RVED ATTORNEYS IN

A156459

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

ROBERT FINDLETON

Plaintiff and Respondent

v.

COYOTE VALLEY BAND OF POMO INDIANS

Defendant and Appellant.

Appeal from the Judgment of the Mendocino County Superior Court

No. SCUK-CVG-12-59929, Hon. John A. Behnke, Presiding

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

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

September 25, 2019

By /s/ Little Fawn Boland

Little Fawn Boland

Attorney for Defendant and Appellant, Coyote Valley Band of Pomo Indians

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STATEMENT OF THE CASE

On September 15, 2017 the Coyote Valley Band of Pomo Indians (Tribe" or "Appellant") filed a suit in the Coyote Valley Tribal Court within the Northern California Intertribal Court System entitled *Coyote Valley Band of Pomo Indians v. American Arbitration Association, et. al*.[1] (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1104.) (Herein, referred to as the "Tribal Court Case".) The Superior Court subsequently issued sanctions against the Tribe to punish it for filing the lawsuit and for ancillary communications to the American Arbitration Association ("AAA") associated with the litigation. (Notice of Entry of Order Granting Plaintiff's Motion for Sanctions ("Sanctions Order").) (CT 1124-1130.) Those sanctions were issued in *this* case, *Findleton v. Coyote Valley Band of Pomo Indians*, which was filed on March 23, 2012 with case number SCUK CVG 12-59929 in the Superior Court of Mendocino County. (Petition to Compel Mediation and Arbitration.) (CT 3 – CT 28.) (Herein, referred to as the "State Court Case".)

The sanctions were granted under two statutes. (Sanctions Order.) (CT 1124-1130.) The first, Code of Civil Procedure ("CCP") 128.5, makes plain that it cannot be applied to any case pending prior to January 1, 2015. CCP 128.5(i). To avoid that time bar and fashion a remedy for the Respondent, the Sanctions Order describes that it is using the filing date from the separate Tribal Court Case to measure the applicability of CCP 128.5. (Sanctions Order.) (CT 1126.) This was an error in the Superior Court's application of the law in violation of the plain language of the statute and legislative intent.

[1] Case number 2017-01103-CO.

Dispensing with the time-bar, without any discussion, the Sanctions Order finds that the Tribe's act of filing suit against the AAA in the Tribal Court and communicating about it with the AAA was frivolous conduct done without good cause justifying sanctions of $86,457 under CCP 128.5 and $1,500 pursuant to CCP 177.5. (Sanctions Order.) (CT 1124-1130.) The Superior Court abused its discretion in finding that the Tribe's conduct was frivolous or without good cause.[2] The conduct clearly had merit because it led to final disposition on April 23, 2018, when the AAA closed the case finding it lacked jurisdiction over the dispute.

The Superior Court also erred when it did not find that the litigation privileges expressed in CCP 47 and CCP 128.5(f)(2)(A) apply to the Tribal Court Case. Similarly, the Sanctions Order was silent on the application of the *Noerr-Pennington* doctrine to the Tribe's protected petitioning activity. (Sanctions Order.) (CT 1124-1130.)

The sanctioning of on-reservation conduct in the court of another tribunal against a tribe for using its judiciary is beyond the bounds of reason and also in direct violation of the contractual agreements between the parties and bedrock principles of Indian law. Moreover, the Superior Court had no authority to apply state law sanctions against the Tribe for the on-reservation activities associated with the Tribal Court Case, as those activities fell outside the Superior Court's jurisdiction.

For these reasons, the Appellant respectfully requests that the Sanctions Order be reversed in its entirety.

[2] The Tribe does not appeal the amount of the sanctions granted under either code provision.

STATEMENT OF APPEALABILITY

This appeal is from the judgment of the Mendocino County Superior Court ordering sanctions in excess of $5,000 and is authorized within the Code of Civil Procedure. CCP 904.1(a)(12).

STATEMENT OF FACTS

This appeal concerns the issuance of sanctions by the Superior Court for the Appellant's filing of a lawsuit in its Tribal Court in September 2017 and attendant communications. (Sanctions Order.) (CT 1124.) On March 23, 2012, Respondent filed a petition to compel mediation and arbitration in Superior Court, seeking to enforce certain mediation and arbitration clauses in the agreements between the Parties. (CT 3-28.) For five years, Respondent consistently argued that the AAA should decide matters of arbitrability, including its jurisdiction. Following a number of decisions and the July 29, 2016 decision in *Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194 ("*Findleton I*"), the Superior Court granted the Respondent's motion to compel mediation and arbitration on April 25, 2017. (Order After Hearing on Motion to Compel Mediation and Arbitration.) (CT 817-819.)

On January 20, 2017, more than three months prior to the Superior Court's April 25, 2017 decision, the Tribe initiated an action in the Coyote Valley Tribal Court, a court within the Northern California Intertribal Court System. (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1104-1107.) The case entitled *Findleton v. Coyote Valley Band of Pomo Indians*, Case No. NCICS-CV-2017-0001-JW led to the Tribal Court agreeing to accept review on January 26, 2017. (*Id*.) (CT 1104.) When the Tribal Court accepted jurisdiction over the case on January 26, 2017, there

had been no order to arbitrate and the *only* issue that had been decided by the state court (through the appellate court) at that point was the question of whether the agreements at issue waived the Tribe's sovereign immunity. (*Findleton I*, 1 Cal.App.5th 1194.)

On February 3, 2017 the Memorandum Decision of the Tribal Court was issued and found that the Tribal Court had jurisdiction over the case. On February 8, 2017, the Respondent filed a Motion to Dismiss in Tribal Court. (*Id*.) (CT 1104.) After Respondent filed the motion he never again participated in any of the Tribal Court proceedings. (*Id*.) (CT 1104.) On March 3, 2017 the Memorandum Decision was provided to the Superior Court. (Request for Judicial Notice.) (CT 662-672.) On May 17, 2017, the Respondent filed for arbitration with the American Arbitration Association ("AAA"). (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1104.)

On July 6, 2017, the Tribal Court issued an order finding that no court has jurisdiction over the dispute because the Tribe did not waive its sovereign immunity from suit. (*Id*.) (CT 1104.) Despite that decision, the AAA process continued on with both the Respondent and the AAA ignoring the Tribal Court's orders. To enforce the Memorandum Decision and July 6, 2017 Tribal Court order, on September 15, 2017, the Tribe filed a new lawsuit in the Tribal Court against Findleton and AAA entitled *Coyote Valley Band of Pomo Indians v. American Arbitration Association and Robert Findleton*, Case No. 2017-01103-CO. (*Id*.) (CT 1104.) Subsequently, on December 20, 2017, the Tribal Court issued a permanent injunction ruling that both Findleton and the AAA could not proceed with the arbitration. (*Id*.) (CT 1104.) Finally, on April 23, 2018, the AAA

determined it lacked jurisdiction to hear the case and closed it. (*Id*.) (CT 1104.)

The Sanctions Order omits the aforementioned procedural history that led to the Tribe initiating an action in Tribal Court against the AAA and Respondent. (Sanctions Order.) (CT 1124.) In the Sanctions Order, the Superior Court completely ignores the original Tribal Court action the Tribe initiated in January 2017 prior to the Superior Court issuing its order on the Demurrer on February 1, 2017 or compelling meditation and arbitration on April 25, 2017. (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1105-1107.) This first case cannot be written out of existence because understanding the first Tribal Court case is necessary to understand the facts and why the parties were later involved in a second Tribal Court case against the AAA and Findleton. (*Id*.) (CT 1105-1107.) Without the first Tribal Court proceeding, the second Tribal Court action would not have been possible or necessary. (*Id*.) (CT 1105-1107.) The first Tribal Court case and the Tribal Court's rulings cannot merely be brushed aside. (*Id*.) (CT 1105-1107.)

The merits of this dispute involve work performed on the Tribe's reservation pursuant to contracts that were negotiated and executed on the Tribe's land, and which the Parties agreed were governed by Tribal law and only the jurisdiction of the Tribe. (*Id*.) (CT 1105-1107.) Accordingly, the Tribe initiated the first Tribal Court Case, *Findleton v. Coyote Valley Band of Pomo Indians*, Case No. NCICS-CV-2017-0001-JW on January 20, 2017. (*Id*.) (CT 1105-1107.)

The Tribe filed in the Tribal Court at the earliest opportunity following the Court of Appeal's overturning of the previously granted Motion to Quash. (*Id*.) (CT 1105-1107.) 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. (*Id*.) (CT 1105-1107.) In January 2017, the Tribe asked the Tribal Court to accept transfer of the case in order to adjudicate the issues remaining on remand—issues which were specifically recognized by the Court of Appeal as open questions. (*Id*.) (CT 1105-1107.) The Tribe did *not* file in Tribal Court to seek a contrary ruling to that of the Court of Appeal. (*Id*.) (CT 1105-1107.) Indeed, in the Tribal Court's January 26, 2017 Order granting the Tribe's petition for transfer, the Court specifically stated: "[b]y granting the Petition, the Court is not suggesting that it will revisit the issue of whether the Tribe waived is sovereign immunity . . ." (*Id*.) (CT 1105-1107.) However, as the matter proceeded in Tribal Court, the Tribal Court determined that it was appropriate to revisit the jurisdictional issue of whether the Tribe waived immunity. (*Id*.) (CT 1105-1107.) Ultimately, on July 6, 2017, after nearly six months of hearings and briefings, all of which Mr. Findleton was required to but refused to attend, the Tribal Court ruled that the Tribe had not waived its immunity and no court could compel the Tribe to arbitrate. (*Id*.) (CT 1105-1107.) Following the ruling, Respondent pursued arbitration anyway. (*Id*.) (CT 1105-1107.) Naturally, the Tribe informed the AAA of the Tribal Court's July 6 order.

In September of 2017, due to Mr. Findleton and the AAA ignoring the Tribal Court's July 6, 2017 order, the Tribe was forced to take steps to effectuate the prior order of the Tribal Court by filing a lawsuit in the Tribal Court against Mr. Findleton and the AAA, entitled *Coyote Valley Band of Pomo Indians v. American Arbitration Association and Robert Findleton*, Case No. 2017-01103-CO. (*Id*.) (CT 1105-1107.) This action was filed for the sole reason of enforcing compliance with the Tribal Court's ruling in

the first Tribal Court action. (*Id*.) (CT 1105-1107.) Unlike Mr. Findleton, the AAA actively participated in this suit before the Tribal Court. (*Id*.) (CT 1105-1107.)

(Hereafter the January 20, 2017 filing in the Tribal Court entitled *Findleton v. Coyote Valley Band of Pomo Indians*, Case No. NCICS-CV-2017-0001-JW is referred to as "Tribal Court Case No. 1" and the second lawsuit filed nine months later in September, 2017 entitled *Coyote Valley Band of Pomo Indians v. American Arbitration Association and Robert Findleton*, Case No. 2017-01103-CO is referred to as "Tribal Court Case No. 2.")

The Sanctions Order characterizes the suit against the AAA and Mr. Findleton (Tribal Court Case No. 2) as intended to "negate" the order to compel meditation and arbitration. (Sanctions Order.) (CT 1126.) The Tribe takes issue with this statement. (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1105-1107.) The Tribe took the steps it did in the Tribal Court Case No. 2 to comply with (and enforce others' compliance with) a validly-issued, binding Tribal Court order issued in Tribal Court Case No. 1—the order issued on July 6, 2017. (*Id*.) (CT 1105-1107.) Thus, the Sanctions Order's characterization of the Tribal Court Case No. 2 is wholly inaccurate and lacking any objective explanation of the procedural history of the two Tribal Court cases. (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1105-1107.)

On June 27, 2018, Respondent filed a motion for sanctions pursuant to CCP 128.5 and 177.5. (Motion for Sanctions Pursuant to CCP Sections 128.5 and 177.5.) (CT 893.) The relevant statutes state:

> **Section 128.5**: "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including

> attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay."
>
> **Section 177.5**: empowers the trial court to "impose reasonable money sanctions, not to exceed fifteen hundred dollars…for any violation of a lawful court order by a person, done without good cause or substantial justification."

On December 10, 2018, the Superior Court issued the Sanctions Order awarding Respondent $1,500 and $86,457, pursuant to CCP 177.5 and 128.5, respectively, for "the Tribe's defiance of this Court's order compelling mediation and/or arbitration, and its actions to enjoin that mediation and/or arbitration" (Sanctions Order.) (CT 1124-1130.)

Upon receipt of the December 10, 2018 order, the Tribe filed the instant appeal concerning the Superior Court's order granting Plaintiff's motion for sanctions. (Notice of Appeal.) (CT 1139).

STANDARD OF REVIEW

"The determination of whether the trial court had the statutory authority to make such an award [of sanctions] is a question of law that [the Court] review[s] de novo." (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 460 (citing *Duale v. Mercedes-Benz USA, LLC* (2007) 147 Cal.App.4th 880, 885).)

The arguments in Section I address whether the Superior Court had the statutory authority under 128.5 to issue sanctions. This issue is subject to de novo review.

The issues discussed in Section II and III regarding the Superior Court's errors in not applying the litigation privileges expressed in CCP 47 and CCP 128.5(f)(2)(A), the *Noerr-Pennington* doctrine and in finding that

it had the power to sanction the on-reservation conduct in the court of another tribunal under CCP 128.5 and 177.5 should all be reviewed de novo.

The matters addressed in Section IV regarding the inapplicability of state law to the on-reservation conduct of an Indian tribal government should be reviewed de novo.

The abuse of discretion standard applies when examining whether the act of filing suit in the Tribal Court was frivolous or without good cause under CCP 128.5 and CCP 177.5.

ARGUMENT

The sanctions granted by the Superior Court under 128.5 were invalid due to the time bar in 128.5(i). Even if CCP 128.5 or CCP 177.5 applied, the act of filing suit in the Tribal Court was not frivolous or without good cause. The conduct clearly had merit because it led to final disposition on April 23, 2018 when the AAA closed the case due to lack of jurisdiction over the dispute.

The Tribe's petitioning activity is exempt from sanction because of the litigation privileges expressed in CCP 47 and CCP 128.5(f)(2)(A). Similarly, the *Noerr-Pennington* doctrine protects the Tribe's petitioning activity. Finally, under bedrock principals of federal Indian law, the Superior Court does not have the authority to sanction a Tribal government for its on-reservation activity. For these many alternative reasons the Sanctions Order is subject to reversal.

I. THE SANCTIONS ORDERED WERE INVALID BECAUSE THIS ACTION IS NOT SUBJECT TO SECTION 128.5.

The Superior Court awarded $86,457 against Defendant as sanctions pursuant to Code of Civil Procedure section 128.5. ("Sanctions Order.") (CT 1128-1129.) The Sanctions Order declared,

> [t]he petition filed by the Tribe in its tribal court in September 2017 was more than just a separate track of proceedings. That action was part of a civil case filed after January 1, 2015, designed to negate this Court's order compelling mediation and/or arbitration. Under these facts, the 2017 tribal action was within the scope of section 128.5(i).

(*Id*.) (CT 1126.)

No other analysis or acknowledgement of the time requirements of Section 128.5(i) can be found in the Sanctions Order. (Defendant's Opposition to Plaintiff's Proposed Order and Accompanying Declarations.) (CT 1107-1108.) However, the Superior Court correctly noted that Section 128.5 only "applies to actions or tactics that were part of a civil case filed on or after January 1, 2015." See Section 128.5(i).

Robert Findleton filed *this* civil case, *Findleton v. Coyote Valley Band of Pomo Indians*, on March 23, 2012 with case number SCUK CVG 12-59929 in the Superior Court of Mendocino County. (Petition to Compel Mediation and Arbitration.) (CT 3 – CT 28.) Thus, the case in which sanctions were ordered; *i.e*., the State Court Case, was outside the reach of Section 128.5.

The separate "case" the Superior Court relied upon to grant sanctions was *Coyote Valley Band of Pomo Indians v. American Arbitration Association, et. al.,* which was filed on September 15, 2017 by the Coyote Valley Band of Pomo Indians with case number 2017-01103-

CO. (Defendant's Opposition to the Plaintiff's Proposed Order.) (CT 1104.) It was filed in the Coyote Valley Tribal Court within the Northern California Intertribal Court System. (*Id*.) (CT 1104.)

The State Court Case and the Tribal Court Case were filed more than 5 years apart with different plaintiffs, different defendants, different case numbers, in the courts of two different sovereigns, and with different presiding judges. The Superior Court's conclusion that the Tribal Court Case was within the reach of Section 128.5 cannot be affirmed. And, although the Superior Court did not share the reasoning behind such conclusion, it cannot withstand de novo review based upon not just the plain language of Section 128.5. This Court should find that a plain reading of CCP 128.5 applies only to a civil action *filed* in the courts of the State of California after January 1, 2015.

The Appellant fully briefed the Superior Court on the legislative history associated with Section 128.5, to no avail. (Defendant's Opposition to the Motion for Sanctions.) (CT 1003.) The history shows that the California Legislature was careful to ensure that cases *pending* on or before January 1, 2015 would not have Section 128.5 applied to them. (*Id*.) (CT 1003.) Yet, that is precisely what happened here. (*Id*.) (CT 1003.)

The California Legislature was clear in expressing its intent that the statute have only prospective effect when it revised it in 2014. (*Id*.) (CT 1003.) After the opinion in *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306 held to the contrary, the Legislature clarified its intentions even further and adopted the current language in 2017 legislation as more fully explained below. (*Id*.) (CT 1003.)

The 2014 amendments to Section 128.5 stated that it would become applicable commencing on January 1, 2015. (*Id*.) (CT 1003.) Between 1994 and the 2014 amendments, section 128.5 was inoperative. (*Id*.) (CT 1003.) When the Legislature enacted Section 128.7 (modeled after Rule 11 of the Federal Rules of Civil Procedure) in 1994, "the Legislature allowed CCP 128.7 to supersede CCP section 128.5, but left section 128.5 in the Code." (*Id*.) (CT 1003.)

The 2014 amendments revived Section 128.5 but were silent as to the effective date other than to note that the amendments would become applicable on January 1, 2015. (*Id*.) (CT 1004.) Two years later, the Fourth Appellate District issued *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306 which, among other things, held that the revived version of section 128.5 applied to all cases pending as of January 1, 2015, not only to cases filed on or after that date. (*Id.* at 1318.)

The Legislature's response was swift and emphatic. (*Id*.) (CT 1004.) AB 984 Report of the Assembly Committee on Judiciary attached as Exhibit 8 to the Brady Declaration, at pp. 8–9:

> Author's statement. According to the author, this bill is intended to abrogate the holdings in *San Diegans for Open Government*. In support of the bill, the author writes:
>
> AB 2494 (Cooley) took effect January 1, 2015 and was intended to be prospective and apply only to cases filed after January 1, 2015. In spite of the plain meaning of the statute and documented legislative intent, the Court of Appeal held in *San Diegans for Open Government v. City of San Diego* (247 Cal.App.4th 1306, 1311) that the statute applied retroactively to any actions pending as of January 1, 2015. This anomalous decision has caused confusion

> amongst trial courts as one Los Angeles Superior Court judge has followed the appellate court's ruling while three other Superior Court judges have reached rulings inconsistent with *San Diegans*. The *San Diegans* decision has already led to similarly situated litigants receiving diametrically opposed rulings of law.
>
> Accordingly, this bill, as recently amended, seeks to clarify the intent behind the enactment of AB 2494 (Cooley, Chap. 425, Stats. 2014) and abrogate several of the holdings under *San Diegans*. When this bill was introduced, its provisions were limited to addressing the *San Diegans* court's holding on retroactive application. However, given the Committee's concerns about the *San Diegans* court's interpretation of "standards, conditions, and procedures," this bill has been amended to address those issues.
>
> This bill clarifies the applicability of the statute. **This bill makes it abundantly clear that it applies to actions or tactics that were part of a civil case filed on or after January 1, 2015.** Accordingly, this applies to cases filed on or after January 1, 2015. Obviously, if this bill were to become enacted and effective January 1, 2018, it would have some retroactive application. However, **it would abrogate the *San Diegan* court's holding about cases pending as of January 1, 2015.**

(Emphasis added.) (*Id*.) (CT 1004.)

Subsequent legislative reports were in accord. (*Id*.) (CT 1005.) AB 984 Report of the Senate Judiciary Committee (06/26/17) attached as Exhibit 6 to the Brady Declaration, at pp. 6–7:

> 3. Clarifying the cases to which Section 128.5 of the Code of Civil Procedure applies
>
> One issue that has surfaced is determining to what cases the newly resurrected Section 128.5 applies. Many courts have interpreted the statute to apply to all

> cases as of its effective date, January 1, 2015, while some have applied it only to cases that were filed after the effective date.
>
> The language of the statute does not provide clear guidance on this issue. The legislative history is also largely silent or hints that any time limitation had been removed and therefore could be applied to any actions after its effective date. One exception is found in the analysis of AB 2494 by the Assembly Judiciary Committee, which explicitly stated: "This bill would apply a revised version of section 128.5 to new cases filed after the effective date of the measure." (Assembly Judiciary Committee, AB 2494 Analysis, 2014.)
>
> **In any event, this bill would amend Section 128.5 to make clear that it only applies to civil cases filed on or after January 1, 2015.** As public policy dictates laws should be applied consistently, this provision of the bill would at least make it clear to which cases the statute should be applied going forward, regardless of the conflicting conclusions on the original intent.

(Emphasis added.) (*Id*.) (CT 1005.)

In the AB 984 Report of the Senate Rules Committee (07/19/17) attached as Exhibit 4 to the Brady Declaration, at p. 6, the author of the bill wrote:

> Applying the law equally to similarly situated parties is a foundational principle of justice and our judicial system. The Legislature has a clear, compelling interest in clarifying whether the statute is prospective or retroactive and what procedural requirements parties must comply with in order to prevent further injustice.
>
> **AB 984 clarifies that Code of Civil Procedure [Section] 128.5 applies only to actions filed after January 1, 2015.** The bill also clarifies that parties and

> the court must comply with all sections of [Code of Civil Procedure Section] 128.7.

(Emphasis added.) (*Id*.) (CT 1005.)

AB 984 was signed by Governor Brown on August 7, 2017[3] and took effect immediately:

> This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:
>
> In order to avoid further confusion or inconsistent decisions among courts regarding the application of Section 128.5 of the Code of Civil Procedure, as amended by Section 1 of Chapter 425 of the Statutes of 2014, including, among other things, the standards, conditions, and procedures that must be applied and **whether the statute applies to a case that was filed on or after January 1, 2015, instead of applying to a case pending as of January 1, 2015**; to apply the statute equally to similarly situated parties; and to prevent further injustice, as quickly as possible, it is necessary for this act to take effect immediately.

(Emphasis added.) (*Id*.) (CT 1006.)

The State Court Case had been pending for nearly three years when 128.5, as amended, took effect. (*Id*.) (CT 1006.) To grant sanctions in this case is an affront to the express legislative intent detailed above. (*Id*.) (CT 1006.) The legislative history is also consistent with the Code of Civil Procedure's general prohibition against retroactive application of new statutes. (*Id*.) (CT 1006.) "No part of [the Code of Civil Procedure] is

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[3] (*Id.*) (CT 1006.)

retroactive, unless expressly so declared." CCP 3. Finally, to use a court case from another jurisdiction as "a civil case" arising under CCP 128.5 is not consistent with CCP 4 either. It makes clear the Code of Civil Procedure is the "law of this State respecting the subjects to which it relates." It does not purport to apply to any other jurisdiction, yet the Superior Court extended its reach.

The Superior Court erred in its use of a separate case from a foreign court that was filed after January 1, 2015 to circumvent the prohibition that it could not award sanctions in the actual case it is presiding over.

II. THE SANCTIONS ARE INVALID BECAUSE THEY ARE PUNISHING THE VALID EXERCISE OF PETITIONING ACTIVITY IN LITIGATION.

In addition to the $86,457 of sanctions granted pursuant to CCP 128.5, the Superior Court also awarded $1,500 pursuant to CCP 177.5. The Superior Court explicitly tied the sanctions to the filing of the lawsuit against the AAA and Robert Findleton in September 2017 because the Superior Court was otherwise powerless to grant sanctions under 128.5 (see argument I above). As such, for this appeal the question is whether the filing of the lawsuit in the Tribal Court and related communications to the AAA is sanctionable conduct under either statute. The Superior Court requested briefing on whether any of the standard privileges applied to Appellant's filing of the suit, saying:

> So, you know, I think I made it clear at the outset of this hearing that it takes some serious convincing for me to find that a entity should be sanctioned for something that they filed before a tribunal or court, whatever. That's why I raised Civil Code Section 47 at the outset of this hearing . . . . So again, I'm going to let both sides brief the privileges that arise out of, you know, seeking relief from a tribunal.
>
> (Supplemental Brief.) (CT 1045.)

The Sanctions Order was devoid of any discussion regarding the extensive briefing submitted by both parties regarding CCP 47 (the litigation privilege), the *Noerr-Pennington* doctrine, the contractual rights and federal Indian law applicable to the filing of the suit or the application of CCP 128.5(f)(2)(A).

It was an error for the Superior Court to not allow the Tribe to benefit from the rights and privileges available to it. The Tribe's acts of petitioning the Tribal Court for transfer and review, for bringing a suit to comply with the rulings of the Tribal Court and communicating with AAA in connection therewith are absolutely privileged under CCP 47. These acts are also completely immunized under the *Noerr-Pennington* doctrine, which protects the Constitutional right to petition. Further, the Tribe should not be sanctioned for exercising fundamental rights that are guaranteed to it under federal Indian law principles applicable to the suit against the AAA or the contractual rights agreed to among the parties.

1. The Tribe's Conduct Did Not Warrant Sanctions Under CCP 128.5 or CCP 177.5.

California law provides for an award of "reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (CCP.125(a).) Frivolous is defined as "totally and completely without merit or for the sole purpose of harassing an opposing party." (CCP.125(b)(2).) To meet this standard, a party requesting the award must show that "any reasonable attorney would agree the motion was totally devoid of merit." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450.)

The other sanction statute relied upon by the Superior Court allows a $1,500 sanction for "any violation of a lawful court order by a person, done without good cause or substantial justification." (CCP 177.5.)

The Superior Court erred in finding that the lawsuit filed by the Tribe in the Tribal Court in September 2017 was meritless and without substantial justification. The suit led to extensive engagement with the AAA, which ultimately concluded in a decision that it was without jurisdiction and the closing of the case on April 23, 2018. While the Superior Court may not like the outcome, a reasonable attorney cannot say the suit had no value to the ultimate resolution of the dispute.

CCP 128.5(f)(2)(A) is on point in this regard:

> Monetary sanctions may not be awarded against a represented party for a violation of presenting a claim, defense, and other legal contentions that are 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.

The lawsuit filed by the Tribe against the AAA and Robert Findleton was an effort to extend, modify, or reverse existing law or the establishment of new law as applied to the dispute with the AAA and Robert Findleton. And again, it cannot be said to be frivolous as the outcome was successful for the Tribe.

The Superior Court mischaracterized the Tribe's actions as taken with "no justification" to negate its order to compel mediation and arbitration. In actuality, the Tribe took the steps it did in order to comply with (and enforce others' compliance with) a validly issued, binding Tribal Court order. The reason for utilizing the Tribal Court in the first place was

not frivolous because the Tribe had good cause and substantial justification for raising this dispute in a tribal forum. Given that the contracts that Findleton agreed to called for the jurisdiction of the Tribe, all the work was performed on tribal land, and the contracts refuted state court jurisdiction, there is at minimum a colorable argument in favor of tribal court jurisdiction.

Finally, this Court cannot find the Defendant violated its order to allow the AAA to determine all remaining disputes regarding arbitrability. After the Tribal Court's July 6 order came out, it was promptly submitted to the AAA. (Boland Decl. at ¶ 5.) (CT 923-926.) Later the AAA, in September 2017, invited Mr. Findleton to comment on the Tribe's position that the Tribal Court order prevented AAA from arbitrating the matter and in fact submitted written comments on the order. (Boland Decl. at ¶ 5.) (CT 923-926.) After September 15, 2017, in relation to the case *Coyote Valley Band of Pomo Indians v. the American Arbitration Association and Robert Findleton*, Case No. CV-2017-01103-CO, in the Tribal Court, the AAA chose to specially appear and attended case management hearings and dispositive hearings on October 2, 2017; October 30, 2017; November 27, 2017; and December 14, 2017. (Boland Decl. at ¶ 8.) (CT 923-926.) Mr. Findleton and his legal counsel, Mr. Pemberton, were supposed to attend all such hearings but refused to participate. (Boland Decl. at ¶ 7.) (CT 923-926.)

On October 2, 2017, the Tribal Court issued a temporary restraining order temporarily enjoining the AAA and Mr. Findleton from proceeding with arbitration. (Boland Decl. at ¶ 9.) (CT 923-926.) On October 20, 2017, Christina Ryan, the Director of ADR Services for the AAA, for a second time sought written comment from Mr. Findleton on whether the AAA

could proceed with arbitration, specifically inviting comments on the order issued by the Coyote Valley Tribal Court that granted preliminary injunctive relief enjoining the AAA from proceeding with arbitration. (Boland Decl. at ¶ 10.) (CT 923-926.) On October 26, 2017, Mr. Findleton, through legal counsel Timothy Pemberton, submitted a filing to the AAA. (Boland Decl. at ¶ 11.) (CT 923-926.) The filing argued that the AAA had jurisdiction over the lawsuit and could proceed with the arbitration because of the state court's order. (Boland Decl. at ¶ 11.) (CT 923-926.) The letter stated that the parties are "bound by the Arbitrators determination of jurisdiction." (Boland Decl. at ¶ 11.) (CT 923-926.)

On October 26, 2017, the Parties received an email from Christina Ryan explaining that the AAA had received the comment letters from the parties and was in the process of making an administrative determination regarding its ability to arbitrate the claim. (Boland Decl. at ¶ 13.) (CT 923-926.) On October 27, 2017, the Parties received a letter from Christina Ryan informing the Tribe and Mr. Findleton that the AAA stayed the arbitration in accordance with the preliminary injunctive relief granted by the parties (*i.e.*, the AAA agreed that the Tribal Court had authority to direct the AAA to stay the arbitration). (Boland Decl. at ¶ 14.) (CT 923-926.) This letter was sent after the AAA considered comments regarding the Tribal Court's order submitted by the parties. (Boland Decl. at ¶ 14.) (CT 923-926.)

On December 20, 2017 the Coyote Valley Tribal Court, Honorable Joseph J. Wiseman issued an order permanently enjoining the AAA and Mr. Findleton from initiating arbitration, or otherwise enforcing the arbitration provisions in the contracts between the Tribe and Mr. Findleton. (Boland Decl. at ¶ 20.) (CT 923-926.) On April 23, 2018, the AAA

determined that it was appropriate to close the case based on the Tribal Court's order. (Boland Decl. at ¶ 22.) (CT 923-926.) Thus, for nearly a year the parties were working together to address arbitrability, ample opportunity was given to Mr. Findleton by the AAA to address the issue, and in fact the AAA reached a conclusion.

The conclusion was not reached lightly by the AAA. Multiple submissions were solicited by the AAA. Soon after the Tribal Court case involving the AAA was filed, the AAA retained specialized Indian law counsel. (Boland Decl. at ¶ 15.) (CT 923-926.) Prior to his retention, Senior Counsel for the AAA was directly handling the case. (Boland Decl. at ¶ 16.) (CT 923-926.) Between August 28, 2017 and April 23, 2018, legal counsel for the Tribe sent a total of 21 emails to the AAA and counsel for the AAA, and during the same time period the AAA and counsel for the AAA sent 33 emails to counsel for the Tribe, many of which were copied to Mr. Findleton and his legal counsel. (Boland Decl. at ¶¶ 17–18.) (CT 923-926.) Legal counsel for the Tribe participated in approximately 10 phone calls with both counsel (together and separate) as part of the Tribal Court hearings and separate negotiations in relation to the Tribal Court lawsuit against the AAA and Mr. Findleton, and exchanged numerous draft documents with both attorneys to address settlement of the same. (Boland Decl. at ¶ 19.) (CT 923-926.) Mr. Findleton and his counsel voluntarily chose to forgo these discussions by electing not to participate in the Tribal Court proceedings.

The Tribe actively engaged with the AAA over the course of nearly a year. The AAA Rules instruct a party to "object to the jurisdiction of the arbitrator or to the arbitrability of a claim" at the earliest possible opportunity. (AAA Construction Industry Arbitration Rules (2005) R-8(c)

(requiring jurisdictional objections to be raised before an answering statement is filed).) The Tribe raised its objections, as permitted by the AAA Rules, and engaged with the AAA, as ordered by this Court. To say otherwise is to complelety mischaracterize the actions of the Tribe. It was an abuse of discretion to find this work to be frivolous or without good cause as the activities in fact led to an official judgement by the AAA to close the case.

2. The Tribe's Petition to the Tribal Court and all Attendant Communications are Absolutely Privileged under CCP 47.

The Tribe's conduct at issue here all stems from that act of the Tribe petitioning the Tribal Court for relief in January of 2017. At the hearing, the Superior Court described the litigation privilege as "the general idea . . . that filings before a tribunal where a citizen or corporation, an entity is petitioning the government for relief shouldn't be a basis for liability." (Supplemental Brief.) (CT 1046.) This is precisely what the Tribe did. The Superior Court erred in not finding that the Tribe's conduct of petitioning the Tribal Court falls within the scope of the litigation privilege and cannot be grounds for sanctions.

Civil Code section 47(b), provides that a "publication or broadcast" made as part of a "judicial proceeding" is privileged. Without reasonable dispute, matters before tribal courts are considered judicial proceedings. (*See*, Judicial Council Comment to Rule of Court 10.60.[4]) This privilege is

[4] The Comment to Rule 10.60 states:

Tribes are recognized as distinct, independent political nations (see *Worcester v. Georgia* (1832) 31 U.S. 515, 559, and *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55, citing *Worcester*), which retain inherent authority to establish their own form of government, including tribal justice systems. (25 U.S.C.A. § 3601(4).) Tribal justice systems are an essential part of tribal governments and serve to ensure the public health

absolute in nature, applying "to all publications, irrespective of their maliciousness." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 216.) The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." (*Id.* at 212.) The Tribe's petitioning the Tribal Court and attendant communication with AAA satisfies all four requirements. The Sanctions Order did not analyze the privileged nature of the communications with the Tribal Court and stayed silent on the issues raised *sua sponte* by the judge.[5]

The litigation privilege originally derived from common law principles establishing a defense to the tort of defamation. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42

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and safety and the political integrity of tribal governments. (25 U.S.C.A. § 3601(5).) Traditional tribal justice practices are essential to the maintenance of the culture and identity of tribes. (25 U.S.C.A. § 3601(7).)

[5] The privileged nature of the communications with the Tribal Court must be put into context with the jurisdiction of this Court pursuant to 28 U.S.C. § 1360 (*See* http://www.courts.ca.gov/documents/Jurisdiction_in_California_Indian_Country.pdf). Under §1360(c), this Court must give full force and effect to tribal law which established the Tribal Court because that section states:

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

(*Id*.) In sum, Plaintiff's position is inconsistent with federal law and must be rejected because the petitioning of a tribal court by the Tribe is recognized as appropriate under federal law – law which requires the state court to give full force and effect in civil causes of action such as this case.

Cal.3d 1157, 1163.) Subsequently, the litigation privilege was extended to other torts. (*Silberg*, 50 Cal.3d at 215.) But it is not confined to tort actions alone. First, the language of the statute itself contains no such limitation. In fact, the statute does not speak of causes of action at all. Instead, it speaks of conduct that is privileged, *i.e*. a publication or broadcast made in any judicial proceeding. Second, the privilege has been applied in a number of non-tort contexts. (See, for example, *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232 where the litigation privilege was found to preempt the City of Santa Monica's Tenant Harassment ordinance.)

Application of the privilege requires consideration of whether doing so would further the policies underlying the privilege. (*Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 276; *Wentland*, 126 Cal.App.4th at 1492.) As noted in *Rubin v. Green* (1993) 4 Cal.4th 1187, 1203: "If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b)."[6]

The litigation privilege "promotes the effectiveness of judicial proceedings by encouraging 'open channels of communication and the presentation of evidence' in judicial proceedings." (*Silberg*, 50 Cal.3d at 213 (citation omitted).) In summary, the purpose of the litigation privilege

[6] The Sanctions Order essentially holds that the Tribe abused the legal process when it brought suit in the Tribal Court. "The common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) Abuse of process claims are subject to Civil Code section 47. (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1522.)

is to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation. (*Id*.) The Tribe's petitioning of the Tribal Court for transfer falls squarely within the policies underlying the litigation privilege. As said before, the lawsuit against the AAA and Respondent was zealous advocacy that brought finality to the case.

If the Tribe had not utilized the Tribal Court it would have been giving up access to its judiciary and forgoing zealous advocacy to enforce the parties' contracts, which required tribal jurisdiction.[7] If, as is the case in

[7] The Tribe and Plaintiff, dba Terre Construction and On-Site Equipment, signed their first construction contract in early October 2007. It related to certain infrastructure improvements on tribal lands in preparation for the construction of a planned gaming facility. The contract provided, among other things, all materials and fixtures would be delivered to the Reservation, title would pass to the Tribe upon delivery, the Contractor bears the risk of loss before title transfers, and a Tribal Tax would apply to the project. (Abbreviated Standard Form of Agreement Between Owner and Contractor for Construction Projects of Limited Scope ("Construction Contract") §§ 8.3.1 D; 8.3.1 E; 8.3.1 F; and 8.3.1.J) (CT 10-15). The contract also provided that it would be governed by the law of the Tribe, that if a particular issue was not covered by Tribal Law, federal law would govern, and that Findleton agrees to the jurisdiction of the Tribe. (*Id*. § 18.1.2.) (CT 10-15.) The second contract—a Master Rental Contract—was between the Tribe and On-Site Equipment, dated November 7, 2007. It stated "[t]his contract shall be deemed to have been negotiated and executed within the Coyote Valley Indian Reservation." (Id. at § E.) (CT 10-15.)

The third and final contract covered additional work by Terre Construction, including the construction of a road on tribal property. Before undertaking the additional work, Findleton required that an amendment to the Construction Contract be executed to cover the scope of the new work, and that the Tribal Council pass a Tribal Resolution accepting the terms of the amendment and providing for a "limited waiver of sovereign immunity" giving Terre Construction a remedy "within the U.S. Federal Court System." (Letter Proposal dated August 19, 2009.) The Amendment to Agreement was executed by the parties on August 20, 2008, and contained

this matter, there is no dispute as to the operative facts, the applicability of the litigation privilege is a question of law. (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1139-40.) Any doubt about whether the privilege applies must be resolved in favor of applying it. (*People ex. rel Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 963.) The privilege must be applied because the Tribe's petitioning activity was communication to a tribunal for the reasons underlying the privilege.

Most importantly, it follows that if the act of seeking transfer and review from the Tribal Court was privileged then following its orders was also privileged. The Tribe's conduct that Plaintiff claims is sanctionable is all conduct taken to comply with the orders of the Tribal Court. The lawsuit against the AAA and Findleton was to give effect to the Tribal Court's prior orders that were being ignored. At the sanctions hearing, the Court explained that it was "not taking umbrage at the fact that there's a conflicting [tribal court] order." (Supplemental Brief.) (CT 1049.) But it appears that this statement only applies if the Tribe ignores the Tribal Court's orders. The Sanctions Order, without a doubt, shows the Superior Court is taking umbrage at the Tribe's compliance with another tribunals' conflicting order in violation of the litigation privilege.[8]

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a description of the scope and cost of the additional work, and specifically provided "[a]ll terms and conditions of the original Agreement dated October 2, 2007 shall apply to this Amendment and to the additional work. . . ." (Third Amendment to Agreement, at ¶ 4.) A week later, the Tribal Council passed Resolution No. CV-08-20-08-03 approving the Third Amendment to Agreement, and consenting to a limited waiver of sovereign immunity only to "1.) provide for arbitration of disputes; 2.) avoid dispute resolution in state courts; 3.) limit recourse solely to casino assets; and 4.) shall not allow recourse to assets owned by individual members of the Tribe. (Resolution No. CV-08-20-08-03.)

[8] The arguments in relation to the litigation privilege are also applicable to the exception provided in CCP 128.5(f)(2)(A) and vice-a-versa.

3. The Tribe's Petition to the Tribal Court and all Attendant Communications are Completely Immunized under the *Noerr-Pennington* Doctrine.

Plaintiff's motion for sanctions also runs afoul of the *Noerr-Pennington* doctrine, which generally immunizes from liability acts taken in connection with petitioning any layer of government, such as the tribal judiciary, for legal review. (*Theme Promotions, Inc. v. News America Mktg FSI* (9th Cir. 2008) 546 F.3d 991, 1007 ("*Theme Promotions"*); *Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 929 (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* (1961) 365 U.S. 127); and *United Mine Workers v. Pennington* (1965) 381 U.S. 657.)

The *Noerr-Pennington* doctrine provides a rule of statutory construction that is based on, and implements, the First Amendment right to petition ("Petition Clause"). (*Sosa*, 437 F.3d at 931.) Under *Noerr-Pennington* courts must construe statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise. (*Id.*)

The *Noerr-Pennington* doctrine has been extended to preclude, "virtually all civil liability for a defendant's petitioning activities . . ." (*People ex. rel Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 964; see also, *Theme Promotions*, at 1006 ("The essence of the *Noerr-Pennington* doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct.").) *Noerr-Pennington* also applies to state law claims.[9] (*Theme Promotions*, at 1006.) (See also, *Tichinin v. City of Morgan Hill*

[9] This is consistent with 25 U.S.C. § 1302 which declares that "[n]o Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances." (*Id*. at section (a)(1).)

(2009) 177 Cal.App.4th 1049, 1064-1071 explaining the full breadth of protections accorded by the *Noerr-Pennington* doctrine and noting that "[m]any of the *Noerr-Pennington* cases are decisions from lower federal appellate and district courts. 'While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight.' (citations omitted)."") (*Id.* at 1064, n. 7.)

There is an exception under *Noerr-Pennington* where the litigation is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." (*California Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, 510 (internal quotation omitted).)

The United States Supreme Court set forth a two part definition of sham litigation in *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.* (1993) 508 U.S. 49, 60-61. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr-Pennington*, and a claim premised on the sham exception must fail. Successful prosecution of an underlying action, as the Tribe accomplished in the Tribal Court proceeding, is *prima facie* evidence that the underlying action was not a sham. (*Freeman v. Lasky* (9th Cir. 2005) 410 F.3d 1180, 1185.)

It was reasonable for the Tribe to expect to be successful in its requests to have the case transferred to the Tribal Court for review because the Parties unequivocally agreed to the Tribe's jurisdiction by contract and the bedrock principles of federal Indian law dictate that after the appellate court rendered its decision the case would then go to the Tribal Court. (See generally, Tribal Court Memorandum Decision.) (CT 662-672.) Moreover, the Tribal Court accepted transfer and review of the case. Because Plaintiff

cannot meet the first requirement there is no need for this Court to examine the litigant's subjective motivation, which is the second prong of the sham litigation analysis.[10] (*City of Columbia v. Omni Outdoor Advertising* (1991) 499 U.S. 365, 380.)

In addition to immunizing conduct in a legitimate lawsuit or administrative proceeding, the *Noerr-Pennington* doctrine also protects conduct that is "incidental to the prosecution of the suit." (*Sosa*, 437 F.3d at 936-39.) In *Sosa* the conduct at issue was the sending of pre-litigation demand letters. The court found such conduct was immunized (from RICO liability) under the *Noerr-Pennington* doctrine as "incidental to the prosecution of the suit." (*Id.* at 934-35.) The Tribe's nearly year long communications with the AAA were all "incidental" to the initial Tribal Court case and the later suit against the AAA and Respondent. (See, for example, Defendant's Memorandum of Points and Authorities in Support of Opposition to Motion for Sanctions Pursuant to CCP Sections 128.5 and 177.5 at p. 2 (citing to Boland Decl. ¶ 5).)

In analyzing the Sanctions Order, this Court may be guided by analogy. Had Mr. Findleton amended his complaint and sued the Tribe for seeking transfer to the tribal courts (perhaps alleging a cause of action for fraud or breach of contract) the Tribe would have successfully filed an anti-SLAPP motion under Code of Civil Procedure § 425.16 because statements and conduct during and "in connection with" a tribal court process are protected as official proceedings under 425.16(e)(1) and (e)(2).[11]

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[10] The subjective motivation of the Tribe has been stated repeatedly throughout this Opening Brief.

[11] Subsection (e) of Code of Civil Procedure § 425.156 states in relevant part:

As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection

Another analogy is also helpful. Had the Tribe sought relief in federal court, rather than Tribal Court, the Superior Court would likely not have imposed sanctions. The Tribe's conduct of petitioning the federal court system for relief would be protected. It was reversible error for those same protections to not have been extended, where the Tribe petitioned the Tribal Court for relief.

4. The Tribe Should Not be Sanctioned for Exercising its Contractual and Fundamental Rights.

The Superior Court specifically sanctioned the act of filing the lawsuit against the AAA and Robert Findleton in September 2017 because that was the sole way to grant sanctions under 128.5 (see argument I above). For another reason, the Superior Court can also be found to have

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with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

The very actions for which Plaintiff seeks sanctions against the Tribe runs afoul of the stated purpose of § 425.16:

The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

Plaintiff should not be awarded sanctions for abusing the legal process to stifle the exercise of First Amendment rights.

erred. The Superior Court does not have the power under California law to punish the Tribe for filing suit in its Tribal Court.

The act of this Court sanctioning the Tribe for following the laws and procedures of the tribal government is no doubt a violation of the Supreme Court's mandate that state action cannot infringe on the rights of Indians to make their own laws and be ruled by them. (*Williams v. Lee* (1959) 358 U.S. 217, 223 ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.").) And as previously stated, is contrary to what the parties agreed to.

The Tribe possesses the sovereign right to self-governance. The Supreme Court has recognized the right of inherent tribal self-governance as the law of the land for nearly two hundred years. (See, *Worcester v. Georgia* (1832) 31 U.S. 515, 559 ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . .").) As an act of self-governance, the Tribal Constitution vests the judicial power of the Tribe in a tribal court system.[12]

The Tribe has legally protected interests in creating tribal justice systems,[13] accessing the court system, resolving disputes arising on the

[12] That the Tribe as a sovereign nation created its court system is not to say that the Tribe and the Tribal Court are one in the same. The Tribal Court operates separate and apart from the Tribe that is a (non-consenting) party to this litigation, just as the California court system is not the same body or branch of government as the State who is party to cases within that court system.

[13] The Tribal Court has been a functioning court for many years and hears a great deal more cases than just those at issue here. The Plaintiff is well aware of this fact, as the Tribe has provided declarations of individuals attesting to the functioning of the Tribal Court as well as copies of court dockets as exhibits in this case. In any event, "[t]hat the Tribe did not have

reservation pursuant to tribal law and in a tribal forum, and ensuring that the decisions of the Tribal Court are effectuated. The State of California's judicial branch recognizes that tribal governance rights include the establishment and use of tribal justice systems. "Tribes are recognized as distinct, independent political nations . . . which retain inherent authority to establish their own form of government, including tribal justice systems." (Judicial Council Comment to Cal. Rules of Court, rule 10.60 (citing *Worcester,* 31 U.S. at 559; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55; 25 U.S.C. § 3601(4)).)

The Sanctions Order reveals an important misunderstanding about the Tribe's arguments about the Tribal Court. The Sanctions Order implied that the Tribe was raising comity as a defense to the sanctions. The issue of comity was not raised in any of the Tribe's filings as a defense to the sanctions. The Tribe never stated that the Superior Court was duty bound to follow the Tribal Court's decision when defending against the sanctions. Instead the Tribe distinguished that it had the right not to be sanctioned for using its Tribal Court and to follow the Tribal Court's orders. The existence or non-existence of the Tribal Court in 2012, which the Superior Court, addressed in the Sanctions Order was wholly irrelevant to being able to file a suit there against the AAA in 2017 and is simply not a comity issue.

A recent Ninth Circuit decision contradicts the notion that the actions in the Tribal Court are sanctionable because the Tribal Court *allegedly* did not exist in 2012. Part II of the decision entitled *Knighton v. Cedarville Rancheria* (9th Cir.) No. 17-15515 (March 13, 2019) directly

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a formal tribal court when the contract was executed is of no import. The salient question is whether it had an adjudicative forum available at any time Findleton attempted to enforce the contract's terms." It has had a judicial branch since the Tribe's government established its constitution in 1980. Tribal Court Memorandum Decision, n.2. Further, the Tribe sought relief in the Tribal Court at the earliest possible opportunity.

supports what the Tribe has been arguing all along. It discussed the contention that the tribe in question sought to exercise greater adjudicative authority over the plaintiff than it was capable of at the time of her employment because no court existed at that time. (*Knighton v. Cedarville Rancheria, supra,* No. 17-15515 at p. 32-36.) The decision held that a tribal court can have adjudicative authority over conduct even if that tribal court is established *after* the conduct giving rise to the claim has occurred. (*Id.* at 33-35.)

The right to establish and access tribal justice systems means nothing if others do not respect the authority of the Tribal Court. Even worse is the prospect of the Tribe being *punished* for using its Tribal Court system. The issuance of sanctions, was designed to punish the Tribe for using its right to access a part of its tribal government. "Tribal justice systems are an essential part of tribal governments and serve to ensure the public health and safety and the political integrity of tribal governments." (Judicial Council Comment to Cal. Rules of Court, rule 10.60 (citing 25 U.S.C. § 3601(5) and 25 U.S.C. § 3601(7)).) The Superior Court's assessment of sanctions was an error that denied the Tribe the sovereign right "to make [its] own laws and be ruled by them." (*Williams*, 358 U.S. at 320.) The existence or non-existence of the Tribal Court in 2012 is simply not a defense to this error.

III. THE SUPERIOR COURT CANNOT APPLY STATE LAW TO SANCTION A TRIBE FOR ON-RESERVATION CONDUCT ASSOCIATED WITH A TRIBAL COURT CASE IT CLAIMS IS SEPARATE FROM THE CASE IN WHICH IT HAS ASSERTED JURISDICTION.

A gating issue for the Superior Court to sanction the Tribe under CCP 128.5 required it to distinguish the Tribal Court Case as a "separate track of proceedings." ("Order.") (CT 1126.) This is because, as the

Superior Court stated, CCP 128.5 applies to actions or tactics "that were part of a civil case filed on or after January 1, 2015." (*Id*.) (CT 1126.) The State Court Case was filed on March 23, 2012. Consequently, if the Superior Court held that the filing of the Tribal Court Case was an action that was "part of" the State Court Case then the action would be outside the reach of CCP 128.5. In other words, the *only* way the Superior Court could sanction the Tribe under CCP 128.5 was to completely divorce the filing of the Tribe's petition to its Tribal court from the State Court Case.

By designating the Tribal Court Case as a "separate track of proceedings," however, the Superior Court also removed any plausible jurisdictional hook that would permit it to apply state law to the on-reservation activities of a sovereign tribal government. If the Tribal Court Case was indeed a "separate track of proceedings" then the entirety of those proceedings (*i.e*, the "actions or tactics" that are the subject of the sanctions) and the attendant communications with the AAA regarding such proceedings occurred solely on the Tribe's reservation. No part of the Tribal Court Case occurred within the State of California, or under the supervision of its courts. In fact, by the Court's own ruling, the Tribal Court Case was not even a "part of the civil case" under the Superior Court's jurisdiction. Based on the Superior Court's reasoning, the Tribal Court Case was a separate and distinct dispute, because if it were not, it would have been barred by the limitations of CCP 128.5. This is important, because as a separate and distinct dispute, the Tribal Court Case is a dispute that entirely arose on, and never proceeded outside of, the reservation—a place where application of state law is very limited.

It is well understood that state courts do not have general jurisdiction over Reservation affairs. (*Williams,* 358 U.S. at 223.) Similarly, absent express authorization by treaty or statute, a state may not ordinarily regulate the conduct of tribes occurring in Indian Country. (See, e.g., *The Kansas*

Indians (1867), 72 U.S. 737; *Worcester,* 31 U.S. at 515.)[14] "A necessary corollary to the rights of Indian tribes to self-government and to exclusive jurisdiction over their internal affairs is the principle that state law does not apply on the reservations." (*Bowen v. Doyle* (W.D.N.Y. 1995) 880 F. Supp. 99, 113.) "[S]tate law does not apply to the Indians except so far as the United States has given its consent." (*United States v. Forness* (2d Cir. 1942) 125 F.2d 928, 932. See also *Worcester,* 31 U.S. at 560.)

28 U.S.C. § 1360 (sometimes referred to as "PL 280") is the only federal law that grants to the state courts of California jurisdiction to apply state law to resolve disputes arising within Indian country. PL 280, however, only grants state courts the authority to apply state law in resolving disputes between individuals and did not grant state courts the authority to apply state law to resolve disputes where one of the parties to the dispute is an Indian tribe. (*Bryan v. Itasca County* (1976) 426 U.S. 373, 389 ("[T]here is notably absent [in § 1360] any conferral of state jurisdiction to the tribes themselves."); *Middletown Rancheria v. Workers' Comp. Appeals Bd*. (1998) 60 Cal. App. 1340 (28 U.S.C. did not grant Workers Compensation Appeals Board subject matter jurisdiction over the tribe, as opposed to individual Indians, for purposes of enforcing California's workers compensation laws); *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal. App. 3d 853, 857-858 ("No case has been cited to us, and we found none, which concludes or even suggests that 28 United States Code § 1360 conferred on California jurisdiction over Indian tribes, as contrasted with individual Indian members of the tribes.").)

As the Superior Court noted, "the court's authority [to order sanctions] derives from the state." (Sanctions Order.) (CT 1126.) But, as

[14] The exception to this rule appears where the burden to the Tribe is "minimal" and the subject of the applicable law is a non-tribal person on the reservation, such as a requirement that a tribe collect sales tax imposed on non-Indian buyers of cigarettes and keep records of such sales. (See *Moe v. Confederated Salish and Kootenai Tribes* (1976) 425 U.S. 463, 483.)

the long-standing legal precedent cited above makes clear, the Superior Court has no authority over a Tribe's on-reservation conduct.

There can be little question that the Order is an attempt to assert authority over the Tribe's on-reservation conduct. The Construction Agreement and Rental Contract involved work solely performed on the Tribe's reservation pursuant to contracts that were negotiated and executed on the Tribe's land, and which are governed by Tribal law and the jurisdiction of the Tribe. (Defendant's Memorandum of Points and Authorities in Support of Opposition to Motion for Sanctions Pursuant to CCP Sections 128.5 and 177.5.) (CT-1001.) The petition that gave rise to the purportedly sanctionable activity was filed by the Tribal government in its Tribal Court, and was argued and decided on the Tribe's reservation. In short, the entirety of the purportedly sanctionable activity occurred on-reservation.

The Superior Court's Order is an undeniable attempt to control the Tribe's on-reservation conduct by applying state law in a dispute arising solely on the Tribe's reservation that the Superior Court took great pains to declare a "separate track of proceedings" from the State Court Case over which it has jurisdiction. The Order thus flies in the face of Public Law 280's prohibition against asserting jurisdiction over an Indian tribe, the general federal prohibitions against the applicability of state law on reservations and the Supreme Court's mandate, described in detail in Section II subsection (4), above, that state action cannot infringe on the rights of Indians to make their own laws and be ruled by them. (*Williams,* 358 U.S. at 223 ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.").) The ruling in *Williams v. Lee* thus not only demonstrates the reasonable (*i.e*, the good cause) basis for a tribe to utilize

its own court system, but also shows that a tribe's use of its courts is a federal right, which the tribe should be free to exercise without state interference (such as by means of sanction).

This last point is in many ways the most important. It is hard to imagine the Superior Court issuing a sanction to a person seeking further redress in a federal court. Yet, the Superior Court had few qualms over sanctioning the Tribe for seeking further redress in its Tribal court. The Superior Court's actions call into serious question whether it respects the hard fought rights of Tribal governments to retain their government institutions.

CONCLUSION

Appellant requests that the Sanctions Order be reversed. The Superior Court erred by permitting sanctions in a civil case filed in 2012, nearly three years before the operative statute took effect. Even if the statute were in effect, the conduct in question was not warranting of sanctions under any statute and was absolutely privileged. Moreover, filing suit in the Tribal Court against the AAA and Mr. Findleton was within the Tribe's contractual and inherent rights. Finally, federal law prohibits a state court from applying state law to a tribal government's on-reservation activities.

DATED: September 25, 2019

Respectfully submitted,

By /s/Little Fawn Boland

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 11120 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By /s/ Little Fawn Boland

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CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2019, a true and correct copy of:

APPELLANT'S OPENING BRIEF

was served on 1) Darrio Navarro, 2) Thomas Gede, and 3) Timothy Pemberton counsel for Respondent electronically through this Court's e-filing system.

DATED: September 25, 2019

By /s/ Little Fawn Boland

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

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