

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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No. 13-15411

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SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Plaintiff-Appellee,

v.

CESAR CABALLERO,

Defendant-Appellant.

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From the United States District Court,  
Eastern District of California  
Case No. 2:08-cv-03133-JAM-AC  
(Honorable John A. Mendez)

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**APPELLEE'S ANSWERING BRIEF**

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### **Preliminary Statement**

This case involves one man's ill-conceived and sustained campaign to steal the identity of the Shingle Springs Band of Miwok Indians (hereinafter "Tribe"), a federally recognized Indian tribe. 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014). Cesar Caballero, a man who identifies himself as a Miwok Indian but who is not a member of the Tribe, appeared wanting for himself the success and goodwill that was finally coming to the Tribe, after a long struggle leading to the opening of its Las Vegas-style casino, and to that end, claimed the Tribe's name and sovereign status as his own.

Mr. Caballero does not deny that he initiated a campaign of purporting to act as "Chief" of the "Shingle Springs Band of Miwok Indians," representing himself as such to the public and federal, state and local governments, and in the course of doing so, using various iterations of trademarks the Tribe had used for decades. The campaign spanned several media, in fact, and included Mr. Caballero's efforts to interfere with the University of California's repatriation of human remains to the Tribe and to fraudulently misdirect the Tribe's governmental mail to himself (a federal crime of which he was ultimately convicted).

Distilled, Mr. Caballero's grievance amounts to little more than a sad recount of the devastating consequences of the United States' policy towards Indians, particularly in California, where by reason of hostile invaders and historic

governmental policies calculated variously to eradicate, assimilate or dispossess native people, American Indians in California were long ago stripped of their lands, their traditional way of life, and their tribal identity. While Mr. Caballero and his forebears may well be a victim of this history, his troubles with the law, as manifested in this case, are of his own making, and his anger with a federally recognized tribe that has prospered in the face of this same adversity is grossly misdirected. As the District Court aptly observed, Mr. Caballero's "battle is with the United States, not with this tribe." (S.E.R. 292:20-22, 544:22-23.) In any event, Mr. Caballero's campaign to usurp the Tribe's identity is legally indefensible.

In the end, even Mr. Caballero has been reluctant to defend his conduct, failing to timely oppose the Tribe's successful summary judgment motion, and then failing to prosecute this appeal, giving this Court no choice but to dismiss it (later reinstating it based on vague assertions of computer trouble). Having finally filed his Opening Brief on appeal, Mr. Caballero advances nothing but conclusory and unsupported assertions evincing little more than disappointment over the District Court's inevitable decision. In the end, he identifies no basis for reversal, and the District Court's judgment should be affirmed in its entirety.

### **Jurisdictional Statement**

The District Court has jurisdiction over the Tribe's federal trademark claims under 15 U.S.C. §§ 1121 and 1125(a) and 28 U.S.C. § 1331. The District Court has supplemental jurisdiction over the Tribe's state law claims under 28 U.S.C. § 1367.

This Court has appellate jurisdiction to review the District Court's order granting summary judgment and entry of permanent injunction under 28 U.S.C. §§ 1291 and 1292.

The District Court's order granting partial summary judgment and entering a permanent injunction was entered on February 8, 2013 (E.R. 3), and Mr. Caballero timely filed his Notice of Appeal under Fed. R. App. P. 4(a)(1)(A) on February 28, 2013. (E.R. 1.)

### **Statement of Facts**

#### **I. The Tribe's Marks**

The United States has recognized the Tribe as the "Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California," and the Tribe has provided services under that name, for decades. 45 Fed. Reg. 27828, 27830 (April 24, 1980); 77 Fed. Reg. 47868, 47871 (August 10, 2012); 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014). During this time, the Tribe has consistently used, and come to be well-known by, the names "Shingle Springs Band of Miwok

Indians” and “Shingle Springs Rancheria” (collectively, referred to as the “Tribal Marks,” to distinguish them from the Tribe’s “Red Hawk Casino” mark, also at issue in this appeal) in various dealings with the United States, the State of California, local government entities, the Tribe’s citizens, and the public in connection with promoting its interests and those of its members. (S.E.R. 213:19-215:14, 218-280, 283-286.)

For instance, the Tribe frequently receives correspondence from various federal, state, and local governmental agencies, who all refer to the Tribe by its federally recognized name, the Shingle Springs Band of Miwok Indians, or the Shingle Springs Rancheria, or both. (S.E.R. 213:19-25, 222-244.) Indeed, a federally approved gaming compact between the Tribe and the State of California, as well as a variety of intergovernmental agreements to which the Tribe is a party, reference the Tribe’s federally recognized name. (S.E.R. 214:14-215:7.) Also, the Tribe has used, and continues to use, the Tribal Marks for official tribal purposes, including, but not limited to, use on its public website and in a published newsletter. (S.E.R. 181:7-14, 183-188, 213:26-214:4, 245-267, 249.)

Accordingly, the Tribe applied to register its Tribal Marks with the United States Patent and Trademark Office. (S.E.R. 213:10-18.) The application proceeding is stayed pending resolution of this case. (*Id.*)

The Tribe is the registered owner of the “Red Hawk Casino” mark, Reg. No. 3,886,697 (Dec. 7, 2010). (S.E.R. 294:26-295:2, 585-586.) The Red Hawk Casino, a casino owned and operated by the Tribe, opened in December 2008. (S.E.R. 167:8-13, 214:14-215:7.) Before and since the opening, the Tribe has used the “Red Hawk Casino” mark extensively in operating its gaming facility, and in advertising and marketing through various media, including the Internet, magazines, newspapers, billboards, television, and the radio. (S.E.R. 167:8-21, 168-179.) As a result of the Tribe’s use and marketing efforts, the “Red Hawk Casino” mark has become well-known, distinctive and famous, and the public associates the Tribe with the mark. (*Id.*) Indeed, Mr. Caballero admits the Tribe has superior rights to the “Red Hawk Casino” mark. (S.E.R. 290:7-9, 300:3-21, 422:20-22.)

## **II. Caballero’s Infringement of the Tribe’s Marks**

Decades after the Tribe’s first use of the Tribal Marks, and only after the Tribe made those marks famous, Mr. Caballero suddenly began using them for his own purposes, giving rise to this lawsuit. (S.E.R. 214:14-215:7, 281-282, 290:7-13, 292:15-19, 330:23-331:23, 422:20-22, 538-540.) On August 19, 2008, Mr. Caballero filed a fictitious business name statement and business license with the County of El Dorado, purporting to do business as the “Shingle Springs Band of Miwok Indians.” (S.E.R. 538-540.) Using these fraudulently obtained documents

to fool postal employees, Mr. Caballero filed fraudulent “Change of Address” forms with the United State Postal Service (“USPS”) to divert the Tribe’s mail to his own address. (S.E.R. 678:14-20; *see also* S.E.R. 290:7-9, 292:23-26, 374:6-375:5 (interposing self-incrimination objection), 552 (admitting filing of change of address forms).) Mr. Caballero also obtained, and displayed to third parties, an Employer Identification Number from the Internal Revenue Service bearing the Tribe’s name (S.E.R. 670:22-671:18, 674-676), and held himself out at a public rally and to a local newspaper reporter as a spokesperson for the Tribe. (S.E.R. 677:28-678:1.)

Even after the District Court issued a preliminary injunction enjoining Mr. Caballero from using the Tribal Marks (and confusingly similar marks), Mr. Caballero continued to usurp the Tribe’s identity, using the Internet and social media websites, including MySpace, Twitter, Facebook, and YouTube to infringe the Tribe’s marks. (S.E.R. 651:19-22, 653:17-654:1, 655-659, 661:12-662:4, 662:24-664:5; *see also* 290:7-9, 357:4-362:18.) Even worse, Mr. Caballero impersonated the Tribe in communications with the University of California’s Phoebe A. Hearst Museum of Anthropology in an attempt to derail the delivery of human remains of which the Tribe had long sought repatriation. (S.E.R. 648:8-649:5.) Mr. Caballero even opened bank accounts under the names “Shingle Springs Band of Miwok Indians” and “Shingle Springs Miwok Tribe,” and



continued to use them in violation of the preliminary injunction. (S.E.R. 290:7-9, 292:1-6, 378:20-379:5, 386:25-387:20, 396:16-397:7, 496-497, 518-520.)

### **Statement of the Case**

#### **I. The Tribe's And Mr. Caballero's Pleadings**

On December 23, 2008, the Tribe sued Mr. Caballero for federal trademark infringement and various state law claims based on Caballero's fraudulent use of "Shingle Springs Band of Miwok Indians." (Doc. 1.)<sup>1</sup> With his answer, Mr. Caballero filed counterclaims (styled a "Cross-Complaint"), which were essentially a mirror image of the Tribe's own trademark claims, and various state law claims. (S.E.R. 685-712.) On May 20, 2009, the District Court dismissed the counterclaims with prejudice. (S.E.R. 682-684.) Mr. Caballero prematurely appealed that order and the Ninth Circuit dismissed the appeal. (Docs. 40, 66.) On November 23, 2009, and August 20, 2010, with leave of the District Court, the Tribe amended its complaints based on newly discovered conduct, including Mr. Caballero's use of additional infringing marks and websites. (Docs. 69, 88.) The Tribe filed its third amended complaint on July 25, 2012. (E.R. 212.) Mr. Caballero filed a response 11 days after his time to plead expired. (E.R. Volume 5 at 1.)

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<sup>1</sup> Each citation to "Doc. \_\_" references the number of an entry on the District Court's docket. (S.E.R. 713-736.)

## II. Preliminary Injunction Against Mr. Caballero

On September 3, 2010, based on evidence that Mr. Caballero diverted the Tribe's mail and engaged in other harmful infringing conduct, the District Court granted the Tribe's application for a temporary restraining order and set a hearing on the Tribe's application for a preliminary injunction. (Doc. 91.) At the hearing, the Court found "there's no question in my mind based on the evidence before the Court, that the plaintiff is likely to prevail on this [trademark] claim, on all the elements necessary." (S.E.R. 292:20-22, 544:6-10.) Specifically, the District Court found that, within the meaning of the Lanham Act, the Tribe was likely to prevail in showing it has "a valid and protectable trademark," and that Mr. Caballero has used marks that are identical, or nearly identical, to the Tribe's. (S.E.R. 292:20-22, 543:23-544:5.) The District Court also found the Tribe would likely prevail in showing Mr. Caballero's use "presents a likelihood of confusion" under the Lanham Act. (*Id.*) Finding for the Tribe on each relevant factor (S.E.R. 292:20-22, 546:1-5), the District Court enjoined Mr. Caballero from using trademarks confusingly similar to the Tribe's trademarks and required him to immediately return all mail he diverted. (S.E.R. 667:14-668:6.) Mr. Caballero immediately appealed the preliminary injunction, and the Ninth Circuit affirmed. (Docs. 109, 122.)

### III. Contempt Proceedings Against Mr. Caballero

The Tribe then sought contempt sanctions based on evidence Mr. Caballero continued to infringe on the Tribe's marks in the wake of the District Court's injunction. (Doc. 126.) The District Court found Mr. Caballero in contempt, and ordered him to pay \$500 per day until he complied with the preliminary injunction. (Doc. 140.) When the monetary sanctions failed to secure Mr. Caballero's compliance, the Tribe asked the District Court to imprison him pending his compliance. (Doc. 146.) At the ensuing hearing, the District Court directed Mr. Caballero to purge his contempt no later than November 14, 2011, or surrender. (Docs. 162, 165.) He failed to comply and was imprisoned until the District Court temporarily released him from custody on January 4, 2012, emphasizing that Mr. Caballero "remain[ed] in contempt of the Court." (Docs. 173, 175.) When Mr. Caballero still failed to comply, the District Court issued a bench warrant, and Mr. Caballero was rearrested on March 5, 2012, and detained in custody until April 3, 2012, at which point Mr. Caballero submitted documents showing that he had complied with the District Court's contempt orders. (Docs. 189, 193, 196, 199.)<sup>2</sup>

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<sup>2</sup> In criminal proceedings, Mr. Caballero was convicted on April 30, 2012, of three counts of obstructing the Tribe's mail, and sentenced to 90 days imprisonment. *USA v. Caballero*, 2:11-mj-00035 (E.D. Cal); *USA v. Caballero*, 2:12-cr-00181 (E.D. Cal). His appeal of that sentence is currently pending before this Court. *USA v. Caballero*, 12-10524.

#### **IV. The Tribe's Unopposed Summary Judgment Motion**

The Tribe moved for partial summary judgment on December 10, 2012, concurrently requesting dismissal of its remaining claims, including all claims for damages and immediate entry of permanent injunction. (E.R. 16; S.E.R. 595-625.) Rather than timely filing an opposition or seeking an extension, Mr. Caballero took no action in response to the Tribe's motion for summary judgment, instead waiting until the Tribe's counsel notified him that his opposition was late. (S.E.R. 12:7-17, 14-16.) Three days after his opposition brief was due, Mr. Caballero requested, and the Tribe agreed, to extend the deadline for the filing of his opposition brief by one week, until January 14, 2013, based on Mr. Caballero's stipulation that the District Court would disregard his opposition papers if they were not filed by that extended date. (*Id.*) On the date of the stipulated extended deadline, Mr. Caballero filed no opposition, but instead moved to continue the deadline. (E.R. 15B:23-25.) The Tribe opposed Mr. Caballero's motion, based on Mr. Caballero's prior stipulation to file his opposition no later than the extended deadline of January 14, 2013, and because his motion was unsupported by evidence showing good cause for his failure to timely meet his filing deadline. (Doc. 248.) On January 22, 2013, the District Court denied Mr. Caballero's motion, holding that Mr. Caballero failed to show good cause as to why he needed a continuance. (Doc. 254.)

Subsequently, on February 4, 2013—two days before the hearing on Plaintiff’s motion for summary judgment—Mr. Caballero filed a second motion to continue (E.R. 15-15A), as well as a motion to dismiss. (Doc. 256.) The next day, the District Court denied Mr. Caballero’s motion to continue, and cancelled the February 6, 2013 hearing, holding that “[a]ll matters are submitted and will be decided without oral argument.” (E.R. 14.) Ignoring the District Court’s order, Mr. Caballero filed his opposition to the Plaintiff’s motion for summary judgment on February 6, 2013. (E.R. 13A; Doc. 258.)

On February 8, 2013, the District Court granted the Tribe’s motion for summary judgment and entry of permanent injunction (E.R. 3-13), and denied Mr. Caballero’s late-filed motion to dismiss as moot. (E.R. 2.)

### **Standard of Review**

This Court reviews a district court’s order granting a motion for summary judgment *de novo*. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). The district court should grant an unopposed summary judgment motion where the moving papers are sufficient on their face and do not reveal that a genuine issue of material fact exists. *Henry v. Gill Indust. Inc.*, 983 F.2d 943, 950 (9th Cir. 1993).

This Court reviews a district court’s interpretation and application of its local rules for abuse of discretion. *Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 582 (9th Cir. 2010) (“Only in rare cases will we question the exercise of

discretion in connection with the application of local rules.”). This Court reviews the trial court’s refusal to consider a late-filed paper for abuse of discretion, as well. *Cusano v. Klein*, 264 F.3d 936, 950-51 (9th Cir. 2001).

This Court also reviews the grant and scope of injunctive relief for abuse of discretion. *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 823 (9th Cir. 2002). A district court abuses its discretion in issuing a permanent injunction by basing its decision on either an erroneous legal standard or clearly erroneous factual findings. *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985).

The Court of Appeals may affirm the district court’s decision on any ground fairly supported in the record, even if the district court ruled on a different basis. *Lee v. United States*, 809 F.2d 1406, 1409 (9th Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988).

### **Summary of Argument**

Before the trial court, Mr. Caballero was unable to seriously dispute the mountain of evidence showing he wrongfully usurped the identity of a federally recognized Indian tribe, the name of its trust land, and the identity of its federally authorized gaming operation, failing to timely oppose the Tribe’s summary judgment motion. Indeed, Mr. Caballero does not now argue that any the evidence he belatedly submitted supported a different result. On appeal, Mr. Caballero has

again chosen essentially to ignore the evidence upon which the District Court properly granted summary judgment.

Mr. Caballero pretends the District Court was required to bend its procedural rules to consider papers he filed late, two days before the date of the summary judgment hearing and other papers filed on the hearing date, after the District Court already had taken the matter under submission. (E.R. 14.) Although the District Court certainly acted within its discretion in considering only timely filed pleadings, the issue is academic as Mr. Caballero has failed to identify in his Opening Brief any evidence in his late-filed papers that could have affected the District Court's analysis.

The remainder of Mr. Caballero's Opening Brief consists of vague assertions of supposed shortcomings in the Tribe's uncontradicted summary judgment evidence. In violation of the Federal Rules of Appellate Procedure, Mr. Caballero omits from his excerpts of record nearly all of the unopposed evidence the Tribe presented with its unopposed summary judgment motion. (*Compare* E.R. 41-94 (omitting nearly all exhibits to the declarations the Tribe submitted in support of summary judgment) *with* S.E.R. 97-594 (declarations accompanied by their exhibits).) *See* Fed. R. App. P. 10(b)(2); *Cnty. Commerce Bank v. O'Brien (In re*

*O'Brien*), 312 F.3d 1135, 1136-37 (9th Cir. 2002) (“the failure to present a sufficient record can itself serve as a basis for summary affirmance”).<sup>3</sup>

Mr. Caballero then disingenuously asserts over and over again, without citation to the evidence upon which the Tribe’s motion relied, that the Tribe failed to present the very evidence he deliberately omitted. (*See, e.g.*, Opening Brief, pp. 48 (asserting the Tribe “offers no evidence” of likelihood of confusion”), 49 (asserting the Tribe “fails to offer sufficient evidence” of infringement of “Red Hawk Casino”), 52 (asserting, without citation, that the Tribe “did not present sufficient evidence” on its unfair competition claim).) Instead of directly discussing the implications of particular portions of the Tribe’s summary judgment evidence, Mr. Caballero repeatedly cites to large chunks of the record containing dozens or even hundreds of pages of assorted documents, and even to materials not before the District Court on the Tribe’s summary judgment motion. (*See, e.g.*, Opening Brief, pp. 32-34, 36-37, 40, 42, 45, 49, 53.)

Putting aside that Mr. Caballero’s lackadaisical approach to appellate practice disregards the Federal Rules of Civil Procedure and the rules of this Court (Fed. R. App. P. 10(b)(2), 28(a)(8)(A); 9th Cir. R. 30-1.1(a)), Mr. Caballero fails to carry his burden to “specifically and distinctly” raise each of his claims of error

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<sup>3</sup> Although Mr. Caballero’s failure to provide adequate excerpts and enunciate specific claims of error is fatal to his appeal, the Tribe has included its summary judgment evidence in its supplemental excerpts, which confirms the District Court correctly granted summary judgment for the Tribe. (S.E.R. 97-594.)



and to support them with citations to the record and case authority. *Christian Legal Soc’y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485, 487-88 (9th Cir. 2010); *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010). To be sure, having failed to raise in his Opening Brief specific challenges to the Tribe’s summary judgment showing, Mr. Caballero may not raise for the first time in his Reply Brief specific arguments about the Tribe’s evidence that he previously asserted in conclusory terms. *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 878 n.4 (9th Cir. 2010); *United States v. Mateo-Mendez*, 215 F.3d 1039, 1043 (9th Cir. 2000).

Although this Court need not “comb[] the record” to debunk Mr. Caballero’s unsupported assertions (*Western Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 979 (9th Cir. 2012)), the Tribe’s uncontradicted summary judgment evidence ultimately establishes each of the elements of its claims and demonstrates the District Court properly entered judgment in its favor.

### **Argument**

#### **I. Mr. Caballero Has Waived All Issues Not “Specifically and Distinctly” Presented, With Legal And Record Citations, In His Opening Brief.**

Mr. Caballero has waived all issues he has failed to “specifically and distinctly” raise in his Opening Brief with supporting legal and record citations. *Christian Legal Soc’y*, 626 F.3d at 485, 487-88 (issues not “specifically and

distinctly” discussed in the opening brief, including in (1) a statement of the issues, (2) summary of the argument, *and* (3) the argument section itself are waived (citing Fed. R. App. P. 28)). Mr. Caballero fails to address several issues potentially or assertedly relevant to his appeal in any meaningful manner whatsoever, much less “specifically and distinctly,” as this Court requires. *Id.* at 485. As such, they are waived. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1176 (9th Cir. 1995); *Quan*, 623 F.3d at 878 n.4.

Mr. Caballero has also waived any argument he has failed to support with evidentiary or legal citations. *Graf*, 610 F.3d at 1166; *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007); Fed. R. App. P. 28(a)(8)(A).

Specifically, Mr. Caballero has waived any challenge to the following issues, which he has failed to develop, or has abandoned entirely:

- The District Court’s grant of summary judgment on the Tribe’s claims based on infringement of its “Shingle Springs Rancheria” mark, which is not challenged in Mr. Caballero’s Opening Brief (*see* Opening Brief, pp. 25-26, 30, 31-37, 57 (referring only to “the Shingle Springs Band of Miwok Indians mark,” “the Shingle Springs Miwok Indian” mark, “Shingle Springs Miwok name,” “the Shingle Springs mark,” “the Miwok mark,” or “the Mark”)); *see also id.* at 26-28 (mentioning “Shingle Springs Rancheria” in the argument section solely to argue that the Tribe used “tacking” to “give the impression that the Shingle Springs Miwok Indian mark is being used in the same manner” as other marks);

- The District Court’s dismissal of Mr. Caballero’s counterclaims (S.E.R. 684:1-7) and Mr. Caballero’s unsupported request that this Court somehow grant him declaratory relief (Opening Brief, p. 57);
- The District Court’s refusal to continue oral argument on the Tribe’s summary judgment motion (*id.*, p. 8);
- The District Court’s finding that Mr. Caballero’s opposition to the Tribe summary judgment motion was untimely (E.R. 2; Opening Brief, p. 8);
- The District Court’s finding that Mr. Caballero’s motion to dismiss, filed two days before the summary judgment hearing date, was mooted by its order granting summary judgment (E.R. 2; Opening Brief, p. 24);
- The District Court’s method of analyzing infringement in its order granting summary judgment, which Mr. Caballero criticizes without citation to any legal authority (Opening Brief, pp. 29-30);
- The Tribe’s unopposed showing that each of the relevant factors this Court considers to evaluate likelihood of confusion supported summary judgment for the Tribe (S.E.R. 612:12-618:18; Opening Brief, pp. 47-48);
- The Tribe’s unopposed showing that each of the statutory factors for evaluating bad faith intent to profit on an Anticybersquatting Consumer Protection Act (“ACPA”) claim supported summary

judgment for the Tribe (S.E.R. 620:24-624:9; Opening Brief, pp. 53-54); and

- The District Court’s evidentiary rulings, including its exclusion, earlier in the case, of the entirety of Mr. Caballero’s “Supplemental” Volume 4 of his Excerpts of Record. (S.E.R. 680:8-19.)

Because Mr. Caballero either completely abandons the above issues in his Opening Brief or fails to discuss, explain, or otherwise support them, he has waived them—and may not address them for the first time on reply. *Quan*, 623 F.3d at 878 n.4; *Graf*, 610 F.3d at 1166.

## **II. The District Court Did Not Abuse Its Discretion By Disregarding Mr. Caballero’s Late Opposition To The Tribe’s Summary Judgment Motion.**

Although Mr. Caballero strives to distort the applicable local rules, the District Court was well within its discretion to decline to consider Mr. Caballero’s undisputedly late-filed opposition. *Leong v. Potter*, 347 F.3d 1117, 1125 (9th Cir. 2003); *Cusano*, 264 F.3d at 950-51; *see* Fed R. Civ. P. 56(e)(2).

Mr. Caballero does not dispute that he belatedly filed his Response to Plaintiff’s Motion for Summary Judgment on February 6, 2013, the day of the scheduled summary judgment hearing and *after the Court ruled the matter submitted*. (See Opening Brief, p. 8; E.R. 2, 13A, 14.) Nor does he contend on appeal that he had good cause for filing his opposition after the extended deadline to which he had stipulated (and over eight weeks after the Tribe filed its motion).

(Opening Brief, pp. 23-25; E.R. 16 (reflecting filing date of December 10, 2012, for Tribe's summary judgment motion).) Mr. Caballero also fails to argue in his Opening Brief that the District Court erred in declining to continue the summary judgment hearing (which it ultimately deemed unnecessary based on the Tribe's showing). (Opening Brief, p. 24; E.R. 14.) Indeed, Mr. Caballero does not even assert the District Court erred in finding that his opposition was filed late.

*Christian Legal Soc'y*, 626 F.3d at 485, 487-88.

Rather, accepting the District Court's finding that his opposition was untimely, Mr. Caballero's only claim of error is that Local Rule 230(c) and (e) somehow preclude the Court from enforcing its briefing deadlines by refusing to consider noncompliant briefs. (Opening Brief, pp. 23-25.) Not so.

Local Rule 230(c)<sup>4</sup> requires a party to file its opposition to a motion "not less than fourteen (14) days proceeding the noticed (or continued) hearing date." L.R. 230(c) (appearing at E.R. 191). Local Rule 230(c) indicates one potential consequence of failing to timely file an opposition: "No party will be entitled to be heard in opposition to a motion at oral arguments if opposition to the motion has not been timely filed by that party." Nothing in Local Rule 230(c) provides that barring a party from oral argument is the sole consequence of failure to file a

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<sup>4</sup>All references to "Local Rules" or "L.R." are to the Local Rules of the Eastern District of California.

timely opposition. *See Xiong v. Veneman*, No. 1:02-cv-6526-SMS, 2005 U.S. Dist. LEXIS 35843 at \*\*6-9 (E.D. Cal. Dec. 22, 2005) (applying Eastern District of California rules to refuse to consider opposition paper filed on the eve of the summary judgment hearing (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936))). Nor does Local Rule 230(c) purport to strip the District Court of its inherent discretion to enforce its procedural rules by considering only timely filed papers. *Leong*, 347 F.3d at 1125.

Likewise, if Mr. Caballero wished to enable the District Court to decide his motion to dismiss in tandem with the Tribe's summary judgment motion, he was required to file the motion no later than the date for opposing the summary judgment motion. L.R. 230(e) (appearing at E.R. 191). Where such a timely counter-motion or related motion is filed, the District Court "*may* continue the hearing on the original and all related motions so as to give all parties reasonable opportunity to serve and file oppositions and replies to all pending motions." *Id.* Here, instead of filing his motion to dismiss as a related or counter-motion, i.e., fourteen days before the summary judgment hearing as required by Local Rules 230 (c) and (e), Mr. Caballero admits he waited until just two days before the hearing to file his motion. (Opening Brief, pp. 7-8.) Because Mr. Caballero undisputedly missed his deadline for filing a counter-motion or related motion under Local Rule 230(e), the District Court properly refused to delay its decision

on the Tribe's duly noticed summary judgment motion, which resulted in judgment for the Tribe and mooted Mr. Caballero's motion to dismiss. (E.R. 2.)

Apart from incorrectly asserting that Local Rule 230(c) deprived the District Court of its inherent discretion to disregard a late-filed papers, Mr. Caballero's Opening Brief provides no argument that the District Court abused its discretion to disregard Mr. Caballero's filings under the circumstances of this case. (Opening Brief, pp. 23-25.) Accordingly, any such argument has been waived and may not be raised for the first time in his Reply Brief. *Quan*, 623 F.3d at 878 n.4.

Mr. Caballero disingenuously expresses "alarm[]" that the District Court "took a mere 48 hours to review the [Tribe's] motion" (albeit admitting the action was within "the court's discretion"), ignoring the reality that the Tribe's papers had been on file for nearly two months. (Opening Brief, p. 24.) Mr. Caballero apparently fails to appreciate the significant efforts district judges and their clerks put into a matter before taking it under submission, and that "[i]t would require the expenditure of substantial amounts of the time of the Court and its staff as well as significant resources of the opposing party if the Court and the parties were required to review serially filed submissions on motions without regard to any schedule or deadlines." *Xiong*, 2005 U.S. Dist. LEXIS 35843 at \*11. The District Court acted within its inherent discretion to control its docket and enforce the Local Rules by deciding the Tribe's summary judgment motion based solely on the

timely filed papers before it. *Leong*, 347 F.3d at 1125; *Cusano*, 264 F.3d at 950-51.

In any event, even if this Court were to second guess the District Court's discretion to disregard Mr. Caballero's late-filed papers, nowhere in Mr. Caballero's Opening Brief does he argue, let alone set forth record citations demonstrating, that the contents of his late-filed papers create a genuine issue as to any material fact. (*See, e.g.*, Opening Brief, p. 25 (asserting without support that the District Court's decision to disregard his late-filed papers was "highly prejudicial").) Mr. Caballero has thus waived any argument that his late-filed opposition papers support reversal. *Navellier v. Sletten*, 262 F.3d 923, 948-49 (9th Cir. 2001) (failure to provide citations to supportive documents in the record on appeal results in waiver of argument).

### **III. The District Court's Order Properly Stated Its Reasons For Granting The Tribe's Unopposed Summary Judgment Motion.**

The District Court's Order on the Tribe's unopposed motion for summary judgment is perfectly consistent with its duties under the Federal Rules of Civil Procedure. (E.R. 4-13.)<sup>5</sup> Rule 56(a) simply advises that a district court deciding a summary judgment motion "should state on the record the reasons for granting or

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<sup>5</sup> Mr. Caballero includes in his excerpts of record a version of the Court's summary judgment order in which the District Court's signature is nearly invisible (E.R. 10) and which contains formatting errors absent from the original order, which the Tribe includes in its supplemental excerpts to illustrate these deviations. (S.E.R. 1-10; *compare* E.R. 12:9-20, 13:7-9, *with* S.E.R. 9:9-20, 10:7-9.)



denying the motion.” Fed. R. Civ. P. 56(a); 2010 Advisory Committee’s Notes on Fed. R. Civ. P. 56(a) (“The form and detail of the statement of reasons are left to the court’s discretion.”); *see* Fed. R. Civ. P. 52(a)(3). Here, the District Court’s detailed summary judgment order more than complied with this simple requirement. *See Insurance Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc.*, 201 F.3d 1111, 1116 (9th Cir. 2000) (affirming district court’s brief, five-line summary judgment order).

The Court reviewed the Tribe’s briefs and the accompanying evidence and found that the “Tribe has superior rights to use” the marks in issue (E.R. 5:4-19), and that there was no genuine dispute that the Tribe “owns the marks . . . is the senior holder of the Marks, and . . . Caballero’s use of the Marks and confusingly similar terms is likely to cause confusion in the marketplace.” (E.R. 5:22-25.) The Court also found that there was no genuine dispute that “Caballero has, with a bad faith intent to profit, registered, trafficked in, or used domain names that are identical or confusingly similar to the Tribe’s distinctive Marks.” (E.R. 6:11-15.)

Mr. Caballero incorrectly suggests the District Court abused its discretion by failing to make specific factual findings on each element of the Tribe’s claims before granting the summary judgment. (Opening Brief, pp. 29-31, 54-56.) To the contrary, it is well-established that “[t]he court is not required to state findings or

conclusions when ruling on a motion under Rule . . . 56.” Fed. R. Civ. P. 52(a)(3); *Lindsey v. Leavy*, 149 F.2d 899, 902 (9th Cir. 1945).

The cases Mr. Caballero cites are in no way to the contrary, and indeed, none even speak to the requirements for a grant of summary judgment under Rule 56. (Opening Brief, p. 55-56.) Rather each involves Rule 52, which carves out summary judgment motions from other decisions, specifically providing that “findings or conclusions” are not required on Rule 56 rulings. Fed. R. Civ. P. 52(a)(3). Because the District Court’s order stated its reasons for granting the Tribe’s summary judgment motion, it complied with Rule 56.

Mr. Caballero also asserts the District Court’s order did not sufficiently explain the basis for enjoining Mr. Caballero from violating the Tribe’s trademarks. (Opening Brief, p. 56.) Not so.

Federal Rule of Civil Procedure 65(d) requires that each injunction order: “(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” The District Court’s Order complied.

On top of detailing the reasons the Tribe was entitled to judgment on its trademark claims as a matter of law (E.R. 5:20-6:9), the District Court stated the specific reasons supporting its injunction:

[P]revailing on these claims entitles the Tribe to permanent injunctive relief because (1) Caballero's conduct has caused Tribe irreparable injury; (2) remedies available at law, such monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the Tribe and Caballero, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

(E.R. 6:17-23.) To be sure, "in 'ordinary trademark infringement actions . . .

complete injunctions against the infringing party are the order of the day.'" *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1209 (11th Cir. 2008).

The District Court's Order, in compliance with Rule 65(d), specifically and meticulously laid out, in six pages of detail, the acts restrained or required by the injunction. (E.R. 7:14-12:20.) The careful explanation of the District Court's decision easily surpasses the level of detail required in the single case Mr.

Caballero cited. *Digital Equip. Corp. v. Emulex Corp.*, 805 F.2d 380, 383 (Fed. Cir. 1985) (holding permanent injunction order inadequate where it contained "no findings of fact" and "no statement of reasons").

Moreover, Mr. Caballero misreads the order as providing that "the *mark Champion Indian* infringes on the mark Shingle Spring [sic] Band of Miwok Indians." (Opening Brief, p. 56 (emphasis added).) In fact, the Order simply requires that Mr. Caballero remove the marks at issue from all of Mr. Caballero's online platforms, including those operated under his "Champion Indian" moniker. (E.R. 8:18-9:2, 11:22-26.)

Mr. Caballero also misquotes the order to suggest that it enjoins him from using marks that “consist of or include” the words “Miwok” and “Indian.” (Opening Brief, p. 56.) In fact, the District Court limited the scope of its injunction to a carefully defined set of terms the Tribe’s uncontradicted evidence showed were likely to cause confusion in the marketplace. (E.R. 5:4-6:9 (defining “the ‘Marks’” as to which the injunction provisions apply, and not precluding Mr. Caballero from identifying himself as “Miwok” or “Indian,” or both).)

Importantly, Mr. Caballero does not discuss the Tribe’s uncontradicted evidence supporting each of the elements for a permanent injunction, let alone claim that the record before the District Court did not support such relief. (Opening Brief, p. 55-56.) Accordingly, any such argument is waived, and Mr. Caballero may not raise it for the first time in his Reply Brief. *Quan*, 623 F.3d at 878 n.4.

#### **IV. The District Court Properly Granted The Tribe’s Unopposed Motion For Summary Judgment On Its Trademark Claims On The Tribal Marks.**

Based on the Tribe’s uncontradicted summary judgment evidence, the District Court properly concluded no genuine dispute existed as to any of the elements of the Tribe’s claims for trademark infringement of the Tribal Marks. (E.R. 5:20-6:9.) Mr. Caballero’s decisions to ignore this evidence in his Opening Brief, to omit nearly all of it from his excerpts of record, and to simply make

conclusory assertions without identifying any specific support in record before the District Court are fatal to his appeal. Fed. R. App. P. 10(b)(2); *Cnty. Commerce Bank*, 312 F.3d at 1136-37; *Christian Legal Soc’y*, 626 F.3d at 487-88.

**A. The Tribe Presented Uncontradicted Evidence Of The Tribe’s First Use Of The Tribal Marks In Commerce.**

On the record before it, the District Court properly found no genuine dispute existed that the Tribe used the Tribal Marks in commerce prior to Mr. Caballero’s recent attempts to capitalize on the Tribe’s identity. (E.R. 5:4-23.) Mr. Caballero’s citations to various documents not properly before the District Court when it decided the Tribe’s unopposed summary judgment motion do not show the District Court erred in finding no genuine issue on the record before it. *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001).

**1. The Tribe’s Unopposed Summary Judgment Evidence Demonstrated Its First Use Of The Tribal Marks.**

“A fundamental principle of trademark law is first in time equals first in right.” *Grupo Gigante SA de CV v. Dallo & Co., Inc.*, 391 F.3d 1088, 1093 (9th Cir. 2004). This means that whoever first uses a mark has a right superior to any subsequent user. *Id.*

The record before the District Court demonstrated that, continuously since 1980, the Tribe has conducted a government-to-government relationship with the United States as both the “Shingle Springs Band of Miwok Indians” and “Shingle

Springs Rancheria,” and specifically under the federally recognized name “Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria.” 45 Fed. Reg. 27828, 27830 (April 24, 1980); 77 Fed. Reg. 47868, 47871 (Aug. 10, 2012) (*See also* S.E.R. 18-96 (showing recognition of the Tribe from 1980 to present).) Indeed, Mr. Caballero admitted the Tribe had used its federally recognized name for “decades.” (S.E.R. 694:8-24; *see* 292:23-26, 707:7-18; *see also* S.E.R. 550 (admitting that “[s]ometime in the late 1970’s . . . , [the Tribe] adopted the name ‘Shingle Springs Band of Miwoks’”).) The Tribe presented evidence it has also used both “Shingle Springs Band of Miwok Indians” and “Shingle Springs Rancheria” extensively in connection with promoting its governmental interests and the interests of its members for decades. (S.E.R. 181:7-182:2, 183-211, 213:19-25, 214:14-215:7, 218-267, 270-280.)

The evidence before the District Court on the Tribe’s summary judgment motion showed that Mr. Caballero waited until the Tribe had made its tribal name famous to misappropriate the Tribal Marks for his own purposes. It was not until August 19, 2008, after the Tribe had defeated the last of the public lawsuits challenging its gaming facility and when it was in the midst of construction, that Mr. Caballero filed a fictitious business name statement and business license with the County of El Dorado, purporting to do business as the “Shingle Springs Band of Miwok Indians,” the exact same name as the Tribe. (S.E.R. 213:6-8, 214:14-

215:7, 281-282, 290:7-13, 330:23-331:22, 423:5-8, 538-540.) Around this time, Mr. Caballero had also begun to impersonate the Tribe's Shingle Springs Rancheria mark, as well. (S.E.R. 291:12-14, 466-471 (reflecting registration of domains containing various iterations of "Shingle Springs Reservation" from November 2007 to July 2010).)

Mr. Caballero does not contend on appeal that the Tribe's use of the "Shingle Springs Rancheria" mark predates his. (See Opening Brief 31-37 (referring only to "the Shingle Springs Miwok Indian Mark" or "the Mark").) He does argue that the Tribe somehow attempted to "tack" use of the "Shingle Springs Miwok Indian [sic]" mark to the use of its other marks. (Opening Brief, pp. 27-28, 32-33.) This contention is strange given the specific evidence of the Tribe's extensive use of its "Shingle Springs Band of Miwok Indians" mark before Mr. Caballero's use. (S.E.R. 181:7-182:2, 183-211, 213:19-25, 214:14-215:7, 218-267, 270-280.)

Mr. Caballero also advances a far-fetched contention that the Tribe listed on the Federal Register in 1980 was in fact his own tribe. (Opening Brief, pp. 31-34.) The only evidence before the District Court on this point at summary judgment was the Tribe's Chairman's testimony that the Plaintiff Tribe has been federally registered and listed as the "Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria" since 1980. (S.E.R. 213:2-4.) Mr. Caballero does not support

his assertion that his own “tribe” was using the “Shingle Springs Miwok Indian” mark prior to 1979 with a citation to any evidence before the Court on the Tribe’s unopposed summary judgment motion. (Opening Brief, p. 32.)

In any event, the record material that Mr. Caballero does cite—an unexplained hodgepodge of hundreds of pages of documents relating to the Tribe’s successful motion to dismiss Mr. Caballero’s counterclaims and unauthenticated documents attached to one of Mr. Caballero’s answers—would not have created a genuine issue for trial, even if he had presented it in opposition to the Tribe’s summary judgment motion. (Opening Brief, p. 32 (citing E.R. 16-80; E.R. 150-178 (evidence opposing the Tribe’s motion to dismiss, much of which is illegible, suggesting at most that Mr. Caballero is a Miwok Indian, that Miwok Indians have lived in the Shingle Springs area for some time, and noting, at E.R. 153:13-17, that Mr. Caballero personally used “Shingle Springs Band of Miwoks” in 2008); E.R. 182-185; E.R. Volume 4 (citing to the entire 212 pages of Mr. Caballero’s request for judicial notice opposing the Tribe’s motion to dismiss which the District Court excluded in its entirety at the motion to dismiss stage on hearsay and other grounds (S.E.R. 680:8-19)); E.R. Volume 5 at 3-25 (portions of Mr. Caballero’s unverified answer and various unauthenticated documents attached thereto, none of which show Mr. Caballero’s use of the Tribal Marks prior to the Tribe)).) Even if the Court were inclined to comb this evidence in an effort to find support for Mr.



Caballero's theory—a theory never advanced in opposition to the Tribe's summary judgment motion—it would find none. *See Western Radio Servs. Co.*, 678 F.3d at 979; *see Carmen*, 237 F.3d at 1031.

To be sure, even putting aside the Tribe's federal recognition under the Tribal Marks since 1980, the summary judgment record contained no evidence that Mr. Caballero's use predated the Tribe's undisputed use of its Tribal Marks on the Tribe's newsletters since at least as early as 2001 and on its website since at least as early as 2003. (S.E.R. 181:7-14, 183-188, 213:26-214:4, 245-267.)

In his Opening Brief, Mr. Caballero purports to create a factual issue as to first use by citing something he identifies as "Def. Dep. 05/13/12," without reference to a record page, or any other page citation, presumably seeking to rely on a portion of his deposition testimony never filed in the District Court. (Opening Brief, p. 34.) Of course, the District Court did not err in not considering evidence never filed, let alone cited, in the trial court. *Carmen*, 237 F.3d at 1031.

Mr. Caballero makes an assertion, as irrelevant as it is incorrect, that the Tribe's "inability to show that [the Tribe] has any members with Miwok Indian lineage" somehow "undermines [the Tribe's] claim of ownership of the mark." (Opening Brief, p. 34.) The Tribe presented uncontradicted evidence that the Tribe includes Miwok Indians, as well as other individuals of Native American ancestry. (E.R. 213:10.) However, the Tribe's trademark rights derive from the priority of

its use of its marks in commerce, not from the degree to which its marks literally describe the ethnicity of persons within the Tribe. *Grupo Gigante SA de CV*, 391 F.3d at 1093; *Schmidt v. Honeysweet Hams, Inc.*, 656 F. Supp. 92, 95 & n.4 (N.D. Ga. 1986) (concluding “Honey Baked Ham” was a protected trademark based on its use of the mark for decades even though the “hams are not baked in honey”). By the same token, and contrary to Mr. Caballero’s legally unsupported assertion (Opening Brief, p. 34), the Tribe has no burden to “articulate a legitimate reason” for adopting any particular trademark. *See* 25 U.S.C. § 1125(a) (broadly prohibiting use of a trademark likely to cause confusion with the services of another).

## **2. The Tribe’s Use Of The Tribal Marks Qualifies As Use In Commerce Under This Court’s Precedent.**

Mr. Caballero argues on appeal that the Tribe did not demonstrate first use of the Tribal Marks in commerce. Mr. Caballero focuses on the “government to government” use of the Tribal Marks, suggesting without citation to legal authority that the Tribe’s extensive use of the Tribal Marks in its dealings with federal, state, and local governments is “not a commercial use that builds consumer association and identification between the name of a particular product in the minds of the consumer public.” (Opening Brief, pp. 35-36.) This is wrong.

The Lanham Act’s “commercial use” requirement simply “does not require any actual *sale* of goods and services.” *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d

672, 679 (9th Cir. 2005) (emphasis in original).<sup>6</sup> Rather, the Lanham Act protects the marks of entities involved in a variety of political, expressive, and association activities. *Committee for Idaho's High Desert v. Yost*, 92 F.3d 814, 818-19, 823, 825-26 (9th Cir. 1996); *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912 (9th Cir. 1980), *cert. denied*, 452 U.S. 941 (1981). Lower courts and courts from other Circuits agree. *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 89-90, 92 (2d Cir. 1997) (“[t]he Lanham Act has thus been applied to defendants furnishing a wide variety of non-commercial public and civic benefits”); *TE-TA-MA Truth Foundation-Family of URI, Inc. v. World Church of the Creator*, 297 F.3d 662, 667 (7th Cir. 2002); *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 354 F. Supp. 61, 71 (N.D. Cal. 1972); *see SMJ Group, Inc. v. 417 Lafayette Restaurant LLC*, 439 F. Supp. 2d 281, 287 (S.D.N.Y. 2006) (A nonprofit organization advocating for restaurant workers “seek[s] to educate the public, an admirable service, but an individual being

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<sup>6</sup>Mr. Caballero’s reliance on *Brookfield Commc’ns v. West Coast Entm’t*, 174 F. 3d 1036, 1051-52 (9th Cir. 1999) changes nothing. (Opening Brief at 35.) That case simply noted that “actual sale of goods and services” was one typical method of establishing use in commerce, not that it was the exclusive method. *Brookfield Commc’ns*, 174 F. 3d at 1051. Notably, Mr. Caballero used ellipses to excise the italicized language from the following passage of that case to distort the law of this Circuit: “The Lanham Act grants trademark protection only to marks that are used *to identify and to distinguish goods or services in commerce —which typically occurs when a mark is used* in conjunction with the actual sale of goods or services.” *Id.*

educated should not be misled about the source of that education, just as an individual purchasing a can of peas should not be misled about the source of those peas.”).

This Court’s decision in *Yost* is instructive as to the broad protection the Lanham Act provides trademarks of nonprofit organizations engaged in political and government advocacy, which constitutes “use in commerce.” 92 F.3d at 818-19, 825-26. The plaintiff in that case was a “non-profit environmental education and advocacy organization.” *Id.* at 817. Under the mark “Committee for Idaho’s High Desert” (“CIHD”), plaintiff offered services that included “dissemination of information on environmental issues through a variety of channels, advocacy of a conservationist agenda on its members’ behalf, and education of the public about the desert.” *Id.* at 821-22. Twelve years after plaintiff began using that mark, three individuals with “virtually antithetical” viewpoints to plaintiff’s, formed a corporation under the exact same name. *Id.* at 817, 821. The president of the newly formed corporation then testified at a public hearing held by the United States Air Force in support of a land use proposal plaintiff opposed. *Id.* at 818.

The district court found a trademark violation, concluding that defendants “adopted and used [the CIHD name] in order to cause confusion, obstruct [CIHD’s] pursuit of its environmental agenda, and thereby to obtain an advantage in the [underlying] litigation by preventing [CIHD’s] intervention.” *Id.* This Court

affirmed and held that defendants' formation of an organization under plaintiff's trademark and their testimony before the U.S. Air Force constituted "us[e] in commerce, in connection with services" supporting liability under the Lanham Act. *Id.* at 823.

The Tribe's undisputedly extensive use of its Tribal Marks in advocacy for its members and in its relationships, dealings, and contracts with third parties, including federal, state, and local governments, therefore constitute use in commerce predating Mr. Caballero's resent usurpation.<sup>7</sup>

Of course, even if, contrary to this Court's precedent, government-to-government usage of a mark did not qualify as use in commerce, the Tribe presented undisputed evidence that it used its marks in connection with providing educational services to the general public. (S.E.R. 181:7-182:2, 183-211.)

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<sup>7</sup>Indeed, the Tribe's government-to-government relationship with the United States falls squarely within the heart of the powers Congress exercised in enacting the Lanham Act, in which Congress declared its intent to regulate "all commerce which may lawfully be regulated by Congress." 15 U.S.C. § 1127. The Commerce Clause specifically grants Congress the sole power to regulate "Commerce . . . with the Indian tribes." U.S. Const., Art. I, § 8, cl. 3. Because the Lanham Act invokes the panoply of Congress' commerce power, including this so-called Indian Commerce Clause power, an Indian tribe's government-to-government relationship with the United States demonstrates that the name by which the United States recognizes any given tribe has thereby been "use[d] in commerce." 15 U.S.C. § 1125(a).

**3. Mr. Caballero's Belated And Inaccurate Citation To 56 Pages Of The Record Not Before The District Court On Summary Judgment Creates No Genuine Issue As To Whether The Tribe's Use Predates Mr. Caballero's.**

For the first time on appeal, Mr. Caballero asserts that his “tribe” used “the Shingle Springs Miwok Indian name” in connection with a “1968 Caltran [sic] overpass project.” (Opening Brief, pp. 36-37.) In support, Mr. Caballero cites 56 pages strewn across various part of the trial court record, none of which were referenced by either party at the summary judgment stage. (*Id.* (citing E.R. 150-178, 182-85, V5 3-25.) It appears that Mr. Caballero is referring to a single line in a declaration, not before the District Court on summary judgment, attesting that “I also found that Cal-Trans negotiated the construction of an overpass in the mid-1960's with the local Miwok Indians. Cal-trans apparently reneged on the deal.” (E.R. 152:22-23.)

To be sure, none of the cited material demonstrates use of the mark “Shingle Springs Band of Miwok Indians,” or any similar mark, by anyone prior to the Tribe's use. Even if evidence of use by a third party existed, “a third party's prior use of a trademark is not a defense in an infringement action.” *See Yost*, 92 F.3d at 820. In any event, because none of the material Mr. Caballero now cites was properly before the District Court when it decided the Tribe's unopposed summary judgment motion, the District Court did not err in entering summary judgment

based on the undisputed evidence of the Tribe's use prior to Mr. Caballero's.

*Carmen*, 237 F.3d at 1031.

**B. The Tribe Presented Uncontradicted Evidence The Tribal Marks Are Distinctive Because They Have Acquired Secondary Meaning.**

Evidence submitted in support of the Tribe's summary judgment motion showed its Tribal Marks are distinctive, as they have acquired secondary meaning in the mind of the public, as well as officials of federal, state and local governments with whom the Tribe has relationships, as an identifier for the Tribe and its services. "Secondary meaning is used generally to indicate that a mark . . . 'has come through use to be uniquely associated with a specific source.'" *Two Pesos v. Taco Cabana*, 505 U.S. 763, 766 n.4 (1992). "Factors considered in determining whether a secondary meaning has been achieved include: (1) whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer, (2) the degree and manner of advertising under the claimed trademark, (3) the length and manner of use of the claimed trademark, and (4) whether use of the claimed trademark has been exclusive." *Yost*, 92 F.3d at 822. Where the trademark is connected to political advocacy, the focus is nevertheless on the "relevant 'consumer' group": those to whom the message is directed. *Id.*

The Tribal Marks have acquired secondary meaning among the relevant consumer groups. Specifically, the Tribe's government has functioned under its

name, and used that name in its dealings with the United States, for over thirty years. (*See* 45 Fed. Reg. 27828, 27830 (April 24, 1980); 77 Fed. Reg. 47868, 47871 (Aug. 10, 2012)). The Tribe has used and advertised its Tribal Marks extensively in connection with governmental services it provides on behalf of its members and educational services it provides to the public. (S.E.R. 181:7-182:2, 183-211, 213:19-214:4, 218-267, 283-286.) The federal, state, and local governments, as well as the general consuming public, associate the Tribe's government services with its Tribal Marks. (S.E.R. 214:14-215:7, 218-280, 283-286, 292:27-293:19, 555-567.) In fact, as Caballero's own counterclaims admitted, through "systematic" use and advertising, "the Bureau of Indians [sic] Affairs, The County of El Dorado, The State of California, Local Agency Formation Commission, El Dorado Irrigation, investors or bond holders and the public" have come to associate the Tribe's governmental operations with the Tribe's federally recognized name. (S.E.R. 694:8-24, 707:7-18.)

As the record before the District Court showed, the Tribe's use was exclusive for decades until Caballero just recently began to use the marks. (S.E.R. 215:8-14, 18-96, 290:10-13, 293:8-11, 423:5-8, 561-563.) Moreover, Caballero himself attempted to register "Shingle Springs Band of Miwok Indians," asserting under penalty of perjury that the mark "has become distinctive" as a mark for "[a]ssociation services, namely, organizing chapters of a fraternity and promoting



the interests of the members thereof” and providing “[i]nformation in the field of government affairs.” (S.E.R. 290:20-23, 437-439.) Thus, the evidence before the District Court on summary judgment established the Tribal Marks had acquired distinctiveness.

Additionally, “[p]roof of exact copying, without any opposing proof, can be sufficient to establish a secondary meaning.” *Yost*, 92 F.3d at 823; (“There is no logical reason for the precise copying save an attempt to realize upon a secondary meaning that is in existence.”). Here, Caballero intentionally adopted marks identical to the Tribe’s. (*See, e.g.*, S.E.R. 101:16-23, 103-106, 215:8-14, 283-286, 290:7-16, 301:5-302:14, 303:7-29, 423:5-8, 429-430, 551.)

Indeed, as the District Court recognized, Mr. Caballero’s campaign of infringement coincided with an explosion of the fame of the Tribe’s marks due to publicity surrounding the Tribe’s well-publicized gaming venture. (S.E.R. 214:14-215:7, 268-269, 290:10-13, 292:20-22, 293:5-11, 423:5-8, 544:14-19, 558-563.) Mr. Caballero sought to usurp the value of the Tribe’s marks out of an expressed belief that the Tribe should not have been recognized by the United States and thus have no right to operate a casino. (S.E.R. 701:5-23, 704:24-705:4.) That Mr. Caballero admittedly adopted the Tribe’s exact marks is sufficient by itself, apart from the direct evidence of acquired distinctiveness, to establish secondary meaning. *Yost*, 92 F.3d at 823.

Mr. Caballero nowhere disputes that the Tribe's summary judgment evidence established that its "Shingle Springs Rancheria" mark has acquired secondary meaning. (*See* Opening Brief, pp. 40-46 (referencing "the Shingle Springs Miwok mark," "the Shingle Springs Indian" mark, or "the Mark").)

Mr. Caballero does suggest that the Tribe's evidence of secondary meaning is "of little value" because the declarants "have a stake in the matter" and their testimony is "self-serving" and "from a partial source." (Opening Brief, pp. 42-43.) This Court has held that arguments that the moving party's summary judgment declarations "should be disregarded as self-serving" are "mere allegations or denials" which do not meet the opposing party's burden of showing a genuine issue of material fact. *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir. 1994). In any event, the declarations each serve primarily to authenticate documentary evidence, which corroborates the deponents' testimony. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (holding court may refuse to consider on summary judgment testimony that is both "*uncorroborated and* self-serving" (citations omitted; emphasis added)).

Mr. Caballero argues that the Tribe's evidence regarding use of its "Red Hawk Casino" somehow shows that, one of its other marks, "Shingle Springs Band of Miwok Indians," has not acquired secondary meaning, ignoring all the above-cited evidence the Tribe actually submitted on that issue. (Opening Brief, pp. 44-

46.) Mr. Caballero makes much of the fact that the Tribe generally does not include its tribal name in advertising for its Casino. (*Id.* at 44-45.) This argument misses the point. The Tribe has presented evidence that the “Shingle Springs Band of Miwok Indians Mark” mark has obtained secondary meaning in connection with operating a Tribal government and educating the public about the Tribe’s culture, government, and history. (*See, e.g.*, S.E.R. 181:7-182:2, 183-211.) It is this evidence, not evidence of use in connection with any casino, that supports enjoining Mr. Caballero’s competing use, purporting to operate a tribal government and act as a “Tribal Historian” under the Tribe’s mark and confusingly similar marks. (S.E.R. 101:16-23, 102:10-17, 105-106, 111, 119, 121, 137, 290:7-9, 313:20-315:16, 371:16-372:3, 404:13-18, 413, 424:15-17, 456-458.) Thus, the Tribe’s choice to offer gaming services under the name “Red Hawk Casino” in no way creates any genuine issue as to whether “Shingle Springs Band of Miwok Indians” has acquired secondary meaning in connection with other services.

**C. The Tribe Presented Uncontradicted Evidence That Mr. Caballero’s Infringement Of The Tribal Marks Was Likely To Confuse.**

The District Court correctly concluded that Mr. Caballero’s “use of the Marks and confusingly similar terms is likely to cause confusion in the marketplace.” (E.R. 5:24-25.) This conclusion was based on the Tribe’s extensive likelihood of confusion evidence, which the Tribe explained with detailed citations

to evidence over the course of six pages of its summary judgment brief. (*See* S.E.R. 612:12-618:18 (citing extensive evidence supporting each of the relevant factors this Court announced in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).)

On appeal, Mr. Caballero first simply pretends the Tribe did not submit this evidence supporting each of the likelihood of confusion factors, and then asserts the Tribe failed to present “consumer perception evidence” (which is not a factor this Court considers) because the Tribe did not proffer consumer survey evidence (a category of evidence this Court has never required). (Opening Brief, p. 48.) None of Mr. Caballero’s unsupported assertions supports reversal.

**1. Mr. Caballero Fails To Challenge The Uncontradicted Evidence That Mr. Caballero’s Infringement Of The Tribal Marks Was Likely To Confuse.**

Without any reference to the Tribe’s mountain of likelihood of confusion evidence, Mr. Caballero myopically asserts on appeal that that the Tribe “offers no evidence” to support this claim. (Opening Brief, p. 48.) However, in violation of the rules of this Court, Mr. Caballero omits virtually all of the Tribe’s evidence from his Excerpts of Record. (*Compare* E.R. 41-94 *with* S.E.R. 97-594.) *See* Fed. R. App. P. 10(b)(2); 9th Cir. R. 30-1.1(a). By taking this tack, Mr. Caballero cannot come close to meeting his burden as appellant, which is to present all relevant portions of the record and “specifically and distinctly” identify any claims

of error in his Opening Brief. In the end, Mr. Caballero's Opening Brief and incomplete excerpts require summary affirmance of the District Court's likelihood of confusion finding. *Christian Legal Soc'y*, 626 F.3d at 485, 487-88; *Cnty. Commerce Bank*, 312 F.3d at 1136-37.

Mr. Caballero completely ignores, for instance, the Tribe's evidence that Mr. Caballero intentionally copied the Tribe's marks based on his expressed belief the Tribe should not have been recognized by the United States and permitted to operate a casino, and that *he* should have been recognized instead. (S.E.R. 101:16-23, 105-106, 111, 119, 121, 137, 290:7-16, 291:3-5, 301:5-302:14, 404:13-18, 413, 424:15-17, 429-430, 551; *see* 701:5-23, 704:24-705:9.) This copying alone establishes a presumption of likelihood of confusion, a presumption Mr. Caballero did absolutely nothing to rebut. *Sleekcraft*, 599 F.2d at 354 ("When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived.").

Mr. Caballero also fails to address in any way the extensive evidence before the District Court showing Mr. Caballero's use of the Tribe's marks has already caused confusion among members of the relevant consumer group. (S.E.R. 98:10-22, 98:24-26, 101:12-23, 102:3-17, 103-106, 136-137, 158:5-28, 164, 215:8-27, 287-288, 290:7-9, 290:10-13, 292:15-19, 292:23-26, 294:1-5, 322:3-326:15,

327:15-328:6, 423:5-8, 423:19-21, 424:7-11, 538-540, 552, 573-575, 670:22-671:18, 674-676.) *See Yost*, 92 F.3d at 822 (concluding that the “relevant ‘consumer’ group” for political advocacy and membership services includes “members and potential members, public officials and agencies involved in making policy decisions . . . , and other members of the interested public”). Mr. Caballero’s success in defrauding government officials and the public into believing that he is affiliated with, or acts on behalf of, the Tribe is “persuasive proof that future confusion is likely.” *Sleekcraft*, 599 F.2d at 352.

In any event, this Court may affirm without delving into these or any of the other likelihood of confusion factors because Mr. Caballero’s Opening Brief failed to “specifically and distinctly” challenge the Tribe’s uncontradicted showing that each of the relevant factors demonstrates a likelihood of confusion here. *Christian Legal Soc’y*, 626 F.3d at 485, 487-88.

## **2. The Tribe’s Uncontradicted Evidence, Including Evidence Of Actual Confusion, Established A Likelihood Of Confusion Without The Need For Survey Evidence.**

Mr. Caballero incorrectly asserts that the Tribe was required to present “a survey or similar method” to demonstrate a likelihood of confusion. (Opening Brief, p. 48.) In making this argument, Mr. Caballero simply ignores the Tribe’s uncontradicted evidence that the relevant “consumers” of its tribal government and educational services were not only likely to be confused, but were actually

confused, by Mr. Caballero's use of the same or confusingly similar marks in connection with competing services. *See* section IV.C.1 *supra*; *Yost*, 92 F.3d at 822.

Ignoring this extensive evidence of consumer perceptions of the Tribe's and Mr. Caballero's use of the Tribal Marks, Mr. Caballero simply asserts the Tribe "doesn't support its summary judgment with consumer perception evidence." (Opening Brief, p. 48.)<sup>8</sup> Mr. Caballero incorrectly suggests that "it's impossible" to prove likelihood of confusing without "a survey or similar method." (*Id.*)

To the contrary, this Court has recognized that survey evidence is just one of "at least three types of proof of likelihood of confusion." *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1404 n.14 (9th Cir. 1997); *see Sleekcraft*, 599 F.2d at 345, 352 (noting absence of survey evidence, but reversing district court's finding that confusion was unlikely). Alternatives to survey evidence include "evidence of actual confusion; and . . . an argument based on an inference arising from a judicial comparison of the conflicting marks themselves

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<sup>8</sup>In support this proposition, Mr. Caballero cites only evidence that the Tribe generally advertises its gaming operation under its "Red Hawk Casino" mark, rather than its "Shingle Springs Band of Miwok Indians" mark. (Opening Brief at 48 (citing E.R. 61-80).) Of course the Tribe relied not on *that* evidence to support this aspect of its claim, but on evidence of its use and advertising of "Shingle Springs Band of Miwok Indians" mark to establish infringement of that mark is likely to confuse. (*See, e.g.*, S.E.R. 181:7-182:2, 183-188, 190, 205-211, 213:19-25, 214:14-215:7, 218-267, 270-280.)

and the context of their use in the marketplace.” *Dr. Seuss Enters., L.P.*, 109 F.3d at 1404 n.14.

Other circuits agree that survey evidence is unnecessary. *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 476 (3d Cir. 1990) (holding consumer surveys “are not essential where, as here, other evidence exists”); *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation, Inc.*, 926 F.2d 134, 140 (2d Cir. 1991). The single case Mr. Caballero cites is not to the contrary, and indeed, does not even involve a likelihood of confusion analysis. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 718 F. 2d 327, 330 (9th Cir. 1983).

In sum, Mr. Caballero’s Opening Brief failed to identify any genuine dispute as to whether the Tribe’s uncontradicted summary judgment evidence established that each of the relevant factors demonstrates a likelihood of confusion.

Accordingly, the District Court’s judgment is properly affirmed.

**D. The Tribe Did Not Have The Burden To Negate A Potential Affirmative Defense By Proving Its Tribal Marks Were Not Generic—But They Are Not Generic In Any Event.**

The District Court did not err in granting the Tribe’s unopposed summary judgment motion without *sua sponte* raising the affirmative defense of genericness.

“[T]he district court may determine whether there is a genuine issue of fact, on summary judgment, based on the papers submitted on the motion and such other papers as may be on file and specifically referred to and facts therein set forth in



the motion papers.” *Carmen*, 237 F.3d at 1031; *Henry*, 983 F.2d at 950. Thus, where the party opposing summary judgment fails to come forward and show the existence of a genuine issue, the moving party “need not present proof negating mere hypothetical defenses.” *Doff v. Brunswick Corp.*, 372 F.2d 801, 805 (9th Cir. 1966); see *Peterson v. Highland Music*, 140 F.3d 1313, 1321 (9th Cir. 1998) (“We apply a ‘general rule’ against entertaining arguments on appeal that were not presented or developed before the district court.”).

A plaintiff only has the burden of proving nongenericness “once the defendant asserts genericness as a defense.” *Filipino Yellow Pages, Inc. v. Asian Journal Publs., Inc.*, 198 F.3d 1143, 1146 (9th Cir. 1999)). Thus, the District Court committed no error by not considering a defense Mr. Caballero’s failed to raise in opposition to the Tribe’s summary judgment motion. *Carmen*, 237 F.3d at 1031.

Ignoring the law of this Circuit, Mr. Caballero incorrectly suggests that mentioning genericness in his superseded answer to the Tribe’s original complaint required the District Court to evaluate that affirmative defense on the Tribe’s unopposed summary judgment motion. (Opening Brief, p. 38 (citing E.R. Volume 5 at 40).) In any event, Mr. Caballero omitted the defense from his operative answer to the Tribe’s third amended complaint. (See E.R. Volume 5 at 1-11.)

Indeed, even in his Opening Brief, Mr. Caballero makes no effort to enunciate any argument that “Shingle Springs Band of Miwok Indians” is a generic term. (Opening Brief, pp. 37-40.) Having failed to “specifically and distinctly” assign any error to the District Court, Mr. Caballero has waived any such argument. *Christian Legal Soc’y*, 626 F.3d at 485; *Lear Astronics Corp.*, 77 F.3d at 1176.

To be sure, the Tribe’s unopposed summary judgment evidence demonstrated that “Shingle Springs Band of Miwok Indians” is not a generic term, because it is simply not a general term for the services it provides. “A generic term is one that refers to the genus of which the particular product is a species.” *Yost*, 92 F.3d at 821 (citation omitted).

This Court’s decision in *Yost* usefully illustrates the concept of genericness. There, this Court rejected an argument that the term “Committee for Idaho’s High Desert” was a generic term because “Committee” and “Idaho’s High Desert” were both generic terms in themselves. *Yost*, 92 F. 3d at 821-22. This Court recognized that services the organization provided included “dissemination of information on environmental issues through a variety of channels, advocacy of a conservationist agenda on its members’ behalf, and education of the public about the desert.” *Id.* The organization also produced goods, including “newsletters, bandanas, t-shirts,

and bumper stickers.” *Id.* Based on the organization’s activities, this Court went on to explain what sorts of names would be generic:

The name for the genus to which these particular services belong would probably be “environmental education and advocacy,” and the generic names for the goods are those actually used by the court to describe them (“newsletter”, “bandana”, “t-shirt”, “bumper sticker”). The name for a supplier of these services and goods might well be “environmental advocacy organization.”

*Id.* at 822. Considering the name as a whole, this Court concluded that “Committee for Idaho’s High Desert” was not generic because that term was not a name for the genus of services that the organization provided. *Id.*

Similarly here, the Tribe’s uncontradicted evidence established that the Tribe’s services include operating a Tribal government and educating the public about the Tribe’s culture, government, and history through newsletters and the internet. (S.E.R. 181:7-182:2, 183-211, 213:19-25, 214:14-215:7, 218-267, 270-280.) Thus, generic names for services the Tribe provides might include “Indian tribe,” “tribal government,” “website,” or “newsletter.” *Yost*, 92 F. 3d at 822. The term “Shingle Springs Band of Miwok Indians,” taken as a whole, is simply not a generic name for such a service. *Id.* at 821-22; *see also California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1455 (9th Cir. 1985).

Indeed, the evidence before the Court on summary judgment, including Mr. Caballero’s admissions earlier in the case, confirmed that members of the relevant

consumer groups—governments, business partners, and interested members of the public—associate “Shingle Springs Band of Miwok Indians” not with any generic type of goods or services, but with the Tribe itself, a particular political entity recognized by the United States, as a particular source of services. (S.E.R. 181:7-182:2, 183-211, 213:10-214:4, 214:14-215:7, 222-280, 292:23-26, 293:16-19, 550, 556-557, 694:8-24, 695:23-696:3, 707:7-18.) *See Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925, 929 (9th Cir. 2005) (explaining that, if consumers “understand the term as being identified with a particular producer’s goods or services, it is not generic” (citations and quotations omitted)).

Thus, although the District Court was not required to consider a defense not raised in opposition to summary judgment (*Doff*, 372 F.2d at 805), the evidence before the trial court readily demonstrated that “Shingle Springs Band of Miwok Indians” is not a generic term for the Tribe’s services.

#### **V. The District Court Properly Granted The Tribe’s Unopposed Motion For Summary Judgment On Its Red Hawk Casino Claims.**

Based on the Tribe’s uncontradicted evidence, the District Court properly granted summary judgment for the Tribe on its “Red Hawk Casino” claims.<sup>9</sup> Mr.

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<sup>9</sup>Despite the Tribe’s vigorous prosecution of “Red Hawk Casino” claims in its operative complaint and its summary judgment motion (*see, e.g.*, 603:7-16, 609:25-610:9, S.E.R. 629:1-4, 630:25-27, 633:1-636:23), Mr. Caballero disingenuously suggests that mark “is not the mark at issue in this case.” (Opening Brief at 50.) Mr. Caballero supports this assertion by taking out of context and misquoting the Tribe’s attorney’s statement at a contempt hearing, deceptively

Caballero does not dispute that the Tribe has superior rights to Mr. Caballero in its registered “Red Hawk Casino” mark. (Opening Brief, pp. 48-51; S.E.R. 290:7-13, 300:3-21, 422:20-22.) Instead, once again flatly ignoring the uncontradicted evidence in the record, Mr. Caballero blithely asserts, without citation to the record or the Tribe’s brief, that the Tribe “fails to offer sufficient evidence” of infringement. (Opening Brief, p. 49.) Mr. Caballero also makes unfounded assertions that the Red Hawk Casino mark is generic, or alternatively is descriptive and lacks secondary meaning. (*Id.*, 50-51.) Each argument fails.

**A. The Tribe Presented Uncontradicted Evidence Of Infringement Of “Red Hawk Casino.”**

The Tribe’s unopposed summary judgment motion demonstrated that Mr. Caballero has infringed the “Red Hawk Casino” mark. The Tribe submitted uncontradicted evidence that Mr. Caballero has used its “Red Hawk Casino” mark to create confusion about the Tribe’s history and the legitimacy of its right to operate its Red Hawk Casino gambling facility. (S.E.R. 290:7-9, 291:15-19, 345:2-351:2, 474-487.) The Tribe also presented specific evidence Mr. Caballero sent mass electronic correspondence to university students and staff under the mark “Red Hawk Casino.” (S.E.R. 290:7-9, 290:14-16, 301:5-302:14, 303:7-19, 423:5-

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adding “[only]” and “[not the name Red Hawk Casino],” to her straightforward statement that “this case involves use of the name Shingle Springs Band of Miwok Indians.” (Opening Brief at 50 (citing E.R. 219).)

8, 429-430.) Mr. Caballero makes no argument in his Opening Brief why the Tribe's uncontradicted evidence of Caballero's usage of the "Red Hawk Casino" mark does not establish infringement,<sup>10</sup> and he may not raise any such argument for the first time in his Reply Brief. *Quan*, 623 F.3d at 878 n.4; *Christian Legal Soc'y*, 626 F.3d at 485, 487-88. Accordingly, the summary judgment record presents no genuine issue as to Mr. Caballero's infringement of "Red Hawk Casino."

**B. The Tribe Had No Burden To Prove "Red Hawk Casino" Is Not Generic, But The Term Is In No Way Generic In Any Event.**

Because the "Red Hawk Casino" mark is registered (S.E.R. 294:26-295:2, 585-586), it is presumed to be valid, distinctive, and not generic. *Filipino Yellow Pages, Inc.*, 198 F.3d at 1146; *Zobmondo Entertainment, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113-14 (9th Cir. 2010). Because Mr. Caballero advanced no argument, and presented no evidence, in the trial court that "Red Hawk Casino" was generic or otherwise invalid the District Court made no error in granting summary judgment for the Tribe. *Carmen*, 237 F.3d at 1031; *Doff*, 372 F.2d at 805; *Peterson*, 140 F.3d at 1321.

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<sup>10</sup>Instead, Mr. Caballero cites the Tribe's summary judgment evidence and various evidence not before the District Court on summary judgment regarding a different mark, "Shingle Springs Band of Miwok Indians." (Opening Brief, p. 49 (citing E.R. 38-65, 150-78, Volume 5 at 3-25).)

Of course, the “Red Hawk Casino” mark is not generic. Although Mr. Caballero’s argument is difficult to decipher, he appears to be arguing that, because the mark *contains* a generic term (“Casino”), the mark as a whole *is* a generic term. (Opening Brief, pp. 50-51.) Mr. Caballero fails to recognize that genericness must be evaluated in terms of “the name as a whole, rather than looking to its constituent parts individually.” *Yost*, 92 F.3d at 821-22; *see Banff, Ltd. v. Federated Dep’t Stores, Inc.*, 841 F.2d 486, 491 (2d Cir. 1988).

Here, there simply is no genus of services known as a “red hawk casino”—putting aside the comical notion of a gaming parlor whose customers are a particular breed of bird of prey (a business model the Tribe has wisely avoided). The Tribe has added the arbitrary term “Red Hawk,” to the generic term “Casino,” resulting in a composite mark that is not generic. *Yost*, 92 F.3d at 821-22; *Banff, Ltd.*, 841 F.2d at 491. Thus, the juxtaposition of the term “casino” with “red hawk,” a term that has no intrinsic connection to casino services, is indicative of the strength of the mark (*Brookfield Commc’ns v. West Coast Entm’t*, 174 F. 3d 1036, 1058 & n.19 (9th Cir. 1999)), which is distinctive, and has indeed become famous, through extensive advertising. (S.E.R. 167:2-21, 168-179.)

In the absence of any argument or evidence on summary judgment that “Red Hawk Casino” is a generic term, the District Court did not err in granting the Tribe’s unopposed summary judgment motion.

## **VI. The District Court Properly Granted The Tribe's Unopposed Motion For Summary Judgment On Its ACPA Claims.**

The District Court found the Tribe was “entitled to summary judgment on its [ACPA] Cause of Action because no genuine dispute exists that Caballero has, with a bad faith intent to profit, registered, trafficked in, or used domain names that are identical or confusingly similar to the Tribe’s distinctive Marks.” (E.R. 6:10-15.) The District Court based this finding on the Tribe’s unopposed summary judgment motion, which showed with detailed evidentiary citations supporting each of the nine statutory factors that Mr. Caballero acted with a bad faith intent to profit to support the Tribe’s ACPA claim. (S.E.R. 620:24-624:9.) *See* 15 U.S.C. § 1125(d)(1)(B)(i)(I)-(IX).

On appeal, Mr. Caballero ignores the statutory factors, as well as the evidence the Tribe submitted in support, and simply makes a blanket assertion that the Tribe’s “evidence at summary judgment, and throughout the case, does not show [Mr. Caballero’s] bad faith intent to profit.” (Opening Brief, p. 53.) In support, Mr. Caballero provides just a single citation to 56 pages of the Tribe’s declarations supporting summary judgment. (*Id.* (citing E.R. 38-94).) Mr. Caballero’s conclusory and false assertion that the Tribe did not present evidence of bad faith intent to profit fails to meet his burden to “specifically and distinctly” enunciate claims of error on appeal. *Christian Legal Soc’y*, 626 F.3d at 485; *Lear Astronics Corp.*, 77 F.3d at 1176; *see FTC v. Publishing Clearing House, Inc.*, 104



F.3d 1168, 1171 (9th Cir. 1997) (“[C]onclusory, self-serving statements in appellate briefs . . . are insufficient to create a genuine issue of material fact.”).

Crucially, Mr. Caballero fails to disclose that, in violation of the Federal Rules and the Court’s rules (Fed. R. App. P. 10(b)(2); 9th Cir. R. 30-1.1(a)), he omitted from the excerpts virtually all of the Tribe’s documentary evidence, and essentially all the evidence supporting its ACPA claims. (*Compare* E.R. 38-94 (excluding nearly all declaration exhibits) *with* S.E.R. 97-594.) Mr. Caballero’s failure to include in the record evidence necessary to evaluate his conclusory claims presents a separate basis to summarily affirm summary judgment on the ACPA claim. *Cnty. Commerce Bank*, 312 F.3d at 1136-37.

Instead of discussing the Tribe’s actual ACPA evidence in any way, Mr. Caballero focuses on other evidence unrelated to the infringing internet domains and upon which the Tribe in no way relied to support its ACPA claim. (Opening Brief, pp. 53-54.) Although the Tribe did not rely on the evidence Mr. Caballero cites—evidence showing his attempts to steal the Tribe’s identity, its historical remains, and its mail, to establish Mr. Caballero’s bad faith use of the infringing internet domains—this evidence certainly underscores the bad faith in which Mr. Caballero undertook his deceptive campaign. (E.R. 38-39, 41-42.)

To be sure, the uncontradicted evidence the Tribe did rely upon demonstrated that each of the statutory factors showed Mr. Caballero's bad faith intent to profit. Specifically, the Tribe's evidence showed the following:

- ***Factor I (Trademark Rights):*** As discussed above in section IV, Mr. Caballero, having copied marks the Tribe owns, has no trademark or other intellectual property rights in the domain names at issue. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(I).
- ***Factor II (Legal Name):*** None of the domain names consists of a legal name or nickname by which Cesar Caballero, a natural person, is known. (E.R. 12:11-17, Volume 5 at 1:1) *See* 15 U.S.C. § 1125(d)(1)(B)(i)(II).
- ***Factors III & IV (Bona Fide Offering Of Goods Or Services Or Fair Use):*** Mr. Caballero has used the illegal domains as part of his bad faith campaign of infringement, not in connection with any bona fide offering of goods or services or for bona fide noncommercial or fair use. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(III), (IV). (*See* S.E.R. 711:24-27 (counterclaim seeking payment of "all gains, profits, and advantages derived by Casino Indians," *i.e.*, the Tribe, from their "economic relations with the United States of America").) (S.E.R.

290:7-9, 290:10-16, 291:3-5, 316:9-23, 404:13-18, 413, 424:15-17, 429-430, 456-458, 474-487.)

- ***Factor V (Caballero's Intent To Divert And Deceive):*** Mr. Caballero intended to divert visitors from the Tribe's websites to his own for financial gain and with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(V). (S.E.R. 252:5-253:18, 290:7-16, 290:20-23, 291:3-8, 291:15-19, 307:4-308:20, 316:9-23, 317:4-319:7, 345:2-351:2, 404:13-18, 413, 424:15-17, 446, 456-458, 459-460, 474-487; *see* 711:24-27.)
- ***Factor VI (Caballero's Intent To Profit):*** Caballero sought to profit from his illegal domains by using them to perpetuate his fraudulent attempt to usurp the Tribe's identity and the benefits of its federal recognition. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(VI); *DSPT Int'l, Inc. v. Nahum*, 624 F.3d 1213, 1219-21 (9th Cir. 2010). (S.E.R. 290:7-9, 343:24-344:17, 711:24-27.)
- ***Factor VII (Caballero's False Contact Information):*** Mr. Caballero provided material and misleading false contact information when applying for the registration of his illegal domains and has failed to

maintain accurate contact information. *See* 15 U.S.C.

§ 1125(d)(1)(B)(i)(VII). (S.E.R. 290:7-9, 290:20-23, 291:12-14, 320:25-321:18, 363:16-364:1, 364:15-365:9, 388:14-21, 431-434, 472 (falsely listing contact address as “Shingle Springs Miwok Tribe, Shingle Springs Indian Reservation”).)

- ***Factor VIII (Caballero’s Pattern Of False Registration):*** Mr. Caballero had a pattern of registering of multiple domain names that are identical or confusingly similar to the Tribe’s marks. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(VIII). (E.R. 6:10-15, 12:6-17 (District Court’s conclusion, unchallenged on appeal, that no genuine dispute existed that Mr. Caballero “registered, trafficked in, or used” the 12 infringing domain names at issue in this case infringing the Tribe’s marks); *see also* S.E.R. 290:7-9, 354:4-356:1, 559.)
- ***Factor IX (The Tribe’s Strong Marks):*** As discussed above (*see* sections IV.B & V.B *supra*), the Tribe’s marks are highly distinctive. *See* 15 U.S.C. § 1125(d)(1)(B)(i)(IX).

In the end, Mr. Caballero has failed to dispute, either before the District Court or in his Opening Brief, that the evidence the Tribe presented to the District Court showed it satisfied each of the statutory factors establishing Mr. Caballero’s bad faith intent to profit from registration and use of the infringing domains.

Accordingly, any such argument is waived and may not be raised for the first time in his Reply Brief, and this Court should affirm the District Court's decision to grant the Tribe's unopposed motion for summary judgment on its ACPA claims.

*Christian Legal Soc'y*, 626 F.3d at 485.

**VII. The District Court Properly Granted The Tribe's Unopposed Motion For Summary Judgment On Its State Law Claims.**

Mr. Caballero advances no "specific[]" and distinct[]" claim of error relating to the District Court's grant of the summary judgment for the Tribe on its state law claims (Opening Brief, p. 51), waiving any such argument. *See Christian Legal Soc'y*, 626 F.3d at 485; *Lear Astronics Corp.*, 77 F.3d at 1176. Rather, Mr. Caballero appears to agree that the elements the Tribe established to support its unopposed summary judgment motion on its federal trademark infringement claims are sufficient to support liability on its claims of infringement and unfair competition under California law. *Mallard Creek Indus. v. Morgan*, 56 Cal. App. 4th 426, 434-35 (1997); *Dream Marriage Group Inc. v. Anastasia Int'l, Inc.*, No. CV 10-5034 RSWL, 2010 U.S. Dist. LEXIS 120543, \*3-4 (C.D. Cal. Oct. 27, 2010).

Mr. Caballero makes a confusing argument that the Tribe's unfair competition claim relating to "Red Hawk Casino" rests on "mere hope" as opposed to "an actual economic relationship or a protected expectancy." (Opening Brief, p. 52.) The language Mr. Caballero quotes, however, is from a discussion of the

elements of a claim for intentional interference with prospective economic advantage (*Brown v. Allstate Ins. Co.*, 17 F. Supp. 2d 1134, 1140 (S.D. Cal. 1998)), a claim not at issue in this case.

In short, this Court should affirm summary judgment for the Tribe's on its state law claims.

### **Conclusion**

As the District Court attempted to communicate to Mr. Caballero, his true “battle is with the United States, not with this tribe” (S.E.R. 292:20-22, 544:22-23), and his ill-conceived and unlawful campaign of identity theft against a federally recognized Indian tribe must end. Mr. Caballero's failure to meaningfully defend his crusade, both before the District Court and in his belated Opening Brief before this Court, readily justifies affirmance of the District Court's well-reasoned decision granting the Tribe's unopposed summary judgment motion.

Respectfully submitted,

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**Statement of Related Cases**

Pursuant to Ninth Circuit Rule 28-2.6, the Tribe states that *USA v. Caballero*, 12-10524, is related to this case because conduct at issue in that case—namely, Mr. Caballero’s obstruction the Tribe’s mail—is also relevant to the Tribe’s claims here.

**Certificate of Compliance**

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 13,818 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

/s/ Paula M. Yost



**Certificate of Service**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 20, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed on February 20, 2014, at Oakland, California.

/s/ Paula M. Yost

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