IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2016-021856-CA-01
SECTION: CA43
JUDGE: Michael Hanzman

Lewis Tein, P.L. et al
Plaintiff(s)

vs.

Miccosukee Tribe of Indians of Florida
Defendant(s)
_____/

ORDER ON DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

I. INTRODUCTION

Before the Court is the latest (and hopefully last) battle in what has been a brutal, decade long war waged between Plaintiffs, Lewis Tein, P.A., Guy Lewis and Michael Tein (collectively Plaintiffs, Lewis Tein, or the Firm) and Defendant, Miccosukee Tribe of Indians of Florida (Tribe). This most recent clash is over the amount of attorney's fees, if any, the Tribe is entitled to recover because: (a) Plaintiffs rejected proposals of settlement served pursuant to Fla. Stat. § 768.79; and (b) the Tribe prevailed in this action when the Third District Court of Appeal held that Plaintiffs' claims were completely barred "on sovereign immunity grounds." *See Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 668-669 (Fla. 3d DCA 2017).

The Tribe s motion for attorney's fees and costs - based solely upon Fla.

Stat. § 768.79 - was filed on December 14, 2017. Docket Entry "DE" 176. The Tribe seeks approximately Nine-Hundred Thousand Dollars ($900,000.00) for fees and costs incurred after May 17, 2017, the date on which it served proposals for settlement, in the amount of Two Thousand Five Hundred Dollars ($2,500.00) on each of the three Plaintiffs. This Court's immediate predecessor, the Honorable Beatrice Butchko, denied the motion, finding that these offers were not made in good faith. *See* Fla. Stat. § 768.79 (7)(a). The Third District reversed, concluding that "the Tribe had a well-founded, good faith, and legally correct belief that sovereign immunity divested the trial court of subject matter jurisdiction," and that, for this reason, its "nominal offers had a reasonable foundation …." *See Miccosukee Tribe of Indians of Florida v. Lewis Tein P.L.*, 277 So. 3d 299, 303 (Fla. 3d DCA 2019).

Although Section 768.79 "automatically creates" an "entitlement to attorneys' fees when the statutory and procedural requirements have been satisfied …," *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846 (Fla. 2016), our Supreme Court has emphasized that unlike fee-shifting statutes, which are designed to reimburse prevailing parties, section 768.79 is intended to encourage settlement, and fees under this provision are awarded not as compensation to offorors, but "as sanctions (against offerees) for unreasonable rejections of offers of judgment." *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 218 (Fla. 2003). For this reason, a finding of entitlement does not compel a trial court to award an offeror its counsel's "lodestar."[1] Rather, the court is *required* to apply the six (6) "factors"

enumerated in section 768.79 (7)(b), as well as all other relevant criteria, and determine an appropriate sanction to be awarded based upon the unique circumstances of the particular case. Fla. Stat. § 768.79 (7)(b); *McGregor v. Molnar*, 79 So. 3d 908, 911 (Fla. 2d DCA 2012) ("If the court decides that the offer was made in good faith, section 768.79 (7)(b) and rule 1.442(h)(2) set forth six factors to be considered in determining the reasonableness of an award."). So, this Court's task is to determine the lodestar for time expended by the Tribe's counsel after service of its settlement proposals (i.e., post May 17, 2017), and adjust that lodestar to the extent warranted by application of § 768.79's enumerated factors and any other relevant criteria.

II. FACTS

From 2005 to 2010, Plaintiffs represented the Tribe, and certain of its individual members, in a variety of civil, criminal, and administrative matters. That changed when a new Chairman of the Tribe, Colley Billie, was elected in December 2009. After assuming his new position, Billie - together with his newly appointed Tribal Counsel, Bernardo Roman III, Esquire (Roman) - discharged the Firm. The Tribe then filed lawsuits in both the United States District Court for the Southern District of Florida and the Eleventh Judicial Circuit in and for Miami-Dade County, alleging that Lewis Tein had engaged in serious criminal and civil wrongdoing, such as:

a. Fraudulently billing for legal work that was "fictitious" or "unnecessary";

b. Paying cash "kick-backs" to the Tribe's former Chairman;

c. Failing to report income received from the Tribe and "filing false returns"; and

d. Engaging in a money laundering scheme.

The Tribe s complaints advanced, among other causes of action, claims of racketeering, embezzlement, civil theft, fraud, and breach of fiduciary duty and legal malpractice.

The federal action filed by the Tribe was presided over by United States District Judge Marcia Cooke. After incurring substantial expense and being vilified in the press, Lewis Tein was eventually vindicated when the court found that:

> There was no evidence, or patently frivolous evidence, to support the factual contentions [in the Tribes Second Amended Complaint] …

Miccosukee Tribe of Indians of Florida v. Cypress, 12-22439-CIV, 2015 WL 235433 (S.D. Fla. Jan. 16, 2015). After finding that the "Tribe is not relenting with its legal crusade" against Lewis Tein, and that its allegations were "inexcusable," Judge Cooke sanctioned the Tribe, and Roman, over One Million Dollars ($1,000,000.00).[2]

The related state court action filed by the Tribe was presided over by then Circuit Judge John Thornton, Jr. Like Judge Cooke, Judge Thornton found the Tribe's claims factually bankrupt and disposed of the case on summary judgment.[3] He later entered an "Order on Lewis Tein's Entitlement to Attorney's Fees and Costs," finding that: (a) the Tribe, and its counsel Roman,

"had access at all times to the facts and evidence, which conclusively refuted their claims"; (b) "the Tribe and its lawyer Mr. Roman acted in bad faith," "motivated by personal animosity for Lewis Tein and this firm's close and financially lucrative relationship with the Tribe's former Chair"; and (c) the litigation was pursued "without regards to the truth." Judge Thornton later awarded Lewis Tein fees and costs of approximately Three Million Dollars ($3,000,000.00) as a sanction pursuant to Florida Statute § 57.105, and as prevailing party attorney's fees pursuant to Florida Statute § 772.104 (3) and § 772.11(1).[4]

Upon prevailing in these (and other) lawsuits initiated by the Tribe, Plaintiffs commenced this action advancing claims for: (a) violation of the Florida Civil Remedies for Criminal Practice Act (§ 772.103 (3)); and (b) malicious prosecution. Plaintiffs alleged that they had "an extremely successful and growing practice from its formation in 2005 through the year 2011, when the Tribe first publicly leveled highly damaging and completely false allegations against the law firm," and that the Tribe's "completely false" allegations "caused existing clients to stop using the firm's services and caused prospectively clients, general counsel and referral lawyers to cease to engage" the Firm for new matters. Plaintiffs also alleged that the Tribe's "malicious allegations which assailed Lewis and Tie' s integrity and accused them of serious criminal acts," resulted in the resignation of "each and every one of" the Firms associates. Finally, Plaintiffs Lewis and Tein alleged that they suffered extreme damages "to their professional reputations (a lawyer's most precious asset), personal humiliation and embarrassment and

emotional distress." Compl. ¶¶ 100-106.

The Tribe responded by filing a motion to dismiss, insisting that it enjoyed - and had not waived - sovereign immunity, and that the court therefore lacked subject jurisdiction. DE 4.[5] Judge Thornton - who had also been initially assigned this case - denied the motion, finding that the Tribe's conduct in bringing bad faith litigation in federal and state court constituted "a clear wavier of sovereign immunity for redress sought against the Tribe, so long as that redress is a direct result of, and arises directly out of the Tribe's initial claims which have already been judicially determined to have been brought in bad faith." DE 14. In support of this ruling, Judge Thornton relied on - amongst other authorities - the Third District's opinion in *Miccosukee Tribe of Indians of Florida v. Bermudez*, 92 So. 3d 232 (Fla. 3d DCA 2012), holding that by providing evidence to counsel, which was "intended to influence ongoing litigation in our state court," the Tribe waived sovereign immunity, as "[a]n election to participate in litigation is not a one-way street." *Id.*

The Tribe then moved to stay the case pending an interlocutory appeal authorized by Rule 9.130(f) of the Florida Rules of Appellate Procedure. (DE 18). *See, e.g., United States v. Moats*, 961 F.2d 1198 (5th Cir. 1992) (staying discovery pending appeal because "sovereign immunity is an immunity from the burdens of becoming involved in any part of the litigation process … "). Judge Thornton denied the motion (DE 19), and the Tribe then sought a stay in the Third District. That request also was denied, and the case proceeded towards a

September 2017 trial.

In March 2014, while the Tribe's interlocutory appeal remained pending, the parties mediated the case before retired judge Stanford Blake. During that mediation, the Tribe offered Plaintiffs Five Million Dollars ($5,000,000.00) as a full and complete settlement of their claims. Plaintiffs rejected that offer and the mediation resulted in an impasse. DE 79. The parties, however, continued to discuss a potential settlement. Then, on May 17, 2017 - a week after the sovereign immunity appeal was argued at the Third District - the Tribe sent its proposals offering each Plaintiff Two Thousand Five Hundred Dollars ($2,500.00) in complete settlement of their claims. These offers were rejected.

On August 9, 2017, the Third District issued its opinion reversing the court's denial of the Tribe's motion to dismiss, finding that sovereign immunity barred all claims advanced in Plaintiffs complaint (as amended). Judge Luck, writing for the court, acknowledged that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity, *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 658 (Fla. 3d DCA 2017) (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)), as it" can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* The Third District also noted that while "Lewis and Tein had a right not to have their reputations ruined and their business destroyed by the Tribe

…," and while some may suffer great harm due to tribal immunity, "[g]ranting immunity to Indian tribes is a policy choice made by our elected representatives to further important federal and state interests"; a choice that protects "the tribes understanding that others may be injured and without a remedy." *Id.* The Third District then concluded that "the Tribe did not clearly, unequivocally, and unmistakably waive its immunity as to this case …" *Id.*[6]

On November 15, 2017, Judge Thornton, in accordance with the Third District's mandate, dismissed Plaintiffs' complaint with prejudice for lack of subject matter jurisdiction. DE 173. The Tribe then filed its motion for attorney's fees and costs based upon its rejected proposals for settlement.

III. GOVERNING LAW

Florida Statute § 768.79 provides, in pertinent part:

> **768.79. Offer of judgment and demand for judgment**
>
> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him … from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer ….
>
> (7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.
>
> (b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

As the Court pointed out earlier, the purpose of this statute, and its implementing rule of procedure (Rule 1.442), is to "reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions." *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010).[7] The statute's aim is *not* to compensate offerors for attorney's fees expended after their offer is rejected. Rather, fees pursuant to § 768.79 and Rule 1.442 are again "awarded as sanctions for unreasonable rejections …." *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 218 (Fla. 2003). *Cent. Motor Co. v. Shaw*, 3 So. 3d 367, 369 (Fla. 3d DCA 2009) ("… an award of attorney fees authorized by section 768.79 is a sanction against the rejecting party for the refusal to accept what is presumed to be a reasonable offer ...").

Because the policy underlying § 768.79 is *not* to compensate offerors, but to instead motivate settlement through the prospect of sanctions, the legislature did not mandate that a trial court, upon a finding of entitlement, award offerors their counsel's "lodestar." Instead, the statute - plainly and unambiguously - *mandates*

that the court, in setting an appropriate sanction, consider specified "factors," including the "then-apparent merit or lack of merit" of the offeree's case; "[t]he number and nature of proposals made by the parties"; the "closeness of questions of fact and law at issue"; "[w]hether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties"; and the "amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged." Fla. Stat. § 768.79 (7)(b). The legislature also mandated a trial court to consider "all other relevant criteria." *Id.*

While § 786.79 (7)(b) has received little appellate attention, it is apparent that the "factors" specified by the legislature do not corelate with, and bear no relation to, the amount of hours "reasonably" expended by an offeror's counsel or the "reasonable" rates of counsel (i.e., the "lodestar"). Factors such as whether the offeree's case had (or lacked) merit; what prior settlement offer(s) had been made; whether the case presented a close call or was in the nature of a test case, and the other "factors" a court is *required* to consider, have absolutely no impact on a "lodestar" analysis, as neither the time "reasonably" spent by counsel, nor counsel's "reasonable" rate, are influenced by any of them. And, as pointed out earlier, the legislature also mandated that the court consider any other "relevant criteria."

Given that these statutory "factors" have nothing to do with a "lodestar" analysis, it is clear that the legislature granted trial courts broad discretion to award

an offeror less (and in appropriate cases far less) than its counsel's "lodestar" (i.e., award less of a "*sanction*") if the particular circumstances of the case warrant.

The question, then, becomes whether a trial court, applying § 768.79 (7)(b), may exercise its discretion to award no fees at all. Our intermediate appellate courts were initially divided on this point. *See Bridges v. Newton*, 556 So. 2d 1170 (Fla. 3d DCA 1990) (court may deny fees altogether); *Schmidt v. Fortner*, 629 So. 2d 1036, 1042 (Fla. 4th DCA 1993) ("[u]nder subsection (7)(b), the court's discretion is directed by the statutory text solely to determining the reasonability of the *amount* of fees awarded …"). That conflict appeared to be resolved by our Supreme Court in *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611-613 (Fla. 1995), where the court held that: (a) "section 768.79 provides for the award of attorney's fees regardless of the reasonableness of an offeree's rejection …"; and (b) "[u]nder subsection (7)(b), the court's discretion is directed … solely to determining the reasonability of the *amount* of fees awarded; and that discretion is informed, at least partially, by the 6 factors thereafter listed in that subsection". The *TGI Friday's* court reasoned, as a matter of statutory interpretation, that when a qualifying offer is made in good faith the offeror is entitled to "an award," *see* subsection (7)(b), and the "noun *award"* refers to "the process of fixing the amount …" *Id.* at 612-613.

Although *TGI Friday's* appeared to have settled this issue, the Third District, on three (3) subsequent occasions, sanctioned a complete denial of attorney's fees despite an offeror s compliance with section 768.79. *See Cent.*

Motor Co. v. Shaw, 3 So. 3d 367, 370 (Fla. 3d DCA 2009) (affirming trial court's denial of any fees when awarding them would, under the unique facts of the case, "amount to nothing more than a gotcha tactic"); *Segundo v. Reid*, 20 So. 3d 933, 936 (Fla. 3d DCA 2009) ("… pursuant to section 768.79(7)(b), the trial court abused its discretion by *not completely disallowing an award of attorney's fees* as that would be the only reasonable award under the circumstances of this case") (emphasis added); *Florida Diversified Films, Inc. v. Simon Roofing & Sheet Metal Corp.*, 118 So. 3d 240, 245 (Fla. 3d DCA 2013) (affirming trial court's denial of *any* fees based upon finding that "it was not unreasonable for [offeree] to reject the proposal for settlement"). *Cent. Motor Co.* drew a dissent from Judge Shepherd, who believed that the result reached by the majority was foreclosed by *TGI Friday's*. At least one other district court of appeal agreed. *See Braaksma v. Pratt*, 103 So. 3d 913, 916 (Fla. 2d DCA 2012) ("… we are not persuaded that the Third District s analysis in *Segundo* and *Central Motor Co.* are consistent with the supreme court's holding in *TGI Friday's* …"). Yet in two more recent cases, the Third District has relied upon *TGI Friday's* in reversing an outright denial of fees. *Vanguard Car Rental USA, LLC v. Suttles*, 190 So. 3d 672 (Fla. 3d DCA 2016); *Ruiz v. Policlinica Metropolitana, C.A.*, 260 So. 3d 1081 (Fla. 3d DCA 2018).

Upon careful review of this precedent, this Court concludes that it may not deny an award altogether based upon an application of § 768.79(7)(b) in cases where the offer procedurally complies with the statute and the offeror recovers "a

judgment in its favor at least 25 percent more or less than the demand or offer." *Suttles,* 190 So. 3d at 674. The *TGI Friday's* court, in fact, expressly rejected the argument that a court "could properly use the enumerated factors of subsection (7)(b) as the basis for denying all fees to an otherwise qualifying offeror." *TGI Friday's*, 663 So. 2d at 612. The Court must therefore award the Tribe "something," but it has considerable discretion in deciding what that "something" should be.

The fact that the legislature afforded trial courts broad discretion in setting the amount to be awarded as a sanction for an unreasonable rejection of a settlement offer is not surprising. First, in virtually all matters involving sanctions, a trial court is afforded broad discretion. *See, e.g., Deutsche Bank Nat'l Tr. Co. v. LGC*, 107 So. 3d 486, 488 (Fla. 2d DCA 2013) ("It is well established that in imposing sanctions trial courts possess broad discretion"); *Michalak v. Ryder Truck Rental, Inc.*, 923 So. 2d 1277, 1280 (Fla. 4th DCA 2006) (the trial court has broad discretion to impose sanctions for discovery violations); *Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA. 2002) ("A trial court has broad discretion to impose sanctions on litigants for their conduct before the court."); *Parisi v. Broward Cty.*, 769 So. 2d 359, 367 (Fla. 2000) ("…courts have broad discretion in formulating a valid contempt sanction…"). Second, in granting such broad discretion, section § 768.79 is no outlier. Many fee statutes grant even more discretion, allowing the court to deny fees altogether. *See, e.g.*, Fla. Stat. § 517.211(6) (providing for prevailing party attorney's fees "unless the court finds

that the award of such fees would be unjust"); Fla. Stat. § 501.2105(1) ("[i]n any civil litigation resulting from an act or practice involving a violation of this part, … the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, *may* receive his or her reasonable attorney's fees and costs from the nonprevailing party") (emphasis added); Fla. Stat. § 57.111(4)(a) (prevailing small businesses entitled to award of fees and costs "unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust"); Fla. Stat. § 607.1431(5) ("…the court may, in its discretion, award attorney fees and other reasonable expenses" if it makes certain findings); Fla. Stat. § 607.1431(5) (" … the court may, in its discretion, award attorney s fees … to other parties… who have been affected adversary …"). Although section 768.79(7)(b), as interpreted by our Supreme Court, is not quite as generous in its grant of discretion, it undoubtedly affords trial courts great latitude in setting an appropriate sanction to be imposed.

IV. ANALYSIS

A. Counsels' Lodestar

The first step in determining a "reasonable fee" is the calculation the "lodestar." This is a two-step process. The court first must "determine the number of hours reasonably expended in the litigation," and award "only those hours" that counsel could have properly billed "to his client." *Rowe,* 472 So. 2d at 1150. As the *Rowe* court explained, it is critical that counsel for the party seeking a fee keep "accurate and correct records and work done and time spent on the case,

particularly when someone other than the client may pay the fee." *Id.* Inadequate time records or improper "unit billing" may result in a reduction of the claim, *see, e.g., Nickerson v. Nickerson,* 608 So. 2d 835 (Fla. 3d DCA 1992); *Browne v. Costales*, 579 So. 2d 161 (Fla. 3d DCA 1991), and a court should not award fees for time it finds to be duplicative, excessive or unnecessary. *Rowe* at 1150; *Rathmann v. Rathmann*, 721 So. 2d 1218 (Fla. 5th DCA 1998) ("While the parties have the right to employ as many lawyers as they choose, the Court will not assess lawyer fees for or against any party for more than one lawyer for a matter in which more than one lawyer is not required."); *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 194 (Fla. 3d DCA 2003) ("The time sheets also reflect a significant amount of time spent in conferences between the partner and the associate who were working on the case as well as multiple attorneys performing or reviewing the same items. Duplicative time charged by multiple attorneys working on the case are generally not compensable.").

Once the court fixes the appropriate number of reasonable hours spent, the second step of a "lodestar" calculation requires that it determine the reasonable hourly rate for the services of the prevailing party attorney …" *Rowe* at 1150. The parties here have stipulated to counsels' hourly rate.

The party seeking fees bears the burden of proving the number of hours reasonably expended on the litigation, as well as the prevailing market rate of the attorneys who provided services. *Rowe* at 1050-1051. In this case the Tribe

offered Bruce Rogow, Esquire as its fee expert. He opined, through an "Addendum" to his initial affidavit (DE 197), that the appropriate post-offer "lodestar" for the attorneys engaged by the Tribe (The Saunooke Firm and Alston & Bird) is a combined Eight Hundred Forty-Four Thousand Five Hundred Fifty-Seven Dollars ($844,557.00), Seventy-Six Thousand Three Hundred Seventy Dollars ($76,370.00) of which is attributable to time spent by Mr. Saunooke at the rate of Three Hundred Fifty Dollars ($350.00) per hour, with the remainder of time being spent by lawyers at Alston & Bird (i.e., Seven Hundred Sixty-Eight Thousand One Hundred Eighty-Seven Dollars ($768,187.00)).[8]

As an initial matter, Mr. Rogow's "lodestar" calculation includes appellate fees which this court lacks jurisdiction to award. *See Respiratory Care Services, Inc. v. Murray D. Shear, P.A.*, 715 So. 2d 1054, 1056 (Fla. 5th DCA 1998) ("Generally, the appellate court has exclusive jurisdiction to award appellate attorney s fees, and in order to invoke the jurisdiction of the court to award fees, the party seeking attorney's fees must timely file a motion, pursuant to Florida Rule of Appellate Procedure 9.400(b), in the appellate court.").[9] The Tribe did not seek attorney's fees in either of the appeals to the Third District (i.e., the sovereign immunity appeal and the fee entitlement appeal) and, as a result, this Court is not authorized to award any time spent on these matters. The Court also concludes that it lacks authority to award fees for the time spent by the Tribe's counsel opposing Plaintiffs efforts to secure discretionary review in the Supreme Court of Florida and Supreme Court of the United States, as those fees were incurred in furtherance

of the appellate process. Eliminating these appellate fees reduces the Tribe's claimed "lodestar" by Three Hundred Thirty-Two Thousand Four Hundred Seventy-Seven Dollars ($332,477.00).

Of the remaining "lodestar" sought (Five Hundred Thousand Twelve Thousand One Hundred Nineteen Dollars and Fourteen Cents ($512,109.14)), the Court finds much of the time spent (particularly by Alston & Bird) to be excessive, duplicative and unnecessary. Without belaboring the point, or lengthening this order with a discussion of individual time entries, the evidence presented persuades this Court that multiple attorneys were used to perform tasks that could have been handled by a single attorney; excessive time was spent in multiple layers of document review; time spent on other matters was mistakenly billed to this file; and Mr. Rogow mistakenly included in his "lodestar" calculation approximately Thirty Thousand Dollars ($30,000.00) of time spent *prior* to service of the Tribe's proposal for settlement. Based upon this evidence, the Court will reduce counsel's remaining lodestar by twenty percent (20%), bringing it down to Four Hundred Nine Thousand Six Hundred Eighty-Seven Dollars and Thirty One Cents ($409,687.31) - an amount this Court finds to be the proper post-offer "lodestar."

B. Application of § 768.79 (7)(b)

Having calculated the proper "lodestar," the Court's next task is to apply those mandatory "factors" set forth in § 768.79 (7)(b), as well as any other "relevant criteria," in order to determine an appropriate sanction to be imposed

upon Plaintiffs for rejecting the Tribe s proposal. *Schmidt v. Fortner*, 629 So. 2d 1036, 1042 (Fla. 4th DCA 1993) ("Under subsection (7)(b), the court's discretion is directed by the statutory text solely to determining the reasonability of the *amount* of fees awarded; and that discretion is informed, at least partially, by the 6 factors thereafter listed in that subsection."). The Court will now review those "factors" and "criteria" it finds relevant.

i. The Then Apparent Merit or Lack of Merit of the Claim

Putting aside for a moment the purely legal issue of sovereign immunity, it is obvious that Plaintiffs' claims were proverbial slam-dunks. Not one, but two, jurists (Judge Cooke and Judge Thornton) had already concluded that the Tribe, armed with no credible evidence, launched an "inexcusable" and relentless "legal crusade" against Lewis Tein and its principals, and that the Tribe and its counsel, Roman: (a) had evidence that conclusively refuted the Tribe claims; (b) were motivated by personal animosity; and (c) acted in bath faith. A stronger case of liability for the tort of malicious prosecution is hard to imagine.[10]

As for damages, Lewis Tein was a highly successful firm that was decimated as a result of the Tribe's litigation onslaught and the barrage of adverse press it garnered. There also can be no doubt that the ferocious attack mounted by the Tribe in multiple courts took a severe toll on Messrs. Lewis and Tein, both financially and emotionally. These lawyers enjoyed a sterling reputation prior to this disgraceful episode, and while those reputations have been largely restored as a result of judicial vindication, this chapter in the book of their careers cannot be

completely unwritten.

Suffice it to say, the harm caused was substantial. Plaintiffs' expert, Tony Argiz, opined that damages were in the range of Fifty-Five to Sixty-Four Million Dollars ($55,000,000.00 - $64,000,000.00), and the Tribe's expert placed them at approximately Five Million Dollars (5,000,000.00). Plaintiffs were also granted leave to seek punitive damages, thereby significantly increasing the Tribe's exposure and the value of the case.

Turning next to the legal issue of sovereign immunity, the question of "waiver" was debatable and a close call. Judge Thornton - a highly accomplished and respected jurist - concluded that after using the court system as a sword to maim Plaintiffs, the Tribe could not hide behind the shield of sovereign immunity when haled into that *same* court to answer for their litigation misconduct. Other courts agree. *See, e.g., Wilkes v. PCI Gaming Auth.*, 287 So. 3d 330 (Ala. 2017). Also noteworthy is the fact that at the time the Tribe's nominal settlement offers were served, Judge Thornton *and* the Third District had denied the Tribe's stay request, and a review of the oral argument that had taken place a week earlier at the Third District hardly leaves one with the impression that a reversal was inevitable or even likely. To the contrary, questions by members of the panel reflected a hint of skepticism towards the Tribe's position.[11]

At the time it served its proposals, the Tribe also had doubts regarding the outcome of its appeal, and was not as confident in its legal "silver-bullet" as it

now suggests. While that appeal was pending, the Tribe offered Plaintiffs Five Million Dollars ($5,000,000.00) in settlement of their claims. And while parties do evaluate and resolve lawsuits for reasons unrelated to the "merits," in this Court's experience defendants generally do not offer multi-million-dollar settlements when they are highly confident that a kill shot legal defense will eventually carry the day.

This Court concludes that at the time the Tribe's proposals were served, an objective review of the record establishes that Plaintiffs' case had substantial merit, both factually and legally.

ii. The Closeness of Questions of Fact and Law at Issue

But for the sovereign immunity obstacle, Plaintiffs case was again a proverbial slam-dunk, and the question of sovereign immunity was again a close call. For purposes of this order, it is not necessary to take a deep dive into the historical jurisprudence of tribal sovereign immunity, or discuss the considerable debate, both judicial and academic, this doctrine has spawned. It will suffice to say that the question of whether an Indian Tribe should enjoy absolute immunity is up for grabs in the Supreme Court, which itself has acknowledged that there are "reasons to doubt the wisdom of perpetuating the doctrine." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). *Kiowa,* which held that the "… tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities

and whether they were made on or off a reservation," drew a three-justice dissent. That dissent later grew to four justices. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 814 (2014) ("I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention."). (Scalia, J., dissenting).[12]

Aside from the fact that this doctrine rests on shaky grounds, the primary debate *in this case* was whether its protection had been waived. While the Third District ultimately said it had not, that point was debatable, and a learned trial judge reasonably concluded otherwise. One thing, however, is certain: The Tribe employed the court system (both federal and state) maliciously and with the intent to bludgeon and cause severe injury to Lewis Tein and its principals. And while the Third District ultimately held that the Tribe could take cover under the blanket of sovereign immunity when called upon to answer for its conduct in the same court it weaponized - the issue was clearly one where reasonable jurists could (and did) differ.

This Court finds that this case presented a close-call; a factor that militates against an award of substantial sanctions.

iii. Other Relevant Criteria

Aside from the six (6) enumerated "factors" specified in § 768.79 (7)(b), the

legislature also has *mandated* that this Court "consider … all other relevant criteria."

Id. The Court will now do as legislatively directed.

This case is disturbing on a number of levels. The Tribe - using the law license of its now disbarred firm "Tribal Counsel" - launched an unprovoked and vicious assault on Plaintiffs using the court system as its weapon of choice. Plaintiffs were then forced to defend themselves against the Tribe's relentless pursuit of claims that had no factual or legal support, suffering through years of litigation in multiple fora. They were also forced to endure personal humiliation and embarrassment when this litigation received non-stop media attention - something the Tribe banked on.

After having their law firm destroyed, and after suffering not only economically, but psychologically and emotionally as well, Plaintiffs finally prevailed. Then, when the Tribe was called upon to answer for its outrageous behavior - in the *same* court it had used to inflict harm - it successfully hid behind the doctrine of sovereign immunity. The law unfortunately sanctioned the Tribe's one-way use of the court system. This Court, however, is authorized to (and does) find the despicable conduct on the part of the Tribe, *and* the fact that it was able to avoid answering for that conduct by taking refuge in its immunity, "relevant criteria" that should inform its analysis. Fla. Stat. 786.79 (7)(b). The Court also finds that rewarding the Tribe with a substantial recovery by sanctioning Plaintiffs

would be a perverse miscarriage of justice.

V. CONCLUSION

Florida Statute § 768.79, as interpreted by our Supreme Court, does not grant this Court the discretion to refuse to impose *some* sanction (i.e., award the Tribe *some* fee), even though Plaintiffs reasonably rejected these *nominal* settlement proposals, and even though entry of *any* award here is manifestly unjust. But fortunately this statute not only authorizes, but in fact *mandates*, that the court apply the "factors" enumerated in subsection (7)(b), as well as any other "relevant criteria," and exercise its discretion in determining the amount of fees that should be imposed upon a party as a sanction for rejecting a settlement proposal.

As our Supreme Court confirmed in *TGI Fridays*, subsection (7)(b) grants trial courts broad discretion to do equity in determining "the amount of the fee to be awarded," taking into account the totality of the circumstances presented. As an example, the *TGI Friday's* court pointed out that:

> … in a given case, the court could justifiably reduce the amount of the attorney's fee to be assessed against a severely injured plaintiff who suffered an adverse verdict after rejecting a small settlement offer.

TGI Friday's, 663 So. 2d at 613. This is that case. And if this Court had the discretion to do so it would award *no* fee at all. But because - and *only* because - that discretion is lacking, the Court is compelled to impose "some" sanction upon Plaintiffs, and give the Tribe "an" award of fees. *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257, 262 (Fla. 3d DCA 2012) ("… the law is the law. Notwithstanding

the distasteful consequences of applying it in this case, it must be served").

Upon consideration of all "factors" enumerated in § 768.79 (7)(b), and all other "relevant criteria," this Court - exercising the broad discretion afforded by our

legislature - will impose a sanction against each Plaintiff in the total amount of ten thousand dollars ($10,000.00), for a total of thirty thousand dollars ($30,000.00) in attorney s fees and costs to be paid to the Tribe.

This Court urges the legislature to jettison § 768.79 altogether. Anecdotal evidence confirms that while the goal of this statute is laudatory, the "juice" it delivers is "not worth the squeeze." *Miccosukee Tribe of Indians, supra.* Disputes over the proper application of this statute have consumed our courts for decades, and an end is nowhere in sight. At last count, over 160 published appellate decisions have addressed this poorly written, unworkable and irrational piece of legislation, and countless other disputes arising out of statutory settlement proposals have either not made it to the appellate level, or were decided on appeal without a published opinion. The attorney's fees tail is wagging the merits dog, and litigation over this statute has exacted an unjustified toll upon litigants and the judiciary. The strict application of this statute can also lead to grossly inequitable results, as this case amply illustrates.

Alternatively, if the legislature elects to leave this statute on the books,

this Court urges it to require a finding that an offer was "reasonable" (or that the rejection of the offer was "unreasonable"), as a condition to imposing sanctions against a rejecting party. Our citizens have a constitutional right to access the courts and should not be punished for rejecting ridiculous settlement offers untethered to any objective assessment of the case. As the goal of this statute is to encourage settlement, a requirement that an offer be "reasonable" (or that a rejection be "unreasonable") will force parties to tender realistic proposals, thereby resulting in more pretrial resolutions, and sanctions will only be imposed upon litigants who reject serious offers. The legislature should also, as it has done *many* times, give trial courts the discretion to deny fees if it finds that an award would be "unjust," particularly given the fact that this statute (as opposed to prevailing party fee statutes) operates as a sanction. *See, e.g.,* Fla. Stat. § 517.211 (6); *Newsom v. Dean Witter Reynolds, Inc.*, 558 So. 2d 1076, 1078 (Fla. 1st DCA 1990) (affirming denial of fees in case where plaintiff's claim had substantial merit but defendant prevailed on a statute of limitation defense, because "it would be unjust under the circumstances to require plaintiff to pay for [defendants] technical escape").

For the benefit of all concerned this Court hopes that this decade old combat is finally concluded. *Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594, 597-98 (5th Cir. 1963) ("… it is for the public interest and policy to make an end to litigation … so that … suits may not be immortal, while men are mortal").

[1] The lodestar is the amount of time reasonably spent by counsel, multiplied by their reasonable hourly rates. *See Florida Patient's Comp. Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985).

[2] This sanction was paid to Lewis Tein s insurance carrier. None of the funds went to the Firm or its principals, Lewis and Tein.

[3] A summary judgment that was affirmed on appeal. *Miccosukee Tribe of Indians of Florida v. Guy Lewis, et. al.,* 165 So. 3d 9 (Fla. 3d DCA 2015).

[4] That award, in its entirety, also went to the Firm's insurers.

[5] The Tribe also attacked the case on other, more traditional, pleading grounds.

[6] Plaintiffs unsuccessfully sought review of this decision in the Florida Supreme Court and the United States Supreme Court.

[7] That, however, has clearly not been the case, as these provisions have created more litigation, consumed more judicial resources, and resulted in more uncertainty then either are worth. *See, e.g., Andrews v. Frey,* 66 So. 3d 376 (Fla. 5th DCA 2011) (lamenting the fact that the statute and rule encourage more litigation); *Design Home Remodeling Corp.*

v. Santana, 146 So. 3d 129, 133 (Fla. 3d DCA 2014) (Emas, J, encouraging revisions to provide an offeror the opportunity to "cure any procedural defects so that the offeree has a genuine opportunity to weigh the substantive merits of a proposal for settlement").

[8] Two Hundred Fifty-Two Thousand Nine Hundred and Seven Dollars (252,907.00) of Alston & Bird's "lodestar" is based on time spent by miscellaneous "time keepers," including a substantial number of contract lawyers hired for purposes of gathering and reviewing electronic discovery.

[9] *See also Bartow HMA, LLC v. Kirkland*, 146 So. 3d 1213, 1215 (Fla. 2d DCA 2014) ("Because a trial court has no authority to award appellate attorney's fees absent specific authorization from the appellate court … this portion of the award [awarding appellate fees] must be reversed."); *Unifirst Corp. v. City of Jacksonville, Tax Collector's Office*, 84 So. 3d 336 (Fla. 1st DCA 2011) (same); *Milanick v. Osborne*, 6 So. 3d 729 (Fla. 5th DCA 2009)(same).

[10] Roman was later permanently disbarred for his conduct in these related cases.

[11] The Court has reviewed the videotape of the oral argument, which is available at the Third District's website:

http:/3dca.flcourts.org/archived video.shtml.

[12] In fact, the Tribe's fee expert, Mr. Rogow, has himself urged the Supreme Court to abrogate this antiquated doctrine.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 15th day of June, 2021.

2016-021856-CA-01 06-15-2021 1:23 PM
Hon. Michael Hanzman

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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