Corrected

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT FINDLETON, *Plaintiff and Appellee,* **v.** **COYOTE VALLEY BAND OF, POMO INDIANS** *Defendant and Appellant.*	**Case No. A156459**

Superior Court of California, Mendocino County
No. SCUK-CVG-12-59929
Hon. Ann C. Moorman

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

The undersigned certifies that there are no interested entities or persons required to be listed under the California Rules of Court, rule 8.208 of the that the justices should consider in determining whether to disqualify them as provided in rule 8.208(e)(2).

June 30, 2020

By /s/ Little Fawn Boland
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Tribal Law

INTRODUCTION

It is evident that the Respondent knows the lower court issued sanctions against the Tribe without just cause.[1] Rather than argue the merits of the law, the Respondent chose to spend the first thirty-three pages of the Respondent's Brief weaving a conspiratorial fairy tale about a fake court that is presided over by an imaginary judge in a land ruled by a tyrannical government and its fraudulent legal advisors. Tellingly, the Respondent dedicates two and a half pages of the Respondent's Brief to admonishing the California Judicial Council for describing Indian tribes as "independent political nations" rather than the Respondent's preferred term of "domestic dependent nations." The Respondent's distaste for Native Americans and Native American culture is so palpable that the Respondent cannot let stand the reasoned choice of the California Judicial Council to replace an antiquated and patronizing description of Indian tribes with a more modern and respectful one.

The Respondent's Brief could not be more affirming of the statement made by the Tribe's legal counsel that:

> This [dispute] ceased being about the merits of the case a long time ago for Coyote Valley. This is a sovereignty case, sovereign immunity case, a case about what respect tribal courts will be given. What law will be applied to cases that arise under tribal law under tribal jurisdiction.

The Respondent's Brief is light on law and heavy on disparaging rhetoric that seems to serve no other purpose than to undermine the achievements of Indian tribal governments. What little time is dedicated to the merits is generally confined to bizarre interpretations of the law intended to circumvent the time-bar of

[1] Filed concurrently with this Appellant's Reply Brief is a Request for Judicial Notice of documents not previously submitted to the lower court and a Motion to Augment with Documents previously admitted by the lower court.

California Code of Civil Procedure ("CCP") 128.5 that plainly prohibits the lower court's sanctions because they arise from a case filed on March 22, 2012. Even stranger is argumentation that Indian tribes are undeserving of the foundational privileges of a democratic society. The Respondent has not submitted a legal brief, rather it is a manifesto on the evils of Indian Country.

STANDARDS OF REVIEW

A. Attorneys' Fees.

Although a trial court's ruling on the propriety of an attorney fees award is generally reviewed under an abuse of discretion standard, the determination of whether the trial court had the statutory authority to make such an award is a question of law that we review *de novo*. (*Carpenter v. Jack in the Box* (2007) 151 Cal.App.4th 454, 460; *Duale v. Mercedes–Benz USA, LLC* (2007) 148 Cal.App.4th 718, 724.)

B. Questions of Law.

Respondent's Brief concurs with the Appellants' Opening Brief in that questions of law detailed in Sections II-IV should be reviewed *de novo*.

C. CCP 177.5.

An abuse of discretion will be found on appeal if a sanctions order rests on incorrect legal premises (*Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 533.)

SUMMARY OF ARGUMENT

A court may not sanction actions or tactics that arise in a civil case filed before January 1, 2015 per CCP 128.5(i). This case was filed on March 22, 2012. That being said, the lower court issued sanctions that it bootstrapped to a case filed by the Tribe on September 15, 2017 entitled *Coyote Valley Band of Pomo Indians v. American Arbitration Association and Robert Findleton*, Case No. 2017-01103-CO ("Tribal Court Case No. 2") in the Coyote Valley Band of Pomo Indians Tribal Court, which is part of the Northern California Intertribal Court System ("Tribal Court"). Tribal Court Case No. 2 was filed to enforce a ruling by the

Tribal Court that the Tribe was not compelled to mediate and / or arbitrate, which was issued on July 6, 2017 ("Tribal Court Case No. 1").

Due to the acknowledged time bar, the lower court framed the sanctions as penalties for (1) the filing of Tribal Court Case No. 2 and (2) for attendant communication to the American Arbitration Association ("AAA"). Because the time-bar in CCP 128.5 is so clear, the Respondent's Brief ("RB") claims CCP 128.5 means "sanctions are not applied retroactively to 'actions or tactics' that occurred prior to January 1, 2015." It then argues that the phrase "civil case" means any case, and not only a case filed in the Courts of Justice of the State of California. Finally, it concludes that if the "civil case" can mean any case, then a case arising in a foreign court can be used to get around the time bar. The legislative history shows that the interpretations offered by Respondent, with regard to both the time bar and the applicability of the sanctions for actions taken outside of the Courts of Justice, must fail as a matter of law. Finally, there is not a single case supporting the sanctioning of conduct arising in a foreign court in the absence of an inherent power to do so in the presiding court.

Also, in the vein of addressing the time bar, the Respondent raised a new argument that in fact the attorney fees granted as part of the Sanctions Order were contractual attorney fees to the Respondent as the prevailing party. The problem is there are no facts supporting this contention. The Respondent was awarded such fees as part of a separate noticed motion for contractual attorney fees, and the Respondent's prior counsel made clear in declarations for the sanctions and prevailing party fees that there was no overlap.

The Respondent's arguments that the Sanctions Order was a contractual attorney fees order, and therefore not governed by CCP 128.5, is contrary to the lower court's and the Respondent's past conduct, filings and written orders.

There are several additional arguments for why the sanctions should not have been granted pursuant to CCP 128.5 as well. These arguments also apply to the $1,500 sanction issued under CCP 177.5 for failure to follow an order of the

lower court. Importantly, though, these additional arguments do not need to be considered with regard to CCP 128.5 if this court agrees that the time bar applies to the Tribe's petitioning activities. If the time bar applies, then this court does not need to review any further argumentation with regard to CCP 128.5, and must as a matter of law reverse the lower court's decision.

The Sanctions Order is also easily reversible (with regard to both CCP 128.5 and 177.5) because the Tribe's suits in the Tribal Court and the year-long communication with the AAA were protected petitioning activities under both California Civil Code Section 47(b) ("Section 47(b)") and the *Noerr-Pennington* Doctrine.[2] As with the legal gymnastics employed in the Respondent's Brief as to interpretation of CCP 128.5 and the Sanctions Order, similarly the Respondent suggests outlandish ideas about the rights of federally recognized Indian tribes. The case law shows that tribes are protected by the First Amendment and that the *Noerr-Pennington* Doctrine may be raised by tribes. Applying it to the facts of this case shows that the Tribe's petitioning activities in the Tribal Court and related communication with the AAA were absolutely privileged. This defense was not waived and should have been a basis for denying the sanctions.

Similarly, Section 47(b) was applicable to the petitioning activities and communication to the AAA. Section 47(b) is not confined to tort actions, as the Respondent contends; but even if they were, the gravamen of the Respondent's "Memorandum of Points and Authorities in Support of Plaintiff's Motion for Sanctions Pursuant to C.C.P. Sections 128.5 and 177.5" ("Motion for Sanctions") and the Sanctions Order was not based on a breach of contract claim but essentially an abuse of process claim. Moreover, the breach of contract issue was not before the lower court. Because of the time-bar, the lower court was explicit

[2] CCP 128.5(f)(2)(A) is an exception to the application 128.5, which also applies to the filing of the suit against the AAA and Respondent in the Tribal Court because it was an attempt to extend, modify, or revers existing law and to establish new law. It was briefed in the Appellant's Opening Brief at 25.

that it was sanctioning the filing of Tribal Court Case No. 2, which is precisely the conduct that the statute protects.

Finally, Respondent failed to make the case for why the Sanctions should be upheld *even without the protections of Noerr-Pennington or Section 47(b)*. Respondent's essential argument is that the Tribe's petitioning actions were "frivolous" and conducted "without good cause" because the lower court subjectively opined that they were. However, determination of the frivolity and good cause of a petition must be determined under the standards and opinions of the *petitioning* court—not the sanctioning court.

For these reasons, the Sanctions Order should be reversed.

ARGUMENT

I. RESPONDENT FAILED TO ESTABLISH THAT CCP SECTION 128.5 APPLIES IN THIS CASE.

The lower court issued sanctions pursuant to CCP 128.5 against the Tribe for (1) filing *Coyote Valley Band of Pomo Indians v. American Arbitration Association and Robert Findleton*, Case No. 2017-01103-CO in the Coyote Valley Band of Pomo Indians Tribal Court, which is part of the Northern California Intertribal Court System ("Tribal Court"), and (2) for attendant communication to the American Arbitration Association ("AAA"). The lower court stated that it was permitted to issue the sanctions despite this case arising on March 23, 2012, which is before the January 1, 2015 effective date of CCP 128.5, because Tribal Court Case No. 2 was filed on September 15, 2017. The Sanctions Order was silent on the lower court's authority to issue such sanctions for petitioning activities in a foreign court and simply relied on the Tribal Court case filing date as the measuring date for the application of CCP 128.5.

The Respondent's logic flow for getting around this time-bar is as follows. First, he claims CCP 128.5 means "sanctions are not applied retroactively to 'actions or tactics' that occurred prior to January 1, 2015." This is contradictory to the plain language and legislative history of the statute, not supported by a single

case, and is inconsistent with the lower court's own analysis of the statute. Second, he argues that the phrase "civil case" means any case, and not only a case filed in the Courts of Justice of the State of California. This interpretation is totally inconsistent with the California Code of Civil Procedure and its legislative history. Third, based on the forgoing twists of logic, he concludes that if the "civil case" can be any case, then a case arising in a foreign court can be used to get around the time bar. For the reasons set forth below, the Respondent's flawed reasoning should be rejected.[3]

A. The Effective Date Language in CCP 128.5 is not Susceptible to Interpretation.

CCP 128.5 states that it "applies to actions or tactics that were part of a civil case filed on or after January 1, 2015." The Respondent would have this court believe that the legislature intended such language to mean "sanctions are not applied *retroactively* to 'actions or tactics' that occurred prior to January 1, 2015." (RB at 66, emphasis added in original.) The Respondent claimed the "proposed construction 'best effectuates the purpose of the law.'" (*Id*. citing *People v. Albillar* (2010) 51 Cal.4th 47, 54.) For this interpretation to be correct, the case in which the action or tactics occurred would have had to be pending on January 1, 2015. The legislative history, which the Tribe briefed extensively in the Opening Brief, dispenses with any argument that a case pending on January 1, 2015 is subject to CCP 128.5. (*See* AOB 18-22.)

[3] Also to deflect from the fatal time-bar issue the Respondent spends an inordinate amount of pages on other specious arguments that tribal courts should not afforded the respect that other courts are given, that they are subordinate to state courts, that the Tribal Court is in other words a "kangaroo court," that the Tribal Court does not really exist, and if it does exist, it was not properly constituted. Since retaining new legal counsel to take over this case Respondent has been saying that he will prove these points in court. The fact of the matter is he presented these exact arguments on May 24, 2019 at an *ex parte* hearing. The Respondent's efforts were unsuccessful and he withdrew the arguments on May 30, 2019. (CT 1290-1291.) The Northern California Intertribal Court has made it very clear to him that the Coyote Valley Tribal Court is a member court in good standing. (RJN at 001-002.)

Moreover, it is clear from the Sanctions Order that the lower court does not even agree with this outlandish reading of the statute. The Sanctions Order says it is specifically sanctioning the Tribe for filing the Tribal Court Case No. 2 because it was filed on September 15, 2017 *after* the effective date of the statute.[4] (Sanctions Order) (5 CT 1126.) The lower court was transparently cognizant of the time bar. The lower court would not have done these legal gymnastics if the Respondent's offered interpretation was correct. Finally, it is important to note that the Respondent did not offer any legal authority or legislative history that supports this contention.

B. The Assertion that the Court Can Issue Sanctions for the Case Filed in the Tribal Court, a Foreign Court is Unsupported in the Law.

Next in the Respondent's logic tree he would have this reviewing court accept the so-called "bipartite interpretation" that "Section 128.5 applies to sanctionable 'actions or tactics' that are part of a 'civil case' filed in *the court of another jurisdiction* 'filed on or after January 1, 2015' that is sanctionable regardless of whether the adversely affected California superior case was filed on, after or before 'January 1, 2015.'" (RB at 60, emphasis added in the original.)

The California Code of Civil Procedure makes clear that it applies to the "Courts of Justice" of the State of California. While "Courts of Justice" is not defined in the CCP, Part 1 entitled "Of Courts of Justice" contains provisions that relate only to the California Supreme Court, Superior Courts, Court of Appeals, and Small Claims Courts. CCP 128.5 is in Chapter 6 of Part 1, "Courts of Justice." The California Code of Civil Procedure, by its content, makes clear that it only applies in Courts of Justice, not other courts. The legislative history of the California Code of Civil Procedure dates back to the Court Act of 1851, "An Act

[4] "The petition filed by the Tribe in its tribal court in September 2017 was more than just a separate track of proceedings. That action was part of a civil case filed after January 1, 2015, designed to negate this Court's order compelling mediation and/or arbitration. Under these facts, the 2017 tribal action was within the scope of section 128.5(i)." (Sanctions Order.) (6 CT 1126.)

Concerning Courts of Justice of this State, and Judicial Officers." (Blume, California Courts in Historical Perspective (1970) 22 Hastings Law Journal 1 pp 133-135.) It was passed by the Second Session of the California Legislature on March 11, 1851 along with another act amending it on the same day. (*Id*.) Stephen J. Field wrote in his "Personal Reminiscences," "Immediately after my election, I commenced the preparation of a bill relating to the courts and judicial officers of the State, intending to present it early in the session." (*Id*. at 134) The following is an outline of the judicial system established by the acts of March 11, 1851:

> COURTS OF JUSTICE
> Supreme Court - to consist of a Chief Justice and two associate justices.
> District Courts - to be held by one judge in each of 11 judicial districts.
> Superior Court of San Francisco - to be composed of three judges until next election; afterwards, one judge.
> County Courts - to be held in each county by the county judge.
> Courts of Sessions - to be held by the county judge and two justices of the peace.

(*Id*. at 135.)

Thus, CCP 128.5 cannot possibly be interpreted to apply to any case anywhere, as offered by the Respondent. To award sanctions under CCP 128.5, they must be awarded in a civil case filed in the Courts of Justice after January 1, 2015. The filing date of the Tribal Court case that is being used as the measuring date cannot be used because it is from a case filed outside of the Courts of Justice.

C. State of California and Federal Case Law Does Not Support the Respondent's Expansive Reading of CCP 128.5.

The Respondent further argued that because courts may in narrow circumstances look at conduct arising in other courts that the time bar is somehow defeated. The Respondent's leap of logic is not explained in the Respondent's Brief. The authority of the lower court to look at conduct in other courts, while an interesting academic question, is irrelevant to the time bar issue and frankly serves

as a distraction to the core issue facing the Respondent. This case—the case in which the sanctions were ordered—was filed on March 23, 2012.

Nonetheless, the Tribe is compelled to defend against the Respondent's argument, as written. First and foremost, *Western Sys. v. Ulloa* (9th Cir. 1992) 958 F.2d 864, was a case regarding sanctions for conduct occurring all within the federal court system, and similarly *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, is about conduct that occurred all within the California Courts of Justice. Neither case addresses foreign courts, i.e. courts outside the justice system in question and they do not address the time bar.

Hall v. Nielsen (D.D.C. Mar. 11, 2019) U.S. Dist. LEXIS 8336, is not helpful to the Respondent because the federal court, while acknowledging the power of courts to prevent re-litigation, in fact declined to assert jurisdiction over a separately filed state court action covering similar topics. Therein, the court noted that the state court would need to decide whether the case should proceed in the state court forum. The parties to Tribal Court Case No. 2 are different than the parties in this case. The arguments raised against the AAA in the Tribal Court case had never been raised before. It was not a matter of re-litigation. Moreover, *Hall* is not about sanctions and does not address the insurmountable time bar issue facing the Respondent.

Every case that addressed this set of facts has concluded that even if, in the opinion of the presiding court, the conduct in the other court warrants sanctions, the presiding court cannot issue them if it does not have the inherent power to do so in the case it is presiding over. In other words, it is not enough that sanctionable conduct is occurring in a civil case in a court "somewhere" as the Respondent suggests.

The Respondent relies on *In re Case* (5th Cir. 1991) 937 F.2d 1014, 1017, stating that the reversal of the sanctions at issue in that case was because the misconduct arose in a state action that was completely collateral to the federal case. It actually says that "[a] bankruptcy court's inherent power to punish bad-

faith conduct does not extend to actions in a separate state court proceeding." "Inherent power must arise from the litigation before that court." The Fifth Circuit reviewed a bankruptcy court's award of fees relating to a bankruptcy case and allowed them, but found there was no valid basis to award attorneys fees incurred by a creditor in a separate state court litigation.[5] (*Id*.) It goes without saying that state courts and federal courts are not part of the same judicial systems. Thus, the sanctioning court must have the power to sanction in the first place, which the lower court did not because of the time bar and because the case arose in a foreign court.

The *Chambers v. Nasco, Inc.* (1991) 501 U.S. 32 case, which the Respondent said shows that the lower court has the absolute power to sanction for conduct outside the courtroom, was limited by *In re Case*. Later cases after *In re Case* affirm its reasoning. (*Schaefer Salt Recovery, Inc.*, 444 B.R. 286 citing *In Re Case*, at 1022 ("Like Rule 11 and Bankruptcy Rule 9011, both § 1927 and the Court's inherent power to sanction arise from conduct that occurs before the court considering the sanction - not conduct in some other court.").) The conundrum for the lower court was that the Sanctions Order could not be framed as simply conduct before its court, and so it instead characterized the Tribe's conduct as a "refusal to arbitrate" because of the time bar. The Sanctions Order said the filing of the case in September 2017 against the AAA was the basis for the sanctions because the lower court needed a hook due to the effective date of CCP 128.5.[6]

Somehow the Respondent forgot to mention *County of Imperial v. Farmer* (1988) 205 Cal.App.3d 479. It is consistent with how federal courts and

[5] The Sanctions Order contained 45.72 hours from the attorney Pemberton related to a Motion to Dismiss filed by Respondent in the first Tribal Court case. The law firm of Morgan Lewis did not itemize what they spent there time on, to the Tribe's objection. Thus, the lower court at least awarded fees for 45.72 hours and possibly more for Morgan Lewis incurred in a foreign court. The Tribe vehemently objected to these fees arising in the Tribal Court. *Opposition* at 8, fn 8. The Tribe's argument was ignored.

[6] *See supra* footnote 2.

bankruptcy courts handle sanctions under Rule 11 and the corresponding Bankruptcy Rule 9011. The court held that even if conduct in another court in the presiding court's view is sanctionable, it has to have the inherent power to sanction in the first place. Following the *County of Imperial* rule, the lower court would have needed to have power over the Tribal Court and would have needed to be presiding over a case filed after January 1, 2015. *County of Imperial* very much supports the Tribe's arguments.[7]

The lower court in *County of Imperial* found "that the filing of the Petition in Washington, and the urging of the Defendant herein and his current Wife to keep the child in Washington, thus requiring the Real Party in Interest to hire counsel in Washington to have the Washington Petition dismissed, were actions which caused an effect in this state within the meaning of *Indiana Insurance Company v. Pettigrew* (1981) 115 CA3d 862, 171 CR 770." (*County of Imperial*, 205 Cal.App.3d at 483.) As a result, the California superior court sanctioned the conduct arising in the Washington court under CCP 128.5. The reviewing court overturned the sanctions order because "the 'reach' of section 128.5 is confined to actions and conduct within proceedings conducted in the trial courts of this State." (*Id.* at 485.) It looked at the facts to determine that the sanctioning court had no inherent power over the sanctioned person.

Thus, there is no basis to read into the statute an application to foreign courts, an application to cases pending on January 1, 2015, nor an to application to any civil case filed anywhere. All sanctions granted under CCP. 128.5 must be denied.

[7] This case has other valuable holdings in it about frivolity being in the eyes of the foreign court that is discussed in detail in Section V below.

II. THE ATTORNEY FEES AWARDED BY THE COURT WERE SANCTIONS ISSUED PURSUANT TO CCP 128.5, NOT PREVAILING PARTY CONTRACTUAL ATTORNEY FEES.

The January 1, 2015 effective date for CCP 128.5 is fatal to the Sanctions Order because this case was filed on March 22, 2012. (Petition to Compel Mediation and Arbitration.) (1 CT 3.) As a "Hail Mary" to overcome the obvious time bar, the Respondent argues that the lower court granted the attorney fees both as a sanction under CCP 128.5 and also as the prevailing party for contractual attorney fees. (RB 41-44.) This argument is neither supported by the Respondent's past filings nor by any document in the Record, including the lower court's Sanctions Order. Contractual attorney fees were awarded upon separate noticed motion and court process. (ARA 8-15.) As such, this specious argument should be denied.

While the lower court made a comment that the fees could be viewed "simply as part of Findleton's continuing quest to enforce his contractual right to arbitrate" (Sanctions Order.) (5 CT 1127), it is patently false that the "superior court expressly awarded attorneys' fees to Findleton as the prevailing party under the contract." (RB 42.) In support of the highly misleading proposition that the lower court awarded fees to the Respondent as the "prevailing party," the Respondent's Brief cites to "(5 CT 1147, ¶2; Civ. Code § 1717)." (RB 25). The Sanctions Order does not say the words "prevailing party" or anything similar in that location, or anywhere else in the Order, and it certainly does not cite to Civ. Code § 1717. The Sanctions Order could not be further from the Respondent's misleading claim.[8] In fact it says:

- "In awarding sanctions under C.C.P., section 128.5, the court looks to

[8] To paint the Tribe in a bad light, the Respondent's Brief is full of unsupported allegations of "frauds on the court." However, it is the Respondent's deliberate and material misrepresentation of the Sanctions Order that should be viewed in this manner, particularly given the fact that the Respondent was separately awarded fees as a prevailing party.

whether any expenses incurred by a party are 'a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay.'" (Sanctions Order.) (5 CT 1126.)

- "Under these facts, the 2017 tribal action was within the scope of section 128.5(i)." (*Id*.)
- "Findleton seeks an order for sanctions in the amount of $170,455.06 pursuant to C.C.P. Section 128.5" (*Id*. at 1127.)
- "Accordingly, the facts meet the bad faith standard of section 128.5(a)." (*Id*. at 1126.)
- The Court "hereby GRANTS Mr. Findleton's Motion for Sanctions Pursuant to C.C. P. Sections 128.5 and 177.5." (*Id*.)

It is not within the realm of reason that the Sanctions Order was for contractual attorney fees. On June 27, 2018, the Respondent filed the Motion for Sanctions based upon a noticed motion under CCP Sections 128.5 and 177.5 only. (Plaintiff's Notice of Motion and Motion for Sanctions.) (4 CT 893.) Later, on December 19, 2018, the Respondent filed a noticed motion seeking contractual attorney fees as the prevailing party ("Prevailing Party Motion") under CCP Sections 1033.5(a)(10)(A) and 1032(b). (ARA 8-15.) The lower court issued a ruling on the contractual attorney fees on March 5, 2019. (Notice of Entry of Order After Hearing on Motion for Determination of Prevailing Party, Award of Attorney Fees.) (6 CT 1270.) It is illogical to think that the Respondent's prior legal counsel or the lower court intended for it to recover prevailing party attorney fees twice.

The calculation of the contractual attorney fees in the Respondent's Prevailing Party Motion was based on the prior work in the case dating back to its inception. It specifically excluded "[a]ny time related to the order for sanctions entered 12/10/18.'" (ARA 013 ¶ b.) Similarly, the Sanctions Motion explicitly did not include the work in the case dating back to its inception related to compelling mediation and arbitration.

The prevailing party proceedings were wholly separate from the sanctions proceedings and the parties' filings never overlapped in anyway. It is not possible for the Sanctions Order to be an award of contractual attorney fees because it did not cover any of the work associated with compelling the meditation and arbitration. The declarations of the attorneys and Respondent supporting the sanctions make no mention of such work. Declaration of West, Gede, Pemberton, and Findleton in Support of Motion for Sanctions, (4 CT 825-889, 5 CT 907-910, 5 CT 914-916, and 5 CT 914-916.) Moreover, there had been no briefing on the topic of prevailing party attorney fees when the lower court issued the Sanctions Order. That briefing came later and was extensive, as can be seen in the record. (ARA 8-48.) Due process requires that a litigant seeking contractual attorney fees as the prevailing party may only do so by noticed motion. (*Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 194 (overruled in part on other grounds).) The appellate record shows that did not happen prior to the issuance of the Sanctions Order. Accordingly, the argument that the Sanctions Order is in fact a prevailing party award of attorney fees should be rejected on the bases that such claim (to use some the Respondent's favorite words) was made in "bad faith" and was "frivolous *in the extreme*."

III. THE *NOERR-PENNINGTON* DOCTRINE APPLIES TO THE TRIBE'S PETITIONING ACTIVITIES IN THE TRIBAL COURT AND THE RELATED COMMUNICATION MADE TO THE AAA THAT WERE INCIDENTAL TO PRESERVING THE TRIBE'S RIGHT TO PETITION THE TRIBAL COURT.

As discussed in detail in Appellant's Opening Brief, the Sanctions Order disregarded the immunities conferred by the *Noerr-Pennington* doctrine, which generally immunizes from liability acts taken in connection with petitioning any layer of government, such as a tribal judiciary, for legal review. (AOB 34-37.) The *Noerr-Pennington* doctrine provides a rule of statutory construction that is based on, and implements, the First Amendment right to petition ("Petition Clause").

Under *Noerr-Pennington*, courts must construe statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise. The *Noerr-Pennington* doctrine has been extended to preclude virtually all liability for a defendant's petitioning activities, specifically including conduct that is incidental to the prosecution of a lawsuit. (AOB 36 citing *Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 936-39.)

There is an exception under *Noerr-Pennington* where the petitioning activities are a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. To constitute a "sham," the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr-Pennington*, and a claim premised on the sham exception must fail. Successful prosecution of an underlying action, as the Tribe accomplished in the Tribal Court proceedings, is *prima facie* evidence that the underlying action was not a sham.

Respondent, conceding that the Tribe's petition to its Tribal Court and related communication to the AAA were not a sham, contends instead that (1) the Noerr-Pennington doctrine is not a privilege available to a tribal government and (2) cannot immunize against sanctions imposed against "litigation misconduct." The former proposition is patently false. The later completely misconstrues both the purpose of the litigation privilege and the lower court's stated reason for the award of sanctions. Indian tribal governments are absolutely entitled to first amendment protections, including the protections afforded by *Noerr-Pennington* and the Petition Clause. When a Tribe asserts those rights, it is not engaging in "litigation misconduct" and cannot be sanctioned on that basis.

A. The Tribe Does Not Require a United States Constitutional Right to Petition the Tribal Court and the First Amendment Restrains the Lower Court from Sanctioning the Tribe for Doing so Under the *Noerr-Pennington* Doctrine.

Respondent conflates the application of the U.S. Constitution to tribes when governing their own tribal members, with the application of the U.S. Constitution to tribes when interacting with state and federal governments. (RB 51.) These are two entirely different applications of U.S. Constitutional rights. The former prohibits state and federal government from interfering with tribal sovereign autonomy to self-govern, and the later protects tribes against unconstitutional infringement by state or federal governments of the United States. Respondent fails to see this distinction, and attempts to argue that because the Tribe is not required to abide by the First Amendment when governing its own members, it has no First Amendment protections under the *Noerr-Pennington* doctrine against state judicial action. Respondent writes:

> The appellate court lacks subject matter jurisdiction to apply the First Amendment to protect the petitioning activity of the Tribe under the *Noerr-Pennington* doctrine in its own tribal court because the Tribe has no First Amendment right to petition its own tribal court for redress of grievances.

(RB 51).

This is wrong; firstly, because the Tribe does not require a First Amendment right to petition the Tribal Court, and secondly, because the First Amendment restricts the lower court from sanctioning the Tribe for doing so under the *Noerr-Pennington* doctrine.

1) The Tribe Does Not Require a First Amendment Right to Petition the Tribal Court.

First, there should be no debate that the Tribe's right to govern itself and its Tribal members is not constrained by the U.S. Constitution.[9] The Supreme Court has upheld tribal rights of self-governance for nearly 200 years, recognizing that such rights predate the U.S. Constitution. (*See Cherokee Nation v. Georgia* (1831) 30 U.S. 1; *Worcester v. Georgia* (1832) 31 U.S. 515.) Respondent makes this same argument, but stops short to avoid showing how this precedent actually protects the way in which tribes access their own court systems. In fact, if anything, the cases Respondent cites (*Talton, Santa Clara*) uphold the principle that the U.S. Constitution has little bearing on who can access a tribal court, or how the Tribal Court shall determine which cases may be brought before it. (RB 52 citing to *Talton v. Mayes* (1896) 163 U.S. 376 and *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.)

Tribal rights of self-governance include the autonomy to legislate and administer justice through their own tribal court systems. (*United States v. Wheeler* (1978) 435 U.S. 313, 331-332.) The federal government has long encouraged tribes to develop and use their own tribal court systems, the legitimacy of which have invariably been supported by the Supreme Court. (*See Iowa Mut. Ins. Co. v. LaPlante* (1987) 480 U.S. 9, 14-15.) Despite Respondent's odd contention that the Tribe has no authority to petition the Tribal Court because it lacks a First Amendment right to do so, the U.S. Constitution "does not dictate the metes and bounds of tribal autonomy." (*United States v. Lara* (2004) 541 U.S.

[9] This of course is tempered by Congressional legislation that specifically dictates otherwise, as it did when it enacted the Indian Civil Rights Act in 1968, and applied restrictions similar to those found in the Bill of Rights to Tribal governments. Specifically in the context of the First Amendment, Congress mandated that "[n]o Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances." (25 U.S.C. § 1302.)

193, 205.) (RB 51). To the contrary, it is Tribal law that dictates the metes and bounds by which the Tribe can petition the Tribal Court.

In this case, the Tribal Court's jurisdiction is clear. The Document Embodying the Laws, Customs and Traditions of the Coyote Valley Band of Pomo Indians ("Coyote Valley Tribal Constitution") delimits the jurisdiction of the Tribal Court, and predicates jurisdiction on where the incident giving rise to the cause of action takes place. Article II, Section 1 of the Tribal Constitution provides in part that jurisdiction of the Tribal Court shall extend to "[a]ll lands, water and other resources within the exterior boundaries of what now comprises the Coyote Valley Indian Reservation," and to "[a]ll persons within any territory under the jurisdiction of the Band." (Document Embodying the Laws, Customs and Traditions of the Coyote Valley Band of Pomo Indians.) (1 CT 146.) The Tribe, and all construction conducted by Respondent giving rise to the cause of action that forms the basis for this lawsuit, fall within the exterior boundaries of the Reservation. (Standard Form of Agreement Between Owner and Contractor.) (1 CT 10-15.) The Tribal Court also had jurisdiction over the AAA under the same contract because the AAA availed itself to the Tribal forum when it agreed to hear arbitration pursuant to an arbitration clause in the agreement for on-reservation construction services between the Tribe and the Respondent. (RJN 022-023.) It additionally had jurisdiction over the AAA because it purposely availed itself to the forum through its on-reservation advertising efforts directed at the Tribe's reservation. (*Id*.) Therefore, under Tribal law, the Tribal Court clearly had jurisdiction to hear the Tribe's petition against the Respondent and the AAA. It seems strange to have to prove that Tribal law authorizes the Tribe to access its own court system to "redress grievances," but for the avoidance of doubt, Tribal law does not require any U.S. Constitutional right to do so.

2) The First Amendment Restrains the Lower Court From Sanctioning the Tribe for Petitioning The Tribal Court Under the *Noerr-Pennington* Doctrine.

Secondly, the fact that the U.S. Constitution does not confine how the Tribe may develop or access the Tribal Court does not mean that the Tribe has no First Amendment protection under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine constrains courts from impeding on the First Amendment right to petition. (*See e.g. Sosa*, 437 F.3d at 936*; Manistee Town Ctr. v. City of Glendale* (9th Cir. 2000) 227 F.3d 1090, 1092; *Adidas Am., Inc. v. TRB Acquisitions LLC* (D.Or. Jan. 23, 2017, No. 3:15-cv-2113-SI) 2017 U.S.Dist.LEXIS 9228, at *8; *see also e.g. California Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, 510.) Whether the *Noerr-Pennington* doctrine applies does not depend on the status of the petitioner, but rather on the nature of "burdened conduct." (*Sosa*, 437 F.3d at 931.) Thus, Respondent's argument that "[s]ince the Tribe has no First Amendment right to petition its tribal court, there is no judicially cognizable First Amendment right to petition protected by the *Noerr-Pennington* doctrine" (RB 52-53) demonstrates a misunderstanding of the purpose and application of the doctrine.

To the contrary, *Noerr-Pennington* protects the litigation conduct of Indian tribes, and has been used to protect tribal First Amendment rights in circumstances with facts similar to this case. In *Oneida Tribe of Indians v. Harms*, the Tribe sought to dismiss counterclaims in a trademark infringement case for retaliatory action and malicious prosecution as protected under the *Noerr-Pennington* doctrine. (*Oneida Tribe of Indians v. Harms* (E.D.Wis. Oct. 24, 2005, No. 05-C-0177) 2005 U.S.Dist.LEXIS 2755 *1.) The court found that sending a demand letter, seeking relief from a special panel to resolve trademark disputes, and filing a complaint in federal court were all protected actions under the *Noerr-Pennington* doctrine. (*Id.* at *8.) It holds "there is no indication that Oneida Tribe was doing

anything other than exercising rights that are protected by the *Noerr-Pennington* doctrine," and granted the Oneida tribe's motion to dismiss. (*Id.* at *9.)

Like in *Oneida*, the Tribe's right to utilize the Tribal Court is protected from lower court sanctions by the First Amendment right to petition under the *Noerr-Pennington* doctrine in the case at bar. Respondent, similarly to the defendant's counterclaims in *Oneida,* accused the Tribe of bad faith for seeking redress in the Tribal Court. As a result, the lower court issued sanctions against the Tribe, essentially punishing the Tribe for lawfully and reasonably exercising its protected right to petition. Properly filing a claim in a court of competent jurisdiction "cannot be said to be retaliatory or malicious; indeed, it is activity protected by the *Noerr-Pennington* doctrine" (*Oneida Tribe* (2005) U.S.Dist.LEXIS 27558, at *9.) There is perhaps no better example of the type of action the right to petition seeks to prevent than a state court sanctioning a petitioner for seeking redress in a court of law.

The application of the First Amendment right to petition under the *Noerr-Pennington* doctrine is consistent with First Amendment protections that have been applied to tribes in other contexts as well. The Supreme Court has held that the right to petition "is cut from the same cloth as the other guarantees of [the First] Amendment." (*McDonald v. Smith* (1985) 472 U.S. 479, 482.). Therefore, examples of courts applying other aspects of the First Amendment to restrain state action against tribes are analogous to the application of the right to petition. It is well settled that the First Amendment protects corporations and other associations that are not "natural persons" against state and federal action. (*Citizens United v. FEC* (2010) 558 U.S. 310, 343) (internal citations omitted); (*Pacific Gas & Electric Co. v. Public Utilities Com*. (1986) 475 U.S. 1, 8) ("The identity of the speaker is not decisive in determining whether speech is protected.").) In some cases, this includes federally recognized Indian tribes.

For example, courts frequently recognize that tribes are protected by the First Amendment right to the free exercise of religion. (*See e.g. Navajo Nation v.*

United States Forest Serv. (9th Cir. 2008) 535 F.3d 1058, 1068 (finding no violation of the Navajo Nation's First Amendment right to free exercise of religion under the Religious Freedom Restoration Act (RFRA)); *Northern Arapaho Tribe v. Ashe* (D.Wyo. 2015) 92 F. Supp. 3d 1160, 1189 (finding a violation of the Northern Arapaho Tribe's First Amendment right to the free exercise of religion); *Snoqualmie Indian Tribe v. FERC* (9th Cir. 2008) 545 F.3d 1207, 1210 (finding no violation of the Snoqualmie Indian Tribe's First Amendment right to free exercise of religion under the Religious Freedom Restoration Act (RFRA)).) Specifically, the Northern Arapahoe court recognized that federally recognized Indian tribes have a First Amendment right to free exercise under the U.S. Constitution, with or without an accompanying statute. It holds, "at the end of the day, the federal government burdened one federally-recognized Indian tribe's free exercise of religion based on the religious objection of another federally-recognized Indian tribe [. . .] it is clear that the First Amendment forbids such conduct." (*Northern Arapaho Tribe*, 92 F. Supp. 3d at 1189.) It would be entirely inconsistent to afford tribes certain protections against state action under the First Amendment, and not others. This supports the application of the Petition Clause to the Tribe under the *Noerr-Pennington* doctrine in this case.

In conclusion, whether federal Indian tribes must follow the U.S. Constitution when governing its own members is completely immaterial to whether the state must abide by U.S. Constitutional restraints in a court of law. In this case, Tribal law permitted the Tribal Court subject matter jurisdiction to hear the Tribe's petition, and the First Amendment prohibits the state court from sanctioning the Tribe from using such forum under the *Noerr-Pennington* doctrine.

B. The Noerr-Pennington Doctrine Specifically Immunizes the Tribe in this Case.

The Sanctions Order is profoundly reversible, as it represents an attempt to punish the Tribe for the constitutionally protected acts of petitioning the Tribal

Court, and for making attendant communication with the AAA to preserve its rights under the Petition Clause. The lower court sanctioned the Tribe explicitly for taking actions "in its tribal court." (*See* Sanctions Order, 5 CT 1126 stating, "[t]he petition filed by the Tribe in its tribal court in September 2017 was more than just a separate track of proceedings. That action was part of a civil case filed after January 1, 2015, designed to negate this Court's order compelling mediation and/or arbitration. Under these facts, the 2017 tribal action was within the scope of section 128.5(i)."") Thus, the lower court—without any examination of the merits of the petition before the Tribal Court—punished the Tribe for *the mere act* of accessing the Tribal Court.

To avoid direct discussion of the lower court's unconstitutional restraint on the federally protected liberties of an Indian Tribe, the Respondent has framed the Sanctions Order as a penalty against the Tribe for generalized "litigation misconduct." However, the record plainly shows that the Respondent specifically sought, and the lower court specifically awarded, sanctions because the Tribe "refus[ed] to participate in the arbitration" (5 CT 1125) and took "actions in its tribal court" (5 CT 1125-1126). These actions were all taken by the Tribe in order to assert its right to petition the Tribal Court. Although the Respondent has taken great pains to do so, the purpose underlying these actions cannot be covered up by blanketing his Brief with words such as "frivolous" and "bad faith" and "re-litigate." The Tribe refutes these baseless accusations in Section V, below. But what is critical to the survival of the Respondent's claims, and what the Respondent utterly fails to prove, is that in order for the Tribe to lose its protected right to petition a court, the petitioning activity in question must be in furtherance of a "sham." The Respondent cannot (and makes no attempt to) prove that the Tribe's petitioning activities were a "sham" because successful prosecution of an action, as the Tribe accomplished in the Tribal Court proceeding, is *prima facie* evidence that the action was not a sham. (*Freeman v. Lasky* (9th Cir. 2005) 410 F.3d 1180, 1185.)

In the absence of a "sham," California statutes jealously protect the universal rights to petition governments and access courts. The reach of the "litigation privilege" codified in California Civil Code section 47(b) is the best example, but California's anti-SLAPP laws ("Strategic Lawsuit Against Public Participation") further emphasize the immunities conferred upon litigants, and extends the privilege to statements and conduct made during and in connection with a court process. Specifically, CCP Section 425.16(e) of the California anti-SLAPP law states that:

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing ***made in connection*** with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

In enacting anti-SLAPP, the California Legislature was particularly concerned with the "disturbing increase in lawsuits brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for the redress of grievances." (CCP Section 425.16(a).) It declared, as a "public interest," that these foundational elements of a free democracy should "not be chilled through abuse of the judicial process." (*Id*.) Thus, the California Legislature expressly sought to protect the very actions for which Plaintiff seeks sanctions against the Tribe.

The California Supreme Court has echoed similar sentiments aimed at advancing the Legislature's policy goals, as the scope of the litigation privilege (Civ. Code § 47(b)) has expanded to the point where it has virtually eliminated a tort action for abuse of process. As noted by the *Rusheen* court:

> The following acts have been deemed communicative and thus protected by the litigation privilege: attorney prelitigation solicitations of potential clients and subsequent filing of pleadings in the litigation, and testimonial use of the contents of illegally overheard conversation. The following acts have been deemed noncommunicative and thus unprivileged: prelitigation illegal recording of confidential telephone conversations; eavesdropping on a telephone conversation; and physician's negligent examination of patient causing physical injury. The "[p]leadings and process in a case are generally viewed as privileged communications." The privilege has been applied specifically in the context of abuse of process claims alleging the filing of false or perjurious testimony or declarations. Thus, the Court of Appeal here correctly concluded that the communicative act of filing an allegedly false declaration of service of process fell within the litigation privilege.

(*Rusheen*, 37 Cal. 4th at 1058, internal citations omitted.)

So highly does judicial and legislative policy revere the rights of petitioning a court or legislative body, the nature of the privilege has been said in case law to be "absolute." As the following passage from *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215, explains:

> To effectuate its vital purposes, the litigation privilege is held to be absolute in nature. In *Albertson v. Raboff,* supra, 46 Cal.2d at p. 381, 295 P.2d 405*,* Justice Traynor, speaking for the court, reasoned that the policy of encouraging free access to the courts was so important as to require application of the privilege to torts other than defamation. Accordingly, in the years since *Albertson,* [Cal. Civ. Code S]ection 47(2) has been held to immunize defendants from tort liability based on theories of abuse of process,

> intentional infliction of emotional distress, intentional inducement of breach of contract, intentional interference with prospective economic advantage, negligent misrepresentation, invasion of privacy, negligence and fraud.

(internal citations omitted). It is against this backdrop of immunity that the *Noerr-Pennington* Doctrine is to be considered.

"Any impairment of the right to petition, including any penalty exacted after the fact, must be narrowly drawn." (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 57.) The *Noerr-Pennington* doctrine establishes immunity from liability for those acts taken in connection with petitioning any layer of government for legal review, except where the litigation activity is demonstrated to be a "sham." (*Prof'l Real Estate Investors, Inc. v. Columbia Pictures* (1993) 508 U.S. 49, 60.) The act of "petitioning" a court, though, has many manifestations. This is why, in addition to immunizing conduct in a legitimate lawsuit or administrative proceeding, the Noerr-Pennington doctrine also protects conduct that is "incidental to the prosecution of the suit," such as the sending of pre-litigation demand letters. (*Sosa*, 437 F.3d at 934-39.)

In assessing whether petitioning activity that is incidental to a lawsuit is a "sham," the typical inquiry of whether "no reasonable litigant could realistically expect success on the merits" does not come into play. (*Prof'l Real Estate Investors Inc.,* 508 U.S., at 60.) Instead, what is pertinent is whether a defendant solely used the *process* of petitioning to stifle a plaintiff's goals as opposed to the *outcome* of the petitioning process. (*Columbia v. Omni Outdoor Advertising, Inc*. (1990) 499 U.S. 365, 380.) The former may be considered a "sham" but that latter is not. "A classic example [of a sham action] is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." (*Id*.) This is aptly illustrated by considering the facts of *Columbia v. Omni Outdoor Advertising, Inc*. (*Id*.) *Omni* did not involve an underlying lawsuit. It instead involved a challenge to

allegedly competitive efforts to lobby and curry favor with government agencies. The *Omni* court determined that the defendant's efforts to obtain government favors, while perhaps executed through improper motive, was not a "sham" because the defendant's petitioning actions were legitimately aimed at procuring a favorable result. (*Id*.) Thus, a "sham" petition—whether in the litigation or non-litigation context— requires both that the petitioning activity that is both objectively baseless (meaning the action is taken without realistic prospect of gaining a favorable result) and subjectively brought for an improper purpose (such as abusing a petitioning process purely for purposes of delay). (*Id*.)

California follows this standard for sanctioning litigation activity. Under California's sanction statute, the courts have consistently regarded CCP Section 128.5 sanctions as involving both an objective and a subjective element. (*See*, e.g., *Dolan v. Buena Eng'rs, Inc*. (1994) 24 Cal.App.4th 1500, 1505-1506; *Abbett Elec. Corp. v. Sullwold* (1987) 193 Cal.App.3d 708, 712; *Corbett v. Hayward Dodge, Inc*. (2004) 119 Cal.App.4th 915, 921.) Therefore, any conflict with the two-pronged "sham" exception to the *Noerr-Pennington* doctrine has been avoided.

The California Supreme Court, in *In Re Marriage of Flaherty*, struck down an award of sanctions for maintaining a frivolous appeal and held that such an award for frivolous litigation required a showing that the appeal is both baseless and pursued in bad faith. (*In Re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650.) The court applied such a standard to the term "frivolous" to avoid chilling litigants' rights:

> [A]ny definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal.

(*Id*. at 650.) Respondent's reliance on *Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331 is unavailing. The *Vargas* court reasoned that *Noerr-Pennington* immunity should not apply since the plaintiffs' lawsuit did not amount to

legitimate First Amendment activity because it was baseless. (*Id.* at 1348.) Here, only the Tribal Court could judge whether the petition before it was baseless. And as noted above, the Tribal Court found sufficient merit in the petition against the Respondent and the AAA to have granted relief. It was a manifest abuse of discretion by the lower court to reach a different conclusion about those petitioning activities.

It should be noted that the U.S. Supreme Court has subtly denounced the "baseless litigation" reasoning of the *Vargas* court. In *BE & K Constr.*, the U.S. Supreme Court distanced itself from dicta contained in an earlier case relied upon by the *Vargas* court. (*See Bill Johnson's Rests*. (1983) 461 U.S. 731.) The court in *Bill Johnson's Rests*. indicated that "baseless litigation is not immunized by the First Amendment right to petition." (*Id*. at 743; *Schroeder v. City of Irvine* (2002) 97 Cal.App.4th 174, 195.) However, in *BE & K Constr.*, the court qualified that statement by stating that even baseless litigation may not be "completely unprotected." (*BE & K Constr.*, 536 U.S. at 531.) *BE & K Constr*. therefore recognized that baseless suits should be protected just as false statements are. While false statements may be unprotected for their own sake, "[t]he First Amendment requires that we protect some falsehoods in order to protect speech that matters." (*Id.*) Thus, under California law, even baseless litigation conduct has been protected in order to protect speech that matters. But that is merely an academic proposition in this case. That is because the litigation conduct that the lower court punished does not meet the *Noerr-Pennington* "sham litigation" two-part test and, furthermore, the lower court could not sit in judgment as to whether a petition filed in a foreign court lacked merit. That determination was the sole province of the Tribal Court, which emphatically held the sanctioned petitioning activities did have merit.

The above rules similarly apply to the attendant communication with the AAA, which were incidental to the Tribe's petition to the Tribal Court. Turning again to *Sosa,* the conduct at issue in that matter was the sending of pre-litigation

demand letters. The court found such conduct was immunized (from RICO liability) under the *Noerr-Pennington* doctrine as "incidental to the prosecution of the suit." (*Sosa*, 437 F.3d at 934-35.) The Tribe's nearly year long communication with the AAA were all "incidental" to enforcing the rights it secured under Tribal Court Case No. 1 in order to seek an injunction in Tribal Court Case No. 2 against the AAA and Respondent. The communication was not aimed at abusing a quasi-judicial process; but were rather a form of pleading to the AAA to respect an order from the Tribal Court. That communication was legitimately aimed at procuring a favorable result, and cannot be seen as "baseless" given the fact that the Tribe's communication *did* procure a favorable result—namely, the AAA honoring the Tribal Court's rulings.

Given these standards of law, the lower court erred in disarming the Tribe of the *Noerr-Pennington* privilege for both its petitions to the Tribal Court and its attendant communication to the AAA.

C. The Noerr-Pennington defense was not waived by the Tribe.

The Sanctions Order says, "[t]he motion of Plaintiff Robert Findleton for sanctions against the Coyote Valley Band of Pomo Indians (the "Tribe") came on for hearing in Department H of this Court on July 27, 2018, and again on September 21, 2018 after the trial court requested briefing on the possible application of C.C.P. 47 and the Noerr-Pennington doctrine to this sanctions request." (Sanctions Order.) (5 CT 1124.) The Sanctions Order shows that the lower court considered the Noerr-Pennington doctrine as intertwined with the discussion of privileges generally and did not hold that the Tribe raised it too late. Thus, the Tribe did not waive the argument nor did it "invite error." (RB 54.)

IV. CIVIL CODE 47(B) IS NOT RESTRICTED TO TORT ACTIONS AND CAN BE APPLIED UNDER THE CIRCUMSTANCES OF THE CASE TO THE SANCTIONS GRANTED PURSUANT TO CCP SECTIONS 128.5 AND 177.5.

The Respondent seeks to circumvent the absolute litigation privilege contained in California Civil Code Section 47(b) ("CCP Section 47(b)") that precludes issuing sanctions against the Tribe in this case. The Respondent does so by making two assertions: (1) that the litigation privilege protection contained in Section 47(b) is restricted *only* to "derivative tort actions" (RB 45) and (2) that Section 47(b) cannot be applied to sanctions imposed on the Tribe arising from its communicative act (and acts related thereto) in seeking relief in a separate judicial proceeding before the Tribal Court (RB 46). The Respondent is wrong on both accounts.

First, the Respondent's arguments run contrary to the plain text of Section 47(b) and case law precedent. As noted in Appellant's Opening Brief, the language of the provision contains no express "derivative tort actions" limitation, and instead speaks broadly of privileged communicative conduct (*i.e*. publications or broadcasts made in any judicial proceeding). Courts have upheld the privilege in a number of non-tort contexts.[10] (*See*, for example, *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232 (preempting local ordinance); *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 336-37 (precluding constitutional and statutory causes of action); *Wentland v. Wass*

[10] The Tribe does not concede that the underlying action, breach of contract, is the cause of action to examine. The filing of the lawsuit against the AAA and Respondent is what the lower court is sanctioning. It can only be that because of the time-bar and because the merits of the breach of contract action were never before the lower court. Essentially, the argument the Respondent and lower court made is that the Tribe is guilty of abuse of process. Where a privileged publication forms the basis for the tort, Section 47 may defeat claims for abuse of process. (*Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408 (overruled in part on other grounds).)

(2005) 126 Cal.App.4th 1484, 1492 (breach of contract causes of action); *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267 (same)).

In this regard, while the issue of the Section 47(b) litigation privilege tends to arise in the context of its application to "derivative tort actions," (*see e.g. Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216), no California decision[11] has held that the privilege cannot be applied to stop sanctions where, as here, it would be appropriate under the circumstances. (*Vivian,* 214 Cal.App.4th at 276 (application of the privilege requires consideration of whether doing so would further the policies underlying the privilege; *Wentland*, 126 Cal.App.4th at 1492.) Moreover, any doubt about whether the privilege applies must be resolved in favor of applying it. (*People ex. rel Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 963; *Silberg*, 50 Cal.3d at 211 ("In furtherance of the public policy purposes it is designed to serve, the privilege prescribed by Section [47(b)] has been given broad application.")))

Applying Section 47(b) to the unique circumstances at hand supports its primary purpose and the public policy underlying it—"to ensure free access to the courts." (*Silberg*, 50 Cal.3d at 214.) The Tribe's conduct at issue here all stems from its communicative act of petitioning the Tribal Court for relief on January 20, 2017 in association with Tribal Court Case No. 1. Each and every "frivolous" or "bad faith" "action or tactic[]" allegedly taken by the Tribe in "defying" the lower court's Order to Compel Arbitration (*i.e.* the purported basis for the sanctions) is intricately related to the Tribe's initial communicative act of petitioning the Tribal Court in Tribal Court Case No. 1 on January 20, 2017 (which came *before* the

[11] Respondent misreads the dicta in *Rusheen,* 37 Cal.4th 1048, 1063 and *People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267, 1274 for the proposition that Section 47(b) can *never* be applied to bar sanctions from being issued in the "original lawsuit" based on a litigant's protected communications and related noncommunicative acts arising in another action filed in another jurisdiction. Neither decision so held.

lower court Order to Compel Arbitration was issued and which is *not* the subject of the Sanctions Order).

This original communicative act of early 2017 resulted in a Tribal Court Opinion on July 6, 2017 ("Tribal Court Case No. 1 Opinion") that declared the lower court did not have jurisdiction to compel the Tribe to arbitration and by extension prohibited the Tribe from selecting an arbitrator. (Ex. 10 to Defendant's Index of Exhibits to Boland Declaration in Support of Opposition to Motion for Sanctions.) (5 CT 988-992.) When the AAA and the Respondent threatened to proceed with the arbitration contrary to the Tribal Court Case No. 1 Opinion, which would have put the Tribe at risk of a default judgment, the Tribe found it was caught in the ultimate "catch-22." Specifically, it was stuck in the proverbial "betwixt and between" position of having to choose to follow the Tribal Court Case No. 1 Opinion on the one hand or the contradictory lower court's Order to Compel Arbitration on the other.[12] In order to seek enforcement of the Tribal Court Case No. 1 Opinion, the Tribe filed its Motion for a Temporary Restraining Order and Preliminary Injunction on September 15, 2017 in Tribal Court Case No. 2 (4 CT 858-881), which led to the Tribal Court enjoining the AAA and the Respondent from proceeding with arbitration (5 CT 941-943 and 988-992).[13] The Tribe did not act arbitrarily or in bad faith in refusing to arbitrate as the Respondent contends, but rather as it was legally obligated to act by the Tribal Court. The same is true of the Tribe's filing of its Motion for a Temporary Restraining Order and Preliminary Injunction in association with Tribal Court

[12] This unique set of circumstances, which are centered on the choice a party litigant has to make between conflicting orders issued by two sovereign courts, illustrates how the attorney discipline cases the Respondent cites (*See* RB at 46, *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606; *Friedman v. Knecht* (1967) 248 Cal.App.2d 455; and *Canatella v. Stovitz* (N.D. Cal. 2005) 365 F.Supp.2d 1064, have little relevance to this case, where the sanctions to be imposed are against a tribal government which is constitutionally mandated under tribal law to obey its Tribal Court decisions.

[13] The AAA invited the Tribe to obtain a stay and is discussed below.

Case No. 2. It was not a mere "act of defiance," but rather an assertion of its right to petition the Tribal Court to enforce the prior Tribal Court Case Opinion No. 1.

The Tribe's so-called "independent, continuing act of defiance" of the lower court's Order to Compel Arbitration (discussed at RB at 47-49) cannot be separated from the Tribe's original communication to the Tribal Court on January 20, 2017 in association with Tribal Court Case No. 1 (which again, was *not* sanctioned). This is because the Tribe's non-communicative act of complying with the Tribal Court Opinion No. 1 instead of the lower court Order to Compel Arbitration is intertwined with and "necessarily related" to the Tribe's original communicative conduct in association with Tribal Court Case No. 1 in early 2017. (*See Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065 (the privilege protection extends to "noncommunicative acts" that are "necessarily related" to the communicative conduct); *Rubin v. Green* (1993) 4 Cal.4th 1187, 1195 (fact that defendants' communications "necessarily involved related acts" does not destroy privilege.)

In other words, the Tribe's inability to comply with the lower court order, which to be clear was in "reliance on" the inapposite Tribal Court Opinion No. 1, arose from and is inextricably related to its original communication to the Tribal Court on January 20, 2017. (*See Rusheen*, 37 Cal.4th at 1065 (the act of seeking "enforcement of the judgment in reliance on the filing of the privileged declarations of service was itself privileged.").) Thus, the Tribe's conduct of petitioning the Tribal Court in association with Tribal Court Case No. 2, its attendant communication to the AAA with respect to the Tribal Court proceedings and compliance with the Tribal Court Opinion No. 1—*i.e.* the specific "multiple defiant acts" allegedly providing the basis for the sanctions—falls squarely within the scope of the absolute litigation privilege contained in Section 47(b) and cannot be grounds for sanctions. (*See* RB 21-22, 48)

In his attempt to avoid the clear mandate of Section 47(b), the Respondent invites this Appellate Court to excessively restrict the reach of the absolute

litigation privilege contained in Section 47(b) in ways that run counter to the intent of the California Legislature and undercuts the important public policy protections enshrined in Section 47(b).[14] This Appellate Court should decline to accept the Respondent's invitation to adopt an excessively crimped interpretation for invoking the application of Section 47(b) and hold that the absolute litigation privilege contained therein requires this Appellate Court to reverse the sanctions award issued against the Tribe.

V. THE TRIBE'S PETITIONING CONDUCT DOES NOT WARRANT SANCTIONS, PRIVILEGED OR NOT.

While the Tribe is confident that the sanctions awarded pursuant to CCP 128.5 are time-barred, and also that the sanctions awarded pursuant to CCP 177.5 and CCP 128.5 are privileged communications under *Noerr-Pennington* and Section 47(b), the lower court's sanctioning of the Tribe was also done in error because (1) the lower court used an inappropriate standard in its review of the Tribe's filing of Tribal Court Case 2; and (2) the lower court exceeded its jurisdiction in sanctioning the Tribe's communication to the AAA, as any authority to sanction the Tribe for the communication was solely within the AAA's purview. Additionally, the activities complained of simply were not sanctionable under any standard because they were neither frivolous nor pursued in bad faith, and the petitioning activities were all conducted with good cause and substantial justification.

[14] (*Cf. Rubin,* 4 Cal.4th 1187 at 1203 ("If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b).")))

A. The Lower Court Erred in Sanctioning the Tribe's Petition to the Tribal Court Because it Reviewed the Petition Against the AAA and Respondent Under an Inapplicable Standard

The lower court found that the Tribe "frivolously" petitioned the Tribal Court in "bad faith" under California law. (Sanctions Order.) (5 CT 1126.) It should not have. To determine whether a person has "frivolously" filed a petition, or otherwise acted in "bad faith," a court must base its determination on the law of the venue in which the petition was filed.

Reference to *County of Imperial,* 205 Cal.App.3d at 486. is instructive here:

> [A]lthough the trial court made findings summarizing the factual and procedural background of the case, the trial court neither expressly found (nor apparently investigated) whether the Washington petition for custody was frivolous under Washington law. Indeed, an inference to the contrary may be drawn by the action of the Washington Superior Court, which refused to award attorney's fees to Lovett in the Washington action.

The lower court engaged in virtually identical behavior to that of the court criticized in *Farmer*. In summarizing the facts and procedure of the case, it too failed to investigate whether the Tribe's petition to the Tribal Court in Tribal Court Case No. 2 was frivolously filed under Tribal law. Likewise, an inference that the petition was not frivolous could (and should) be drawn by the ruling of the Tribal Court in Tribal Court Case No. 2, which granted the relief sought in the petition.

The Respondent contends in Section V.B of the Respondent's Brief that the Tribe, in filing a Motion for a Temporary Restraining Order and Preliminary Injunction on September 15, 2017 to stop the AAA and the Respondent from participating in arbitration, was attempting to "frivolously" "re-litigate" the settled law of the case. (RB 55-56, 65.) There are two issues with this portrayal: first, the Sanctions Order is based not on the "law of the case" as it existed at the time the

Tribe filed its Motion for a Temporary Restraining Order and Preliminary Injunction under *Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194 ("*Findleton I*"), but rather is based on the "law of the case" as subsequently interpreted (or perhaps from the point of view of the Appellate Court, clarified) by the Court of Appeals in *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565 (*Findleton II*); second, in any event, it relies on an interpretation of the "law of the case" from the perspective of the State Court rather than that of the Tribal Court.

Findleton I, in examining the resolutions it held to have granted a limited waiver of sovereign immunity in favor of the Respondent, stated:

> These acts effected an express waiver of the Tribe's sovereign immunity that was clear and unequivocal […] The waiver was limited to arbitration of disputes regarding those agreements and to recourse against certain assets of the Tribe. The waiver extended to judicial enforcement of the right to arbitrate and of any arbitration award.

(*Findleton I,* Cal.App.5th 1194 at 1217.)

Nowhere does it state that the *Superior Court* would have jurisdiction to compel or enforce arbitration. It was only in *Findleton II* that it was made clear that the Court of Appeals intended by its prior holding that the Superior Court would have jurisdiction to compel arbitration. Specifically, it held:

> We necessarily decided that the Tribe waived its sovereign immunity *and thereby conferred jurisdiction on the superior court* (as well as the state appellate courts)—not to resolve the underlying dispute, but to enforce the arbitration clauses in the agreements.

(*Findleton II,* Cal.App.5th 565 at 572.) (emphasis in original.)

The Appellate Court reasoned that, by remanding the case to the lower court it was implicitly conferring jurisdiction to the lower court to enforce arbitration proceedings. (*Id*.) However, at the time of the filing of the Motion for a

Temporary Restraining Order and Preliminary Injunction and the Tribal Court's issuance of the injunction on December 20, 2017 enjoining the AAA and the Respondent from arbitrating against the Tribe, the Appellate Court had not yet published its interpretation of *Findleton I* via *Findleton II*. Nonetheless, the lower court relied on this later-in-time interpretation of the Tribe's petitioning conduct in its Sanctions Order, quoting the following from *Findleton II* (which again, was not available to the Tribe or the Tribal Court for examination at the time the Tribal Court issued its injunction):

> In Findleton I 'we necessarily decided that the tribe had waived its sovereign immunity and therefore conferred jurisdiction on the superior court ... , not to resolve the underlying dispute but to enforce the arbitration clauses in the agreements.'

(*Findleton II*, Cal.App.5th 565 at 572)

It was a clear error of the lower court to rely on this later-in-time interpretation to assess questions of frivolity or bad faith using an interpretation of law that was not available to the Tribe at the time of the sanctioned activities. *Farmer* requires that the lower court review questions of bad faith and frivolity from the perspective of the petitioned court (not the sanctioning court). If the lower court had followed the rule in *Farmer* it would have needed to consider a number of factors it never addressed.

To begin, the lower court should have considered the fact that, regardless of the State's interpretation of *Findleton I*, it was evident that the Tribal Court was not of the opinion that the lower court had jurisdiction to enforce the arbitration provisions. The agreements from which the underlying dispute between the Parties arose stated that Tribal law would govern the contracts, and that the Tribal courts would have jurisdiction. (Dec. of John Feliz.) (CT 116 at Section 18.1.2 of the agreement.) Such language strongly suggests that the Tribal court has jurisdiction over matters of compulsion and enforcement of arbitration. The Appellate Court in *Findleton I* also made clear that there remained open issues left to be decided,

such as whether Findleton failed to exhaust tribal administrative remedies. (*Findleton I*, Cal.App.5th 1194 at 1204.)

In effort to address questions that (appropriately) were left unresolved in *Findleton I*, the Tribe filed a Petition for Tribal Court Review on January 20, 2017, requesting that the Tribal Court assert jurisdiction over the matter of *Findleton v. Coyote Valley*. (ARA 003 - 007.) On February 3, the Tribal Court held that it had jurisdiction over the case. (Memorandum Decision.) (4 CT 672) On February 8, the Respondent challenged that assertion of jurisdiction by way of a motion to dismiss for lack of jurisdiction. (Dec. of Keith Anderson, Def. Motion to Dismiss.) (4 CT 736-751.) The Respondent's motion was denied by the Tribal Court on March 23, 2017. (*Id* at CT 763-771.) Approximately three months later, following a briefing schedule and oral argument (in which the Respondent declined to participate), the Tribal Court held on July 6, 2017 that the State Courts of California did not have jurisdiction to compel the Tribe to arbitration. (Exhibit 10 to Defendant's Index of Exhibits to Boland Dec. in Support of Opposition to Motion for Sanctions.) (5 CT 988-992.)

It is important to note that these prior petitions are *not* the subjects of the lower courts sanctions. The sanctions were issued in relation to the Motion for a Temporary Restraining Order and Preliminary Injunction on September 15, 2017 to stop the AAA and the Respondent from participating in arbitration in violation of the July 6, 2017 decision of the Tribal Court. The Tribe's petition to the Tribal Court led to it issuing a TRO against the AAA and the Respondent on October 2, 2017 and later a permanent injunction on December 20, 2017. (5 CT 988-992 and 941-943.)

The Tribe's petition to the Tribal Court, viewed through the required lens of *Farmer*, shows a total absence of any frivolity or bad faith. But on some level, this is beside the point because the critical question is whether the *Tribal Court* viewed the petition as frivolous or made in bad faith. The fact that it favorably ruled on the Tribe's petition is *prima facia* evidence that it did not. The lower

court's failure to defer to the Tribal Court in its determination of sanctionable activity is reversible error under *Farmer*.

B. The Lower Court Erred in Sanctioning the Tribe's Attendant Communication to the AAA Because the Sanctions Were Issued in Excess of Jurisdiction, and Also Because the Communication Was Neither Frivolous nor in Bad Faith, But Rather Was Made With Good Cause and Substantial Justification

While the Tribe does not believe the lower court awarded sanctions under CCP Section 177.5 for the Tribe's attendant communication with the AAA, it appears the Respondent does. (RB at 58, Section V.E, entitled "The Tribe's threat to the AAA in its letter of September 8, 2017 to the AAA violated the Order to Compel Arbitration.") For this reason, the Tribe is compelled to respond to the Respondent's contentions.

Awarding sanctions for the Tribe's attendant communication with the AAA would be a clear abuse of discretion for any one of three distinct reasons.

First, Sanctions under CCP Section 177.5 are limited to "violation[s] of a lawful court order." There was no order prohibiting the Tribe from communicating with the AAA. To Sanction the Tribe for its communication to the AAA under CCP Section 177.5 is illogical given the statute's obvious limited scope.

Second, the lower court did not have jurisdiction to issue sanctions under either CCP Section 177.5 *or* 128.5 during the timeframe in which the Tribe communicated with the AAA because the lower court had expressly stayed its jurisdiction by way of its Order After Hearing on Motion to Compel Mediation and Arbitration. (4 CT 817-819.) A trial court retains "extremely narrow" jurisdiction over the parties to a dispute after it grants a motion to compel arbitration and stays the lawsuit. (*MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 658.) During that time, "the arbitrator takes over. It is the job of the arbitrator, not the court, to resolve all questions needed to determine the

controversy." (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1200.)

> Once a petition is granted and the lawsuit is stayed, "the action at law sits in the twilight zone of abatement with the trial court retaining merely vestigial jurisdiction over matters submitted to arbitration." During that time, under its "vestigial" jurisdiction, a court may: appoint arbitrators if the method selected by the parties; grant a provisional remedy "but only upon the ground that the award to which an applicant may be entitled may be rendered ineffectual without provisional relief"; and confirm, correct or vacate the arbitration award. Absent an agreement to withdraw the controversy from arbitration, however, no other judicial act is authorized.

(*MKJA, Inc.,* 191 Cal.App.4th at 658-659.) (internal citations omitted.)

The "extremely narrow" jurisdiction of a court following a stay does not extend to issuing sanctions to penalize a party who frustrates another party's right to arbitrate. This is because the question of "whether a party is frustrating the other party's right to arbitration is [] for the arbitrator, not the trial court, to resolve." (*Id*. at 659.)

The lower court's Order After Hearing on Motion to Compel Mediation and Arbitration" stated "this action is stayed pending the outcome of the mediation/arbitration" and that the lower court "reserves jurisdiction to enforce any mediation settlement or award by the arbitrator." (4 CT 817-819.) The Order effectuated a clear intent that the lower court would not have jurisdiction to control the conduct of the parties until mediation and arbitration efforts had run their course. The arbitration ended on April 23, 2018 (long after the allegedly threatening letter September 8, 2017 was sent). By sanctioning communication made by the Tribe during the Court's stay of jurisdiction, the lower court is attempting to control conduct that is within the sole province of the AAA to govern. The lower court's sanctions against the Tribe thus represent an action taken in excess of jurisdiction and should be reversed on this basis alone.

There is, though, a third reason that the communications with the AAA should not be sanctioned. They were neither frivolous nor pursued in bad faith (under CCP Section 128.5), and the petitioning activities were all conducted with good cause and substantial justification (under CCP Section 177.5). This is because all of the Tribe's communications were made in furtherance of supporting its right to petition the Tribal Court in Tribal Court Case No. 2 to enforce the prior Tribal Court decision in Tribal Court Case No. 1.

Following the Tribal Court No. 1 Opinion, the Respondent chose to not follow the Tribal Court order, continuing his pursuit of arbitration. This precipitated the need for the Tribe to notify the AAA by a letter dated August 22, 2017, which stated "the case should be dismissed per the Tribal Court order." (RJN 072-073.) In response on August 29, 2017, the AAA sent a letter stating:

> While the Tribal Court ruled that the state court did not have jurisdiction over the [Tribe], ***the Tribal Court did not order a stay of these proceedings***. As such, this arbitration will proceed, subject to [the Tribe's] right to raise the issue of jurisdiction with the arbitrator, once appointed.

(RJN 085.)

As can be seen, the August 29, 2017 letter from the AAA *invited* the Tribe to request a stay of arbitration proceedings. The Tribe responded in a letter dated August 30, 2017 as follows:

> At this time, the courts of two sovereign governments have rendered diametrically opposed decisions. Findleton specifically agreed in the contracts that are the subject of this dispute to abide by Tribal law and to subject himself to Tribal jurisdiction. [The Tribe], on the other hand, specifically contracted to avoid dispute resolution in state court and to not be bound by state law.
>
> While Respondent is not convinced a stay issued by the Tribal Court is necessary given the definitive legal

> conclusions drawn in its decision, we nonetheless appreciate AAA's recognition of the Tribal Court's authority in this matter. As such, the Tribe will seek an appropriate response from the Tribal Court to halt these proceedings.

(RJN 087-088.) The AAA then responded by letter dated August 31, 2017 that if the Tribe did not agree to mediate by September 8, 2017, the AAA would commence arbitration "without further notice." (RJN 091.)

In order to halt proceedings that were moving ahead in violation of a Tribal Court Order, and without permitting the Tribe reasonable opportunity to obtain the stay order *invited by the AAA*, the Tribe then sent a letter to the AAA on September 8, 2017 stating:

> The AAA availed itself of the laws and jurisdiction of the Coyote Valley Band of Pomo Indians. By proceeding in this manner the AAA is violating a valid order of the Tribal Court which has also has jurisdiction over the AAA.
>
> Please be aware that if you continue to attempt to assert jurisdiction in this matter, we will be obligated to publicize AAA's flippant disregard of tribal law, tribal courts and tribal sovereignty.

(RJN at 092-093.)

This was followed by another letter on September 13, wherein the Tribe reiterated its position:

> Due to the ongoing disregard of the Tribal Court's order, the Tribe is compelled to take legal action. Subsequently pleadings will be filed in the Tribal Court, seeking to enjoin actions by the AAA and Robert Findleton that constitute ongoing violations of Tribal law.

(RJN 094-095.)

It is evident by the AAA's actions that it was not "intimidated" by the Tribe's communication sent September 8, 2017. The AAA fully participated in the

subsequent Tribal Court hearings, and as it indicated it would in its prior communication to the Tribe, it only stayed the arbitration once it was ordered to do so by the Tribal Court. Moreover, under prevailing case law, it was for the arbitrator to determine whether the Tribe's actions were "intimidating" or had otherwise frustrated the Respondent's right to arbitrate—not the lower court.[15] Thus, while there is no need to review this matter under an abuse of discretion standard because all of the Tribe's petitioning and communicative activities are absolutely privileged, the Tribe presents these facts so that the Appellate Court may see the utter egregiousness of the Sanctions Order.

CONCLUSION

For the reasons set forth in this Reply Brief, the Sanctions Order must be reversed.

[15] A little over a year after the Tribal Court issued its Tribal Court Case No. 2 Order, and on the heels of the lower court's Sanctions Order, the Respondent actually tried to convince the AAA that it had been "intimidated" in a letter dated February 5, 2019, referencing the Sanctions Order for support. (ARA 050-051.) That same letter argued that the AAA should reopen the case, based on the then recent decision of *Findleton II*. (*Id*.) The AAA declined to reopen the case "in accordance with the terms of [the Tribal Court Case No. 2 Order]." (ARA 052.)

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that this brief contains 13970 words, including footnotes and was written in 13 point font. In making this certification, I have relied on the word count of the computer program used to prepare the brief. The word count excludes the tables, the cover information, the Certificate of Interested Entities or Persons, this certificate, any signature block, and any attachments.

By /s/ Little Fawn Boland

Little Fawn Boland

By /s/ Keith Justin Anderson

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CERTIFICATE OF SERVICE

I hereby certify that, on June 30, 2020, a true and correct copy of:

APPELLANT'S REPLY BRIEF

was served on Darrio Navarro, Michael Scott, Timothy Pemberton, and Thomas Gede, counsel for Respondent electronically through this Court's e-filing system.

DATED: June 30, 2020

By /s/ Little Fawn Boland

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