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SULPHER BANK RANCHERIA

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, MICHAEL HUNTER, ANTHONY STEELE, DAVID BROWN, ADRIAN JOHN, PAUL STEWARD, NATALIE SEDANO GARCIA, KIUYA BROWN, AND DOES 1-100 INCLUSIVE, Defendants.	Case No. 3:16-cv-03081-WHA **PLAINTIFF'S OPPOSITION TO DEFENDANTS CEIBA LEGAL AND INDIVIDUAL DEFENDANTS MOTIONS TO DISMISS** **[**Fed. R. Civ. P. 12 (b)(1) and (6)] **Date:** **October 6, 2016** **Time:** **8:00 a.m.** **Place:** **Courtroom 8, 19th Fl.** **Before:** **Hon. William Alsup**

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I. INTRODUCTION

This is a case about a federally recognized Indian Tribe taking the necessary precautions to protect itself, its trademark, and its federal funding from an illegitimate hostile takeover by unelected Tribe members and non-Tribal abettors. This is Plaintiff's Joint Opposition to Defendants' Motions to Dismiss. Dkt. 32, 35. Defendants characterize this case as one filed in retaliation for exercising their First Amendment rights to petition the government regarding the validity of Plaintiff's tribal government—called the "Garcia Faction." It is not a retaliatory lawsuit. Rather, it properly alleges trademark and Civil Racketeer Influenced and Organized Crime Act (RICO) violations, along with state law tortious interference with contract claims. The First Amended Complaint (Dkt. 28) states a claim upon which relief may be granted. Further, this Court has jurisdiction over this case.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria is a federally recognized Indian Tribe in Lake County, California. On November 8, 2014, the Tribe held an election. The following were elected as the Tribe's General Council: Agustine Garcia (chair), Stephanie Brown (vice chair), Sarah Garcia (secretary/treasurer) and Nathan Brown and Leora John (members at large). The Bureau of Indian Affairs issued a decision recognizing the Garcia Faction as the Tribe's legitimate Tribal Council.

A group of Plaintiff's members did not like the Garcia Faction and has been battling them for years. Non-tribal members Hunter and Steele provided the necessary funding to orchestrate an attempted hostile takeover. This group is known as the Brown Faction and through the funding of Defendants Hunter and Steele, paid for a law firm, Defendant Ceiba Legal, to try to take over the Elem Tribe by holding an election in a park. The Brown Faction did not succeed in its take over—but claimed it did. It then advised third parties and the public that it was the legitimate Tribal Council. It contacted two banking institutions that held Plaintiff's accounts, worth millions of dollars, and it contacted various governmental

agencies. The Brown Faction asserted it was the legitimate Tribal Council and had the right to Plaintiff's bank accounts.

Defendants' communications to one bank, Wells Fargo, caused Wells Fargo to file an interpleader action. Wells Fargo *believed* the Elem Tribe was in a leadership dispute. Plaintiff had to expend monies to defend that interpleader action. Plaintiff has also suffered other financial losses due to Defendants' false claim that they were the legitimate Tribal Council. The precise amount of these losses is the subject of an ongoing investigation and intended formal discovery should this case proceed past the pleading stage.

B. Procedural Background

On June 6, 2016, Plaintiff filed its initial complaint. Dkt. 1. Via the parties' stipulation, on August 3, 2016, Plaintiff filed its First Amended Complaint. Dkt. 28. The instant Motions to Dismiss followed on August 24, 2016. Dkt. 32, 35.

1. Individual Defendants' Motion To Dismiss

Among the individual defendants, some are purported members of the Elem Tribe and two are not. The purported tribal members are David Brown, Adrian John, Natalie Sedano Garcia, and Kiuya Brown. Defendants Michael Hunter and Anthony Steele are not tribal members. All six of these individuals filed a Motion to Dismiss (Dkt. 32) where they claimed the First Amended Complaint has failed to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). These individual defendants claim Plaintiff's First, Second, Fifth, Sixth and Seventh Causes of Action are barred by the *Noerr-Pennington* doctrine, California Code of Civil Procedure section 425.16 and Civil Code section 47 and that the Fourth, Fifth, Sixth, and Seventh claims fail because Plaintiff has not alleged use of its "mark" in connection with a sale of goods or services and that the individual defendants' use of the mark was nominal fair use of the Tribe's name.

2. Ceiba Legal's Motion To Dismiss

Defendant Ceiba Legal, LLC, is a Mill Valley, California, law firm which filed its Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt.

35. Defendant Ceiba Legal claims this Court has no jurisdiction over Plaintiff's causes of action because the matter is alleged to be a non-justiciable "intra-tribal" dispute subject to dismissal pursuant to Rule 12(b)(1) and that per Rule 12(b)(6); Defendants challenge Plaintiff's claims per Rule 12(b)(6) claiming that the RICO, Federal and State Trademark claims and state claims fail to state cognizable claims. Both parties have incorporated by reference the other defendants arguments warranting dismissal of the action at this juncture.

III. ARGUMENT

Legal Standard for F.R.C.P. 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.3rd 1136, 1140 (9th Cir. 2003). 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.3rd at 1139 (quoting *Stockman v. Hart Brewing, Inc*., 143 F.3rd 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 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). On a Motion to Dismiss the 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 Service,* 910 F.Supp. 1500, 1504 (D.Or. 1995)(internal citations omitted).

Legal Standard for F.R.C.P. 12(b)(6) Motion

When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material factual allegations of the complaint while construing the complaint in favor of the plaintiff and indulge all reasonable inferences to be drawn from the facts. See *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999); *Gillespie v. Civiletti*, 629 F. 2d 637 (9th Cir. 1980); and *Dodd v. Spokane County*, 393 F.2d 637 (9th Cir. 1968). The plaintiff need not necessarily plead a particular fact if it can be reasonably inferred from facts alleged. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In addition, Federal Rule of Civil Procedure 8(a)(2) states that a "pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). The Supreme Court has stated that "the Rule means what it says." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). Therefore, except for Plaintiff's RICO claims, which must be pled with particularity per Federal Rule 9(b), the bare requirements of notice pleading under Federal Rule 8(a) govern this Court's review of the legal sufficiency of Plaintiff's claims. With regard to Plaintiff's RICO claims, the pleading standard is heightened and the circumstances constituting fraud, identifying the time, place, and content of the fraudulent communications must be pled with particularity. Fed.R.Civ.P. 9(b); see *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On a Motion to Dismiss, a court must "accept the well-pleaded allegations of the complaint as true and constru[e] them in the light most favorable to the [plaintiff]." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Ashcroft, supra,* 556 U.S. at 678, quoting *Bell Atl. Corp., supra,* at 570.)

The Supreme Court has further held that a motion to dismiss under Rule 12(b)(6) will only be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. See *Gibson v. United States,* 781 F.2d 1334, 1337 (9th Cir. 1986). The facts presented in Plaintiff's Complaint meet the heightened pleading standard for the RICO claims, and sufficiently put the Defendants on notice of the claims for relief being alleged against them. For the reasons below, this Court should deny Defendants' motions to dismiss. Alternatively, it should grant Plaintiff leave to amend to correct any pleading deficiencies identified by the Court.

IV. ARGUMENT

A. Ceiba Legal's Motion To Dismiss Under Rule 12(b)(1)

1. The Court Has Jurisdiction Over this Case Because the Court is Not being asked To Decide A Question of Pure Tribal Law In An Intra-Tribal Dispute

Defendant Ceiba Legal attempts to cast this case as another run-of-the-mill intra-tribal squabble with no clear victor. It is not, for the simple reason that the Bureau of Indian Affairs (BIA) has decided previously, that the Garcia Faction is the legitimate Tribal Council. It in its motion to dismiss, Ceiba Legal sites several tribal cases that it says stand for the proposition that this Court is generally prohibited from intervening in intra-tribal disputes. While generally true, the cases cited by are easily distinguishable in that this is not an intra-tribal dispute that hinges exclusively on a question of Tribal law. Ceiba Legal's jurisdictional argument is based on *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki*

Casino Litig. 340 F.3d 749 (8th Cir. 2003), *Smith v. Babbitt*, 875 F.Supp. 1353 (D.Minn. 1995), *aff'd* 100 F.3d 556 (8th Cir. 1996) and *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171 (E.D. Cal. 2009). Those three cases were intra-tribal disputes where the Court lacked jurisdiction because they involved pure questions of tribal law, compared to this case, which involves questions of federal and state law—namely federal civil racketeering, tortious interference with contract, and federal and state trademark law. To decide this case, the Court need not analyze and dissect the Tribe's constitution or other governing documents.

In *Sac & Fox Tribe of Mississippi*, *supra*, the 8th Circuit found it lacked jurisdiction to resolve an internal tribal leadership dispute between competing factions, where one faction sought a declaration from the district court that it was the proper Tribal Council under the Tribe's Constitution. 340 F.3d at 753, 763-764. In *Smith v. Babbitt*, *supra*, 875 F.Supp. at 1360-61, the U.S. District Court for the District of Minnesota, noted that it did not have jurisdiction to decide an internal tribal membership dispute which would require the court to interpret the Tribe's constitution and "other organic documents." The *Timbisha Shosohone Tribe* case, meanwhile, involved a dispute between two tribal factions where one faction moved for a preliminary injunction seeking the district court to prevent the opposing faction from acting as the Tribe's legitimate Tribal Council. *Timbisha* at 1175-1176, 1181. The key distinction between this case and *Timbisha* is that the BIA had not recognized one faction over the other, leading to a valid question as to which Tribal Council was legitimate. *Id*. at 1175-1178. The Court denied one faction's motion for a preliminary injunction because in

light of the BIA's indecision as to which faction was legitimate, the Court could not decide which faction was the current, legitimate governing body of the Tribe. *Id.* at 1186.

Contrast these cases to the recent intra-tribal dispute analysis in *Miccosukee Tribe of Indians of Florida v. Billy Cypress et al*. 2015 U.S. App. LEXIS 22518 (11th Cir.). In *Miccosukee*, the Tribe brought suit against the Tribe's former chairman and non-tribal vendors, including their former legal counsel, alleging theft and violation of the federal RICO statute. Although the Court dismissed the RICO claims because the Tribe failed to state the claims properly (not the issue here), the court *did* find jurisdiction over the RICO claims. It held the intra-tribal dispute doctrine to not apply. "[C]ertain issues are, by their very nature, inherently reserved for resolution through purely tribal mechanisms due to the privilege and responsibility of sovereigns to regulate their own, purely internal affairs . . ." *Id*. at *10, attached as Exhibit 1, Request for Judicial Notice (RJN). "Examples of such issues include membership determinations, inheritance rules, domestic relations, and the resolution of competing claims to tribal leadership." *Id.*, citing e.g., *Montana v. United States*, 450 U.S. 544, 564 (1981); *In re Sac & Fox Tribe of Miss., supra*, 340 F.3d at 767.)

The Court rejected automatically applying the intra-tribal dispute doctrine because, like here, the Tribe pursued civil liability under the federal RICO statute. The Court reasoned: "[T]he district court correctly determined that it was necessary to examine the federal claims in the case to determine if 'at their core' they presented important matters of internal Tribal governance bearing upon the Tribe's status as a sovereign." *Miccosukee, supra*, 2015 U.S. App. LEXIS 22518, *12. The 11th Circuit held that while a close question, the Tribe's RICO complaint did not present a non-justiciable issue and therefore the Court

had jurisdiction. *Id.* It reasoned: "First, and most importantly, the mere suggestion of a dispute regarding tribal law is insufficient to trigger the intra-tribal dispute doctrine. Instead, to trigger the intra-tribal dispute doctrine, a case must present a genuine and non-frivolous question of tribal law." *Id.* The Court held it was "by no means clear that any actual dispute exist[ed]" involving the question of tribal law and rested on speculation, as the defendants made no reference to Tribal law. *Id.*

In a RICO complaint, the Court ruled that the question of an intra-tribal dispute is not dispositive simply because an issue of tribal law may arise in the litigation. *Id*. at *13. "We hold merely that more than the speculative assertion of undefined Tribal law and reference to a vague and seemingly errant statement in a pleading is required to introduce a genuine question of Tribal law into the case and convert the otherwise justiciable RICO claim into a non-justiciable matter of internal Tribal affairs." *Id*.

Further, "even if at some future point the court is presented with a seemingly genuine question of Tribal law . . . it is not necessarily the type of question the court is categorically precluded from addressing." *Id*. at *14. "[I]t presents a potential scope-of-authority question we previously have examined in the context of suits against Tribal officials." *Id*., citing *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F. 3d 1212, 1225 (11th Cir. 1999). "[A]lthough courts are not free to delve into the resolution of outstanding questions of Tribal law, courts are competent to examine a developed record to determine whether an actual dispute exists regarding the scope of tribal authority." *Id*. at *14. "Because we do not find the case as presented at this stage to involve a genuine dispute as to a non-

justiciable intra-tribal issue, we hold that federal question jurisdiction exists, and we proceed to address the sufficiency of the pleadings under Rule 12(b)(6)." *Id*. at *15.

For similar reasons the 11th Circuit outlined in *Miccosukee*, "at its core," this case is not an "intra-tribal dispute"[1] requiring analysis of pure questions of Tribal law. Just as in *Miccosukee,* the Plaintiff Tribe is not asking this Court whether Defendants' actions were in accord with Tribal law, custom or tradition. Instead, Plaintiff asks: **"Did Defendants' actions violate RICO, the Lanham Act and the stated pendant state law claims?"**

As in *Miccosukee*, answering this question requires an analysis of several sub-questions related to Defendants' scope of authority: 1) were Defendants the "Tribe"?; 2) were Defendants the governing body of the Tribe?; 3) could Defendants freeze a tribal bank account?; and 4) could Defendants freeze federal or state funding? While Defendants raise the question of tribal law/intra-tribal dispute as a defense, these questions are not the *focus* of the allegations made in Plaintiff's complaint.[2] Moreover, Plaintiff recognizes that Defendants have issues with Plaintiff serving as the Tribe's government and with the Department of the Interior's decision to recognize the "Garcia Faction" over the "Brown Faction," and that Defendants have filed an appeal over these issues.

Further, Defendants' alleged wrongdoing occurred off reservation and are related to the Tribe's finances, specifically bank accounts holding federal grant funding, e.g., BIA 638 [federal tribal operations funds], BIA TCLC [climate change grant funding] funding,

[1]Defendants' reliance on *Apache Tribe of Oklahoma v. Brown*, No. CIV-10-646-D, 2011 WL 710486 (W.D. Okla. Feb. 22, 2011, a case involving alleged civil RICO violations, is also distinguishable. That case was dismissed because Defendants failed to properly plead RICO. Plaintiff alleges it has properly pled its RICO claims.

[2]Defendants have raised questions of pure tribal law in their habeas corpus petition, *Johns v. Garcia*, United States District Court, Northern District of California, 1:16-cv-2638 WHA. Exhibit 2, RJN. In contrast, here Plaintiff's case raises questions of Defendants'—tribal members and non-tribal associates—individual liability.

Housing and Urban Development Block Grant Funding, Preferred Referral Care funding, Environmental Protection Agency contract funds, GAP [General Assistance] funds, Clean Water Act grant funding, Superfund site funds and California Indian Gaming Regulatory Act Revenue Sharing Funds, of which ***Plaintiff continues to receive directly from the federal and state agencies***. These funds continue to flow from the agencies to the Plaintiff Tribe presently unobstructed by Defendants. Hence, the Court is not being asked to determine who is entitled to receive these funds as in *Smith v. Babbit* and *Apache Tribe, supra.* Nor is Plaintiff asking the Court to confirm tribal court jurisdiction or interpret tribal authority over defendants as in *Sac & Fox, supra. [See Ex. 14, Declaration of A. Garcia at pp. 2]*

i. Sovereign Immunity is Not a Bar to Liability

Defendants raise the possibility of tribal sovereign immunity being applicable to them as putative tribal officials. If the Interior Board of Indians Appeals (IBIA) or this Court in *Johns v. Garcia*, United States District Court, Northern District of California, 1:16-cv-2638 WHA, were to find in Defendants' favor as to their IBIA appeal or habeas corpus petition, as noted by the Court in *Miccosukee*, sovereign immunity is not a bar to RICO liability because sovereign immunity can be stripped pursuant to *Ex Parte Young. Miccosukee*, *supra*, 2015 U.S. App. LEXIS 22518, *14. Non-Tribal Defendants Hunter and Steele, who Plaintiff alleges financed Defendants' "Elem Power Grab" scheme, can be held liable also as they are not entitled to sovereign immunity.[3]

[3] Additionally, even if non-tribal Defendants Hunter and Steele were somehow entitled to immunity, which they are not, immunity could also be stripped from them via the RICO, Lanham Act and pendant state claims.

In sum, because a question of pure tribal law is not present, especially at the pleading stage, the "intra-tribal dispute" doctrine does not apply. The Court therefore has jurisdiction and may review Plaintiff's claims for sufficiency pursuant to Rule 12(b)(6).

ii. The Tribe Has Standing to File Its RICO Claim

As previously discussed at least one court found tribal standing not prohibitive to a tribes ability to bring a RICO action. *Miccosukee, supra*, 2015 U.S. App. LEXIS 22518, *14. (denied for issued unrelated to standing). Additionally, Plaintiff does not cite a single case that stands for the proposition that a Tribe does not have standing to file suit when a putative competing tribal council claims they are the true council.

Further, the prior analysis of *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.* 340 F.3d 749 (8th Cir. 2003), *Smith v. Babbitt*, 875 F.Supp. 1353 (D.Minn. 1995), *aff'd* 100 F.3d 556 (8th Cir. 1996) and *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171 (E.D. Cal. 2009), also do not apply to this case, nor do these cases support the lack of the applicability of RICO to individual defendants stripped of their immunity under *Ex Parte Young*.[4] Further, the case factors discussed previously related to defendants request to apply the *intra-tribal dispute doctrine* are analogous to the factors discussed in *Donovan v. Coeur d' Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), in which the National Labor Relations Act, a statute of general applicability, was determined applicable to an Indian tribe. In sum, as this case does not involve issues of pure tribal law and any tribal law issues the Court may review are akin to the "scope of authority" issues in *Miccosukee*, which the Court did not find intruded upon tribal law to bar Plaintiff's complaint. Finally, Plaintiff's well pled complaint also states that Plaintiffs are the federally recognized tribal government

[4] Defendant Ceiba Legal's citation to

of the Elem Indian Colony, which the Court must view as true when reviewing a Motion to Dismiss.

B. Individual Defendants' Motions to Dismiss Under Rule 12(b)(6)

1. *Noerr–Pennington* Does Not Apply to Bar Plaintiff's RICO Claims Because the Tribe's IBIA Appeal is Objectively Baseless and Brought for an Unlawful Purpose

Defendants cite the doctrine of "*Noerr-Pennington*" as a complete bar to Plaintiff's causes of action under RICO and its pendant state law claims. However, *Noerr-Pennington* does not apply in this case because the IBIA appeal filed by the Brown Faction in early 2015, of which they assert is their protected government petition, is a sham and objectively baseless litigation, brought for an unlawful purpose. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (citations omitted).

a). Defendants' IBIA Appeal Is Objectively Baseless

Interior Board of Indian Appeal (IBIA) precedent has consistently held that the IBIA itself **does NOT** have jurisdiction over tribally imposed sanctions, including the allegations of disenrollment as alleged by defendants.[5] As noted in their motions to dismiss, in early 2015, Defendants petitioned the Pacific Region and the IBIA, alleging Plaintiff's application of a Tribal Ordinance [#GCORD080412] resulted in Defendants' alleged disenrollment. This appeal has zero chance of success because the IBIA is prohibited from reviewing tribal enrollment disputes—thus rendering the appeal "objectively baseless."

The IBIA decision in *Welmas v. Sacramento Area Director Bureau of Indian Affairs*, 24 IBIA 264 (10/20/93) illustrates the IBIA's lack of jurisdiction over tribally imposed

[5] 43 C.F.R. 4.330(a), states, "[E]xcept as otherwise permitted by the Secretary or Assistant Secretary-Indian Affairs by Special Delegation or request, the Board shall not adjudicate: (1) Tribal Enrollment Disputes, (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority…."

sanctions concisely. Exhibit 3, RJN. In *Welmas,* a former tribal official was reprimanded by a Tribe's council and was excluded from tribal activities, including being denied receipt of tribal funds distributed to tribal members not under tribal discipline. In his appeal, Welmas asserted that the tribal sanctions amounted to disenrollment and they violated the Indian Civil Rights Act. Exhibit 3, RJN pp. 24 BIA 265-268.

Similar to the "Brown Faction" Defendants here, Welmas appealed to the Bureau of Indian Affairs Superintendent who refused to intervene in the dispute. Welmas thereafter appealed the Superintendent's inaction to the BIA's Pacific Region Area Director, who upheld the Superintendent's inaction. In so doing, the Area Director held that while he believed the tribal sanctions were extreme, they were outside the federal government's jurisdiction and any remedy lied exclusively with the Tribe, specifically because the action was not an adverse enrollment action and because no disenrollment of Welmas had occurred. Welmas then appealed to the IBIA. It upheld the Tribal sanctions and rejected Welmas' "constructive" disenrollment theory. In so doing, the Board stated that the Tribe's code provided for sanctions of less than disenrollment.

Here, the Defendants' Pacific Region and IBIA appeal is essentially the same as that in *Welmas,* which the Board denied due to lack of jurisdiction. Although the Brown Faction Defendants appealed to the Superintendent – as in *Welmas*, the Superintendent did not intervene. The Brown Faction Defendants next appealed to the Pacific Regional Director (the equivalent to the Area Director in *Welmas*), who upheld the Superintendent's decision to not intervene on behalf of the Brown Faction for similar reasons as the Area Director in

Welmas. *See* RJN, Exhibit 3, pp. 24 IBIA 268-274; *See also* RJN, Exhibit 4, Pacific Regional Director's Memorandum Opinion, November 20, 2015.

Thus, even assuming the Brown Faction was disenrolled by Plaintiffs'—which Plaintiff flatly denies—because the sanction of disenrollment was imposed by a Tribal Ordinance by the Tribe itself, and not due to official Interior action or inaction, Defendants' IBIA appeal is subject to dismissal pursuant to IBIA regulations, as in *Welmas* and other similar cases.[6] As such, Defendants' alleged petitioning activity (the IBIA appeal) is objectively baseless and an "attempt to directly interfere with the business relationships with a competitor." *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); see also *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49, 60-61 (1993). That is, under *Noerr-Pennington* doctrine, once objective baselessness is established, anticompetitive intent is an example of the litigant's unlawful subjective intent. *Professional Real Estate Investors, Inc.*, *supra*, 508 U.S. at 57, n. 4, 61.

b). The Purpose of Defendants' IBIA Appeal Is Unlawful

Defendants' filing of their IBIA appeal was motivated by an unlawful purpose. Defendants' "petitioning" letters to federal and state government agencies, and to Wells Fargo Bank and Mendo Credit Union, were designed to attempt to influence third parties (e.g. banks) to refrain from doing business with Plaintiff. Plaintiff is a federally recognized

[6] See *Wheeler v. United States Department of the Interior*, 811 F.2d 540 (10th Cir.1987); other IBIA tribal disenrollment cases dismissed for lack of jurisdiction, *Wasson v. Western Regional Director*, 42 IBIA, 141 (January 24, 2006);38 IBIA 244(12/29/2002); Exhibit 6, RJN, *Cahto Tribe v. Pacific Regional Director*, upholding Tribal disenrollment of members who had received land claim settlement funds. Exhibit 7, RJN, upheld by the 9th Circuit in *Cahto Tribe v. Amy Dutschke* No.11-17847 (Dec. 5, 2012, S.F.CA); 45 IBIA 121 (07/20/2007) *Robert Edward and 56 Unnamed Individuals v. Pacific Regional Director* (alleged tribal disenrollment's dismissed by IBIA due to lack of jurisdiction), Exhibit 8, RJN; 52 IBIA 036 (08/10/2010), *Madrigia v. Pacific Regional Director* (alleged tribal disenrollment dismissed by IBIA pursuant to 43 C.F.R. 4.330 (a), IBIA has limited jurisdiction to review appeals by Interior officials or official action), Exhibit 9, RJN.

Tribal government and a government adverse to Defendants. This attempted interference was unlawful. Under the second prong of *Noerr-Pennington*'s sham exception, using a government process as an "anti-competitive weapon," is an unlawful purpose. *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991). "A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Id*., citing *California Motor Transport Co.*, *supra*, 404 U.S. 508. The correspondence to the banks and government officials Defendants allege were *benign* and *incidental* to their IBIA appeal were either intended to starve the Tribe and its membership (by cutting off vital funding), or to chill the professional relationship of agencies working with Plaintiff. In any event, Defendants' activities towards Plaintiff are identical to those cited in *California Motor Transport* (putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition), of which the Supreme Court remanded for trial, finding them to be outside of *Noerr-Pennington* protection. *California Motor Transport, supra*, 404 U.S. at 512.

The sole purposes of the federal and state agency and bank letters were to shut down Plaintiff's receipt of federal funds and to access Plaintiff's bank accounts. As a result of Defendants' letter to Wells Fargo Bank, that bank filed an interpleader action. Plaintiff incurred thousands of dollars in attorneys' fees to respond to Wells' interpleader. Further, Defendants' tortious interference and harassment led to Plaintiff's prior counsel decision to stop representing Plaintiff. Defendants' actions therefore were designed to intimate and disrupt all aspects of Plaintiff's business dealings—from its bank accounts, to its retention of

professionals, to casting doubt on its recognized status by federal, state, and local governments.

In sum, as the IBIA is barred from hearing a Tribal enrollment dispute pursuant to Title 43 of the Code of Federal Regulations, section 4.330, subdivision (a), Defendants' petitioning activity, based on a tribal enrollment dispute, as a matter of law, is objectively baseless. Since Defendants' anticompetitive petitioning activity was akin to the activity denied protection in *California Motor Transport*, the *Noerr-Pennington* doctrine is inapplicable. This case should proceed past the pleading stage.

2. *At This Juncture Plaintiffs Lanham Act and State Trademark and State Claims are not Subject to Dismissal Because Discovery has not occurred Pursuant to Rule 56*

Defendants next argue Plaintiff's state law claims are barred by California's litigation privilege and its anti-SLAPP statute. While Plaintiff's state law claims may be attacked on these grounds, they are not subject to dismissal in the absence of discovery.

California's anti-SLAPP statute provides:

> "[A] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim[.]" Code Civ. Proc., § 425.16, subd. (b)(1).

The Ninth Circuit has held that this provision may be applied to state law claims that are asserted in federal court. *U.S. ex. rel. Newsham v. Lockheed Missiles and Space, Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999).

The analysis of an anti-SLAPP motion is a two-step burden-shifting process. First, defendant has the initial burden to establish that plaintiff's claims arise from an act in

furtherance of the defendant's rights of petition or free speech. *Browne v. McCain*, 611 F. Supp. 2d 1062, 1067 (C.D. Cal. 2009).

Second, if defendant meets its initial burden, the plaintiff is then charged with the burden of establishing, by competent and admissible evidence, a probability of prevailing on his claims at trial. *Id*. at 1067-68. The statute sets forth four categories of protected activity: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. Code Civ. Proc., § 425.16, subd. (e).

a). *Defendants Cannot Establish that the Correspondences Arise from Protected Activity*

Defendants fail to meet their threshold burden that their correspondences to federal and state agencies and California banks arise from protected activity taken in furtherance of its right to petition. Defendants cite no authority establishing that their correspondence which defamed Plaintiff is protected activity under the Anti-SLAPP statute. Further, Plaintiff's complaint was not filed to chill protected speech. It was filed because Defendants' actions harmed Plaintiff, and were unlawful acts done solely to inhibit third parties from doing business with Plaintiff—a direct competitor to Defendants' Brown Faction.

Further, although Defendants insist that these correspondences are protected under California Civil Code's litigation privilege, not all pre-litigation activities are provided protection from liability. *Edwards v. Centex Real Estate,* 53 Cal.App.4th 22, 29 (1977). ("Nevertheless, because the privilege does not attach prior to the actual filing of a lawsuit unless and until litigation is seriously proposed in good faith for the purpose of resolving the dispute, even a threat to commence litigation will be insufficient to trigger application of the privilege if it is actually made as a means of inducing settlement of a claim, and not in good faith contemplation of a lawsuit. This is a question of fact that must be determined before the privilege is applied.") In *Edwards* the Court denied defendants' claims of protection for pre-litigation correspondences because they were not contemplated in good faith and were only used for the purposes of effectuating a bargain. *Id.*

Here, as noted previously, Defendants petition to the Pacific Region and the IBIA could **not have been made in good faith** because IBIA regulations bar hearing Tribal enrollment issues. Although Defendants couch their claims as being "something other than enrollment," for the purposes of gaining the Pacific Region's and IBIA's attention, they **must** prevail on their enrollment dispute claims—they simply cannot effectuate their claims to be the Tribe's government absent a resolution of the enrollment matter that the IBIA and federal courts have previously determined is a non-justiciable intra-tribal matter. *Santa Clara Pueblo v. Martinez* 436 U.S. 49, 58 (1978). Hence, in the absence of good faith protected activity upon which to base Defendants' claims of privilege, no privilege exists under either the Civil Code or the Anti-SLAPP statute.

b). *Defendants Communications are Not Protected Pursuant to the Common Interest Privilege provided by Civil Code 47 Because Plaintiff can prove Actual Malice*

Civil Code section 47 provides: "A privileged publication or broadcast is one made: [¶] … [¶] (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested … ." Thus, it extends a conditional privilege against defamatory statements made without malice on subjects of mutual interest. (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1368 [7 Cal. Rptr. 3d 216].) If malice is shown, the privilege is not merely overcome, it never arises. (*Ibid.*) However, if the privilege does arise, it is a complete defense. (*Id.* at p. 1369.) In the case of the common interest privilege, malice cannot be inferred from the communication itself. (Civ. Code, § 48.) Moreover, the malice necessary to defeat a qualified privilege is "actual malice." Such malice is established by a showing that the publication was motivated by hatred or ill will toward the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights. (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413 [134 Cal. Rptr. 402, 556 P.2d 764].)

However, the lack of reasonable grounds requires more than mere negligence. Malice is shown only when the negligence amounts to a reckless or wanton disregard for the truth, so as to imply a willful disregard for, or avoidance of, accuracy. (*Noel v. River Hills Wilsons, Inc., supra,* 113 Cal.App.4th at pp. 1370-1371.)

In this case malice can be demonstrated by Defendants, who have been at the core of an intra-tribal dispute with Plaintiffs that has lasted several decades. In 1998, defendants hatred and ill will towards the family comprising the Garcia Faction of the Elem government resulted in multiple injuries, several shootings and the destruction of the Tribe's Class III

gaming facility. (see RJN, Ex. 10, October 13, 1995, Associated Press article). Prior to the 2014 tribal election, in 2011, defendants engaged in various activities challenging the Garcia Faction as the Elem Tribe's government. (RJN, Ex. 11, Memorandum Opinion, Pacific Regional Director, May 20, 2011). These actions by Defendants demonstrate hatred and ill will towards defendants, thus the common interest privilege under Civil Code 47 does not apply.

c). Plaintiffs Can Demonstrate Reckless Disregard for the Truth of the Correspondences Because the Brown's have stated Previously that their alleged "Election" was merely a Protest Election Not in compliance with Tribal law

Defendants have previously stated that the "election" upon which they base their Pacific Region and IBIA appeals and their entitlement to be recognized as the Tribe's government was in fact a *protest election* that did not meet the criteria of an election pursuant to the Tribe's constitution. (See RJN Ex. 12, Central California Agency Superintendent, Troy Burdick, Memorandum Opinion, dated October 23, 2015).

Superintendent, Troy Burdick, in his October 23, 2015 memorandum opinion reaffirming the Garcia faction's recognition as the Tribe's government, wrote extensively of the circumstances surrounding the November 8, 2014 Elem Tribal Election and why the Brown faction's purported election was ineffective under tribal law. Specifically, during a November 14, 2014 meeting with David Brown and Paul Steward, just a week and a half after the Tribe's November 8, 2014 tribal election, David Brown admitted that he was aware the election was not in accord with the Tribe's constitution and that it was a purported *mock election*. (RJN, Exhibit 12, Burdick Memorandum at p. 2). After exhaustive review by Burdick as recounted in his October 2015 memorandum, Burdick concluded that the Brown

election was not noticed in accord with the Tribe's constitution. In denying David Brown's appeal Superintendent Burdick stated:

> **"The authority to conduct tribal elections is provided in Article V Section 1, 2 of the Tribe's Constitution and Bylaws. The Protest Election held on the same day at Redbud Park was not conducted in accordance with the Tribe's constitution and Bylaws. The Notice of the November 8, 2014, election was noticed by Sarah Garcia, Secretary/Treasurer of the Elem Executive Committee and not issued for the purpose of a conducting a protest election at Redbud Park, Clearlake California. Moreover, the Election Notice provided the election was to be at Best Western El Grande Inn, Clearlake California, and the Agenda was included in the notice. The election notice was not subject to change the same day as the General Council meeting by unauthorized individuals based on internal tribal disagreements about who may or may not be eligible to vote. A review of the protest election showed that it was not properly noticed or executed within the Tribe's provisions.**
>
> Memorandum Opinion Appeal of David Brown, October 23, 2015, Superintendent, Troy Burdick at p.7.

As outlined above, although the Superintendent's Opinion on the David Brown appeal was made in October, 2015, the Brown's knew or should have known that at the time they held their *mock election* in Redbud Park, Clearlake, CA, that the election did not meet the requirements set forth in the Tribe's Constitution. Hence, neither their appeal to the Pacific Region or the IBIA was a good faith appeal. Further, their correspondences based on this mock election, was really a "Trojan horse" because its foundation is based again on a intra-tribal enrollment dispute of which neither the Pacific Region, the IBIA of this Court has jurisdiction. *Santa Clara Pueblo v. Martinez* 436 U.S. 49,58 (1978).

d). Plaintiff Has A Probability of Success on the Merits of Its Claims

Because an anti-SLAPP motion is typically brought at an early stage of the case, the Plaintiff's burden of establishing probability of success is not high. *Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.*, 137 Cal. App. 4th 1118, 1124 (2006). Indeed, probability in this context has been described as "a mere possibility of success[.]" *Id.* at 1069. Courts have determined that this requires plaintiff to "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment[.]" *Id.* (quoting *Navellier v. Sletten*, 29 Cal.4th 82, 88-89). Where an anti-SLAPP motion is brought in federal court and is based upon a plaintiff's alleged failure of proof, the court must analyze the motion under Rule 56, and therefore allow the parties to conduct sufficient discovery such that a summary judgment ruling is appropriate. *Carr v. Asset Acceptance, LLC*, 2011 U.S. Dist. LEXIS 89862, 2011 WL 3568338 *3 (E.D. Cal. 2011) (quoting *Rogers v. Home Shopping Network, Inc.*, 57 F.Supp.2d 973, 983 (C.D. Cal.1999)). Here, Defendants have not presented any evidence to show that Plaintiff does not have a probability of succeeding on the merits. Defendants merely state that a letter sent to Wells Fargo is privileged under *Neville v. Chudacoff*, 160 Cal.App.4th 1255 (2008). Yet, Defendant do not proffer evidence to dispute the probability of Plaintiff successfully prosecuting its multiple pendant state law claims—tortious interference with contract, fraud, trademark infringement and common law injury to business reputation. Even assuming that the conduct at issue was protected under the anti-SLAPP statute, Defendants' anti-SLAPP argument must be presented via Federal Rule 56 with admissible evidence, which they have not done. Dismissal of the state law claims based on the anti-SLAPP and litigation privilege is premature at the pleading stage. Further as established below, the state law trademark and

business reputation claims have a probability of succeeding on their merits and the motion to dismiss should be denied on this ground as well.

3. Plaintiff has Appropriately Pled Its Trademark/Business Reputation Claims

Defendants allege Plaintiff's Lanham Act and pendant state trademark claims should be dismissed for failing to state a claim. Dkt. 32, pp. 17-21; Dkt. 35, p. 23. Defendants allege the trademark claims fail because Plaintiff did not allege the mark was used in furtherance of the "sale of goods or services." Dkt. 32, pp. 17-18.

Instead of challenging the allegations in the Complaint *as they have been pled,* drawing all inferences in the Plaintiff's favor, Defendants have attempted to introduce other facts, and to draw inferences in their favor. Defendants' reliance on factual disputes shows that their motion to dismiss should be denied.

a). The Elem Mark Relates to Wide-Ranging Goods and Services

On or about January 10, 1949, the Elem Rancheria (previously Sulphur Bank Rancheria) was established by the United States government on behalf of the Tribe and its members. Since then, the Elem Tribe has been using its mark in commerce for years. Beginning in 1970, the mark has been published annually on the List of Indian Entities Recognized and Eligible to Receive Services From the Bureau of Indian Affairs as published in the federal register. (Exhibit 13, RJN, Federal Register / Vol. 77, No. 155 / Friday, August 10, 2012 / Notice). The mark is the Tribe's identity and it is used in its business relations, in its government-to-government relations with the United States, used to identify itself from other tribes across the nation and to distinguish itself from other tribes in Lake County,

California. The mark is used in relation to various programs that the Tribe uses to distribute funding and programs to its membership, represent itself externally to the public, and for purposes of receiving funds and economic development, including banking activities. (Declaration of A. Garcia, ¶¶ 4, 5).

Defendants' argument that their usurpation of the mark was not in furtherance of "the sale of goods or services" because they are not selling goods or services is not the law. Under established law, no actual goods or services need be required to properly plead a Lanham Act claim, only the potential to impact goods or services need be pled to satisfy the "in connection with goods and services" element of the Act. *People for the Ethical Treatment of Animals v. Doughtney*, 263.F.3rd 369, 371 (4th Cir. 2001).

b) Defendants' Use of the Elem Mark Satisfies the Use In Connection with "Goods and Services" element of the Act Even Where no Actual Use in Commerce Occurs

Defendants cite to numerous cases that allegedly stand for the proposition that Defendants' use of Plaintiff's mark was not in relation to the sale of goods or services in commerce. However, none of Defendants' cases impact Plaintiff's claims related to the *effect* of Defendants' use of Plaintiff's mark "on commerce," which has been held to satisfy the in connection with "goods and services" element of the Lanham Act even where no goods and services are actually used. Plaintiff's case should be viewed under the analogous lens of *People for the Ethical Treatment of Animals*, *supra*, 263.F.3rd 369.

In *PETA*, the Court held that defendant's use of the PETA mark to prevent consumers from conducting business with the true *PETA* mark-holder was sufficient for pleading Lanham Act purposes and defeating a motion for summary judgment. The Court reasoned

that the "in connection with goods and services" element of the Lanham Act did not require actual goods and services in commerce, and that the confusing *effect* on goods and services was sufficient. The *PETA* court reasoned: "[T]o use PETA's Mark 'in connection with' goods or services, [defendant] need not have actually sold or advertised goods or services on the www.peta.org website." *Id*. at 371. "Rather, [defendant] need only have prevented users from obtaining or using PETA's goods or services, or need only have connected the website to other's goods or services." *Id*.

Here, Plaintiff has pled that Defendants used its mark in an attempt to gain federal and state funds and funds from two California financial institutions. Plaintiff, as an Indian tribe, provides various services to its members—namely programs designed to enhance the economic development of its members. Under *PETA,* no actual use of goods and services by Defendants need occur, just the potential to confuse or obstruct members and the public at large from finding Plaintiff's services.

As set forth in Plaintiff's Exhibit 1 to its First Amended Complaint, which is Defendants' correspondence to various federal, state and California financial institutions, the correspondence demonstrates that Defendants used Plaintiff's mark to represent that they, and not Plaintiff, were the true Elem Tribe. Defendants' use of the Elem mark was not to distinguish themselves from Plaintiff, or to parody it (as in *Bosley Medical Institute v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005) (citations omitted)), but with the sole intent to broadcast to both tribal members and the public at large that Defendants, not Plaintiff, were the true owners of the mark. Such use is similar to defendant's use of PETA's mark—a use that the *PETA* court held was sufficient for the "in connection with goods and services"

element required to plead a Lanham Act claim. Defendants' trademark use also meets the essence of the purpose of the Lanham Act in avoiding confusion and deterring unfair competition. As such, Plaintiff has properly pled its Lanham Act claim. Defendants' motion to dismiss this claim should be denied.

c. Defendants' Use of the Elem Mark Exceeded Nominal or Fair Use and was More Than Necessary

Defendants also argue that their use of the mark is nominal, and/or fair use, and cite *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175-76 (9th Cir. 2010), to support their argument and inference that this defense may be decided in a motion to dismiss. Dkt. 32, pp. 17-18. The Court in the *Toyota* case, however, did not dismiss the complaint based on the lack of fair use of the plaintiff's mark, but rather struck down an overbroad injunction issued by the District Court. In *Toyota*, the defendant was using plaintiff Toyota Motor Sales, U.S.A.'s Lexus mark on its website, along with a copyright protected picture of a Lexus vehicle to sell Lexus vehicles. The court ruled that defendants were using the phrase "Lexus" as a name for their business of selling Lexus cars, not as a trademark for goods sold by Toyota. *Id.* The court stated: "[I]n cases where a nominative fair use defense is raised, we ask whether (1) the product was 'readily identifiable' without use of the mark; (2) defendant used more of the mark than necessary; or (3) defendant falsely suggested he was sponsored or endorsed by the trademark holder." *Id*. at 1177, citations omitted.

Here, Defendants' actions as alleged in the operative Complaint far exceed anything representing fair or nominal use. Defendants cannot allege that the Tribe is readily identifiable without use of the mark because no one would know who the Tribe was without

use of their name when conducting business and providing services. Additionally, it is one thing to use the words "Elem Indian Colony" as in reference to the Tribe's geographical area in Lake County; it is entirely another thing to use the words "Elem Indian Colony," as Defendants did to represent themselves as **the** Elem Tribal government.

Defendants also used the mark much more than necessary by representing themselves as the mark's owner. Defendants allege their use was minimal and merely used to distinguish themselves from Plaintiff. However, a review of Defendants' correspondences sent to federal and state agencies and state banking institutions, attached as Exhibit 1 to Plaintiff's First Amended Complaint, suggest the exact opposite: Defendants used the Elem mark at the top of their correspondence, in letterhead, specifically representing themselves as the mark's owner. Defendants' use infers they intended the governmental agencies, financial institutions, tribal members, and the public at large, to believe they were the duly elected Elem Tribal Council, and entitled to the accounts held in the institutions and to conduct business with the public and to distribute services to its members. In so doing, Defendants did not distance themselves from Plaintiff; they represented themselves **as** Plaintiff.[7] Defendants' use and abuse of the mark was expressly to cause confusion and goes to the very heart of the Lanham Act—protecting consumers and preventing unfair competition. In sum, because Defendants' use of the mark could effect those who might conduct business with the Tribe or its members, by confusing them, Plaintiff has properly pled its Lanham Act claim and trademark claims. Defendants' use was not nominal or fair and its motion to dismiss these federal and state trademark claims should be denied.

[7] As set forth in its Complaint, Plaintiff has been designated by the Department of the Interior as the sole government entity entitled to represent the Elem Tribe. Such representation entitles Plaintiff exclusive use of the Tribe's mark.

4. Plaintiff Has Adequately Pled Its RICO Claim But If It Has Not, Seeks Leave To Amend

Defendants argue Plaintiff, as required by Federal Rule of Civil Procedure 9(b), has not pled with sufficient particularity three elements of its RICO claim: 1) the predicate act of mail fraud; 2) a pattern of racketeering; and 3) cognizable injury. Dkt. 35, pp. 18-22., As to the predicate act of mail fraud, Defendants argue Plaintiff must allege facts alleging that Defendants defrauded the "banks" and "government agencies." Dkt. 35, p. 19. Defendants argue that Plaintiff must allege Defendants used the mail to defraud these non-parties. Defendants rely on *Apache Tribe of Okla v. Brown*, 2013 U.S. Dist. Lexis 114776 to make this argument. *Apache* concerned a RICO claim based on bank and wire fraud as well as mail fraud that sought to deceive the Department of Interior and a bank. *Id*. at *14-17. Plaintiff does not allege Defendants committed bank or wire fraud. To establish a predicate act of mail fraud, Plaintiff must allege a scheme or artifice to defraud or obtain money or property by false pretenses, representations, or promises, and use of the U.S. mails to execute the scheme. *Bacchus Indus, Inc. v. Arvin Indust., Inc.*, 939 F.2d 887, 892 (10th Cir. 1991).

Here, Plaintiff has alleged Defendants used the U.S. mail to make false pretenses by claiming they were the legitimate Tribal Council, when per the BIA, they were not, so that it could access money controlled by Plaintiff. Plaintiff has properly pled predicate act mail fraud in support of its RICO claim. Under *Apache, supra*, relied upon by Defendants, Plaintiff's racketeering theory does not require an allegation that Defendants defrauded

"third party" banks or governmental agencies. The parties that defrauded Plaintiff are the Defendants—not non-parties.

With regard to Plaintiff's allegations that it failed to specifically plead a pattern of racketeering, as stated in the First Amended Complaint, the racketeering activity began in November 2014 with the fake election and lasted through at least February 2015—some four months. Plaintiff is informed and believes Defendants continued their racketeering activity past February 2015 by falsely claiming they were the legitimate Tribal Council despite the BIA's determination that they were not. Plaintiff continues to conduct informal discovery to verify Plaintiff's post-February 2015 racketeering activity and intend to conduct formal discovery on this point. Plaintiff has sufficiently pled a pattern of racketeering that lasted four months, and if necessary, seeks leave to amend to allege more detail regarding the length and nature of Defendants' pattern of racketeering.

Lastly, Defendants claim Plaintiff has not alleged a cognizable injury. Plaintiff has pled a concrete harm in the attorneys' fees incurred to defend Wells Fargo's interpleader action. Further, since November 2014, Defendants' racketeering activity has caused Plaintiff to suffer other concrete financial losses in the form of the loss of services provided to Plaintiff by third parties. If necessary, Plaintiff seeks leave to amend its cognizable injury beyond its fees and costs incurred in defending the Wells Fargo interpleader. The motion to dismiss the RICO claim should be denied, or alternatively leave to amend should be granted.

C. Plaintiff should be Granted Leave to Amend to Correct any Pleading Deficiencies.

Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, "a party may amend its pleading only with the opposing party's written consent or the court's leave. This court

should freely give leave when justice so requires." The decision to grant leave is within the sound discretion of the court. Therefore, a sound reason must be apparent for the denial to amend. Unless a substantial reason exists to deny leave to amend the district's courts discretion is not broad enough to permit denial.

Defendants will not be prejudiced if the Court grants Plaintiff leave to amend. No scheduling order has been issued in this case. Although Plaintiff has filed a First Amended Complaint (Dkt. 28), it was filed pursuant to a stipulation between the parties because as the original complaint failed to include referenced attachments. The First Amended Complaint was not filed due to Plaintiff's delay, dilatory act, or failure to correct. *Leadsinger, supra*, 512 F.3d at 532 (citation omitted). Consistent with the liberal standard that applies to motions to amend under Federal Rule of Civil Procedure 15(a)(2), if the Court has identified any pleading deficiencies, justice requires that Plaintiff be allowed to amend.

V. CONCLUSION

For the reasons stated herein, Defendants' motions to dismiss should be denied. Alternatively, the Court should grant Plaintiff leave to amend to cure any pleading deficiencies.

Dated: September 12, 2016

DURAN LAW OFFICE

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