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6 Attorneys for David Mendoza

7
 8 **SUPERIOR COURT OF CALIFORNIA**
 9 **COUNTY OF LAKE**

10 GARY SABALONE,	)	Case No. 409878
)	
11 Person asking for protection,)	
	)	NOTICE OF MOTION AND MOTION
12 vs.	)	FOR COSTS AND ATTORNEY'S FEES
)	
13 DAVID MENDOZA,)	
	)	Date: June 13, 2011
14 Person to be restrained.	)	Time: 9:00 a.m.
	)	Ctrm: 1, Judge David W. Herrick

15 _____
 16 **TO: PETITIONER, GARY SABALONE:**

17 **PLEASE TAKE NOTICE**, that on June 13, 2011, at 9:00 a.m., or as soon thereafter as
 18 the matter may be heard, in the Courtroom of the Honorable David W. Herrick, Judge of the
 19 Superior Court of California, County of Lake, located at 255 N. Forbes Street, 4th Floor,
 20 Lakeport, CA 95453, Respondent, David Mendoza ("Mendoza"), shall, and hereby does, move
 21 the Court, pursuant to Code of Civil Procedure § 527.6(i), and Robinson Rancheria Tribal Code
 22 Section 01.2.020, for an order awarding Mendoza his costs and attorney's fees incurred in this
 23 action.

24 This motion is based on the grounds that:

- 25 1. On March 24, 2010, the Court dismissed Sabalone's petition for an order to stop
- 26 Mendoza from harassing him,
- 27 2. The Court found that Sabalone's petition failed to meet the statutory
- 28 requirements for the issuance of an order to stop civil harassment.

1 3. Code of Civil Procedure § 527.6(i) authorizes the Court to award costs and
 2 attorney's fees to the prevailing party in an action filed pursuant to that section. Under the
 3 applicable provisions of California law and the relevant case decisions, Mendoza qualifies as
 4 the prevailing party in this action.

5 4. Under Section 01.02.020 of the Robinson Rancheria Tribal Code, "In any
 6 litigation in which the Tribe, its officers, employees or agents are a prevailing party, the Tribe,
 7 its officers, employees or agents shall be entitled to recover from all adverse parties all of the
 8 costs and reasonable attorney's fees incurred in prosecuting or defending the action."

9 5. Mendoza is the Chief of the Robinson Rancheria Tribal Police Department and
 10 is, therefore, a tribal officer who was acting in his official capacity at the time of the events
 11 alleged in Sabalone's petition.

12 6. Federal law, 25 U.S.C. § 1360, requires that the courts of California give full
 13 force and effect to tribal ordinances that are not inconsistent with any applicable civil law of the
 14 State of California.

15 7. Mendoza is, therefore, entitled to an award of his costs and reasonable attorney's
 16 fees incurred in defending the claims against him in this action.

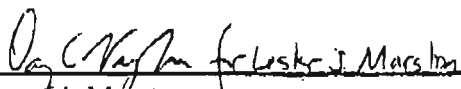
17 8. Mendoza incurred \$209.75 in costs and \$14,307 in attorney's fees in defending
 18 this action.

19 This motion is based on: (1) this Notice of Motion and Motion for Attorney's Fees; (2)
 20 the Memorandum of Points and Authorities in Support of Respondent's Motion for Attorney's
 21 Fees, filed herewith; (3) the Declaration of Lester J. Marston in Support of Respondent's
 22 Motion for Attorney's Fees, filed herewith; (4) the Proposed Order, filed herewith; (5) all
 23 pleadings already on file in this case, and (6) such other evidence and argument as may be
 24 presented at the hearing on this Motion.

25 DATED: May 17, 2011

Respectfully submitted,

RAPPORT AND MARSTON

27 By: 
 28 Lester J. Marston
 Attorneys for David Mendoza

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8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF LAKE

10 GARY SABALONE,)	Case No. 409878
)	
11 Person asking for protection,	)	DECLARATION OF LESTER J.
	)	MARSTON IN SUPPORT OF
12 vs.	)	RESPONDENT'S MOTION FOR
	)	ATTORNEY'S FEES
13 DAVID MENDOZA,)	
	)	Date: June 13, 2011
14 Person to be restrained.	)	Time: 9:00 a.m.
	)	Ctrm: 1, Judge David W. Herrick
)	

17 I, Lester J. Marston, declare:

18 1. I am the attorney for the Respondent, David Mendoza ("Mendoza"), in the
 19 above-entitled case. I am submitting this declaration in support of Mendoza's motion for
 20 attorneys' fees and costs. The information contained in this declaration is of my own personal
 21 knowledge and if called as a witness in these proceedings I could competently testify thereto.

22 2. I was admitted to practice law in California in June of 1978, after graduating
 23 from Hastings College of the Law, University of California, in May of 1977. I am also
 24 admitted to, have remained a member in good standing of, and practiced before, the United
 25 States District Courts for the Northern, Eastern, Central, and Southern Districts of California,
 26 the United States Court of Appeals for the Ninth Circuit, the United States Claims Court, the
 27 Federal Circuit Court of Appeals, the United States Supreme Court, as well as all of the courts
 28 of the State of California.

DECLARATION OF LESTER J. MARSTON IN
 SUPPORT OF MOTION FOR ATTORNEYS' FEES

1 3. Upon graduation from law school, I was awarded a Reginald Herbert Smith
2 Community Lawyer Fellowship from Howard University School of Law in Washington, D.C.
3 After receiving the fellowship, I began working for California Indian Legal Services ("CILS")
4 in the program's Escondido office. Upon admission to the California Bar in June 1978, I
5 became a staff attorney in that office. In September of 1979, I transferred to the Ukiah office of
6 CILS. In July of 1980, I became the Directing Attorney for the Ukiah office of CILS, and
7 served in that capacity until I left the program in June of 1993.

8 4. In 1982, I embarked upon the private practice of law on a part-time basis in
9 Ukiah, California, specializing in federal Indian, business, and land use law. In 1984, as part of
10 my private practice, I accepted the City Attorney position for the City of Willits and held that
11 position until June of 1994. From 1989 to 1993, I served as the Chief Judge for the Tribal
12 Court of the Confederated Tribes of the Grand Ronde Community of Oregon. From March of
13 1992 to December of 2003, I served as a Pro Tem Superior Court Judge for the Mt. Sanhedrin
14 Judicial District for Mendocino County. I am presently serving as the Chief Judge of the Blue
15 Lake Rancheria Tribal Court.

16 5. Since 1984, I have engaged almost exclusively in the practice of federal Indian,
17 municipal, environmental, and business law. I have authored two law review articles: (1)
18 Marston and Fink, The Indian Commerce Clause: Reports of Its Death Have Been Greatly
19 Exaggerated, 16 Golden Gate L. Rev. 205 (1986); and (2) Marston, Retrocession of Public Law
20 280 Jurisdiction, 1 Justice in Indian Country 154. From 1979 to the present, I have practiced
21 extensively in the federal courts, particularly in the United States District Court for the
22 Northern District of California. Some of the more significant litigation that I have been or
23 presently am responsible for are: *Chemehuevi Indian Tribe v. California State Board of*
24 *Equalization*, 492 F.Supp. 55 (N.D. Cal. 1979); *Chemehuevi Indian Tribe v. S.B.O.E.*, 757 F.2d
25 1047 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985); *Chemehuevi Indian Tribe v.*
26 *Wilson*, 987 F. Supp. 804 (N.D. Cal. 1997); *Coyote Valley Band of Pomo Indians v. United*
27 *States*, 639 F. Supp. 165 (E.D. Cal. 1985); *Blake v. Simpson Timber Co.*, 663 F.2d 906 (9th Cir.
28 1981); *Smith v. United States*, 515 F.Supp. 51 (N.D. Cal. 1978); *Duncan v. United States*, 667

1 F.2d 36 (Cls. Ct. 1981); *In re Wilson*, 30 Cal.3d 21 (Cal. Sup. Ct. 1981); *People v. McCovey*, 36
2 Cal.2d 517 (Cal. Sup. Ct. 1984); *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d
3 1067 (N.D. Cal. 2004); *State of Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006);
4 and *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008).

5 6. During my professional career, I have become familiar with the fees charged by
6 attorneys for litigation in cases of comparable complexity that have been litigated in the courts
7 of the State of California and federal district courts. In my opinion, the prevailing market rate
8 charged by attorneys with my experience is \$300 an hour or more. It is my opinion that \$300
9 an hour is a reasonable hourly rate, given the nature of the case, my experience, and
10 professional reputation.

11 7. Regarding the hours billed by Scott Johnson, Mr. Johnson graduated from
12 Cornell Law School in 1984 and was admitted to the California bar in December of 1984. He
13 clerked with CILS while in law school, and began practicing in the Bishop, California, office of
14 CILS in 1984 as a staff attorney.

15 8. Mr. Johnson has worked for the law firm Rapport and Marston since 1996 as an
16 attorney, spending at least 90% of his time in the practice of federal Indian law.

17 9. During the fifteen years that he has worked at Rapport and Marston, he
18 researched legal issues, formulated legal arguments, and drafted briefs in connection with the
19 following kinds of litigation: gaming, tax, land acquisition litigation, tribal jurisdiction, and
20 business issues in connection with tribal economic development. He has also argued in both
21 state and federal courts on behalf of clients of the firm.

22 10. Litigation in which participation by Mr. Johnson was significant includes
23 *Chemehuevi Indian Tribe, et al. v. Wilson*, 987 F. Supp. 804 (N.D. Cal. 1997), in which the
24 district court held that, pursuant to 25 U.S.C. § 175, the "federal defendants [had] a mandatory
25 duty to prosecute [an action compelling negotiation with the State of California] against the
26 State of California on [Plaintiff tribes'] behalf, to enforce plaintiffs' rights under the [Indian
27 Gaming Regulatory Act] to negotiate a compact."

28 11. Other litigation in which Mr. Johnson's participation was significant includes:

1 *Redding Rancheria v. Superior Court*, 88 Cal. App.4th 384 (2001); *Friends of East Willits*
2 *Valley v. County of Mendocino*, 123 Cal. Rptr.2d 708 (2002); *Bodrell Joer'dan Smith v.*
3 *Hopland Band of Pomo Indians*, 95 Cal. App.4th 1 (2002); *State of Wisconsin v. Ho-Chunk*
4 *Nation*, 463 F.3d 655 (7th Cir. 2006); and *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d
5 921 (7th Cir. 2008). Mr. Johnson is admitted to practice before the United States District Court
6 for the Northern and Eastern Districts of California, as well as all of the courts of the State of
7 California.

8 13. Rapport and Marston bills the work done by Mr. Johnson at the same hourly rate
9 as the work done by me.

10 14. Having become familiar with the rates charged for litigation in cases of
11 comparable complexity that have been litigated in the courts of the State of California and
12 federal district courts, \$250 per hour is a reasonable rate for attorney's fees for the hours spent
13 by Mr. Johnson in this case.

14 15. Rapport and Marston keeps contemporaneous records of attorney time through
15 the automated computer software program, "Timeslips," which tracks time to the second. Bills
16 are prepared each month using "Timeslips." The "Timeslips" program was used to keep track
17 of the attorney time expended in defending this action. The total hours of attorney time claimed
18 in the Motion for Attorneys' Fees was determined using the records from the "Timeslips"
19 program.

20 16. The total number of attorney hours expended by the Tribe defending this action
21 and in preparing this motion and related pleadings was 54.72 hours. Of the total attorney time
22 expended, Scott Johnson expended 42.18 hours at \$250 per hour, for a total of \$10,545. I
23 expended 12.54 hours in defending this case at \$300 per hour, for a total of \$3,762. Attached
24 as **Exhibit 1** is a copy of the billing statements for the legal services provided to Mendoza by
25 Rapport and Marston in defending this action. Attached as **Exhibit 2** are copies of the
26 statements of the costs incurred by Mendoza in defending this action.

27 17. Attached as **Exhibit 3** is a true and correct copy of the Robinson Rancheria's
28 Attorney's Fees Ordinance.

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I declare under penalty of perjury that the foregoing is true and correct, executed this 17th day of May, 2011, in Ukiah, California.


LESTER J. MARSTON

EXHIBIT 1

ROBINSON RANCHERIA POLICE DEPT.

Page 2

Hours Amount

03/16/11 LJM Review

✓ of the e-mail from Mendoza re:
what happened with Sabalone and
preparation of an e-mail
requesting a statement from Irwin
and then call with Johnson re:
what needs to go into the motion.

0.40 114.00 ✓

✓ JOH Preparation of
a memorandum of points and
authorities in support of
Mendoza's motion to quash/to
dismiss.

2.07 465.75 ✓

ROBINSON RANCHERIA POLICE DEPT.

Page 3

	<u>Hours</u>	<u>Amount</u>
03/17/11 JOH Preparation of the memorandum of points and authorities in support of ✓ Mendoza's opposition and motion to dismiss Sabalone's request for an order to stop civil harassment.	5.28	1,188.00
03/18/11 JOH Preparation of the memorandum of points and authorities and declarations in support of Mendoza's opposition and motion to dismiss Sabalone's request for an order to stop civil harassment, phone conversations with Chief Mendoza, Dean Rogers, and Dietrick McGinnis.	6.25	1,406.25
03/21/11 LJM Conference w/ ✓ Johnson re: what needs to be presented to the court in the Mendoza case.	0.05	14.25
✓ JOH Preparation of the notice of motion to quash/dismiss request for order to stop civil harassment, memorandum of points and authorities in support thereof, and declarations of Mendoza, Irwin, Rogers, and McGinnis in support thereof.	5.53	1,244.25
✓ LJM Final Proofing of the memorandum of points and authorities in support of the motion to dismiss the lawsuit against Mendoza.	1.22	274.50

ROBINSON RANCHERIA POLICE DEPT.

	<u>Hours</u>	<u>Amount</u>
03/22/11 JOM Final proofing and preparation of opposition/motion documents in Sabalone's request for order to stop civil harassment.	1.63	366.75
LJM Conference w/ Johnson re: how the Mendoza lawsuit is being served and filed with the Court and to discuss who we need as witnesses at the hearing.	0.11	24.75
03/24/11 LJM TRAVEL TIME from Ukiah to the Superior Court and back and attend the oral argument on the motion to dismiss the Sabalone case then meeting with the D.A. re: preparing a response to the Stand Up California letter and then trial of the Sabalone case.	9.02	2,029.50
JOM Legal Research re: sovereign immunity as it applies to the chief of the Tribal Police Department.	0.28	63.00
03/25/11 LJM Dictation of a memo to the Council re: the status of the Sabalone case.	0.27	60.75

ROBINSON RANCHERIA POLICE DEPT.

Page 5

03/29/11 JOH Final

✓ review and proofing of the
memorandum re: the hearing on the
civil harassment suit against
Chief Mendoza.

<u>Hours</u>	<u>Amount</u>
0.28	63.00 ✓

ROBINSON RANCHERIA POLICE DEPT.

Page 4

Hours Amount

* ✓ 04/19/11	JOH Preparation of a motion for attorneys' fees in Sabalone case.	1.60	360.00
* ✓ 04/20/11	JOH Preparation of the motion for attorney's fees in Sabalone v Mendoza.	5.54	1,246.50

ROBINSON PANCHERIA POLICE DEPT.

Page 5

<u>Hours</u>	<u>Amount</u>
4.84	1,089.00

04/21/11 JOH Preparation of
the motion for attorney's fees in
Salabone v. Mendoza and revision
of draft attorney's fees ordinance.

JOH Preparation of
the memorandum of points and
authorities in support of motion
for attorney's fees in Sabalone v.
Mendoza.

0.41	92.25
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ROBINSON RANCHERIA POLICE DEPT.

Page 6

	<u>Hours</u>	<u>Amount</u>
✓ 04/26/11 JOH Revision of the motion for attorney's fees in Sabalone v. Mendoza.	1.00	225.00

✓ JOH Revision of the memorandum of points and authorities in support of the motion for attorney's fees in Sabalone v. Mendoza.	2.25	506.25
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ROBINSON RANCHERIA POLICE DEPT.

Page 7

Hours Amount

[Handwritten initials]

04/28/11 JOW ✓ Revision of
the memorandum of points and
authorities in support of motion
for attorney's fees, the
declaration of Marston in support
of same, and notice of motion and
motion re: same.

4.63 1,041.75

[Handwritten initials]

04/29/11 JOW ✓ Revision of
the notice of motion for
attorney's fees.

0.59 132.75

ROBINSON RANCHERIA POLICE DEPT.

Page 2

Hours Amount

05/16/11 LJM Final Proofing
of the motion for attorney fees.

0.95 213.75

EXHIBIT 2

TWO FEATHERS PRIVATE SECURITY
 www.TwoFeathersPS.com
 4740 BURKE HILL DR.
 UKIAH, CA 95482



WWW.TWOFEATHERSPS.COM
707-234-0284
TWO FEATHERS PRIVATE SECURITY
C.C.T.V - SECURITY - SURVEILLANCE
Over 10 Years of Experience!

Invoice

Date: 3/22/2011
 Invoice #: 100883

Bill To
 Rapport & Marston, Law Offices
 ATTN: KRISTA
 405 W. PERKINS
 UKIAH, CA 95482

Ship To

P.O. Number	Terms	Rep	Ship	Via	F.O.B.	Project
SAMBALONE	Due on receipt	PGJT	3/22/2011	PERSONAL S...		

Quantity	Item Code	Description	Price Each	Amount
1	RPSPRI40	PRIORITY/RUSH PROCESS SERVICES: Sales Tax	134.00 7.25%	134.00 0.00

YOUR PRIORITY PROCESS SERVICE DELIVERY IS SUCCESSFUL - THANK YOU FOR YOUR BUSINESS!

Total \$134.00

Phone #	Fax #	E-mail	Web Site
707-234-0284	707-162-7045	CCTVSales@TwoFeathersPS.com	www.TwoFeathersPS.com

ROBINSON RANCHERIA POLICE DEPT.

Page 6

03/24/11 MILEAGE

from Ukiah to the Superior Court and back to attend the oral argument on the motion to dismiss the Sabalone case then meeting with the D.A. re: preparing a response to the Stand Up California letter and then trial of the Sabalone case.

Amount

35.75

EXHIBIT 3

ORDINANCE NO. 01-20-11

ATTORNEY'S FEES

Sections:

- 01.2.010 Definitions
- 01.2.020 Award of Fees
- 01.2.030 Computation of Award
- 01.2.040 Multiple Adverse Parties
- 01.2.050 Severability
- 01.2.060 Tribal Court Jurisdiction

01.2.010 Definitions. For purposes of this Ordinance, the following words and phrases shall have the meanings as set forth hereinafter unless the context requires a different meaning:

A. "Adverse Party" means any party to any litigation who seeks any relief from the Tribe or opposes any relief requested by the Tribe.

B. "Tribe" means the Robinson Rancheria, its duly authorized officers, employees, and agents.

C. "Court" means any court, administrative proceeding, or hearing of any kind.

D. "Litigation" means any hearing, administrative proceeding, or court action to which the Tribe is a party.

E. "Prevailing Party" means a party to litigation who obtains any relief it has sought in the litigation. The term "any relief" includes, but is not limited to, one or more but not necessarily all of the claims or defenses asserted in the action. Any party who achieves any relief sought including relief by way of settlement or unilateral act of an opposing party shall also be considered a prevailing party for purposes of this section.

01.2.020 Award of Fees. In any litigation in which the Tribe, its officers, employees or agents are a prevailing party, the Tribe, its officers, employees or agents shall be entitled to recover from all adverse parties all of the costs and reasonable attorney's fees incurred in prosecuting or defending the action.

01.2.030 Computation of Award. The amount of any award of attorney's fees shall be established by the Court upon the filing of a cost bill as provided by law, rule or by separate motion. In determining the amount of the attorneys's fees, the court shall multiply the number of hours devoted to preparing, prosecuting or defending the action, commencing when the matter is first referred to the Tribe's attorney, by a reasonable hourly rate for the services provided. In determining a reasonable hourly rate, the court shall consider the reasonable market rate in the jurisdiction for the attorney's services, taking into consideration the attorney's experience and skill and shall not be limited to the amounts actually paid by the Tribe, its officers, employees or agents.

01.2.040 Multiple Adverse Parties. If there is more than one adverse party, they shall be jointly and severally liable for all of the attorney's fees awarded to the Tribe, its officers, employees or agents by the court.

01.2.050 Severability. If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such a ruling shall not effect the remaining portions of this ordinance. The Tribal Council declares that it would have passed this ordinance and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more such provisions be declared unconstitutional or invalid.

01.2.060 Tribal Court Jurisdiction. The Robinson Rancheria Tribal Court shall have the authority to hear any action initiated in the Tribal Court to enforce the provisions of this ordinance and to award attorney's fees to the Tribe, its officers, employees or agents as a result of the Tribe, its officers, employees or agents being a prevailing party in any litigation brought in any court.

Section 3. Effective Date, Publication. This Ordinance shall take effect immediately upon its adoption by the Robinson Rancheria Citizens Business Council. [?]

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6 Attorneys for David Mendoza

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 8 **SUPERIOR COURT OF CALIFORNIA**
 9 **COUNTY OF LAKE**

10 GARY SABALONE,)	Case No. 409878
)	
11 Person asking for protection,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
12 vs.	)	RESPONDENT'S MOTION FOR
	)	ATTORNEY'S FEES
13 DAVID MENDOZA,)	
)	
14 Person to be restrained.	)	Date: June 13, 2011
	)	Time: 9:00 a.m.
15	)	Ctrm: 1, Judge David W. Herrick

16
 17 **INTRODUCTION**

18 On March 24, 2011, the Court dismissed Gary Sabalone's petition for an order directing
 19 David Mendoza to stop harassing him, filed pursuant to Code of Civil Procedure § 527.6
 20 ("Section 527.6"). The Court found that Sabalone's petition failed to meet the statutory
 21 requirements for civil harassment and dismissed the petition.¹ Section 527.6(I) provides that
 22 the prevailing party in an action brought under that section may be awarded court costs and
 23 attorney's fees. Mendoza, as the prevailing party in this matter, is entitled to an award of his
 24 costs in the amount of \$209.75 and attorney's fees in the amount of \$14,307.

25
 26
 27 ¹Although the Court's records reflect that this matter was dismissed, the Court did not issue
 28 a minute order or other written order dismissing the case. Mendoza, therefore, submits a
 [Proposed] Order, should the Court find that the issuance of such an order is necessary in order to
 address this motion.

I.

MENDOZA IS ENTITLED TO COSTS AND ATTORNEY'S FEES.

Section 527.6(i) states: "The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any." Section 527.6 does not define the term "prevailing party." In *Alder v. Vaicius* (1993) 21 Cal. App. 4th 1770, the Court of Appeals ruled that, because Section 527.6 does not define "prevailing party," the definition of "prevailing party" is to be found in Code Civ. Proc. § 1032: "Since section 527.6 does not define 'prevailing party,' the general definition of 'prevailing party' in section 1032 may be used." *Id.* 21 Cal. App. 4th at 1777. Section 1032(a)(4), provides that "Prevailing party" includes . . . a defendant in whose favor a dismissal is entered, . . ." In the present case, the Court dismissed Sabalone's petition, so, under *Alder*, Mendoza is the prevailing party in this action.

The decision to award the prevailing party attorney's fees under Section 527.6 is left to the discretion of the court. *Krug v. Machmeier* (2009) 172 Cal. App. 4th 796, 802-803. Significantly, the Court of Appeal has found that an award of attorney's fees to a prevailing defendant under Section 527.6 does not require that the petition be frivolous:

As [defendant] points out, there are numerous so-called "sanctions statutes" in which the Legislature has explicitly limited the recovery of attorney fees to those instances where a party's conduct was frivolous or in bad faith. The failure of the Legislature to spell out a similar limitation on the recovery of attorney fees by prevailing defendants in actions brought under section 527.6, when examined in light of the frequency with which the Legislature has expressly limited such recovery in numerous other statutes, leads inescapably to the conclusion that both plaintiffs and defendants in section 527.6 proceedings have an equal opportunity to recover their attorney fees, as well as costs, if they prevail.

Id., 172 Cal. App. 4th at 803.

The case law addressing the awarding of attorney's fees under 527.6, supports an award of attorney's fees to Mendoza in the present case. In *Alder*, *supra*, the Court of Appeals upheld the award of attorney's fees to the defendant, a police officer, based on the voluntary dismissal of the petition by the petitioner, before a hearing on the petition had been held. As was the case in *Alder*, Sabalone's petition was dismissed. The present case, in fact, provides a more

MEMO. OF POINTS AND AUTHORITIES IN
SUPPORT OF RESPONDENT'S MOTION FOR
ATTORNEY'S FEES

1 compelling basis for awarding attorney's fees to Mendoza than the defendant in *Alder*.
2 Sabalone's petition was dismissed by the Court on the merits; Sabalone's petition failed to meet
3 the statutory requirements for the issuance of an order enjoining harassment under Section
4 527.6. Despite the clear absence of facts that would support the issuance of an order enjoining
5 harassment, Sabalone filed the petition and forced Mendoza to defend against a meritless claim.

6 The decision in *Krug* also supports an award of costs and attorney's fees to Mendoza.
7 In *Krug*, the petitioner made a number of assertions that the defendant had engaged in harassing
8 behavior. At trial, however, the petitioner admitted that the defendant had not engaged in the
9 asserted harassment. The court dismissed the petition and awarded attorney's fees to the
10 defendant. Similarly, although Sabalone asserted that Mendoza acted toward him in a manner
11 that constituted harassment, his petition failed to provide support for that assertion. Sabalone's
12 claim was frivolous. Thus, even under the narrow interpretation of Section 527.6 rejected by
13 the *Krug* court, an award of attorney's fees would be appropriate in this case.

14 Moreover, as will be discussed in the next section of this brief, it is particularly
15 important to award Mendoza his attorney's fees because of the circumstances surrounding
16 Sabalone's petition.

17 II.

18 AN AWARD OF COSTS AND ATTORNEY'S FEES IS 19 NECESSARY IN THIS CASE TO ENSURE THAT THE SECTION 527.6 PROCEDURE IS NOT ABUSED.

20 The California Legislature enacted Section 527.6 for the purpose of protecting persons
21 who are the object of harassment that threatens them with significant injury:

22 *Section 527.6* was passed to supplement the existing common law torts
23 of invasion of privacy and intentional infliction of emotional distress by
24 providing quick relief to harassment victims threatened with great or irreparable
injury. . . . It was enacted to protect the individual's right to pursue safety,
happiness and privacy as guaranteed by the California Constitution.

25 *Section 527.6* has been used where the victim has been stalked,
threatened or otherwise seriously harassed. . . .

26 *Grant v. Clamplitt* (1997) 56 Cal. App. 4th 586, 591. (Citations omitted.)

27 The California Legislature did not intend that the procedures set forth in Section 527.6
28 be used as a tool for harassing people or inflicting emotion distress. Yet, that is precisely what

MEMO. OF POINTS AND AUTHORITIES IN
SUPPORT OF RESPONDENT'S MOTION FOR
ATTORNEY'S FEES

1 Sabalone attempted to do in the present case.

2 The evidence submitted to the Court demonstrates that, on November 3, 2010, Sabalone
3 confronted Mendoza, the Chief of the Robinson Rancheria Tribal Police Department and a
4 federally commissioned law enforcement officer, for allegedly trespassing on his property.
5 Declaration of David Mendoza in Support of Opposition to Request for Restraining Order and
6 in Support of Motion to Quash, Demurrer, and Motion to Dismiss ("Mendoza Declaration"), p.
7 2, ¶ 5, previously filed with the Court. Mendoza apologized to Sabalone and engaged him in a
8 conversation in which he explained why he was, unintentionally, on Sabalone's property. The
9 conversation was generally civil. The conversation ended in a handshake. Mendoza
10 Declaration, pp. 2-3, ¶¶ 6-7. Mendoza never engaged in any conduct that could be considered
11 threatening. See Mendoza Declaration, the Declaration of John Irwin in Support of Opposition
12 to Request for Restraining Order and in Support of Motion to Quash, Demurrer, and Motion to
13 Dismiss ("Irwin Declaration"), the Declaration of Dean Rogers in Support of Opposition to
14 Request for Restraining Order and in Support of Motion to Quash, Demurrer, and Motion to
15 Dismiss ("Rogers Declaration"), and the Declaration of Dietrick McGinnis in Support of
16 Opposition to Request for Restraining Order and in Support of Motion to Quash, Demurrer, and
17 Motion to Dismiss ("McGinnis Declaration"), previously filed with the Court. Mendoza had
18 never met Sabalone before November 3, 2010. Mendoza did not interact with Sabalone in any
19 way after the November 3, 2010, conversation. Mendoza Declaration, pp. 3, ¶ 8.

20 The reason that Mendoza was present on Sabalone's property on November 3, 2010,
21 was that he was checking in with Sargent John Irwin of the Robinson Rancheria Tribal Police
22 Department, also a federally commissioned law enforcement officer, who have been assigned to
23 provide civil standby for tribal employees and consultants who were to test a well on tribal land
24 adjacent to Sabalone's property. Mendoza Declaration, p. 2, ¶ 4. Irwin Declaration, p. 2, ¶ 4.
25 That civil standby was necessary because, in the past, Sabalone had confronted and threatened
26 tribal employees and consultants working on the well. On at least one occasion, Sabalone was
27 in possession of a firearm while confronting the tribal employees and consultants. McGinnis
28 Declaration, pp. 1-4, ¶¶ 2-8. The tribal consultants were sufficiently concerned for their safety

1 and that of their employees that they requested that the Robinson Rancheria Tribal Police
2 Department provide a civil standby when the well was to be tested on November 3, 2010.
3 Mendoza Declaration, pp. 1-2, ¶ 2.

4 The reason that Mendoza was present in the vicinity of Sabalone's property on
5 November 3, 2010, was that he was coordinating tribal efforts to avoid a confrontation or
6 violence.

7 In filing the Petition, Sabalone was unquestionably aware of these facts. He knew that
8 no "unlawful violence . . . credible threat of violence, or . . . knowing and willful course of
9 conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and
10 that serves no legitimate purpose" had been committed by Mendoza. The filing of the petition
11 appears to have been designed to annoy and inflict emotional distress on Mendoza and disrupt
12 the Tribe's efforts to maintain the peace on the Reservation.

13 Furthermore, even if Mendoza had committed an act that could be considered conduct
14 that seriously alarmed, annoyed, or harassed Sabalone, there can be no question that Mendoza's
15 actions served a legitimate purpose: keeping the peace. The Court of Appeals has specifically
16 ruled that, if an action served a legitimate purpose, it cannot be considered harassment,
17 "Conduct which serves a legitimate purpose is outside the definition of 'harassment' and cannot
18 be enjoined pursuant to the summary procedures of *section 527.6*, . . ." *Byers v. Cathcart*
19 (1997) 57 Cal. App. 4th 805, 812. Thus, even if Mendoza's actions seriously annoyed or
20 harassed Sabalone, under the plain wording of Section 527.6, those actions did not qualify as
21 harassment.

22 It is also important to note that, as a tribal and federally commissioned law enforcement
23 officer, Mendoza is required to be qualified to carry a firearm. See, for example, 25 C.F.R.
24 §12.21; 25 U.S.C. 2803; Department of the Interior, Bureau of Indian Affairs, Internal Law
25 Enforcement Services Policies, 69 Fed. Reg. 6,322. Under Section 527.6, the subject of an
26 order to stop civil harassment is not permitted to possess a firearm, Section 527.6(t)(1). A
27 person subject to such an order is, in fact, required to sell or relinquish any firearms in his
28 possession to the Court. Section 527.6(t)(2). The failure to relinquish all firearms and

MEMO. OF POINTS AND AUTHORITIES IN
SUPPORT OF RESPONDENT'S MOTION FOR
ATTORNEY'S FEES

1 ammunition subjects a person to whom an order to stop harassment is directed to criminal
2 penalties.² Section 527.6(t)(2). Thus, in filing the Petition, Sabalone was not merely attempting
3 to annoy Mendoza by forcing him to respond to the request for an order to stop harassment,
4 Sabalone was attempting to prevent Mendoza from carrying out his duties as the Chief of Police
5 of the Robinson Rancheria Tribal Police Department. He was, in effect, attempting to take
6 away his livelihood by preventing him from meeting the requirements of his job as a law
7 enforcement officer.

8 This threat to Mendoza's livelihood, with its attendant effect on law enforcement on the
9 Tribe's Reservation, cannot be understood to be an unanticipated consequence of the filing of
10 the Petition. Exhibit 1 to the Petition reveals that Sabalone attempted to use the alleged
11 incident to convince the Bureau of Indian Affairs, Office of Justice Services ("OJS") to
12 reconsider the issuance of Mendoza's Special Law Enforcement Commission and that
13 Sabalone intended to disrupt the OJS's deputation agreement with the Tribe.³

14 Because of the Sabalone's illegitimate purpose in filing the Petition, it is particularly
15 important that Sabalone not be permitted to force Mendoza to incur significant attorney's fees
16 and costs. If Mendoza is not awarded his attorney's fees and costs, Sabalone, in effect, will be
17 successful in his effort to harm Mendoza. If he is not awarded attorney's fees and costs,
18 Mendoza will be punished for carrying out his duty as a peace officer to prevent violence or the
19 threat of violence, the kind of behavior that the Section 527.6 is intended to stop.

20 In *Elster v. Friedman* (1989) 211 Cal. App. 3d 1439, 1443, the Court of Appeals
21 upheld an award of attorney's fees to the plaintiff, because, "nothing in the record even hints

22 _____
23 ²Cal. Penal Code § 12021(g).

24 ³"While on the surface this may appear to be a minor incident of trespass, it nevertheless,
25 represents a very serious situation which requires investigation. Clearly, SLEC officers must not
26 be convicted of a misdemeanor offense, thus potential legal action threatens the renewal of Police
27 Chief Mendoza's SLEC status. This potentially could affect the loss of the Deputation Agreement
28 between the Robinson Rancheria and your Department as Police Chief Mendoza clearly has
misused his authority. Finally, SLEC status grants not only authority to officers but a significant
responsibility which equates to a high level liability risk to the U.S. Government." Exhibit 1 to
Petition, p. 2.

1 that [the plaintiffs] were anything but the victims in this case." The evidence presented to the
2 Court in this case revealed clearly that Mendoza was, if anything, the victim in this case. He
3 was present at the time of the events to ensure that the tribal employees and consultants were
4 not harassed by Sabalone, who had threatened tribal employees and consultants in the past. His
5 reward for attempting to keep the peace was to be forced to defend against a frivolous petition
6 for an order to stop civil harassment.

7 The Court cannot countenance this misuse of the Section 527.6 process. An award of
8 attorney's fees is necessary to discourage Sabalone and others from abusing the Section 527.6
9 process.

10 **III.**

11 **THE COURT IS COMPELLED TO GRANT ATTORNEY'S**
12 **FEES AND COSTS UNDER THE APPLICABLE TRIBAL**
AND FEDERAL LAW.

13 The Robinson Rancheria Citizen Business Council has enacted an Attorney's Fees
14 Ordinance ("Ordinance"). A true and correct copy of the Robinson Rancheria Attorney's Fees
15 Ordinance is attached to the Declaration of Lester J. Marston in Support of Respondent's
16 Motion for Attorney's Fees, ("Marston Declaration") as Exhibit 3. Section 01.2.020 of the
17 Ordinance provides:

18 In any litigation in which the Tribe, its officers, employees or agents are a
19 prevailing party, the Tribe, its officers, employees or agents shall be entitled to
20 recover from all adverse parties all of the costs and reasonable attorney's fees
incurred in prosecuting or defending the action.

21 Ordinance, Exhibit 3 to Marston Declaration, p. 2.

22 The definition of "prevailing party" in the Ordinance states:

23 "Prevailing Party" means a party to litigation who obtains any relief it has sought
24 in the litigation. The term "any relief" includes, but is not limited to, one or
25 more but not necessarily all of the claims or defenses asserted in the action. Any
26 party who achieves any relief sought including relief by way of settlement or
unilateral act of an opposing party shall also be considered a prevailing party for
purposes of this section.

27 Ordinance, Section 01.2.010(E).

28 It is the policy of Congress to give full force and effect to tribal laws. Under Public

MEMO. OF POINTS AND AUTHORITIES IN
SUPPORT OF RESPONDENT'S MOTION FOR
ATTORNEY'S FEES

1 Law 280 (25 U.S.C. § 1360), the federal statute granting limited civil jurisdiction over
2 individual Indians and non-Indians in Indian Country to a number of states, including
3 California, Congress specifically required that state courts covered by the Act recognize tribal
4 law:

5 Any tribal ordinance or custom heretofore or hereafter adopted by an Indian
6 Tribe, band, or community in the exercise of any authority which it may possess
7 shall, if not inconsistent with any applicable civil law of the State, **be given full
force and effect** in the determination of any civil causes of action pursuant to
this section.

8 25 U.S.C. §1360(c) (Emphasis added).

9 The various attorney's fees provisions in the California Code, and the state court
10 decisions upholding the award of attorneys' fees under the provisions of municipal ordinances
11 make it clear that the Tribe's Attorneys' Fees Ordinance is not inconsistent with state law. See,
12 e.g., Code Civ. Proc. §1021 and Code Civ. Proc. §1033.5; *Aquirre v. Lee*, 20 Cal. App.4th
13 1646, 1651-52 (1993); and *Kelly v. Yee*, 213 Cal. App.3d 336, 343-44,(1989). Public Law 280,
14 therefore, mandates that the courts of this State give full force and effect to the Ordinance.

15 The Court dismissed Sabalone's petition. By so doing, the Court granted the relief that
16 Mendoza was seeking in the case. Mendoza is, therefore, the "prevailing party" within the
17 meaning of Section 01.2.010(E). As Chief of the Robinson Rancheria Police Department,
18 Mendoza is a tribal official. The Tribe is, therefore, entitled to attorney's fees under Section
19 01.2.020 of the Ordinance. Because federal law requires state courts to give full force and
20 effect to tribal law that is not in conflict with state law, the Court is compelled to award
21 Mendoza attorney's fees.

22 IV.

23 MENDOZA INCURRED SUBSTANTIAL COSTS AND 24 ATTORNEY'S FEES.

25 The Marston Declaration and Exhibits 1 and 2 thereto establish beyond doubt that the
26 prevailing market rate for the attorney services provided by the Mendoza's lead counsel, Lester
27 Marston, given his skill and experience in the area, is at least \$300 per hour, and that the
28 prevailing market rate for the attorney services provided by Scott Johnson, given his skills and

MEMO. OF POINTS AND AUTHORITIES IN
SUPPORT OF RESPONDENT'S MOTION FOR
8 ATTORNEY'S FEES

1 experience, is at least \$250 per hour. The Marston Declaration and the exhibit attached thereto
 2 further demonstrate that Mendoza incurred costs in the amount of \$169.75 and that Mendoza's
 3 attorneys expended 34.84 hours of attorney time in responding to the Petition and that, as a
 4 result, and incurred attorneys' fees in the amount of \$8,807. Finally, the Marston Declaration
 5 and the exhibit attached thereto demonstrate that Mendoza's attorneys expended 21.81 hours of
 6 attorney time in preparing this motion for attorney's fees and that, as a result, Mendoza incurred
 7 attorneys' fees in the amount of \$5,500 in preparing and filing this motion, and additional costs
 8 of \$40, the Court's filing fee for this motion. Mendoza is, therefore, entitled to an award for all
 9 of his attorney's fees in the amount of \$14,307.

10 **CONCLUSION**

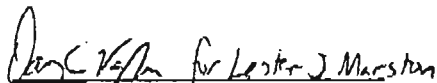
11 Sabalone's petition was utterly meritless. Section 527.6 authorizes the Court to award
 12 costs and attorney's fees to the prevailing party in an action brought pursuant to that statute.
 13 Mendoza is the prevailing party in this matter and is, therefore, entitled to attorney's fees under
 14 Section 527.6. Mendoza is also entitled to attorney's fees pursuant to the Robinson Rancheria's
 15 Attorney's Fees Ordinance, to which, under federal law, the Court is compelled to give full
 16 force and effect.

17 Mendoza, therefore, respectfully requests that the Court award him costs in the amount
 18 of \$209.75, and attorney's fees in the amount of \$14,307.

19 Respectfully submitted,

20 Dated: May 17, 2011

RAPPORT AND MARSTON

21 
 22 Lester V. Marston
 23 Attorneys for David Mendoza

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7
 8 **SUPERIOR COURT OF CALIFORNIA**
 9 **COUNTY OF LAKE**

10	GARY SABALONE,)	Case No. 409878
11	Person asking for protection,	)	[PROPOSED] ORDER DISMISSING
12	vs.	)	PETITION TO STOP CIVIL
13	DAVID MENDOZA,	)	HARASSMENT
14	Person to be restrained.	)	[Civil Code § 527.6]
15)	

16
 17 Gary Sabalone's request for an order directing David Mendoza to stop harassing him,
 18 filed pursuant to Civil Code § 527.6 ("Section 527.6") came on for hearing on March 24, 2011,
 19 the Honorable Arthur H. Mann, presiding. Sabalone appeared on his own behalf. Mendoza
 20 appeared through his legal counsel, Lester J. Marston of the law offices of Rapport and
 21 Marston.

22 The Court, having heard and considered the testimony of David Mendoza, John Irwin,
 23 and Gary Sabalone, the arguments of Sabalone and counsel for Mendoza, and having reviewed
 24 and considered all the pleadings and documents on file herein, and good cause appearing
 25 therefor, finds:

26 1. Sabalone failed to allege facts sufficient to demonstrate that Mendoza engaged
 27 in a credible threat of violence, or a knowing and willful course of conduct directed at Sabalone
 28 that seriously alarmed, annoyed, or harassed Sabalone and that served no legitimate purpose.

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IT IS HEREBY ORDERED:

1. Sabalone's request for an order to stop harassment against Mendoza is denied.

Dated: May _____, 2011

By: _____
JUDGE OF THE SUPERIOR COURT

1 LESTER J. MARSTON
 California State Bar No. 081030
 2 RAPPORT AND MARSTON
 405 West Perkins Street
 3 P.O. Box 488
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 4 Telephone: 707-462-6846
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 6 Attorneys for David Mendoza

7
 8 **SUPERIOR COURT OF CALIFORNIA**
 9 **COUNTY OF LAKE**

10	GARY SABALONE,	)	Case No. 409878
11	Person asking for protection,	)	[PROPOSED] ORDER AWARDING
12	vs.	)	ATTORNEY'S FEES
13	DAVID MENDOZA,	)	[Civil Code § 527.6 and 28 U.S.C. § 1360]
14	Person to be restrained.)	
15	<hr/>		

16 David Mendoza's motion for attorney's fees against Gary Sabalone, filed pursuant to
 17 Civil Code § 527.6(I) and the Robinson Rancheria's Attorney's Fees Ordinance, came on for
 18 hearing on June 13, 2011, the Honorable David W. Herrick, presiding. Mendoza appeared
 19 through his legal counsel, Lester J. Marston of the law offices of Rapport and Marston.
 20 Sabalone appeared on his own behalf.

21 The Court, having heard and considered the arguments of counsel for Mendoza and
 22 Sabalone, having reviewed and considered all the pleadings and documents on file herein, and
 23 good cause appearing therefor, finds:

24 1. Because Sabalone failed to allege facts sufficient to demonstrate that Mendoza
 25 engaged in a credible threat of violence, or a knowing and willful course of conduct directed at
 26 Sabalone that seriously alarmed, annoyed, or harassed Sabalone and that served no legitimate
 27 purpose, his request for an order to stop harassment against Mendoza was denied by this Court.

28 2. Mendoza is, therefore, the prevailing party in this matter.

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3. Section 527.6(l) grants the Court the authority to award court costs and attorney's fees to the prevailing party in an action brought under that section.

IT IS HEREBY ORDERED:

1. David Mendoza is entitled to an award of his costs in the amount of \$209.75 and attorney's fees in the amount of \$14,307.

Dated: June 13, 2011

By: _____
DAVID W. HERRICK
Judge of the Superior Court