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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.

Appeals from the Judgments 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 them as provided in rule 8.208(e)(2).

June 19, 2020

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 April 23, 2018, the American Arbitration Association ("AAA"), lacking jurisdiction, closed a case filed by Robert Findleton ("Respondent" or "Mr. Findleton") against the Coyote Valley Band of Pomo Indians ("Appellant" or "Tribe"). (CT 1106.) Infuriated at the loss, Respondent filed a motion for sanctions pursuant to CCP 128.5 and 177.5 on June 27, 2018, which was granted in the amount of $86,457 and $1,500, respectively, on December 10, 2018. (Motion for Sanctions Pursuant to CCP Sections 128.5 and 177.5 and Notice of Entry of Order Granting Plaintiff's Motion for Sanctions ("Sanctions Order").) (CT 1174 and CT 1519-1525.)

The Sanctions Order is on appeal under case number A156459. To collect the money in the Sanctions Order and a prior award of attorney fees on appeal, Respondent made an application for an examination ("Debtor's Exam") (CT 1593) and sought an order requiring an undertaking in the amount of $79,815 to stay execution on the Sanctions Order and to obtain a writ of execution if the undertaking was not promptly paid by the Tribe. (Notice of Motion, Motion for an Order Requiring Undertaking to Stay Execution on Order Awarding Sanctions; Motion for Order Directing Issuance of a Writ of Execution ("Motion for Undertaking") and Defendant's Combined Opposition to Plaintiff's Motion for an Undertaking to Stay Execution on Order Awarding Sanctions and Plaintiff's Motion for Order Directing Issuance of a Write of Execution.) (CT 1845-1850 and CT 2042-2058.)

In response to the application for the Debtor's Exam, the Tribe submitted two motions that collectively asked the Court: to clarify that the

collection of money judgments could only be enforced against "Casino assets" (Defendant's Motion for Exemption from Enforcement of a Money Judgment ("Motion for Exemption")) (CT 164); and requested the Court to acknowledge the fact that the Tribe did not possess any "Casino assets" and that the Coyote Valley Enforcement of Judgments Ordinance ("Judgments Ordinance") be deemed the applicable law for any collection efforts against the Tribe. (Defendant's Motion for Clarification; Declaration of Little Fawn Boland in Support of Motion for Clarification; Defendant's Amended Motion for Clarification.) (CT 1858 - 1869, 1898 - 1906.) The Court ultimately granted the undertaking, did not clarify anything, and found that the "Casino assets" were inequitably or fraudulently conveyed based on principles of equitable estoppel, judicial estoppel and evidentiary estoppel. The transfer was set aside such that Coyote Valley Casino cash accounts were still available for attachment in the amount of $222,018.62 in the eyes of the Court.

STATEMENT OF APPEALABILITY

This appeal is from three orders of the Mendocino County Superior Court issued on April 26, 2019 and April 29, 2019 respectively. An appeal of the orders is authorized within the Code of Civil Procedure at CCP 904.1(a)(1).

STATEMENT OF FACTS

I. THE HISTORY LEADING TO THE SANCTIONS ORDER AND RELATED APPEAL.

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 24-49.)

Ultimately, on July 29, 2016, in *Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194 ("*Findleton I*"), the Tribe was found to have waived sovereign immunity. On November 21, 2016 the Court (CT 859-860) granted $4,591 for costs and $28,148.75 for attorney fees, which was stayed on appeal until September 25, 2018. *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal. App. 5th 565, 568 ("*Findleton II*"). The Superior Court subsequently 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 1137-1139.)

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 1486-1497.) In the case entitled *Findleton v. Coyote Valley Band of Pomo Indians*, Case No. NCICS-CV-2017-0001-JW ("Tribal Court Case No. 1"), the Tribal Court agreed to accept review on January 26, 2017. (*Id*.) 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 this Court of Appeals 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 Tribal Court issued a "Memorandum Decision." (CT 980-990.) It found that the Tribal Court had jurisdiction over the case. (*Id*.) On February 8, 2017 the Respondent filed a Motion to Dismiss in Tribal Court. (CT 997, 1020, 1056-1069.) After Respondent filed the motion he never again participated in any of the Tribal Court proceedings. (*Id*.) On March 3, 2017, the Memorandum Decision was

provided to the Court. (Request for Judicial Notice.) (CT 980-990.) On May 17, 2017 the Respondent filed for arbitration with the AAA. (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1486-1497.)

The Tribal Court issued an order on July 6, 2017 finding that no court has jurisdiction over the dispute because the Tribe did not waive its sovereign immunity from suit. (*Id*.) (CT 1244-1257.) 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 the July 6, 2017 Tribal Court order, on September 15, 2017, the Tribe filed a new lawsuit in the Tribal Court against Respondent and the AAA entitled *Coyote Valley Band of Pomo Indians v. American Arbitration Association and Robert Findleton*, Case No. 2017-01103-CO. ("Tribal Court Case No. 2") (*Id*.) (CT 1398-1405.) Subsequently, on December 20, 2017, the Tribal Court issued a permanent injunction ruling that both Respondent and the AAA could not proceed with the arbitration. (*Id*.) Lacking jurisdiction, on April 23, 2018, the AAA closed the case. (*Id*.) (CT 1106.)

On June 28, 2018 Respondent sought sanctions against the Tribe in the Superior Court, which were later granted on December 10, 2018 pursuant to the Sanctions Order in the amount of $1,500 and $86,457, pursuant to CCP 177.5 and 128.5. (Sanctions Order.) (CT 1145-1174.) The Tribe filed an appeal concerning the Sanctions Order on February 7, 2019 under case number A156459. (Notice of Appeal.) (CT 1622.)

II. OTHER MONEY JUDGMENTS GRANTED BY THE COURT.

On December 19, 2018, Respondent sought attorney fees as the prevailing party on the motion to compel arbitration. (CT 1570-1592.) On the same day, he sought attorney fees and costs on appeal as related to

Findleton II. (CT 1529-1534.) The Court found on March 5, 2019 that the Respondent was the prevailing party and awarded attorney fees and costs of $74,673.75 and $7,724.09. (CT 1856-1857.) On March 14, 2019, it granted attorney fees and costs on appeal of $12,130 and $571.20. (CT 1886-1887.)

III. THE APPLICATION FOR A DEBTOR'S EXAM AND RELATED MOTION FOR EXEMPTION.

Respondent submitted an application for a debtor's examination on January 11, 2018. (CT 1593-1595.) In response to the application for the Debtor's Exam, on February 11, 2019 the Tribe filed a motion arguing that the fact that the Tribe did not own any "Casino assets" signified that it did not possess any assets against which the Respondent could collect. (Motion for Exemption.) (CT 1642-1661.)

The Coyote Valley Casino ("Casino") and all its assets are owned by Coyote Valley Entertainment Enterprises ("CVEE"), a Tribally chartered subdivision of the Coyote Economic Development Corporation ("CEDCO"), a federally chartered corporation. Mahdavian Affidavit at ¶ 9 and Exhibit C thereto. (CT 1662-1665.)

The Tribe transferred the "Casino assets" to CVEE for one reason only: to comply with lender and investor requirements as related to a federal program that brought in $13,000,000 in tax credit allocation. Declaration of Little Fawn Boland ("Boland Declaration") of April 18, 2019 attached hereto at ¶ 9-10. (CT 2116-2203.) The Tribe was selected to participate in the New Markets Tax Credit Program ("NMTC Program") and entered into a letter of commitment with Travois New Market, LLC, a recognized Community Development Entity ("CDE") for part of its tax credit allocation. *Id*. at ¶ 9-10. The program is administered by the US

Department of Treasury's Community Development Financial Institution's Fund. *See* https://www.cdfifund.gov/programs-training/Programs/new-markets-tax-credit/Pages/default.aspx (April 17, 2019). (CT 2240.) The NMTC Program incentivizes community and economic development through the use of tax credits that attract private investment to distressed communities. *Id*. As conditions to the transaction, the commitment stated: "Satisfactory underwriting of Project including: NMTC eligibility per the IRS requirements related to Targeted Populations and CDE's criteria, and financial feasibility of Project per CDE's underwriting standards. This analysis will also include, but not be limited to, *sufficient separation of business operations between the hotel portion of the project and any gaming facility operated by the sponsor*." (Emphasis added.) (CT 2117-2118 at ¶ 11 and Exhibit B thereto.)

The attorneys for the CDE and the investor, US Bank, were uncomfortable that the Tribe, the project sponsor and guarantor for the project, was a casino owner because the proceeds of the NMTC program cannot be used in furtherance of gaming. *Id*. at ¶ 12; *See* Treasury Regulations section 1.45D-1(d)(5). They were also uncomfortable with the Coyote Economic Development Corporation ("CEDCO"), the Borrower in the NMTC transaction, being the direct owner of the Casino for the same reason. *Id.* at ¶ 13. The risk of comingling funds between the Casino and the NMTC project was the basis of CDE and US Bank requiring the Casino be moved to a separate legal entity and that the hotel also be owned by another separate legal entity. *Id*. at ¶ 14. The names of the companies formed for these special purposes are CVEE and the Coyote Valley Hospitality Corporation ("CVHC"). *Id.* at ¶ 15.

The segregation of the gaming business from the Tribe, CEDCO and

CVHC is addressed throughout the transaction documents. *Id.* at ¶ 16. The requirement is best expressed in Section 3.18 of the Loan Agreement for the transaction. *Id*. at ¶ 16 and Exhibit C thereto. It states: "All consents to the Loans and transactions contemplated in connection therewith have been obtained. As a condition of the Loan, the Guarantor agreed to transfer the assets and liabilities of the Coyote Valley Casino from the Guarantor to the Coyote Valley Entertainment Enterprises, a separate portion of the Borrower." *Id*.

The immense benefit of the NMTC Program, a $13M tax credit allocation, was the sole motivating factor for transferring the Casino because the transaction is vital for the future of the Tribe's members. Declaration of Michael Hunter ("Hunter Declaration") of April 18, 2019 (CT 2234-2235 attached hereto at ¶ 4.) The hotel project will generate at least 25 living wage jobs, over half of which are designated for low-income individuals, and will generate significant tax revenue for the Tribe and sales revenue for CVHC. *Id*. at ¶ 5. But for the capital investment derived from the NMTC Program, developing the hotel would have been impossible on the current timeline. *Id*. at ¶ 6. According to the Tribal Chairman, it was a "no-brainer" to complete the transaction and necessarily comply with the investor's requirements. *Id*. at ¶ 7.

In order to satisfy the asset transfer requirement of the investor and the CDE, CEDCO chartered CVEE. (CT 2241.) On November 16, 2017, the Tribe transferred all the assets and liabilities of the Coyote Valley Casino to it by way of an "Asset Transfer Agreement," which was duly approved by resolutions of the Tribal Council, the Board of Directors of CEDCO and the Board of Directors of CVEE. (*Id.*) Boland Declaration at ¶ 18 and Exhibit D thereto. (CT 2116-2203.) All contracts were assigned to

CVEE and all legal actions necessary to effectuate the transfer were completed as of the transfer date. *Id*. at ¶ 19. The NMTC Program transaction closed on December 21, 2017. *Id*. at ¶ 20. The timing was due to the transaction needing to close by the end of 2017. *Id*. at ¶ 21. Moreover, the only order that existed at the time of the transfer was for $4,591.79 for costs and $28,148.75 for attorney fees entered on appeal but stayed until September 25, 2018. *Findleton II*, 27 Cal. App. 5th at 568.

Importantly, the transfer of the Casino came at a time when the case against the Tribe was seemingly over. On July 6, 2017 the Tribal Court found it had jurisdiction over the Tribe and Respondent, that the Tribe had not waived its sovereign immunity and the State court case could not proceed. (*Findleton v. Coyote Valley Band of Pomo Indians*, NCICS-CV-2017-0001-JW, Opinion.) (CT 1244-1311.) The Tribal Court granted on October 2, 2017 a Temporary Restraining Order ordering the AAA and the Respondent to refrain immediately from proceeding with mediation and arbitration. (*Coyote Valley Band of Pomo Indians v. American Arbitration Association and Robert Findleton*, 2017-01103-CO, Order Granting Temporary Restraining Order.) (CT 1206-1207.) On October 27, 2017, the AAA sent a letter to the Tribe and Respondent that stated: "Please take notice that this matter is hereby stayed, in accordance with the October 2, 2017 Temporary Restraining Order issued by the Coyote Valley Tribal Court." Boland Declaration at ¶ 22 and Exhibit E thereto. (CT 1296.)

The Respondent was inactive for a year after the stay was issued by the AAA, before seeking sanctions on October 12, 2018. *See* Plaintiff's Motion for Sanctions. (CT 1145-1174.) The Respondent did not send a request for the AAA to reconsider its position until February 5, 2019 (16

plus months after they stayed the case) and only did so by a short letter (which was ineffective). *Id*. at ¶ 24 and Exhibit G thereto. (CT 2156.)

The court order ("Exemption Order") issued on April 26, 2019, without any analysis, denied the relief requested "because it (1) lack[ed] any cognizable evidentiary foundation and (2) is subject to equitable estoppel under federal common law to prevent an injustice." (CT 2362-2364.)

IV. THE APPLICATION FOR A DEBTOR'S EXAM AND RELATED MOTION FOR CLARIFICATION.

The Debtor's Exam also precipitated the Tribe filing a motion seeking clarification of all money judgments to be clear that "recourse is limited to casino assets." (CT 1867.) As written, the prior orders seemed to impermissibly imply that they are general obligations of the Tribe. On March 13, 2019, just eight days after the prevailing party order and a day before the attorney fees on appeal order, and prior to the Debtor's Exam having occurred, the Tribe requested that the Court clarify that all judgments in the case needed to be consistent with the Court's prior ruling on the Demurrer.[1] (*Id*.)

The Court previously stated:

> Findleton presented the proposal entitled Third Amendment to Agreement (part of Exhibit 1 to this ruling) in August of 2008 and a day later, the Tribal Council, by prior authorization of the General Council, approved the Third

[1] The Court allowed the Tribe to submit an Amended Motion for Clarification on March 28, 2019.

[2] "Judgment Creditor" is defined under the Judgments Ordinances "a Person to whom money is owed pursuant to a Final Judgment."

[3] The Judgments Ordinance defines a "Final Judgment" as "a final order awarding money issued by a court or in conjunction with arbitration or similar quasi-judicial proceedings, that is not or is no longer subject to an

> Amendment to the Agreement with Findleton and consented to a limited waiver of sovereign immunity which was limited, in part, to provide for the arbitration of disputes. The Tribal Council Resolution specifically accepted several other terms in Findleton's proposal, which included terms favorable to the Tribe and its members, e.g., *limiting recourse to casino revenues* and barring recourse to assets of individual tribal members.

See February 1, 2017 "Ruling on Request for Judicial Notice and Ruling on Demurrer" at pg. 4 (emphasis added). (CT 953-967.)

The above paragraph, as well as the proceeding and subsequent analysis contained in the Demurrer, demonstrated that the Court viewed the Tribe's grant of a waiver of sovereign immunity as conditioned on certain limitations. In addition, the text suggested that Respondent's agreement to limit recourse to Casino revenues was a bargained-for-exchange whereby favorable terms for the Tribe were traded for favorable terms for Respondent.

The Tribe sought a Writ of Mandate seeking review of the ruling on the Demurrer. (CT 1617.) The Court of Appeals First Appellate Division denied the request. (*Id*.) While the Demurrer did not issue from a court of last resort, it is now the "law of the case." Moreover, Resolution 07-01, which the Court attached to the Ruling on Demurrer, contains plain language to "limit recourse solely to casino assets" in the waiver of sovereign immunity. The Court and the Respondent have insisted that the waiver of sovereign immunity sentence in Resolution 07-01 be given full effect. This Court of Appeal stated that Resolution 07-01 must be followed. (*Findleton I,* 1 Cal.App.5th 1194, 1207, fn. 8.) They also held that the laws

(including resolutions) of the Tribe govern the contracts and disputes related to them. *Id.*

On April 26, 2019, the court issued an order ("Clarification Order") finding the words "Casino assets" do need any explanation, that the motion was premature, without statutory basis and that the Court's jurisdiction was not limited to the conditions of the waiver of sovereign immunity. (CT 2365-2367.) The Court went many steps further and also found "that in pursuing recourse against the "Casino assets," Respondent may question Defendant, CEDCO, CVEE or any of their officers, representatives, employees or agents and undertake such investigation as may be permitted by applicable law during the course of the debtor's examination concerning any asset that was held in an account of the Defendant's Casino business during the term of the contract between the parties or any asset traceable to such account regardless of the party to whom or the account to which it was transferred." (*Id*.) (CEDCO and CVEE are not parties to this case.)

V. MOTION FOR UNDERTAKING AND ORDER ISSUED THERETO.

The Respondent sought an undertaking (via its Motion for Undertaking) to enforce the Sanctions Order on Feb 27, 2019 and a writ of execution if the undertaking was not paid at the initial stage of the appeal. (CT 1845-1850.) The Motion for Undertaking solely discussed collection of the Sanctions Order on appeal. (*Id*.)

On April 29, 2019, the Court granted the undertaking for the sanctions order in the amount of $86,457 ("Undertaking Order"). (CT 2381-2384.) But the Undertaking Order also went much further than the Respondent's requested relief in the Motion for Undertaking. (*Id*.) The Court found all money judgments (per Respondent the total equal to

$222,018.62) subject to immediate execution against any and all of the Casino's traceable accounts regardless of "the nominal owner of such assets at present or any putative conveyance of such assets to any putative third-party corporate entity." (*Id*.)

Incredibly, the Court also concluded the transfer was set aside for purposes of this case and that the transfer "constitutes an inequitable or fraudulent conveyance that is not judicially cognizable under the federal common law doctrine of equitable estoppel or the state law doctrines of judicial estoppel or evidentiary estoppel under Evidence Code section 623." (*Id*.) "[A]ll casino assets traceable to accounts used during the term of the contracts that are the subject of this action and have been putatively transferred to any entity controlled by Defendant may be treated by Plaintiff for purposes of the execution of any money judgment issued by this Court as if such casino assets were legally owned and controlled directly by Defendant." (*Id*.)

VI. COYOTE VALLEY ENFORCEMENT OF JUDGMENTS ORDINANCE.

The Appellate Court strongly suggested in its decision that State law should not govern where an applicable Tribal law exists. (*Findleton I,* 1 Cal.App.5th 1194, 1207, fn. 8.) In the matter at hand, a particular issue is covered by the Tribe's laws, which is the Judgments Ordinance. At a duly held and noticed meeting held on December 14, 2017, the Tribal Council of the Coyote Valley Band of Pomo Indians enacted Ordinance No. CV-TC-12-14-17-01, the Coyote Valley Enforcement of Judgments Ordinance (the aforementioned Judgments Ordinance). (CT 1650.) The Judgments Ordinance was approved by the Tribal Chief the following day. (*Id*.)

The Judgments Ordinance establishes the "exclusive procedure" for collection of a debt by a "Judgment Creditor"[2] against persons under the Tribe's jurisdiction or against the Tribe or an entity wholly owned by the Tribe. Thereunder, a "Final Judgment" [3] must first be obtained against the person who owes the debt. If the judgment is a "Foreign Judgment,"[4] it must be domesticated by the Tribal Court prior to enforcement. (*Id*.) With the Final Judgment, the Judgment Creditor can petition the Tribal Court for a "Writ of Execution"[5] to obtain payment of the debt by seizing funds belonging to the person owing the debt. Judgments Ordinance at Article 1, Section 1.

The Judgments Ordinance:

> covers the enforcement of judgments against, and the garnishment of assets belonging to, the Tribe, its Tribal Entities, its members, and the assets of any Person doing business, or having assets, on the reservation. The Ordinance covers the garnishment of assets of the Tribe and Tribal Entities, whether those assets are located on or off the reservation.
>
> Judgments Ordinance at Article 1, Section 2. (CT 1946-2041.)

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[2] "Judgment Creditor" is defined under the Judgments Ordinances "a Person to whom money is owed pursuant to a Final Judgment."

[3] The Judgments Ordinance defines a "Final Judgment" as "a final order awarding money issued by a court or in conjunction with arbitration or similar quasi-judicial proceedings, that is not or is no longer subject to an appeal. For the avoidance of doubt, judgments include fines resulting from an order of contempt."

[4] The Judgments Ordinance defines "Foreign Judgment" as "any judgment, order, writ, or decree of a court of another tribe, state, or jurisdiction, or any arbitration or other quasi-judicial award."

[5] The Ordinance defines a "Writ of Execution" is "an order issued by the Tribal Court, commanding the addressee to take specific action with regard to the enforcement of a judgment."

Further, the Judgments Ordinance gives the Tribal Court the exclusive jurisdiction over the execution of a judgment on any property (real or personal) within the boundaries of the reservation, and over any property, including personal property such as cash accounts, regardless of where they are located, of the Tribe and Tribal Entities. Judgments Ordinance at Article 1, Section 3. (CT 1946-2041.) While the applicability of the Judgments Ordinance was raised throughout the Tribe's filings in relation to the Debtor's Exam and the Motion for Undertaking, the Court ignored the arguments and clearly rejected them.

VII. DISCOVERY DISPUTE.

The confusion caused by the three orders on appeal continues to plague the parties as will be seen in a recent appeal of discovery orders that purported to require compliance with such orders from non-parties to the case, amongst other related issues. (See case number A159823).[6]

VIII. TIMELINE OF IMPORTANT DATES.

- November 18, 2016 - An order for $4,591.79 for costs and $28,148.75 for attorney fees was entered on appeal but stayed until September 25, 2018.
- November 16, 2017 - Casino transferred to CVEE so that $13M New Market Tax Credit allocation could be accepted.
- June 28, 2018 - Sanctions requested.
- September 25, 2018 - Prior stay lifted as to order for $4,591.79 for costs and $28,148.75 for attorney fees.
- December 10, 2018 - Sanctions granted in the amount of $86,457

[6] That appeal and the appeal of these three orders is going to be requested to be consolidated by way of a Motion for Consolidation that is being filed imminently.

under CCP 128.5 and $1,500 pursuant to CCP 177.5.

- December 19, 2018 - Prevailing party claim filed.
- December 19, 2018 - Claim for attorney fees and costs on appeal filed.
- January 11, 2019 - Application for Debtor's Exam.
- March 5, 2019 - Prevailing party order granted awarding attorney fees and costs of $74,673.75 and $7,724.09.
- March 14, 2019 - Order granting attorney fees and costs on appeal of $12,130 and $571.20.

STANDARD OF REVIEW

The determination of whether equitable estoppel, judicial estoppel and evidentiary estoppel could be used by the Court to set aside the transfer of the "Casino assets" to the Coyote Valley Entertainment Enterprises is a question of law that this Court reviews 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 Court's wrongful assertion of jurisdiction over the enforcement of money judgments contrary to applicable Tribal law is also a question of law. Finally, the abuse of discretion standard applies when reviewing the refusal of the Court to clarify that the money judgments in this case are only collectable against "Casino assets."

The Court's conclusions reflected in the underlying orders apparently rests on a multitude of factual findings that were not properly litigated. This Court reviews factual findings to determine if they are supported by substantial evidence. (*Balon v. Drost* (1993) 20 Cal.App.4th 483, 487.)

ARGUMENT

The rulings by the Superior Court that the Tribe made an inequitable or fraudulent conveyance were erroneous. The Court applied inappropriate standards of equitable, judicial and evidentiary estoppel to sidestep basic notions of notice, due process and the right to a jury trial. It used similarly inappropriate equity-based standards to bar the Tribe from arguing that Tribal law should apply to certain debt collection procedures, rather than basing its determination on choice of law principles, contractual interpretation and the law of the case, as required. Finally, it erroneously determined that the Tribe's Motion for Clarification, and the amendment thereto, was premature, not statutorily based and time barred.

I. THE COURT ERRED WHEN IT SET ASIDE THE CASINO ASSET TRANSFER AS AN INEQUITABLE OR FRAUDULENT CONVEYANCE.

1. California Law Controls the Proceedings Below, Not ERISA.

The Motion for Undertaking was noticed under CCP 917.9(b). There was no indication at any time—much less notice and an opportunity to be heard—that Respondent was asserting a federal cause of action against not only the Tribe, but CVEE and CEDCO, whom were not parties in the suit, nor in the proceedings underlying the orders appealed from. This constitutes a complete denial of due process, as we shall explain in a separate section below. In this section, we shall explain why the Court's reliance on federal law was clearly erroneous and an error.

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2. California Law is Indisputably Clear in Rejecting Equitable Estoppel as an Independent Cause of Action.

As aptly summarized in *Moncada v. W. Coast Quartz Corp*. (2013) 221 Cal.App.4th 768, 782:

> In *Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 127 Cal.Rptr.3d 372, the court reiterated that California does not recognize an independent cause of action for equitable estoppel: "[A]s Witkin ... explains, ' "[t]he [equitable estoppel] doctrine acts defensively only." ' (13 Witkin, Summary of Cal. Law [(10th ed. 2005)] Equity, § 190, p. 527; see also *Central National Ins. Co. v. California Ins. Guarantee Assn.* (1985)165 Cal.App.3d 453, 460, 211 Cal.Rptr. 435 [equitable estoppel 'must be pleaded ... either as a part of the cause of action or as a defense'].) As a stand-alone cause of action for equitable estoppel will not lie as a matter of law...." (Id. at p. 1463, 127 Cal.Rptr.3d 372.)

With California law as clear as it can be on the limitations of equitable estoppel and how it is asserted by a litigant, Respondent overreached and invited the Court to rely upon inapposite federal law instead, because CVEE is a subordinate economic entity of CEDCO, a federally chartered corporation. Federal law, of course, was never litigated (nor even noticed) before, and applying federal law simply because CEDCO, a non-party to this suit, was federally chartered is nonsensical and without support in the record. This will again be addressed in the discussion of the deprivation of due process, below.

3. The Underlying Orders Attempted to Circumvent California Law by Applying Inapposite ERISA Case Law.

It is a central contention in the underlying orders that they are empowered by the remedy of equitable estoppel. Support for this contention is offered through case law, specifically a small assortment of federal cases—all of them were disputes controlled by the Employee

Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. ch. 18 § 1001 et seq. ERISA is a federal United States tax and labor law that establishes minimum standards for pension plans in private industry. It contains rules on the federal income tax effects of transactions associated with employee benefit plans. ERISA was enacted to protect the interests of employee benefit plan participants and their beneficiaries. Among other things, ERISA established required disclosures to plan beneficiaries and standards of conduct for plan fiduciaries.

ERISA requires accountability of plan fiduciaries and generally defines a fiduciary as anyone who exercises discretionary authority or control over a plan's management or assets, including anyone who provides investment advice to the plan. Fiduciaries who do not follow the principles of conduct may be held responsible for restoring losses to the plan. ERISA addresses fiduciary provisions and bans the misuse of assets through these provisions.

In addition to keeping participants informed of their rights, ERISA also grants participants the right to sue for benefits and breaches of fiduciary duty. It is from this complex set of workplace laws—which govern a uniquely intimate fiduciary relationship—that Plaintiff found support for "equitable estoppel" being used in disregard of the explicit limitations extant in California law. To do this, Respondent had to find a way to inject Federal law into the state law proceedings below. Thus, he injected inapposite ERISA case law into the proposed orders that were thoughtlessly signed by the Court.

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4. It Was Error to Apply ERISA Case Law, Both Because Contradictory State Law Controlled and Because the ERISA Holdings Were Uniquely Distinguishable From the Facts Below.

Although it was independently erroneous to apply federal case law to the proceedings below, the specific holdings referenced in the underlying orders are also uniquely distinguishable. All of the federal authorities relied upon by the Respondent (*Gabriel*, *Greaney*, *Ellensburg*) involve ERISA claims and none of them recognizes an independent equitable estoppel remedy outside of the ERISA context.

Gabriel v. Alaska Elec. Pension Fund (9th Cir. 2014) 773 F.3d 945, 955 (*internal citations omitted*) exemplifies this fact:

> '[A]ppropriate equitable relief' may include the remedy of equitable estoppel, which holds the fiduciary 'to what it had promised' and 'operates to place the person entitled to its benefit in the same position he would have been in had the representations been true.' Under this theory of relief:
>
> '(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.'

The foregoing passage articulates the full stop limitations of equitable estoppel in federal law, but the *Gabriel* court also explained that to maintain a federal equitable estoppel claim the party asserting estoppel must show:

> (1) extraordinary circumstances; (2) that the provisions of the plan at issue were ambiguous such that reasonable persons could disagree as to their meaning or effect; and (3) that the representations made about the plan were an interpretation of the plan, not an amendment or modification of the plan. A plaintiff must first establish that the plan provision in question is ambiguous and the party to be estopped interpreted this

> ambiguity. If these requirements are satisfied, the plaintiff may proceed with the equitable estoppel claim by satisfying traditional equitable estoppel requirements.

(*Id.* at 957.) These requirements further clarify that reliance upon the equitable estoppel remedy expressed in ERISA case law was clearly erroneous.

5. The Orders Below Profess to Adjudicate Claims and Issues that Were Not Litigated.

Fundamental due process requires that a court order adjudicate only matters that were properly litigated before it. "It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless she was given proper notice and an opportunity to defend." (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.) Similarly, a court cannot grant unrequested relief against a party who appears without affording that party notice and an opportunity to respond. "Due process requires affording a litigant a reasonable opportunity, by continuance or otherwise, to respond to evidence or argument that is new, surprising, and relevant." (*In re Marriage of O'Connell* (1992) 8 Cal.App.4th 565, 574.)

Here, the Court did not adhere to these basic principles. Neither CVEE nor CEDCO were parties to the underlying proceedings, nor were they invited by proper notice and/or assertion of jurisdiction. As to the Tribe, it was before the Court, but completely without any notice that the Court would purport to issue rulings on matters not properly before it. As noted in *In re Marriage of Siegel* (2015) 239 Cal.App.4th 944, 953-54, "[A] dissolution court cannot grant unrequested relief against a party who appears without affording that party notice and an opportunity to respond." A court exceeds its jurisdiction when it issues orders that are not based on

any pending motion. (*In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 640; see also *Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1545 (A notice of motion must state the grounds upon which the motion is made, and only those specified grounds may be considered by the trial court.").)

> We conclude that the trial court erred. Linda's request for an order to disclose insurance information as "proof" that a life insurance policy existed could not be treated, consistent with due process, as notice that the family court would take the matter under submission and issue an order requiring Irwin to establish and fund a $126,916 trust. As *O'Connell* makes clear, a "dissolution court cannot grant unrequested relief against a party who appears without affording that party notice and an opportunity to respond."

In re Marriage of Siegel, 239 Cal. App. 4th at 958.

6. The Court Side-Stepped Due Process Rights Extant in UVTA, Including the Right to a Jury Trial.

The right to a jury trial in an action asserting a fraudulent conveyance or transfer—whether based on Uniform Voidable Transfer Act ("UVTA")[7] or its common law predecessors and counterparts—is well established for cases in which monetary recovery is sought. (See e.g. *Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 (holding that a party has a right to a jury trial whether claiming under UFTA or its common law counterparts.).) As further noted in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 299, "[t]he Legislature cannot convert a legal right into an equitable one so as to infringe upon the right of trial by jury." Additionally, the Supreme Court held in *Granfinanciera, S.A.*

[7] UVTA used to be called the Uniform Fraudulent Transfers Act and is referred to as "UFTA" in older cases.

v. Nordberg (1989) 492 U.S. 33, 44 (citing 1 G. Glenn, Fraudulent Conveyances and Preferences (Rev. Ed. 1940) § 98, pp. 183-184) that if a fraudulent transfer "was of cash, the trustee's actions would be for money had and received"—in other words, a legal remedy. Just this year, the court in *Moofly Productions, LLC v. Favila* cited *Granfinanciera* (2020) 46 Cal.App.5th 1, 8-9 (quoting *Id.* at 49, fn. 7) stated that "[a]n action to recover a fraudulent conveyance of a determinate sum of money must proceed under law because in such a case, 'a complete remedy is available at law, and equity will not countenance an action when complete relief may be obtained at law.'" Set asides of a fraudulent conveyance are typically equitable and therefore do not allow for a jury.

In the case at bar, the orders make clear that the Court is not attempting to recover chattel, which would sound in equity. The orders attempt to recover a determinant amount of all judgments, which is $222,018.62 exclusively as against "traceable accounts." It uses the word "accounts" four times and discusses money judgments. Litigant Moofly could not obtain a jury trial because the property at issue was of various classes of assets. The Court in this case confined its order just to cash accounts. Also, unlike in *Moofly* no accounting is needed to determine the value of the accounts.

There can be no doubt that the Court manifestly erred by concluding in the underlying orders—without a trial or other evidentiary proceeding—that Plaintiff was entitled to the remedies of UVTA or its common law counterparts. Such a determination could have only been made by proper adjudication of *causes of action*, not the un-substantiated, un-litigated contentions interjected by Respondent's counsel into the proposed orders. It

is undisputed that there was no trial or other evidentiary proceedings before the court below to find that a fraudulent conveyance had occurred.

7. The Court's Factual Findings Were Wholly Unsupported by Substantial Evidence.

"Substantial evidence" is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) "Substantial evidence...is not synonymous with 'any' evidence… it must actually be 'substantial' proof of the essentials which the law requires." (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990); 220 Cal.App.3d 864, 871-872; *Kruse v. Bank of America*, 202 Cal.App.3d 38, 51 (1988)).

In order to prove an entitlement to relief under UVTA, a claimant must prove the following: (1) that Plaintiff has a right to payment from Defendant, (2) that Defendant transferred property to another party, (3) that Defendant transferred the property with the intent to hinder, delay, or defraud one or more of its creditors, and that such conduct was a substantial factor in causing harm to Plaintiff. (*See* CACI No. 4200.) To prove intent to hinder, delay, or defraud creditors, Plaintiff must show that Defendant intended to remove or conceal assets to make it more difficult for its creditors to collect payment. (*Id*.)

The Court neither sought nor received any substantial evidence that met these requirements and the record is devoid of any evidence to support either the express or implied findings in the underlying orders.

8. The Doctrine of Judicial Estoppel is Not Applicable.

The doctrine of judicial estoppel precludes a party from taking inconsistent positions in separate judicial proceedings. It is invoked to prevent a party from changing its position over the course of judicial

proceedings when such positional changes have an adverse impact on the judicial process. The policies underlying preclusion of inconsistent positions are "general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings." Judicial estoppel is intended to "protect against a litigant playing fast and loose with the courts, because it seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (*See The Swahn Grp., Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841 [collecting cases; internal citations omitted].)

In *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, the court set forth the following five requirements for the application of judicial estoppel: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." These elements were later adopted by the Supreme Court in *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.

As noted by the *Swahn* panel, "[j]udicial estoppel focuses on the relationship between the litigant and the judicial system." (*The Swahn Grp., Inc., supra,* 183 Cal.App.4th at p. 840.) This puts a sharp focus on the "success" and "acceptance" elements noted above. Central to the requirements of judicial estoppel is that the party to be estopped must have successfully asserted a position relied upon or accepted by the court. (*Jackson, supra,* 60 Cal.App.4th at p. 183.) The United States Supreme Court has explained the significance of the success factor in the defense of

judicial estoppel in the federal courts: "Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' [citation], and thus poses little threat to judicial integrity." (*New Hampshire v. Maine*, 532 U.S. 742, 750.)

"Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." (*The Swahn Grp., Inc., supra*, 183 Cal.App.4th at p. 847, quoting *Jogani v. Jogani* (2006) 141 Cal.App.4th 158.)

Here, the Tribe has never asserted in a pleading or other court paper what, if any, "Casino assets" were available for recourse by the Respondent, and more importantly, the Tribe has met with no success of any kind in persuading the Court to accept its positions.

A. The Tribe has Not Taken any Inconsistent Position Regarding "Casino Assets."

The Tribe has never claimed in any argument it has advanced before the Court that it is in possession of any "Casino asset" subject to judgment in favor of the Respondent. The Respondent's subjective and false belief that "Casino assets" would be available to him is not dispositive.

But even if the Tribe had advanced a prior argument that it possessed "Casino assets" that would be available as recourse to the Respondent, it would only be "inconsistent" if such statement were made after the transfer was effectuated. Relying on Webster's II New College Dictionary 561 (1st ed. 1995), the Ninth Circuit defined the term "inconsistent" as "lacking in correct logical relation" or "not in agreement or harmony." (*Singh v. Ashcroft* (9th Cir. 2002) 301 F.3d 1109, 1112.) After the transfer of "Casino assets" occurred on November 16, 2017 the

Tribe informed the Court that it no longer possessed "Casino assets" in response to the first filing by the Respondent related to the enforcement of a money judgment. There is certainly nothing "lacking in correct logical relation" about that sequence of events.

If the Respondent insists on claiming something wrongful occurred regarding the transfer, he has the right to make such a claim under UVTA or a general claim of fraud, pursuant to a *jury trial*. What he cannot do, however, and what the Court was beyond its discretionary authority to condone, is making a motion to judicially estop the Tribe from asserting a fact in the absence of a prior inconsistent statement.

B. The Tribe has Not had Any Success in Convincing the Court of its Positions.

The Tribe has not been successful in convincing the California Courts to accept any position it has taken.[8] So it seems particularly perverse to attempt to judicially estop an accurate factual assertion. The required element of success "means not just the party prevailed in the earlier action, but that "the tribunal adopted the position or accepted it as true … ." (*See Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 183.) The fact that the Tribe has not successfully argued any point before the Court should be enough to dispense with the Superior Court's reliance on judicial estoppel alone. The fact that no prior ruling in the record establishes the Tribe's ownership of "Casino assets" should be even more proof of the Court's error. In fact, the discussion of the ownership of "Casino assets" after November 16, 2017 had no relevance until the Debtor's Exam and Motion for Undertaking arose. It is for this very reason that the Tribe

[8] The Tribe's lone success in the Superior Court in the early stages of the dispute was overturned on appeal.

requested that the Court specify in its Amended Motion for Clarification that the money judgments granted thus far can only be collected from "Casino assets."

To be clear, "success" in the context of judicial estoppel is not limited to a formal court order. A favorable settlement in some instances may be equivalent to winning a judgment for purposes of applying judicial estoppel. (*See Levin v. Ligon* (2006) 140 Cal.App.4th 1456.) Lift-stay stipulations and court confirmed reorganization plans may also qualify as "successes" where achieved through court process. (*See Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 140.) But with each of these examples, a prior inconsistent fact judicially estopped a person from making a subsequent inconsistent fact when the person somehow *benefitted* from the prior inconsistent fact through aid of a judicial body. (*See*, e.g., *Levin v. Ligon*, *supra*, 140 Cal.App.4th at p. 1477, quoting *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 605.) "We agree with those courts that have held that a settlement in some instances may be equivalent to winning a judgment for purposes of applying judicial estoppel. The pivotal issue is whether it can be established that the party succeeded in the first position or that the position was a basis or important to the settlement. "[T]he fact that plaintiff prevailed by obtaining a favorable settlement rather than a judgment should have no more relevance … ." quoting (*Rissetto v. Plumbers and Steamfitters Local 343*, *supra*, 94 F.3d at p. 605.))

The Tribe has lost every motion that it has filed, and no determination was made by the Court regarding the Tribe's possession of "Casino assets." But perhaps most importantly, in the context of judicial estoppel's limited purpose, a determination of the ownership of the "Casino

assets," had one occurred, would not have had any effect on the Court's determination that the Tribe waived its immunity, that it engaged in purportedly sanctionable conduct or whether an undertaking would be required in association with the appeal of the Sanctions Order.

9. The Court's Reliance on Evidentiary Estoppel Was an Error.

California Evidence Code section 623 provides:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

This section codifies the doctrine of equitable estoppel. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384.)

The doctrine of equitable estoppel is founded on principles of equity and fair dealing. It prevents a party from taking a different position at trial than he or she did at an earlier time if the other party would be harmed by the change in position.

> The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

(*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279.) The general rule is that estoppel must be specifically "pleaded in the complaint with sufficient accuracy to disclose the facts relied upon." (*Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 467) (see also; *Central National Ins. Co. v. California Ins. Guarantee Assn.* (1985) 165 Cal.App.3d

453, 460 (equitable estoppel "must be pleaded, either as a part of the cause of action or as a defense."); *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641.)

It is undisputed that no pleadings before the Court plead equitable estoppel as an affirmative defense, nor otherwise pleaded the facts necessary to establish it. Moreover, even if we assume that equitable estoppel were a theory available to Respondent on appeal, that theory would fail. As noted, there are numerous triable issues of fact that were never litigated in the proceedings below. These include the factual bases necessary to establish estoppel per the codified requirements of Evidence Code section 623.

There was no evidence presented to the Court from which findings could be properly made that Respondent relied on statements or representation from the Tribe, or even that such statements were made, let alone how Respondent relied on such statements to his injury. Moreover, there were triable issues concerning whether it intended Respondent to act on his receipt or acceptance of benefits, whether Respondent was ignorant of the true facts, and whether Respondent relied upon the receipt or acceptance to their detriment. Even if Respondent had attempted to present such facts, courts are weary of granting summary judgment because of the triable nature of such facts. (*See* e.g., *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 458-59 (reversing summary judgment upon a "dubious theory of evidentiary admission/estoppel [which] does not support the order granting summary judgment.").)

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10. Estoppel Against a Government Requires a Higher Standard, Which Was Neither Met Nor Considered.

Besides erring by allowing Respondent to make an impermissible "offensive" application of the defense of equitable estoppel,[9] the Superior Court also erred in the manner in which it applied the doctrine to the Tribe, a sovereign government. In this respect, there is no dispute that the Tribe is a sovereign Indian government, possessed of all the attributes of a sovereign, including the responsibility to perform government functions for the benefit of its tribal member constituents. *See* Declaration of Robert Findleton at ¶13 (describing the Tribe as "a tribal governmental entity").) (CT 2075.)

In invoking the doctrine of equitable estoppel in order to effectively undo the Tribe's sovereign legislative act of reorganizing its government functions and operations (i.e. transferring its government casino operations to CVEE) in furtherance of obtaining the New Market financing necessary to benefit its Tribal members (which is the essence of a sovereign's governmental function), the Superior Court (1) never considered nor addressed the fact the Tribe is a sovereign government, and (2) did not weigh and consider all the factors, in addition to the four traditional elements of equitable estoppel, required to be addressed with respect to equitable estoppel and sovereign governments.

It is well established that sovereign governments may not be equitably estopped from asserting a defense on the same terms as a private party litigant. (*See* generally, 28 Am.Jur.2d Estoppel and Waiver, § 131; 1 A.L.R.2d 138 Comment Note - Applicability of Doctrine of Estoppel

[9] "Estoppel operates always as a shield, never as a sword" (see note 15: 28 Am. Jur. 2d *Estoppel and Waiver* § 33, p. 637).

Against Government and its Governmental Agencies.) Generally, equitable estoppel against a sovereign government is not favored, and a person seeking to invoke the doctrine of equitable estoppel against a sovereign government bears a heavy burden. (*See*, e.g., *Baillargeon v. Department of Water & Power of the City of Los Angeles* (1977) 69 Cal.App.3d 670, 679-680; see also *Federal Crop Ins. Corp. v. Merrill* (1947) 332 U.S. 380; *Office of Personnel Management v. Richmond* (1990) 496 U.S. 414; *Heckler v. Community Health Servs.* (1984) 467 U.S. 51, 68 (conc. opn. of Rehnquist, J.) ("[O]ur cases have left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances."); *Sprint Corporation v. Department of Interior* (D.D.C. 2018) 356 F.Supp.3d 12, 27 (bar for succeeding on estoppel claim against government is high).) The application of equitable estoppel must not impair government functions or defeat a strong public policy. (*See*, e.g., *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493 (an estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public); *County of San Diego v. Cal. Water etc. C*o. (1947) 30 Cal.2d 817, 829-830; *see* also *Las Vegas Convention and Visitors Authority v. Miller* (S. Ct. Nev. 2008) 191 P.3d 1138, 1157 (generally, equitable estoppel does not apply against the state in matters affecting governmental or sovereign functions).) "A governmental unit is not estopped when functioning in a governmental capacity … The doctrine of estoppel is not applied to the extent of impairing sovereign powers of a state. [T]he doctrine of estoppel will not be applied against the state in its governmental, public, or sovereign capacity" (See 28 Am.Jur.2d Estoppel and Waiver, § 122 Note 15, p. 782; § 123, p. 784.) In other words, with respect to a sovereign government

functioning in its governmental capacities, the standard for equitable estoppel is higher, requiring even more egregious conduct (i.e. active "affirmative misconduct"), and a party seeking to invoke equitable estoppel against a sovereign government must show the estoppel is not inconsistent with the sovereign government's public interest, which interest must be weighed and balanced against the equities of the circumstances. (*See*, e.g., *United States v. Gonzales for Estate of Gonzales* (N.D. Cal. 2018) 323 F.Supp.3d 1119, 1129 (In addition to traditional elements of estoppel, a party asserting equitable estoppel against the government must also establish that: (1) the government engaged in affirmative misconduct going beyond mere negligence, (2) the government's wrongful acts will cause a serious injustice, and (3) the public's interest will not suffer undue damage by imposition of estoppel); *Krolikowski v. San Diego City Employees' Retirement System* (2018) Cal.App.5th 537 (where a party seeks to invoke the doctrine of equitable estoppel against a government entity, in addition to usual elements of equitable estoppel, an additional element applies; the government may not be bound by an equitable estoppel in the same manner as a private party unless, in considered view of court of equity, the injustice which would result from failure to uphold an estoppel was of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel); *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1274 (if the four traditional elements are established against the government, the court must then balance the burden on the party asserting estoppel if the doctrine is not applied against the public policy that would be affected by the estoppel).)

In invoking the doctrine of equitable estoppel against the Tribe, the Court failed to account for any of the foregoing. In fact, in the orders[10] on appeal wherein the Court expressly referenced the "federal common law doctrine of equitable estoppel" as a basis for effectively nullifying the Tribe's legitimate exercise of sovereign powers, the Superior Court not only failed to make any specific findings as to any of the four traditional elements of equitable estoppel, but did not describe at all any of its analysis of the other factors relevant to equitable estoppel and sovereign governments. This led to the Court erroneously invoking the doctrine against the Tribe.

If the Court had properly applied the other factors relevant to equitable estoppel and sovereign governments, it would have had to take note of the fact that in reorganizing its tribal government functions and operations by transferring its tribal government casino operations to CVEE in order to secure the New Markets financing that it needed for vital Tribal projects to serve its Tribal government and members, the Tribe was legitimately exercising its sovereign legislative powers to advance important Tribal public interests.[11] And, the Court would have also needed

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[10] Specifically, the Order Granting Respondent's Motion for an Order Requiring Undertaking to Stay Execution On Order Awarding Sanctions and Motion for Order Directing Issuance of a Writ of Execution and Order Denying Defendant's Motion for exemption From Enforcement of a Money Judgment.

[11] Important federal government public policy interests – such as fostering strong tribal governments and enhancing tribal economic self-sufficiency – are also advanced by the Tribe's sovereign legislative act in organizing its economic affairs functions in such a manner as to be able to access the New Market loans necessary for the crucial tribal projects. *See e.g. National Farmers Union Insurance Cos. v. Crow Tribe* (1985) 471 U.S. 845, 856 (describing how its cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination); *Cal. v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 216 ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-

to take note of the fact that any "undoing" of the reorganization done by the Tribe could substantially impair the Tribe in performing its governmental functions.

The Court would have had to determine whether this legitimate exercise of sovereign legislative powers, adopted for the benefit of the Tribal community and to advance important Tribal public interests, amounted to "affirmative misconduct" sufficiently egregious to satisfy the high bar required to justify invoking equitable estoppel against a sovereign government. The Court would have had to make a finding that the Tribe's efforts to perform its legislative governmental functions in accessing the New Market financing were not made to benefit its Tribal community, but rather were made with the premeditated intent to somehow inspire Respondent to ***alter*** his position to his detriment (there was in fact no change in position at all by Respondent after the Tribe made the legislative governmental decisions necessary to obtain the New Market financing. Respondent continued his action to compel arbitration as before[12]). But the Court did none of this.

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government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."); *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 149 (referencing general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs."); *also generally* Indian Reorganizational Act of 1934, now codified at 25 U.S.C. Chapter 45.

[12] At no time was the Tribe under a legal duty to affirmatively inform Respondent about its efforts to access the New Market loans or any of its governmental reorganization decisions necessary to achieve that access. Cf, *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir. 1981 ("to invoke estoppel against the Government, the party claiming estoppel must show 'affirmative misconduct' as opposed to mere failure to inform or assist").

II. IT WAS AN ABUSE OF DISCRETION NOT TO CLARIFY THAT ALL MONEY JUDGMENTS IN THIS CASE ARE ONLY ENFORCEABLE AGAINST "CASINO ASSETS."

The Tribe filed a "Motion for Clarification" on March 13, 2019. (CT 1865.) The Court denied it because (1) the words "Casino assets" do not need any interpretation and (2) considering the Court's jurisdiction in light of the waiver of sovereign immunity was "premature" and "lacking grounds in any statutory authority." (CT 2366.)

The Tribe did not request the Court in any way, shape or form to engage in an analysis of what the words "Casino assets" mean. The Motion for Clarification, Amended Motion for Clarification and the Reply to the Opposition to the Motion for Clarification very clearly set forth that the relief requested was twofold; modifications to the text of the money judgments to make clear they were not general obligations of the Tribe but rather only collectable from "Casino assets" and clarification that all debt collection of money judgments needed to be squared with the text in the waiver of sovereign immunity. As to the later point, clarification was needed because the Demurrer decision affirming recourse was only against "Casino assets" was in conflict with the Court's orders, which were silent on the restriction.

The Motion for Clarification was not premature. The filing was eight (8) days after the March 5, 2019 order declaring the Plaintiff the prevailing party and awarding attorney fees and costs of $74,673.75 in fees and $7,724.09 in costs and was filed a day before the March 14, 2019 order granting attorney fees and costs on appeal of $12,130 and $571.20, respectively. As to the Sanctions Order and the 2016 stayed order for attorney fees, the Respondent was actively engaging in debt collection

efforts by motioning for an undertaking and applying for a Debtor's Exam. Moreover, the Court's subject matter jurisdiction over the dispute is governed by the precise requirements of the waiver of sovereign immunity, which can be raised anytime. *Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1418.

Finally, the Motion for Clarification, Amended Motion for Clarification and the Reply to the Opposition to the Motion for Clarification were supported by legal authority. The request to alter verbiage in a prior issued order is permitted by way of a Motion for Reconsideration. CCP § 1008(e) specifically states that a motion for reconsideration can be used to modify "any order of a judge or court … whether the order deciding the previous matter or motion is interim or final." Thomas, California Civil Courtroom Handbook and Desktop Reference (2015 ed.), Law and Motion Practice § 17:47 ("The 10-day deadline for seeking reconsideration is extended under Code of Civil Procedure section 1013 for service by mail, fax or overnight delivery.").) Thus, the request to change the verbiage in the prevailing party order was timely because it was within 10-days of its issuance.

The fact that the title of the filing said "Motion for Clarification" was not dispositive. A trial court has the discretion to ignore the label put on the motion and to decide the motion on the basis of its actual content. (*City & County of S.F. v. Muller* (1960) 177 Cal.App.2d 600, 603 ("The nature of a motion is determined by the nature of the relief sought, not by the label attached to it. The law is not a mere game of words.").)

As to the Sanctions Order, 2016 stayed order, and most recent attorneys fees on appeal order the clarification could have been to the text of the orders. There was clearly time to modify the text directly in the

attorney fees on appeal order. Alternatively, the clarification could also have been done by way of an explanation in an order on the Amended Motion for Clarification. Motions for clarification are permitted in order to ask a court to explain what it intended by certain verbiage because it is confusing, vague, or because there is an internal inconsistency, etc…

Motions for clarification are not authorized by any statute, a judge has the inherent right, *sua sponte*, to reconsider and to modify his or her own rulings. Under the separation of powers doctrine of the California Constitution, which gives the judicial branch the ability to resolve controversies between parties, a judicial officer has the ability, even in the absence of a change in the law, to reconsider his or her own interim orders at any time prior to final judgment of case on his or her own motion, and this right cannot be restricted by legislation. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1103-1104.) As the California Supreme Court explained:

> The legislative restriction of a court's ability to *sua sponte* reconsider its own rulings is not merely a reasonable regulation on judicial functions. Instead, such a restriction would directly and materially impair and defeat the court's most basic functions, exercising its discretion to rule upon controversies between the parties and ensuring the orderly administration of justice. Courts are empowered to decide controversies, a power derived from the state constitution. We are hard pressed to conceive of a restriction that goes more directly to the heart of a court's constitutionally mandated functions.

(*Le Francois v. Goel*, *supra*, 35 Cal.4th at 1104-1105.)

It is the law of the case that recourse on any judgments against the Tribe is limited to "Casino assets" and recourse against assets of individual

tribal members is barred altogether. The Tribe was not attempting to "re-litigate" the matter of whether the Tribe waived its sovereign immunity, as implied in the Court's order. Rather, the Tribe was engaging the Court in the continuing and actively discussed question of the parameters of the Tribe's waiver of sovereign immunity.

The Court recognized significant limits to the waiver and its effect on the collectability of a judgment. *See* February 1, 2016 "Ruling on Request for Judicial Notice and Ruling on Demurrer at 4, stating that the waiver was "limited" as to the forums available for dispute resolution and the recourse available to satisfy judgments. It was an abuse of discretion not to address the inherent inconsistencies between the Ruling on Demurrer and the money judgments because their silence on recourse implies a limitless waiver of sovereign immunity as to all assets of the Tribe. In fact that is precisely what the Respondent argued. *See* Plaintiff's Opposition to Defendant's Amended Motion for Clarification at 7 (part III). (CT 2091-2092.)

The denial of the Amended Motion for Clarification was also an abuse of discretion because the Tribe was not requesting the Court to make any new determinations. The Tribe was merely asking the Court to clarify its orders to reflect a determination this Court already made — namely, that judgments against the Tribe are limited to casino revenues and recourse against assets of individual tribal members is barred altogether.

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III. THE COURT ERRED WHEN IT FOUND THAT AN APPLICABLE TRIBAL LAW REGARDING THE ENFORCEMENT OF JUDGMENTS DID NOT NEED TO BE FOLLOWED.

In its Motion for Exemption, as well as Defendant's Combined Opposition to Plaintiff's Motion for an Undertaking to Stay Execution on Order Awarding Sanctions and Plaintiff's Motion for Order Directing Issuance of a Writ of Execution ("Combined Opposition"), the Tribe argued that its Judgments Ordinance was the governing law applicable to collection of a debt by a judgment creditor against the Tribe. (*See*, e.g., CT 1648 - 1656, 2044 - 2055.) The rulings contained within the Undertaking Order are specific to alleged fraudulent conveyances in association with the transfer of "Casino assets," wholly ignoring the applicability of the Judgments Ordinance. (CT 2382 - 2383.) Similarly, the Exemption Order, which denied a motion from the Tribe wherein the Tribe argued extensively in favor of the applicability of the Judgments Ordinance, broadly found that "Defendant's Motion must fail because it (1) lacks any cognizable evidentiary foundation and (2) is subject to equitable estoppel under federal common law to prevent an injustice." (CT 2363.) As the following rules of law demonstrate, it was an error for the Court to have equitably estopped the Tribe from presenting evidence that its Judgments Ordinance was the governing law applicable to collection of a debt by a judgment creditor against the Tribe because: estoppel may not be used offensively; and the elements of estoppel against a sovereign government were neither met nor even attempted to be proven.

To begin, "axiomatic is [] the rule that the theory of estoppel is invoked as a defensive matter to prevent the party estopped from alleging

or relying upon some fact or theory that would otherwise permit him to *recover* something from the party asserting estoppel." (*Green v. Travelers Indemnity Co.* (1986) 185 Cal.App.3d 544, 555.) Or as frequently stated: "[t]he doctrine acts defensively only. It operates to prevent one from taking an unfair advantage of another but not to give an unfair advantage of one seeking to invoke the doctrine." (*Id.*, quoting *Peskin v. Phinney* (1960) 182 Cal.App.2d 632, 636.)

The Tribe (the party estopped) was not trying to *recover* anything in the underlying action. It was attempting to raise a defense against what it believed was an incorrect application of governing law. Moreover, because the doctrine acts defensively only, it cannot be asserted by the Respondent as a stand-alone *offensive* cause of action aimed at prohibiting the Tribe from arguing a point of law.

Second, even if the theory of estoppel could be raised in this manner, the facts do not support its application. There are four elements that are essential to the application of the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Green v. Travelers Indemnity Co., supra,* 185 Cal.App.3d at p. 556.) There can be no estoppel where one of these elements is missing. (*Hill v. Kaiser Aetna* (1982) 130 Cal.App.3d 188, 195.) When estoppel is sought against a government, the bar is even higher because it must be demonstrated that the estoppel is not inconsistent with the sovereign government's public interests.

The earliest point at which the Tribe (the party being estopped) could have been apprised of the fact of the existence of the Judgments Ordinance was December 15, 2017, the date of its enactment. (CT - 1956.) It argued for the law's applicability by submission to the Court of its Motion for Exemption from Enforcement of a Money Judgment on February 11, 2019, the earliest date on which the law had relevance to the Respondent's money judgments. (CT 1642, 1657.) At no point between those dates did the Tribe make any assertion of the non-existence of its Judgments Ordinance. The Tribe simply did not (and could not have) alleged any facts which would have reflected a misrepresentation made by the Tribe or a concealment of facts known to the Tribe, but unknown to the Respondent.

To be clear, the Tribe has no knowledge (nor opinion) as to whether the Respondent was apprised of the existence of the Judgments Ordinance. However, Respondent was put on notice that Tribal law could be applied to disputes when he signed his contract with the Tribe. (See ¶ 18.1.2 at CT 244.) One of the most quoted legal principles is the concept that "ignorance of the law is no excuse." Citing to the old English law, the California Court of Appeals has said "'[e]very man' . . . 'must be taken to be cognizant of the law; otherwise, there is no saying to what extent the excuse of ignorance might be carried. It would be urged in almost every case.'" (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1506.) For this reason:

> the legal effect of a statute cannot be avoided merely by pleading ignorance of the statute. If it could, the Legislature's efforts to shape public policy and the judiciary's efforts to interpret the statutory law and to shape the common law could

> easily be frustrated either by deliberate maintenance of ignorance or by false claims of it."

(*Id.* at 1507.)

This is also the reason that California courts "refus[e] to apply estoppel to preclude [a] defendant from relying on case law defeating [a] plaintiff's claims." (*Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1075.) A defendant's knowledge of a law gives him or her no unfair advantage when raised in a court of law, as any initial advantage should be easily overcome by the notice provided to the plaintiff in its submission to the court and the plaintiff's opportunity to respond.

Finally, in order to have estopped consideration of the Judgments Ordinance, the Respondent would have been required to present evidence (and the Court would have been required to rule whether) the proposed estoppel was inconsistent with the sovereign government's public interest, which interest must be weighed and balanced against the equities of the circumstances. These factors were never considered by the Respondent or the Court.

It was therefore an error for the Court to rule on the application of the Judgments Ordinance by equitable estoppel. As such, it should have been reviewed and the Court should have determined its applicability in accordance with choice of law principles, contract interpretation and the "law of the case," which stated Tribal law, where existing, is the first law to be applied to disputes arising under the Respondent's contract with the Tribe. (*Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194, 1207, fn. 8.)

IV. THE COURT ERRED IN DENYING THE APPLICATION OF THE JUDGMENTS ORDINANCE BECAUSE OF A LACK OF COGNIZABLE EVIDENTIARY FOUNDATION.

In addition to finding that application of the Judgments Ordinance should be equitably estopped, the Court also denied its application because it "lacks any cognizable evidentiary foundation." The Judgments Ordinance was submitted pursuant to a Request for Judicial Notice. (CT 1946, 1954.) As such, it should have been reviewed and the Court should have determined its applicability in accordance with the choice of law principles briefed by the Tribe, contract interpretation and the "law of the case."

CONCLUSION

The Tribe requests that each of: (1) the Order Granting Plaintiff's Motion for an Order Requiring Undertaking to Stay Execution On Order Awarding Sanctions and Motion for Order Directing Issuance of a Writ of Execution; (2) the Order Denying Defendant's Motion for Exemption from Enforcement of a Money Judgment; and (3) the Order Denying Defendant's Amended Motion for Clarification be reversed and remanded back to the Superior Court consistent with the standards outlined in this submission, above.

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Corrected / Bookmarked

DATED: June 19, 2020

Respectfully submitted,

By /s/Keith Anderson

Keith Anderson

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

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 13606 words, including footnotes and was written in 13 point font. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By /s/ Little Fawn Boland

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

Corrected / Bookmarked

CERTIFICATE OF SERVICE

I hereby certify that, on June 19, 2020, a true and correct copy of:

APPELLANT'S OPENING BRIEF

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

DATED: June 19, 2020

By /s/ Little Fawn Boland

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