not alter that result;
- Second, because of the tribal law issues that must be resolved, this Court cannot even make the requisite findings bearing on whether Plaintiffs possess standing to represent the Tribe, and whether Defendant is entitled to sovereign immunity as legal counsel for a duly elected Tribal government;
- Third, given the entire factual predicate of this action, and as discussed more thoroughly in materials supporting individual defendants' concurrently filed motion to dismiss, civil liability may not attach here, where Plaintiffs seek to hold Ceiba Legal liable for representing clients in their constitutionally protected efforts to petition the United States for recognition, and to protect a sovereign tribal treasury;
- Finally, and not surprisingly, Plaintiffs have not, and cannot, state a claim for relief under the federal statutes they invoke, requiring dismissal.

II. FACTUAL AND PROCEDURAL BACKGROUND

The following facts and procedural history provide background for this motion:

November 8, 2014 – the Brown Faction and their supporters arrived at the lobby of the Best Western El Grande Inn for the Tribe's election at the time stated in the Tribe's election notice. (Declaration of Little Fawn Boland ("Boland Declaration") at ¶ 2.) They were told by private security guards hired by the then-existing Executive Committee made up of the Garcia Faction's members and their family that the people waiting in the lobby would be allowed to enter but only through the back door of the banquet hall. (*Id.*) Ultimately, guards would not open the banquet hall for them and then local police forced the Brown Faction and their supporters out of the hotel lobby and the hotel parking lot at the direction of the Garcia Faction's members. (*Id.*) The Brown Faction and their supporters continued the election in the nearest public place available to all adult tribal members, specifically, the park contiguous to the parking lot of the hotel. (*Id.*) The Garcia Faction proceeded with their election behind closed doors. (*Id.*) The

Brown Faction proceeded to hold a public election open to all adult tribal members in the park. (*Id.*)

November 12, 2014 – David Brown (elected Chairman) met with BIA Superintendent Troy Burdick to hand deliver an Election Report on the BIA form designed to report election results. (Boland Declaration at ¶ 3 and Ex. A thereto.) The Election Report showed that sixty (60) adult tribal members unanimously elected each of the Brown Faction members to serve on the Tribe's governing body, specifically, its Executive Committee. (*Id.*)

November 18, 2014 – the Brown Faction, believing itself to be the duly elected Executive Committee of the Tribe, called a meeting and voted on a resolution to enter into an attorney services agreement with Ceiba Legal, LLP, as legal counsel to the Tribe. (Boland Declaration at ¶ 4.)

November 19, 2014 – as reflected in the Administrative Record (submitted to Ceiba Legal in March of 2016) the Garcia Faction also submitted an Election Report to Superintendent Burdick. (Boland Declaration at ¶5 and Ex. B thereto.) The cover letter to the Election Report stated the election notice and other attached exhibits evidenced the vote, but they are not in the Administrative Record provided to the IBIA by Superintendent Burdick. (*Id.*) The Election Report shows only 56 votes cast in the election administered by the Garcia Faction and that none of the candidates received a unanimous vote. (*Id.*) The cover letter to the Election Report stated the election notice was attached, but it is not in the Administrative Record provided to the IBIA by Superintendent Burdick. (*Id.*) The Election Report shows only 56 votes cast in the election administered by the Garcia Faction and that none of the candidates received a unanimous vote. (*Id.*) The failure to include the election notice is important because the Pacific Regional Director affirmed Superintendent Burdick's analysis of the election notice.

January 20, 2015 – after more than two months passed with no response from Superintendent Burdick, the Brown Faction submitted a letter explaining why he should recognize them as the Tribe's lawfully elected government in the context of three requested federal actions. (Boland Declaration at ¶ 6 and Ex. C thereto.)

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February 6, 2015 – Ceiba Legal notified Wells Fargo of the pending dispute between the two Tribal factions, and requested the bank to freeze the Tribe's assets, and not distribute funds to either faction during the pendency of the dispute. (Amended Complaint, Ex. A at 5.)

March 3, 2015 – the Bureau acknowledged receipt of the letter from the Brown Faction but did not address the requests therein. (Boland Declaration at ¶ 8.) In fact, the Superintendent impermissibly issued his recognition decision in December 2014. (*Id.* and Ex. D thereto.) It was not sent to the Brown Faction and did not contain any of the requisite appeal rights mandated by 25 CFR § 2.7. Ceiba Legal did not know about it until an attorney for Wells Fargo passed it along. (*Id.*)

March 9, 2015 – citing an unidentified "federal action,"[2] Superintendent Burdick stated in a letter to the Garcia Faction that he recognized them as the Tribe's government, and he did so without explanation or notice to the Brown Faction and without the requisite appeal rights mandated by 25 CFR § 2.7. (The Garcia Faction's legal counsel provided this letter to Appellants, not the Bureau.) (Boland Declaration at ¶ 9.)

March 12, 2015 - Superintendent Burdick sent a letter stating he was returning Ceiba Legal's attorney services agreement "without action"[3] and again without explanation recognized the Garcia Faction. (Boland Declaration at ¶ 10 and Ex. E thereto.)

April 14, 2015 – the Brown Faction filed a Notice of Appeal challenging Superintendent Burdick's decisions to the Pacific Regional Director of the BIA. (Boland Declaration at ¶ 11 and Ex. F thereto.)

April 15, 2015 – Wells Fargo filed an interpleader action (at the request of Anthony Cohen, former legal counsel to the Garcia Faction). (Boland Declaration at ¶ 12.) On several

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[2] The BIA is required to issue an official recognition decision that fully explains the rationale for the decision when the need to take a federal action arises and the BIA is aware of a dispute regarding a tribe's governing body. *See, e.g., Coyote Valley Band of Pomo Indians v. Acting Pacific Director*, 54 IBIA 320, 326 (2012); *Pueblo de San Ildefonso Council v. Acting Southwest Regional Director*, 54 IBIA 253, 254, 259 (2012); *Alturas Indian Rancheria v. Pacific Regional Director*, 54 IBIA 138, 140, 144 (2011).

[3] The Tribe's constitution requires that all fee charging attorney services agreements shall be reviewed and approved by the Bureau of Indian Affairs.

occasions, by phone and e-mail, Ceiba Legal urged Wells Fargo not to file the action and to let the administrative processes run their course. (*Id.*)

May 13, 2015 – the Garcia Faction filed a complaint with the State Bar of California against Little Fawn Boland, principal of Ceiba Legal, asserting that she was "unlawfully claiming that [she is] representing the Elem Indian Colony" despite the fact that the BIA did not recognize her as the Tribe's attorney. (Boland Declaration at ¶ 13 and Ex. G thereto.)

September 2, 2015 – in response to the bar complaint, the State Bar stated "that this matter is presently on appeal before by the BIA. As such, the State Bar has determined that this matter does not warrant further action." (Boland Declaration at ¶ 14 and Ex. H thereto.) (This is the second time the State Bar dismissed a bar complaint the Garcia Faction filed against Ms. Boland. (*Id.*)

September 11, 2015 – Wells Fargo voluntarily dismissed the interpleader case. (Boland Declaration at ¶ 15.)

November 20, 2015 – the Pacific Regional Director of the BIA issued a final appealable agency decision recognizing the Garcia Faction as the Tribe's Executive Committee. (Boland Declaration at ¶ 16.)

December 31, 2015 – the Brown Faction filed its Notice of Appeal to the Interior Board of Indian Appeals ("IBIA"). Plaintiff, the Garcia Faction, is an interested party in that administrative process. (Boland Declaration at ¶ 17.)

March 1, 2016 – the IBIA issued Docket No. IBIA 16-037, "Notice of Docketing and Order Setting Briefing Schedule," stating specifically that the IBIA will address the Pacific Regional Director's decision to affirm the Superintendent's decisions to recognize the Garcia Faction. (Boland Declaration at ¶ 18 and Opening Brief attached thereto as Ex. I.) The respondent, the BIA, never filed a response to the Brown Faction's Opening Brief. (*Id.*) The Brown Faction provided analysis as to why the Pacific Regional Director's decision was wrong. (*Id.*) Additionally, the Brown Faction made clear that the Garcia Faction's recognition lacked legal effect during the pendency of the IBIA appeal, and that no consequences may flow from the

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decision, because it was stayed under existing precedent. *See* 25 C.F.R. § 2.6(b) ("[d]ecisions made by officials of the [BIA] shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed"); *Wichita and Affiliated Tribes v. Acting Southern Plains Regional Director*, 58 IBIA 263, 266 n.6 (2014) (noting that a decision under appeal will "remain ineffective during the appeal period pursuant to the automatic stay provision in 25 C.F.R. § 2.6(b)"); *Yakama Nation v. Northwest Regional Director*, 47 IBIA 117, 119, (2008) (remarking that the Regional Director's decision "would automatically be stayed" by 25 C.F.R. § 2.6(b)).

March 28, 2016 – an "Order to Disenrollment [sic]" was sent to forty-eight (48) adult tribal members by the Garcia Faction alleging a list of supposed crimes for which the Garcia Faction claimed it had the power for its politically motivated permanently banishment of the members from the Tribe's reservation through the penalty of disenrollment. (Boland Declaration at ¶ 19.)

April 27, 2016 – general counsel to the Garcia Faction, Anthony Cohen, informed the Brown Faction that he withdrew his representation of the Garcia Faction and published a blog post entitled "No Disenrollments! I'm Done at Elem." (Boland Declaration at ¶ 20.)

April 29, 2016 – on behalf of the purportedly disenrolled tribal members, Ceiba Legal submitted a response to the Garcia Faction, denying each allegation and seeking due process in accordance with the requirements and timing of the purported "Order to Disenrollment [sic]." (Boland Declaration at ¶ 21.)

May 9, 2016 – before the IBIA, and on behalf of the Garcia Faction, litigation counsel Lester Marston sought an extension of time to respond to the Brown Faction's Opening Brief. The request stated the Garcia Faction needed time to secure new legal counsel because Mr. Marston needed to withdraw from his representation "because . . . representing the Tribe on the issue of whether certain members of the Tribe have been disenrolled goes beyond the scope of Mr. Marston's current representation." (Boland Declaration at ¶ 22.)

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May 16, 2016 – Ceiba Legal served the Brown Faction's Petition for Writ of Habeas Corpus on members of the Garcia Faction. The Petition is currently before this Court under case number Case No. 3:16-cv-02368-WHA.

June 2, 2016 – the Brown Faction sent a "Disenrollment Notice of Default" to forty-five (45) adult tribal members, purporting to permanently banish them from the Tribe effective June 2, 2016. (Boland Declaration at ¶ 24.) The Notice claims they failed to respond to the March 28, 2016 "Order to Disenrollment [sic]" and therefore defaulted. (*Id.*)

June 6, 2016 – the Garcia Faction filed the instant action against the Defendants, alleging liability for legal counsel's communications dating back to nearly a year and a half prior.

June 27, 2016 – the Garcia Faction sent out a "Preliminary Notice of General Council Hearing," claiming forty-five (45) tribal members were disenrolled due to default. (Boland Declaration at ¶ 26.) While Ceiba Legal's clients properly requested hearings, only three people, who are not represented by Ceiba Legal, were granted hearings. (*Id.*)

III. ARGUMENT

A. Legal Standards For Rule 12(b)(1) Motion

Where the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction, the complaint is properly dismissed for lack of subject matter jurisdiction. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). Where, as here, such a "facial" subject matter jurisdiction defect appears, the court dismisses the action without considering extrinsic evidence or affidavits. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Li v. Chertoff*, 482 F. Supp. 2d 1172, 1175 (S.D. Cal. 2007). In evaluating a facial attack on subject matter jurisdiction, the court accepts all factual allegations in the complaint as true, but is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Warren*, 328 F.3d at 1139 (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)). Nor may the court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Id.* (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)).

On a motion to dismiss, the district court is also "'free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary.'" *Friends of the Wild Swan, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 1500, 1504 (D. Or. 1995) (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.1987)). The plaintiff, as the party asserting jurisdiction, has the burden of establishing that the federal court has jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Li*, 482 F. Supp. 2d at 1175.

B. Legal Standards For Rule 12(b)(6) Motion

A complaint that fails to state a claim upon which relief can be granted should be dismissed. Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim is proper when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1041 (9th Cir. 2010). "[A] wholly conclusory statement of claim" does not "survive a motion to dismiss" under Rule 12(b)(6) simply because the pleadings have "left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007). Rather, a complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *Id.* at 570. Conclusory allegations or legal characterizations cast in the form of factual allegations may be disregarded. *Warren*, 328 F.3d at 1139; *see also Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). Where, as here, the complaint alleges fraud, it must satisfy the heightened pleading standard under Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that a complaint "must state with particularity the circumstances constituting fraud." A court's discretion to dismiss the complaint with prejudice "is particularly broad where plaintiff has previously amended the complaint." *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011).

Documents attached to a complaint may be considered part of the complaint for purposes of a facial motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1989). "[W]hen a written instrument contradicts allegations in a complaint to

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which it is attached, the exhibit trumps the allegations." *Thompson v. Ill. Dep't of Prof'l Reg.*, 300 F.3d 750, 754 (7th Cir. 2002) (internal quotation omitted). The Court may disregard allegations that contradict facts in referenced documents. *See Skilstaf, Inc. v. CVS Caremark Corp*, 669 F.3d 1005, 1016 & n.9 (9th Cir. 2012).

C. This Court Lacks Jurisdiction To Hear An Intratribal Leadership Dispute Under The Guise Of General Federal Statutory Claims.

This Court lacks jurisdiction over the Garcia Faction's claims against Ceiba Legal, which seek to use general federal statutes to embroil this Court in an intratribal dispute to determine which of two tribal government factions was "duly elected" as a matter of tribal law. (*See, e.g.*, Amended Complaint, ¶¶ 12, 17.) Because Indian tribes possess "exclusive rights of self-governance in purely intramural matters," general statutes simply do not create federal jurisdiction over disputes about tribal self-governance. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1079-80 (9th Cir. 2001). As demonstrated below, plaintiff sues under federal statutes that are completely silent as to their application to tribes as all, let alone, as to matters of tribal self-governance. Accordingly, the federal court lacks jurisdiction to intercede here, in a tribal leadership dispute, and resolve issues of tribal law under the guise of a civil action brought pursuant to general federal statutes. *See* Section III.C.1, 2. Nor may the Court begin to make the required findings of Plaintiff's alleged standing to seek relief for the Tribe, or Defendants' entitlement to sovereign immunity as a bar to this suit, without first resolving tribal law issues beyond the Court's jurisdiction. *See* Sections III.C.3 and III.C.4.

1. Generally Applicable Federal Statutes, Like Those Upon Which The Garcia Faction Relies, Do Not Apply To Intramural Tribal Disputes.

"Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo*, 436 U.S. at 55. Accordingly, absent express

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congressional authority, general statutes simply do not create federal jurisdiction over internal tribal disputes. *Coeur d'Alene*, 751 F.2d at 1116; *Karuk Tribe Housing Authority*, 260 F.3d at 1079-80.

The U.S. Supreme Court suggested that a "general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). This Court has interpreted the Supreme Court's statement to mean that, where Congress enacts a statute of general applicability, the statute generally extends to everyone within the jurisdiction of the United States, including Indians exercising self-governance. *Coeur d'Alene*, 751 F.2d at 1115-16.

However, this general rule is not without exception. A federal statute of general applicability that is silent on the issue of its reach to Indians will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the law's application to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." *Id.* at 1116 (citing *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)). "In any of these three situations, Congress must *expressly* apply a statute to Indians before [this Court] will hold that it reaches them." *Coeur d'Alene*, 751 F.2d at 1116 (emphasis in original).

Thus, federal statutes do not apply to internal disputes absent express congressional authorization. One instance of such consent is the Indian Civil Rights Act ("ICRA"), which expressly authorizes federal courts to intervene in matters of tribal self-government by writ of habeas corpus. 25 U.S.C. §§ 1302, 1303 (authorizing writ of habeas corpus in federal court against persons "exercising powers of self-government"); *Santa Clara Pueblo*, 436 U.S. at 60. Also, the Administrative Procedures Act permits a federal court to entertain certain challenges to federal action relating to tribal self-government. *Aguayo v. Jewell*, No. 14-56909, ___ F. 3rd ___, 2016 WL 3648465, at *6 (9th Cir. July 8, 2016) (holding that, despite the general rule that federal courts may not adjudicate intratribal disputes, "[a] different scenario arises when a suit is not a

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direct challenge to a tribe's enrollment decision, but is instead a challenge to agency action under the Administrative Procedures Act (APA)").

In contrast, the federal statutes Plaintiff invokes are statutes of general applicability that do not mention Indians or supply jurisdiction over an intratribal dispute. *See* 18 U.S.C. § 1962; 15 U.S.C. §§ 1114, 1125(a); *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 767 (8th Cir. 2003) (holding RICO did not supply federal jurisdiction over claims by federally recognized faction against other faction); *Navajo Nation v. Urban Outfitters, Inc.*, No. CV 12-195 LH/LAM, 2014 WL 11511718, at **5-6 (D.N.M. Sept. 19, 2014) (observing that the Lanham Act is a "generally applicable federal statute" making no specific reference to suits against Indians or Indian tribes).

2. Without Express Congressional Authorization, This Court Cannot Interpret Tribal Law To Decide Which Faction Was "Duly Elected."

Without express congressional direction, federal courts simply cannot grant relief for civil claims predicated on the violation of tribal laws. *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 276-80 (9th Cir. 1981) (rejecting argument that "federal courts are empowered to grant relief in civil cases for the alleged violation of various tribal laws"). Resolution of tribal law claims in a federal forum implicates Indian tribes' "inherent and exclusive power over matters of internal tribal governance." *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1184-85 (E.D. Cal. 2009) (citing *Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989)); *In re Sac & Fox Tribe*, 340 F.3d at 763-64 ("Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws . . . lies with Indian tribes and not in the district courts." (citing *United States v. Wheeler*, 435 U.S. 313, 323-36 (1978))); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) ("[T]he district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute."); *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995), *aff'd* 100 F.3d 556 (8th Cir. 1996) (upholding dismissal of federal statutory claims in a tribal election dispute because a dispute "'involving questions of [a] tribal constitution and

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tribal law is not within the jurisdiction of the district court'" (citation omitted; alteration in original)).

Accordingly, a dispute about the legitimacy of a tribe's governing body is an internal tribal matter that a federal court may not resolve without express congressional direction. *Boe*, 642 F.2d at 276-78 (holding federal court lacks power to resolve plaintiffs' federal claims that tribal government officials violated the tribe's constitution, bylaws, and ordinances in certifying tribal election involving ineligible candidate); *Timbisha Shoshone*, 687 F. Supp. 2d at 1181, 1184-85 (declining to "interfere in the internal affairs of the Tribe" to decide claims by federally recognized faction based on other faction's alleged "'conspiracy to violate the Constitution and the laws of the Tribe by continuing to divert' tribal funds 'to bank accounts maintained with various banks'"); *In re Sac & Fox Tribe*, 340 F.3d at 766-67(holding "jurisdiction does not exist to resolve an intra-tribal leadership dispute" and affirming dismissal of federally recognized faction's RICO claims predicated on allegations that the other faction "was not the lawful governing body of the Tribe"); *County of Charles Mix v. U.S. Dept. of the Interior*, 674 F.3d 898, 903 (8th Cir. 2012) (holding district court properly refused relief that "would have required the district court to interpret tribal law to determine whether the committee had exceeded the authority provided it in the tribe's own bylaws"); *Goodface*, 708 F.2d at 336 (holding "the district court lacked jurisdiction to enter a judgment based on a final resolution of the underlying election dispute").

This prohibition also deprives the federal court of jurisdiction of claims against nontribal third parties in the context of an intratribal dispute. *In re Sac & Fox Tribe*, 340 F.3d at 752, 766-67 (8th Cir. 2003) (affirming dismissal of tribal leadership dispute complaint "in its entirety," including claims "against the banks that froze Tribal accounts"); *County of Charles Mix*, 674 F.3d at 903 (8th Cir. 2012) (holding district court properly declined to address tribal law issue in dispute between county and federal defendants (citing *In re Sac & Fox Tribe*, 340 F.3d at 763)); *Apache Tribe of Oklahoma v. Brown*, No. CIV-10-646-D, 2011 WL 710486, at *4 (W.D. Okla. Feb. 22, 2011) (in suit by tribal faction against bank, law firm, and tribal officials of other faction,

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"a federal complaint for damages, treble RICO damages, and punitive damages should not serve as a vehicle for tribal in-fighting to be played out"). In any event, the Amended Complaint makes clear that at all relevant times Ceiba Legal was acting "on behalf of" the Brown Faction of the Tribe's government, as its legal counsel. (Amended Complaint, ¶ 38; *see also id.*, ¶¶ 2, 32.) *See Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968) (recognizing tribe's right "to look beyond its own membership for capable legal officers, and to contract for their services").

The Garcia Faction's claims necessarily turn on issues of tribal law. Plaintiff's claims rest on the alleged falsity of Defendants' representations that they "were the duly elected government of the Tribe" authorized by tribal law to act as the Tribe's government. (Amended Complaint, ¶ 12; *see also id.*, ¶¶ 17, 25, 27,[4] 36, 43, 58, 63, 68, 72.) Specifically, the Garcia Faction's third cause of action under RICO is predicated on the Defendants supposedly falsely stating that the Garcia Faction's "Tribal Council was illegally governing Plaintiff, and that its existing Tribal Council was illegitimate." (Amended Complaint, ¶¶ 36; see also *id.*, ¶¶ 45, 53) *See Smith*, 875 F. Supp. at 1366, *aff'd* 100 F.3d 556 (8th Cir. 1996) ("Plaintiffs cannot circumvent the [tribe]'s exclusive jurisdiction simply by recasting [tribal law] determinations as RICO violations."). Likewise, Plaintiff's fourth cause of action for trademark infringement depends on establishing that the Brown Faction, when representing that it was acting as the Tribe's government as it informed third parties about the disputed election, was not in fact the Tribe's government authorized to hold itself out as the Tribe's government. (Amended Complaint, ¶¶ 12, 17, 58.) Moreover, the Garcia Faction alleges no superior right to any mark apart from its claim to be the Tribe's duly elected government. (Amended Complaint, ¶ 58 (alleging "unauthorized use of *the Tribe's* trademark" (emphasis added)).) *See Smith*, 100 F.3d at 559 (upholding district court's refusal to entertain civil claims that were "merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court"). Thus, this Court lacks jurisdiction to hear this intratribal dispute couched as a trademark claim.

[4] Plaintiff's Amended Complaint has two paragraphs numbered 27. This reference is to the second paragraph 27.

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3. This Court Lacks Jurisdiction To Decide Whether The Garcia Faction Has Standing To Sue In The Name Of The Tribe.

Plaintiff has the burden of establishing its standing to bring this action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To prove standing, a plaintiff must show, among other things, that it suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest. *Lujan*, 504 U.S. at 560-61. Plaintiff must further show that standing exists "for each claim [it] seeks to press" and for "each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 185 (2000)).

To establish standing, Plaintiff must show that the Garcia Faction is the duly elected government permitted to bring this case in the Tribe's name. The Court would have to decide whether the Garcia Faction has a legally protected interest, *i.e.*, that the Garcia Faction is the Tribe's duly elected Executive Committee and as such may represent the Tribe to address the alleged harm caused to the Tribe. In order to make this standing determination, the Court would have to determine the legitimacy of the election. As explained above (Section III.C.2 *supra*), without express congressional authority, the Court may not make this determination. It simply lacks the power to interpret tribal law and thereby decide which faction was "duly elected." *See Timbisha Shoshone*, 687 F. Supp. 2d at 1184-85 (declining to "interject itself into the internal affairs of the Tribe" to "consider the numerous elections held by the parties to determine whether the 2008 Death Valley Tribal Council acted with legitimate authority" and finding that plaintiffs had therefore "failed to sustain their burden to demonstrate that they have standing to pursue this action").

4. This Court Lacks Jurisdiction To Decide Whether Sovereign Immunity Precludes Suit Against The Brown Faction.

"Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mtn. Rancheria*, 509 F.3d 1008, 1015-16 (9th

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Cir. 2007). Tribal sovereign immunity also "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Cook v. Avi Casino*, 548 F.3d 718, 727 (9th Cir. 2008). If the individuals comprising the Brown Faction—David Brown, Adrian John, Natalie Sedano Garcia, and Kiuya Brown—are the duly elected Executive Committee of the Tribe, they possess sovereign immunity from suit, as the government of the Tribe. *Alvarado*, 509 F.3d at 1015-16; *Cook*, 548 F.3d at 727. In its capacity as legal counsel for that government, Ceiba Legal, in turn, would also possess sovereign immunity. *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212, 1225 & n.15 (11th Cir. 1999); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1421, 1423-24 (1999) (extending tribal immunity to tribe's outside law firm for "actions taken or opinions given in rendering legal services to the tribe"); *see also Davis*, 398 F.2d at 85.

Of course, for the same reason this Court cannot adjudicate the issue of standing, it cannot decide whether sovereign immunity deprives it of jurisdiction *without first resolving which faction was duly elected*. The *Timbisha Shoshone* decision is instructive. When facing a similar dispute between competing factions seeking federal recognition as the government of their tribe, the district court found that it could not decide whether the defendants were immune to the plaintiffs' suit because that decision would require a ruling on the validity of the election itself. *Timbisha Shoshone*, 687 F. Supp. 2d at 1181, 1186-1187 (finding that determinations of which faction may rightfully maintain a government-to-government relationship with the BIA is "within the province of the BIA," noting that, "[c]urrently, two consolidated appeals are pending before the IBIA on this issue" and "that neither side can predict with certainty how the IBIA will resolve the pending appeals"). Likewise here, this Court lacks jurisdiction to hear this dispute, as it would require the Court to decide whether the Brown Faction and Ceiba Legal possess immunity from unconsented suit as the duly elected government of the Tribe and its counsel.

D. The Action Should Also Be Dismissed Because The Garcia Faction Cannot State A Claim Upon Which Relief Can Be Granted.

Not surprisingly given the predicate facts—but, separate and apart from the Court's lack

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of jurisdiction to intercede in this tribal leadership dispute—the lawsuit should be dismissed because Plaintiff failed to state federal claims upon which relief can be granted, and indeed, the conduct at issue is constitutionally protected. As detailed in the Motion to Dismiss[5] concurrently filed by the Brown Faction, Anthony Steele and Michael Hunter (collectively the "Individual Defendants"), the Garcia Faction cannot secure relief where the basis for liability is constitutionally protected conduct—the Brown Faction's petition to government agencies for relief, and outreach to banks to maintain the status quo given the ongoing tribal leadership dispute. (*See* Individual Defendants' Motion to Dismiss, DISCUSSION, § 2.) This constitutional right to petition extends the same protection to legal counsel representing the Brown Faction's interests. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). Ceiba Legal incorporates each of the Individual Defendants' arguments in the Motion to Dismiss here by reference.

Furthermore, distinct from the foregoing, Ceiba Legal presents additional bases requiring dismissal. First, even assuming, for the sake of argument, the Individual Defendants' petition rights did not bar the Garcia Faction's RICO claims against their legal counsel, the Amended Complaint does not come close to stating an actionable RICO claim, let alone with the particularity Federal Rule of Civil Procedure 9(b) requires. Second, the Individual Defendants' motion establishes several barriers that would bar the Garcia Faction's trademark claims against Ceiba Legal if this Court had jurisdiction to reach them.

1. The Garcia Faction Cannot State A RICO Claim Upon Which Relief Can Be Granted.

The Brown Faction's allegations that the Garcia Faction sent correspondence to banks and government agencies asking them to maintain the status quo by preventing distribution of tribal funds pending resolution of the ongoing leadership dispute fail to state a claim under RICO. "'Liability under § 1962(c) requires (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004) (citations omitted). On a RICO claim, "Federal Rule of Civil Procedure 9(b) requires a pleader of

[5] "Motion to Dismiss" refers to the Individual Defendants' motion to dismiss the Amended Complaint and supporting memorandum, filed concurrently with this Motion.

fraud to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme." *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991); *accord Powell v. Wells Fargo Home Mortgage*, No. 14-CV-04248-MEJ, 2015 WL 4719660, at *13 (N.D. Cal. Aug. 7, 2015).

a) Failure To Allege Predicate Act Of Mail Fraud

The Garcia Faction failed to allege a single act by any Defendant constituting a predicate act of racketeering activity. "'Racketeering activity' is defined in 18 U.S.C. § 1961(1)(B) as including any act 'indictable' under certain enumerated federal criminal statutes, including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Yokohama Tire Corp.*, 358 F.3d at 620 (quoting *Schreiber Distrib. Co. v. Serv–Well Furniture Co., Inc.*, 806 F.2d 1393, 1399 (9th Cir.1986)). The elements of a mail fraud violation under § 1341 are as follows: "'(1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud.'" *Id.* (quoting *Schreiber*, 806 F.2d at 1400).

Although the Garcia Faction alleges Defendants engaged in "a pattern of racketeering activity for the unlawful purpose of intentionally *defrauding Plaintiff*" (Amended Complaint, ¶ 45 (emphasis added)), the Amended Complaint only identifies communications to government agencies and banks. (*Id.*, ¶¶ 11, 36, 45, 46, Ex. A.) The Garcia Faction does not allege, nor does the allegedly fraudulent correspondence plausibly support, the existence of any scheme to defraud the communications' recipients, *i.e.*, the government agencies and banks that received them. *Id.*; *see Apache Tribe* , 966 F. Supp. 2d 1188 (dismissing tribe's RICO claims against law firm for lack of predicate act because communications to bank and government agency during leadership dispute did not defraud their recipients).

Even assuming communications to persons other than Plaintiff could "defraud" Plaintiff, the allegations reveal no plausible scheme to defraud the Garcia Faction. The communications merely identify the dispute between the two factions and ask that the recipients preserve the status

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quo by immediately "freez[ing]" funds pending its resolution. (*Id.*, Ex. A at 2, 4-5 (explaining that Bureau of Indian Affairs would be reviewing the leadership dispute).) The Amended Complaint does not and cannot allege a plausible theory by which such communications expressly disclosing the leadership dispute could be part of a fraudulent scheme to obtain monies of the Tribe prior to the dispute's resolution. Rather, the communications confirm that Defendants claim no entitlement to tribal funds absent a final determination that the Brown Faction was in fact the recognized government of the Tribe. Thus, Plaintiff's RICO claims fail as a matter of law for lack of a predicate act.

b) Failure To Allege A Pattern Of Racketeering

Even assuming the communications Plaintiff identifies could constitute predicate acts, the Amended Complaint fails to allege a pattern of racketeering required for RICO liability. Demonstrating a pattern "requires the showing of a relationship between the predicates and of the threat of continuing activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989) (internal citation and quotation marks omitted). To satisfy the continuity requirement, the complaint must allege "a series of related predicates extending over a substantial period of time," *i.e.*, closed-ended continuity (*H.J.*, 492 U.S. at 242), or "past conduct that by its nature projects into the future with a threat of repetition," *i.e.*, open-ended continuity (*id.* at 241). Plaintiff's Amended Complaint fails to establish either.

(i) Closed-Ended Continuity

The allegations of the Amended Complaint do not establish closed-ended continuity. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the closed-ended continuity] requirement." *H.J.*, 492 U.S. at 242. Activity that lasts only a few months is not sufficiently continuous. *See Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir.1995); *see also Religious Technology Ctr. v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) ("We have found no case in which a court [of appeals] has held the [continuity] requirement to be satisfied by . . . activity lasting less than a year.").

The Garcia Faction alleges "Defendants started their racketeering activity in November

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2014 by staging a fake, and illegitimate election." (Amended Complaint, ¶ 45.) The correspondence upon which the Garcia Faction bases its RICO allegations was all sent in January and February of 2015 (even though the Amended Complaint erroneously states it was "sent on or around March 28, 2016"). (*Id.*, ¶ 12, Ex. A.) The Amended Complaint contains a conclusory allegation that "Defendants racketeering activity continued in 2015 through 2016 with its false communications described herein," but does not identify any communications other than those appearing in its Exhibit A. (Amended Complaint, ¶ 45) *See Thompson*, 300 F.3d at 754("[W]hen a written instrument contradicts allegations in a complaint to which it is attached, the exhibit trumps the allegations."). As a matter of law, this alleged racketeering activity extending over "a few weeks or months"—from November 2014 to February 2015—does not support RICO liability. *H.J.*, 492 U.S. at 242

(ii) Open-Ended Continuity

Nor does the Amended Complaint allege open-ended continuity. "Open-ended continuity is shown by 'past conduct that by its nature projects into the future with a threat of repetition,'" namely "[p]redicate acts that specifically threaten repetition or that become a 'regular way of doing business.'" *Allwaste*, 65 F.3d at 1528. The Amended Complaint contains the conclusory assertion that "Defendants continue to threaten Plaintiff with its [sic] efforts to invalidate its lawful Tribal Council through its continued misconduct—making false statements that Plaintiff's Tribal Council is illegal and has no right to conduct business or represent the Tribe." (Amended Complaint, ¶ 37.) However, the Amended Complaint fails to allege any specific conduct after February 2015. (*Id.*, Ex. A at 4 (letter to bank dated February 27, 2015)) *See, e.g., Durning v. Citibank, Int'l*, 990 F.2d 1133, 1139 (9th Cir. 1993) (holding that predicate acts arising from a single event—the dissemination of a misleading document—do not satisfy the open-ended continuity requirement). Nor can the Garcia Faction allege any plausible theory that the nature of Defendants' conduct threatened future fraudulent activity. To the contrary, Defendants' communications merely asked government agencies and banks to preserve the status quo and made clear Defendants' commitment to use federal processes to resolve the factions' dispute. (*Id.*,

Ex. A at 2, 4-5.)

Because the Garcia Faction has not alleged, and cannot allege, closed-ended or open-ended continuity of racketeering activities, Plaintiff's RICO claims are subject to dismissal.

c) Failure To Identify Cognizable Injury

Plaintiff's RICO claims also fail as a matter of law for lack of any cognizable injury. Under 18 U.S.C. § 1964(c), a plaintiff must show the RICO violation proximately caused an injury to the plaintiff's business or property. *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir.2008). RICO requires "concrete financial loss, and not mere injury to a valuable intangible property interest." *See Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc). This is because Congress enacted RICO "to combat organized crime, not to provide a federal cause of action and treble damages" for personal injuries. *Id.* at 786. Accordingly, the Ninth Circuit has declined to "recognize[] the incurment of legal fees as an injury cognizable under RICO." *Thomas v. Baca*, 308 F. App'x 87, 88 (9th Cir. 2009).

The Garcia Faction alleges "Plaintiff had to spend money (and time) to successfully object, defend and correct the false communications," including defending an interpleader action by Wells Fargo. (Amended Complaint, ¶¶ 44, 49.) This is not a cognizable injury in this Circuit. *Thomas*, 308 Fed. Appx. at 88. The Garcia Faction also alleges, without further explanation, that it "has been injured in its business and property in that third parties are reluctant to provide services to Plaintiff . . . ." (Amended Complaint, ¶ 49.) The Garcia Faction thus has failed to allege "concrete financial loss" supporting a RICO claim. *Oscar*, 965 F.2d at 785.

d) Failure To Plead RICO Claim Fatal To Conspiracy Claim

Section 1962(d) makes it unlawful to conspire to violate any of the other three subsections of § 1962. 18 U.S.C. § 1962(d). Failure to plead a RICO claim is fatal to a conspiracy claim. *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir.2000) ("Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO."). Because the Garcia Faction fails to allege a RICO claim, its RICO conspiracy count necessarily fails as well.

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2. The Garcia Faction Also Cannot State A Trademark Claim Upon Which Relief Can Be Granted.

As detailed in the Individual Defendants' Motion to Dismiss (*see* DISCUSSION, §§ 3-5) and incorporated here by reference, the Garcia Faction also cannot state a claim for relief under the Lanham Act. As an initial matter, the Amended Complaint nowhere alleges Ceiba Legal used any mark in connection with goods and services, as required for trademark infringement. 15 U.S.C. §§ 1114(1)(a), 1125(a)(1). Even if Plaintiff could allege such use, the correspondence attached to the complaint establishes at most nominative fair use of the Tribe's name. *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175–76 (9th Cir. 2010). This is because the correspondence shows Ceiba Legal at most used the Tribe's name as required to identify the ongoing intratribal dispute, while disclaiming any connection to Plaintiff. (*See* Amended Complaint, Ex. A.) In any event, Ceiba Legal's petition right would immunize any act that would otherwise violate the Lanham Act. *Sosa*, 437 F.3d at 929. Accordingly, the Lanham Act claim against Ceiba Legal, if subject to this Court's jurisdiction, should be dismissed with prejudice, as well.

IV. CONCLUSION

As a matter of bedrock law, federal courts lack the fundamental power to intercede in internal tribal disputes, including a tribal leadership dispute, under the guise of a general civil action. The entire basis of Plaintiffs' lawsuit concerns, and emanates from, such a dispute. Accordingly, Defendant Ceiba Legal respectfully requests that the Court dismiss the Amended Complaint with prejudice. Putting aside these fundamental jurisdictional barriers to suit, the Garcia Faction clearly seeks to use this Court to silence the group's political opponents, under the guise of RICO and the Lanham Act, and such tactics cannot be countenanced. The lawsuit should be dismissed with prejudice.

Dated: August 24, 2016

Respectfully submitted,

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