Anthony Broadman, Bar No. 112417
anthony@galandabroadman.com
Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
PO Box 15146
Seattle, WA 98115
Telephone: (206) 321-2672

Nicole E. Ducheneaux, *Pro Hac Vice*
nducheneaux@bigfirelaw.com
Big Fire Law & Policy Group LLP
1404 Fort Crook Road South
Bellevue, NE 68005-3060
Telephone: (531) 466-8725

Attorneys for Defendant Ho-Chunk, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JOHN H. DOSSETT, Plaintiff, v. HO-CHUNK, INC., a tribal corporation formed by the Winnebago Tribe of Nebraska, NOBLE SAVAGE MEDIA, L.L.C, a Limited Liability Company of unknown origin, THE NATIONAL CONGRESS OF AMERICAN INDIANS OF THE UNITED STATES AND ALASKA, an Oklahoma Non-For Profit Corporation, and HIGH COUNTRY NEWS, a Colorado Nonprofit Corporation, Defendants.	Case No.: 3:19-cv-01386 DEFENDANT HO-CHUNK INC'S OPPOSITION TO MOTION FOR LEAVE TO AMEND.

DEFENDANT HO-CHUNK INC'S
OPPOSITION TO MOTION FOR LEAVE TO AMEND.

INTRODUCTION

John Dossett's poorly timed Motion for Leave to Amend has added further chaos to an already fraught process related to his lawsuit against Ho-Chunk, Inc. ("HCI"), the owner of Indianz.com. Mr. Dossett's Motion represents a last-minute attempt to correct his ill-advised lawsuit against HCI, an arm of the Winnebago Tribe of Nebraska, that shares in that sovereign's immunity from suit as a matter of federal law. Mr. Dossett has long known that his suit against HCI was unlikely to succeed. He has likewise long planned to sue HCI's employees, Acee Agoyo and Kevin Abourezk, as part of a strategy to avoid tribal sovereign immunity from suit by reaching HCI through the backdoor.[1] His decision to withhold his Motion to Amend until the veritable eve of oral arguments on numerous motions that could dispose of his lawsuit completely is disruptive and has the potential to cause undue prejudice and undue delay to HCI as well as the orderly conduct of this proceeding and judicial efficiency. As discussed in detail herein, his Motion should be denied. In the alternative, HCI respectfully requests that this Court exercise its discretion to impose reasonable conditions that preserve order and efficiency and protect HCI from Mr. Dossett's erratic conduct.

FACTUAL AND PROCEDURAL BACKGROUND

Dossett's interactions with HCI have been perplexing since the outset of this litigation. Dossett filed his original Complaint on August 29, 2019, which names HCI as "a tribal corporation, formed by the Winnebago Tribe of Nebraska," in its caption, and describes it as "a tribal government corporation formed by the Winnebago Tribe of Nebraska" in the body of the Complaint. ECF 1 at ¶ 12. Counsel for HCI contacted Dossett's counsel to meet and confer concerning HCI's intent to move to dismiss pursuant to Local Rule 7-1 on October 14, 2019,

[1] As Mr. Dossett's Motion to Amend is a blatant end run around HCI's clear immunity. Mr. Agoyo and Mr. Abourezk are also represented by the undersigned and HCI properly considers Dossett's proposed suit against these individuals to be a suit against HCI.

providing the bases for HCI's motion to dismiss in its correspondence. Declaration of Nicole Ducheneaux ("Ducheneaux Decl.) at Ex. A. What followed was a frustrating back, and forth in which Dossett's counsel was repeatedly unavailable for a telephone conference,[2] Dossett's counsel required more and more information from HCI's counsel,[3] and ultimately required that HCI move for two motions to extend time to file its motion to dismiss to avoid Dossett's threat to request that the court deny HCI's motion for failure to abide by Local Rule 7-1(a) (ECF 19, 21). Despite Mr. Dossett's personal expertise in federal Indian law, Dossett's counsel evinced unfamiliarity with the principles of sovereign immunity and seemed to want to use the meet-and-confer process, not to resolve disputes, but to redraft Dossett's Complaint.[4] After engaging in an extended discussion on the substance of its motion to dismiss, HCI's counsel finally objected to Dossett's conduct of the meet-and-confer process:

> I understand that meet-and-confer obligations exist to alleviate the necessity of court intervention, where the parties may resolve their issues out of court. That being said, Dossett has had a year to research and perfect the instant complaint. HCI has had only a few weeks to digest the complaint and figure out how to address it. I'm sure the meet-and-confer process was not intended to empower litigants to throw spaghetti at the wall, meet and confer, see what sticks, and amend. Meet-and-conferring is aimed [at] facilitating out-of-court resolution. I guarantee it was not intended to facilitate the filing of trial-balloon complaints.

Ducheneaux Decl. Ex. E. Dossett's counsel was finally satisfied with the meet-and-confer on HCI's motion to dismiss, and HCI's counsel filed the same on November 4, 2019.

On November 25, 2019, the day before Dossett's opposition to HCI's motion to dismiss was due, Dossett's counsel contacted HCI's counsel to discuss the substance of his opposition.

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[2] Ducheneaux Decl. Ex B (Dossett's counsel's claim of limited availability for a meet and confer); Ducheneaux Decl. Ex. C (HCI's counsel's notice that time is of the essence and request for call that day); Ducheneaux Decl. Ex. D (Dossett's counsel's further claim of lack of availability and threat to request denial of motion based on lack of meet and confer); and Ducheneaux Decl. Ex. E (HCI's counsel correspondence describing Dossett counsel's telephone unavailability).

[3] Ducheneaux Decl. Exs. B-C.

[4] Ducheneaux Decl. Exs. B, D.

Ducheneaux Decl. Ex. F. Dossett's counsel had apparently finally begun to appreciate the legal landscape surrounding a suit against "a tribal corporation, formed by the Winnebago Tribe of Nebraska." The bulk of Dossett's correspondence was threats related to a waiver argument that was so specious and incorrect that Dossett wisely chose not to include it in his brief, but also suggested that Dossett understood that HCI was immune from this suit and advised explicitly that he was going to take a ***wait-and-see*** approach. Dossett's counsel stated that it was his intent to use this process as another trial balloon; "[W]e will request leave to amend to assert claims directly against the reporters should the Court rule that Ho-Chunk has sovereign immunity." *Id.* He reiterated the same in his brief on November 26, 2019. ECF 47 at p. 12.

On January 15, 2020, this Court scheduled oral argument. ECF 52. One week later, Dossett contacted defendants' counsel with his proposed First Amended Complaint proposing to add HCI's employees, Acee Agoyo and Kevin Abourezk, requesting to meet and confer on his motion to amend. Ducheneaux Decl. Ex. G. Counsel for HCI responded and declined to consent, noting the poor timing of the request, which Dossett made just one month before oral argument. Ducheneaux Decl. Ex. H. HCI's counsel complained that Dossett has long known that he wanted to sue Mr. Agoyo and Mr. Abourezk and should have done it sooner so as not to frustrate the existing schedule. *See id.* HCI's counsel further stated that timing would be better after the Court had ruled on the currently pending motions: "We can certainly revisit your amended complaint if necessary after the court has ruled on the pending motions to dismiss, but we will oppose your amendment if you choose to do it before then." *Id.* Again, the parties engaged in a frustrating back and forth, which ended, on February 3, 2020, without any indication of Dossett's next move. Ducheneaux Decl. Exs. H-K.

One week before the scheduled hearing, on February 19, 2020, Mr. Dossett filed the motion for leave to amend that is the subject of this brief. ECF 53.

DISCUSSION

I. Dossett's Motion for Leave to Amend Should Be Denied

Where opposing parties have not granted consent, "a party may only amend its pleading with . . . the court's leave." Fed. R. Civ. P. 15(a). The Rule guides that courts should grant such leave freely if it is required in the interest of justice. *Id.* Courts, however, enjoy broad discretion to deny leave where there has been (1) undue delay, (2) bad faith, (3) repeated failure to cure deficiencies, (4) undue prejudice, and (5) futility of amendment. *Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Whether to grant leave is "within the sound discretion of the trial court." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). "In exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." *Id.* "[I]t is the consideration of prejudice to the opposing party that carries the greatest weight [as] [p]rejudice is the 'touchstone of the inquiry. . .." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Mr. Dossett's confounding behavior over the course of this proceeding touches on each of the five *Foman* factors. Chief among these is prejudice to HCI and undue delay. Despite the fact that Mr. Dossett claims that he "reasonably believes that HCI will no longer be a party to this action by the time hears [sic] argument on this Motion,"[5] HCI is still a party to this action. Further, HCI has no idea what Mr. Dossett intends to do with regard to its status in this lawsuit ***even now, just three business days prior to the scheduled oral argument.*** Since August 29,

[5] Mindful of Federal Rule of Evidence 408 protections, HCI can confirm that as of the filing of Mr. Dossett's brief on February 19, 2020, HCI was explicitly entertaining settlement properties from Mr. Dossett. Dossett's claim that he is "in negotiations with HCI" is not accurate.

2020, HCI has expended significant time and resources defending against Mr. Dossett's suit, a matter that HCI and its parent, the Winnebago Tribe of Nebraska, take incredibly seriously as it implicates a core aspect of the Tribe's sovereignty. As Mr. Dossett's conduct over the past six months has demonstrated, he filed this suit without seriously considering the viability of his claims against HCI.[6] He then realized months ago that his suit against HCI was futile and that his best shot at getting HCI was to sue its employees, Mr. Agoyo and Mr. Abourezk. He could have sought leave to amend his Complaint to sue the individuals and get HCI through the backdoor, with or without dismissing HCI, anytime over the past six months. Instead, as he stated multiple times in briefing and in correspondence to counsel, Dossett explicitly preferred to use this Court's resources to ***wait and see*** about his claim and clean it up later.

While not ideal, the ***wait and see*** approach almost would have been preferable to the current state of affairs. HCI, is an uncertain party to this suit days before oral argument to dispose of the entire lawsuit on multiple grounds. Dossett has requested to launch a second attack against HCI that will be subject to identical grounds for motions to dismiss outside of the immunity context, new immunity arguments, relation back arguments, and Rule 19 arguments, as the injunctive relief that Mr. Dossett wants from Mr. Agoyo, and Mr. Abourezk is really directed at HCI. This second attack has already triggered a new briefing schedule on the instant motion for leave, while this Court is in the process of considering prior motions to dismiss. In the event leave is granted, there will then be a briefing schedule on Mr. Agoyo's and Mr. Abourezk's motions to dismiss. HCI and its employees are hopeful that this Court ultimately will rule in favor of the defendants on the pending motions to dismiss, in which case, pursuant to the law of this case,

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[6] It should be noted that Federal Rule of Civil Procedue, Rule 11 imposes a duty on every attorney filing a Complaint to " perform adequate legal research that confirms whether the theoretical underpinnings are warranted by existing law." Christian v. Mattell., 28F.3d 1118,1127 (9th Cir 2002)

Dossett's defamation claims are futile. Likewise, even if Dossett's claims survive the pending motions to dismiss, HCI's immunity (which Dossett all but concedes) will factor into a Rule 19 argument that Dossett cannot properly obtain the injunctive relief he desires from Mr. Agoyo and Mr. Abouresk, because the content about which he complains is owned and controlled by HCI. In any event, until this Court rules on those pending motions, HCI and its employees will be obligated to expend further time and resources defending against the Amended Complaint, which may be mooted by an Order dismissing other parties. None of this even takes into account how the separate track for Dossett's suit against HCI's employees would affect the timing of other parties' Rule 72 objections that may arise out of the Court's ruling on the now-pending motions to dismiss.

In short, Mr. Dossett's current motion for leave to amend not only works significant prejudice against HCI, but it prejudices this Court and the other parties by creating avoidable, undue chaos in this proceeding. Further, while this case is admittedly in an early stage, there is a strong likelihood that it is also at a late stage in light of multiple, well-reasoned pending dispositive motions. Further, the delay at issue, like the chaos, was wholly avoidable and, therefore, undue.

Importantly, Mr. Dossett's ***wait and see*** strategy is generally disfavored when courts consider motions for leave to amend. In a recent case, the Fourth Circuit explained that "[t]he district court does not serve as legal advisor to the parties, nor is a dispositive motion a 'dry run' for the nonmovant to 'wait and see' what the district court will decide before requesting leave to amend." *Abdul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 292 (1st Cir. 2018); *accord Kader v. Sarepta*, 887 F.3d 48, 61 (1st Cir. 2018) (upholding district court's decision to deny a motion to amend because the "'wait and see' pleading" amounted to undue delay); *see also Read*

v. Corning Inc., 371 F.Supp.3d 87, 90 (W.D.N.Y. 2019) (holding that Rule 15's "liberal standard is not meant to encourage a 'wait-and-see' approach,' where the pleader in effect lets the court identify the deficiencies in the pleading, and only then attempts to correct them") (citing *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005); *Abdul-Mumit*, 896 F.3d at 292). In the instant matter, Mr. Dossett's wait-and-see approach has burdened both the Court and HCI.

Mr. Dossett has disclaimed that his erratic conduct in this proceeding is the product of bad faith. ECF 53 at p. 6. Only he and his counsel know his motivations. However, his attempt to shift the blame to the Court, claiming that "when Dossett's counsel filed [his] Memorandum in Opposition, he reasonably believed that the Court would have rendered a ruling by mid-February," is unavailing. I.d. Likely every attorney involved in this matter understands the pressures on the district court's docket, and it is doubtful that any attorney in this matter agrees that it would be "reasonable" to believe that this Court could hear oral argument and render a written decision in that time period, especially with the intervening holidays. It is likewise implausible that Mr. Dossett, a nationally-renowned Indian law attorney, actually "believed that the tribal corporation would be unlikely to assert immunity" in this matter, particularly in light of his powerful and eloquent defense of the doctrine and its critical importance to every aspect of tribal life and government in his Amicus brief to the U.S. Supreme Court in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014). *See generally* ECF 51, Ex. A.

At worst, Mr. Dossett's erratic conduct amounts to deliberate abuse of both HCI and this judicial process. At best, it demonstrates a lack of preparation or seriousness with regard to this litigation and casual disregard for the rights of other parties and judicial efficiency. Neither should be rewarded. The underlying purpose of Rule 15 is to facilitate decisions on the merits. *Webb*, 655 F.2d at 979. Mr. Dossett's request to amend his Complaint at this stage will not

facilitate decision on the merits. It will only frustrate it. For that reason, and the reasons discussed herein, his motion should be denied.

II. If Dossett's Motion is Granted, This Court Should Impose Conditions

The Ninth Circuit has held that "[t]he district court may, in its discretion, impose reasonable conditions on a grant of leave to amend a complaint. " *Int'l Ass'n of Machinists and Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1391 (9th Cir. 1985) (internal citations and quotation marks omitted). In such cases, the district court may consider the same factors that are relevant to the granting or denying of a motion for leave to amend. *Id.* Commentators have observed that granting the district court wide discretion to impose conditions in this circumstance serves Rule 15's liberal amendment policy while judiciously "balancing the interests of the party seeking the amendment and those of the party objecting to it." Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1486 (3d ed.) The most common condition that courts impose on amending parties is costs. *See, e.g., Gen. Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1513 (9th Cir. 1995) ("We find no abuse of discretion arising from the court's justifiable attempt to compensate [non-amending party] from [amending party's] backpedaling. . . ."); *In re Coinstar Inc.*, No. C11-133, 2011 WL 13229255 *2 (W.D. Wash. Dec. 22, 2011). However, courts also impose other conditions that serve both judicial efficiency and the parties' interests, including dismissal of futile claims and specific amendment language. *Matlink, Inc. v. Home Depot U.S.A., Inc.*, No. 07CV1994, 2008 WL 11338407 *1-2 (S.D. Cal. July. 10, 2008); *Naranjo v. Bank of Am. Nat'l Ass'n*, No. 14-CV-02748, 2015 WL 913031 (N.D. Cal. Feb. 27, 2015).

In the instant matter, HCI asserts that three conditions serve judicial efficiency and HCI's interests in the event that this Court grants Dossett leave to amend. First, Dossett has forced HCI

to defend against a lawsuit that even he has not believed to be viable since at least November 26, 2019. If he is permitted to amend his Complaint to seek redress against HCI through the backdoor by suing HCI's employees and, in so doing, forces HCI to begin defending his lawsuit all over again, HCI respectfully requests that Mr. Dossett pay HCI's costs of defending the original suit against HCI. Second, in light of the fact that the suit against Mr. Agoyo and Mr. Abourezk is explicitly an end-run around his bad lawsuit against HCI, HCI respectfully requests that this Court order Mr. Dossett to dismiss with prejudice his suit against HCI (if he has not already done so – that remains murky). Third, in the interest of judicial efficiency, if this Court grants Mr. Dossett's motion to amend, HCI respectfully requests that this Court stay the effect of the First Amended Complaint until after this Court has ruled on the pending motions to dismiss based on the Anti-SLAPP statute and First Amendment principles so that HCI, via Mr. Agoyo and Mr. Abourezk, should have the benefit of understanding the law of this case and any precedential effect it may have on their defense.

CONCLUSIONS

For the foregoing reasons, HCI respectfully requests that this Court deny Mr. Dossett's Motion for Leave to Amend or, in the alternative, impose the conditions discussed herein.

Dated: February 21, 2020.

By: s/ Nicole E. Ducheneaux

Nicole E. Ducheneaux, *Pro Hac Vice*
Big Fire Law & Policy Group LLP
1404 Fort Crook Road South
Bellevue, NE 68005
Telephone: (531) 466-8725
Facsimile: (531) 466-8792
Email: nducheneaux@bigfirelaw.com

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By: s/Anthony Broadman

Anthony Broadman, Bar No. 112417
Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
PO Box 15146
Seattle, WA 98115
Telephone: (206) 321-2672
Fascimile: (206) 299- 7690
Email: anthony@galandabroadman.com

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Nicole E. Ducheneaux

Anthony Broadman, Bar No. 112417
anthony@galandabroadman.com
Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
PO Box 15146
Seattle, WA 98115-3677
Telephone: (206) 321-2672

Nicole E. Ducheneaux, *Pro Hac Vice*
nducheneaux@bigfirelaw.com
Big Fire Law & Policy Group LLP
1404 Fort Crook Road South
Bellevue, NE 68005-3060
Telephone: (531) 466-8725

Attorneys for Defendant Ho-Chunk, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JOHN H. DOSSETT, Plaintiff, v. HO-CHUNK, INC., a tribal corporation formed by the Winnebago Tribe of Nebraska, NOBLE SAVAGE MEDIA, L.L.C, a Limited Liability Company of unknown origin, THE NATIONAL CONGRESS OF AMERICAN INDIANS OF THE UNITED STATES AND ALASKA, an Oklahoma Not For Profit Corporation, and HIGH COUNTRY NEWS, a Colorado Nonprofit Corporation, Defendants.	Case No.: 3:19-cv-01386 DECLARATION OF NICOLE E. DUCHENAUX IN SUPPORT OF HO-CHUNK INC' OPPOSITION TO MOTION FOR LEAVE TO AMEND.

I, Nicole E. Ducheneaux, declare as follows:

1. I am counsel of record for Defendant Ho-Chunk, Inc. I have been admitted to practice *Pro Hac Vice* before this Court.
2. A true and correct copy of an e-mail to Scott Whipple and Andrew Paris, from Nicole Ducheneaux dated October 14, 2019, time 11:27 AM, is attached here to as **Exhibit A**.
3. A true and correct copy of an e-mail to Nicole Ducheneaux, from Scott Whipple, dated October 14, 2019, time 7:48 PM is attached hereto as **Exhibit B**.
4. A true and correct copy of an e-mail to Scott Whipple, from Nicole Ducheneaux, dated October 15, 2019, time 8:56 AM is attached hereto as **Exhibit C**.
5. A true and correct copy of an e-mail to Nicole Ducheneaux, from Scott Whipple, dated October 15, 2019, time 12:01 PM is attached hereto as **Exhibit D**.
6. A true and correct copy of an e-mail to Scott Whipple, from Nicole Ducheneaux, dated October 15, 2019, time 2:00 PM is attached hereto as **Exhibit E**.
7. A true and correct copy of an e-mail to Nicole Ducheneaux and Anthony Galanda, from Scott Whipple, dated November 25, 2019, time 2:00 PM is attached hereto as **Exhibit F**.
8. A true and correct copy of an e-mail to Nicole Ducheneaux and Anthony Galanda, from Scott Whipple, dated January 23. 2020, time 7:51 PM is attached hereto as **Exhibit G**.
9. A true and correct copy of an e-mail to Scott Whipple, from Nicole Ducheneaux, dated January 29,2020, time 12:57 PM is attached hereto as **Exhibit H**.
10. A true and correct copy of an e-mail to Scott Whipple, from Nicole Ducheneaux, dated January 30, 2020, time 12:42 PM is attached hereto as **Exhibit I**.

11. A true and correct copy of an e-mail to Nicole Ducheneaux, from Scott Whipple, dated January 30.2020, time 5:50 PM is attached hereto as **Exhibit J.**

12. A true and correct copy of an e-mail to Scott Whipple from Nicole Ducheneaux, dated February 3,2020, time 4:32 PM is attached hereto as **Exhibit K.**

I declare under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated: February 21, 2020

By: Nicole Ducheneaux
Nicole E. Ducheneaux

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Nicole E. Ducheneaux

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT A

Case No. 3:19-cv-01386-SB

Vivian Windham

From: Sarah Whitford on behalf of Nikki Ducheneaux
Sent: Monday, October 14, 2019 11:27 AM
To: andrew@andrewparislaw.com; scott@whipplelawoffice.com
Cc: anthony@galandabroadman.com; Nikki Ducheneaux; Filing
Subject: Dossett v. HoChunk, Inc., et al. Meet and Confer

Dear Mr. Whipple and Mr. Paris:

Please advise whether you will oppose HCI's motion to dismiss Counts One and Five for lack of subject matter jurisdiction based on tribal sovereign immunity and pursuant to concepts related to Oregon's anti-SLAPP statute and First Amendment principles. Please indicate your availability either today or tomorrow to discuss via teleconference as required by Local Rule 7-1.

Best regards,

Nikki

Nicole E. Ducheneaux | Partner
1404 Fort Crook Road South
Bellevue, NE 68005
Phone: 531.466.8725 | Fax: 531.466.8792
nducheneaux@bigfirelaw.com | www.bigfirelaw.com

BIG FIRE
LAW & POLICY GROUP LLP

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT B

Case No. 3:19-cv-01386-SB

Vivian Windham

From: Scott Whipple <scott@whipplelawoffice.com>
Sent: Monday, October 14, 2019 7:48 PM
To: Nikki Ducheneaux; andrew@andrewparislaw.com
Cc: anthony@galandabroadman.com; Filing
Subject: RE: Dossett v. HoChunk, Inc., et al. Meet and Confer

Dear Ms. Ducheneaux (I hope that we can be on a first-name basis going forward):

Andrew and I could be available for a phone conferral on Wednesday, October 16 any time after 11:00 a.m. PDT. If you and Mr. Broadman (who should be part of the call) are not available, I have some availability on Thursday the 17th (but we would have to check with Andrew).

LR 7-1 requires us to make a "good faith effort" to resolve the dispute and to discuss "each claim, defense or issue that is the subject to the proposed motion." In order for us to comply, tomorrow please provide more detail on the arguments for your proposed motion so that we can have a better understanding of your client's position and are better prepared to meaningfully participate in our call.

Thanks and I look forward to working with you on this matter.

B. Scott Whipple
Whipple Law Office, LLC
503-222-6004

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT C

Case No. 3:19-cv-01386-SB

Vivian Windham

From: Nikki Ducheneaux
Sent: Tuesday, October 15, 2019 8:56 AM
To: Scott Whipple; andrew@andrewparislaw.com
Cc: anthony@galandabroadman.com; Filing
Subject: RE: Dossett v. HoChunk, Inc., et al. Meet and Confer

Scott,

Thank you for your quick response. I am filing my motions today, therefore a telephonic meet and confer on Weds or Thurs will be too late. I apologize. That being said, my client has not remotely authorized me to discuss settlement; so unless your will consider voluntary dismissal of his claims against HCI, I suspect our conversation will be short.

Here is a better outline of our claims:

(1) **Sovereign immunity from suit**: HCI is an arm of a federally recognized tribe and hence protected by tribal sovereign immunity from suit. It meets the so-called *Breakthrough* arm-of-the-tribe test, set forth in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), which the Ninth Circuit adopted in *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (2014). HCI is one of the premier tribal economic development corporations in the nation and easily meets *Breakthrough*'s six-part balancing test (*White* excludes the sixth factor, but whatever…): (1) created under tribal law; (2) with a purpose to benefit the tribe; (3) with a structure, ownership, and management is closely tied to the tribe; (4) the tribe intended to share its immunity; (5) there is a significant financial relationship between the entity and the tribe; and (6) the policies underlying tribal sovereign immunity is served by granting HCI immunity.

(2) **Dossett's defamation claims are barred by Oregon's anti-SLAPP statute and the First Amendment**: Dossett is a public figure and has not alleged actual malice; the allegedly defamatory material is comprised almost totally of opinion, which is protected speech.

(3) **Dossett's IIER claim is barred by Oregon's anti-SLAPP statute:** Dossett has not properly pleaded IIER because he has failed to connect his economic damage to HCI's conduct; Dossett has failed to allege that HCI had either improper motives or used improper means to interfere with his economic relations.

If you can find sometime to discuss today, that would be greatly appreciated.

Best,

Nikki

Nicole E. Ducheneaux | Partner
1404 Fort Crook Road South
Bellevue, NE 68005
Phone: 531.466.8725 | Fax: 531.466.8792
nducheneaux@bigfirelaw.com | www.bigfirelaw.com

BIG FIRE
LAW & POLICY GROUP LLP

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT D

Case No. 3:19-cv-01386-SB

Vivian Windham

From: Scott Whipple <scott@whipplelawoffice.com>
Sent: Tuesday, October 15, 2019 12:01 PM
To: Nikki Ducheneaux; andrew@andrewparislaw.com
Cc: anthony@galandabroadman.com; Filing
Subject: RE: Dossett v. HoChunk, Inc., et al. Meet and Confer

Hi Nikki,

Thank you for your reply. Unfortunately, my schedule will not allow me to set a time to confer today (and I would not have time to read your citations and meaningfully confer).

I encourage you to consider waiting until after we can confer before filing any motion. If you choose to file the motion before we confer (which by rule is required to occur in person or by telephone conference), we will have little choice but to ask the Court to deny the Motion based upon failure to abide by LR 7-1(a).

If you choose to wait to file the motion until after we confer, I think we would discuss (among other things):

1) Our sovereign immunity research is different, but I would like the opportunity to read your citations and hear your argument;
2) I'm interested to hear why you believe Dossett is a public figure and if we are convinced, it sounds like we can address your concerns by amending the Complaint to include additional allegations; and
3) It appears to me that your concern with the IIER is a pleading issue that we may be able to address without the Court's involvement (if you first give us a chance to discuss).

If you decide to wait and confer, I am still available tomorrow afternoon (but am filling my calendar as new issues arise). Thanks.

B. Scott Whipple
Whipple Law Office, LLC
503-222-6004

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT E

Case No. 3:19-cv-01386-SB

Vivian Windham

From: Nikki Ducheneaux
Sent: Tuesday, October 15, 2019 2:00 PM
To: Scott Whipple; andrew@andrewparislaw.com
Cc: anthony@galandabroadman.com; Filing
Subject: RE: Dossett v. HoChunk, Inc., et al. Meet and Confer

Scott,

The problem is that our dispositive motions are due within 21 days of service of your complaint, which is today.

I just attempted to contact you via phone at your office, 503-222-6004 and reached your voicemail. I also tried Andrew Paris at 970-251-0294. I actually tried Andrew twice in row because the interface was strange to me. When you call Andrew's number, an automated voice picks up and says: "You have reached google voice. Please state your name and we will try to connect you." Then it goes silent for a period. On both tries, the service hung up on me and I received a dial tone.

Substantively, I don't think we have a problem:

1) **Sovereign immunity**: This is a binary issue that has nothing to do with the contents of your pleading, other than the fact that you sued HCI. HCI either is or isn't immune pursuant to the authorities. Again, if Dossett is willing to concede that HCI is immune and voluntarily dismiss, then meeting and conferring will be fruitful. If not, then I'm sure not what you would like to talk to me about. HCI categorically will not concede that it is not immune. Further, I'm not sure how your research could possibly be different than ours. My prior email to you cited the leading cases in the area: *Breakthrough* and *White*. If you have researched this issue at all, then it is simply not plausible that you are unfamiliar with these cases and require additional time to review my citations. That said, if you cannot find time to discuss with me on the phone today, then please send me your contravening authorities via email.

2) **Defamation and IIER:** I appreciate your willingness to amend the pleadings in the event that you agree with our positions concerning Dossett's status as a public figure, economic harm and IIER, and lack of improper means/motive. As you know, the rules permit you to seek leave of the court to amend your pleading and liberally grant such leave. I understand that meet-and-confer obligations exist to alleviate the necessity of court intervention where the parties may resolve their issues out of court. That being said, Dossett has had a year to research and perfect the instant complaint. HCI has had only a few weeks to digest the complaint and figure out how to address. I'm sure the meet-and-confer process was not intended to empower litigants to throw spaghetti at the wall, meet and confer, see what sticks, and amend. Meeting-and-conferring is aimed out facilitating out-of-court resolution. I guarantee it was not intended to facilitate the filing of trial-balloon complaints.

My brief is due today. You are clearly somewhat available to discuss. I can't jeopardize my client's position because you and Andrew will not take my calls. I do not intend to file my motion before 5:30 central/3:30 pacific. Please contact me anytime between now and then at the number below.

Nicole E. Ducheneaux | Partner
1404 Fort Crook Road South
Bellevue, NE 68005
Phone: 531.466.8725 | Fax: 531.466.8792
nducheneaux@bigfirelaw.com | www.bigfirelaw.com

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT F

Case No. 3:19-cv-01386-SB

Sent: Monday, November 25, 2019 2:00 PM
To: Nikki Ducheneaux <NDucheneaux@bigfirelaw.com>; anthony@galandabroadman.com
Subject: Dossett v Ho-Chunk / Sovereign Immunity

Hi Nikki and Anthony –

Below is a portion of our response to Ho-Chunk's argument that it has sovereign immunity with respect to the claims made by Mr. Dossett. I understand that Ho-Chunk frequently litigates with the State of Nebraska and that this argument could cause Ho-Chunk issues that go beyond Dossett's claims. If I am correct and you want to discuss before we file, please let me know. As you are aware, our filing deadline is tomorrow.

What is not included below is that if the Court does not find waiver, we will request discovery on Ho-Chunk's sovereign immunity argument. Also, we will request leave to amend to assert claims directly against the reporters should the Court rule that Ho-Chunk has sovereign immunity.

Thanks and let me know if you want to discuss.

Indianz.com published a salacious, rumor- and innuendo-filled story. Indianz's owner, Ho-Chunk[1], cannot avoid this suit because the Winnebago Tribe waived its sovereign immunity for torts in its 1855 Treaty.

A tribe may waive sovereign immunity to suit. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). While waiver must be clear, "there is no requirement that talismanic phrases" or "magic words" be used to effectively waive tribal sovereign immunity. *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir., 2006). Indeed, the Supreme Court has held that the waiver need not use the words "sovereign immunity." *C & L Enters. v. Citizen Band Potawatomi Indian Tribe,* 532 U.S. 411, 420-21 (2001) (*citing Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.,* 86 F.3d 656, 659-60 (7th Cir. 1996)).

In *C & L Enterprises*, a unanimous Supreme Court concisely held that the tribe waived its sovereign immunity from *C & L*'s suit to enforce an arbitration award in state court based on a "construction contract's provision for arbitration and related prescriptions . . . ." 532 U.S. at 418. The contract contained a clause that required resolution of all contract-related disputes by binding arbitration, that arbitration awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof," and that the contract is governed by "law of the place where the project is located. *Id.* at 415, 419. In its analysis, the Court looked to the American Arbitration Association Rules, referenced in the contract, and state law, the Oklahoma Uniform Arbitration Act, which was not referenced in the contract. In so doing, the Court refused the United States' urging as *amicus* to remain within the four-corners of the contract. *Id.* at 419 n. 1. The Court rejected the tribe's argument that arbitration clause only waived the parties' rights to a court trial because the arbitration scheme has a "real world objective" and the clause would be meaningless if one of the parties could assert sovereign immunity as a defense to enforcement. *Id.* at 422 (citations omitted).

Ho-Chunk asserts sovereign immunity here as an arm of the Winnebago Tribe. The Winnebago Tribe waived its sovereign immunity for torts in Article 10 of the Treaty of 1855:

The said tribe of Indians, jointly and severally, obligate and bind themselves, not to commit any depredation or wrong upon other Indians, or upon citizens of the United States; to conduct themselves at all times in a peaceable and orderly manner; to submit all difficulties between them and other Indians to the President, and to abide by his decision; to respect and observe the laws of the United States, so far as the same are to them applicable....

TREATY WITH THE WINNEBAGO, 1855. Feb. 27, 1855. 10 Stat., 1172. Ratified Mar. 3, 1855. Proclaimed Mar. 23, 1855. Indian Affairs: Laws and Treaties. Vol. II (Treaties). Pages 690-693. Compiled and edited by Charles J. Kappler. Washington: Government Printing Office, 1904.

At a textual level, Article 10 is a clear waiver of legal immunity. The mandates in this treaty provision apply to the Tribe "jointly and severally," not just to individuals. The Winnebago "obligate and bind themselves, not to commit and depredation or wrong . . . upon citizens of the United States;" such as the defamation published by Ho-Chunk at issue here. The terms "obligate and bind" necessarily requires the ability to enforce the terms, otherwise, like the arbitration clause in *C & L*, the terms are meaningless without enforcement. When ratifying this treaty, the leaders of the Winnebago Tribe could not have understood that the Tribe was immune from enforcement of the "laws of the United States." In *C & L*, the Supreme Court found the arbitration clause "no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime." 532 U.S. at 422. In the same manner, Article 10 memorializes the Winnebago Tribe's commitment not to "wrong" U.S. citizens and to abide by the laws of the United States.[2]

As the Supreme Court did in *C & L*, this Court may look outside the treaty to interpret its terms. The "laws of the United States" include 28 USC § 1360, where Congress established state courts and state law as appropriate for the resolution of civil disputes arising on Indian reservations in six states, including both Nebraska and Oregon. "Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties...to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360(a). As Lance Morgan stated in his declaration, Ho Chunk, Inc. is a resident of and maintains its corporate headquarters on the Winnebago Nebraska Reservation in Winnebago, Nebraska. The Winnebago Tribe has waived its immunity from federal law, and is obligated by treaty to respect and observe 28 USC § 1360, along with other applicable federal laws.[3] For the purposes of federal diversity jurisdiction, Ho Chunk Inc. is deemed to be a citizen of Nebraska, where its principle place of business is located. *Cook v. Avi Casino Enterprises, Inc.*, 548 F. 3d 718, 724 (2008).

The laws of the United States also include the right of due process guaranteed by the Fifth Amendment, that no person shall be "deprived of liberty or property without due process of law." These words provide an assurance that all levels of government must operate within the law and provide fair procedures. Ho Chunk's claim of tribal immunity for the tort of defamation would deny due process to Mr. Dossett, and his opportunity to recover his reputation and damages from the publication of false rumors. *See*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (considering it "settled" that a cause of action is a species of property.") Due process obligations apply to Indian tribal governments under 25 U.S.C. § 1302(a)(8), the Indian Civil Rights Act (ICRA). Although in *Santa Clara v. Martinez*, 436 U.S. 49, 59 (1978), the Supreme Court concluded that ICRA suits against Indian tribes are barred by sovereign immunity, the Winnebago Tribe has waived this immunity by treaty agreement that the Tribe is obligated to respect and observe federal law, including 25 U.S.C. § 1302(a)(8), the right of due process.

The historical purpose of the Winnebago Treaty of 1855 was to relocate the Tribe from remote, poor lands in northern Minnesota to open prairie lands in southern Minnesota, closer to the Mississippi River and non-Indian settlements and better suited for trade and agriculture. Initially, the proposed relocation of the Winnebago engendered great opposition from local non-Indian communities, resulting in the Senate failure to ratify the Watab Treaty of 1853. Commissioner of Indian Affairs Charles Manypenny cited frequent complaints "against their depredations and annoying presence" as a culprit for the failed 1853 treaty.[4] The Treaty of 1855 addressed these concerns. In exchange for better lands, the Winnebago promised "not to commit any depredation or wrong" against U.S. citizens and "to respect and observe the laws of the United States."

Under Article VI of the Constitution, all treaties made under the authority of the United States are the supreme law of the land and "the judges in every state shall be bound thereby . . . ." U.S. Const. art. VI. If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.'" *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006), *quoting Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 177 (1803). Just as treaty provisions regarding hunting or fishing are enforceable in federal court, *Tulee v. Washington*, 315 U.S. 681 (1942), so too are treaty promises made by Indian tribes not to commit wrongs on U.S. citizens and to adhere to federal law. Under 28 U.S.C. § 1331, the district courts have original jurisdiction of all civil actions arising under United States treaties.

At the same time, the Treaty's history and language suggest a relatively narrow waiver of tribal immunity. Article 10 was intended to provide resolution for conflicts with non-Indians and other Indian tribes, not to interfere with internal tribal matters. The provision doesn't implicate tribal tax or contract immunity but was intended to assure unrelated third parties that they could seek redress for torts committed by the Winnebago fits neatly within Article 10's parameters.

The First Circuit *en banc* held that a similar exchange of land in return for a promise to obey the law constitutes a waiver of tribal immunity. *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006). In a settlement agreement with Rhode Island (referred to as the "J-Mem"), "the Tribe, for valuable consideration received — 1,800 acres of coveted land — explicitly acknowledged that, with certain modest exceptions not applicable here, 'all laws of the State of Rhode Island shall be in full force and effect on the settlement lands.'" *Id.* at 25. The tribes "concession" to abide by state law on the settlement lands "was an integral part of the bare-knuckled negotiations that created the settlement lands." *Id.* "Read in light of this unique historical context," the provision applying state law to the settlement lands "clearly and unambiguously establishes that the parties to the J-Mem intended to subjugate the Tribe's autonomy on and over the settlement lands (and, thus, its sovereign immunity) *to the due enforcement* of the State's civil and criminal laws." *Id.* (emphasis added). Thus, the J-Mem agreement "clearly abrogates the Tribe's sovereign immunity with respect to the State's enforcement activities on the settlement lands." *Id.* at 27; *see also id.* at 30-31 (Tribe failed to explain how being subject to the *enforcement* of state law infringes on sovereignty when being subject to state-law *requirements* is not). The same result should hold here. The Winnebago Tribe's concession to bind itself to not commit wrongs on U.S. citizens and abide by the laws of the United States was part of the treaty agreement that allowed the Tribe to move from poor lands to those better for agriculture and trade. The Tribe waived sovereign immunity for the enforcement against the Tribe when it commits those wrongs, such as the defamation here.

B. Scott Whipple
Whipple Law Office, LLC
503-222-6004

[1] As discussed below, Inianz.com may be a joint product of Noble Savage Media, LLC and Ho-Chunk, Inc.

[2] Supreme Court Justices have wrestled with applying tribal sovereign immunity to off-reservation commercial conduct, such as the defamation at issue here. In one such case, Justice Kagan adhered to precedent applying sovereign immunity, but noted that the State had alternative remedies and had "no need to sue the Tribe to right the wrong it alleges." *Michigan v. Bay Mills Indian Community*, 572 U.S. 799, n. 8 (2014). Justice Kagan reserved "whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." *Id.; see also id.* at 814-832 (dissenting opinions). Following this decision, the Supreme Court held that tribal sovereign immunity does not bar an action against a tribal employee for torts committed within the scope of their employment. *Lewis v. Clarke*, 581 U.S. ___, 137 S.Ct. 1285, 191 L.Ed.2d 631 (2017). On this basis, Plaintiff has amended the complaint to name the individual reporters as defendants, while maintaining Ho-Chunk does not have immunity.

[3] The State of Nebraska has retroceded criminal jurisdiction over the Winnebago Tribe, 51 Fed. Reg. 24,234 (1986), as well as civil jurisdiction for the Indian Child Welfare Act, 47 Fed. Reg. 17,337 (1982). However, state law remains applicable for civil actions arising from actions on the Winnebago Reservation.

[4] Pluth, Edward J. "The Failed Watab Treaty of 1853." Minnesota History 57, no. 1 (Spring 2000): 2–22, 16. http://collections.mnhs.org/MNHistoryMagazine/articles/57/v57i01p002-022.pdf

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT G

Case No. 3:19-cv-01386-SB

From: Scott Whipple <scott@whipplelawoffice.com>
Sent: Thursday, January 23, 2020 7:51 PM
To: anthony@galandabroadman.com; bowmanchad@ballardspahr.com; kelleym@ballardspahr.com; mike@meloylawfirm.com; Nikki Ducheneaux <NDucheneaux@bigfirelaw.com>; ryan.bledsoe@tonkon.com; saldworth@kelrun.com; salterman@kelrun.com
Cc: Andrew Paris <andrew@andrewparislaw.com>
Subject: 3:19-cv-01386-SB Dossett v. Ho-Chunk, Inc. et al

Dear Counsel,

Attached is a redline version of proposed amendments to the Complaint in the above-referenced matter. The amendments are primarily to address the assertion by Ho-Chunk's counsel that Noble Savage Media, LLC is no longer a going concern and to add Acee Agoyo and Kevin Abourezk as defendants to this matter.

Below are the days and times (all times PST) that I offer for a conferral call (we can have conferral call with multiple counsel at the same time or individually). By the end of business Monday, Jan. 27 please let me know either: 1) which date and time below works best for you for a conferral; or 2) that your client has no objections to the proposed Amended Complaint and that a conferral call is not necessary. Thank you.

Tuesday, Jan. 28 -- anytime between noon and 5:00 p.m.

Wednesday, Jan. 29 – anytime between 10:30 a.m. and 5:00 p.m.

Thursday, Jan. 30 – anytime between 10:30 a.m. and 3:00 p.m.

B. Scott Whipple
Whipple Law Office, LLC
503-222-6004

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT H

Case No. 3:19-cv-01386-SB

From: Nikki Ducheneaux
Sent: Wednesday, January 29, 2020 12:57 PM
To: Scott Whipple <scott@whipplelawoffice.com>; anthony@galandabroadman.com; bowmanchad@ballardspahr.com; kelleym@ballardspahr.com; mike@meloylawfirm.com; ryan.bledsoe@tonkon.com; saldworth@kelrun.com; salterman@kelrun.com
Cc: Andrew Paris <andrew@andrewparislaw.com>
Subject: RE: 3:19-cv-01386-SB Dossett v. Ho-Chunk, Inc. et al

Scott,

The purpose of this email is to advise you in conjunction with our telephonic meet and confer that HCI will not consent to your proposed amendment at this time. As you well know, you would not be amending as a matter of course pursuant to Rule 15(a)(1), but rather only with our consent or the court's leave under Rule 15(2). While both the Rule and case law provide that the court should "freely give leave when justice so requires," the policy is construed less liberally when amendments seek to add parties instead of claims. *E.g., Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127, 1129 (D. Or. 2001) (citing *Union Pac R.R. Co. v. Nev. Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991)). Furthermore, in this jurisdiction, an attorney's mistake concerning the viability of his claim is not necessarily good cause for amendment. *Chao v. Westside Drywall, Inc.*, 709 F.Supp.2d 1037, 1074 (D. Or. 2010) (citing *Schultz v. Wal-Mart Sotres, Inc.*, 68 Fed.Appx. 130, 131-33 (9th Cir. 2003).

More importantly, amendment is highly disfavored in every jurisdiction, as you know, when it is apparent that the moving party is causing undue delay, acting bad faith, or has a dilatory motive. *E.g., Forman v. Davis*, 371 U.S. 178, 182 (1962). You advised the parties and the court that you would seek this self-same amendment to add Mr. Agoyo and Mr. Abourezk "if the court finds that Ho Chunk has sovereign immunity" in your Opposition to HCI's motion to dismiss filed on November 26, 2019. ECF 47 at 12. Just two months later, you contradicted this representation. Notably, your notice to the other parties occurred just a week after the court scheduled oral argument and a month before oral arguments were scheduled to occur.

The amendment you seek will require additional briefing on behalf of HCI, Mr. Agoyo, and Mr. Abourezk. This will necessarily frustrate the existing oral argument schedule as HCI has raised the same Anti-Slapp and 1st amendment concerns that the other two defendants have. In light of your prior representation, the timing of your request, the necessary effect of your request, if you insist on moving for leave to amend prior to the court rendering a decision on the existing motions, HCI will be forced to make an argument that the amendment constitutes bad faith. This is a strong accusation, but I think warranted.

We can certainly revisit your amended complaint if necessary after the court has ruled on the pending motions to dismiss, but we will oppose your amendment if you choose to do it before then.

Best,

Nikki

Nicole E. Ducheneaux | Partner

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT I

Case No. 3:19-cv-01386-SB

From: Nikki Ducheneaux [mailto:NDucheneaux@bigfirelaw.com]
Sent: Thursday, January 30, 2020 12:42 PM
To: Scott Whipple <scott@whipplelawoffice.com>; anthony@galandabroadman.com; bowmanchad@ballardspahr.com; kelleym@ballardspahr.com; mike@meloylawfirm.com; ryan.bledsoe@tonkon.com; saldworth@kelrun.com; salterman@kelrun.com
Cc: Andrew Paris <andrew@andrewparislaw.com>; Vivian Windham <vwindham@bigfirelaw.com>; Filing <Filing@bigfirelaw.com>
Subject: RE: 3:19-cv-01386-SB Dossett v. Ho-Chunk, Inc. et al

Scott,

I am writing to follow up on yesterday's telephonic meet and confer. During that call, I requested that you send me an email memorializing the rationale you provided for seeking leave to amend at this particular time. You indicated that you would think about it. I understand that whether you would send such an email depended in part on cost to your client. I do not want to unduly burden Mr. Dossett, so I will endeavor to summarize here.

Is it accurate that the reason you stated for seeking leave to amend at this time is as follows?

- You originally intended to amend to add Agoyo and Abourezk after the court had ruled on the now pending motions to dismiss and strike, particularly HCI's motion to dismiss for lack of jurisdiction based on tribal sovereign immunity from suit;
- You believed that the court would have scheduled oral argument sooner;
- In light of the length of time that the court took to schedule oral argument, you determined that you should seek leave to amend because you are concerned about the expired statute of limitations;
- It is your hope that seeking leave to amend now instead of after resolution of the pending motions will have an impact on whether the court will interpret these amendments as relating back to the date of your original complaint.

Please let me know if I have misunderstood.

Likewise, please advise when you intend to file your motion for leave to amend. There are just 27 calendar days between now and the scheduled oral argument date. Despite your stated hope that your motion for leave to amend will not frustrate the existing schedule, you acknowledged on our call that you understand your motion for leave very well might impact the 2/26/20 oral argument. As you know, the local rules provide 14 days for an opposition and another 14 days for a reply. If you intend to pursue a motion for leave to amend, I would to resolve it as quickly as possible, perhaps pursuant to stipulated expedited briefing schedule. Please advise.

Thanks

Nikki

Nicole E. Ducheneaux | Partner
1404 Fort Crook Road South
Bellevue, NE 68005
Phone: 531.466.8725 | Fax: 531.466.8792
nducheneaux@bigfirelaw.com | www.bigfirelaw.com

BIG FIRE
LAW & POLICY GROUP LLP

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT J

Case No. 3:19-cv-01386-SB

From: Scott Whipple <scott@whipplelawoffice.com>
Sent: Thursday, January 30, 2020 5:50 PM
To: Nikki Ducheneaux <NDucheneaux@bigfirelaw.com>; anthony@galandabroadman.com; bowmanchad@ballardspahr.com; kelleym@ballardspahr.com; mike@meloylawfirm.com; ryan.bledsoe@tonkon.com; saldworth@kelrun.com; salterman@kelrun.com
Cc: Andrew Paris <andrew@andrewparislaw.com>; Vivian Windham <vwindham@bigfirelaw.com>; Filing <Filing@bigfirelaw.com>
Subject: RE: 3:19-cv-01386-SB Dossett v. Ho-Chunk, Inc. et al

Nikki,

Your summary is generally accurate. A few clarifications:

"You originally intended to amend to add Agoyo and Abourezk after the court had ruled on the now pending motions to dismiss and strike, particularly HCI's motion to dismiss for lack of jurisdiction based on tribal sovereign immunity from suit,:

In order to preserve judicial resources as well as the resources of the parties, we originally intended to amend to add Agoyo and Abourezk only if the Court granted HCI's jurisdictional motion.

"You believed that the court would have scheduled oral argument sooner."

That is correct. When I put the parties on notice on November 26, 2019 that if the Court finds that Ho-Chunk has sovereign immunity that Dossett would seek and amendment to add the Agoyo and Abourezk as Defendants, I expected that there would be a hearing and a ruling by mid-February. My belief on the timing proved to be inaccurate.

"In light of the length of time that the court took to schedule oral argument, you determined that you should seek leave to amend because you are concerned about the expired statute of limitations."

I am not particularly concerned about the statute of limitations because I believe that pursuant to FRCP 15(c) the proposed amendments clearly relate back and there are no expired statute of limitations. However, because there is always a chance (albeit a small chance) that the Court could disagree, it is important to file a Motion to Amend prior to February 15 to eliminate the statute of limitations arguments regarding the additional articles on Indianz.com referenced in the amended complaint.

"It is your hope that seeking leave to amend now instead of after resolution of the pending motions will have an impact on whether the court will interpret these amendments as relating back to the date of your original complaint."

This not accurate. As stated above, seeking to leave to amend prior to February 15 is intended to address Oregon's one-year statute of limitations for defamation claims that would apply to the newly referenced articles in the proposed amended complaint, in the unlikely event that the Court does not agree that the amendments relate back pursuant to FRCP 15(c).

It is true that I believe that the Court will keep the February 26 hearing on Defendants' pending motions and as I stated in our call, we will put an affirmative statement in the Motion asking the Court to maintain the hearing for Defendants' pending motions. That being said, I fully acknowledge that the Court has the power to decide whether to maintain the existing hearing date or not.

Regarding your suggestion of an expedited briefing schedule, if defendants' objections are limited to what we discussed yesterday – 1) That Defendants are concerned about delaying oral argument on their pending motions; and 2) that Defendants do not believe that any amendment is permitted while an Anti-SLAPP motion is pending, I suspect that we can agree to an expedited briefing schedule so that the briefing is completed in advance of the February 26 hearing (as we won't oppose any attempts by Defendants to convince the Court to keep the pending hearing date – which is in the best interest of Mr. Dossett and we believe that the amendments to add new parties, which the existing parties agree do not directly impact any of them, should be allowed under Oregon law). However, if Defendants are intending to make any additional arguments beyond what we discussed yesterday, then we can't agree to an expedited briefing schedule not knowing what other objections Defendants may have and what efforts will be necessary to address those objections.

In our call yesterday, we did not discuss your assertion that an attorney's mistake is not good cause to allow an amendment. The "mistake" is that we erroneously believed what Indianz.com still states on its website was accurate: that "Indianz.com is a product of Noble Savage Media, LLC and Ho-Chunk, Inc." I don't believe that relying on what your client advertises to the world is a "mistake." Regardless, the only amendment relating to the asserted "mistake" is that we are removing Noble Savage Media, LLC as a defendant based upon your assertion that it is no-longer a going concern and that Ho-Chunk, Inc. is the sole owner of Indianz.com. Is the asserted "mistake" still a part of Ho-Chunk's objection to the proposed amendments?

Last, but not least, I was truly surprised by the objections. Because the amendments did not impact any of the existing defendants and we had no intentions to delay this matter, I did not expect any objections and certainly did not expect that your initial reaction was to accuse me of acting in bad faith. Knowing that all parties, including Dossett, will ask the Court to keep the February 26 hearing date, I wonder if the parties can file a Stipulated Motion and jointly assert that no one objects to the amendments as long as they do not cause the Court to postpone the current hearing date. Of course, that would require Defendants to withdraw any objections on the basis that an amendment to a Complaint is not proper while an Anti-SLAPP motion is pending, when the proposed amendments do not affect the claims made against the Defendants that have pending motions.

I look forward to your response. Thanks.

B. Scott Whipple
Whipple Law Office, LLC
503-222-6004

Case No. 3:19-cv-01386-SB

HO-CHUNK, INC.

EXHIBIT K

Case No. 3:19-cv-01386-SB

Vivian Windham

From: Nikki Ducheneaux
Sent: Monday, February 3, 2020 4:32 PM
To: Scott Whipple; anthony@galandabroadman.com; bowmanchad@ballardspahr.com; kelleym@ballardspahr.com; mike@meloylawfirm.com; ryan.bledsoe@tonkon.com; saldworth@kelrun.com; salterman@kelrun.com
Cc: Andrew Paris; Vivian Windham; Filing
Subject: RE: 3:19-cv-01386-SB Dossett v. Ho-Chunk, Inc. et al

Dear Scott,

Thank you for clarifying your position. I have two follow up points:

1) Stipulated expedited briefing schedule: You have stated that you will not stipulate to an expedited briefing schedule unless Defendants will agree to limiting our arguments to arguments discussed on our call. HCI won't agree to limiting its arguments. HCI must have the opportunity to review your brief before fully assessing its response.

2) Stipulated amendment: HCI will not stipulate to your motion for leave to amend your complaint as you propose below.

Thanks,

Nicole E. Ducheneaux | Partner
1404 Fort Crook Road South
Bellevue, NE 68005
Phone: 531.466.8725 | Fax: 531.466.8792
nducheneaux@bigfirelaw.com | www.bigfirelaw.com

BIG FIRE
LAW & POLICY GROUP LLP