MICHAEL V. BRADY (SBN 146370)
MICHAEL E. VINDING (SBN 178359)
BRADY & VINDING
400 Capitol Mall, Suite 2640
Sacramento, CA 95814
Telephone: (916) 446-3400
Facsimile: (916) 446-7159
mbrady@bradyvinding.com

Attorneys for Individual Defendants Michael Hunter, Anthony Steele, David Brown, Adrian John, Natalie Sedano Garcia, Kiuya Brown

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

INDIVIDUAL DEFENDANTS' REPLY BRIEF SUPPORTING MOTION TO DISMISS FIRST AMENDED COMPLAINT [Fed. R. Civ. P. 12(b)(6)]

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

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INTRODUCTION

As noted at the outset of Individual Defendants' Motion to Dismiss, Plaintiff's "First Amended Complaint for Damages and Injunctive Relief" ("First Amended Complaint") infringes upon the Individual Defendants' constitutional right to petition the United States government for redress under the First Amendment and each claim for relief, whether based on federal or state law, is barred by the *Noerr-Pennington*[1] doctrine and/or California law.[2] The petitioning activity at issue here is the appeal of a disputed tribal election that occurred in November 2014. In connection with that dispute a letter was sent on February 6, 2015 to Wells Fargo Bank notifying the bank of the pending dispute, requesting the bank to freeze the Tribe's assets and not distribute funds to either faction during the pendency of the dispute.[3] The election dispute was appealed to the Interior Board of Indian Appeals ("IBIA") on December 31, 2015, where it currently resides.[4] Plaintiff is an interested party to that appeal.

Plaintiff argues that *Noerr-Pennington* does not apply because the petitioning activity is a sham, i.e. objectively baseless and brought for an unlawful purpose. ("Plaintiff's Opposition to Defendants Ceiba Legal and Individual Defendants Motions to Dismiss," ("Opposition") at pp. 18-21.) But the petitioning activity upon which Plaintiff hangs its entire argument is not the election dispute referenced in the First Amended Complaint. Instead, Plaintiff latches onto a purported tribal disenrollment that occurred in March, 2016,[5] well after the events described in the First Amended Complaint, and proceeds to demonstrate why an appeal of the disenrollment dispute is objectively baseless. The issue of disenrollment is never even mentioned in the First Amended Complaint (or, understandably, the Motion to Dismiss). The appeal pending before the IBIA is not

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1 *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1964).

2 All subsequent references are to the California Codes unless indicated otherwise.

3 Declaration of Little Fawn Boland in Support of Ceiba Legal, LLP's Motion to Dismiss Amended Complaint [Fed. R. Civ. P. 12(b)(1), 12(b)(6)], at ¶ 7.

4 Declaration of Little Fawn Boland in Support of Ceiba Legal, LLP's Motion to Dismiss Amended Complaint [Fed. R. Civ. P. 12(b)(1), 12(b)(6)], at ¶ 17 and ¶ 18 and Exhibit I thereto.

5 Declaration of Little Fawn Boland in Support of Ceiba Legal, LLP's Motion to Dismiss Amended Complaint [Fed. R. Civ. P. 12(b)(1), 12(b)(6)], at ¶ 19.

a disenrollment dispute.[6] The Court should recognize Plaintiff's sleight of hand for what it is and, more importantly, for what it tries to hide: Defendants' conduct in connection with the disputed election is exactly the sort of petitioning activity protected by *Noerr-Pennington* and state law.

In addition to the authorities below, the Individual Defendants incorporate each of the arguments Ceiba Legal, LLP's raises in its "Reply Brief Supporting Motion to Dismiss Amended Complaint."

A. *Noerr-Pennington* Commands Dismissal of the First Amended Complaint.

Plaintiff acknowledges that *Noerr-Pennington* applies unless it can be demonstrated that the underlying petitioning activity is "a sham and objectively baseless litigation, brought for an unlawful purpose" citing *Sosa v. DIRECTV, Inc.,* 437 F.3d 923 (9th Cir. 2006). (Opposition at p. 18.) But then, in a startling shift, Plaintiff alleges that the petitioning activity at issue in the instant case is tribal disenrollment.

> 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*. *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 enrollment. This appeal has zero chance of success because the IBIA is prohibited from reviewing tribal enrollment disputes - thus rendering the appeal "objectively baseless."

(Opposition at p. 19:16-23.) (Footnote omitted, emphasis added.)

Leaving aside Plaintiff's mischaracterization of the IBIA's jurisdiction and when the purported disenrollments were appealed to the BIA - it was March 2016, not "early 2015"[7] - Individual Defendants never even mentioned disenrollment in their Motion to Dismiss. This was for good reason because Plaintiff's First Amended Complaint never mentioned it either. In fact, the word "disenrollment" can be found nowhere in the First Amended Complaint. The issue as framed by Plaintiff in the First Amended Complaint was confined solely to Defendants' actions

[6] Declaration of Little Fawn Boland in Support of Ceiba Legal, LLP's Motion to Dismiss Amended Complaint [Fed. R. Civ. P. 12(b)(1), 12(b)(6)], at ¶ 17 and ¶ 18 and Exhibit I thereto.

[7] Declaration of Little Fawn Boland in Support of Ceiba Legal, LLP's Motion to Dismiss Amended Complaint [Fed. R. Civ. P. 12(b)(1), 12(b)(6)], at ¶ 19.

taken in connection with the November 2104 tribal election. (See First Amended Complaint, ¶¶ 10-17.) The letters to federal agencies and private banks all occurred between November 2014 and February 2015 as did any alleged damages they might have caused. (Opposition at 35:3-7.) Plaintiff sent the Disenrollment Notice of Default to 45 tribal members on June 2, 2016.[8]

Read plainly, the First Amended Complaint is about activities that occurred in connection with a tribal election held in 2014, not purported tribal disenrollment that occurred in 2016. Individual Defendants' Motion to Dismiss is about, among other things, application of the *Noerr-Pennington* doctrine to these activities. Plaintiff's Opposition does not even attempt to argue that the underlying election dispute pending before the IBIA is a sham proceeding, because it cannot. The Court should treat Plaintiff's failure to address the point as concession of the point and hold that *Noerr-Pennington* bars all of Plaintiff's claims for the reasons articulated in Individual Defendants' original motion.

Under the *Noerr-Pennington* analytical framework, where there had been no showing that the underlying proceeding is objectively baseless, the Court does not engage in the analysis of whether the disputed activities are being brought for improper purposes. (*Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.,* 508 U.S. 49, 60-61 (1993).) Nevertheless, Plaintiff argues that Individual Defendants' acts in the instant case are "identical" to those cited in *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508 (1972). A cursory review of the facts in that case demonstrates that they are not even close. In *California Motor Transport Company* the charge was that:

> . . . the petitioners conspired to monopolize trade and commerce in the transportation of goods in violation of the antitrust laws. The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights. These activities, it is alleged, extend to rehearings and to reviews or appeals from agency or court decisions on these matters.
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> More critical are other allegations, which are too lengthy to quote, and

[8] Declaration of Little Fawn Boland in Support of Ceiba Legal, LLP's Motion to Dismiss Amended Complaint [Fed. R. Civ. P. 12(b)(1), 12(b)(6)], at ¶ 24.

> which elaborate on the 'sham' theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners became "the regulators of the grants of rights, transfers and registrations' to respondents - thereby depleting and diminishing the value of the business of respondents and aggrandizing petitioners' economic and monopoly power.

(*California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 509-510 (1972) (citation omitted).)

The holding was that "massive, concerted and purposeful activities" calculated to harass and deter competitors from having free and unlimited access to the agencies and the courts constituted an improper purpose. (*Id.* at 515.) The handful of letters at issue in the instant case, only one of which was acted upon - the one to Wells Fargo - does not come close to the facts or holding of *California Motor Transport Company v. Trucking Unlimited.*

No amount of amendment can save the First Amended Complaint. All seven causes of action suffer from the same defect, each is based upon activity that is protected by *Noerr-Pennington* and the First Amendment. The First Amended Complaint must be dismissed with prejudice.

B. The State Law Causes of Action Must Be Dismissed under CCP 425.16 and Civil Code section 47.

In addressing the state law privileges Plaintiff again hides behind the disenrollment straw man it has created. So, for example, on page 24 of the Opposition Plaintiff breathlessly argues that Individual Defendants' claims of privilege under CCP 425.16 and Civil Code section 47 fail because appeal of the disenrollment issue to the BIA was not brought in good faith. (Opposition at p. 24:23-25.) That might be an argument in another case but it has no relevance to this case which is about a disputed election that occurred 17 months before the purported disenrollment. Nowhere does Plaintiff allege that Individual Defendants have pursued their appeal of *that* issue in bad faith or that pursuit of the election dispute appeal is not protected activity. Again, Plaintiff effectively concedes the point by not addressing it.

Plaintiff's claim that Defendants' communications to Wells Fargo are not protected by

Civil Code section 47 because of malice does not survive close scrutiny. As noted by Plaintiff, "Malice is shown only when the negligence amounts to a reckless and wanton disregard for the truth so as to imply a willful disregard for, or avoidance of accuracy." (Opposition, p. 25:19-23 (citation omitted).) A fair reading of the letter to Wells Fargo[9] shows an honest description of the dispute in question without any misrepresentation of the truth, much less malice.

Lastly, Individual Defendants have never referred to the November 2014 election as anything other than lawful under the Tribe's Constitution. The statement "[s]pecifically, 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" is patently false. The exhibit submitted by Plaintiff to support the statement is the Superintendent's Memorandum. (RJN, Exhibit 12, Burdick Memorandum at p. 2.) Presumably Plaintiff assumed this Court would not read the exhibit.

The Superintendent's letter shows that in actuality he met separately on November 14, 2014 with David Brown and a tribal member named Richard Steward. The memorandum states that "Mr. Brown stated that the November 8, 2014 election is official, and he is requesting the BlA to recognize the newly elected executive committee. He claims that they followed all the election procedures in the Tribe's constitution." (RJN, Exhibit 12, Burdick Memorandum at p. 2-3.)

Even if the Burdick Memorandum claims that Richard Steward, an elder tribal member entrusted to hold the sign-in sheets and ballots, said the election was a protest on November 12, 2014, the same memo shows that "[o]n November 14, 2014, Richard Steward followed up his meeting with the Superintendent of November 12, 2014, with a letter stating that the majority of the qualified voters request that BIA take one of the following actions: recognize the results of the protest election *which was conducted in accordance with the Tribe's constitution* so as to not delay federal action mandates." (RJN, Exhibit 12, Burdick Memorandum at p. 3) (emphasis added).)

In any event, it does not matter that an elder tribal member, Richard Steward, may have

[9] The letter is attached as page 4 to Exhibit A to the First Amended Complaint.

used words characterizing the election as a "protest." The Defendants believe the election to be valid. The Defendants have fully briefed why the election was "real" to the Superintendent, the Pacific Regional Director, and the IBIA with declarations and evidence.[10] This "protest" election angle relied upon by the Superintendent was clearly not persuasive to the Pacific Regional Director because he did not mention the protest/mock election justification for denying recognition of the results and instead focused on the notice for the election. (RJN, Exhibit 4, Pacific Regional Director Decision at pp. 1-4.) Accordingly, the IBIA is not considering this argument on appeal because the Pacific Regional Director disregarded it. So too should this court.

C. Plaintiff Can Not Demonstrate a Probability of Success on the Merits.

Plaintiff misses the point in its argument beginning on page 27 that Individual Defendants must provide admissible evidence, via Federal Rule 56, to show that Plaintiff does not have a probability of succeeding on the merits. If *Noerr-Pennington* or Civil Code section 47 applies there is no likelihood of success on the merits no matter what evidence might be generated. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 155, 1262, n.7; *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 6.)

D. Plaintiff Concedes Defendants did not use any Trademark in Connection with a Sale of Goods or Services, as Required in this Circuit.

In the Ninth Circuit, trademark liability can only attach where the defendant uses a mark "in connection with a sale of goods or services." (*Bosley Med. Inst., Inc. v. Kremer,* 403 F.3d 672, 677 (9th Cir. 2005).) Plaintiff does not contend that it has alleged, or can allege, Defendants used any mark "in connection with a sale of goods or services." Instead, Plaintiff suggests that out-of-circuit authority provides that a sale of goods or services is not required where the defendant "prevented users from obtaining or using [plaintiff]'s goods or services." (Opposition at 31:3-8 quoting *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 365 (4th Cir. 2001) ("*PETA*").) Plaintiff fails to disclose that the Ninth Circuit has rejected the rule Plaintiff tries to glean from *PETA*: "To the extent that the *PETA* court held that the Lanham Act's

[10] *See generally* Declaration of Little Fawn Boland in Support of Ceiba Legal, LLP's Motion to Dismiss Amended Complaint [Fed. R. Civ. P. 12(b)(1), 12(b)(6)].

commercial use requirement is satisfied because the defendant's use of the plaintiff's mark as the domain name may deter customers from reaching the plaintiff's site itself, we respectfully disagree with that rationale." (*Bosley Med. Inst., Inc.*, 403 F.3d at 679; *Aviva USA Corp. v. Vazirani*, 902 F. Supp. 2d 1246, 1259 (D. Ariz. 2012), *aff'd*, 632 F. App'x 885 (9th Cir. 2015) ("The Ninth Circuit, however, disagreed with *PETA*'s 'over-expansive' approach . . . and instead adopted a narrower view of the commercial use requirement."); *see also Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1053-54 (10th Cir. 2008) (adopting Ninth Circuit's reading of *PETA* and holding "the defendant in a trademark infringement and unfair competition case must use the mark in connection with the goods or services of a competing producer, not merely to make a comment on the trademark owner's goods or services").)

Moreover, Plaintiff does not explain how it could state a claim for relief even under the repudiated reading of *PETA* Plaintiff advances. Plaintiff claims it "provides various services to its members—namely programs designed to enhance the economic development of its members." (Opposition at 31:10-13.) But Plaintiff does not explain how it can plausibly allege that Defendants' communications to banks and government agencies would ever reach, let alone confuse, members of the Tribe and thereby prevent them from obtaining any services Plaintiff offers. (*See PETA*, 263 F.3d at 365-66 (infringement requires a showing of likelihood of confusion as to source or sponsorship of goods or services).) Further distinguishing this case from *PETA*, the defendant's infringing website in that case "provide[d] links to more than 30 commercial operations offering goods and services." (*PETA*, 263 F.3d at 366.) Plaintiff alleges, and the correspondence at issue reveals, no such connection to commercial offering of goods and services. (First Amended Complaint, Ex. A.) Thus, Plaintiff cannot state a Lanham Act claim under its repudiated reading of *PETA*, let alone under the law of this Circuit.

E. Defendants Fairly Used the Tribe's Name as Required to Inform Third Parties about the Ongoing Dispute.

Plaintiff's trademark claims fail for the independent reason that Defendants' expression of their position on the pending leadership dispute at most constituted nominative fair use. A fair use defense depends on "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." (*Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175–76 (9th Cir. 2010).)

As to the first element of the nominative fair use defense, Plaintiff concedes the Tribe is not "readily identifiable without the use of the mark" (Opposition at 32:26-33:1), meaning Defendants had to use the Tribe's name identify the dispute. Plaintiff contends that the second element is not satisfied because Defendants used more of the mark than was necessary and "represented themselves as Plaintiff" by including the name of the Tribe at top of some of the correspondence. (Opposition at 33:10-19.) Plaintiff, however, ignores that use of a competing mark without a plaintiff's distinctive stylization or logo is consistent with the fair use doctrine. (Individual Defendants' Motion at 14:24-15:4.) Plaintiff does not contend, and presumably cannot allege, that anything in the Brown Faction's correspondence in any way resembled Plaintiff's use of any mark. Rather, as Plaintiff acknowledged, the correspondence simply included a "readily identifiable" portion of the Tribe's name as necessary to identify and disclose the intratribal dispute.

Under the third nominative fair use element, the correspondence in no way suggested the Plaintiff faction sponsored or endorsed the Brown Faction. Ignoring the actual content of the correspondence, Plaintiff asserts that "Defendants did not distance themselves from Plaintiff; they represented themselves **as** Plaintiff." (Opposition at 33:17-19 (Plaintiff's emphasis).) In fact, significantly, the correspondence expressly disclaimed any connection to the Plaintiff faction "being led by Augustine Garcia." (First Amended Complaint, Ex. A at 2-5.) (*See Toyota Motor Sales, U.S.A., Inc.*, 610 F.3d at 1182.) Moreover, the correspondence actually criticized the Plaintiff faction as having "no right to conduct business or represent the tribe" (First Amended Complaint, Ex. A at 2-5), which is sufficient to establish as a matter of law that Defendants did not suggest the Plaintiff faction sponsored or endorsed Defendants' message. (See Individual Defendants' Motion at 21:19-22:1; see, e.g., *Architectural Mailboxes, LLC v. Epoch Design*, LLC (S.D. Cal. Apr. 28, 2011) No. 10CV974 DMS CAB, 2011 WL 1630809, at *3 (granting motion to dismiss based on nominative fair use where defendant's negative statements and criticism dispelled any "affiliation, connection or sponsorship" and "dr[ew] a clear distinction between its products

and those of Plaintiff").)

Thus, Plaintiff's trademark claims separately fail because the First Amended Complaint and its exhibit establish that Defendants possess a nominative fair use defense.

CONCLUSION

For the foregoing reasons the First Amended Complaint should be dismissed with prejudice.

Respectfully submitted.

Dated: September 27, 2016

BRADY & VINDING

By: s/Michael V. Brady
MICHAEL V. BRADY
Attorneys for Individual Defendants Michael Hunter, Anthony Steele, David Brown, Adrian John, Natalie Sedano Garcia, Kiuya Brown

CERTIFICATE OF SERVICE

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

INDIVIDUAL DEFENDANTS' REPLY BRIEF SUPPORTING MOTION TO DISMISS FIRST AMENDED COMPLAINT [Fed. R. Civ. P. 12(b)(6)]

was served electronically through CM/ECF.

Dated: September 27, 2016

/s/ Michael V. Brady
Michael V. Brady