No. 15-17069

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUIDIVILLE RANCHERIA OF CALIFORNIA,

Plaintiff-Appellant,

and

UPSTREAM POINT MOLATE, LLC,

Plaintiff-counter-defendant,

v.

UNITED STATES OF AMERICA; SALLY JEWELL, the Secretary of the Department of the Interior; KEVIN K. WASHBURN, Esquire, the Assistant Secretary Indian Affairs,

Defendants,

and

CITY OF RICHMOND,

Defendant-counter-claimant-Appellee.

Appeal from the United States District Court for the Northern District of California, Oakland, case no. 4:12-cv-01326-YGR, Honorable Yvonne Gonzalez Rogers

BRIEF FOR DEFENDANT-APPELLEE CITY OF RICHMOND

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JURISDICTIONAL STATEMENT

The City of Richmond ("City") accepts in part and disputes in part the jurisdictional statement set forth by Plaintiff-Appellant Guidiville Rancheria of California ("Guidiville" or "Tribe"). The City agrees with Guidiville that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. The City disagrees with Guidiville's suggestion (Opening Br. 2) that this Court may lack appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's award of attorneys' fees in favor of the City.

As will be discussed further (*infra* pp. 5-11), this litigation involves claims brought by Guidiville and Upstream Point Molate LLC ("Upstream," and collectively "plaintiffs") against the City under state law, and against the United States and officials in the Department of the Interior under federal law. The district court finally resolved plaintiffs' claims against the City through a judgment in favor of the City and entry of a voluntary joint-stipulation of dismissal. ER17-18. The district court, however, stayed plaintiffs' claims against the federal defendants. ER19-23.

On February 4, 2015, plaintiffs filed a timely joint notice of appeal from the district court's judgment in favor of the City (No. 15-15221). ER117. On February 18, 2015, this Court entered a show cause order, instructing plaintiffs to demonstrate why the appeal "should not be dismissed for lack of jurisdiction"

given their unresolved federal claims. No. 15-15221 Dkt. No. 8. At the request of the parties (including Guidiville), the district court subsequently entered an amended judgment on March 10, 2015, expressly certifying its decision in favor of the City as a partial final judgment under Federal Rule of Civil Procedure 54(b). ER15-16; SER13-23. That same day, plaintiffs informed this Court of the district court's amended judgment and certification in their response to the Court's show cause order. No. 15-15221 Dkt. No. 9. On March 30, 2015, the Appellate Commissioner of this Court discharged its jurisdictional show cause order in light of the district court's amended judgment and Rule 54(b) certification. No. 15-15221 Dkt. No. 11. Plaintiffs' appeal in No. 15-15221 is currently pending before this Court.

On August 18, 2015, the district court granted the City's motion for attorneys' fees and costs, holding Guidiville and Upstream jointly and severally liable for the City's fees and costs. ER1-13. Guidiville filed a notice of appeal from that judgment on October 18, 2015. ER55-59. In its answers to this Court's mediation questionnaire, Guidiville suggested that its "appeal of the attorney fees award is not properly before this Court" because the Tribe did not seek interlocutory certification of the fee award. *See* Appellant Guidiville Rancheria of California Mediation Questionnaire, No. 15-17069 Dkt. No. 7. In Guidiville's view, "the proper course" was for this Court to issue an order "that the appeal be

dismissed or cause be shown as to why it should not be dismissed." *Id.* This Court did not issue such an order.

This Court has appellate jurisdiction over the district court's decision awarding attorneys' fees to the City. Fee awards are appealable under 28 U.S.C. § 1291 when "they follow a final judgment on the merits," and they "dispose of the issue of attorneys' fees." *Gates v. Rowland*, 39 F.3d 1439, 1450 (9th Cir. 1994). The same is true when, as here, "the judgment on the merits is a judgment properly entered under Rule 54(b)." 10 *Moore's Federal Practice* § 54.158[1][a] (3d ed. rev. 2015). In such circumstances, the district court's "decision to render the merits judgment final" under Rule 54(b) "carr[ies] over to the fee determination" entered later. *Johnson v. Orr*, 897 F.2d 128, 130-32 (3d Cir. 1990).

Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's decision awarding attorneys' fees. Because the district court properly certified its merits ruling for immediate appeal under Rule 54(b), ER15-16, the court's "corresponding award of attorney's fees is final and appealable," 10 *Moore's* § 54.158[1][a].

STATEMENT OF THE ISSUE

Whether Guidiville waived its tribal immunity from reimbursing the City for attorneys' fees under the contract Guidiville sued to enforce.

INTRODUCTION

Indian tribes are fully empowered to waive their sovereign immunity by contract, and Guidiville did so here.

The Land Disposition Agreement ("LDA") at the heart of this case unambiguously requires losing litigants to reimburse their adversary's costs and attorneys' fees. Although Guidiville was not a signatory to the LDA, the Tribe sued to enforce its rights as a third-party beneficiary to the agreement. When it did so, Guidiville stepped into the shoes of the signatories and admittedly assumed the "rights *and obligations*" conferred by the LDA.

Guidiville cannot now avoid the legal consequences of its voluntary litigation decisions. Black-letter law holds that, when Guidiville sued to enforce its "rights" under the LDA, it also took on the agreement's "obligations"—chief among them the obligation to pay the winning side's attorneys' fees. Guidiville cannot pick and choose which obligations of the LDA federal courts can enforce in a suit the Tribe initiated.

The voluntarily-assumed obligation to pay attorneys' fees is enforceable against the Tribe according to its plain terms. Section 8.8 of the LDA provides that if "*any* legal action is commenced to interpret or to enforce the terms of" the LDA, "the party prevailing in *any* such action shall be entitled to recover against the party not prevailing *all* reasonable costs and expenses incurred in such action,

including reasonable attorney fees and costs of any appeals." SER180 (emphases added). The unambiguous terms of that provision clearly apply to Guidiville as "the party not prevailing" in the "legal action" it brought "to interpret" and "enforce" the LDA. Indeed, the Supreme Court has made clear that contracts need not specifically refer to "sovereign immunity" or use any other magic phrase to waive tribal immunity. Rather, what matters is that the black-and-white terms of the contract Guidiville sued to enforce put it on notice of its obligation to pay fees in the event its suit were unsuccessful. Guidiville is therefore not immune from attorneys' fees under the agreement.

STATEMENT OF THE CASE

The City describes the factual background to this case in detail in the brief it filed in the related appeal pending in this Court. *See* Brief for Defendant-Appellee City of Richmond, No. 15-15221 Dkt. No. 30. The City recounts that background in condensed form here.

A. The Parties Enter Into The Land Disposition Agreement ("LDA")

After receiving a grant of federal land from the United States, the City negotiated and executed the LDA with Guidiville and Upstream in hopes of developing the property. ER85-86, 97. The LDA provided that—if certain conditions were met and subject to the California Environmental Quality Act ("CEQA")—the City would deliver the land to Upstream, and Upstream would

build a casino that Guidiville would operate. ER34-39. Given that this agreement involved the disposition and development of public lands, the City retained discretion—as required by CEQA—to disapprove the proposal and not go forward with the project. ER34-42.

The City, Guidiville, and Upstream "worked in tandem in this Project." ER89. The City and Upstream were signatories to the LDA, and Guidiville "entered into [the] written contract memorialized in the LDA" as a "third party beneficiary." ER87-89, 97. By its own account, Guidiville was actively involved not only "in the negotiations that resulted in the formation o[f] the LDA" but also "in the negotiations for all six Amendments to the LDA." ER87, 106-07.

In April 2006, Guidiville's Tribal Council formally affirmed the Tribe's assent to the LDA. SER99-102. Pursuant to its authority to "approve contracts" as Guidiville's "duly authorized governing body," SER99, the Tribal Council unanimously adopted Resolution #06-02, which acknowledged Guidiville's acceptance of "the Land Purchase Agreement with the City." SER101. According to Resolution #06-02, the "Tribal Council" "negotiated" that contract and found it to be "an acceptable agreement." SER101.

Like many such agreements, the LDA specified the rights and procedures that would govern in the event of litigation. For example, Section 8.6's choice-of-law provision stated that the LDA "shall be interpreted under and pursuant to the

laws of the State of California." SER180. Section 8.8 of the LDA contained a provision allocating costs and fees. That provision stated:

> In the event any legal action is commenced to interpret or enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the party prevailing in any such action shall be entitled to recover against the party not prevailing all reasonable costs and expenses incurred in such action, including reasonable attorney fees and costs of any appeals.

SER180.

B. Guidiville Sues The City For Breach Of The LDA And Seeks Damages And Attorneys' Fees Under The LDA

Ultimately, given the significantly adverse environmental, socioeconomic, and other impacts of the project, the City exercised its discretion under the LDA not to permit a casino to be built on the land. ER41-42. Guidiville and Upstream then sued the City for breach of contract under California law, among other claims. In their third amended complaint, Guidiville and Upstream stated that, although the Tribe did not sign the LDA, it "was an intended third party beneficiary of the LDA," which "expressly confers rights *and obligations* on the Tribe." ER87 (emphasis in original).

Guidiville sought declaratory relief and alleged more than $500,000,000 in damages on its claims. Guidiville also expressly invoked the LDA's remedial

provisions, demanding that the City pay the Tribe's attorneys' fees and costs under "Section 8.8(a) of the LDA" and "as permitted by law." ER99, 103, 113.[1]

The City answered and then moved for judgment on the pleadings. SER139-60; SER105-38. The City's motion argued that, even accepting plaintiffs' allegations as true, the City's actions did not breach the LDA or violate any other principle of law. SER120-36.

C. The District Court Rejects Plaintiffs' Claims For Damages

The district court granted the City's motion for judgment on the pleadings. ER34-54, 15-18. The court concluded that the City had not breached the LDA, had not violated any implied covenant of fair dealing, and had not failed to negotiate in good faith. ER34-54. Plaintiffs subsequently agreed to dismiss its remaining declaratory-judgment claim. ER19-23; SER50-54. As explained above (*supra* pp.1-3), the district court later certified its order entering final judgment in favor of the City for immediate appeal under Federal Rule of Civil Procedure 54(b). ER15-18.

Guidiville's appeal of the district court's merits ruling is currently pending in this Court in Case No. 15-15221. In that appeal, Guidiville states that, as a

[1] Guidiville and Upstream also sued the United States and certain officials of the Department of Interior under federal law. As noted in the City's jurisdictional statement, Guidiville's federal claims remain unresolved and have been stayed pending the outcome of Guidiville's appeal in No. 15-15221. *See supra* pp. 1-3.

"third party beneficiary," it was among "[t]he parties" that "entered into the LDA," and therefore assumed that agreement's "contractual rights" and "contractual obligations." Appellants' Joint Opening Br. 4, 7 n.2, 16, 19, No. 15-15221 Dkt. No. 24-1.

D. The District Court Grants The City's Request For Costs And Fees Under The LDA And California Law

After prevailing on the merits, the City requested costs and fees from Guidiville and Upstream under the LDA. SER29-49.[2] In response, Guidiville asserted tribal immunity. SER2-12. According to Guidiville, although it admittedly waived immunity by "bringing the lawsuit against the City" and "by its participation in these proceedings," it nonetheless retained "immunity" from enforcement of the LDA's attorneys' fees provision. SER8-11.[3]

The district court rejected Guidiville's claims of immunity and granted the City's motion for attorneys' fees. ER1-13. The court concluded that Guidiville "expressly consented to" the terms of the LDA obliging it to reimburse the City for

[2] The same day the City moved for attorneys' fees and costs, it also filed a bill of costs with the district court. SER24-28. On May 4, 2015, the district court taxed costs against Guidiville and Upstream in the amount of $127,800.41. SER1. Neither Guidiville nor Upstream appealed that award; indeed, Guidiville's notice of appeal referred only to the award of attorneys' fees with no mention of the City's bill of costs. ER55-56. As such, the district court's allowance of costs is now final and not amenable to challenge. *Lee v. United States*, 238 F.2d 341, 342-44 (9th Cir. 1956).

[3] Guidiville and Upstream also opposed attorneys' fees on other grounds, but the Tribe has not pressed those arguments on appeal.

its costs and attorneys' fees. As the court explained, "having filed suit to enforce the LDA and obtain attorneys' fees incurred in doing so," Guidiville not only "admitted that the terms of the LDA apply to it," but it also "consented to the jurisdiction of" the court to enforce the LDA's terms "*against*" it. ER9. In other words, Guidiville had accepted the LDA's "rights and obligations" as "a third party beneficiary" of the agreement. ER11-12. As a result, Guidiville was bound by, and thus waived immunity under, the provisions of the LDA that unambiguously require all losing litigants to pay attorneys' fees, as well as those expressly incorporating "the reciprocity provisions" of California law. ER12-13. The court explained that those provisions require "third party beneficiaries" to pay "attorneys' fees as provided under a contract even if they are not signatories to the agreement." ER4 n.5, 12-13.

In reaching its conclusion, the district court rejected Guidiville's characterization of the fee request as a "counterclaim" for "affirmative" relief. ER9. Unlike such counterclaims, the City's motion for fees rested on a contractual obligation Guidiville voluntarily assumed by, among other things, suing on the LDA and "affirmatively avail[ing] itself of the attorneys' fees provision of the agreement." ER9. For that reason, the district court found that Guidiville's tribal immunity did not protect it from the LDA's clear, unambiguous duty to reimburse

the City for its attorneys' fees. ER9 (citing *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411, 420 (2001)).

Accordingly, the district court held Guidiville and Upstream jointly and severally liable for the City's fees and costs. ER13. Guidiville, but not Upstream, filed a timely notice of appeal.

SUMMARY OF ARGUMENT

Guidiville clearly waived tribal immunity from attorneys' fees under the LDA by suing to enforce that agreement under California law.

A. Guidiville's voluntary initiation of suit under the LDA waived its immunity from federal court jurisdiction and conclusively bound the Tribe to both the favorable and *un*favorable terms of the LDA.

1. When sovereigns voluntarily invoke federal court jurisdiction, they waive immunity from the court's authority to render adverse decisions. That much Guidiville concedes. Opening Br. 6, 19. But Guidiville overlooks the longstanding principles of contract law under which nonsignatory plaintiffs are bound by the terms and conditions of the contracts that they sue to enforce. When nonsignatories assert their rights under an agreement, they must take the contract as they find it—the bad with the good, the burdens with the benefits. They cannot selectively enforce an agreement whose protections they voluntarily invoked.

2. The same rule applies to sovereigns—they, too, must take the contract as they find it when suing as nonsignatories. Because a nonsignatory sovereign cannot acquire or enforce greater rights than the parties to the agreement, they are bound by the contract's applicable obligations just as the signatories would be. Thus, in this case, Guidiville must take the bitter with the sweet: by suing to assert its rights under the LDA, Guidiville voluntarily stepped into the shoes of the LDA's signatories and assented to the LDA's obligations—including those specified in the attorneys' fees and choice-of-law provisions.

B. The LDA, whose obligations Guidiville accepted when it sued to enforce the agreement, satisfies the standard of requisite clarity for a waiver of sovereign immunity.

As the Supreme Court made clear in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe*, contractual waivers of tribal immunity must simply be clear in light of the purposes of the underlying agreement. 532 U.S. at 418-22. Under that practical, commonsense framework, parties need not invoke magic words or talismanic phrases for a waiver of immunity to be sufficiently explicit.

In this case, the LDA clearly waived Guidiville's immunity from attorneys' fees—even without using the words "sovereign immunity." Section 8.8 of the LDA—the attorneys' fees provision—unambiguously denotes that *any* litigant suing to enforce the agreement will be obligated to pay its adversary's costs and

fees should its suit fail. Further, Section 8.6 of the LDA—the choice-of-law provision—expressly incorporates California law, which independently obligates nonsignatory plaintiffs (like Guidiville) to pay the prevailing side's costs and fees. Under the Supreme Court's decision in *C & L Enterprises*, these provisions of the LDA waive Guidiville's immunity with unmistakable clarity.

Moreover, Guidiville's attempt to recast the City's fee request as a "counterclaim" is legally baseless. The City sought attorneys' fees pursuant to a contractual obligation—Section 8.8 of the LDA—that Guidiville voluntarily assumed by suing to enforce the LDA as a nonsignatory. Contrary to Guidiville's assertions, such a request is not a "counterclaim" for "damages" or "affirmative relief."

C. Guidiville's invocation of tribal law is misplaced and does not void its contractual obligations.

1. Even under Guidiville's proposed rule requiring any waiver of sovereign immunity to be executed by the Tribal Council, the LDA unambiguously waives Guidiville's immunity from attorneys' fees. The LDA's waiver was "duly authorized under tribal law" because the Guidiville Tribal Council formally acknowledged Guidiville's acceptance of the LDA.

2. Even putting aside the Tribal Council's assent to the LDA, Guidiville waived immunity from attorneys' fees under the LDA. Sovereigns (like all parties)

are bound by their judicial admissions. In this case, Guidiville has repeatedly claimed that it "negotiated" the terms of the LDA, that it "entered into" the LDA, and that it accepted the LDA's "rights *and obligations*." ER87 (emphasis in original). Thus, even assuming Guidiville's attorneys were not expressly authorized to waive immunity, Guidiville does not contend those attorneys were without authorization to make those substantive allegations in the course of litigating this case. Guidiville is bound by those admissions, which conclusively establish its waiver of immunity.

STANDARD OF REVIEW

"[A]n award of attorneys' fees cannot be disturbed on appeal absent a showing of abuse of discretion." *Gluck v. Am. Prot. Indus., Inc.*, 619 F.2d 30, 32 (9th Cir. 1980).

ARGUMENT

GUIDIVILLE WAIVED IMMUNITY FROM ATTORNEYS' FEES

The district court's decision awarding attorneys' fees should be affirmed. Federal common law provides Indian tribes immunity from suit. *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418-22 (2001). But as with other sovereigns, a tribe may waive its immunity—through contract, conduct, or both. *United States v. Oregon*, 657 F.2d 1009, 1011-16 (9th Cir.

1981). The autonomy to waive immunity is an important aspect of a tribe's "powers of self-determination." *Id.* at 1014.

Here, Guidiville waived tribal immunity from attorneys' fees under the LDA by suing to enforce its rights under that agreement. In doing so, Guidiville assumed the rights *and* the obligations of the LDA. Among those express obligations to which Guidiville consented was the obligation to pay attorneys' fees in the event the Tribe's suit failed.

A. By Suing The City, Guidiville Consented To The District Court's Jurisdiction And Bound Itself To The LDA's Terms

Tribes waive their immunity from adverse judgments by voluntarily invoking federal court jurisdiction. *See Oregon*, 657 F.2d at 1011-15. Indeed, because tribes cannot "selectively" consent to federal jurisdiction, *United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992), they "must abide by the consequences of choosing to assert a claim," *In re White*, 139 F.3d 1268, 1272 (9th Cir. 1998). No tribe can "reclaim immunity just because the case took a turn that was not to its liking." *Id.*; *see Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1246 (8th Cir. 1995) ("[The Tribe] cannot revoke its consent because it disagrees with decisions it authorized the district court to make by virtue of its filing suit.").

This Court's decision in *United States v. Oregon* illustrates this rule. There, a tribe voluntarily intervened in ongoing litigation in order to enforce its rights under a federal treaty. 657 F.2d at 1011-15. After first granting the tribe

injunctive relief, the district court later modified the injunction to prohibit the tribe from exercising its treaty rights. *Id.* at 1011-12. Although the tribe claimed that it was immune from such an adverse decision, this Court disagreed. *Id.* at 1011-15. Writing for the Court, then-Judge Kennedy reasoned that, by voluntarily invoking federal jurisdiction, the tribe not only "assumed the risk" of an "adverse" ruling, but it also rendered itself "vulnerable to complete adjudication by the federal court of the issues in litigation." *Id.* at 1014-15.

Guidiville acknowledges these principles and admits that it "waive[d] its immunity such that it is bound by the District Court's determination regarding the obligations and enforceability" of the LDA. Opening Br. 6; *see id.* at 19 (acknowledging that "sovereign immunity did not prevent the District Court from construing the written contracts to operate against the Tribe"). But Guidiville contends that its waiver did not authorize what it characterizes as the "affirmative relief" of an attorneys-fee award "absent an express waiver" going specifically to that relief. *Id.* at 6, 19.

There was such an express waiver: Section 8.8 of the LDA. That provision expressly stated that the losing side in litigation over the LDA would be responsible for paying the winning side's attorneys' fees:

> In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the party prevailing in any such action shall be entitled to recover against the party not prevailing all reasonable costs and

> expenses incurred in such action, including reasonable attorney fees and costs of any appeals.

SER180; *see infra* Section B (explaining that Section 8.8 is sufficiently clear to constitute a waiver of sovereign immunity). As noted above, Guidiville acknowledges that it "waive[d] its immunity such that it is bound by the District Court's determination regarding the obligations" of the LDA. Opening Br. 6. Section 8.8(a) is among those "obligations."

1. A nonsignatory plaintiff assumes the obligations of the contract it sues to enforce

By suing to enforce the LDA, the Tribe became a party to it—in the Tribe's words, it assumed the LDA's "rights *and obligations*" as a "third party beneficiary of the LDA." ER87 (emphasis in original).[4] A nonsignatory, like Guidiville, may enforce an agreement executed for its benefit. *Northstar Fin. Advisors Inc. v.*

[4] In its brief, Guidiville again states that "the Tribe is a third-party beneficiary to the LDA." Opening Br. 14 n.2. Guidiville also asserts—without any citation—that "the City disputes" that status. *Id.* In the City's Answer, it noted that Guidiville "was not a signatory" to the LDA but added that the agreement "speaks for itself" as to Guidiville's status. SER145. The thirty-ninth affirmative defense listed in the City's Answer stated that "[t]he Complaint, and each cause of action therein, is barred because one or more Plaintiffs is not the proper party or assignee to bring this action and lacks standing or capacity to sue under the LDA or other agreements." SER159. In the City's motion for judgment on the pleadings, however, it did not assert that defense or otherwise argue that Guidiville should be dismissed for lack of standing because it was a nonsignatory to the LDA. SER105-36. The district court subsequently found "convincing[]" Guidiville's "position that it is a third party beneficiary of the LDA." ER11. The City has not disputed Guidiville's status as a third-party beneficiary in the pending merits appeal in this Court.

Schwab Invs., 779 F.3d 1036, 1062-65 (9th Cir. 2015). But such a plaintiff "must take that contract as [it] finds it, rather than having the right to select the parts [it] finds advantageous and reject those [it] finds not to [its] liking." *Mercury Cas. Co. v. Maloney*, 6 Cal. Rptr. 3d 647, 650 (Cal. Ct. App. 2003); *accord L.E. Sanders v. Am. Cas. Co.*, 74 Cal. Rptr. 634, 637 (Cal. Ct. App. 1969). Such nonsignatories "cannot accept the benefits and avoid the burdens" of an agreement they seek to enforce. *Joint Admin. Comm. of Plumbing & Pipefitting Indus. v. Washington Grp. Int'l, Inc.*, 568 F.3d 626, 631 (6th Cir. 2009) ("[C]laimants must accept the bitter with the sweet—the portions of the agreement they like along with those they do not.").

Thus, contracts may "be enforced by *or against* nonparties"—including third-party beneficiaries. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (emphasis added); *Maloney*, 6 Cal. Rptr. 3d at 650 (ordering third-party beneficiary to reimburse insurer under contract to which it was not a signatory). Indeed, when, as here, nonsignatories bring suit against a signatory to enforce an agreement, they are "bound by the terms and conditions of the contract that [they] invoked." *Trans-Bay Eng'rs & Builders, Inc. v. Hills*, 551 F.2d 370, 378 (D.C. Cir. 1976); *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517-18 (5th Cir. 2006) (similar). A contrary rule would "jettison hundreds of years of common law under which nonparties can be contractually liable under ordinary

contract and agency principles." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006); *Ackman v. N. States Contracting Co.*, 110 F.2d 774, 776 (6th Cir. 1940) (stressing that "[t]he principle is too elementary to require citation" that when plaintiffs "sue as third party beneficiaries" of a contract "[t]hey are therefore bound by the terms of the contracts").[5]

2. A nonsignatory plaintiff is subject to a contractual attorneys' fee provision

This rule applies fully to contractual attorneys' fee provisions: "A defendant that has signed a contract providing for attorney's fees is generally entitled to fees if it prevails against a nonsignatory plaintiff in an action on the contract." *Abdallah v. United Savings Bank*, 51 Cal. Rptr. 2d 286, 293 (Cal. Ct. App. 1996); *see also, e.g., In re Bennett*, 298 F.3d 1059, 1071 (9th Cir. 2002) ("third party beneficiaries" must pay "attorneys' fees" even if "not signatories to the agreement"). In such circumstances, the obligation of nonsignatory plaintiffs to pay attorneys' fees does not depend on whether they "*could* have prevailed"—it matters only that they "would have been entitled to attorney fees" "assuming [they]

[5] *See also, e.g., Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 456-57 (9th Cir. 2007) (applying forum-selection clause against nonparties); *Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 364 F.3d 884, 890 (7th Cir. 2004) (applying choice-of-law provision against nonparties); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986) (applying arbitration clause against nonparties); *Lucas v. Bechtel Corp.*, 800 F.2d 839, 848-49 (9th Cir. 1986) (applying collective-bargaining agreement against nonparties).

had prevailed." *Exarhos v. Exarhos*, 72 Cal. Rptr. 3d 409, 415-16 (Cal. Ct. App. 2008); *see Emp'rs Mut. Liab. Ins. Co. v. Tutor-Saliba Corp.*, 951 P.2d 420, 424-26 (Cal. 1998) (third-party subrogee bound by attorneys' fees provision in "contract to which it was not a party").

This settled rule defeats the Tribe's contention that it did not "waive[] its immunity in the context of the LDA" simply because it "was neither a party nor a signatory" to the agreement. Opening Br. 14 n.2. In the district court, Guidiville also contended that the LDA's attorneys' fee provision was limited to the "parties" to the contract and therefore did not apply to the Tribe as a nonsignatory. SER10. Guidiville's own litigation conduct refutes these arguments—the Tribe sought its *own* attorneys' fees under this provision, ER11-13, thus clearly evincing the Tribe's view that it was covered by Section 8.8. Indeed, the law presumes that Guidiville's "decision to so litigate was intelligently made after weighing the risks that all those who instigate litigation face," which "includes the risk of not prevailing" and "bearing all of the cost of the litigation—especially in a case in which there is a contract providing for the payment of the prevailing party's attorney fees." *Tutor-Saliba*, 951 P.2d at 425 (quoting *Allstate Ins. Co. v. Loo*, 54 Cal. Rptr. 2d 541, 544 (Cal. Ct. App. 1996)).

Moreover, Guidiville's view that Section 8.8 applied to it is confirmed by the LDA's plain language. When (as here) a contractual term indicates that

"attorney fees are available to 'any party'" and makes "no reference to a particular party to the contract bringing the suit," the term is not limited to "the signatories." *Cargill, Inc. v. Souza*, 134 Cal. Rptr. 3d 39, 42-45 (Cal. Ct. App. 2011); *see Bennett*, 298 F.3d at 1071 (fee provision must apply to the third-party plaintiff for that plaintiff to be bound to pay fees). Indeed, the "enforcement right" of "a third party beneficiary" is deemed "to include a right to attorney fees" unless the agreement expresses "a clear intent to limit attorney fees to the signatories to the contract." *Cargill*, 134 Cal. Rptr. 3d at 42-45; *cf. Sessions Payroll Mgmt., Inc. v. Noble Constr. Co.*, 101 Cal. Rptr. 2d 127, 133-34 (Cal. Ct. App. 2000) (fees provision expressly disclaimed application to, or enforcement by, third parties).

The LDA evinces no such "clear intent" to limit recovery of attorneys' fees to the parties to the agreement. Phrased in the passive voice, Section 8.8 applies to "*any* legal action" that "is commenced to interpret or to enforce the terms of" the LDA, making clear that *all* lawsuits brought under the LDA are subject to the attorneys' fee provision. SER180 (emphasis added). The "parties" referred to in the provision are the parties *to the lawsuit*, not the signatories of the LDA. *See* SER180 (referring to "the parties prevailing in any such action" and "the party not prevailing"). Thus, because Section 8.8 unambiguously provides that "attorney fees are available to 'any party'" in litigation and makes "no reference to a

particular party to the contract bringing the suit," Guidiville is bound by that provision as a third-party plaintiff. *Cargill*, 134 Cal. Rptr. 3d at 42-45.

3. The rule that a nonsignatory plaintiff assumes the rights and obligations of a contract applies to sovereigns

The general rule that nonsignatory plaintiffs seeking to enforce a contract assume all of that contract's obligations applies to sovereign plaintiffs.

As the Supreme Court has held, a sovereign suing as a nonsignatory "can be in no better position"—and cannot "acquire or exert any greater rights"—than the original parties to the underlying agreement. *Guar. Trust Co. v. United States*, 304 U.S. 126, 141-43 (1938) (government's claim as assignee barred by state statute of limitations). Indeed, when suing as a nonsignatory, a sovereign "stands in the shoes of" the contracting parties "and possesses only those rights" that the parties "could have asserted." *United States v. Garan*, 12 F.3d 858, 860 (9th Cir. 1993) (government suing as assignee subject to equitable estoppel). Thus, whether a signatory or not, a sovereign plaintiff seeking to enforce an agreement cannot "pick and choose" the "contractual obligations with which it will abide." *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320-24 (4th Cir. 2001), *cited with approval by C & L Enters.*, 532 U.S. at 423.

The Sixth Circuit's decision in *United States v. Republic Insurance Company* is instructive. 775 F.2d 156 (1985). There, the United States sued an insurance carrier as the subrogee of a contract that contained a one-year limitations

period. *Id.* at 157-58. The government argued that it could not be bound by the contractual terms of an agreement "to which it was not a party." *Id.* But the court of appeals rejected the government's argument, holding that a sovereign cannot "enforce rights under [a] contract" as a nonparty "while at the same time avoid[ing] conditions imposed by the same writing." *Id.* at 159. Thus, although the limitations term "was not included in a contract to which the government was a party," the government's claim was nonetheless "barred by the contractual limitation of action clause." *Id.* at 159-60.

* * * * *

Under these general contract-law principles, Guidiville became bound by the LDA's applicable terms—including the attorneys' fee provision—when it sued to enforce the agreement. Indeed, Guidiville's "status as a nonsignatory is irrelevant." *Abdallah*, 51 Cal. Rptr. 2d at 293; *see United States v. McInnes*, 556 F.2d 436, 440-41 (9th Cir. 1977) (government waived immunity from back-pay award under settlement agreement—despite having "never signed" the agreement). In "suing as a third-party beneficiary," Guidiville "must accept the contract as it was made." 17A Am. Jur. 2d *Contracts* § 448 (2016). It cannot effectively rewrite or selectively enforce the agreement it voluntarily chose to invoke. *Republic Ins. Co.*, 775 F.2d at 158-60; *see Bankers Ins.*, 245 F.3d at 320-24. Accordingly, because Guidiville cannot "enforce rights under" the LDA "while at the same time

avoid[ing] conditions imposed by" that agreement, *Republic Ins. Co.*, 775 F.2d at 159, the district court did not abuse its discretion in finding that Guidiville was bound by the LDA's attorneys' fees clause. ER12-13.

B. The LDA Waives Any Immunity Guidiville Might Have Possessed From Attorneys' Fees With Requisite Clarity

Guidiville may contend on reply that the attorneys' fees provision in Section 8.8 did not waive tribal immunity with sufficient clarity. Such an argument would be unavailing.

Contractual waivers of tribal immunity must simply be "clear" in light of the agreement's "practical consequences" and "real world objective." *C & L Enters.*, 532 U.S. at 418-22; *see Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) (waiver turns on "a practical, commonsense" inquiry). As such, a contractual waiver of tribal immunity need not "use the words 'sovereign immunity,'" *C & L Enters.*, 532 U.S. at 420—or any other "magic" phrase, *Rosebud Sioux Tribe v. Val–U Constr. Co.*, 50 F.3d 560, 563 (8th Cir. 1995); *see Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (en banc) (same). Rather, tribal immunity is waived when the "clear import" of an agreement indicates the tribe is subject to suit, liability, or specified remedies. *C & L Enters.*, 532 U.S. at 414; *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996) (Posner, J.) (waiver unless tribe "hoodwinked" "into giving up [its] immunity");

see Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp., 818 N.E.2d 1040, 1048 (Mass. 2004) (waiver unless "expressed in a way that" would "unfairly surprise a tribe").

In *C & L Enterprises*, for example, a contract between a tribe and a builder included an arbitration clause and provided that "judgment" on any arbitration award "may be entered . . . in accordance with applicable law in any court having jurisdiction thereof." 532 U.S. at 415. The contract also included a choice-of-law provision providing that it "shall be governed by the law of the place where the Project is located," *i.e.*, Oklahoma. *Id.* The builder obtained an arbitration award for damages and attorneys' fees and filed suit in state court to enforce it. *Id.* at 416. The tribe, however, argued that it had not waived immunity from suit in state court. *Id.* According to the tribe, the underlying contract waived immunity only from arbitration—but not from liability pursuant to the enforcement of an arbitral award in state court. *Id.* at 422.

The Supreme Court rejected that argument, holding that the tribe had waived its immunity by entering into the contract. *Id.* at 418-22. In particular, "the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures" and was bound by that choice. *Id.* at 420. Moreover, by including a choice-of-law provision specifying Oklahoma law, "the parties . . . effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration

Act." *Id.* at 419. That statute's provisions on confirmation in state court were "incorporated by the express terms of the agreement itself." *Id.* at 419 n.1. The Court rejected the contention that such contractual provisions had to use "the words 'sovereign immunity'" in order to effectuate a waiver. *Id.* at 420 (internal citation omitted).

Just like the contractual provision at issue in *C & L Enterprises*, the LDA waived Guidiville's sovereign immunity. The LDA expressly required losing litigants to reimburse "*all* reasonable costs and expenses incurred" by the prevailing side—including "attorney fees." SER180. As evidenced by Guidiville's own demand for attorneys' fees under "Section 8.8(a) of the LDA," ER99, ER103, Guidiville was on clear notice that this provision applied to the Tribe and that it would therefore be required to pay such fees if it lost the "legal action" it instituted to "enforce the terms of" the LDA. SER180.

The LDA's choice-of-law provision underscores the clarity of Guidiville's waiver. By requiring the LDA to be "interpreted under and pursuant to the laws of the State of California," SER180, Section 8.6 expressly "incorporate[s]" California law into "the agreement itself," *cf. C & L Enters.*, 532 U.S. at 419 n.1. And, as the district court noted, ER12, California law mirrors Section 8.8 of the LDA: both entitle "the party prevailing" to "attorney's fees" in "any action on a contract" with

a fee provision, even if the losing party was a nonsignatory to the agreement, *see* Cal. Civ. Code § 1717; *Bennett*, 298 F.3d at 1071.

According to Guidiville, *C & L Enterprises* is "different" from this case because it involved a "contractual provision" under which a tribe "affirmatively consented to the alternative dispute resolution process of arbitration, which, by rule and by common practice, provides for the award of attorneys' fees." Opening Br. 25. But here, Guidiville claims, the "sole basis on which the District Court found the Tribe had waived its sovereign immunity" was its "prayer for attorneys' fees." *Id.* at 5, 25. Guidiville argues that without a "contractual provision" "wherein the Tribe affirmatively waived its immunity," the award of attorneys' fees constitutes "affirmative relief" in the nature of a "counterclaim" for "money damages." *Id.* at 6, 12-13, 25.

Guidiville's arguments are mistaken. ***First***, to the extent this case is "different" from *C & L Enterprises*, the waiver here is even clearer. There is no need to point to any "rule" or "common practice" on attorneys' fees outside the four corners of the LDA (*id.* at 25) to find that Guidiville clearly consented to pay attorneys' fees. The contract expressly so provides. In Guidiville's words, there accordingly was a "contractual provision" "wherein the Tribe affirmatively waived its immunity." *Id.*

Second, Guidiville's "prayer for attorneys' fees" was *not* the "sole basis" for the district court's finding that Guidiville waived immunity. *Contra id.* at 5, 25. Rather, the district court held that Guidiville (like the tribe in *C & L Enterprises*) consented to "an express waiver" of immunity under specific contractual provisions—namely, "Section 8.8 of the LDA," which expressly requires payment of attorneys' fees, and "Section 8.6 of the LDA," which expressly incorporates "the reciprocity provisions of California Civil Code section 1717." ER4 n.5, ER12-13. The district court relied on Guidiville's "convincing[]" allegations that it was "a third party beneficiary" of the LDA and thus subject to the "rights *and obligations*" of the agreement it sued to enforce. ER11 (quoting ER87).

Finally, Guidiville is wrong to characterize the City's award of attorneys' fees as a "counterclaim" for "damages." *Contra* Opening Br. 6, 12-13, 25. The "recovery of attorney fees is not accomplished by counterclaim" when it "has been agreed to by contract." *Tutor-Saliba*, 951 P.2d at 425. Here, as the district court recognized, the City's request for attorneys' fees invoked a contractual term to which Guidiville clearly consented by suing under the LDA as a third-party beneficiary—it was "not a counterclaim or other affirmative claim" against the Tribe. ER9. Thus, just as sovereign immunity did not protect the tribe in *C & L Enterprises* from paying an arbitral award of damages and attorneys' fees,

532 U.S. at 414-23, neither does it protect Guidiville from paying a judicial award of attorneys' fees under the LDA.

C. Guidiville Cannot Undo Its Clear Waiver Of Immunity By Invoking Tribal Law

Guidiville asserts that its waiver of immunity should be ignored because the waiver was purportedly not "authorized as a matter of tribal law." Opening Br. 11-12. According to Guidiville, its tribal constitution authorizes the Tribal Council to "waive the Tribe's sovereign immunity" and to "consult, negotiate, contract or conclude agreements with federal, tribal, state, and local governments on activities, which may affect the Tribe or its interests." ER66-67. Thus, Guidiville claims it cannot be subject "to an award of fees or any other relief in favor of the City" without a waiver of sovereign immunity from the Tribal Council. Opening Br. 11-12. Guidiville's contentions are factually incorrect and legally meritless.

1. The LDA satisfies even Guidiville's standard for finding a "valid" waiver of immunity

Even under Guidiville's proffered test, there is a waiver of sovereign immunity in this case. According to Guidiville, a waiver of immunity is valid only if it is (1) "specific," "limiting," and "in writing"; and (2) "evidenced by a resolution of the Tribal Council." ER61. The LDA meets both of Guidiville's requirements.

First, the LDA's immunity-waiving provisions are "specific," "limiting," and "in writing." Section 8.8 of the LDA reflects Guidiville's written, specifically limited waiver of immunity from costs and attorneys' fees in actions in which it sues to enforce the LDA. *See* SER180. Likewise, Section 8.6's choice-of-law provision embodies Guidiville's written, specifically limited consent "to the governance of [California] law" in disputes arising under the LDA. *C & L Enters.*, 532 U.S. at 414. Because no "talismanic phrases" are needed to effect a clear, specific, and limited waiver, *Narragansett*, 449 F.3d at 25, the LDA waives Guidiville's immunity "with the requisite clarity," *C & L Enters.*, 532 U.S. at 418.

Second, contrary to Guidiville's assertions, the LDA's specific waiver of immunity *is* "evidenced by a resolution of the Tribal Council." *Contra* ER61. As noted, Guidiville's Tribal Council unanimously adopted Resolution #06-02 in April 2006, pursuant to its authority to "approve contracts" as Guidiville's "duly authorized governing body." SER99-102. Resolution #06-02 expressly recognized Guidiville's assent to "the provisions of the Land Purchase Agreement with the City of Richmond"—proclaiming on behalf of Guidiville that the "Tribal Council ha[d] negotiated" the LDA with the City and that it was "an acceptable agreement." SER101. Resolution #06-02 therefore unambiguously "evidence[s]" Guidiville's consent to the LDA and its immunity-waiving terms. *Contra* ER61.

Thus, even under Guidiville's standard, the LDA embodies a "valid" waiver of immunity from attorneys' fees.

2. Tribal law notwithstanding, Guidiville waived immunity from attorneys' fees under federal law by repeatedly admitting its acceptance of the LDA's obligations

Even putting aside the Tribal Council's formal assent to the LDA, Guidiville's waiver of immunity is clear and irrevocable in light of Guidiville's own allegations in this case. Under federal law, the assertions in a pleading constitute "judicial admissions conclusively binding on the party who made them"—both "before the trial court" and "on appeal." *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir. 1988); *see United States v. Crawford*, 372 F.3d 1048, 1055 (9th Cir. 2004) (en banc) (same). Hence, plaintiffs cannot attempt "to controvert [their] own pleading" through post-complaint affidavits. *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528-29 (2d Cir. 1985). Nor may they disavow an "express factual assertion" that they "entered into a" contract. *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 60-61 (1st Cir. 1992).

Jurisdictional facts are no different. When, as here, parties or their attorneys "admit the existence of facts which show jurisdiction," this Court "may act judicially upon such an admission." *Lynch v. Dawson*, 820 F.2d 1014, 1016-17 (9th Cir. 1987) (official's "counsel admitted" "[a]t oral argument" that plaintiffs

had "personal stake" in case); *see In re Benny*, 842 F.2d 1147, 1149 (9th Cir. 1988) (party "cured [a] jurisdictional defect" by admitting "missing element of voluntariness"). Indeed, regardless of the nature of an allegation, parties are bound by statements of counsel—particularly when "represented by a competent attorney of [their] own choice." *Egan v. Teets*, 251 F.2d 571, 577 n.9 (9th Cir. 1957).

Similar principles apply to sovereigns and their representatives. *See Val-U Constr. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 578 (8th Cir. 1998) (tribes bound by litigation strategy, particularly when "represented by counsel of their choosing"). As this Court has explained, the "orderly administration of justice" demands that courts be able to "accept a statement or stipulation of a [sovereign's] attorney." *United States v. Coast Wineries*, 131 F.2d 643, 650 (9th Cir. 1942); *see ACLU v. Masto*, 670 F.3d 1046, 1064-65 (9th Cir. 2012) ("The State, like any party, is responsible for official representations that it makes to the court."); *Hakopian v. Mukasey*, 551 F.3d 843, 846-47 (9th Cir. 2008) (federal agency bound by its uncontested allegations). Accordingly, once a tribe represents that it has entered into a contract waiving its immunity—and seeks to enforce that contract—it cannot assert immunity and "renege on" the agreement. *Cf. Oregon*, 657 F.2d at 1016.

Under these principles, Guidiville's litigation conduct and statements waived immunity. In its district court filings, Guidiville repeatedly asserted that, by

"entering into the LDA," it accepted the "rights *and obligations*" of that agreement. ER87 (emphasis in original). Indeed, Guidiville admitted that, although "not a signatory," it "participated in the negotiations that resulted in the" LDA as well as "all six Amendments to the LDA." ER87. Guidiville represented in the district court that "the only way" the LDA can operate as "intended" was for it to be "binding upon the Tribe," SER85. *See Crawford*, 372 F.3d at 1055 (parties bound by attorneys' statements at argument). Guidiville reaffirmed those allegations in this appeal, incorporating expressly its brief "in the related and pending appeal, Case No. 15-15221," Opening Br. 3, which reiterated the claim that Guidiville "entered into" the LDA, *see* Appellants' Joint Opening Br. 7 & n.2, No. 15-15221. That brief likewise states that the LDA provides "contractual rights" and imposes "contractual obligations" on Guidiville. *See id.* at 4, 16.

Guidiville, however, asserts that such representations "are insufficient to waive tribal immunity." Opening Br. 11. In its view, no "person or entity" can "waive tribal immunity" unless it "had the authority to waive that immunity" under tribal law. *Id.* As such, Guidiville claims that, since its "attorneys had no authority to waive the Tribe's immunity," the pleadings and briefs filed on its behalf cannot waive Guidiville's "immunity as to an award of attorneys' fees." *Id.* at 11-12.

Even putting aside the fact that the Tribal Council *did* waive Guidiville's immunity, *see supra* Section C.1., Guidiville is wrong. ***First***, after invoking

federal court jurisdiction under the pretense of a validly authorized suit, nonfederal sovereigns cannot "regain immunity" simply by asserting that "no properly authorized executive or administrative officer" had "waived [its] immunity." *See Lapides v. Bd. of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 621-23 (2002) (state waived immunity through its attorney general's litigation conduct, despite lacking authority to waive immunity under state law); *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 46-47 (1916) (territory waived immunity when its attorney general invoked federal jurisdiction, despite local law precluding such a waiver); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1289-1300 (11th Cir. 1999) (similar as to foreign sovereigns). The same rule should apply to Guidiville.

Although Guidiville relies on the Supreme Court's decision in *United States v. U.S. Fidelity & Guaranty Co.* ("*USF&G*") to assert that its attorneys cannot waive immunity, that case is inapposite. *Contra* Opening Br. 11 (citing 309 U.S. 506, 513 (1940)). Unlike here, *USF&G* involved "*a failure to object* to the jurisdiction of" a federal court. 309 U.S. at 513 (emphasis added). The Court held that such a failure did not confer federal jurisdiction when there was no "waiver of immunity" and when the lower court's judgment "was entered without statutory authority." *Id.* at 507, 513.

But in this case, Guidiville has not simply failed to object—it has affirmatively demanded federal court jurisdiction to assert its claims, alleging that

it "entered into" the LDA and assumed the "rights *and obligations*" of that agreement. ER85-87 (emphasis in original). Indeed, Guidiville's duty to comply with the LDA was the very basis of its lawsuit against the City. Thus, Guidiville's own allegations distinguish this case from *USF&G* by conclusively establishing the Tribe's assent to the LDA's immunity-waiving terms. *See Bankers Ins.*, 245 F.3d at 323 ("[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid [other] terms.").

Second, even assuming Guidiville's attorneys were not authorized to waive immunity, they undoubtedly *were* authorized to make binding representations on the Tribe's behalf—and Guidiville has not argued otherwise. Thus, Guidiville cannot undo the "express factual assertion" of its pleadings that it "entered into" the LDA. *See Schott*, 976 F.2d at 60-61; *Bellefonte*, 757 F.2d at 528-29. Because Guidiville's representations in this case bind it to an agreement that clearly requires payment of attorneys' fees, Guidiville is "conclusively" bound by facts showing that it waived immunity. *See Am. Title Ins.*, 861 F.2d at 226-27.

Put simply, Guidiville has judicially admitted "the existence of facts which show jurisdiction" via a clear waiver of immunity—and this Court "may act judicially upon such an admission." *See Lynch*, 820 F.2d at 1016-17. As the Supreme Court has long held in similar contexts, "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the

action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step." *Porto Rico v. Ramos*, 232 U.S. 627, 632 (1914).

CONCLUSION

The district court's judgment awarding the City attorneys' fees under the LDA should be affirmed.

Dated: May 25, 2016

Respectfully submitted,

s/ Joseph R. Palmore

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 25, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 8,304 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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