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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FEDERATED INDIANS OF GRATON RANCHERIA, Plaintiff and Appellant, v. KENWOOD INVESTMENTS NO. 2, LLC, Defendant and Respondent.	A147281 (San Francisco County Super. Ct. No. CGC-14-537441)

Federated Indians of Graton Rancheria (the Tribe) entered into an agreement with Kenwood Investments No. 2, LLC (Kenwood), whereby Kenwood would provide consulting services concerning the development of a casino on a particular site. In connection with this agreement, the Tribe approved a resolution waiving its sovereign immunity from suit by Kenwood. The parties subsequently amended the agreement to allow for the development of another site. Litigation ensued when the Tribe allegedly failed to make required payments to Kenwood, and the Tribe claimed its waiver of sovereign immunity did not apply because of the amendment to the contract. The trial court disagreed, and entered judgment for Kenwood and also awarded Kenwood attorney fees pursuant to an indemnity clause in the agreement. We affirm the trial court's findings regarding sovereign immunity but reverse the award of attorney fees.

BACKGROUND

The Tribe's ancestral territories include Marin and Sonoma counties. The General Council of the Tribe consists of all Tribe members who are 18 years of age or older. The governing body of the Tribe is the Tribal Council, which consists of seven tribal members elected from the General Council. Pursuant to the Tribe's constitution, the power to waive the Tribe's sovereign immunity is reserved to the General Council, and may be exercised through initiative, referendum, recall, or amendment to the constitution.

On March 2, 2002, the Tribe entered an agreement to hire Platinum Advisors (Platinum) as the Tribe's business development consultant. Several months later, in November 2002, the Tribe approved a resolution directing Platinum to identify a "large portion of land" in Marin County or Sonoma County which could accommodate "homes, a school, a cultural center and large businesses with the possibility of a casino." In or around March 2003, with the consent of the Tribe, Platinum assigned the March 2, 2002 agreement to Kenwood.

The record of this two-week trial below indicates there was a " 'flurry of activity' " among the parties in this suit to finalize the Agreement before the April 22, 2003 General Council meeting where the Agreement and the tribal immunity issue was considered. As a result of this extended discussion, the parties, including the Tribe representatives, decided the definition of "Agreement" in the original contract would include "*amendments*" within the meaning of "Agreement" defined in Article 1 of the contract approved by the General Council. As noted by the trial court in its statement of decision, no evidence was presented at the trial to controvert the notion *all* the parties anticipated possible modifications of the original Agreement. Consequently, the pact approved by the General Council on April 22 expressly included "amendments" within the definition of "Agreement" as well.

On April 22, 2003, the Tribe entered into the Land Acquisition and Governmental Relations Consulting Agreement (Consulting Agreement) with Kenwood, whereby

Kenwood would consult with and provide advice and assistance to the Tribe regarding real estate acquisition, development, land use, and federal, state, and local government relations necessary to the development of a gaming enterprise. The gaming enterprise was to be located on lands identified as "the Gaming Enterprise Site." An attachment to the agreement provides a legal description of that site, which the parties now refer to as the "Highway 37 property." In consideration for its services, Kenwood was to receive a consulting fee equal to 4 percent of net gaming revenues generated by the enterprise, which could be reduced to 3 percent in the event the Tribal Council concluded Kenwood did not act in good faith or did not make reasonable efforts to meet the deadlines set forth in the agreement.

The Consulting Agreement also includes an arbitration clause, and a limited waiver of sovereign immunity. The arbitration clause states, in relevant part: "All disputes, controversies or claims arising out of or relating to this Agreement, including, but not limited to, any allegation of uncured breach, shall be resolved by binding arbitration . . . ." The sovereign immunity waiver, which is set forth in section 10(C) of the Consulting Agreement, states: "[T]he Tribe expressly and irrevocably waives its sovereign immunity from suit for the purpose of claims by Consultant, including enforcing this Agreement, compelling arbitration, enforcing any arbitration award and enforcing other remedies as provided in Section 10(D)." Section 10(D) states the Tribe's immunity from suit is specifically limited to actions for damages, actions for injunctive relief, and actions to compel arbitration.

In order to complete and execute the Consulting Agreement, the General Council approved Resolution No. 03-01 GC (the Resolution) on April 22, 2003. The Resolution states: "[T]he Tribe expressly and irrevocably waives its sovereign immunity from suit by Consultant [Kenwood] for the purpose of enforcing the Consulting Agreement by compelling arbitration, enforcing any arbitration award or seeking injunctive relief authorized under the Consulting Agreement, as limited by the specific language of the

waiver of sovereign immunity provision of the Consulting Agreement. . . . The purpose of this explicit waiver of Tribal sovereign immunity is to induce Consultant to enter into the Consulting Agreement on the terms and conditions therein provided." Additionally, the resolution approves the waiver of sovereign immunity contained in the Consulting Agreement and authorizes the tribal chairman and secretary to "execute and deliver on behalf of the Tribe such additional instruments and certifications as may be necessary and appropriate in order to implement the Consulting Agreement and this Resolution . . . ."

Problems arose with the Highway 37 property, and the Tribe decided to develop the casino on another site. To accommodate this change in plans the Tribe and Kenwood executed Amendment No. 2 to the Consulting Agreement in August 2003. Amendment No. 2 recites: "Tribe and [Kenwood] now desire to amend the [Consulting] Agreement in order to clarify their respective rights and obligations regarding the terms of the Agreement." Except as expressly provided in Amendment No. 2, all provisions of the original Consulting Agreement, including the limited waiver of sovereign immunity, continued in full force and effect. Amendment No. 2 amended the term "Gaming Enterprise Site" to mean "that portion of Tribal Lands located in Marin County or Sonoma County, California that are acquired by, or for the benefit of, the Tribe . . . as the site for the Tribe's Enterprise." It also reduced Kenwood's consulting fee from 4 percent to 3 percent of the net gaming revenues generated by the enterprise.

The Tribe later developed a gaming enterprise near Rohnert Park, known as the Graton Resort & Casino, which opened on November 5, 2013. In January 2014, Kenwood asserted the Tribe was in breach of the parties' agreements as a result of its failure to pay Kenwood the first priority payment due under the Consulting Agreement.

In February 2014, the Tribe filed the instant action. A first amended complaint, the operative pleading in this matter, was filed in December 2014. The amended pleading asserted two claims for declaratory relief and sought a judgment declaring the Tribe's sovereign immunity barred suit to enforce Kenwood's purported rights under

Amendment No. 2 to the Consulting Agreement. The crux of the pleading is that the Tribe's General Council did not approve Amendment No. 2 or authorize any waiver of the Tribe's sovereign immunity for the enforcement of that amendment. Kenwood filed a cross-complaint to compel arbitration and for related declaratory relief, and a motion to compel arbitration and dismiss the Tribe's complaint. The matter was set for trial and tried over nine days in April 2015.

On November 3, 2015, the trial court issued a statement of decision, finding the Tribe had waived its sovereign immunity as to Kenwood's claims. The court held it must compel arbitration under the terms of the Resolution and the arbitration and waiver clauses in the Consulting Agreement. Alternatively, the court found the extrinsic evidence admitted at trial established arbitration was appropriate because the parties entered into Amendment No. 2 to implement the Consulting Agreement in accordance with the terms of the Resolution.

Kenwood later moved for an award of attorney fees and costs, which the trial court granted pursuant to Code of Civil Procedure sections 1032, subdivision (b), 1033.5, and 1293.2, and the Tribe's contractual obligations under section 26 of the Consulting Agreement. The court awarded Kenwood $1,232,277.55 in attorney fees.

DISCUSSION

A. *Sovereign Immunity*

The Tribe argues the trial court erred in finding it was not immune from Kenwood's claims for breach of contract, as only the General Council is authorized to waive the Tribe's sovereign immunity. While the Tribe concedes the General Council waived sovereign immunity with respect to claims arising out of the Consulting Agreement, the Tribe contends the General Council did not waive immunity as to claims arising out of Kenwood's work on a new casino site pursuant to Amendment No. 2. The Tribe further argues the trial court erred by applying a contract-type analysis to the sovereign immunity waiver, as the Resolution and the sovereign immunity language of

the Consulting Agreement should have been treated as legislation. We find these arguments unavailing.

"Indian tribes enjoy sovereign immunity 'from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.' [Citation.] 'As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its [sovereign] immunity.' [Citation.] '[T]o relinquish its immunity, a tribe's waiver must be "clear." ' [Citation.] For a waiver to be effective, it 'must be made by a person or entity authorized to do so.' [Citation.] A party claiming a tribe has waived its sovereign immunity bears the burden of proof on the issue." (*Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194, 1204–1205, fn. omitted.) Generally, the issue of whether an Indian tribe has waived its sovereign immunity, and thus whether a court has subject matter jurisdiction over an action against the tribe, is a question of law subject to de novo review. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180.) Likewise, we review a trial court's interpretation of a contract de novo where the contractual interpretation is based solely upon the terms of the written instrument. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913.)

Here, both the Resolution and the Consulting Agreement clearly and unambiguously waive the Tribe's sovereign immunity as to claims concerning the enforcement of the Agreement. The Resolution, which was approved by the Tribe's General Council, states: "[T]he Tribe expressly and irrevocably waives its sovereign immunity from suit by [Kenwood] for the purpose of enforcing the Consulting Agreement . . . ." The Resolution also approves the waiver of sovereign immunity contained in the Consulting Agreement, which states "the Tribe expressly and irrevocably waives its sovereign immunity from suit for the purpose of claims by [Kenwood], including enforcing this Agreement . . . ."

The question presented is whether the Resolution and Consulting Agreement's sovereign immunity waivers encompass disputes arising from amendments to the Consulting Agreement, including Amendment No. 2. The plain language of the Resolution and Consulting Agreement indicate that they do. As discussed, section 10(C) of the Consulting Agreement states the Tribe waives its sovereign immunity from suit for the purposes of claims by Kenwood, including claims to "enforc[e] this Agreement." The Consulting Agreement defines the term " 'Agreement' " to mean "this Consulting Agreement, as the same may be amended from time-to-time." These provisions, which were reviewed and approved by the General Council when it enacted the Resolution, leave no doubt that the Tribe's waiver of sovereign immunity extended to amendments to the Consulting Agreement. This includes Amendment No. 2, which amended the Consulting Agreement's definition of the "Enterprise" to encompass development on other sites.

Moreover, in section 10(B) of the Consulting Agreement, which was also reviewed and approved by the General Council, the Tribe agreed that "[a]ll disputes, controversies or claims arising out of or relating to this *Agreement*, including, but not limited to, any allegation of uncured breach, shall be resolved by binding arbitration . . . ." (Italics added.) The agreement's dispute resolution regime "has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration." (*C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411, 422.) Thus, the Tribe's agreement to arbitrate disputes about the Agreement, which the parties defined to include amendments thereto, further evidenced its intent to waive its sovereign immunity. Indeed, the Supreme Court suggested an arbitration clause like that in the Consulting Agreement would be *meaningless* if it did not amount to waiver of any tribal immunity. (*Ibid.*) Additionally, "the Tribe [did not] find itself holding the short end of an adhesion

contract stick: The Tribe *proposed and prepared* the contract; C & L foisted no form on a quiescent Tribe." (*Id.* at p. 423, italics added.) Our record at the very least reflects full engagement by Tribe representatives in the contract drafting process.

The Tribe asserts its waiver of sovereign immunity was site specific, and thus no longer applied when the site of the proposed development was moved to Rohnert Park. It reasons the scope of the Consulting Agreement is expressly limited to the "Enterprise," a defined term meaning a gaming development on the Highway 37 property. According to the Tribe, nothing in the Consulting Agreement delegates any authority to the Tribal Council to expand the waiver either generally or to embrace a project on another site. The Tribe further argues the only term in the Consulting Agreement referring to another site grants the Tribe the right to develop a casino somewhere other than the Highway 37 property without paying Kenwood. Additionally, the Tribe contrasts the Resolution with legislation adopted for the Tribe's contracts with another party, which both waived immunity and expressly anticipated a site change. On reply, the Tribe further argues that not every change to a contract constitutes an "amendment," and here the plain language of the relevant documents preclude amendment to waive sovereign immunity for acquiring land other than at the Highway 37 property.

These contentions are unavailing. While the original Consulting Agreement may have been site specific, or at least specific to the Highway 37 property, Amendment No. 2 to the Consulting Agreement was not. That amendment expanded the definition of the "Gaming Enterprise Site" to mean "that portion of Tribal Lands located in Marin County or Sonoma County, California that are acquired by, or for the benefit of, the Tribe, . . . as the site for the Tribe's Enterprise." And the Tribe can point to nothing in the Resolution or the Consulting Agreement which precluded the amendment of the Consulting Agreement to encompass another site. Moreover, as discussed above, the Consulting Agreement's waiver of sovereign immunity extended to claims to enforce the "Agreement," which was defined as the "the Consulting Agreement, as the same may be

amended or modified from time-to-time." The Tribe's arguments concerning the definition of "amendment" run contrary to the commonsensical meaning of the term. Amendment No. 2 changed a handful of provisions in the Consulting Agreement, and allowed the parties to carry through on their contractual obligations after it became apparent development of the Highway 37 property would be infeasible. It strains credulity to suggest such a change was something other than an amendment and necessitated the approval of the General Council or a second, separate waiver of sovereign immunity, especially in the absence of any authority requiring such an undertaking.

The Tribe contends the contractual definition of the term Agreement "harmonizes with the Tribal Council's power to make contracts without waiving immunity." According to the Tribe, the contract's definition of Agreement does not imply "that the Tribal Council can waive sovereign immunity for a contract—called an amendment or otherwise—to develop a different site." We remain unconvinced. Read as a whole, the Consulting Agreement, which was approved by the General Council through the Resolution, clearly and unambiguously shows the Tribe agreed to waive its sovereign immunity as to claims by Kenwood to enforce the contract and any amendments thereto. The Tribe is essentially asking us to ignore the plain language of the Consulting Agreement and impose limitations on its waiver of sovereign immunity to which the parties never agreed. It simply does not make sense that an amendment changing the site of the proposed development would somehow void the General Council's waiver of sovereign immunity when the General Council expressly approved a waiver for any action brought by Kenwood to enforce the Consulting Agreement or authorized amendments to that agreement.

The Tribe further argues that only the General Council can waive sovereign immunity, and the Resolution does not delegate to the Tribal Council the authority to develop a project on a different site or waive sovereign immunity for such a project. But

nothing in the Resolution suggests General Council approval is required for changing the site of the proposed development. To the contrary, the Resolution approved the Consulting Agreement, which, as discussed, contemplates the potential for amendment and expressly extends the sovereign immunity waiver to amendments.[1] We suppose the parties could have agreed to limit the types of amendments that could be made without General Council approval. But they declined to do so. We also take issue with the Tribe's suggestion that Amendment No. 2 constituted a wholly new or independent agreement which contemplated a new project. Amendment No. 2 did little to substantively amend the original Consulting Agreement other than to change the definition of the "Gaming Enterprise Site" to allow for development on other sites and to reduce Kenwood's consulting fee. Almost all of the other provisions in the Consulting Agreement were to "continue in full force and effect."[2]

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[1] In this case, Resolution No. 03-01 GC authorized identified the Tribal Council to "negotiate the final form of the Consulting Agreement" without further action by the General Council. This was the authorization employed by the Tribal Chairman and Tribal Counsel in adopting Amendment No. 1 and, importantly, Amendment No. 2. This delegation of "power" allowed them to act where immunity had been approved without further request of a new grant of tribal immunity. In *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 215–216, a new request for tribal immunity to approve the fourth amendment to a commercial transaction was unnecessary in light of the previous grant of such immunity, even though the new amendment involved substantial legal and procedural modifications of the business undertaking.

[2] Kenwood contends the Resolution expressly allows the Tribal Council to amend the Consulting Agreement because it authorizes the Tribal Council to "negotiate the final form of the documents listed herein with advice of the Tribe's legal counsel," and authorizes the Tribal Chairman and Secretary "to execute the documents listed herein in substantially the form heretofore provided to the General Council with such changes as the Tribal Council, upon advice of counsel to the Tribe, shall approve, without further action by the General Council, and to execute and deliver on behalf of the Tribe such additional instruments and certifications as may be necessary and appropriate in order to implement said documents and this Resolution . . . ." The Tribe counters the provisions are merely boilerplate. We need not and do not reach the issue.

Amendment No. 2, effective August 14, 2003, less than six months after the original agreement, has *numerous* recitals within its three pages stating its purpose was to amend the Consulting Agreement, which otherwise remains in full force. "Tribe and Consultant [Kenwood] now desire to amend the Agreement in order to clarify their respective rights and obligations regarding the terms of the [Consulting] Agreement, as set forth below." Later the parties state: "Except as expressly provided in this Amendment No. 2, *all of the provisions* of the Agreement dated April 22, 2003 and the First Amendment dated July 14, 2003 shall continue in full force and effect. In the event a conflict between the terms of this Amendment No. 2 and [the] terms of the [Consulting] Agreement or the First Amendment, *this* Amendment No. 2 shall prevail." (Italics added.) A further indication Amendment No. 2 was within the scope of the tribal immunity waived by the General Council is this reference in the Amendment: "Except as expressly amended by this Amendment No. 2, the terms and conditions of the [Consulting] Agreement, including, but not limited to[,] the Limited Waiver of Sovereign Immunity as evidenced by . . . Resolution No. 0301-CG, . . . shall remain unaltered, are hereby affirmed, and shall continue in full force and effect."

In sum, we find there was a clear and express waiver of sovereign immunity for claims arising out of Amendment No. 2 based on the plain language of the Resolution and the Consulting Agreement approved by the Resolution. In light of this finding, we need not and do not address the Tribe's contention that the trial court erred in considering extrinsic evidence to interpret the Resolution.

B. *Attorney Fees*

Next, the Tribe argues the trial court erred in awarding Kenwood attorney fees. The trial court's award was based on section 26 of the Consulting Agreement, in which the Tribe agreed to indemnify Kenwood from and against "any and all costs, liability, obligation, suit, claim or demand." The Tribe contends this indemnity clause applies only to third party claims—not direct claims—and does not authorize the award of

attorney fees as costs in litigation between the parties to the contract. The argument has merit.

The indemnity provision at issue states in relevant part: "The Tribe agrees to defend[,] indemnify[,] save[,] and hold harmless Consultant [Kenwood], its agents and employees from and against any and all costs, liability, obligation, suit, claim or demand, whether legal, equitable[,] declaratory or otherwise, asserted against, or incurred by[,] Consultant (including, without limitation, reasonable attorneys' fees and expenses) as a result of, or arising from, or in connection with, this Agreement to the fullest extent permitted by law, except to the extent that any such liability arises from Consultant's gross negligence or willful misconduct. In no event shall Tribe make any claim against Consultant on account of any alleged errors of judgment made in good faith in connection with the performance by Consultant of the obligations and duties set forth herein. The Tribe hereby waives any right and shall not assert in any lawsuit, action or proceeding that this Agreement is void, voidable, or otherwise invalid for failure to receive the approval of the Chairman of the National Indian Gaming Commission . . . ."

"Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, § 2772.) "Indemnity generally refers to third party claims. 'A clause which contains the words "indemnify" and "hold harmless" is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons.' " (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1024 (*Zalkind*).) While indemnity clauses usually relate only to third party claims, "this general rule does not apply if the parties to a contract use the term 'indemnity' to include direct liability as well as third party liability." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 555 (*Dream Theater*).) "[T]he question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control."

(*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633.) To the extent this analysis is based solely on the terms of the contract, and not extrinsic evidence, our review is de novo. (*Morey v. Vannucci*, *supra*, 64 Cal.App.4th at p. 913.)

In *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574 (*Alki Partners*), the court addressed a similar indemnity clause to the one at issue here and found that it did not grant the prevailing party a right to recover attorney fees. The agreement stated the plaintiff would indemnify the defendant "for all losses, including attorney fees 'resulting in any way from the performance or non-performance of [the defendant's] duties hereunder. ' " (*Alki Partners*, at p. 602.) The court concluded the language was indistinguishable from other cases finding indemnity provisions covered only third-party claims, including *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14 (*Carr*), where the indemnitor promised to indemnify against " ' "all claims, damages, losses and expenses including attorney fees arising out of the performance of the work described herein," ' " and *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949 (*Myers*), where the indemnity clauses covered " ' "every claim" ' " arising " 'out of the "performance of the contract." ' " (*Alki Partners*, at p. 602.) Likewise, in the instant action, the Tribe agreed to indemnify Kenwood from all costs, liability, claim or demand asserted against it, including attorney fees, as result of or in connection with the Consulting Agreement.

Kenwood contends it is entitled to recover attorney fees because the Tribe agreed to indemnify it " 'from any and all costs . . . suit, claim or demand . . . asserted against or incurred by [Kenwood] . . . as a result of, or arising from, or in connection with, the Agreement.' " Kenwood further argues the second sentence of the indemnity clause, which states the Tribe shall not make claims against Kenwood "on account of any alleged errors of judgment made in good faith," shows indemnity extends to direct claims. We cannot agree. As to the first point, it is entirely unclear whether the indemnity clause is referring to "any and all" direct claims, or merely "any and all" third party claims.

Moreover, the indemnity provisions in *Alki Partners*, *Carr*, and *Myers* contained similar language, and in those cases the provisions were found to apply to only third party claims. (*Alki Partners*, 4 Cal.App.5th at p. 602 ["all losses"]; *Carr, supra,* 166 Cal.App.4th at p. 19 [" 'all claims, damages, losses, and expenses' "]; *Myers*, *supra*, 13 Cal.App.4th at p. 974 [" 'any, all, and every claim' "].) Kenwood's interpretation of the agreement has the potential to convert all indemnity clauses into attorney fee provisions. We decline to adopt such a broad reading. With respect to Kenwood's next point, the second sentence in the indemnity provision is incongruous with the rest of the text, as it does not appear to apply to indemnity at all. While this incongruity may raise other questions about the parties' intent, it does not suggest the Tribe intended to indemnify Kenwood for direct claims.

We also find the cases cited by Kenwood to be distinguishable. In *Zalkind*, *supra*, 194 Cal.App.4th 1010, one party agreed to indemnify the other from any and all " damages," which the contract defined to include all liabilities, damages, losses, costs and expenses incurred by the indemnified party " 'whether or not they have arisen from or were incurred in or as a result of any demand, claim, action, suit, assessment or other proceeding or any settlement or judgment.' " (*Id.* at p. 1027.) The court found this language suggested the categories of damages covered by the agreement was "not limited to third party claims." (*Id.* at pp. 1027–1028.) The indemnity provision also distinguished between the procedures for providing notice of a direct and third party claims, which would not have been necessary if the provision only referred to third party claims. (*Id.* at p. 1028.) No similar language appears in the Consulting Agreement.

Baldwin Builders v. Coast Plastering Corp. (2005) 125 Cal.App.4th 1339 is also distinguishable. There, the issue was whether an indemnity agreement allowed for the recovery of attorney fees incurred in litigating an indemnity claim. The indemnity clause there not only provided the plaintiff with a right to indemnity for liabilities to third parties, but it also specified that the defendants were required to pay the plaintiff " 'all

costs, including attorney's fees, incurred in enforcing this indemnity agreement.' " (*Id.* at pp. 1344–1345, italics omitted.) By contrast to the general provisions requiring the defendants to indemnify the plaintiff in the event of third party claims, "the attorney fee clauses unambiguously contemplate an action *between the parties* to enforce the indemnity agreements . . . ." (*Id.* at p. 1345.) Again, the Consulting Agreement contains no such language.

Likewise, in *Dream Theater, supra*, 124 Cal.App.4th 547, one party agreed to indemnify the other against all losses " 'whether or not arising out of third party Claims.' " (*Id.* at p. 556.) Based on this language, the court concluded nothing in the indemnity provision was limited to third party lawsuits. (*Ibid.*) No such language appears in the Consulting Agreement.

In *Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, a corporation agreed to indemnify two corporate officers as to any claims or actions brought against them in their official capacity. (*Id.* at pp. 1387, 1394–1395.) The officers sued the corporation, and the corporation cross-complained for breach of fiduciary duty, conversion, and conspiracy, among other things. (*Id.* at pp. 1385–1386.) The trial court entered judgment in favor of the officers, but found they were not entitled to attorney fees under the indemnity agreements. (*Id.* at pp. 1386–1388.) On appeal, the court reversed the denial of attorney fees, noting the indemnity provision applied to an " 'action or suit by or in the right of the corporation to procure a judgment in its favor.' " (*Id.* at p. 1395.) Kenwood can point to no similar language in the Consulting Agreement.

Hot Rods, LLC v. Northrop Grumman Systems Corporation (2015) 242 Cal.App.4th 1166 (*Hot Rods*) is inapposite as well. There, the contract indemnified the plaintiff from " 'any claims, demands, penalties, fees, fines, liability, damages, costs, losses, or other expenses including . . . reasonable attorney fees.' " (*Id.* at p. 1181, italics omitted.) The court held the indemnity provision was broad enough to encompass direct claims because of the contract's special definition of "claim," which encompassed " 'any

claim or demand by any Person for any alleged liabilities,' " as well as the contract's definition of "Person," which included " 'any person, employee, individual, corporation, unincorporated association, partnership, trust, federal, state or local governmental agency, authority or other private or public entity.' " (*Ibid.*) While the Tribe also agreed to indemnify Kenwood against "any . . . claim[s]," the Consulting Agreement does not include an expansive definition of the term claim. Moreover, as in *Zalkind*, *supra*, 194 Cal.App.4th 1010 and unlike here, the contract in *Hot Rods* contained language concerning notice of claims which suggested indemnity was not limited to third party claims. (*Hot Rods*, at p. 1182.)

DISPOSITION

The trial court's ruling that the Tribe waived sovereign immunity with respect to Amendment No. 2 is affirmed. We reverse the award of attorney fees. All other aspects of the judgment remain undisturbed. The parties shall bear their own costs on appeal.

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Dondero, J.

We concur:

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Humes, P. J.

_____
Banke, J.