IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

No. A156459

ROBERT FINDLETON, doing Business as Terre Construction and also doing business as On-Site Equipment,
Respondent and Appellee,

v.

COYOTE VALLEY BAND OF, POMO INDIANS, also known as the Shodakai Casino,
Petitioner and Appellant.

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

RESPONDENT'S BRIEF

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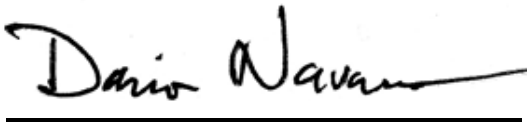
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under rule 8.208(e)(3). (Cal. Rules of Court, rule 8.208, subd. (e)(3).)

Dated: March 5, 2020

By: 

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INTRODUCTION

This appeal concerns the inexcusable, contumacious violation of the superior court's clear and unequivocal April 24, 2017 Order to Compel Arbitration[1] and the resultant December 10, 2018 Sanctions Order[2] that was granted after *more than a year-and-a-half* of continuous refusal to comply by Defendant-Appellant Coyote Valley Band of Pomo Indians ("Tribe").[3] There is no better evidence of the contumacious, obstructive purpose and consequences of this egregious violation than the Tribe's Opening Brief which is itself rife with frivolous attempts to relitigate the settled law of the case,[4] erroneous, one-sided, self-serving statements of fact[5] and wildly mistaken, misleading contentions of law.[6]

The Tribe has even completely failed to raise in its Opening Brief the issue of the *second "alternative basis" for the award of costs and attorneys'*

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1. Order After Hearing on Motion to Compel Mediation and Arbitration (signed Apr. 24, 2017 and filed Apr. 25, 2017) ["Order to Compel Arbitration"] at 4CT 817-819.
2. Order Granting Plaintiff's Motion for Sanctions (signed and filed Dec. 10, 2018) ["Sanctions Order"] at 5CT 1124-1129.
3. The Sanctions Order was granted 1 year, 7 months, and 15 days, excluding the end date, after the Order to Compel Arbitration. The Tribe has continued to refuse to comply with the Order to Compel Arbitration until today's filing date of March 6, 2020 for a period of exactly 2 years, 10 months, 11 days.
4. See texts and authorities cited at Section I(B), *infra,* at pp. 34─35.
5. (OB 10-15.) See texts and authorities, *infra,* at pp. 19─29.
6. See texts and authorities cited at Section I(A)─(E), *infra,* at pp. 32─40.

award ("fee award") as expressly stated in the Sanctions Order and has thereby waived that issue in this appeal with the result that the superior court's fee award must be affirmed on such "alternative basis."[7] (Sanctions Order, 5CT 1127, ¶ 2.) In addition to granting the fee award as monetary sanctions under Code of Civil Procedure section 128.5 ("Section 128.5"),[8] the superior court expressly stated that it granted the fee award on a second, "alternative basis" under the fee-shifting provision of the underlying contract which has been specifically construed by this very appellate court as entitling Plaintiff-Respondent Robert Findleton ("Findleton") to such a fee award as prevailing party based on his right to enforce the arbitration agreement in state court, a right that has been expressly twice affirmed by this appellate court and is now the settled law of the case.[9] (*Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194, 1217 [holding that the

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7. See texts and authorities cited at Section II, *infra,* at pp. 41─44.

8. All references in the main text of this brief to statutory code provisions shall refer to sections of the California Code of Civil Procedure, unless otherwise specified. Civil Code Section 47 will be hereinafter referred to as "Section 47." (Civ. Code, § 47.)

9. Contract Arbitration Provisions and Third Amendment, 1CT 110-112, §§ 9.10.1-9.10.8 [arbitration provisions of merged construction contract]; 2CT 265-266, § 12(D) [arbitration provisions of merged master equipment leasing agreement]; 2CT 349-350 [Third Amendment]; Tribal Waiver of Sovereign Immunity, 2CT 341-344 [General Council Resolution No. 08-01 [delegating authority to Tribal Council to waive sovereign immunity]; 2CT 346-347 [Tribal Council Resolution No. CV-08-20-08-03 expressly waiving sovereign immunity and consenting to arbitration]. See texts and authorities, *infra,* at pp. 41─44.

Tribe's clear and unequivocal waiver of sovereign immunity "extended to judicial enforcement of the right to arbitrate and of any arbitration award, as indicated by the arbitration provisions of the agreements" (later treated as one merged contract in *Findleton II* under Section 1642)] ["*Findleton I*"]; *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565, 569-570 [holding that the merged contracts, treated as one contract, permit the prevailing party to recover attorneys' fees] ["*Findleton II*"]; Sanctions Order, 5CT 1125, ¶ 3; 1126, ¶ 1; 1127, ¶ 2; Code Civ. Proc., § 1642.)

STATEMENT OF THE CASE

Since the Tribe's Statement of the Case is incomplete and erroneous, Findleton must restate the case to provide the reviewing court with an accurate, reliable basis for decision.

This is an appeal from the Sanctions Order (5CT 1124-1129) granted by the Mendocino County Superior Court on December 10, 2018 sanctioning the Tribe for the violation of that Court's Order to Compel Arbitration (4CT 817-819) of April 24, 2017 under both Sections 177.5 and 128.5. (Code Civ. Proc., §§ 128.5 & 177.5.)

A. Violation of Section 177.5

The superior court "ordered that sanctions in the amount of $1,500" be awarded pursuant to "Section 177.5, based on the Tribe's defiance of this Court's order compelling mediation and/or arbitration, and its actions to

enjoin that mediation and/or arbitration" in the Coyote Valley Tribal Court ("CV Tribal Court")[10] and further ordered under Section 177.5 that the Tribe

10. Findleton disputes that the Coyote Valley Tribal Court ("CV Tribal Court") was a duly constituted court "within" the Northern California Intertribal Court System ("NCICS Court") on September 15, 2017, the date the Tribe's Petition for Injunctive and Declaratory Relief (*not included in CT*) and the Motion for Temporary Restraining Order and Preliminary Injunction (5CT 952-975) were filed. (OB 8, ¶ 1.)

    Findleton is currently contesting in the superior court the legal status of the tribal forum which issued the tribal injunctive relief based on recently discovered evidence showing that the Tribe and its attorneys may have committed a *fraud on the court* by presenting filings and orders from a putative CV Tribal Court created in secret outside NCICS as *the* NCICS Court for the Tribe. Thus, the issue of whether the CV Tribal Court is actually part of NCICS is not ripe for review in this appeal as it is still the subject of a factual dispute in the trial court enforcement proceedings.

    The *fraud on the* court is, however, apparent even on the face of the limited record before this appellate court. Note that the assigned case number for the September 15, 2017 petition, *i.e.,* Case No. 2017-01103-CO, does not bear the required prefix of "NCICS," whereas the original tribal action seeking transfer of the this case from the Mendocino County Superior Court to the NCICS Court does bear the required case number prefix: NCICS-CV-2017-0001-JW. (Compare citations to September 15, 2017 CV Tribal Court case to January 20, 2017 NCICS Court case at OB 8, fn. 1 to OB 10, ¶ 3.) In its Opening Brief, the Tribe falsely attempts to portray these two separate actions as originating in one and the same tribal court, when, in fact, they originated in two separate tribal fora: a putative CV Tribal Court of dubious provenance and the NCICS Court. This conclusion is also confirmed by (1) the caption of the December 20, 2017 "Order Granting Plaintiff's Request for a Permanent Injunction" (5CT 989), which lacks any reference to NCICS, and (2) the signature block (5CT 992) of that Order which identified the presiding judge as merely the "Judge, Coyote Valley Tribal Court," again with no mention of NCICS. In contrast, the October 2, 2017 "Order Granting Temporary Restraining Order" (5CT 943-943), bears an NCICS caption and the judge is identified in the TRO signature block as "Chief Judge, Northern California Intertribal Court System."

    Due to the seriousness of the Tribe's apparent litigation misconduct and its ongoing contumacious violation of multiple lower court orders,

"shall pay such amount to the clerk of this Court within 30 days of this order, unless within that 30 days Defendant agrees to submit to mediation, and, if mediation is not successful, to arbitration, consistent with this Court's April 24, 2017 order." (5CT 1127, ¶ 1.) The Tribe has never complied with the Order to Compel Arbitration and continues to refuse to comply without any colorable legal justification. (Sanctions Order, 5CT 1125:2-3.) Finally, the superior court also expressly found that the Tribe's threatening letter of September 8, 2017 to AAA was "meant to intimidate the AAA from hearing the matter submitted by Mr. Findleton, directly contradicting and in contempt of this Court's order to compel the Tribe to submit to mediation and/or arbitration." (5CT 1126, ¶ 2.) Thus, the superior court expressly identified three contumacious actions by the Tribe formed the basis of the superior court's discretionary determination that the Tribe had violated the April 24, 2017 Order to Compel Arbitration:

(1) a continuing, unjustifiable refusal to obey the court order compelling mediation and arbitration;

Findleton will shortly be filing a motion to dismiss this appeal under the disentitlement doctrine. A formal determination of the facts relating to the aforementioned *fraud on the court* by this appellate court would be premature and unnecessary to affirm the Sanctions Order. The appellate court should be aware, however, that Findleton contests the question of the legitimacy of the CV Tribal Court as a constituent court of NCICS and will be litigating this issue in the superior court in his efforts to enforce four outstanding money judgments against the Tribe.

(2) the contumacious filing of a petition and motion in the CV Tribal Court on September 15, 2017 for declaratory and injunctive relief; and

(3) the threat made by the Tribe to AAA in its letter of September 8, 2017 that the Tribe would "publicize AAA's flippant disregard of tribal law, tribal courts and tribal sovereignty" in retaliation against the AAA, as the court stated, if AAA "entertained Mr. Findleton's Request for Mediation/Arbitration." [11] (5CT 1125, ¶ 2; 4CT 848-849, at 849, ¶ 1.)

(Sanctions Order, 5CT 1125, ¶ 2; 5CT 1126-1129; Motion for Temporary Restraining Order and Preliminary Injunction in CV Tribal Court (Sept. 15, 2017) ["CV Tribal Court TRO Motion"], 5CT 952-975.) *The Tribe did not include its September 15, 2017 petition to the CV Tribal Court in the designation of record, nor did the Tribe submit that petition to the superior court.* The superior court expressly found in connection with the filing of the September 15, 2017 petition that "the facts demonstrate the tribal filing was intended for the purpose of negating this Court's order [compelling arbitration of April 24, 2017]. The [September 15, 2017] petition was filed

11. The superior court's finding occurred both in its general statement of the facts supporting its Order to Compel Arbitration (5CT 1125, ¶ 2) and subsequently in its discussion of the Tribe's violation of Section 128.5 (5CT 1126, ¶ 2). This crucial factual finding is, however, relevant to the Tribe's violation of both 128.5 *and 177.5* in light of (i) the superior court's characterization of the act as "directly contradicting and in contempt of this Court's order to compel the Tribe to submit to mediation and/or arbitration" and (ii) the appellate precept that "all evidence must be viewed most favorably" to the respondent "in support of the order." (*Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531; (5CT 1126, ¶ 2; 4CT 848-849.)

after, and in response to, this Court's order [compelling arbitration of April 24, 2017]. It, and the Tribe's communications with AAA, were meant to intimidate the AAA from hearing the matter submitted by Mr. Findleton, *directly contradicting and in contempt of this Court's order to compel the Tribe to submit to mediation and/or arbitration*." (5CT 1126, ¶ 2 [italics added].)

B. Issuance of CV Tribal Court TRO and Permanent Injunction

On October 2, 2017, in response to the Tribe's September 15, 2017 petition and motion for injunctive relief, the CV Tribal Court issued an "Order Granting Temporary Restraining Order" ("CV Tribal Court TRO") captioned as being from the NCICS Court but bearing a case number lacking the NCICS prefix: 2017-01103-CO ("*Findleton CVTC Case*"). That CV Tribal Court TRO purported to "temporarily" enjoin "Defendants American Arbitration Association and Robert Findleton, and all those in active concert with them . . . from participating with mediation and/or arbitration of the case captioned *Findleton v. Coyote Valley Band of Pomo Indians,* Case No. NCICS-CV-0001-JW." (5CT 942-943 ["*Findleton NCICS Case*"]; 5CT 1125, ¶ 1.) The CV Tribal Court TRO was signed by the Honorable Joseph J. Wiseman in his capacity as "Chief Judge, Northern California Intertribal Court System." (5CT 943.) As the superior court expressly found in the Sanctions Order, "AAA stayed further proceedings" in response to the CV Tribal Court TRO. (5CT 1125, ¶ 2.) AAA made no jurisdictional finding.

On December 20, 2017, the CV Tribal Court issued an "Order Granting Plaintiff's Request for a Permanent Injunction" [CV Tribal Court Permanent Injunction"], captioned as being from the "Coyote Valley Band of Pomo Indians Tribal Court," but also bearing a case number lacking the NCICS prefix: CV-2017-01103-CO. (5CT 989-992; 5CT 1125, ¶ 1.) The CV Tribal Court Permanent Injunction purported to permanently enjoin the American Arbitration Association and Robert Findleton "from initiating arbitration, or otherwise enforcing the arbitration clause contained in the contracts that were the subject of this dispute . . . ." (5CT 992:15-17.) The CV Tribal Court Permanent Injunction was signed by the Honorable Joseph J. Wiseman in his capacity as "Judge, Coyote Valley Tribal Court," with no mention of NCICS in the signature block of the order. (5CT 943:11-12.) As the lower court expressly found, as a result of the issuance of the CV Tribal Court Permanent Injunction, "AAA closed their file and declined to hear the mediation or arbitration." (5CT 1125, ¶ 2.)

Contrary to the repeated false and misleading statements of the Tribe in its Opening Brief, *AAA never formally ruled it lacked jurisdiction.* It simply stayed and later closed the Findleton matter in response to the CV Tribal Court TRO and CV Tribal Court Permanent Injunction. (Compare OB 9, ¶ 1; 11-12; 16, ¶ 3; 25, ¶ 2 with 5CT 979, 974.)

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C. Two Alternative Bases for the Fee Award

The superior court ordered that the Tribe pay an award of costs and attorney's fees of $86,457 ("fee award") on two expressly differentiated, independent "alternative" bases:

(1) The superior court identified the first legal basis for the fee award as monetary sanctions under 128.5 that would reimburse Findleton for "expenses incurred [as] . . . 'a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay.'" (5CT 1126, ¶ 2.)

(2) The second independent "alternative basis" for the fee award was Findleton's contractual right to reimbursement for expenses incurred as prevailing party in his efforts to enforce his right to arbitrate his dispute with the Tribe. (5CT 1127, ¶ 2; Civ. Code, § 1717.)

In its Opening Brief, the Tribe failed to challenge the second independent, "alternative basis" of the fee award and has, therefore, waived its right to raise that issue in this appeal. (See texts and authorities, *infra,* at Section II.)

D. Other Litigation Misconduct Cited by the Trial Court

Other litigation misconduct that the superior court cited in the Sanctions Order relevant to a determination of the evidentiary basis for sanctions under both Sections 128.5 and 177.5 included the following express findings:

(1) On "September 8, 2017, the Tribe threatened AAA [in a letter from Tribal Chairperson Michael Hunter] that if it entertained Mr. Findleton's Request for Mediation/Arbitration, it would 'publicize AAA's flippant disregard of tribal law, tribal courts and tribal sovereignty.'" (5CT 1125, ¶ 2; 4CT 848-849, at 849, ¶ 1.) The Tribe's Opening Brief omits any mention of this misconduct in its

one-sided Statement of the Case except to refer misleadingly to "ancillary communications to the American Arbitration Association . . . associated with the litigation." (OB 8, ¶ 1.)

(2) The superior court stated that it was "also cognizant of the comment of counsel for the Tribe to the effect that from the Tribe's perspective 'this ceased to be about the merits a long time ago,'" which refers to a remark made by defense counsel Little Fawn Boland, Esq. at the July 27, 2018 hearing on Findleton's motion for sanctions. (5CT 1127, ¶ 2; 6CT 1218:45:11-12.) This remark is reproduced below in context:

> MS. BOLAND: . . . This 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.

(6CT 1218:45:11-16; see text and authorities cited at Section I(A), *supra*.)

E. Statutory Construction of Section 128.5

The superior court construed the September 15, 2017 tribal petition and motion for injunctive relief to constitute "actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay" that "were part of a civil case filed on or after January 1, 2015" under Section 128.5(a) and (i). (Code Civ. Proc., § 128.5, subds. (a) & (i).)

F. Procedural History of Order to Compel Arbitration

Prior to its tribal court filings on September 15, 2017, the Tribe had exhausted all appeals of the April 24, 2017 Order to Compel Arbitration. On August 14, 2017, the California Court of Appeal denied the Tribe's petition

for writ of mandate. (5CT 1124, ¶ 3.) On August 28, 2017, the California Supreme Court denied the Tribe's petition for review. (*Ibid.*)

STATEMENT OF APPEALABILITY

This appeal is from the judgment of the Mendocino County Superior Court and is authorized by Section 904.1(a)(12). (Code Civ. Proc., § 904.1, subd. (a)(12).

STATEMENT OF FACTS

The Statement of the Case and Statement of Facts (OB 8-15) in the Tribe's Opening Brief are incomplete and inaccurate in the following significant respects to the extent they:

(1) omit any express reference to the September 8, 2017 threatening letter the Tribe sent to AAA (5CT 1125, ¶ 2; 4CT 848-849, at 849, ¶ 1);

(2) omit any express reference of the remark made by the Tribe's counsel that its opposition to Findleton's enforcement action "ceased being about the merits of the case a long time ago" (5CT 1127, ¶ 2; 6CT 1218:45:11-12);

(3) falsely state that the AAA expressly found that it had no jurisdiction over the underlying dispute on the merits without citation to the actual AAA letters of October 17, 2017 and April 23, 2018 (Compare OB 9, ¶ 1; 11-12; 16, ¶ 3; 25, ¶ 2 with 5CT 979, 994);

(4) falsely state that the Sanctions Order was "silent on the application of the *Noerr-Pennington* doctrine" when that topic was expressly mentioned as having been considered by the superior court (OB 9, ¶ 2; 5CT 1124, ¶ 1);

(5) falsely state that the "*only* issue" that had been decided in *Findleton I* by the appellate court as of January 26, 2017, the date the NCICS Court accepted jurisdiction to hear the Tribe's original petition, was the "question of whether the agreements at issue waived the Tribe's sovereign immunity" when, in fact, *Findleton I* had also expressly held that the waiver of tribal sovereign immunity extended "to arbitration of disputes" regarding the underlying agreements and "to judicial enforcement of the right to arbitrate and of any arbitration award, as indicated by the arbitration provision of the agreements" (*Findleton I,* 1 Cal.App.5th at p. 1217; *Findleton II*, 27 Cal.App.5th at pp. 571-572);

(6) falsely and misleadingly state that the parties had agreed that the "merits of the dispute" were "governed by Tribal law and only the jurisdiction of the Tribe" (OB 12, ¶ 2);

(7) falsely state without any support in the record that at "every step of the way, the Tribe sought to ensure the Superior Court had a full understanding of the Tribal Court proceedings and always kept the Court informed of the status of the actions in Tribal Court" (OB 12-13; see text and citations at fn. 10, *supra,* pp. 20─21.);

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(8) omit any mention that Findleton did ***not*** receive any personal service whatsoever in either tribal court action (OB 13:1-20; 4CT 741:12-17; 4CT 750:9-10; 1CT 239 [NCICS Rules of Court Procedure and Practice, rule 8(A) [requiring "personal service" of the petition].)

(9) omit any mention that the Tribe's counsel engaged in extensive ex parte communications with AAA (Compare OB 12-13 with OB 28, ¶ 1 and 5CT 926:3-20, ¶¶ 17-19); and

(10) misleadingly characterize and dispute the superior court's finding that the intent and effect of the tribal court filing for injunctive relief was to "negate" (5CT 1126, ¶ 2) the Order to Compel Arbitration by citing the self-serving declaration of the Tribe's own counsel in support of this attempt to reargue the factual determination of the superior court. (OB 14, ¶ 2, citing 5CT 1105-1107.)

ARGUMENT

STANDARD OF REVIEW AND SCOPE OF APPEAL

The statement of the relevant standard of review in the Tribe's Opening Brief is both inaccurate and incomplete. (OB 15-16.)

A. Standard of Review for Fee Award

Only the issue of statutory authorization for the attorneys' fee award *as a sanction for litigation misconduct* under Section 128.5 is reviewed de novo. (*Carpenter v. Jack in the Box* (2007) 151 Cal.App.4th 454, 460 [italics added] ["*Carpenter*"]; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311.)

In contrast, appellate review of the "alternative basis for the award of fees" to Findleton as the prevailing party under the contract is reviewed under the "abuse of discretion standard." (*Carpenter,* 151 Cal.App.4th at p. 460.)

B. Abuse of Discretion Standard of Review

The abuse of discretion standard also applies to all discretionary superior court rulings concerning whether the conduct of the Tribe was sanctionable, including, as the Tribe concedes in its Opening Brief, any superior court determination of "whether the act of filing suit in the Tribal Court was frivolous or without good cause under CCP 128.5 and CCP 177.5." (OB 16, ¶ 2; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 ["*Denham*"]; *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 ["*Sargon*"].)

C. Doctrine of Implied Findings Applies

Since the Tribe made no request under Section 632 for a "statement of decision" following the Sanctions Order, the appellate court must presume that the superior court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793; *Lien v. Lucky United Properties* (2008) 163 Cal.App.4th 620, 623-624; *DuPont Merck Pharmaceutical Company v. Superior Court* (2000) 78 Cal.App.4th 562, 564; Code Civ. Proc., §§ 632, 634; OB 23-40.)

D. De Novo Review of Questions of Law

The issues raised in Sections II, III and IV of the Opening Brief relating to (i) the litigation privilege under Civil Code Section 47 and Section 128.5, (ii) the *Noerr-Pennington* doctrine, and (iii) state court jurisdiction to sanction the on-reservation conduct of the Tribe under Sections 128.5, 177.5 and Public Law 280 should all be reviewed de novo as questions of law. (Civ. Code, § 47; Code Civ. Proc., §§ 128.5, 177.5; Public Law 280, Pub.L. No. 83–280 (Aug. 15, 1953) 67 Stat. 588) *codified at* 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326 & 28 U.S.C. § 1360 ["*Public Law 280"*].)

E. Effect of Omission and Mischaracterization of Adverse Facts

The Tribe had a legal obligation to fairly, accurately and objectively summarize the material evidence of its misconduct *free of bias* in its Statement of the Case and Statement of Facts. (*Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531 [opening brief must accurately and fairly state critical facts free of bias] ["*Davenport*"]; Cal. Rules of Court, rule 8.204, subd. (a)(2)(C); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) § 9:27, p. 9-8 ["*Eisenberg*"].) The Tribe's Statement of the Case and Statement of Facts is one-sided and self-serving; it merely attempts to reargue the facts as the Tribe would prefer them to have been found. (OB 8-15.) Its Statement of the Case and the Statement of the Facts are so flagrantly biased, the Tribe must be deemed to have waived any "contention that the findings are not supported by

substantial evidence." (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738; *Eisenberg,* § 9:27, p. 9-8.)

I. NEITHER THE COURT-IMPOSED SANCTIONS NOR THE ASSERTION OF STATE COURT JURISDICTION TO ENFORCE THE ARBITRATION AGREEMENT IN ANY WAY VIOLATES THE TRIBE'S RIGHT OF SELF-GOVERNMENT OR OTHER FUNDAMENTAL RIGHTS.

A. Indian tribes are not "independent political nations."

By its own admission, the Tribe's defiance of the Order to Compel Arbitration is ***not*** based on any reasonable argument arising from the "merits" of the enforcement action (5CT 1127, ¶ 2; 6CT 1218:45:11-12), but, rather, springs from its idiosyncratic determination to vindicate a totally untenable, transparently frivolous claim that tribal sovereignty and tribal sovereign immunity are identical to those enjoyed by **"independent political nations"** (OB 29, fn. 4, 39, 40), while thrice relying on a wildly mistaken Comment by the California Judicial Council to California Rule of Court 10.60 for that insupportable proposition. (OB 29, 39, 40; Judicial Council of Cal., comment, following Cal. Rules of Court, rule 10.60 ["*Rule 10.60 Comment*"] [boldface added].)

The *Rule 10.60 Comment* lacks any precedential value whatsoever as a source of federal Indian law and must be deemed a nullity.[12] None of the

12. The California Judicial Council is constitutionally authorized only to "adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute." (Cal. Const., art. VI, § 6, subd. (d).) Further, the "rules adopted shall not be inconsistent with

sources cited in that mistaken comment use the phrase "independent political nations."[13] In fact, the legally operative phrase that does correctly characterize the legal status of Indian tribes is **"domestic dependent nations"** which are only quasi-sovereign and subject to the "plenary control

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statute." (*Ibid.*) Since 1871, federal statute has expressly mandated that "[n]o Indian nation or tribe within the territory of the United states shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." (Indian Appropriations Act of March 3, 1871, Sess. 3, ch. 120 (Mar. 3, 1871) 16 Stat. 544, 566, now codified at 25 U.S.C. § 71.) Any rule or comment promulgated beyond the Judicial Council's constitutionally delegated authority or inconsistent with statute is "invalid." (*Calif. Court Reporters v. Jud. Council of Calif.* (1995) 39 Cal.App.4th 15, 21-22, 33-34.) Since the legal characterization of Indian tribes as "independent political nations" is incorrect, concerns a subject about which the Judicial Council lacks legal authority to comment and is inconsistent with statute, it must be deemed a nullity and of no precedential value as legal authority. (*Ibid.*) The *Rule 10.60 Comment* goes on to mistakenly cite the 2005 edition of the Cohen treatise for the proposition that the "government-to-government relationship" enjoyed by Indian tribes extends to "all other sovereigns" when, in fact, that treatise and federal law only recognize "tribes as sovereigns in a government-to-government relationship with the United States" and no other foreign state. (*Rule 10.60 Comment;* Cohen's Handbook of Federal Indian Law (2005 ed.) Inherent Tribal Sovereignty, § 4.01[1][a], p. 207.)

13. In *Worcester v. Georgia*, the U.S. Supreme Court stated in 1832 that "Indian nations . . . had always been considered as distinct, independent political *communities,*" not "independent political *nations,"* and made clear that its use of that phrase was then only referring to the *past legal status* of the tribes. (*Worcester v. Georgia* (1832) 31 U.S. 515, 559 [italics added].) Similarly, in *Santa Clara Pueblo v. Martinez*, the high court used in 1978 the phrase "independent political *communities*," not "independent political *nations*," in reference to tribal "matters of local self-government" and clearly did not intend to equate tribal sovereignty to that of independent nation-states. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55, 72, fn. 32, citing *Worcester*.)

by Congress." (*Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 134 S.Ct. 2024, 2030 [emphasis added] ["*Bay Mills*"]; *United States v. Lara* (2004) 541 U.S. 193, 194, 199-200, 204, 215, 217, 219, 224-226.)

B. The Tribe's attempt to relitigate the issue of state court subject matter jurisdiction is barred by the law of the case.

The Tribe's Opening Brief (OB 10-13, 16, 26, 30, 32-33, 35, 38, 41-44) is permeated with spurious attempts to revisit the question of state court subject matter jurisdiction to enforce the arbitration agreement under the Federal Arbitration Act ("FAA")[14] in violation of the settled law of the case

14. Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. In *Southland*, the U.S. Supreme Court held that the FAA is a substantive body of law that is binding on both state and federal courts. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 16 ["*Southland*"].) As the U.S. Supreme Court has specifically emphasized, "the FAA's 'substantive' provisions—§§ 1 and 2—are applicable in state as well as federal court . . . ." (*Volt Information Sciences v. Leland Stanford Jr. University* (1989) 489 U.S. 468, 477 n.6.) FAA Section 1 defines the term "commerce," and Section 2 is "the primary substantive provision of the FAA . . . ." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 384 ["*Cronus*"]; (9 U.S.C. §§ 1-2.) As the *Concepcion* court noted, the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 341, 343-344 ["*Concepcion*"].) Further, tribal contracts have been expressly held subject to the FAA as agreements in "commerce." (*Wisconsin v. Ho-Chunk Nation* (W.D. Wis. 2007) 478 F. Supp. 2d 1093, 1100-1101, revd. in part on other grounds, *Wisconsin v. Ho-Chunk* (7th Cir. 2008) 512 F.3d 921, 936 n.5.) State contractual, procedural law and evidentiary law applies in this case under the preemptive mandate of FAA Section 2. (9 U.S.C. § 2; *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 59.) "*Concepcion* teaches that [courts] must be alert to new devices and formulas that would" obstruct arbitration. (*Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1623; *Concepcion,* 563 U.S. at p. 342.)

and defiance of this Court's admonition that the Tribe may not continuously "relitigate jurisdictional issues without regard to prior decisions in the case addressing those very same issues." (*Findleton II,* 1 Cal.App.5th at p. 571.)

Yet this is precisely what the Tribe continues to do in its Opening Brief by attempting to relitigate the question of whether the Tribe had waived tribal sovereign immunity and is subject to state court jurisdiction to enforce Findleton's right to arbitrate. (OB 10-13, 16, 26, 30, 32-33, 35, 38, 41-44; *Findleton II,* 27 Cal.App.5th at pp. 571-572.) Indeed, this appellate court has expressly identified the very jurisdictional arguments the Tribe attempts to relitigate yet again in its Opening Brief as being barred by the law of the case. (*Findleton II,* 27 Cal.App.5th at p. 572.) Thus, the tribe's jurisdictional arguments must be summarily rejected.

C. Neither Public Law 280 nor *Williams v. Lee* prohibit the attorney fee award or court-imposed sanctions because the Tribe waived its sovereign immunity to suit and agreed to arbitration under the Federal Arbitration Act.

In attempting to relitigate the question of state court subject matter jurisdiction, yet again, on the supposed authority of both Public Law 280 and *Williams v. Lee*, the Tribe reached the apotheosis of frivolity as both of these authorities are totally irrelevant to this suit. (Public Law 280, Pub.L. No. 83–280 (Aug. 15, 1953) 67 Stat. 588) codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326 & 28 U.S.C. § 1360; *Williams v. Lee* (1959) 358 U.S. 217 ["*Williams*"]). Neither Public Law 280 nor *Williams* apply in the present

factual context where the Tribe has both **(1)** waived sovereign immunity and **(2)** agreed to arbitration and state court enforcement as governed by the AAA Construction Industry Arbitration Rules and Mediation Procedure in the choice-of-forum provision of the underlying contract. (*Findleton I*, 1 Cal.App.5th at pp. 1191 [cited AAA rules apply], 1217 [Tribe "effected an express waiver of the [its] immunity that was clear and unequivocal"].)

Public Law 280 left intact both the sovereign immunity of California tribes and their inherent right to waive such immunity as an expression of their sovereign rights. (18 U.S.C. § 1162, subd. (b).) Thus, any limitation on the exercise of state court jurisdiction over a tribe is self-evidently applicable only in cases in which there has been no waiver of tribal sovereign immunity nor any tribal consent to arbitrate. (*Wisconsin v. Ho-Chunk Nation* (W.D. Wis. 2007) 478 F. Supp. 2d 1093, 1100-1101, revd. in part on other grounds, *Wisconsin v. Ho-Chunk* (7th Cir. 2008) 512 F.3d 921, 936 n.5, 937 [arbitration permissible where there has been a tribal waiver of sovereign immunity in Wisconsin, a mandatory Public Law 280 state the same as California]; 18 U.S.C. § 1162, subd. (a); 28 U.S.C. § 1360, subd. (a) [listing California and Wisconsin mandatory Public 280 states].)

Further, the Tribe has *failed to cite a single case* in which any court has held that Public Law 280 would prevent a state court from adjudicating a party's right to enforce an arbitration agreement against a tribe that has

waived sovereign immunity and expressly agreed to arbitration, as occurred here. (OB 8-44.)

Since *Williams* involved no express waiver of tribal sovereign immunity nor any binding choice-of-forum provision in the underlying contract selecting an arbitral forum, rather than a tribal court, for dispute resolution, as occurred here, it is easily distinguished on the facts. Here the Tribe exercised its sovereign prerogative by choosing an arbitral forum and waiving sovereign immunity. (*Findleton I,* 1 Cal.App.5th at p. 1217.) No such sovereign choice to wave immunity was made in *Williams,* which renders it completely inapposite. (*Williams,* 358 U.S. at pp. 218-223.)

D. The superior court had clear jurisdiction to award sanctions under Sections 128.5 and 177.5 even though the Tribe's misconduct consisted, in part, of the "on-reservation" filing of a separate civil action in its putative tribal court intended to "negate" the Order to Compel Arbitration.

Contrary to the settled law of the case, the Tribe also frivolously argues that its "on-reservation" conduct somehow still enjoys residual territorial immunity from state court jurisdiction even after it has waived tribal sovereign immunity. (OB 9, ¶ 3; 15, ¶ 6; 16:1; 16, ¶¶ 1, 4; 40-44.) The Tribe cites no case authority in support of this unprecedented and logically incoherent position. (OB 8-44.) This is just another vain attempt to relitigate the issue of its waiver of sovereign immunity and the state court's subject matter jurisdiction in yet a different guise.

The Tribe is a party before the Mendocino County Superior Court and subject to its jurisdiction for litigation misconduct both within and "beyond the courtroom," as are its attorneys as officers of the court,[15] including misconduct that occurs before a tribunal of another jurisdiction, such as the putative tribal court here, and especially where such misconduct subverts a state court order or involves a deliberate effort to relitigate issues already decided by the state court in an attempt to obtain a different result. (*Chambers v. Nasco, Inc.* (1991) 501 U.S. 32, 34 [holding that the superior court "did not err in imposing sanctions for conduct before other tribunals, since, as long as [the offending party] received an appropriate hearing, he may be sanctioned for abuses of process beyond the courtroom."] ["*Chambers*"]; see text and authorities cited herein at Section VI(B), *infra.*) Obviously, by waiving sovereign immunity, the Tribe also inextricably waived any defense based on the location of its litigation misconduct, whether on or off the reservation. (See *Bay Mills,* 134 S. Ct. at pp. 2028, 2035 [observing that a waiver of sovereign immunity would apply to otherwise immune off-reservation tribal commercial activity].) No residual "on-reservation" territorial immunity could logically survive a waiver of tribal sovereign immunity without rendering such waiver totally meaningless

15. *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 337 fn. 6 quoting *Ex Parte Garland* (1866) 71 U.S. (4 Wall.) 333, 378-379; *People v. Mattson* (1959) 51 Cal.2d 777, 793.

and ineffective. Indeed, all the authorities marshaled by the Tribe in support of immunity for its "on-reservation" conduct involved cases in which there had been no waiver of tribal sovereign immunity and no consent to dispute resolution in an arbitral forum, thereby rendering them all irrelevant. (See cases and authorities cited by the Tribe at OB 40-44.)

E. The Tribe's reliance on *Knighton* as a defense to court-imposed sanctions is frivolously mistaken.

The Tribe's reliance on the Ninth Circuit's recent decision in *Knighton* as a defense to court-imposed sanctions is frivolously mistaken. (*Knighton v. Cedarville Rancheria of Northern Paiute Indians* (9th Cir. 2019) 922 F.3d 892 ["*Knighton*"]; OB 39-40.) *Knighton* is easily distinguished. *Knighton* did not involve an attempt, as has occurred here, by a tribal court to divest the jurisdiction of a state court after years of state court litigation during which time no tribal court even existed, which is precisely the crucial fact that persuaded this appellate court to apply *Krempel* and its progeny to uphold continuing state court enforcement jurisdiction in this case. (*Findleton II,* 27 Cal.App.5th at pp. 573-575; *Krempel v. Prairie Island Indian Community* (8th Cir. 1997) 125 F.3d 621, 623 ["*Krempel"*]; *Knighton,* 922 F.3d at pp. 895-898.) Rather, in *Knighton,* the plaintiff Tribe first filed a tort suit against defendant Knighton, a non-Indian and former tribal employee, in tribal court, which rightfully had primary jurisdiction. (*Ibid.,* at pp. 898-907.) Knighton then challenged the tribal court's subject

matter jurisdiction in federal court, which held the tribal court had jurisdiction. (*Ibid.,* at pp. 906-907.)

In *Knighton,* there was no issue of competing jurisdiction between a state and tribal court to enforce an arbitration agreement, nor any waiver of tribal sovereign immunity, nor years of state court litigation prior to the creation of the tribal court, nor any doubt about the existence of applicable tribal law. (*Knighton,* 922 F.3d at pp. 895-899, 906.) Unlike the present case, in *Knighton,* the applicable tribal rules were in existence and known to the non-Indian litigant during the term of the relevant contract. (*Ibid.,* at pp. 896, 903, 905-907.) In the present case, the record is clear that there was no applicable tribal law in existence when the underlying contract was formed and amended. (*Findleton I,* 1 Cal.App.5th at pp. 1199, fn. 3, 1207, fn. 8.)

Indeed, *Knighton* held that "the Personnel Manual regulated the conduct that forms the basis of the Tribe's claims against Knighton and conferred jurisdiction over her conduct as Tribal Administrator on the Community Council." (*Knighton,* 922 F.3d at p. 906.) Thus, if *Knighton* is relevant to this case at all, it is to establish that the uncontested absence of any tribal law applicable to the underlying contract at any time relevant to contract formation or amendment effectively prevents the Tribe from subsequently asserting jurisdiction over the issue of enforcement of the arbitration agreement (*Ibid.*)

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II. SINCE THE TRIBE FAILED IN ITS OPENING BRIEF TO RAISE THE ISSUE OF THE FEE AWARD TO FINDLETON AS THE PREVAILING PARTY UNDER THE CONTRACT AND DECLINED TO APPEAL THE AMOUNT AWARDED, THE TRIBE HAS WAIVED THAT ISSUE ON APPEAL.

A. An appellant's failure to raise an issue in its opening brief waives the issue on appeal.

The failure of an appellant to raise an issue in its opening brief waives that issue on appeal and the appellant is thereafter precluded from arguing that issue during the appeal. (*Katelaris v. County of Orange* (2001) 92 Cal.App.4th 1211, 1216, fn. 4, *as modified at* 93 Cal. App. 4th 1158f [holding that "an issue is waived when not raised in appellant's opening brief."] ["*Katelaris*"]; *Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [same] ["*Tisher*"]; *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 [holding that "points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before."] ["*Balboa*"]; *In re Marriage of Millet* (1974) 41 Cal.App.3d 729, 732 [same] ["*Millet"*].)

B. The Tribe failed to raise in its Opening Brief the issue of the fee award as the prevailing party under the contract.

The Tribe has failed to raise in its Opening Brief the *second alternative, independent basis* for the award of attorneys' fees specified in the December 10, 2018 Order Granting Motion for Sanctions ('Sanctions Order") as an issue in this appeal. In that Sanctions Order, the superior court expressly based its award of attorneys' fees in the amount of $86,457 on two

alternative, independent grounds. First, it awarded Findleton fees as monetary sanctions under Section 128.5. (5CT 1124-1129, at 1126-1129; Code Civ. Proc., § 128.5.) Second, the superior court expressly awarded attorneys' fees to Findleton as the prevailing party under the contract. (5CT 1147, ¶ 2; Civ. Code, § 1717.) As the superior court ruled in the Sanctions Order, "[a]n alternative basis for award of fees sought is that this motion is *simply part of Findleton's continuing quest to enforce his contractual right to arbitrate*." (*Ibid.* [italics added].)

Findleton's contractual right to recover attorneys' fees incurred while enforcing his contractual right to arbitrate under the merged contracts ("contract") is already the settled law of the case as stated in two previous published opinions arising from this litigation. (*Findleton I,* 1 Cal.App.5th at p. 1217 [holding the Tribe's waiver of sovereign immunity "extended to judicial enforcement of the right to arbitrate and of any arbitration award, as indicated by the arbitration provisions of the agreements . . . ."]; *Findleton II,* 27 Cal.App.5th at pp. 569-570 [holding that the merged contracts, treated as one contract, permit the prevailing party to recover attorneys' fees]; Code Civ. Proc., § 1642.) The Sanctions Order expressly acknowledges that *Findleton II* "resulted in a determination that judicial enforcement of the right to arbitrate includes awarding fees specifically incurred to enforce that right." (5CT 1125, ¶ 3.) The superior court further explained that *Findleton II* "found that the tribe [sic] had waived sovereign immunity with respect to a

claim for fees Findleton incurred in enforcing his right to arbitrate." (5CT 1125-1126.)

Despite the clear articulation by the superior court of an independent, "alternative basis" for the award of attorneys' fee in the Sanctions Order, the Tribe failed to make any mention whatsoever of that other *contractual* basis for the fee award in its Opening Brief. (OB 8-44.) The Tribe only challenged the fee award as unauthorized monetary sanctions under Section 128.5. (OB 8, ¶ 2; 9, ¶ 1; 10, ¶¶ 1-2; 15, ¶¶ 3-4; 16, ¶ 1; 17-23; 44, ¶ 2.)

C. The Tribe also failed to raise the issue of the fee award to Findleton as prevailing party under the contract as being proscribed on any other legal grounds.

The Tribe also expressly waived by omission in its Opening Brief any challenge to the alternative *contractual* basis of the fee award pursuant to Civil Code Section 47, the *Noerr-Pennington* doctrine or any other legal grounds. (OB 23-44.) (*Katelaris,* 92 Cal.App.4th at p. 1216, fn. 4, *as modified at* 93 Cal. App. 4th 1158f; *Tisher,* 231 Cal.App.3d at p. 361.) Under the alternative *contractual* basis, the fee award became, not a sanction for litigation misconduct that somehow deterred access to the courts or expressive activity, but rather merely "an element of the costs of suit" shifted from Findleton to the Tribe in accordance with the terms of the contract between them. (Civ. Code, § 1717.) The Tribe has waived all those issues in this appeal by failing to raise them in its Opening Brief. (OB 8-44.)

D. The Tribe expressly waived any appeal of the amount of the fee award in its Opening Brief.

In its Opening Brief, the Tribe expressly declined to appeal or contest in any way the amount of the fee award of $86,457, which had been reduced by the superior court from the originally requested sum of $170,455.06. (OB 9, fn. 2; 5CT 1127, ¶ 2.) The Tribe conceded that the it "does not appeal the amount of the sanctions granted under either code provision." (*Ibid*.)

E. Since the Tribe completely waived the issue of the fee award to Findleton under the contract, the reviewing court must affirm the full amount of the fee award to Findleton as prevailing party.

Having failed to raise the issue of the fee award as a reimbursable expense of the prevailing party under the contract, i.e., the "alternative basis" of such fee award, the Tribe must be held to have waived that issue on appeal with the result that the fee award must be affirmed its entirety. (*Katelaris*, 92 Cal.App.4th at p. 1216, fn. 4, *as modified at* 93 Cal. App. 4th 1158f.)

III. THE TORT LITIGATION PRIVILEGE OF SECTION 47 UNDOUBTEDLY DOES NOT APPLY TO COURT-IMPOSED SANCTIONS FOR VIOLATIONS OF THE ORDER TO COMPEL ARBITRATION UNDER SECTIONS 128.5 AND 177.5.

Section 47 manifestly does not preclude this Court's sanctions under Section 128.5 or 177.5 based on (1) the Tribe's refusal to mediate or arbitrate or (2) its contumacious filing of a petition for injunctive relief in a putative

tribal forum. The Tribe's argument under Civil Code Section 47 ("Section 47") is frivolous in its face. (Civ. Code, § 47.)

A. The issue whether Section 47 bars judicially imposed sanctions for tribal court filings in violation of the Order to Compel Arbitration is subject to the de novo standard of review.

The issue whether Section 47 bars, as a matter of law, judicially imposed sanctions for the violation of the Order to Compel Arbitration is subject to the de novo standard of review as a question of statutory interpretation. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Daugherty v. City & County of San Francisco* (2018) 24 Cal.App.5th 928, 944.)

B. Section 47 only applies to bar derivative tort actions based on statements made in or related to judicial proceedings.

There is absolutely no doubt that Section 47 in the present context would only bar Findleton from bringing a *separate, derivative tort lawsuit* against the Tribe based on any "'publication or broadcast" made "in any . . . judicial proceeding." (Civ. Code, § 47.) The "principal purpose" of Section 47 "is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by *derivative tort actions*." *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 830-31 [emphasis added]; *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578, 586-587 [holding Section 47 "operates to limit tort liability."].) Indeed,

Section 47 "applies only to *tort causes of action*." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [emphasis added].)

C. As a matter of statutory construction, Section 47 does *not* apply to court-imposed sanctions within the underlying case for violations of the Order to Compel Arbitration.

Section 47 does not prohibit the judicially imposed sanctions here. Indeed, the Tribe's Opening Brief fails to cite a single case that even suggests, much less holds, that Section 47 bars the imposition of sanctions based on litigation misconduct. (OB 29-33.) On the contrary, it is the settled law in California that Section 47 in no way precludes an award of sanctions by a superior court. (*Rushee v. Cohen* (2006) 37 Cal.4th 1048, 1054-1055; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1204.) Thus, rather than prohibit judicially imposed sanctions for litigation misconduct, Section 47, as construed by the California Supreme Court, actually permits sanctions imposed by the superior court in the core proceedings as a preferred remedy to any derivative tort action proscribed by the Section 47 privilege. (See also *G.R. v. lntelligator* (2010) 185 Cal.App.4th 606, 610, 618; *Friedman v. Knecht* (1967) 248 Cal.App.2d 455, 462; *People v. Persolve,* LLC (2013) 218 Cal.App.4th 1267, 1274 [emphasizing Section 47 "seeks to encourage free access to the courts and finality of judgments by limiting tort claims arising out of litigation-related misconduct and by *favoring sanctions within the original lawsuit*."] [emphasis added].)

Indeed, if Section 47 barred judicially imposed sanctions, statutes enacted to address defiance to court orders and improper litigation tactics would be rendered useless and the inherent power of superior courts to control their own proceedings would be substantially subverted. (*Canatella v. Stovitz* (N.D.Cal. 2005) 365 F.Supp.2d 1064, 1080-1081.)

Finally, the Tribe's refusal to participate in court-ordered mediation or arbitration is not a "publication or broadcast" related to a "petition for redress of grievances" and, therefore, not within the litigation privilege of Section 47. (Civ. Code, § 47; *In re Mann* (7th Cir. 2002) 311 F.3d 788, 790 ("Defiance of a judicial order is not a 'petition [to] the Government for a redress or grievances' protected by the first amendment.") Thus, under the de novo standard of review, there can be no doubt that Section 47, as a matter of statutory construction, does not apply to bar judicially imposed sanctions and the Sanctions Order must, therefore be affirmed.

D. Since the Tribe's Section 47 claim was only raised in its Opening Brief with respect to (1) its tribal court filings and *not* with respect to (2) its *independent, continuing act of defiance to the Order to Compel Arbitration*, the Tribe waived the latter issue under Section 47 in this appeal.

The Tribe only raised in its Opening Brief the issue whether the Section 47 litigation privilege applies to prohibit sanctioning the Tribe for its resort to tribal injunctive relief and not with respect to its prior and continuing refusal to comply with the Order to Compel Arbitration independent of such

tribal court filings. (OB 29-33.) The Sanctions Order was granted on multiple grounds specifying multiple defiant acts by the Tribe, including first and foremost the Tribe's initial act of refusing to "participate in the mediation or arbitration," as well as its subsequent obstructive, contumacious tribal court filings and the threats made to AAA in its September 8, 2017 letter. (5CT 1125, ¶¶ 1-2, 1126, ¶ 2, 1127, ¶ 1.) The superior court made clear during oral argument that it did not consider the independent contumacious act of refusing to obey the Order to Compel Arbitration as falling within the Section 47 litigation privilege and there is no basis to interpret the Sanctions Order otherwise. (6CT 1211:15:22-25—1211:16:1-2.)

Thus, the Tribe has waived the issue of whether the Section 47 litigation privilege applies to its contumacious refusal to comply with the Order to Compel Arbitration by failing to raise that question in its Opening Brief, independent of its Section 47 defense of the putative tribal court filings. (OB 27-33; *Katelaris,* 92 Cal.App.4th at p. 1216, fn. 4, *as modified at* 93 Cal.App.4th 1158f; *Tisher,* 231 Cal.App.3d at p. 361; *Balboa,* 149 Cal.App.3d 1002, 1010; *Millet*, 41 Cal.App.3d at p. 732.)

E. Imposition of the Sanctions Order is amply warranted by substantial evidence under the abuse of discretion standard.

The Tribe incontestably defied the superior court's Order to Compel Arbitration and continues to do so as an independent, continuing act in violation of such Order, quite apart from any filings in the putative tribal

forum, and the Sanctions Order expressly so found. (CT 1125, ¶ 1.) The court obviously did not abuse its discretion in recognizing the Tribe's inexcusable defiance of such Order or by imposing sanctions on the Tribe as a consequence under both Sections 128.5 and 177.5. (*Denham*, 2 Cal.3d at p. 566; *Sargon,* 55 Cal.4th at p. 773.)

IV. THE *NOERR-PENNINGTON* DOCTRINE UNDOUBTEDLY DOES NOT APPLY TO COURT-IMPOSED SANCTIONS FOR VIOLATIONS OF THE ORDER TO COMPEL ARBITRATION UNDER SECTIONS 128.5 AND 177.5.

A. The application of the *Noerr-Pennington* doctrine is subject to de novo review.

The superior court's ruling in the Sanctions Order that the *Noerr-Pennington* doctrine does not immunize the Tribe's tribal court action from sanctions under Sections 128.5 and 177.5 may be reviewed de novo as a pure question of law. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 C4th 1185, 1191; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

B. *Noerr-Pennington* doctrine only applies to bar *civil lawsuits* based on constitutionally protected petitioning activity.

The *Noerr-Pennington* doctrine derives from the First Amendment's guarantee of "the right of the people . . . to petition the Government for a redress of grievances." (U.S. Const., 1st amend.; *Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 929.) Like Section 47, the *Noerr-Pennington* doctrines bars only *civil liability* and is meant to preclude only separate,

derivative civil lawsuits based on a defendant's petitioning the government for redress as protected by the First Amendment. (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 964 ["The *Noerr-Pennington* doctrine has been extended to preclude virtually all *civil liability* for a defendant's petitioning activities."] [emphasis added].) It does not apply outside of that context. *Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, 1344.)

C. The *Noerr-Pennington* doctrine does not apply to court-imposed sanctions for litigation misconduct.

In the seminal case of *BE&K Constr. Co. v. NLRB,* the U.S. Supreme Court held that the *Noerr-Pennington* doctrine did not bar sanctions for litigation misconduct. (*BE&K Constr. Co. v. NLRB* (2002) 536 U.S. 516, 536-537 ["*NLRB*"].) Although the *NLRB* Court predictably rejected the imposition of civil liability by the National Labor Relations Board under *Noerr-Pennington* based on the employer's unsuccessful lawsuit against a union, the *NLRB* majority expressly held that its ruling did not bar sanctions for litigation misconduct: "nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves -- such as those authorized under Rule 11 of the Federal Rules of Civil Procedure." (*Ibid.,* at p. 536; see also *Kentish v. Modahcom, Inc.* (M.D.Fla. 2008) 566 F.Supp.2d 1343, 1349 [despite *Noerr-Pennington,* "litigation sanctions" permissible]; *Behrmann v. Natl Heritage Found., Inc.*

(*In re Nat'l Heritage Found., Inc.*) (E.D.Va. 2014) 510 B.R. 526, 542 [*Noerr-Pennington* "has no application here, where the liability appellants seek to avoid is not antitrust liability, but a finding of contempt"].) Thus, the Tribe's *Noerr-Pennington* claims do not in any way invalidate the court-imposed sanctions under Section 128.5 and 177.5. (*Ibid.*)

D. 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.

The Tribe cites no authority that it has a First Amendment right to petition its own tribal court because none exists. (OB 34-37.) A foundational principle of federal Indian law is that "Indian tribes are not constrained by the provisions of the United States Constitution, which are framed specifically as limitations on state or federal authority." (Cohen's Handbook of Federal Indian Law (2005 ed.) Sovereign Immunity § 4.05[2][a], p. 212; Cohen, Handbook of Federal Indian Law (1942) ch. 2, § 7, p. 124 [constitutional constraints on "federal courts or upon Congress . . . do not apply to the courts or legislatures of the Indian tribes."]; ch. 8, § 10(B), p. 181 ["The provisions of the Federal Constitution protecting personal liberty and property rights do not apply to tribal action."] ["*Cohen 1942*"].) In the seminal decision of *Talton v. Mayes*, the U.S. Supreme Court held in 1896 that the Fifth Amendment did not "operat[e] upon . . . the powers of local

self-government enjoyed" by the tribes because Indian tribes predated the Constitution and did not derive their authority from it, although they remain subject to the "paramount authority of Congress." (*Talton v. Mayes* (1896) 163 U.S. 376, 382, 384 ["*Talton*"].)

In the ensuing years, the lower federal courts have extended the holding in *Talton* to other provisions of the Bill of Rights, including the First Amendment. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 56 ["*Martinez*"]; *Native American Church v. Navajo Tribal Council* (10th Cir. 1959) 272 F.2d 131 [First and Fourteenth Amendments]; *Settler v. Lameer* (9th Cir. 1974) 507 F.2d 231, 241 [Sixth and Fourteenth amendment right to counsel not applicable to tribal courts]; *Tom v. Sutton* (9th Cir. 1976) 533 F.2d 1101, 1102-1103 [emphasizing federal constitutional restraints are "inapplicable to Indian tribes, Indian courts and Indians on the reservation"].) Thus, it is now axiomatic that both state and federal courts are without any subject matter jurisdiction to apply First Amendment protections or restraints directly to Indian tribal governments, such as the Tribe, because that provision of the federal constitution does "not apply to tribal action." (*Cohen 1942,* ch. 8, § 10(B), p. 181; *Lamere v. Superior Court* (2005) 131 Cal.App.4th 1059, 1063 ["*Lamere*"].) Since 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 and, thus, no subject matter jurisdiction to construe or apply such

First Amendment right. The *Noerr-Pennington* doctrine is totally inapplicable because the Tribe has no First Amendment right cognizable by the appellate court that would operate as a constraint on the adjudicatory powers of a state superior court.[16] The lack of subject matter jurisdiction cannot be waived and may be raised at any time, even for the first time on appeal. (*People v. Lara* (2010) 48 Cal.4th 216, 225; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 372; *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union, Local 16* (1968) 69 Cal.2d 713, 721.)

E. The *Noerr-Pennington* defense was waived by the Tribe in the superior court when it failed to raise that claim in the first round of briefing on Findleton's motion for sanctions.

As Findleton argued below (5CT 1066-1067), the Tribe waived its *Noerr-Pennington* defense to Findleton's motion for sanctions in the lower court when it failed to raise that claim in both the initial round of briefing (5CT 997-1013) and during oral arguments (6CT 1207-1220) at the initial July 27, 2018 hearing. The court-ordered supplemental briefing was strictly limited to submissions on the applicability of the litigation privilege of

16. The Tribe's suggestion at OB 34, fn. 9, that this court would have parallel jurisdiction under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302(a)(1) is *frivolous in the extreme.* It is well-settled that neither state nor federal courts have any subject matter jurisdiction whatsoever to adjudicate claims under ICRA. *Martinez,* 436 U.S. at p. 56; *Lamere,* 131 Cal.App.4th at p. 1067 [A "cause of action under the Indian Civil Rights Act of 1968 is also unsustainable in California courts."] Note the Tribe's contention lacks any citation to supporting legal authority because none exists.

Section 47 without any leave to make additional new arguments. (6CT 12:11, pp. 15-16; 6CT 1220, pp. 51-53.)

Thus, any ruling on *Noerr-Pennington* defense in the Sanctions Order was *invited error* since any such ruling on that defense could only have resulted from the Tribe's improper, dilatory argument in the supplemental round of briefing on an issue that the superior court had not authorized the Tribe to raise. Thus, under the doctrines of invited error and waiver, the *Noerr-Pennington* defense may not be considered in this appeal. (*Baxter v. Cal. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 377-378; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.)

V. SINCE THE TRIBE REFUSED TO COMPLY WITH THE ORDER TO COMPEL ARBITRATION AND SOUGHT TRIBAL COURT INJUNCTIVE RELIEF WITH THE INTENT AND EFFECT OF NEGATING SUCH ORDER, THE AWARD OF MONETARY SANCTIONS UNDER SECTION 177.5 IS JUSTIFIED ON THE RECORD.

A. The abuse of discretion standard applies to appellate review of the monetary sanctions imposed on the Tribe.

The award of $1,500 in monetary sanctions must be reviewed by this appellate court under the abuse of discretion standard of review. (*Gemini Aluminum Corp. v. California Custo1n Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1262-1263; *Shelton v Rancho Mortgage & Inv. Corp.* (2002) 94 Cal.App.4th 1337, 1345-1346.)

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B. No good cause nor substantial justification excuses the Tribe's contumacious refusal to obey the superior court's Order to Compel Arbitration.

Section 177.5 authorizes a judicial officer to impose reasonable money sanctions, up to $1,500, payable to the court for any violation of a lawful court order by a party without good cause or substantial justification. (Code Civ. Proc., § 177.5; *In re Woodham* (2001) 95 Cal.App.4th 438, 446; *20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1278.)

The Tribe offers three frivolous arguments purporting to show good cause or substantial justification. First, the Tribe's improper attempt in its Opening Brief to relitigate, yet again, the question of its waiver of sovereign immunity must be rejected as contrary to the settled law of the case. (OB 11, 13, 32, 33; see Section I(B), *supra*.) The defense of sovereign immunity does not constitute good cause nor substantial justification for any contumacious action taken by the Tribe in 2017 in violation of the Sanctions Order. *Findleton I,* contrary to the Tribe's gross mischaracterization of its holding (OB 10-11), actually held *both* **(1)** that the Tribe clearly waived its sovereign immunity and (2) that its waiver of sovereign immunity "extended to judicial enforcement of the right to arbitrate . . . ." (*Findleton I,* 1 Cal.App.5th at pp. 1216-1217.) In its Opening Brief, the Tribe falsely asserts in its Statement of Facts that *Findleton I* had only decided "the question whether the agreements at issue waived the Tribe's sovereign immunity."

(OB 11:2-3.) That is an inexcusable misrepresentation of the *Findleton I* holding intended to give a patina of legitimacy to the Tribe's pretense that the question of the superior court's jurisdiction to enforce Findleton's right to arbitrate had not yet been addressed in the 2016 *Findleton I* decision, thereby leaving the Tribe free in 2017 to file in tribal court for injunctive relief on an issue that had supposedly not yet been decided by the state court. (OB 11:2-3.) The Tribe's characterization *Findleton I* is simply false. (*Findleton I,* 1 Cal.App.5th at p. 1217 [expressly holding that the "waiver extended to judicial enforcement of right to arbitrate"]; *Findleton II,* 27 Cal.App.5th at pp. 567, 571 [same].) Thus, any attempt to relitigate the settled law of this case does not constitute good cause or substantial justification under Section 177.5.

Second, the Tribe's frivolous suggestion that that the tort litigation privilege of Civil Code Section 47 precludes the imposition of sanctions under Section 177.5 (OB 29-32) should be rejected for the reasons already set forth in Section III. (See text and authorities cited in Section III, *supra*, 53─58.)

Third, the Tribe's equally frivolous claim that the *Noerr-Pennington* doctrine somehow precludes the imposition of sanctions under Section 177.5 should be summarily rejected for the reasons already set forth in Section IV. (See text and authorities cited in Section IV, *supra*, pp. 49─54.) In sum, no good cause nor substantial justification excuses the Tribe's refusal to comply.

C. The Tribe incontestably and contumaciously refused to comply with the Order to Compel Arbitration.

The superior court expressly found, as a critical factual foundation of the Sanctions Order under Section 177.5, that the "Tribe refused to participate in the mediation or arbitration, and explicitly told AAA on several occasions that it would not do so." (5CT 1125, ¶ 1:2-3.) Without more, such overt disobedience to the April 24, 2017 Order to Compel Arbitration would constitute sufficient evidence to justify the superior court's sanctions award under Section 177.5, even if there had been no aggravating resort to the CV Tribal Court for injunctive relief or the Tribe's threatening letter to AAA of September 8, 2017. (5CT 1125, ¶ 1; 1126 ¶ 2.)

After having clearly and unequivocally waived its sovereign immunity and having been expressly found to have done so by this appellate court, the refusal by the Tribe to submit to mediation or arbitration alone would justify the discretionary finding of the superior court that the Tribe had violated Section 177.5. (*Findleton I,* 1 Cal.App.5th at p. 1217; *Findleton II,* 27 Cal.App.5th at pp. 572-573.) The Sanctions Order expressly acknowledged that *Findleton II* "found that the tribe [sic] had waived sovereign immunity with respect to a claim for fees Findleton incurred in enforcing his right to arbitrate." (5CT 1125-1126.) In continuing to dispute this law of the case, settled definitively since the 2016 decision in *Findleton I*, the Tribe is doing nothing more than indulging in bad faith, frivolous argument before this

appellate court. (*Findleton I,* 1 Cal.App.5th at p. 1217.) Thus, the award of monetary sanctions in the amount of $1,500 is fully justified under Section 177.5 on the basis of the Tribe's refusal to mediate or arbitrate alone.

D. The September 15, 2017 tribal court filings for injunctive relief violated the Order to Compel Arbitration.

The superior court expressly found that the purpose and effect of the tribal court filings on September 15, 2017 was to "negate" the Order to Compel Arbitration. (5CT 1126, ¶ 2.) Consequently, such acts were necessarily in violation of the Order to Compel Arbitration under Section 177.5 as they clearly were intended to and did, in fact, prevent the arbitration from occurring in accordance with that Order. (5CT 1125, ¶ 1.)

E. The Tribe's threat to AAA in its letter of September 8, 2017 to AAA violated the Order to Compel Arbitration.

As the superior court expressly ruled, the Tribe was not satisfied with merely obstructing arbitration by means of putative tribal legal process, it actually engaged in intimidation tactics by threatening to damage the reputation of AAA in its letter of September 8, 2017 if AAA were to hear the matter submitted by Findleton. (5CT 1126, ¶ 2.) Such misconduct is completely inexcusable. (Code Civ. Proc., § 177.5; *Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1178 [violation does not even have to be willful]; *People v. Tabb* (1991) 228 Cal.App.3d 1300, 1311 [same].) The evidence of willfulness in making a threat that would, if successful in its aim,

obstruct the court-ordered arbitration exceeds the proof necessary to establish a violation of Section 177.5.

F. The superior court did not abuse its discretion in determining that the Tribe's refusal to arbitrate and its tribal court filings for injunctive relief warranted the sanctions imposed pursuant to Section 177.5.

The superior court may be found to have abused its discretion only if its decision to impose sanctions under 177.5 "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham,* 2 Cal.3d at p. 566.) The appellate court should not reverse the superior court's Sanctions Order under Section 177.5 unless such order were found to be "so irrational or arbitrary that no reasonable person could agree with it." (*Sargon,* 55 Cal.4th at p. 773 [internal quotes omitted].) Given the overt refusal of the Tribe to participate in mediation and arbitration (5CT 1125:1-3) and its tribal court filings to "negate" the Order to Compel Arbitration (5CT 1126, ¶ 2), the sanctions are obviously warranted under the abuse of discretion standard.

VI. SECTION 128.5 APPLIES TO THE LITIGATION MISCONDUCT OF THE TRIBE.

A. Since litigation misconduct occurring in a tribal court during 2017 is within the plain meaning of the words "actions or tactics" in a "civil case filed on or after January 1, 2015" in Section 128.5, the Tribe's 2017 litigation misconduct is sanctionable under that statute.

Section 128.5 empowers this Court to impose sanctions for "actions or tactics, made in bad faith, that are frivolous or solely intended to cause

unnecessary delay" and "applies to actions or tactics that were part of a civil case filed on or after January 1, 2015." (Code Civ. Proc., § 128.5, subds. (a), (i).) Neither the statutory language nor the legislative history proferred by the Tribe anywhere expressly limits the application of Section 128.5 to *only* a "civil case" that arises in a California superior court. (OB 17-23.) Section 128.5 applies to at least *two distinct categories of civil cases* within the plain meaning of the term "civil case" as it is used in the statute:

(1) Section 128.5 applies to sanctionable "actions or tactics" that are part of a "civil case" initiated in a *California superior court* "on or after January 1, 2015." (Code Civ. Proc., § 128.5, subd. (i).);

(2) 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." (*Ibid.*)

1. The plain meaning canon of construction supports Findleton's interpretation of Section 128.5.

First, the *plain or ordinary meaning* of the statutory language supports this bipartite interpretation given the "language and design of the statute as a whole." (*K Mart Corp. v. Cartier, Inc.* (1988) 486 U.S. 281, 291; *People v. Traylor* (2009) 46 Cal.4th 1205, 1212; *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155.) Section 128.5 did not expressly specify that the January 1, 2015 limitation date *only* applies to a "civil case" that arises in a California superior court. It simply uses the generic term

"civil case," which should be interpreted in its ordinary sense. (*People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 43; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; *Estate of Richartz* (1955) 45 Cal.2d 292, 294.) The California Supreme Court has defined the generic term "case" in its seminal decision of *Calderwood v. Peyser*:

> A case is a state of facts which furnishes occasion for the exercise of the jurisdiction of a Court of justice; to the existence of such a case parties are necessary, also pleadings and proceedings, trials, orders, judgments, etc., usually follow. These together constitute the case . . . .

(*Calderwood v. Peyser* (1871) 42 Cal. 110, 115 [internal quotation marks and citation omitted] ["*Calderwood*"].) Under the well-established canon of construction that "[w]ords and phrases which have received judicial construction before enactment are to be understood according to that construction." (Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed* (1950) 3 Vand. L.Rev. 395, 395 [citing *Scholze v. Scholze,* (1925) 2 Tenn.App. 80, 92].) Thus, the term "civil case" should be understood in its ordinary, generic sense as previously defined in *Calderwood* by the California Supreme Court. In its generic usage, a "civil case" is not necessarily a case arising in a California superior court, but is any "state of facts which furnishes occasion for the exercise of the jurisdiction of a Court of justice" regardless of whether

it arises in a California superior court or otherwise. (*Calderwood,* 42 Cal. at p. 115.)

When the legislature wants to limit application of a statute to cases that arise on California superior courts, it says so. For example, Section 1741(a) of the California Uniform Foreign-Country Money Judgments Recognition Act expressly applies to "all actions commenced in *superior court* before January 1, 2015, in which the issue of recognition of a tribal court money judgment is raised." (Code Civ. Proc., §§ 1713–1725, at 1741, subd. (a) [italics added].) The sharp contrast between the permissive, generic language at issue in Section 128.5 and restrictive, court-specific language in Section 1741(a) suggests that 128.5 should be more liberally construed to apply to courts of another jurisdiction in which a "civil case" is commenced "on or after January 1, 2015" involving sanctionable "actions or tactics." (*FCC v. NextWave Personal Communications, Inc.* (2003) 537 U.S. 293, 302 [when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"]; *Central Bank of Denver v. First Interstate Bank* (1994) 511 U.S. 164, 176-77; *Franklin Nat'l Bank v. New York* (1954) 347 U.S. 373, 378; *Dole Food Co. v. Patrickson* (2003) 538 U.S. 468, 476; *Whitfield v. United States* (2005) 543 U.S. 209, 214.)

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2. Section 128.5 applies to litigation misconduct occurring in a separate cause of action before a tribunal of another jurisdiction.

Second, the Tribe's filing in tribal court for injunctive relief was appropriately the subject of state court sanctions because litigation misconduct that occurs in *a separate action in a court of another jurisdiction* is *universally recognized* as being subject to sanctions imposed in the core proceedings by the court whose ability to protect and effectuate its prior orders is substantially impaired by such misconduct "beyond the courtroom."[17] (*Chambers,* 501 U.S. at p. 34 [upholding sanctions for conduct constituting abuse of process "beyond the courtroom."].) In principle, the imposition of sanctions for misconduct "beyond the courtroom," such as the tribal court action filed here or the threatening letter the Tribe sent to AAA, are appropriate where such misconduct in any way subverts a state court order and especially when the civil case in the other tribunal includes issues previously resolved by the state court. (*Ibid.*) Here

17. The Tribe asserts without discussion and without citation to any supporting authority (OB 23:1-6) that Section 4 somehow prevents application of sanction provisions to litigation misconduct in the court of another jurisdiction. Section 4 merely states the "Code establishes the law of this State respecting the subjects to which it relates," but in no way limits the imposition of sanctions to litigation misconduct occurring within a California courtroom. (Code Civ. Proc., § 4.) The Tribe's interpretation begs the question and assumes the quoted language could only mean what it assumes it means and, therefore, must be rejected.

the Tribe went to its putative tribal court for the express purpose of relitigating the issue of whether tribal sovereign immunity had been waived and obtaining injunctive relief negating the Order to Compel Arbitration based on a putative tribal court decision that flatly contradicted the express holding of this appellate court that tribal sovereign immunity had, indeed, been waived. (5CT 1126, ¶ 2; OB 9, ¶ 3; 11, ¶¶ 1-2; 12, ¶ 2; 13:12-15; 26:2-6; 32, ¶ 1; 35, ¶ 3; 38, ¶ 1; 41-43; *Findleton I,* 1 Cal.App.5th at p. 1217; *Western Systems, Inc. v. Ulloa* (9th Cir. 1992) 958 F.2d 864, 873 [upholding imposition of sanctions against party for filing action in Guamanian territorial court relitigating issues previously resolved by bankruptcy court] ["*Ulloa*"]; *Hall v. Nielsen* (D.D.C. Mar. 11, 2019) Civ. No. 18-461 (JEB), at p. 5 [upholding sanctions award in federal court for litigation misconduct in state court under "relitigation exception" to protect and effectuate federal court judgment under 28 U.S.C. § 2283]; *Chick Kam Choo v. Exxon Corp.* (1988) 486 U.S. 140, 146 [relitigation exception explained]; *In re Case,* 937 F.2d 1014, 1023-1024 (5th Cir.1991) [reversing sanctions award where the misconduct of the parties in the state action was "completely collateral" and "[could not] be said to affect the exercise of the judicial authority of the bankruptcy court or limit the bankruptcy court's power to control the behavior of parties and attorneys in the litigation before it"]; *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 400 [upholding the imposition of sanctions by family court based on conduct by litigant in a separate civil action].) While,

of course, these cases did not expressly construe the scope of Section 128.5, they dispositively illustrate the principle that a court may sanction litigation misconduct occurring in *another civil action before a tribunal of another jurisdiction* where such misconduct substantially impairs an order or judgment of the sanctioning court and especially where the sanctioned party attempts to relitigate issues already expressly decided by that court. The "jurisdictional hook"[18] that the Tribe supposes is somehow lacking here can be easily found in the *negation of a valid, existing court orde*r by its attempt to relitigate settled issues already decided by the sanctioning court before a tribunal of another jurisdiction in the hope of getting a different result, not to mention the obstruction that resulted from the Tribe's threatening letter to AAA. (OB 41, ¶ 1; *Ulloa,* 958 F.2d at p. 873.)

3. Although resort to legislative history is unnecessary, Findleton's construction of Section 128.5 is consistent with the legislative history proferred by the Tribe.

Third, although resort to the legislative history of Section 128.5 is unnecessary given the plain meaning of the term "civil case," as established

18. The Tribe has egregiously misread and misstated the finding of the superior court in its mistaken claim that the superior court had designated the tribal court filings as a "separate track of proceedings" in the state court case, *when the superior court actually said just the opposite.* (OB 41:9-12, ¶ 1.) The superior court actually stated that the tribal court action was "more than just a separate track of proceedings" (5CT 1126, ¶ 2) in the state court litigation; it was actually a separate "civil case" filed in a tribal court to negate the Order to Compel Arbitration. (*Ibid.*) This mistaken reading of the Sanctions Order renders the Tribe's argument utterly incoherent.

by settled judicial construction, the interpretation offered by Findleton is consistent with the legislative history proferred by the Tribe since Findleton's proposed construction "best effectuates the purpose of the law" given "the intent of the enacting legislative body" when it amended Section 128.5. (*People v. Albillar* (2010) 51 Cal.4th 47, 54 ["*Albillar*"].) The primary purpose of the time limitation in Section 128.5 was to insure that bad faith, dilatory, and frivolous "actions or tactics that were part of a civil case filed on or after January 1, 2015" are subject to judicial sanctions and that such sanctions are not applied *retroactively* to "actions or tactics" that occurred prior to January 1, 2015. (Code Civ. Proc., § 128.5, subd. (i).) The avoidance of "retroactive application" was clearly the primary concern of the California legislature in amending the limitation period of Section 128.5(i), as even the Tribe repeatedly concedes. (5 CT 1004, ¶¶ 4-6; 5 CT 1005, ¶ 7; OB 19, ¶ 5; 20, ¶ ¶ 1-2; 21, ¶ 4; 22, ¶ 4; 23:1 [quoting Code Civ. Proc., § 4].) Since there is *no retroactive application whatsoever of sanctions under Section 128.5* to the Tribe for its post January 1, 2015 misconduct and such misconduct was expressly held ***not*** to constitute merely a "separate track of proceedings" (5CT 1126, ¶ 2) in the state court action, but instead constituted an entirely discrete "civil case" initiated in a putative tribal court "on or after January 1, 2015," Findleton's proposed construction "best effectuates the purpose of the law" given the "the intent of the enacting legislative body" when it enacted Section 128.5. (*Albillar,* 51 Cal.4th at p. 54.) In contrast,

the Tribe's construction would allow it to evade any consequences for its contumacious tribal court filings, which would actually defeat the intent of the legislature and subvert the purpose of the law. (*Ibid; Dyna-Med, Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Fay v. District Court of Appeal* (1927) 200 Cal. 522, 537.)

Thus, the legislative history proferred by the Tribe actually more persuasively supports Findleton's proposed construction of Section 128.5 than it does that of the Tribe because Findleton's construction is more consonant with the primary legislative purpose of Section 128.5 to avoid retroactive application while providing for the sanctioning of bad faith litigation misconduct. (5 CT 1004, ¶¶ 4-6; 5 CT 1005, ¶ 7.)

B. The Tribe's litigation misconduct cannot be excused as being "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" under Section 128.5(f)(2)(A).

First, the September 8, 2017 threatening letter that the Tribe sent to AAA independently violates Section 128.5 as an impermissible action or tactic that is completely unjustified "by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" under Section 128.5(f)(2)(A). (Code Civ. Proc., § 128.5, subd. (f)(2)(A).) Indeed, the Tribe failed to even mention the threatening letter in it Opening Brief, much less offer any defense of such misconduct under Section 128.5(f)(2)(A), thereby waiving that defense with

respect to the threatening letter in this appeal. (*Katelaris,* 92 Cal.App.4th at p. 1216, fn. 4, *as modified at* 93 Cal. App. 4th 1158f; *Tisher,* 231 Cal. App. at p. 361.)

Further, such an illicit tactic is outside the scope of Section 128.5(f)(2)(A) because it does not consist of "presenting a claim, defense, and other legal contentions." (*Ibid.*) Without more, the Tribe's fatal omission of a crucial fact and its waiver of any defense of an adverse ruling based on that omission constitute a sufficient basis to defeat any defense based on Section 128.5(f)(2)(A). (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738; *Eisenberg*, § 9:27, p. 9-8.)

Second, the Tribe's resort to injunctive relief in a putative tribal court to "negate" (5CT 1126, ¶ 2) the Order to Compel Arbitration and its refusal to comply with such Order constitute tactics clearly unwarranted by existing law or by a non-frivolous argument for a change in existing law given the overwhelming weight of authority supporting the holding of this appellate court in *Findleton II* that Findleton had no obligation to pursue a tribal court remedy that was not even in existence until some five years after this litigation began and was contrary to the choice-of-forum provision of the underlying contract which expressly permitted state court enforcement of Findleton's right to arbitrate. (*Findleton II,* 27 Cal.App.5th at p. 572, 574-575; *Krempel,* 125 F.3d at pp. 623-624; *Johnson v. Gila River Indian Community* (9th Cir.1999) 174 F.3d 1032, 1036; *Comstock Oil & Gas Inc. v.*

Alabama and Coushatta Indian Tribes (5th Cir. 2001) 261 F.3d 567, 572–573.) Incredibly, the Tribe suggests that the favorable outcome it obtained from its *unopposed, ex parte* filings in the CV Tribal Court should be interpreted as indicating a lack of argumentative frivolity (OB16, ¶ 3), when actually such favorable outcome merely reflects unjustifiable default rulings totally contrary to controlling federal precedent. (*Ibid.*) Further, the actual results attained in the putative tribal court are irrelevant to the issue of the frivolity of the Tribe's position because the very act of initiating duplicative, vexatious parallel tribal proceedings, in and of itself, regardless of the tribal forum's view of the merits, constitutes a brazen act of defiance of the Order to Compel Arbitration and offends the venerable principle that "equity abhors a multiplicity of suits." (*Whitehead v. Sweet* (1899) 126 Cal. 67, 75; *Yavitch v. Workers' Comp. Appeals Bd.* (1983) 142 Cal.App.3d 64, 70.)

Defiance of an order compelling arbitration warrants sanctions under Section 128.5. (*Jansen Assocs., Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166, 1168-69.) The Tribe refused to attend mandatory arbitration and refused all participation in arbitral proceedings; it actively sought to "negate" the Order to Compel Arbitration by engaging in tribal forum shopping and continues to relitigate issues already decided by the appellate court. (OB 10-13, 16, 26, 30, 32-33, 35, 38, 41-44.) Thus, the sanctions imposed under Section 128.5 must be affirmed.

CONCLUSION

In essence, this appeal constitutes little more than a frivolous attempt to relitigate the long settled law of the case with respect to the issues of the Tribe's clear waiver of sovereign immunity, its binding sovereign choice of an arbitral forum for dispute resolution under the Federal Arbitration Act and the subject matter jurisdiction of the state court to enforce Findleton's federally protected right to arbitrate.

This appellate court has already decided these issues against the Tribe and even admonished the parties that "[l]itigants are not free to continually reinvent their position on legal issues that have been resolved against them by an appellate court," yet the Tribe's contumacious determination to do so is evident in virtually every specious argument it raises in its Opening Brief. (*Findleton II,* 27 Cal.App.5th at p. 571; OB 8-44.)

Quite literally, the Tribe has refused to accept defeat and desperately seeks to evade the consequences of its waiver of sovereign immunity and reprehensible litigation misconduct through not only unabashed tribal forum shopping, but tribal forum fabrication. There is no legal justification whatsoever for the Tribe's outrageous litigation misconduct in this case and the Sanctions Order was well justified on substantial and compelling evidence.

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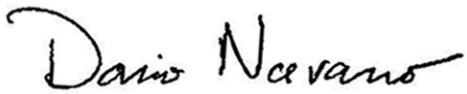
The Sanctions Order must be affirmed in full and the Tribe's appeal summarily denied.

Dated: March 6, 2020

Respectfully submitted,

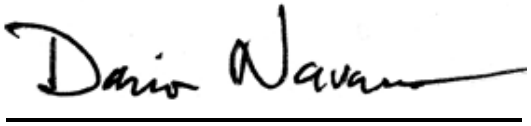


Dario Navarro
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Times New Roman font and, according to the computer program used to prepare the foregoing brief, it contains 13,990 words, including footnotes.

Dated: March 6, 2020

By: 

Dario Navarro
Attorney for Respondent

PROOF OF SERVICE

RESPONDENT'S BRIEF

Case Name: ***Findleton v. Coyote Valley Band of Pomo Indians***

Court of Appeal Case Number: A156459

Superior Court Case Number: SCUK CVG 12-59929

1. At the time of service, I was at least 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place. My residence or business address is 7240 Uva Drive, Redwood Valley CA 95470. My electronic service address is stuartzeller@sbcglobal.net.

2. I served a copy of Respondent's Brief ("said document") on the persons at addresses listed in items 4, 5, 6 and 7:

   ☑ **BY FIRST-CLASS MAIL:** I enclosed said document in a sealed addressed envelope and deposited the sealed envelope containing said document with the United States Postal Service with first-class postage fully prepaid at a United States Post Office in Redwood Valley, California; and

   ☑ **BY ELECTRONIC MAIL:** I electronically served a true and correct courtesy copy of said document to said persons via electronic mail to the email addresses listed in item 7.

3. Said document was placed in the mail:

   a. on *(date)*: **March 6, 2020**

   b. at (*City and State*): **Redwood Valley, California.**

4. The envelopes were addressed and mailed as follows to counsel of record for the Defendant-Appellant Coyote Valley Band of Pomo Indians ("Defendant-Appellant"):

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Glenn W. Peterson, Esq.
Peterson Watts Law Group, LLP
2267 Lava Ridge Court, Suite 210
Roseville, CA 95661

5. An additional copy of said document was addressed and mailed to the following attorney, representing the Coyote Economic Development Corporation ("CEDCO") and Coyote Valley Entertainment Enterprises ("CVEE") in this case:

Sara Dutschke Setshwaelo, Esq.
Partner, Kaplan Kirsch & Rockwell, LLP
595 Pacific Avenue, 4th Floor
San Francisco, CA 94133

6. I enclosed said document in a sealed addressed envelope and deposited the sealed envelope containing said document with the United States Postal Service with first-class postage fully prepaid at a United States Post Office in Redwood Valley, California to the Honorable Ann C. Moorman, Presiding Judge, Mendocino County Superior Court:

Honorable Ann. C. Moorman
c/o Superior Court Clerk
100 North State Street
Ukiah, CA 95482

7. Electronic service address of each person served:

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Honorable Ann C. Moorman
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On (*date*): **March 6, 2020** at (*time*): 9 : 16 ☒ a.m. ☐ p.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in Redwood Valley, California on the date indicated below:

Date: March 6, 2020

Stuart Zeller

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **Findleton v. Coyote Valley Band of Pomo Indians**
Case Number: **A156459**
Lower Court Case Number: **SCUKCVG1259929**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **navdar@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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Date

/s/Dario Navarro

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Last Name, First Name (PNum)

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