PAULA M. YOST (Bar No. 156843)
IAN R. BARKER (Bar No. 240223)
DENTONS US LLP
One Market Plaza, Spear Tower, 24th Floor
San Francisco, California 94105
Telephone: (415) 267-4000
Facsimile: (415) 267-4198
E-mail: paula.yost@dentons.com
ian.barker@dentons.com

Attorneys for Defendant CEIBA LEGAL, LLP

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 REPLY BRIEF SUPPORTING MOTION TO DISMISS AMENDED COMPLAINT [Fed. R. Civ. P. 12(b)(1), 12(b)(6)]

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

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

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ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

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DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

I. INTRODUCTION

As Plaintiff concedes, this action emanates from "an intra-tribal dispute . . . that has lasted several decades." (Plaintiff's Opposition to Motions to Dismiss ("Opposition") at 25:24-25.) This lawsuit was filed as the latest salvo by a faction of the Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria ("Tribe") led by Agustine Garcia (the "Garcia Faction" or "Plaintiff").[1] The suit is nothing but a bald effort to silence the Garcia Faction's political opposition, specifically a group that threatens the Garcia Faction's proclaimed authority to govern the Tribe and that is led by Chairman David Brown and represented by Ceiba Legal LLP (collectively the "Brown Faction"). After the Brown Faction brought a congressionally authorized challenge to Plaintiff's purported banishment of *every single* adult tribal citizen living on the Tribe's reservation (*see* related case *Adrian John Sr., et al. v. Stephanie Brown et al.*, Case No. 3:16-cv-02368-WHA (N.D. Cal. filed June 6, 2016)) — an unprecedented action that was taken without any due process for the targeted residents and that, if successful, literally would leave Elem Rancheria completely vacant — the Garcia Faction hastily filed this RICO suit in retaliation. The Garcia Faction's 36-page Opposition, which fails in any way to establish this Court's jurisdiction, let alone any plausible claim for relief, reveals this action for what it is — a political tactic to exhaust the resources of the Brown Faction and their legal counsel, in an effort to deter them from exposing the Garcia Faction's wrongful actions.

Plaintiff's gambit necessarily fails because only the Brown Faction's petition for habeas corpus can give this Court jurisdiction over a matter of tribal self-governance. *See* 25 U. S. C. § 1303. Outside the habeas context, this Court simply lacks the power to adjudicate claims arising out of an intertribal leadership dispute, jurisdiction the Garcia Faction concedes is "require[d]" to adjudicate each of its claims. (Opposition at 15:7-12.) As demonstrated in Ceiba Legal's moving papers, the Garcia Faction cannot meet its burden to show jurisdiction exists here. (*See* Ceiba Legal's Motion to Dismiss Amended Complaint ("Ceiba Legal's Motion") at 11:5-17:24.)

[1] Neither Ceiba Legal nor the Brown Faction concedes Plaintiff is, or governs, 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 and not the Tribe Plaintiff purports to govern.

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ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

Jurisdictional barriers aside, the Garcia Faction cannot state a claim for relief on any theory, and further amending the Amended Complaint cannot save it. Even if Defendants' petition right did not bar Plaintiff's claims (as discussed in the Individual Defendants' briefing), the Garcia Faction simply cannot state a RICO claim based on a few letters notifying banks and government agencies of this dispute and asking each to simply *preserve the status quo, and the Tribe's assets*, pending the dispute's lawful resolution. The Garcia Faction's claims, including its Lanham Act claim, all rest on the Brown Faction's attempt to inform third parties about the ongoing intratribal dispute, and necessarily fail as shown in Defendant Ceiba Legal's moving papers and the Individual Defendants' briefing, which Ceiba Legal incorporates by reference.

In the end, the Garcia Faction's Opposition presents no reason for the Court to further prolong this tactical litigation, which deserves dismissal with prejudice.

II. ARGUMENT

A. Resolving The Merits Requires Adjudicating A Tribal Leadership Dispute Over Which This Court Lacks Jurisdiction.

The Garcia Faction concedes that each of its claims "*requires* an analysis of" two questions: "1) were Defendants the 'Tribe'?" and "2) were Defendants the governing body of the Tribe?" (Opposition at 15:7-12 (emphasis added).) The Garcia Faction's Amended Complaint confirms that its claims all require the Court to decide whether the Brown Faction officials "were the duly elected government of the Tribe." (Amended Complaint, ¶ 12; *see also id.*, ¶¶ 17, 25, 27,[2] 36, 43[3], 58, 63, 68, 72; *see* Ceiba Legal's Motion at 15:7-25.) This concession and these allegations only underscore the obvious: This is a tribal leadership dispute over which this Court lacks jurisdiction. *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1181,1184-85 (E.D. Cal. 2009) (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

[2] Plaintiff's Amended Complaint has two paragraphs numbered 27. This and subsequent references are to the second paragraph 27.

[3] Plaintiff's Amended Complaint has two paragraphs numbered 43. This and subsequent references are to the first paragraph 43.

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ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

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 of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 766-67 (8th Cir. 2003). (*See* Ceiba Legal's Motion at 13:13-15:25.)

Although the Garcia Faction asserts that this Court "need not analyze and dissect the Tribe's constitution or other governing documents," it does not explain how the Court can decide whether the Brown Faction was, in the words of the Amended Complaint, "duly elected," without reference to the Tribe's laws. (Amended Complaint, ¶ 12.) In fact, determining the properly elected leadership of a tribe is quintessentially a tribal law dispute. *See, e.g.*, *In re Sac & Fox Tribe*, 340 F.3d at 763-64; *Timbisha*, 687 F. Supp. 2d at 1184-85 (resolving intratribal election dispute would require court to "consider tribal law as it relates to elections").

The Garcia Faction relies on *Miccosukee Tribe of Indians of Florida v. Cypress* ("*Cypress*") (Opposition at 13:3-15:2), which held that "to trigger the intratribal dispute doctrine, a case must present a genuine and non-frivolous question of tribal law." 814 F.3d 1202, 1209 (11th Cir. 2015). *Cypress* confirms this Court lacks jurisdiction here. On inapposite facts presented there, the Eleventh Circuit recognized that neither the complaint nor defendants' dismissal papers presented any genuine issue of tribal law bearing on whether a tribal chairman embezzled funds from his tribe, apart from "speculative assertion of undefined Tribal law and reference to a vague and seemingly errant statement" in the complaint about the scope chairman's authority. *Id.* at 1210. The court expressly distinguished the case before it from intratribal disputes the federal courts are "categorically precluded from addressing," such as "active disputes between competing factions claiming current leadership power." *Id.*

Here, in contrast to *Cypress*, resolution of an intratribal leadership dispute is not "speculative"; it is by the Garcia Faction's own admission "require[d]." (Opposition at 15:7-12.) Nor is the Amended Complaint's invocation of a tribal law issue "vague" or "errant"; it is pervasive. (Amended Complaint, ¶¶ 12, 17, 25, 27, 36, 43, 58, 63, 68, 72.) And the issue here is not the scope of a tribal official's authority potentially at issue in *Cypress*, but rather, in the Garcia Faction's own words, which faction "is the governing body of the Tribe" (Opposition at

15:7-12)—an issue this Court is "categorically precluded from addressing." *Cypress*, 814 F.3d at 1210.

Contrary to the Garcia Faction's assertion (Opposition at 11:19-22), this Court's inability to intercede in an intratribal leadership dispute is unaffected by certain federal officials' interim dealings with the Garcia Faction. The Garcia Faction falsely asserts that *Timbisha* is distinguishable because, in that case, "the BIA had not recognized one faction over the other." (Opposition at 12:22-25 (citing *Timbisha*, 687 F. Supp. 2d at 1175-78).) In fact, as here, the BIA had recognized one of the factions, and that decision was on appeal to the Interior Board of Indian Appeals ("IBIA") at the time of the *Timbisha* decision. 687 F. Supp. 2d at 1178, 1186. Likewise, in *In re Sac & Fox Tribe*, the Eighth Circuit dismissed claims against the unrecognized faction and nontribal entities under RICO as requiring "resolution of the internal tribal leadership dispute," even though the claims had been brought by the "*federally recognized* tribal council[]." 340 F.3d at 751, 763 (emphasis added).

Here, the federal government is yet to finally determine which faction it will recognize for government-to-government purposes. (*See* Declaration of Little Fawn Boland in Support of Ceiba Legal's Motion (Doc. 35-1), ¶¶ 17, 18; Declaration of Agustine Garcia in Support of Opposition to Motions to Dismiss (Doc. 45-1), ¶ 9.) In any event, the issue of which faction the BIA recognizes for government-to-government purposes is not identical to the issue upon which the Garcia Faction rests its claims: namely, which faction was "the duly elected government of the Tribe" as a matter of tribal law. (Amended Complaint, ¶ 12.) *See Timbisha*, 687 F. Supp. 2d at 1186 (distinguishing a request to "determine a Tribal Council for government-to-government purposes" from the jurisdictionally barred request "to interject [the court] into the internal affairs of the Tribe by making a determination on tribal elections").

In sum, the parties do not dispute that each of the Garcia Faction's claims "requires" resolution of which faction is the "duly elected" tribal government. (Opposition at 15:7-12; Amended Complaint, ¶ 12.) Because this Court lacks jurisdiction to resolve that question, the Amended Complaint should be dismissed with prejudice.

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

B. Deciding Whether The Garcia Faction Has Standing Separately Requires Adjudication Of An Intratribal Dispute.

The Garcia Faction does not explain how it can meet its burden to establish standing to sue the Brown Faction in the Tribe's name without this Court deciding which faction of the Tribe was duly elected under the Tribe's law. In *Timbisha Shoshone*, involving a civil suit while an election challenge was before the IBIA, the court concluded the intratribal doctrine prevented the plaintiff faction from "sustain[ing] their burden to demonstrate that they have standing to pursue this action." 687 F. Supp. 2d at 1184-85.

The Garcia Faction's reliance on the *Cypress* case is misplaced, as standing was not even discussed in that case, which was brought by the "undisputed current leaders of the Tribe." 814 F.3rd at 1205. Also of no help to the Garcia Faction is *Donovan v. Coeur d' Alene Tribal Farm*, which announced the rule that general statutes do not create federal jurisdiction over disputes about tribal self-governance, while opining that the "operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government." 751 F.2d 1113, 1116 (9th Cir. 1985). In contrast, the interpretation of tribal law to resolve "an election dispute concerning competing tribal councils" is a quintessential "non-justiciable intra-tribal matter." *In re Sac & Fox Tribe*, 340 F.3d at 763-64 (citing *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir.1983)). And of course, the Garcia Faction's mere pleading that it is the duly elected faction does meet its burden or remove the issue from the case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, the Garcia Faction's suit is separately barred because this Court must decide, but lacks jurisdiction to decide, whether the Garcia Faction has standing.

C. Resolving A Sovereign Immunity Defense Separately Requires Adjudication Of An Intratribal Dispute.

The Garcia Faction does not dispute that Ceiba Legal, and the majority of Individual Defendants, possess sovereign immunity if the Brown Faction was duly elected under tribal law. (Ceiba Legal's Motion at 17:1-11; Opposition at 16:13-23.) However, the intratribal dispute

doctrine prevents this Court from resolving that issue to decide whether the Tribe's sovereign immunity bars the Garcia Faction's claims. (Ceiba Legal's Motion at 13:13-15:6.)

The Garcia Faction's reliance on the *Ex Parte Young* doctrine is misplaced. First, *Ex Parte Young* cannot circumvent the intratribal dispute doctrine. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) (reading statute as not permitting suit against tribal official under *Ex Parte Young* "in the absence of clear indications of legislative intent" to interfere with tribal self-government). Second, *Ex Parte Young* at most permits suits for injunctive relief (*Big Horn Cty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000)), but the Amended Complaint seeks damages (Amended Complaint at 14:13-17). Thus, the Court's need, and jurisdictional inability, to resolve a sovereign immunity defense separately triggers the intratribal dispute doctrine.

D. The Garcia Faction Cannot State A RICO Claim.

1. The Garcia Faction Cannot Plead Predicate Mail Fraud.

Neither the Garcia Faction's Amended Complaint nor its opposition brief even attempt to enunciate a plausible theory by which the communications underlying its claims could be part of a scheme to defraud anyone. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face"). The communications all (i) expressly identify the dispute between the Garcia and Brown Factions and (ii) ask that the recipient banks and governmental entities preserve the status quo by immediately "freez[ing]" the Tribe's funds pending the dispute's resolution. (Amended Complaint, Ex. A at 2, 4-5.) A fraudster seeking to abscond with the funds would have no incentive to disclose the dispute or ask for a freeze. The Garcia Faction does not even hint at how such a communication could possibly lead to distribution of tribal funds to the Brown Faction without a determination that the Brown Faction is legally entitled to them. In short, the letters show the Brown Faction *sought to preserve Tribal assets, not abscond with them.*

Even if the Garcia Faction could enunciate a scheme by which communications to third parties plainly *warning* them of an intratribal dispute could plausibly result in a *release of funds*

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

to the faction providing the warning, the Garcia Faction cannot plead any attempt to defraud the entities that received the communications. *Apache Tribe of Oklahoma v. Brown*, 966 F. Supp. 2d 1188, 1194-95 (W.D. Okla. 2013) (dismissing RICO mail fraud claims with prejudice for failure to plead "injury to the recipient" of the communication, who were a government agency and a bank holding tribal funds). The Garcia Faction's attempt to distinguish *Apache Tribe* because it dealt with "bank and wire fraud as well as mail fraud" (Opposition at 34:12-13) is difficult to understand: *Apache Tribe* expressly rejected the tribal government's *mail fraud* claims because allegedly false statements to a bank and federal agency of the composition of a tribal governing body did not defraud those recipients. *Apache Tribe*, 966 F. Supp. 2d at 1194-96 (noting dispositive concession "that the Department's alleged reliance on false information did not cause injury *to the deceived party*" (emphasis added)).

2. The Garcia Faction Cannot Allege A Pattern Of Racketeering.

The Garcia Faction has not alleged, and cannot allege, closed-ended or open-ended continuity of mail fraud activity constituting a pattern of racketeering. Ignoring the authorities holding closed-ended continuity requires activity lasting more than a few months (Ceiba Legal's Motion at 20:20-26), the Garcia Faction simply reiterates that the conduct at issue lasted from the election in November 2014 to February 2015 (even though it fails to identify any alleged mail fraud before the January 22, 2015 correspondence attached to its complaint). (Opposition at 35:3-7; Amended Complaint, Ex. A.) Plaintiff then claims it 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." (Opposition at 35:7-9.) Even had this vague assertion been included in the Amended Complaint, it in no way suffices to plead a pattern of mail fraud, let alone with the particularity Federal Rule of Civil Procedure 9(b) requires. *See. e.g.*, *Ice Cream Distributors of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc.*, No. 09-5815 CW, 2010 WL 3619884, at *4 (N.D. Cal. Sept. 10, 2010), *aff'd*, 487 F. App'x 362 (9th Cir. 2012) (dismissing with prejudice amended RICO claims for failure to identify a pattern of criminal activity with particularity despite alleging false statements in 2004

and 2007 and pleading "the mode through which [defendant] made eleven alleged false statements between December, 2005 and March, 2006").

Nor does the Garcia Faction contend that the alleged mail fraud "by its nature projects into the future with a threat of repetition," to constitute open-ended continuity. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1527 (9th Cir.1995). Rather, the communications at issue all express the Brown Faction's commitment to use legal processes to resolve the dispute. (Amended Complaint, Ex. A at 2, 4-5.)

3. The Garcia Faction Cannot Identify A Cognizable Injury.

The Garcia Faction continues to erroneously rely on its alleged payment of attorneys' fees incurred to advocate its position to show a cognizable injury. (Opposition at 35:16-18.) It does so despite the uncontradicted authority holding that incurred legal fees are not an actionable injury under RICO. *Thomas v. Baca*, 308 F. App'x 87, 88 (9th Cir. 2009). The Garcia Faction asserts in its Opposition that it has suffered unspecified "other concrete financial losses in the form of loss of services provided to Plaintiff by third parties," but does not disclose what acts allegedly caused these "losses," which "third parties" are involved, and how Defendants' conduct allegedly caused any loss. (Opposition at 35:18-20.) Nor does the Garcia Faction ever explain why it did not identify these losses with particularity in its initial Complaint, its Amended Complaint, or even in its Opposition.

* * *

In the end, the Garcia Faction has not alleged an actionable RICO claim, let alone with particularity. Nor does the Garcia Faction dispute that its RICO conspiracy claim falls with its RICO claim. (Ceiba Legal's Motion at 22:22-27.)

The Garcia Faction simply fails to identify any allegations that could salvage his claims, even if permitted to amend its Amended Complaint once again. Thus, even assuming, for the sake of argument, this Court had jurisdiction to adjudicate claims resting on Tribal law, the RICO claims would be subject to dismissal with prejudice in any event. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

III. CONCLUSION

Plaintiff admits this lawsuit is part of "an intra-tribal dispute . . . that has lasted several decades" (Opposition at 25:24-25), and "*requires* an analysis of" which of two factions is the rightfully elected governing body of the Tribe (*id.* at 15:7-12 (emphasis added)). That is the end of the inquiry, requiring dismissal for lack of jurisdiction to adjudicate what amounts to an internal tribal leadership dispute. In addition to this very basic jurisdictional barrier to Plaintiff's lawsuit, Plaintiff has yet to even hint at a plausible theory of recovery based on communications by which Defendants sought to preserve and protect the Tribe's assets, pending resolution of the ongoing leadership dispute. Leave to further amend Plaintiff's deficient pleading would be futile. It also would simply fuel a retaliatory lawsuit that amounts to nothing more than the Garcia Faction's continued and meritless campaign of harassing its political opponents. Accordingly, Defendant Ceiba Legal respectfully requests that the Court dismiss the Garcia Faction's Amended Complaint with prejudice.

Dated: September 27, 2016

Respectfully submitted,

DENTONS US LLP

By: /s/ Ian R. Barker
Paula M. Yost
Ian R. Barker

Attorneys for Defendant CEIBA LEGAL, LLP

101557833

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2016, a true and correct copy of:

CEIBA LEGAL, LLP'S REPLY BRIEF SUPPORTING MOTION TO DISMISS AMENDED COMPLAINT [Fed. R. Civ. P. 12(b)(1), 12(b)(6)]

was served on all parties' counsel through CM/ECF.

Dated: September 27, 2016.

/s/Ian R. Barker
IAN R. BARKER

101557833

DENTONS US LLP
ONE MARKET PLAZA, SPEAR TOWER, 24TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 267-4000