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

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' MOTION FOR ATTORNEYS' FEE AWARD

Date: January 12, 2017
Time: 8:00 am
Courtroom: 8
Judge: Hon. William H. Alsup

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Plaintiff ELEM INDIAN COLONY OF POMO INDIANS OF THE SULPHUR BANK RANCHERIA, a federally-recognized Indian tribe (the "Tribe"), submits the following opposition to the Motion for Attorneys' Fees Award (Dkt. No. 70) filed by Defendants CEIBA LEGAL, LLP ("Ceiba") and MICHAEL HUNTER, ANTHONY STEELE, DAVID BROWN, ADRIAN JOHN, PAUL STEWARD, NATALIE SEDANO GARCIA, KIUYA BROWN (for ease of reference these seven Defendants are referred to collectively herein as "Individual Defendants").

I. INTRODUCTION

Defendants' request for attorneys' fees and costs exceeds $390,000. This is unreasonable. It should be denied. The nearly $400,000 in fees and costs is for work on a case that was dismissed at the pleading stage. Defendants' nearly 700 hours' worth of work from three law firms amounts to 17.5 weeks (40-hour work week) of legal services to file two law and motion filings.[1] Defendants' motion is an unjustified windfall. The instant motion fails for two reasons.

First, the Tribe's sovereign immunity—which has not been abrogated or waived—precludes an award of any fees. Absent an effective waiver, Defendants cannot recover attorneys' fees against Plaintiff.

Second, the instant motion should also be denied because Defendants have not (and cannot) make a showing that any fees are recoverable under either the Lanham Act or California's anti-SLAPP statute (California Code of Civil Procedure § 425.16). Fees are not recoverable under the Lanham Act because this case is not "exceptional" within the meaning of 15 U.S.C. § 1117(a) (*i.e.*, it was not groundless, unreasonable, vexatious, or pursued in bad faith.) And fees are not recoverable under California's anti-SLAPP statute because Defendants never brought any motion under California Code of Civil Procedure § 425.16, nor were they prevailing parties on the same. "Under section 425.16, subdivision (c), only a '*prevailing defendant on a special motion to strike*' may recover attorney fees and costs. (Italics added.) This statutory language is unambiguous, and makes the filing of a viable anti-SLAPP motion a

[1] Two motions to dismiss (Dkt. Nos. 32, 35) and two reply briefs in support of the motions to dismiss (Dkt. Nos. 51, 52), and the instant motion (Dkt. No. 70.)

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prerequisite to recovering any fees and costs. As a matter of logic, a defendant must file a special motion to strike in order to prevail on one." *S.B. Beach Properties v. Berti*, 39 Cal. 4th 374, 379 (2006).

If the instant motion is not denied outright, any award to Defendants should be greatly reduced as the request is unreasonable, excessive and a windfall. By way of example, Defendants seek fees for attorneys' time allegedly in excess of 161 hours related to the instant motion for fees alone, and more than 139 hours related to mediations and settlement proceeding that were related to other matters and, in any event, did not result in any settlement of this or other matters.

If the Court does not agree with the Tribe's three threshold arguments—sovereign immunity, the inapplicability of the Lanham Act, and the inapplicability of the anti-SLAPP statute—all of which warrant denial of Defendants' motion, then the Tribe requests that the Court award Defendants no more than $53,600. This is the amount the Tribe paid in attorneys' fees to defend the Wells Fargo interpleader that precipitated this case, coupled with the Tribe's attorney fees in defending this entire case through December 8, 2016.[2] While Defendants failed to provide *any* documentary support of the work allegedly performed (*i.e.*, the actual attorneys' bills) other than declarations setting forth block amounts of time, reducing the fee award to no more than $53,600 is also justified by the fact that on its face it was unreasonable for the Defendants' counsel to expend over 600 hours in the defense of a case which never got past the pleadings, and lasted less than six months.

II. FACTUAL BACKGOUND

A. The Tribe brought this action in good faith to protect its right to self-governance

The dispute that predicated the instant suit has been set forth at length in the record. The status of the parties' dispute over the leadership of the tribal government, and the legitimacy of

[2] The Tribe's attorneys' fees incurred in defending the interpleader were $7,261 from Rapport & Marston and $11,270 from Clement, Fitzpatrick & Kenworthy, and Anthony Cohen. [Decl. A. Garcia, ¶ 10.] Compared to Defendants' counsel, through December 8, 2016, the Tribe's counsel only expended 140.3 hours in prosecuting this *entire* action; including drafting the complaint, attending ADR proceedings, and opposing the motion to dismiss. [Decl. A. Garcia, ¶ 13.] This equals $35,075—140.3 hours at $250 an hour. [Decl. A. Garcia, ¶ 13.] Collectively, these three amounts total $53,606.75.

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the Tribe's current council, bears repeating, albeit in cursory fashion. The instant dispute traces itself back to at least 2011, when Tribe member Richard James Steward challenged current Garcia Faction member Sarah Garcia's status as Secretary/Treasurer of the Tribe's Executive Committee. [Decl. A. Garcia, ¶ 4, Ex. A, Interior Board of Indian Appeals, *Steward v. Pacific Regional Director*, p. 61 IBIA 201, ¶ 2, fn. 7.] On at least four occasions in 2015, the United States Department of Interior, Bureau of Indian Affairs determined that the Tribe's Garcia Faction was the recognized Executive Committee for purposes of government-to-government relationships: March 9, 2015 (letter from Superintendent Troy Burdick to Augustin Garcia); March 12, 2015 (letter from Superintendent Troy Burdick to attorney Little Fawn Boland); October 23, 2015 (United States Government memorandum); and November 20, 2015 (Bureau of Indian Affairs, Pacific Regional Office, decision on notice of appeal). [Decl. A. Garcia, ¶ 5, Exs. B, C, D, E, attached thereto.]

While the Tribe does not dispute that Defendants have filed an appeal with the IBIA which challenges the current Tribal Council, there can also be no dispute that the current Tribal Council has—time and time again—been found to be legitimate by the Bureau of Indian Affairs. BIA. Specifically, the Bureau of Indian Affairs has stated: "**The BIA reviewed both election processes of November 8, 2014. The review showed that the election chaired by incumbent Chairman Nathan Brown II, was properly noticed and conducted within the provisions of the Tribe's constitution. The review of the available election information submitted by Mr. Brown and Mr. Steward for the 'protest' election was not properly noticed or executed within the provisions of the Tribe's constitution**." [Decl. A. Garcia, ¶ 6, Ex. D, attached thereto, p. 1, ¶ 3.] The BIA then recognized Agustin Garcia, Stephanie Brown, Sarah Garcia, Leora Brown, and Nathan Brown as the properly noticed and elected Executive Committee for the Tribe. [*Id*., p. 6, #11, and subsequent paragraph.] Simply put, the Brown Faction is not the legitimate Tribal Executive Committee. [Decl. A. Garcia, ¶¶ 7-8.]

With the incessant attacks on the Tribe's lawful government, the Tribe brought this action in good faith as a legitimate attempt to protect itself from Defendants' repeated attempts to

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undermine the legitimate exercise of Tribal self-determination. [Decl. A. Garcia, ¶ 12.] It was not brought in bad faith for any improper purpose. [*Id*.]

B. Procedural posture of this action and the instant motion

The Tribe filed this action on June 6, 2016. [Dkt. No 1.] Then, by way of the parties' stipulation, the Tribe filed its amended complaint on August 3, 2016. [Dkt. No. 28.] Three weeks later, on August 24, 2016, Ceiba and the Individual Defendants both filed motions to dismiss the Tribe's amended complaint. [Dkt. Nos. 32, 35.] Thereafter, the parties participated in settlement efforts, including informal settlement discussions, mediation, and a settlement conference. [Decl. Garcia, ¶ 15] The settlement discussions included as many as four matters: 1. this case; 2. a habeas corpus case; 3. an IBIA appeal; and 4. a state county case in Lake County Superior Court. [*Id.*, ¶ 14.] The parties were unable to settle this case, or any of the three other matters. [*Id.*, ¶15.]

On September 12, 2016, the Tribe filed its opposition to Defendants' motions to dismiss [Dkt. No. 45], and on September 27, 2016, Defendants filed their reply briefs [Dkt. Nos. 51, 52]. On November 3, 2016 the Court issued an order granting Defendants' motions to dismiss without leave to amend [Dkt. No. 63] and entered final judgment in Defendants' favor on the same day [Dkt. No. 64].

In all, the merits of this action were litigated for less than five months and only two motions to dismiss were filed by Defendants before judgment was entered. In those five months, neither Ceiba nor the Individual Defendants filed any other motions—including, importantly, any motion to strike under California Code of Civil Procedure section 425.16.

Defendants jointly filed the instant fees motion on November 30, 2016. The motion itself is 16 pages long, and Defendants filed 19 written pages of supporting declarations. [*See* Dkt. Nos. 70, 71, 72, 74.]

C. Fees claimed

1. Before the instant fee motion

The Defendants in this action were represented by three firms: Dentons US LLP; Brady & Vinding; and Ceiba Legal, LLP. Over the five-month span the pleadings in this action were

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pending (that is, time spent on tasks other than the instant fees motion) these firms claim to have expended 473.9 hours in defense of the case.

Of those 473.9 hours, Defendants' counsel claim to have spent 322.8 hours related to preparing and arguing the motions to dismiss. All of that work yielded a total of 74 written pages of court filings: 64 written pages of memoranda, an 8-page declaration, and two written pages requesting judicial notice. The declarations Defendants have submitted in support of the instant fees motion do not delineate how much time was spent on discreet tasks, such as how much time was spent drafting each document or researching each legal issue; instead the level of description provided is, *e.g.*, more along the lines of: 57.7 hours (at $550 per hour) spent "Developing strategy for response to the complaint; preparing and revising motions to dismiss and supporting pleadings; researching, supervising research, and reviewing authority supporting motions to dismiss" [Dkt. No. 71, ¶ 11 (Declaration of I. Barker).]

The 151.1 hour balance of these 473.9 hours was spent on other matters unrelated to the preparation of the motions to dismiss, such as attending settlement proceedings (involving issues presented in this action and three other pending disputes between the parties), as well as procedural and case management issues.

2. Fees claimed by Defendants' counsel spent prosecuting the instant fee motion

According to the declarations in support of the instant motion, Defendants' counsel has so far expended 161.7 hours of attorney time bringing the instant motion, much of it duplicative and excessive and includes the work of *six* attorneys:

- Mr. Barker: 52.1 hours, at $550 per hour, spent "Developing strategy for attorneys' fees motion; preparing motion for attorneys' fees and supporting documentation; supervising preparation of the bill of costs; researching, supervising research, and reviewing authority supporting motions to dismiss; meeting and conferring with opposing counsel regarding resolution of attorneys' fees issue." [Dkt. No. 71, ¶ 11.]

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- Mr. Kohn: 37.2 hours, at $300 per hour, spent "Assisting in preparation of attorneys' fees motion and supporting pleadings; researching legal issues for attorneys' fees motion." [*Id.*, ¶ 12.]
- Mr. Brady: 31.2 hours, at $325 per hour, spent "Researching basis for attorneys' fees motion; preparing motion and memorandum of points and authorities in support of motion for attorneys' fees." [Dkt. No. 70-1, ¶ 9.]
- Ms. Boland: 23.7 hours, at $150 per hour, spent, "[a]t the direction of Dentons and Brady and Vinding, gather[ing] information for attorneys' fees motion; edit[ing] sections of the motions for attorneys' fees; draft[ing] a section of the motion for attorneys' fees and [her] declaration; edit[ing] the declarations of the other attorneys; prepar[ing] spreadsheets to gather the necessary billing information; conduct[ing] legal research and supervis[ing] the research conducted by L. Hartway and C. Snider; and review[ing] authority supporting the motions to dismiss; [meeting and conferring] with opposing counsel regarding resolution of attorneys' fees issue and [sending] background information re same to opposing counsel." [Dkt. No. 74, ¶ 10 (Declaration of L. Boland).]
- Ms. Hartway and Ms. Snider: 17.5 hours, at $150 per hour, spent "assisting in preparation of attorneys' fees motion and supporting pleadings; researching legal issues for attorneys' fees motion." [*Id.*, ¶ 11.]

Additionally, Mr. Brady estimates he will expend 20 more hours of his time "preparing reply brief supporting attorneys' fees motion, preparing for hearing, and attending hearing" [*see* Dkt. No. 70-1, ¶ 9 (Declaration of M. Brady)].

* * *

In total, by way of the instant motion, Defendants seek compensation for fees related to 634.1 hours of attorney time [*see* Dkt. No. 70-1, ¶ 6; Dkt. No. 71, ¶ 7; Dkt. No. 74, ¶ 7.] over approximately six months for three law and motion proceedings: two motions to dismiss and this instant fees motion. They also collectively estimate 71.5 hours of work for the reply and hearing.

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[*see* Dkt. No. 70-1, ¶ 9; Dkt. No. 71, ¶ 15; Dkt. No. 74, ¶ 15.] This is over 700 hours of attorney time—or 17 and a half 40 hour weeks.

III. ARGUMENT

A. The Tribe is immune from an award of fees absent an effective waiver of its sovereign immunity, which it did not make

1. Tribal sovereign immunity

Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Oklahoma Tax Com'n v. Citizen Band of Potawatomi*, 498 U.S. 505, 509-510 (1991); *Turner v. United States*, 248 U.S. 354, 358, (1919); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). A primary historical purpose for tribal sovereign immunity is to protect the sovereign tribe's treasury, preserving financial integrity and avoiding forced insolvency from private suits. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (citing *Alden v. Maine*, 527 U.S. 706, 750 (1999)). Claims against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Citizen Band of Potawatomi*, 498 U.S. at 509-510; *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."). In *Bay Mills Indian Community*, the Supreme Court detailed that federal courts may not "carv[e] out exceptions" to the broad protections sovereign immunity provides federally-recognized tribal governments. *Bay Mills Indian Community*, 134 S.Ct. at 2031 (2014). In light of Supreme Court precedent, the Ninth Circuit likewise employs "a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

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Any waiver must be construed narrowly, and is subject to the limitations set forth by the tribe. Precedent has consistently held that "[a]waiver of sovereign immunity must be strictly construed in favor of the sovereign." *E.g.*, *Orff v. United States*, 545 U.S. 596, 601-02 (2005). A waiver of tribal sovereign immunity may not be implied from the tribe's actions, "but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *see also Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982); *C & B Invs. v. Wis. Winnebago Health Dept.*, 542 N.W.2d 168, 169 (Wis. Ct. App. 1995) ("a surrender of sovereign immunity by a nation must be advertent"). Thus, a tribe may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted. *Missouri River Services v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001).

The Tribe has not waived its tribal sovereign immunity with respect to Defendants' excessive request for an award of nearly $400,000 in attorneys' fees. Defendants provide no argument whatsoever that a waiver exists in any form, much less one that has authorized by the Tribe.

2. The Tribe's lawsuit did not Constitute an effective waiver of its sovereign immunity from liability of an award of attorneys' fees

It is hornbook law that an Indian tribe does not waive its sovereign immunity from suit by affirmatively seeking relief in court. The Supreme Court has repeatedly rejected the principle that a tribe exposes itself to claims against it by affirmatively seeking relief in the filing of a lawsuit. *See, e.g.*, *Citizen Band of Potawatomi*, 498 U.S. at 509-510 (an Indian tribe's suit in federal court to enjoin a state from assessing a tax did not constitute a "clear waiver" of tribal immunity from the state's counterclaims); *see also McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) ("a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts"); *Contour Spa v. Seminole Tribe*, 692 F.3d 1200, 1208 (11th Cir. 2012) ("It is clear that the Indian tribe [in Potawatomi] had voluntarily invoked the jurisdiction of the federal courts, yet did not

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waive its sovereign immunity against related counterclaims by doing so."); see also *White v. Univ. of California*, 765 F.3d 1010, 1026 (9th Cir. 2014) (citations omitted) ("Waiving immunity as to one particular issue does not operate as a general waiver. Thus, when a tribe files suit, it submits to jurisdiction only for purposes of adjudicating its claims, but not other matters, even if related.")

In the same vein, Ninth Circuit decisions have also consistently confirmed that Indian tribes may invoke a federal forum either to seek affirmative relief, or to defend litigation on the merits, while retaining their sovereign immunity. *E.g.*, *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (holding a tribe's voluntary participation in administrative proceedings "is not the express and unequivocal waiver of tribal immunity that we require in this circuit"); *McClendon*, 885 F.2d at 630; *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 723 (9th Cir. 1986) (holding sovereign immunity barred state's compulsory counterclaim in suit filed by tribe); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985) (same); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154-55 (9th Cir. 1979) (holding tribal sovereign immunity barred suit even after tribe invoked the jurisdiction of the district court to litigate cross-motions for summary judgment on the merits and then raised its sovereign immunity defense for the first time on appeal). Offsets and defenses that might otherwise be characterized as counterclaims against a plaintiff may be asserted in response to a lawsuit filed by a tribe (*see United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512 (1940)), but relief beyond the breadth of the tribe's claims is not available, particularly in the context of claims against tribal revenues (*i.e.*, awards of money).

The burden for finding a waiver of tribal sovereign immunity is a high. *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, 2016 Bankr. LEXIS 3605, *24 (E.D. Mich. 2016). *In re Greektown Holdings* is instructive:

> A Congressional waiver of tribal sovereign immunity must be express, unequivocal, unmistakable, unambiguous, clearly evident in statutory language, and allow the Court to conclude with perfect confidence that Congress intended to waive sovereign immunity. *See generally In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D.

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> Mich. 2015) (citing various cases and holding that Indian tribes are not within the statutory definition of "other... domestic governments"). "Statutes are liberally construed in favor of Indians tribes, who have their thumb on the interpretive scale, so to speak." *Id.* at 686. This burden of proof is equally high for *voluntary* waivers of tribal sovereign immunity. For example, the Supreme Court has held:
>
> To abrogate tribal immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58. Similarly, to relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991). […]
>
> *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (tribe's entry into contract with a specific arbitration and choice of law provisions waived its sovereign immunity as to arbitration and enforcement of arbitration awards); *White*, 765 F.3d at 1026 (a voluntary waiver by a tribe must be unequivocally expressed); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281 (10th Cir. 2012) (waiver must be clear, not implied, and unequivocally expressed); *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.").

In re Greektown Holdings, LLC, 2016 Bankr. LEXIS 3605, at *24.

Thus, although the Tribe did consent to a limited waiver of its sovereign immunity by filing the instant action, it did not waive its sovereign immunity with respect to any counter-claim or claim for recoupment—in the form of an award of attorneys' fees or otherwise—made by Defendants.[3] The Tribe's reference to the right to attorneys' fees in its First Amended Complaint is not an express unequivocal waiver of sovereign immunity as to the issue of recoverable attorneys' fees. [Dkt. 28, ¶ 61.] Accordingly, the Tribe is immune to an award of attorneys' fees and the Court should deny the instant motion in its entirety.

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[3] In the interest of full disclosure and candor with the Court, the Tribe acknowledges that the recent case of *Guidiville Rancheria of Cal. v. United States*, No. 12-cv-1326 YGR, 2015 U.S. Dist. LEXIS 109057 (N.D. Cal. Aug. 18, 2015), may appear to hold otherwise. That case is inapposite to this matter because the Indian tribe there sought to benefit from an attorneys' fees provision contained in a contract which served as the basis of a breach of contract action. Here, however, the Tribe has not put any attorneys' fees provision in a contract at issue, nor sought an award of attorneys' fees predicated on the same.

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B. Fees are not available to Defendants under California's anti-SLAPP statute because they did not bring an anti-SLAPP motion

Unlike the general provision of such statutes as California Code of Civil Procedure section 1033.5(a)(10) and Civil Code section 1717, an award of fees to a party prevailing on a motion to strike pursuant to Code of Civil Procedure section 425.16 is circumscribed to recovery for the work done in prosecuting the motion to strike. The operative statutory language states: "(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." While at first glance this might seem to entitle a defendant to recover fees for all manner of other work done on the case, this is not the law—especially where Defendants never filed any motion under section 425.16. The California Supreme Court elucidated this issue in *S.B Beach Properties v. Berti*, 39 Cal.4th 374 (2006):

> Under section 425.16, subdivision (c), only a "*prevailing defendant on a special motion to strike*" may recover attorney fees and costs. (Italics added.) This statutory language is unambiguous, and makes the filing of a viable anti-SLAPP motion a prerequisite to recovering any fees and costs. As a matter of logic, a defendant must file a special motion to strike in order to prevail on one.
>
> Here, defendants failed to do so …
>
> […]
>
> Legislative history buttresses this conclusion. In enacting the anti-SLAPP statute, the Legislature adopted a balanced approach to end SLAPP suits at an early stage while not jeopardizing meritorious actions. (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1269 [20 Cal. Rptr. 3d 673].) The Legislature originally passed an anti-SLAPP bill that "contained a 'pleading hurdle' which prohibited a person from pleading a SLAPP suit cause of action until a court granted leave to do so after demonstration of a 'substantial probability' of success on the merits." (Assem. Subcom. on Admin. of Justice, Analysis of Sen. Bill No. 1264 (1991–1992 Reg. Sess.) as amended Mar. 26, 1992, p. 4.) The Governor vetoed this bill. The Legislature then passed Senate Bill No. 1264, which became section 425.16.
>
> […]
>
> Thus, the Legislature "establish[ed] a special procedure. It [gave] the defendant the right to file a 'special motion to strike' the claim." (Cal. Dept. of Consumer Affairs, Enrolled Bill Rep. on Sen. Bill No. 1264 (1991–1992 Reg. Sess.) prepared for Governor

> Pete Wilson Aug. 25, 1992, p. 3.) And only "[d]efendants *who prevail on the motion to strike are entitled to attorney's fees and costs.*" (*Ibid.*, italics added.) … .
>
> Using a "motion to strike" approach, rather than a "pleading hurdle," the Legislature made the filing of a viable anti-SLAPP motion a necessary trigger for both an imposed judgment of dismissal and an award of fees and costs. Where, as here, defendants never filed such a motion, they cannot recover under section 425.16, subdivision (c).

S.B Beach Properties, 39 Cal.4th 374 at 379-81. Here, as in *S.B. Beach Properties*, Defendants have not filed an anti-SLAPP motion, have not prevailed on one, and therefore cannot be awarded fees under section 425.16. Defendant Ceiba brought a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6). [Dkt. No. 35.] It did not file a motion to strike. Ceiba is certainly not able to recover under the anti-SLAPP statute.

The Individual Defendants also brought a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). [Dkt. No. 32.] They likewise did not file a motion to strike. Defendants could have filed motions to strike in federal court under California's anti-SLAPP statute. *E.g.*, *Henry v. Bank of Am Corp*., 2010 U.S. Dist. LEXIS 94028, at *3 (N.D. Cal. 2010). But they did not. This Court recognizes the difference between a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and a motion to strike under California's anti-SLAPP statute. *Id.* at *3-4; *see Pandora Jewelry, LLC v. Bello Paradiso*, LLC, 2009 U.S. Dist. LEXIS 56265, at *5-9 (E.D. Cal. 2009) (discussing the anti-SLAPP motion to strike standard).

In *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), the Ninth Circuit ruled that it had jurisdiction via an interlocutory appeal of the denial of a defendant's motion to strike. *Id*. at. 1024-26. Hence, California Federal Courts recognize the anti-SLAPP motion to strike as a distinct motion separate from a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Moreover, to obtain attorneys' fees under the anti-SLAPP statute, the court must *rule* on the motion. *See Pfeiffer Venice Properties v. Bernard*, 101 Cal.App.4th 2011, 218-219 (2002). Here, this Court could not have ruled on the Individual Defendants' anti-SLAPP motion because they did not bring such a motion. Further, now that this case is closed, this Court

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has no jurisdiction to permit the Individual Defendants' to file an anti-SLAPP motion. They had their opportunity at the outset but elected to only bring a 12(b)(6) motion.

Since the Defendants did not bring an anti-SLAPP motion, they are not entitled to attorneys' fees under California Code of Civil Procedure section 425.16, subdivision (c), and their requests for the same should be denied.

1. Even If This Court Construes The Individual Defendants' 12(b)(6) Motion as an Anti-SLAPP Motion, Any Fees Would Be Limited to the Cursory Anti-SLAPP Analysis

Even if this Court decides that the Individual Defendants' 12(b)(6) motion was actually a special motion to strike under California's anti-SLAPP statute (it was not), the Individual Defendants' fees should be drastically curtailed to the attorney fee work connected to the anti-SLAPP analysis.

"Generally, the award of attorneys' fees pursuant to an anti-SLAPP motion is limited to the reasonable fees incurred during the course of or in connection with the anti-SLAPP proceeding, not the entire action." *Ravet v. Stern*, 2010 U.S. Dist. LEXIS 79589, at *7-8 (S.D. Cal. 2010), citing *S.B. Beach Properties*, 39 Cal.4th at 381. The Individual Defendants' motion to dismiss makes a passing reference to the anti-SLAPP analysis by simply repeating their *Noerr-Pennington* discussion. [*See* Dkt. No. 32, pp. 14-16.] This discussion consists of a little more than a single page. [*Id.*] The Individual Defendants then allot two pages to the anti-SLAPP discussion in their reply brief, with a single paragraph devoted to the probability of the merits prong. [*See* Dkt. No. 52, pp. 4-6.] The Individual Defendants' counsel's attorneys' fees declaration does not even address their anti-SLAPP research or drafting, and notably references work on a "motion to dismiss" rather than a "motion to strike." [Dkt. No. 70-1, ¶ 9.]

The Individual Defendants have not established that all their attorney work in this case is "in connection" to the anti-SLAPP proceeding (should the Court conclude there is an anti-SLAPP proceeding at all). Rather, the Individual Defendants seek all of their fees in defending the entire action, including attempts to settle other matters. This is not reasonable and the

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Individual Defendants' attorney fees should be limited to the handful of hours spent on their cursory anti-SLAPP analysis. Plaintiff would generously assign 10 hours to this work.

In sum, attorneys' fees are not available by way of the anti-SLAPP statute.

C. Fees are not available to Defendants under the Lanham Act

1. The Tribe's action was not "exceptional" within the meaning of 15 U.S.C. § 1117(a)

Importantly, the Court did not analyze the Lanham Act claim at all in its dismissal order. It did not have to—all the claims were encompassed by *Noerr-Pennington*. [Dkt. 63.] The Court correctly labels this case "a RICO action." [*Id.*, p. 1:21.] This was not a "Lanham Act" case by any stretch of the imagination.

While it is true that the Lanham Act authorizes an award of fees (under 15 U.S.C. § 1117(a)), the Ninth Circuit precedent has established that any such award requires a showing that the case is "exceptional"—relevant to the posture of this action: Defendants must affirmatively demonstrate that the Tribe's case was "groundless, unreasonable, vexatious, or pursued in bad faith." *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 615 (9th Cir. 2010). Here, Defendants have not, and cannot, make such a showing. This is because the Tribe filed this suit in a good faith attempt to protect itself from Defendants' would-be attempt to usurp control from the lawfully elected tribal council.

2. Even if the Tribe's Lanham Act claim was "exceptional" (it was not), and the Tribe is found to have waived its sovereign immunity (it has not), Defendants can only recover for fees related to their opposition to the Tribe's Lanham claim

Defendants' fee request does not make any attempt to apportion the amount of fees spent between opposing the Tribe's Lanham Act claim and opposing the Tribe's other claims. While the Defendants' declarations in support of the fee motion make clear that 139.6 hours were spent on ADR proceedings—*i.e.*, not in preparing any opposition to the Tribe's Lanham Act Claim—the 334.3 other hours purportedly expended on other matters prior to the Court's judgment are not apportioned in any way between the time spent on the opposition to the Tribe's Lanham Act

claim and the time spent on opposing the Tribe's six other claims. Instead, Defendants are impermissibly trying to recover fees for opposing claims separate from the Tribe's Lanham Act count. The law in this circuit simply does not allow this: "a prevailing party in a case involving Lanham Act and non-Lanham Act claims can recover attorneys' fees *only for work related to the Lanham Act claims*." *Gracie v. Gracie*, 217 F.3d 1060, 1069 (9th Cir. 2000) (emphasis added).

Here, from the record before the Court, it is impossible to apportion the Defendants' purported fees between Lanham and non-Lanham claims because the declarations setting forth the claimed amount of time spent on the motions to dismiss are entirely too vague to make any meaningful apportionment. Specifically, the declarations in support of the instant fee motion set out the following time:

- Ms. Yost: 2.0 hours, at $625 per hour, spent: "Reviewing case management conference statement and developing case strategy" and "[r]eviewing and revising reply brief." [Dkt. No. 71, ¶ 10.]
- Mr. Barker: 109.2 hours, at $550 per hour, spent: "Developing strategy for response to the complaint; preparing and revising motions to dismiss and supporting pleadings; researching, supervising research, and reviewing authority supporting motions to dismiss", "[n]egotiating, preparing, and revising case management documents, procedural motions, stipulations, and other filings and related communications", "[d]eveloping strategy for reply briefs; preparing and revising reply briefs supporting motions to dismiss; researching, supervising research, and reviewing authority supporting replies to the opposition brief", and "[p]reparing for and attending hearing on motions to dismiss." [Dkt. No. 71, ¶ 11.]
- Mr. Kohn: 35.4 hours, at $300 per hour, spent: "Assisting in preparation of motions to dismiss and supportive pleadings; researching legal issues for motions to dismiss", "[p]reparing procedural motions, stipulations, and other filings", and "[a]ssisting in preparation of reply briefs supporting motions to dismiss and

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supporting pleadings; researching legal issues for reply briefs supporting motions to dismiss." [*Id.*, ¶ 12.]

- Mr. Brady: 81.2 hours, at $325 per hour, spent: "Reviewing operative pleadings; researching and drafting motion to dismiss…", "[r]eviewing opposition brief and researching potential responses", "[p]reparing and revising reply brief", and "[p]reparing for and attending hearing on motions to dismiss." [Dkt. No. 70-1, ¶ 9.]
- Mr. Vinding: 47.2 hours, at $325 per hour, spent: "Review[ing] files, pleadings and related relevant documents; follow[ing] up to obtain background of inextricably intertwined issues; research claims and defenses", [r]eview[ing] pleadings/court docket; research, review and draft pleadings/motions", and "[p]repar[ing] for/travel[ing] to and from hearing and confer[ing] with clients regarding facts and issues." [Dkt. No. 70-1, ¶ 10.]
- Ms. Boland: 59.3 hours, at $150 per hour, spent "developing strategy" and drafting, editing, and appearing at hearing on Motions to dismiss. [*See* Dkt. No. 74, ¶ 10 (Declaration of L. Boland).]

From the above, there is absolutely no distinction between time spent on defending the single Lanham count and time spent on defending the Tribe's six other claims—all of the time is impermissibly block-billed as one. The Court should not be tasked with "guessing" how much time was spent on defending the lone Lanham Act claim. For this reason alone, no fees should be awarded to Defendants.

To the extent that Defendants may argue that their entire defense was "inextricably intertwined" [Dkt. No. 70, at 8-9] with their opposition to the Tribe's Lanham count, they likewise have failed to make any such showing. While some of the acts relevant to the Tribe's Lanham Act claim—namely sending letters to banks and government officials—may have been related to the other claims, the Defendants' opposition to the Lanham Act claims is not "inextricably intertwined" with their opposition to the other counts. Defendants have implicitly conceded this point in that large proportions of the text of the Motions to Dismiss are devoted

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entirely and separately to arguments irrelevant to the Lanham count and instead focused on another claim. [*E.g.*, Dkt. No. 35, at 11-16 (entire section of Ceiba's motion to dismiss related to argument on whether the Court even has jurisdiction to entertain the merits of this case).] In any event, "the impossibility of making an exact apportionment does not relieve the district court of its duty to make some attempt to adjust the fee award in an effort to reflect an apportionment." *Gracie*, 217 F.3d at 1069.

Inasmuch as the amount of briefing Defendants' submitted opposing the Tribe's Lanham Act claim specifically is any proxy for a percentage of the time spent on the same, it appears that a very small percentage of Defendants' fees should be allocated, if at all, to their defense of the Tribe's Lanham count. Of the 74 written pages filed in support of the Defendants' motion-to-dismiss-efforts, Ceiba spent only one paragraph (of less than one page) discussing the Lanham act count [*see* Dkt. No. 35, at 23:3-15 (Ceiba's Motion to Dismiss)], and the Individual Defendants offered only approximately eight and a half pages, of argument related to the Tribe's Lanham count [*see* Dkt. No. 32, at 17-22 (Individual Defendants' Motion to Dismiss); Dkt. No. 52, at 4:17-5:5, 5:16-9:3 (Individual Defendants' Reply in support of Motion to Dismiss)]. Put another way, Defendants appear to have spent only 12% of their opposition efforts[4] on matters related to the Tribe's Lanham Act claim. *Cf. Gracie*, 217 F.3d at 1070 ("While calculating an 'exact percentage' may be impossible, this does not relieve the district court of its duty to make some attempt to adjust the fee award to reflect, even if imprecisely, work performed on non-Lanham Act claims."). Accordingly, based on the record before the Court, if any amount of attorneys' fees are properly awardable to Defendants for their defense of the Tribe's Lanham count, it should be for no more than 41 hours of time: approximately 12% of the 334.3 hours purportedly spent by Defendants' counsel that was even arguably related to drafting the motions to dismiss.

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[4] Nine out of the 74 total filed pages equates to 12.16%.

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D. Defendants' request for an award of unnecessary, duplicative, and excessive time spent on the instant fee motion should be substantially reduced

As indicated by the declarations submitted by Defendants in support of this motion, Defendants are claiming to have already expended more than 160 hours of attorney time in preparing a 16-page motion and four declarations. Mr. Brady then goes on to declare that he anticipates spending another 20 hours on the instant motion after this opposition is filed. [*See* Dkt. No. 70-1, ¶ 9.) In total, Defendants claim that the instant fee motion will take them at least more than 180 of attorney time to prepare; notably, this figure does not include whatever other dozens of hours Defendants' counsel are likely claim to expend on "strategizing," "reviewing," and "supervising" any reply brief. On its face this amount of time is excessive and unreasonable for a fees motion; and much of it is patently duplicative.

Because Defendants' counsel blocked billed, it is impossible to tell exactly how many hours were spent merely analyzing potential positions to take in their fee motion. It appears that several of the Defendants' attorneys spent nearly a hundred hours alone, in researching and "[d]eveloping strategy for attorneys' fees motion." [*See, e.g.*, Dkt. No. 71, ¶¶ 11-12 (the Dentons firm allegedly spent a total 89.3 hours on the instant motion without a single minute of this time apparently spent on drafting the same).] This amount of time, frankly, is equivalent to what would reasonably be expected for Defendants to have researched, prepared and filed their sole dispositive motion. There is no reason why Defendants could not have filed the instant motion expending 30 hours or less. Yet from the supporting declarations it appears the Defendants' counsel billed at least more than twice that much merely contemplating and discussing the same. It is not reasonable for Defendants to expect to pass on to the Tribe fees resulting from inefficiencies and redundancies such as this example provides.

E. The 1.5x lodestar multiplier sought by Defendants is inappropriate

The lodestar method calculates attorney fees "by multiplying the number of hours reasonably expended by counsel on the particular matter times a reasonable hourly rate." *Florida v. Dunne*, 915 F.2d 542, 545 n.3 (9th Cir. 1990). The product of this computation, the "lodestar" amount, yields a presumptively reasonable fee. *Gonzalez v. City of Maywood*, 729 F.3d 1196,

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1202 (9th Cir. 2013); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). As discussed above, much of the time allegedly spent by Defendants' counsel should be reduced. In any event, while the Court may adjust the lodestar upward or downward using a "multiplier," it must consider the following factors adopted by the Ninth Circuit in a determination of the reasonable fees:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975). Since *Kerr*, however, the 9th Circuit Court of Appeals has suggested that the fixed or continent nature of a fee and the "desirability" of a case are no longer relevant factors. *Resurrection Bay Conservation Alliance v. City of Seward*, 640 F.3d 1087, 1095, n.5 (9th Cir. 2011). Here, the only two of these factors Defendants' point to which they argue justify a 1.5x multiplier are the relative desirability of the case and "risk that fees incurred would not be recoverable from the Tribe's treasury" (*i.e.*, the contingent nature of the case). [S*ee* Dkt. No. 70, at 15:17-16:1.] As Defendants are trying to argue that they should be given a windfall for the "riskiness" in taking on this action, their request for a multiplier on this ground is impermissible as a matter of law. *Cf. City of Burlington v. Dague*, 505 U.S. 557, 560-67 (1992) (holding, in the context of another federal fee-shifting provision, that Courts should not consider the risks specific to the case at bar when deciding a lodestar multiplier request). Accordingly, Defendants' request for a 1.5x lodestar multiplier should be denied.

F. <u>The transcript from the habeas corpus case should be stricken</u>

The transcript to the habeas corpus action, *John v. Garcia*, United States District Court, Case No. C 16-2368 WHA, is attached to the declaration of attorney Boland. [Dkt. 74, Exh A, pp. 10-66.] This is a transcript from another case. It is not germane to the attorneys' fees motion

before the court. It should be stricken as irrelevant to the subject matter, unduly prejudicial, and having insufficient probative value.

IV. CONCLUSION

For all of these reasons, even if the Tribe's filing of the instant lawsuit constituted its express intent to waive sovereign immunity as to all matters collateral to its claims (which it does not), the Defendants' claims for attorneys' fees must still fail. Fees are not available under the anti-SLAPP statute for the obvious reason that Defendants did not bring such a motion. Fees are not available under the Lanham Act because the claim is not "exceptional." If the Court elects to award fees, however, the amount of fees should be drastically curtailed under any or all of the methodologies discussed herein, such as $53,600—the amount of the Tribe's interpleader defense fees and its fees incurred in this case through December 8, 2016. These are, after all, the damages and fees the Tribe could have reasonably recovered but for the *Noerr-Pennington* bar.

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DATED: December 14, 2016

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