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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ACRES BONUSING, INC., et al.

Plaintiffs,

v.

LESTER MARSTON, et al.

Defendants.

Case No.: 3:19-cv-05418-WHO

REPLY TO OPPOSITION TO MOTION OF DEFENDANTS LESTER MARTSON, ARLA RAMSEY, THOMAS FRANK, ANITA HUFF, "RAPPORT AND MARSTON", DAVID RAPPORT, COOPER DEMARSE, ASHELEY BURRELL, DARCY VAUGHN AND KOSTAN LATHOURIS TO STRIKE PLAINTIFF ABI'S PENDENT STATE LAW CLAIMS PURSUANT TO C.C.P. § 425.16 (Anti-SLAPP)

DATE: April 15, 2020
TIME: 2:00 p.m.
DEPT: 53

Judge: Hon. William H. Orrick

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Defendants Arla Ramsey, Anita Huff, Thomas Frank, Lester Marston, Rapport and Marston, David Rapport, Darcy Vaughn, Ashley Burrell, Cooper DeMarse, and Kostan Lathouris ("Moving Defendants") respectfully submit this Reply to Plaintiff ABI's Opposition to their motion to strike Plaintiff ABI's pendent state law claims pursuant to California Code of Civil Procedure section 425.16 (anti-SLAPP).

I. INTRODUCTION

Plaintiff's Opposition makes two facts exceedingly clear: (1) Mr. Acres and ABI refuse to acknowledge that Indian tribes are entitled to set the rules for their own courts and (2) ABI's real complaint is against the Blue Lake Rancheria ("Blue Lake Rancheria" or "Tribe"). Since neither Mr. Acres nor ABI can sue Blue Lake Rancheria except in Tribal Court, Mr. Acres has instead brought multiple lawsuits individually and through his corporation against every individual who had any direct, indirect, or suspected involvement in that case or the two unsuccessful federal court cases he filed in an attempt to derail the tribal court proceedings. Plaintiffs' arguments essentially treat the Blue Lake Rancheria and its elected officials, employees and attorneys as one, thus clearly establishing that this is a blatant attempt to avoid the Tribe's immunity. In essence, they are suing because Mr. Acres does not believe the Tribe's process for selecting its Tribal Court judges is fair. He seeks to impose upon tribal court judges the strict separation of powers doctrine that governs federal court judges. He also argues that an attorney's representation of a different tribe with related interests precludes acting as a judge.

Determining how tribal courts are run, how its judges should be selected, and what code of conduct applies to them is outside the jurisdiction of this court. It is not for this court or Mr. Acres to dictate to the Blue Lake Rancheria who can sit as a judge or the rules that apply to that individual. Plaintiff's attempts to dictate to a sovereign Indian tribe how its courts should operate falls squarely within the ambit of the anti-SLAPP statute. Further, their entire case is based on the supposition that Judge Marston was "suborned" into ruling against them – an argument with no factual support that runs contrary to what actually happened in the underlying case. Since ABI cannot establish a reasonable likelihood of success on the merits, its state law claims should be stricken in their entirety.

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II. THE ANTI-SLAPP STATUTE APPLIES

Plaintiff contends that the anti-SLAPP statute does not apply to this claim, making a variety of contradictory assertions that are unsupported by law. The California Legislature has specifically instructed that the anti-SLAPP statute "shall be construed broadly." (Code Civ. Proc., § 425.16, subd. (a).) Plaintiff's proposed narrow interpretation of the anti-SLAPP states runs contrary to its plain language and the case law.

A. Tribal Court is a Proceeding Authorized by Law to which the anti-SLAPP Statute Applies.

Plaintiff argues that the anti-SLAPP statute does not apply because the Blue Lake Rancheria is not a party to the United States Constitution. While historically undisputable, the fact is also completely irrelevant.[1] None of the cases cited by Plaintiff hold or even suggest that tribal courts are not proceedings authorized by law or that constitutional rights do not exist in those courts.

In fact, the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. sections1301-1304, imposes many of the protections of the U.S. Constitution on Indian tribes. That specifically includes the right "to petition for redress of grievances." (25 U.S.C. §1302, subd. (a)(1).) As noted in the dissenting opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978): "The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U. S. C. §§ 1301-1341, is 'to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.'" (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72-73 (1978), citing S. Rep. No. 841, 90th Cong., 1st Sess., 6 (1967).) Plaintiff's bare statement that there is no constitutional right of petition in tribal courts is therefore dubious and his citation to a billing entry from Ms. Burrell does not support a contrary finding.

[1] *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1988) states simply that because tribes were not parties to the Constitution they are also not "parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible." Similarly, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1675-76 (1978) noted that as "separate sovereigns pre-existing the Constitution, tribes have historically been [regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" while also noting that the Indian Civil Rights Act imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Id.* at 57-58.

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Plaintiff's argument also ignores the anti-SLAPP statute's own definitions. The statute defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include: (1) "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" and (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e).) *Vargas v. City of Salinas*, 46 Cal.4th 1 (2009) makes clear the anti-SLAPP definitions of protected activity apply whether the participation is constitutionally protected or not, since the decision acknowledges that while a government is not a person protected by the First Amendment, it nevertheless is entitled to file an anti-SLAPP motion, if it engages in protected activity as defined in § 425.16(e). (*Id.* At 17.)

Further, the anti-SLAPP statute includes proceedings authorized by law outside of the traditional context of courts. For example, a hospital peer review committee has been deemed to be "an official proceeding authorized by law" under section 425.16, subdivision (e)(2) because that procedure is required under Business and Professions Code section 805 et seq. (*Kibler v. Northern Inyo County Local Hospital Dist.*, 39 Cal.4th 192, 199 (2006).)

Tribal courts are both judicial proceedings and proceedings authorized by United States law. Numerous federal laws authorize tribal courts to exercise authority over both tribal members and non-Indians. For example, the Indian Civil Rights Act authorizes tribal courts to impose a $500 fine and up to six months in prison. The 2013 reauthorization of Violence against Women Act allowed tribes to prosecute non-Indians who commit acts of violence against Indians with whom they are in a relationship. (42 U.S.C. § 1301, et seq.; Violence against Women Reauthorization Act of 2013, 113 P.L. 4, 127 Stat. 54, 121.) Further, federal law mandates that the states give full faith and credit to tribal court custody orders involving Indian children (25 U.S.C. § 1911(d)), protection orders (18 U.S.C. § 2265); child support orders (28 U.S.C. § 1738 B); and child custody orders (Family Code § 3404).

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Finally, there is a "long-standing federal policy supporting the development of tribal courts" for the purpose of encouraging tribal self-government and self-determination." (*Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003). This policy is the basis for according tribal court judges "the same absolute judicial immunity that shields state and federal court judges." (Ibid). This policy is also best served by according tribal courts the same protection of the anti-SLAPP statute that is afforded to state courts.

B. Tribal Court is Not the Equivalent of a Foreign Nation's Courts

Plaintiff's reliance on *Guessous v. Chrome Hearts, LLC*, 179 Cal.App.4th 1177 (2009) is misplaced. *Guessous* held that "petitioning activity undertaken in a foreign county is not protected by the anti-SLAPP statute." *Id.* at 186. This was based on the lack of any Constitutional right to petition in the courts of France, where the underlying litigation took place.

A Native American tribe is not equivalent to a foreign government. This has been well established law in the United States since the 1830s, beginning with *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). "For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities,' [Citation] . . . We have frequently noted, however, that the 'sovereignty that the Indian tribes retain is of a unique and limited character.'" (*Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008).) "Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. . . . As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states. . ." (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-209 (1978)) "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' [Citation]." (*Ibid*, citations omitted.)

As discussed at length above, tribal courts are not treated as courts of a foreign nation for purposes of multiple federal statutes. Further, as discussed length in the two District Court lawsuits that Mr. Acres filed attacking the Tribal Court's jurisdiction, any decision of the Blue

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Lake Tribal Court regarding jurisdiction would have been reviewable by the District Court after tribal court remedies were exhausted, a limitation that would certainly not apply to the courts of a foreign nation. There is simply no basis for treating tribal courts, whose authority ultimately is subordinate to the federal government, as equivalent to courts in independent foreign countries.

C. The Illegal Activity Exclusion Does Not Apply

Plaintiff alleges that the anti-SLAPP statute does not apply because Moving Defendants are guilty of "suborning" the Tribal Court. First, Plaintiff cites absolutely no evidence in support of this assertion. The only evidence is that the Blue Lake Rancheria paid Defendants for work they performed for it. There is no suggestion that they did not perform the work for which they billed nor that their payments were tied in any way to their handling of the *Blue Lake v. Acres* litigation. Notably, Plaintiff does not cite a single substantive ruling in the underlying case that was not legally and procedurally proper other than an error in issuing a summons.

The ruling of *Flatley v. Mauro*, 39 Cal. 4th 299 (2006) simply does not apply here. "A long line of cases have concluded in the wake of *Flatley* that its exception for illegal conduct is a 'very narrow' one, one that applies "only 'where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence. (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP*, 18 Cal. App. 5th 95, 115, fn. 7 (2017), citations omitted.) Further, "the Flatley rule applies only to criminal conduct, not to conduct that is illegal because in violation of statute or common law." (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal. App. 4th 793, 806.) None of Plaintiff's allegations, even if true, would reach the level of criminal conduct and the illegality exception to the anti-SLAPP statute does not apply.

Nothing in 18 U.S.C. § 666 prohibits a tribe from paying a tribal court judge, tribal employees, or attorneys for services rendered. It criminalizes only payments made or solicited "corruptly" and "with intent to influence or reward." (18 U.S.C. § 666, subd. (a).) Further, subsection (c) of that statute specifically excludes "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." Plaintiff's unsupported conspiracy theories notwithstanding, there is no evidence that any of Moving Defendants did anything other than charge for work they performed, or that such payments were

made or received corruptly or with intent to influence or reward. Prohibiting a tribe from paying tribal court judges and employees would essentially make such courts impossible to operate and impose a substantial limitation on the Tribe's sovereignty and its right to select its judges. Prohibiting a tribe from paying its legal counsel would have the same limiting effect.

D. Plaintiff Has Misunderstood or Misstates Judge Marston's Role in Compact Negotiations and Related Litigation

Plaintiff's next argument is that the anti-SLAPP statute does not apply because Judge Marston misrepresented his involvement in compact negotiations. Specifically, it points to a statement by Judge Marston that "I do not represent, nor am I paid by, the Tribe or the Blue Lake Casino & Hotel with respect to negotiating tribal-state gaming compacts." Again – this is completely irrelevant to any issue in this motion as selection of their tribal court judges is solely within the purview of the Blue Lake Rancheria. However, it is also factually incorrect.

The record shows that Judge Marston (in his capacity as an attorney) took part in various negotiations as one of a number of lawyers and tribal leaders serving as the negotiating team for the Compact Tribe Steering Committee ("CTSC"), consisting of numerous California tribes, which negotiated with the State of California with respect to replacing the tribe's current gaming compacts. (See ECF 55-7, pg. 16.) The list of individuals on the CTSC's negotiating team included five attorneys, and while they and the tribal leaders sitting at the negotiating table with the State's negotiators spoke on behalf of all participating tribes during the negotiations, that does not mean an attorney-client relationship was formed between every lawyer on the negotiating team and every participating tribe. Otherwise, attorneys would essentially be precluded from being members of the negotiating team without entering into formal retention agreements.

At most, Plaintiff has shown that Lester Marston had an active law practice representing tribes other than the Blue Lake Rancheria, and that those tribes' interests on occasion aligned with Blue Lake's. In addition, in his capacity as a tribal court judge, he gave advice to the Blue Lake Rancheria regarding the intersection between the courts and the gaming compact. Neither of these activities was illegal. They were clearly known to the Blue Lake Rancheria, which nonetheless appointed and continued to seat him as a tribal court judge. Further, none of these

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allegations impact the applicability of the anti-SLAPP statute to Judge Marston – much less any of the other moving defendants.

II. PLAINTIFF HAS NOT SHOWN IT CAN PREVAIL ON THE MERITS

In arguing that he has a reasonable probability of prevailing on the merits, Plaintiff has conflated the actions of the Blue Lake Rancheria with the actions of its Tribal Court personnel and the attorneys who represented it in its (successful) defense of the two District Court lawsuits. Plaintiff spends considerable time in its Opposition to the Boutin Jones' defendants' [2] motion to strike arguing why the lawsuit against ABI and Mr. Acres had no merit. This only reinforces the essential point that plaintiffs are suing these defendants as stand-ins for the Blue Lake Rancheria, and that their real claim, if any, is against the tribe itself.

As much as many judges and court personnel might wish otherwise, it is not the function of a court to dismiss lawsuits that they believe at first glance might lack merit. The Blue Lake Rancheria Tribal Court accepted a complaint for filing and allowed the parties the opportunity to present their respective cases. ABI and James Acres chose to spend considerable effort in the tribal court and two District Court lawsuits arguing that the tribal court lacked jurisdiction. The substantive legal arguments were later presented to Justice Lambert, who confirmed the tribal court's jurisdiction and then ruled in their favor. It is pure supposition on plaintiffs' part to assume that Judge Marston would have ruled differently.

Plaintiff appears to believe that a judge and judicial staff have the power and duty to dismiss out of hand a lawsuit that appears meritless out of hand, without affording the parties due process. That is not the task of any judge, and failing to do so cannot be the basis for liability.

Further, these factual arguments are completely irrelevant. Plaintiff seeks to undermine the Tribal Court by arguing at length that the hiring of the tribe's attorney to act as a judge was improper and that the entire Tribal Court proceeding was illegitimate because the judge performed unrelated work for the tribe as an attorney. However, he cites no prohibition on such conduct, nor any basis for this court to impose upon Indian tribes any requirement for judicial

[2] Plaintiff has incorporated that opposition into his opposition to Moving Defendants' motion. This procedure is improper and leaves Moving Defendants uncertain as to which argument are addressed toward them. This also demonstrates Plaintiff's inability or unwillingness to distinguish between the multiple parties he has sued.

selection or ethics. It is for Blue Lake Rancheria to select its judges and set rules for their conduct. While any perceived unfairness in that process might potentially be a basis for a federal or state court to refuse to enforce a tribal court order, it is not a basis for a private litigant to sue the tribal court judge, court personnel or other individuals employed by the tribe.

For these reasons, Plaintiff's assertions that this motion cannot be granted without discovery fails. The facts (as opposed to Mr. Acres' unsupported opinions) are clear that every defendant is entitled to tribal, official, judicial or prosecutorial immunity from any suit by ABI.

III. CONCLUSION

For all of the reasons set forth above, Moving Defendants' motion should be granted, the Complaint dismissed in its entirety, and Moving Defendants should be awarded their attorneys' fees in connection with this motion.

Dated: March 27, 2020

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Dated: March 27, 2020

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