

Docket No. 13-56066

In the
UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

In the Matter of: VINCENT TORRES, *Debtor.*

VINCENT TORRES,
Appellant,

v.

THE SANTA YNEZ BAND OF CHUMASH INDIANS
Appellee.

Appeal from a decision of the United States District Court,
Central District of California, the Honorable Michael W. Fitzgerald
Case No. 2:12-cv-04513-MWF

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellee The Santa Ynez Band of Chumash Indians (“The Tribe”) states that it is not a publically traded company. The Tribe has no parent corporation, and no publically held corporation owns 10% or more of its stock.

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I. STATEMENT OF JURISDICTION

The United States Bankruptcy Court had original jurisdiction over this case pursuant to 28 U.S.C. section 158(a). The United States District Court had appellate jurisdiction over this case pursuant to 28 U.S.C. section 158(a)(1). If this Court determines that the instant appeal is timely, this Court has appellate jurisdiction over this case pursuant to 28 U.S.C. section 158(d)(1).

The Order Affirming the Bankruptcy Court's Order Denying Sanctions ("Order"), which is the subject of this appeal, was filed in the District Court on March 27, 2013. According to the District Court's docket, the Order was also entered by the District Court on March 27, 2013. 1 SER 15.¹ The Notice of Appeal for this case was filed on June 14, 2013, which was 79 days after the Order was entered by the District Court.

II. ISSUES PRESENTED

- A. Whether this appeal is timely.
- B. Whether the Bankruptcy Court abused its discretion in denying the motion for sanctions filed by the debtor and appellant Vincent Torres ("Torres")

¹ As used herein, "SER" refers to Appellee's Supplemental Excerpts of Record filed currently with this brief. Because the Appellant's Brief cites to the six-volume Appellant's Appendix filed in the District Court (referred to in Appellant's Brief as "CT"), Appellee has provided a parallel citation to the Appellant's Appendix (cited as "AA"), whenever a parallel citation is available, for the Court's convenience. "AB" is used herein to refer to Appellant's Brief.

against appellee The Santa Ynez Band of Chumash Indians (“The Tribe”).

III. STATEMENT OF FACTS

A. TORRES’ AGREEMENT WITH THE TRIBE

The litigation between the Tribe and Torres arose from construction work which the Tribe hired Torres to perform on reservation land, commencing in 1999.

From approximately mid-January to the end of November 1999, Torres performed work on the reservation lands of the Tribe. 3 SER 214 (6 AA 1301). The work included installing street lights, cleaning Zanje de Cota Creek, installing a storm drain system along Zanja de Cota Road, preparing for the overlay of Zanja de Cota Road, expanding a bus parking lot, grading a portion of the reservation, placing boulders in a parking lot, removing debris, and performing a general cleanup of the reservation and a portion of the highway adjacent to the reservation. 3 SER 214-215 (6 AA 1301-1302). The terms of the work were not documented in writing. 3 SER 215 (6 AA 1302). Torres periodically sent bills to the Tribe, which the Tribe paid. During 1999, the Tribe paid Torres \$1,975,654. 3 SER 215 (6 AA 1302).

B. THE TRIBE’S CONCERNS ABOUT THE AMOUNTS CHARGED BY TORRES

Because of the amounts that Torres was charging for his work, the Tribe

became concerned about whether Torres was billing appropriately. 3 SER 216 (6 AA 1303). Among other things, the Tribe was concerned about the following charges:

1. Torres billed the Tribe \$740,000 to install 108 street lights within the reservation, an amount that was \$400,000 over what the Tribe was informed to be the fair market value for the time and materials spent doing the work. Torres also failed to complete the work and left exposed bolts in violation of accepted standards of workmanship. 3 SER 216 (6 AA 1303).

2. Torres was charged \$94,720 by a subcontractor, John L. Wallace & Associates, for performing engineering, permit processing, and surveying tasks, but billed the Tribe \$250,000 for this work without adding any value. 3 SER 216 (6 AA 1303).

3. Torres billed the Tribe an excessive amount for the construction of the storm drains that proved to be defective and caused damage to the Tribe's property. 3 SER 216 (6 AA 1303).

4. Torres billed the Tribe an excessive amount for grading he performed outside the reservation that was in violation of local, State, and Federal law, and for deficient grading on the reservation. Based on the information that it received, the Tribe believed that Torres' charges for this work would have been excessive

even if the work had been done correctly. 3 SER 216 (6 AA 1303).

C. THE TRIBE'S CONCERNS ABOUT THE QUALITY OF TORRES' WORK

In addition to its concerns that it was being taken advantage of with respect to billing, the Tribe also became concerned about the quality of Torres' work. On October 8, 1999, the Santa Barbara County Building and Safety Division issued a Notice of Correction because of Torres' unpermitted grading beyond the boundaries of the reservation, which Torres did not correct. 3 SER 215 (6 AA 1302). In April 2000, the Santa Ynez River Water Conservation District ("District") issued a demand due to a debris pile left by Torres within the District's easement and for damages to a hydrant caused by Torres. 3 SER 215 (6 AA 1302). In addition to these infractions, specific items of Torres' work appeared to be substandard. These items included the following:

1. Torres incompletely and negligently cut back slopes along the Zanja de Cota Road to contain and divert waters, causing conditions of erosion. 3 SER 215 (6 AA 1302).
2. Torres trenched along the road and left open holes, causing serious hazards for vehicles. 3 SER 215 (6 AA 1302).
3. Torres constructed storm drains but neglected to construct concrete

boxes, leaving holes and not permitting proper drainage. 3 SER 215 (6 AA 1302).

4. Torres graded roads without shooting grades or procuring engineering services, resulting in poor grading. 3 SER 215 (6 AA 1302). As a result of these deficiencies, the Tribe was required to hire others to repair erosion conditions and to set concrete boxes in storm drains. 3 SER 215 (6 AA 1302).

5. Torres caused damaged to the creek bed by unpermitted grading in and near the creek bed, resulting in a Notice of Correction being issued by the District. 3 SER 215 (6 AA 1302).

6. Torres damaged a hydrant, causing it to leak, and piled debris within the District's easement, blocking access to the hydrant and denying fire protection to the entire reservation. 3 SER 215-216 (6 AA 1302-1303).

In November 1999, the Tribe instructed Torres to stop work and leave the reservation due to its concerns over the quality of work being done and the amounts being charged. 3 SER 216 (6 AA 1303). The Tribe asked Torres to submit detailed billing statements for his work and to provide backup for his charges. 3 SER 216 (6 AA 1303).

**D. THE TRIBE'S RETENTION OF A CONSTRUCTION EXPERT
TO INVESTIGATE TORRES' WORK AND BILLING**

Because of the aforementioned concerns, the Tribe retained a construction

expert, Glen Northrup, to inspect the work done by Torres. 3 SER 216 (6 AA 1303). Mr. Northrup conducted such an inspection in February 2000, soon after Torres left the job site, and obtained quotes from other local contractors as to what they would have charged to do the work in question. Mr. Northrup also reviewed the materials used on site, obtained prices from local suppliers, and reviewed aerial photos and topographical maps of the reservation both before and after Torres' work was performed. 3 SER 216 (6 AA 1303). Based on this investigation, Mr. Northrup concluded that by billing the Tribe more than \$2 million, Torres had grossly overcharged the Tribe for his work. 3 SER 216 (6 AA 1303). This opinion was also expressed by engineers at John Wallace and Associates, who had been hired by Torres. 3 SER 216 (6 AA 1303).

E. THE TRIBE'S STATE COURT ACTION AND TORRES' COUNTERCLAIM

Based on the results of its investigation, on November 3, 2000 the Tribe filed suit against Torres in the Santa Barbara County Superior Court (the "state court action") alleging breach of contract, negligence and misrepresentation based on the deficient work done by Torres and the excessive charges for his work, and for the work which the Tribe had to pay for to remediate Torres' defective work and to complete the work Torres should have completed. 3 SER 216-217, 220-229

(6 AA 1303-1304, 1310-1319). The Tribe amended its complaint on December 22, 2000, and again on May 22, 2002 to include claims for equipment that Torres had not been returned. 3 SER 217 (6 AA 1304).

Torres counterclaimed against the Tribe, asserting that the Tribe owed him an additional \$850,000 for services rendered. 3 SER 217 (6 AA 1304). On August 22 and 23, 2001, the Tribe responded to discovery served by Torres in the state court action, including responses to requests for admissions and form interrogatories. 3 SER 230-248 (6 AA 1321-1339). The Tribe's discovery responses described in detail the basis for the Tribe's claims against Torres and the issues to be adjudicated in the state court action. 3 SER 217, 230-248 (6 AA 1304, 1321-1339).

F. TORRES' BANKRUPTCY

On September 16, 2002, Torres filed for bankruptcy and a deadline was set for the filing of proofs of claim. The Tribe timely filed a proof of claim in Torres' bankruptcy proceeding on December 10, 2002 to preserve its claims giving rise to the state court action. 3 SER 217, 250-252 (6 AA 1304, 1341-1343). At that time the state court action had not yet been adjudicated. The Tribe believed that its claims in the state court action were meritorious, and it further believed that if it prevailed it would recover some or all of the fees which had been improperly

charged by Torres (totaling more than \$2 million), that it would recover additional amounts expended by the Tribe to remediate Torres's defective work, that it would recover its attorneys' fees and costs, and that it would recover prejudgment interest, all as prayed for in the state court action. 3 SER 217 (6 AA 1304).

On September 3, 2004, the Tribe filed a motion for relief from the automatic stay to allow it to proceed with its state court action against Torres. Over Torres' opposition, the Bankruptcy Court granted the Tribe's motion and authorized both parties to proceed with their respective claims in the state court. 3 SER 218, 253-256 (6 AA 1305, 1359-1362). As part of its order granting relief from the stay, the Bankruptcy Court specifically granted leave for the Tribe to file a proof of claim. 3 SER 254 (6 AA 1360).

Torres filed an objection to the Tribe's proof of claim, which was set for hearing simultaneously with the Tribe's motion for relief from stay. The Bankruptcy Court declined, however, to rule on Torres's objection, stating as follows:

"This Court abstains from considering the merits of Torres's Objection to Claim of the Movant, filed herein. This Court will defer to the State Court before whom the State Court Action referenced herein was pending for a determination of the merits and amount of the Movant's Claim." 3 SER 255 (6 AA 1361).

G. THE RESUMPTION OF THE STATE COURT ACTION

The state court action proceeded to trial in April 2005 before the Honorable Zel Canter. 3 SER 218 (6 AA 1305). A principal point of contention concerning the Tribe's claim was whether the Tribe had entered into a fixed price agreement with Torres. The state court found that the oral agreement for Torres's services was, in fact, a fixed price agreement, and therefore the Tribe could not recover excessive amounts charged by Torres, absent proof of fraud, which the state court found had not been made. 3 SER 258 (6 AA 1368).

With respect to Torres' multiple claims against the Tribe for amounts allegedly owed, which totaled \$850,000, the state court sustained only two of these claims, and awarded Torres a total of \$309,950, less than half of the amount that Torres claimed he was owed by the Tribe. 3 SER 262 (6 AA 1378). Among other things, the state court rejected Torres's claim for reimbursement for amounts paid to John L. Wallace & Associates, finding that Torres had already been reimbursed for such amounts, and further rejected Torres' claim that he was entitled to a 35% markup, finding instead that a 15% markup is a reasonable profit for a contractor. 3 SER 260-262 (6 AA 1376-1378).

Judgment was entered in the state court action on September 13, 2005. 3 SER 263-266 (6 AA 1380-1383). Torres did not seek sanctions in the state court

for the Tribe's claims against him, nor did he pursue any other recourse against the Tribe, such as an action for malicious prosecution. Both the Tribe and Torres appealed the judgment, but neither appeal was successful, and the state court judgment became final on January 22, 2008. 3 SER 206-212 (5 AA 1256-1262). Torres subsequently brought a motion to disallow the Tribe's claim against him, which the Bankruptcy Court granted without objection from the Tribe. 3 SER 177-178 (4 AA 791-792).

H. TORRES' MOTION FOR SANCTIONS IN THE BANKRUPTCY COURT

On January 19, 2012, approximately four years after the state court action became final, Torres filed a motion in the Bankruptcy Court for sanctions against the Tribe and its chairman, Vincent Armenta. Torres asserted that the Tribe's claim against him was "false and fraudulent" and therefore both it and Mr. Armenta should be sanctioned under 28 U.S.C. § 1927, which provides for sanctions in certain circumstances against an "attorney or other person admitted to conduct cases in any court of the United States." 3 SER 183-A (4 AA 807). Torres also sought sanctions under the Bankruptcy Court's inherent power to sanction. 3 SER 183-C (4 AA 809). Torres's motion did not specify the amount of sanctions that should be awarded. 3 SER 183-D (4 AA 810).

The Bankruptcy Court held a hearing on Torres' motion for sanctions on April 27, 2012. After the Bankruptcy Court observed that neither the Tribe nor Mr. Armenta were licensed attorneys, Torres agreed to abandon his claim for sanctions under 28 U.S.C. section 1927. The Bankruptcy Court proceeded to find that neither the Tribe nor Mr. Armenta should be subject to sanctions under the court's inherent power to sanction. On May 10, 2012, the Bankruptcy Court issued a written order denying Torres' motion for sanctions. 3 SER 297-298 (6 AA 1554-1555).

I. TORRES' FIRST APPEAL OF THE DENIAL OF HIS MOTION FOR SANCTIONS

On May 22, 2012, Torres appealed the Bankruptcy Court's denial of his motion for sanctions to the United States District for the Central District of California, the Honorable Michael W. Fitzgerald, judge presiding. 3 SER 309-316 (6 AA 1592-1600). Mr. Torres was represented by the law firm of Jeffer, Mangels, Butler & Mitchell LLP during the appeal. 3 SER 309 (6 AA 1592). After full briefing by the parties, oral argument took place on March 18, 2013. 1 SER 15. On March 27, 2013, the District Court issued a written opinion affirming the Bankruptcy Court's decision in its entirety. 1 SER 24.

The District Court based its ruling on two grounds. First, after examining

the record, the District Court agreed with the Bankruptcy Court that the facts did not support a finding of bad faith on the part of the Tribe or Mr. Armenta. Second, the District Court held that “simply because a claim is ultimately deemed meritless or without evidentiary support does not necessarily indicate that such a claim was brought in bad faith.” 1 SER 23, citing *T.W. Elec. Serv., Inc. v. Pac Elec. Contractors Ass’n*, 809 F.2d 626, 638 (9th Cir. 1987). In that regard, the District Court found that the Bankruptcy Court properly expressed concern with imposing sanctions simply because the Tribe was ultimately unsuccessful in its claim against Torres. 1 SER 23. The District Court concluded that “Mr. Torres lacks sufficient evidence to persuade this Court that the Bankruptcy Court abused its discretion or that the Bankruptcy Court’s factual findings were clearly erroneous.” 1 SER 24. The District Court’s order was entered on its docket on March 27, 2013. 1 SER 15.

**J. TORRES’ SECOND APPEAL OF THE DENIAL OF HIS
MOTION FOR SANCTIONS**

Torres filed a notice of appeal to this Court on June 14, 2013. This is Torres’ second appeal of the Bankruptcy Court’s denial of his motion for sanctions. Torres is representing himself in this appeal. 1 SER 1.

IV. SUMMARY OF ARGUMENT

The Bankruptcy Court properly exercised its discretion to deny the motion for sanctions against the Tribe because Torres failed to present any evidence indicating that the Tribe had acted in bad faith or violated any court orders. 3 SER 306 (6 AA 1566). Torres claimed that he was entitled to sanctions because the Tribe and its chairman, Mr. Armenta, allegedly filed a “false and fraudulent proof of claim in Torres’ chapter 11 case” without legal or factual basis for the proof of claim. 3 SER 181 (4 AA 798). The Tribe’s proof of claim was based on the pending state court lawsuit brought by the Tribe against Torres arising from construction work performed by Torres. Torres had also filed a counterclaim in the state court action against the Tribe. 3 SER 217 (6 AA 1304). After Torres filed his bankruptcy petition, the Bankruptcy Court lifted the automatic stay and instructed the Torres and the Tribe to liquidate their claims against each other by proceeding with the state court action. 3 SER 173-175 (2 AA 299-301). The Bankruptcy Court further authorized the Tribe to file a proof of claim in the bankruptcy proceedings, which the Tribe did. 3 SER 217 (6 AA 1304).

The trial of the state court action was completed in April 2005. 3 SER 257 (6 AA 1364). In its statement of decision, the state court denied the Tribe’s claims against Torres, but it further found that Torres was entitled to recover only

\$302,450 of the \$850,000 that he sought from the Tribe. 3 SER 262 (6 AA 1378). The state court's finding that Torres' charges must be reduced by more than 63% vindicated many of the Tribe's concerns about Torres' billing practices. In addition, the state court judge made express written findings (because Torres raised the issue at trial) that neither the Tribe nor Mr. Armenta had acted in bad faith by litigating the billing dispute with Torres. Among other things, the state court found that Mr. Armenta's credibility had not been impeached during the trial and that "the new tribal chairman may have suspected Defendant of taking advantage of the Tribe. His motive-behind-the-motive was to protect his people. His quantum of proof could well be lower than that required by the law to establish what he suspected." 3 SER 259 (6 AA 1373). The state court's finding that the tribal chairman's motive "was to protect his people" completely undercuts Torres' assertion that the tribal chairman's motive was to pursue a personal vendetta.

Following unsuccessful appeals from both Torres and the Tribe, the state court judgment became final on January 22, 2008. 3 SER 206 (5 AA 1256). Torres did not seek sanctions against the Tribe in the state court (at either the trial court or the appellate court level), nor did he bring an action against the Tribe for malicious prosecution. Instead, Torres waited until January 19, 2012, almost four years after the state court action became final, to file a motion for sanctions against

the Tribe in the Bankruptcy Court. 3 SER 180 (4 AA 794).

Following the Bankruptcy Court's denial of Torres' motion, Torres appealed the Bankruptcy Court's decision to the United States District Court for the Central District of California. 3 SER 309 (6 AA 1592). After carefully reviewing the record of this case, the District Court affirmed the Bankruptcy Court's denial of Torres' motion for sanctions, stating that "this Court agrees with the Bankruptcy Court's conclusion that the factual record does not support a finding of bad faith." 1 SER 24. Although the District Court's order was entered in the District Court's docket on March 23, 2013 (1 SER 15), Torres failed to file a notice of appeal of the order until June 14, 2013, thus rendering the instant appeal untimely. 1 SER 1.

Three different courts – the state court, the Bankruptcy Court, and the District Court – have reviewed the Tribe's conduct in the state court action, and all three have come to the same conclusion: The evidence does not show that the Tribe litigated the billing dispute with Torres in bad faith. The Bankruptcy Court and the District Court have similarly found that no actions by the Tribe outside of the state court action warrant the imposition of sanctions. Despite the findings by these three courts, however, Torres seeks to continue this litigation by a second appeal of the Bankruptcy Court's order, all the while shrilly asserting, with unconscious irony, that the Tribe is pursuing a vendetta against him. The record

simply does not support his assertions. Given the broad discretion given to the Bankruptcy Court to award or deny sanctions, and given the absence of any evidence showing that the Bankruptcy Court abused its discretion, the order denying the motion for sanctions must be affirmed.

V. ARGUMENT

A. TORRES' APPEAL IS UNTIMELY AND SHOULD BE DISMISSED

The first issue presented to the Court is whether Torres' appeal of the District Court's decision is timely.

Federal Rule of Appellate Procedure ("FRAP") 3(a)(1) provides that an appeal permitted as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by FRAP 4. FRAP 4(a)(1)(A) provides that, subject to exceptions not applicable here, the notice of appeal required by FRAP 3 must be filed with the district clerk "within 30 days after entry of the judgment or order appealed from." Because the 30-day deadline is mandatory and jurisdictional, an appeal filed after the expiration of the 30-day period must be dismissed. *Cruz v. International Collection Corp.*, 673 F.3d 991, 1001-1002 (9th Cir. 2012).

In the instant case, the District Court's docket states that the District Court's

order affirming the Bankruptcy Court's decision was entered on March 27, 2013.

1 SER 15. Torres, however, failed to file his notice of appeal of the District Court's order until June 14, 2013. 1 SER 1. Because Torres' notice of appeal was filed 49 days after the 30-day deadline set forth in FRAP 4(a)(1)(A), Torres' appeal is untimely and should be dismissed.

In his notice of appeal, Torres erroneously stated that the District Court's order was entered on May 16, 2013, and he attached a copy of the District Court's order to his notice of appeal. 1 SER 1-3. The copy of the District Court's order attached by Torres contains two legends at the top of the page, which state in pertinent part:

Case 9:02-bk-12791-RR Doc 428 Filed 05/16/13 Entered 05/16/13
Case 2:12-cv-04513-MWF Document 15 Filed 3/27/13

It is apparent that the lower legend, which bears the District Court case number for this matter, was created by the District Court, and the upper legend, which bears the Bankruptcy Court case number for this case, was created by the Bankruptcy Court. The Bankruptcy Court legend stating "Filed 05/16/13 Entered 05/16/13" shows the date on which the District Court's order was filed and entered *in the Bankruptcy Court*; it does not show the date that the District Court's order was entered in the District Court. The date of entry of the order by the District

Court is determined by examining the District Court's docket, which states that the order was "Entered 03/27/2013." 1 SER 15 [Item 15 on the Docket]. Since Torres is appealing the District Court's order (1 SER 1), the 30-day period for him to file a notice of appeal began to run from the time that the order was entered by that court. The subsequent filing of the District Court's order in the Bankruptcy Court, after the entry of the order by the District Court, did not enlarge the time for Torres to file a notice of appeal.

Torres' appeal accordingly should be dismissed because it was not filed within the time permitted by FRAP 4(a)(1)(A).

**B. THE BANKRUPTCY COURT DID NOT ABUSE ITS
DISCRETION BY DENYING SANCTIONS**

The second principal issue presented by this appeal is whether the Bankruptcy Court abused its discretion in denying Torres' motion for sanctions.

**1. Torres' Opening Brief Contains Untrue Factual Assertions
Without Any Supporting Evidence or Proper Citations to
the Record**

As a preliminary matter, it must be noted that Torres' statement of facts in his Appellant's Brief is larded with pages of aspersions against the Tribe, including false statements about the private thoughts, knowledge, and motives of tribal

members and others, without any citations to the record supporting such false assertions. Moreover, in the instances where Torres does cite to the record to support his untrue factual assertions, he seeks to avoid impeachment by providing highly imprecise citations, some of which are more than 40 transcript pages in length. Even when Torres provides a reasonably precise citation to the record, the material cited seldom supports his factual assertions. Torres' failure to provide proper citations violates Ninth Circuit Rule 28-1.8, which provides that "every assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found." Torres' failure to comply with these rules is grounds for striking his brief. See *N/S Corp. v. Liberty Mutual Ins. Co.*, 127 F.3d 1145, 1146-1147 (9th Cir. 1997) [brief stricken for failure to cite record].

Torres made similar assertions in the Bankruptcy Court, supported only by his own declaration, in which he claimed to be aware of the private thoughts of other people and to have knowledge of events that occurred outside of his presence. 3 SER 185-200 (4 AA 813-828). Torres is obviously incompetent to testify about such matters; and as shown by his hyperbolic denunciations of the Tribe, he is clearly too consumed with animus to be trustworthy even if he could. This Court should accordingly give no weight to Torres' assertions about the

subjective mental state and motives of the Tribe's members for which there is no support in the record.

2. Standard Of Review of The Bankruptcy Court's Order

A decision to grant or deny sanctions is reviewed for an abuse of discretion. *United Computer Systems, Inc. v. AT & T Corp.*, 298 F.3d 756, 760 (9th Cir. 2002). An abuse of discretion is “a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.” *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). A reviewing court will not disturb a lower court's exercise of discretion unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *Smith v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996). “Normally, the decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.” *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000), citing *Valley Engineers v. Electric Engineering Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998). Stated differently, the standard means that within substantial margins the lower court could be upheld had it determined the issue one way or the other. *Speiser, Krause & Madole, P.C.*

v. Ortiz, 271 F.3d 884, 887 (9th Cir. 2001).

In determining whether an abuse of discretion occurred, the reviewing court must accept the lower court's findings of fact unless the appellate court is left with the definite and firm conviction that a mistake has been committed. *Gonzalez–Caballero v. Mena*, 251 F.3d 789, 792 (9th Cir. 2001). In addition, the appealed decision is presumed to be correct, and the appellant has the burden of overcoming this presumption. *Parke v. Riley*, 506 U.S. 20, 29, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). An appealed judgment will be affirmed if it is correct on any theory, even if the lower court's reasoning is incorrect. *Evans v. Chater*, 110 F.3d 1480, 1481 (9th Cir. 1997)

3. **Sanctions May Be issued Only Where The Court Makes An Explicit Finding of Bad Faith or Willful Misconduct**

The inherent authority of a federal court to sanction is wide in scope and powerful in effect, and therefore courts should exercise it with discretion and restraint. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). "A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Ibid.* Accordingly, before imposing sanctions under its inherent authority, a court must make an explicit finding of bad faith or willful misconduct. *In re Dyer*, 322 F.3d

1178, 1196 (9th Cir. 2003); see also *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) ("We insist on the finding of bad faith because it ensures that 'restraint is properly exercised' and it preserves a balance between protecting the court's integrity and encouraging meritorious arguments." (citation omitted)); quoting *Zambrano v. City of Tustin*, 885 F.2d 1473, 1478 (9th Cir. 1989).

In *Primus*, the District Court imposed sanctions on the defense counsel after finding that certain arguments made by counsel were "totally frivolous" and described certain actions by counsel as "outrageous" and "inexcusable." *Id.* at 646. On appeal, however, the Ninth Circuit reversed the sanctions order because the District Court's findings did not explicitly state that bad faith conduct or conduct tantamount to bad faith had occurred. *Ibid.*

The bad faith requirement sets a "high threshold" for justifying the imposition of sanctions. *Ibid.* Mere recklessness alone does not constitute bad faith conduct and, under a court's inherent power, does not justify the imposition of sanctions. *Fink v. Gomez*, 239 F.3d 989, 993-994 (9th Cir. 2001). "[S]anctions should be reserved for the 'rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose.'" *Primus, supra*, 115 F.3d at p. 649 (citation omitted).

4. The Bankruptcy Court Correctly Determined That the Tribe Did Not Act in Bad Faith or Engage In Willful Misconduct

After considering the evidence submitted by the parties in connection with Torres' motion for sanctions, the Bankruptcy Court correctly found that the facts did not support an award of sanctions against the Tribe or its chairman. In that regard, the Bankruptcy Court found that the Tribe and Torres had both brought actions against each other in the state court before Torres petitioned for bankruptcy protection. 3 SER 304 (6 AA 1564). After the petition was filed, the Tribe filed a proof of claim to preserve its right to obtain a determination of its claims in the state court lawsuit. 3 SER 304 (6 AA 1564). The Bankruptcy Court did not find any irregularities in connection with the proof of claim. 3 SER 308-A (6 AA 1569). Upon a motion by the Tribe, the Bankruptcy Court directed the parties to litigate their claims in the state court, which they proceeded to do. 3 SER 304 (6 AA 1564). The state court ultimately ruled in favor of Torres on the Tribe's claims but only awarded Torres \$309,950 of the \$850,000 he sought from the Tribe. Both parties appealed the state court judgment and both were unsuccessful on grounds unrelated to the merits. 3 SER 305 (6 AA 1565). The Bankruptcy Court found that the Tribe had "a colorable issue about whether sovereign immunity claims

have been waived” and that this was “a perfectly valid reason to appeal” the state court judgment. 3 SER 305 (6 AA 1565). After the state court judgment became final, Torres moved to disallow the Tribe’s claim without objection or interference from the Tribe. 3 SER 306 (6 AA 1566).

Based on this record, the Bankruptcy Court concluded that the Tribe had done nothing that was sanctionable:

“They did exactly what they were supposed to do. I said, ‘go back to the state court. Litigate it.’ They did litigate it.” 3 SER 306 (6 AA 1566).

The Bankruptcy Court’s findings are abundantly supported by the record. The evidence shows that the Tribe’s dispute with Torres was based on legitimate concerns about Torres’ work and billing practices. Among other things, Torres charged the Tribe \$740,000 for streetlight installation, an amount which the Tribe was informed and believed was at least \$400,000 over the fair market value of the time and materials for the work. 3 SER 216 (6 AA 1303). Torres also paid a subcontractor, John L. Wallace and Associates, \$94,720 for engineering, permit processing and surveying work but charged the Tribe \$250,000 for the same work without adding any value. *Ibid.* The Tribe also believed that Torres overcharged it for the construction of storm drains and for deficient grading. *Ibid.*

Torres’ assertion that the Tribe failed to investigate its claim before filing

suit is not supported by the evidence. The record instead shows that, after the Tribe developed its concerns about Torres, it hired Glen Northrup, a construction expert, to investigate Torres' work and billing practices. 3 SER 216 (6 AA 1303). After carefully inspecting Torres' work and the materials used on the job site, reviewing aerial photographs and maps of the work area, and obtaining prices from local contractors and suppliers, Mr. Northrup concluded that Torres' bills to the Tribe, which exceeded \$2 million, were clearly excessive. Engineers at John L. Wallace and Associates, which had been hired by Torres, expressed similar opinions to the Tribe. 3 SER 216 (6 AA 1303). It was only after the Tribe received these opinions that it brought suit against Torres in the state court. 3 SER 216 (6 AA 1303).

The Tribe's concerns about Torres' billing practices were in large measure vindicated by the state court's decision, which found that the Tribe was only obligated to pay \$309,950 of the \$850,000 sought by Torres. The state court's finding that Torres' charges must be reduced by more than 63% eliminates any possible argument that Tribe initiated its dispute with Torres in bad faith.

Moreover, as the Bankruptcy Court correctly observed, Torres had multiple remedies in the state court, which was in the best position to assess the merits of the Tribe's claims, if he believed that the Tribe had acted inappropriately in

challenging his work and bills. Among other remedies, Torres could have sought sanctions against the Tribe in the state court under California Code of Civil Procedure section 128.7. Patterned after Rule 11 of the Federal Rules of Civil Procedure, section 128.7 provides that an attorney who presents a pleading, motion or similar paper to the court makes an implied certification as to its legal and factual merit and is subject to sanctions for violation of this certification.

Alternatively, Torres could have sued the Tribe for malicious prosecution if he believed that the Tribe had brought its action against him without probable cause. Torres availed himself of neither of these remedies. He instead waited until *four years* after the state court action was final to seek sanctions in another court.

In his Appellant's Brief, Torres claims that state court's ruling against the Tribe on its claims shows that the Tribe and its chairman acted maliciously and in bad faith. This assertion is directly contradicted by the language of the state court's ruling. Far from finding that the Tribe's action was a result of the tribal chairman's "personal vendetta" against Torres, as Torres now claims, the state court instead found that the tribal chairman's credibility had not been impeached during the trial and that "the new tribal chairman may have suspected Defendant of taking advantage of the Tribe. His motive-behind-the-motive was to protect his people. His quantum of proof could well be lower than that required by the law to

establish what he suspected.” 3 SER 259 (6 AA 1373). The state court’s express finding that the tribal chairman’s motive “was to protect his people” completely undercuts Torres’ assertion that the tribal chairman’s motive was to pursue a personal vendetta. Given its 63% reduction of Torres’ charges, the state court clearly believed, after a lengthy trial, that many of the Tribe’s concerns about Torres’ charges were well founded.

Torres also complains that the Bankruptcy Court should have granted his motion for sanctions because the Tribe allegedly provided vague and nonresponsive answers to discovery in the state court action. This complaint is similarly unsupported by the record. Torres grossly exaggerates the number of times that Mr. Armenta indicated at his deposition that he did know the answer to a question, and the events and information that Mr. Armenta could not precisely recall in most instances occurred as long as five years before the deposition took place in 2004. The fact that Mr. Armenta could recall observing a foundation being poured sometime in 1999 (and reporting the event to the Tribe in that same year), but could not recall exactly *when* in 1999 he saw the foundation being poured, or when he reported it to the Tribe, is not evidence of bad faith. 2 SER 86 (1 AA 126). Similarly, Mr. Armenta’s lack of knowledge as to whether a particular document was stored at the Tribe’s reservation or at another site is not

proof of bad faith, particularly since Mr. Armenta testified that he was not the custodian of the document.² 2 SER 103 (1 AA 143). If the Tribe had, in fact, evaded discovery, Torres could have brought the matter to the attention of the state court judge and obtained appropriate remedies. Significantly, Torres cites no evidence that the state court, which was charged with monitoring the litigation, made any findings that the Tribe had evaded discovery or acted in bad faith in any way with respect to discovery. On the contrary, the record shows that the state court judge made express findings in its statement of decision that the Tribe and Mr. Armenta had not acted in bad faith.

Torres also blames the Tribe for the length of the litigation, and appears to assert that this fact, too, indicates that the Tribe acted in bad faith. The record, however, contains no evidence (and Torres cites none) indicating that the Tribe improperly delayed the litigation or otherwise pursued its claims in an inappropriate manner. On the contrary, the record shows that Torres' own conduct considerably extended the litigation and increased the costs to the parties. After the state court action was filed, Torres declared bankruptcy, and then unnecessarily

² Contrary to Torres' assertions, Mr. Armenta did not "walk out of the deposition" because he "could not evade answering questions anymore." AB at p. 9. The portion of the record cited by Torres shows that, after extension discussions between the parties' attorneys, Mr. Armenta's counsel was unwilling to permit Mr. Armenta to provide testimony concerning a matter that was subject to a bankruptcy stay without first obtaining direction from the Bankruptcy Court.

and unsuccessfully fought the Tribe's motion to lift the automatic stay so that the parties' respective claims could be liquidated in the state court. 2 SER 25-172 (1 AA 65-212). As a counterclaimant in the state court action, Torres was at least equally responsible for the length of that action, and in fact he has admitted that the trial of his counterclaim consumed 21 of the 28 days it took to try the state court action. 3 SER 202-204 (5 AA 982, 986-987). Like the Tribe, Torres appealed the judgment in the state court action, without success. 3 SER 206 (5 AA 1256). After the Tribe paid the judgment amount, Torres refused to provide a satisfaction of judgment and to release his lien on the Tribe's property, forcing the Tribe to pursue legal action in the state court to compel Torres to do so. 3 SER 271-288 (6 AA 1465-1466, 1470-1490). Torres then inexplicably delayed obtaining an order from the bankruptcy court disallowing the Tribe's proof of claim until January 20, 2011, three years after the state court judgment became final. 3 SER 206 (5 AA 1256); 3 SER 177-179 (4 AA 791-793). The Tribe did not oppose the disallowance of its proof of claim in any way. 3 SER 177 (4 AA 791). Based on this record, it is absurd for Torres to claim that the length of the litigation somehow shows bad faith by the Tribe.

Torres also asserts that the Bankruptcy Court improperly denied his request for sanctions because it mistakenly believed that it lacked authority to sanction

conduct occurring outside of the Bankruptcy Court. AB at p. 21. The Bankruptcy Court never stated that it lacked such authority, however, nor does the record show that the Bankruptcy Court denied Torres' motion for any reason other than the lack of evidence that the Tribe or Mr. Armenta had acted in bad faith. The Bankruptcy Court instead made it clear that it was denying Torres' motion because bad faith should not be presumed simply because the Tribe was unsuccessful in its claim against Torres. In that regard, the Bankruptcy Court stated:

“You [counsel for Torres] know, you'd have me go down a slippery slope here. If every plaintiff who essentially was nonsuited, lack of evidence, and did not prevail at trial, would be open for sanctions . . . just because they didn't prove their case” 3 SER 308-B (6 AA 1584).

As the District Court found, the Bankruptcy Court was absolutely correct in expressing this concern. Mere lack of success does not indicate bad faith conduct, nor does it justify the imposition of sanctions. *Fink v. Gomez, supra*, 239 F.3d at 993-994.

Finally, none of the cases relied on by Torres support the imposition of sanctions on a party who has not violated any statute or court order, and is not guilty of contempt. The case principally relied on by Torres, *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), arose from facts far

different from the instant case. In *Chambers*, the sole shareholder of a media company (Chambers) agreed to sell a television station to NASCO. Chambers subsequently repudiated the agreement and, to place the station beyond the reach of NASCO in the lawsuit which ensued, sold the station to a trust created by Chambers and operated by Chambers' relatives. Chambers thereafter violated an injunction and two restraining orders despite warnings and a \$25,000 contempt fine by the district court. Finally, in response to the district court's judgment in favor of NASCO, Chambers removed station equipment from service and persuaded station officials to oppose NASCO's pending FCC application to consummate the transfer of the station.

It is absurd to analogize the present case to *Chambers*. There is no evidence in this case that the Tribe violated any court orders or was guilty of contempt. The conduct Torres complains of -- that the Tribe filed a proof of claim based on a then-pending lawsuit filed in the state court -- was specifically authorized by the Bankruptcy Court when it lifted the stay to permit the Tribe to proceed with the state court action. 3 SER 268 (6 AA 1440).

5. **The Bankruptcy Court Properly Denied Torres' Request For Sanctions Because He Failed To Specify The Amount Of Sanctions Sought Or The Basis For Such An Amount**

Before a court may award legal fees as sanctions, the party seeking sanctions must demonstrate that the fees have been incurred as a direct result of the sanctionable conduct, and that they are reasonable. *ADO Finance AG v. McDonnell Douglas Corp.*, 938 F.Supp. 590 (C.D. Cal. 1996); 28 U.S.C. § 1927; Fed.R.Civ.P. 11(c)(2). See also *Brown v. Baden (In re Yagman)*, 796 F.2d 1165 (9th Cir. 1986), 1185, cert. denied, 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987).

When examining whether fees are reasonable, courts consider factors such as: (1) the time and labor necessary to perform the tasks for which the attorney seeks fees; (2) the novelty and difficulty of the issues involved; (3) the skill required to perform the legal task properly; (4) the inability to accept other employment while performing the task; (5) the customary fee; (6) whether the fee was contingent or fixed; (7) time limitations; (8) the amount at stake and the results obtained; (9) the experience and reputation of the attorneys; (10) the undesirability of the case; (11) the nature and length of the attorney's relationship with the client; and (12) awards in similar cases. *ADO Finance AG, supra*, at 595, citing *Super Power Supply, Inc. v. Macase Industrial Corp.*, 154 F.R.D. 249, 258 n. 14 (C.D.

Cal. 1994).

A fee award should “never exceed those expenses and fees that were reasonably necessary to resist the offending action.” *Yagman, supra*, 796 F.2d at 1185. Implicit in this requirement is a duty on behalf of the party seeking the fees to mitigate its fees and expenses. *ADO Finance AG, supra*, at 595. A failure to show that specific items of fees and costs are directly related to the allegedly sanctionable conduct, and to show which costs relate to which legal tasks, precludes an award of these costs as sanctions. An award of fees as sanctions, without such a specific showing, would be arbitrary and unfair. *ADO Finance AG, supra*, at 597-598.

In his motion for sanctions, Torres made no attempt to demonstrate that he incurred any legal expense as a result of any conduct by the Tribe, nor did he attempt to tie specific items of expense to specific events. As previously discussed, however, Torres’ own conduct has contributed greatly to the costs of litigation. Torres obdurately resisted the Tribe’s motion to lift the stay to proceed with the state court action, which the Bankruptcy Court granted, so that the parties’ claims, including his own, could be liquidated. 2 SER 25-172 (1 AA 65-212). Torres also admits that the presentation of his claims against the Tribe consumed most of the time at the parties’ trial in the state court, and that he unsuccessfully


appealed the state court's decision. 3 SER 202-204 (5 AA 982, 986-987).
Thereafter, even after the trial had been concluded and the judgment satisfied,
Torres refused to provide a satisfaction of judgment and to release its lien on the
Tribe's property, forcing the Tribe to pursue legal action in the state court to
compel Torres to do so. 3 SER 271-288 (6 AA 1465-1466, 1470-1490). In short,
not only has Torres completely failed to document any legal costs attributable to
any sanctionable conduct of the Tribe, the record shows that he himself bears
responsibility for much of the cost of the litigation. On this basis alone the
Bankruptcy Court was justified in denying Torres' motion for sanctions.

VI. CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court's
March 27, 2013 order upholding the Bankruptcy Court's denial of Torres' motion
for sanctions.

Date: January 2, 2014

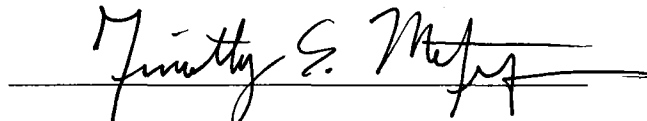
PRICE, POSTEL & PARMA LLP

By: 
Melissa J. Fassett
Timothy E. Metzinger
Attorneys for Appellee
The Santa Ynez Band of Chumash
Indians

CERTIFICATE OF COMPLIANCE

I certify pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Appellee's Brief is proportionately spaced, has a typeface of 14 points, and contains 7,805 words.

Dated: January 2, 2014

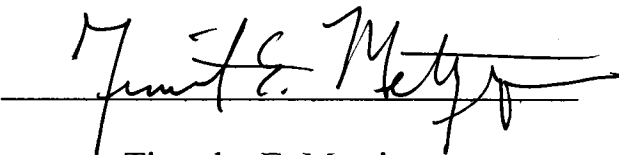
A handwritten signature in black ink, reading "Timothy E. Metzinger", written over a horizontal line. The signature is cursive and includes a long horizontal flourish at the end.

Timothy E. Metzinger

STATEMENT OF RELATED CASES

No other cases in this Court are deemed related to this case pursuant to
Circuit Rule 28-2.6.

Dated: January 2, 2014



Timothy E. Metzinger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 200 East Carrillo Street, Fourth Floor, Santa Barbara, California 93101.

On January 2, 2014, I served the foregoing document described as **APPELLEE'S BRIEF** on all interested parties in this action by placing two (2) copies thereof enclosed in sealed envelopes, addressed as follows:

***SEE ATTACHED SERVICE LIST**

- BY MAIL: I placed a true copy in a sealed envelope addressed as indicate above. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- BY PERSONAL DELIVERY: I personally delivered a true copy in a sealed envelope addressed as indicated above.
- BY OVERNIGHT DELIVERY: I placed a true copy in a sealed, fully prepaid FedEx, Next Day Air envelope addressed as indicated above, which is picked up by FedEx on that same day in the ordinary course of business.
- BY FACSIMILE: I personally sent a true copy to the parties authorized to accept service as set forth above at the fax numbers indicated above. The facsimile machine I used complied with CRC Rule 2003(3) and the transmission was reported as complete and without error. Pursuant to CRC Rule 2005(i), a transmission verification report was properly issued by the transmitting facsimile machine, stating the time and date of such transmission.
- BY E-MAIL: I caused to be e-mailed a true copy to the e-mail addresses listed above.
- (**STATE**) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- (**FEDERAL**) I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on January 2, 2014, at Santa Barbara, California.



Elizabeth Wright

SERVICE LIST

**In Re VINCENT TORRES, Debtor
United States Court of Appeals for the Ninth Circuit, Docket # 13-56066**

| | |
|---|--------------------|
| Vincent Torres 1835 Laurel Avenue Solvang, CA 93463 | In Propria Persona |
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