

Susan T. Alterman, OSB No. 870815
salterman@kelrun.com
Scott J. Aldworth, OSB No. 113123
saldworth@kelrun.com
Kell, Alterman & Runstein, L.L.P.
520 SW Yamhill, Suite 600
Portland, OR 97204
Telephone: 503/222-3531
Fax: 503/227-2980

Matthew E. Kelley (admitted *pro hac vice*)
kelley@ballardspahr.com
Chad R. Bowman (admitted *pro hac vice*)
bowmanchad@ballardspahr.com
Ballard Spahr LLP
1909 K Street, NW, 12th Floor
Washington, DC 20006
Telephone: 202/508-1112
Fax: 202/661-2299

Attorneys for Defendant The National Congress of
American Indians of the United States and Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

JOHN H. DOSSETT,

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

Plaintiff,

v.

**Defendant The National Congress
of American Indians of the United
States and Alaska's**

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,

**OPPOSITION TO PLAINTIFF
JOHN DOSSETT'S MOTION TO
AMEND**

Defendants.

**Defendant The National Congress of American Indians'
OPPOSITION TO PLAINTIFF JOHN DOSSETT'S MOTION TO
AMEND**

Page 1

KELL, ALTERMAN & RUNSTEIN, L.L.P.
ATTORNEYS AT LAW
520 SW YAMHILL, SUITE 600
PORTLAND, OR 97204
TELEPHONE (503) 222-3531
FACSIMILE (503) 227-2980

Defendant The National Congress of American Indians of the United States and Alaska (“NCAI”) hereby opposes Plaintiff John Dossett’s motion for leave to amend his Complaint, and in support thereof, states as follows:

Dossett casts his motion to amend his Complaint as merely correcting a “clerical” mistake. Dkt. 53 at 6. It is not. As relevant to NCAI, the proposed amended complaint would add another defamation claim against it – and Dossett sought this amendment just one week before oral arguments on all defendants’ motions to dismiss and special motions to strike. This is clearly the kind of substantive change that Dossett acknowledges is procedurally improper under Oregon’s anti-SLAPP statute. *Id.* at 5. That alone warrants denial of the motion.¹

NCAI is compelled to note that, even apart from the statutory ban on amendment,² leave to amend as relevant to NCAI, *i.e.*, adding it as a defendant to Count Five, should be denied as futile because the challenged statement is true—even crediting Dossett’s unreasonable interpretation of it.

Although Rule 15 “is very liberal,” a court “need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile.” *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). Amendment would be futile where “no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or

¹ Accordingly, NCAI agrees with Dossett that the February 26 hearing should go forward as scheduled.

² *See, e.g., Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.*, 122 Cal. App. 4th 1049, 1054-56, 18 Cal. Rptr. 3d 882, 885-86 (2004) (California’s nearly identical anti-SLAPP statute prohibits amendment during pendency of special motion to strike; to hold otherwise would “provid[e] the pleader a ready escape from [the statute’s] quick dismissal remedy”).

defense.” *Robillard v. Opal Labs, Inc.*, 337 F. Supp. 3d 962, 969 (D. Or. 2018) (quoting *Barahona v. Union Pac. R.R. Co.*, 881 F.3d 1122, 1134 (9th Cir. 2018)). The standard to be applied in determining whether an amendment would be futile is the same as that on a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Id.*

Dossett seeks to amend Count Five, which was originally pleaded only against Defendants Ho-Chunk Inc. and Noble Savage Media,³ to add NCAI as a defendant to that claim. Dkt. 53 at 6. Leave should be denied on the basis of futility because that claim fails as a matter of law. The challenged statement by then-NCAI President Jefferson Keel does not convey the purported defamatory meaning that Dossett ascribes to it and Dossett’s own pleadings conclusively show that it is true.

Dossett claims in the proposed amended complaint that Keel defamed him by saying, “NCAI doesn’t condone harassment of any kind in the workplace, nor have we, nor will we tolerate it anymore. . . . We will take action when it occurs in the future just like we did in the situation at hand.” Am. Compl. ¶ 88. Dossett asserts that this statement “was defamatory because it was in reference to the demotion and firing of Mr. Dossett and falsely states that sexual harassment occurred ‘in the situation at hand.’” *Id.* ¶ 89. But Keel obviously did not say “the situation at hand” involved *sexual* harassment; he expressly referred to “harassment of *any kind*.” No reasonable person would interpret that reference to harassment of any kind as a specific accusation of sexual harassment against Dossett.

³ See Compl. at 26 & ¶¶ 85-90.

Moreover, Keel’s statement is true. Dossett pleads both in his original complaint and his proposed amended complaint that he was demoted for “unprofessional and inappropriate behavior, including yelling, bullying, being disrespectful, speaking over colleagues, insulting and derogatory emails, and sexually-charged comments.” *Id.* ¶ 31. That conduct is the very definition of harassment: “aggressive pressure or intimidation.” *Definition of harassment in English*, LEXICO.COM, <https://www.lexico.com/en/definition/harassment> (last visited Feb. 21, 2020). Thus, Dossett’s own pleadings establish the substantial truth of this statement. Moreover, as NCAI demonstrated in its motion to dismiss and special motion to strike, the finding that Dossett engaged in “sexually-charged comments” means that he was demoted for conduct that meets the definition of sexual harassment in NCAI’s employee handbook. *See* Dkt. 48 at 20. Thus, even if Keel had said, in so many words, “Mr. Dossett was demoted for sexual harassment,” that true statement would not be actionable.

Because Dossett is a public figure and the challenged statement in Count Five is about an issue of public concern (allegations of misconduct at the highest levels of the most prominent inter-tribal advocacy organization in the United States), it is *Dossett’s burden* to plead and prove that the statement is false. *Phila. Newspapers v. Hepps*, 475 U.S. 767, 776 (1986); *see also Hickey v. Settlemier*, 141 Or. App. 103, 111, 917 P.2d 44, 49 (1996) (“[I]n cases involving public figures or issues of public concern . . . falsity is an element of plaintiff’s defamation case, because plaintiff has the burden of proving it.”). He cannot possibly meet that burden.

In sum, amending the Complaint to add NCAI as a defendant to Count Five would be futile. For this reason as well, Dossett’s motion for leave to amend should be denied.

**Defendant The National Congress of American Indians’
OPPOSITION TO PLAINTIFF JOHN DOSSETT’S MOTION TO
AMEND**

Page 4

KELL, ALTERMAN & RUNSTEIN, L.L.P.
ATTORNEYS AT LAW
520 SW YAMHILL, SUITE 600
PORTLAND, OR 97204
TELEPHONE (503) 222-3531
FACSIMILE (503) 227-2980

NCAI showed that Dossett's defamation claims are subject to dismissal pursuant to Oregon's anti-SLAPP statute in its memorandum and reply in support of its special motion to strike, which are hereby incorporated by reference. Therefore, NCAI is entitled to an award of its reasonable attorneys' fees and costs should the Court deny Dossett's motion for leave to amend his complaint. *See Gardner v. Martino*, 563 F.3d 981, 990-91 (9th Cir. 2009).

CONCLUSION

For all of the foregoing reasons, NCAI respectfully requests that this Court enter an order denying Dossett leave to file an amended complaint and, pursuant to the Oregon anti-SLAPP statute, awarding NCAI its reasonable fees and costs in an amount to be determined at a later date.

DATED this 24th day of February, 2020.

KELL, ALTERMAN & RUNSTEIN, L.L.P.

By: s/Scott J. Aldworth

Scott J. Aldworth, OSB No. 113123
Susan T. Alterman, OSB No. 870815
Telephone: (503) 222-3531
Fax: (503) 227-2980
saldworth@kelun.com
salterman@kelrun.com

Matthew E. Kelley (admitted *pro hac vice*)
Chad R. Bowman (admitted *pro hac vice*)
BALLARD SPAHR LLP
Telephone: 202/508-1112
Fax: 202/661-2299
kelley@ballardspahr.com
bowmanchad@ballardspahr.com

Attorneys for Defendant The National
Congress of American Indians of the United
States and Alaska

**Defendant The National Congress of American Indians'
OPPOSITION TO PLAINTIFF JOHN DOSSETT'S MOTION TO
AMEND**

Page 5

KELL, ALTERMAN & RUNSTEIN, L.L.P.
ATTORNEYS AT LAW
520 SW YAMHILL, SUITE 600
PORTLAND, OR 97204
TELEPHONE (503) 222-3531
FACSIMILE (503) 227-2980