A159823

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).

March 15, 2021

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[1]

This appeal challenges discovery sanctions issued against an Indian tribe for failing to produce documents outside of its the control and in the possession of sovereign non-parties to a suit. The appeal also challenges the issuance of sanctions against a tribe for following a tribal court order enjoining any individuals under the tribal court's jurisdiction from complying with debt collection proceedings (including document production). The trial court itself acknowledged the quandary posed by the tribal court's injunction and stated it was at an impasse because the case belonged in federal court, yet sanctioned the tribe nonetheless. Specifically, this appeal asks whether CCP § 708.030 and related CCP provisions (§§ 2031.010 - 2031.060) can be used to force a party to a suit to circumvent the sovereign immunities of a non-party federally chartered corporation and its non-party subsidiary for the purpose of thwarting a tribal court decision binding on individuals working for or representing the tribe.

This case also raises a third issue regarding a trial court discretionarily awarding sanctions stemming from an untimely document production request that was "cured" by a subsequently submitted textual amendment. Finally, this appeal challenges whether a document discovery should have been mooted due to an impasse identified by the trial court, and which the Tribe reasonably relied upon.

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[1] Pursuant to the August 28, 2020 consolidation order, this Opening Brief cites to both the Clerk's Transcript ("CT") and Reporter's Transcript ("RT") filed for this appeal under case number Al59823 and also the Clerk's Transcript filed in the three consolidated appeals (A158171, A158172 and A158173). This brief cites to consolidated appeals' Clerk's Transcript as "Con.CT."

This appeal is the fifth in a series of appeals arising from sanctions issued against the Coyote Valley Band of Pomo Indians ("Tribe" or "Appellant") to punish the Tribe for successfully utilizing its tribal court to argue that the American Arbitration Association ("AAA") was without jurisdiction over a case filed by Mr. Robert Findleton ("Respondent"). (*See* generally A156459.) AAA closed the case and, despite Respondent's requests to reopen it, has kept the case closed. (4 Con.CT 1106.) The Notice of Entry of Order Granting Plaintiff's Motion for Sanctions Order ("Sanctions Order") is on appeal under case number A156459. (6 Con.CT 1622.)

To collect the money in the Sanctions Order, Respondent made an application for an examination ("Debtor's Exam") (6 Con. CT 1593) and sought an order requiring an undertaking in the amount of $79,815. (7 Con.CT 1845-1850; 7 Con.CT 2042-2058.) Subsequently, the Coyote Valley Tribal Court ("Tribal Court"), issued a Temporary Restraining Order ("Tribal Court TRO") (with a copy served on Mr. Findleton) ordering that *any* individual, including officers, staff and representatives of the Tribe, are restrained from engaging in judgment collection proceedings in the State Court (including the Debtor's Examination) against the Tribe's property. (7 Con.CT 1946, 1951-1952 emphasis added.) The Tribal Court TRO therefore applied to any individuals working for or representing the Tribe, including corporations wholly owned by the Tribe and their subdivisions. Later, the Tribal Court issued a permanent injunction ("Tribal Court Injunction") affirming the TRO. (7 Con.CT 1965-1982.) As related to the debt collection efforts, the Tribe informed the Court and Respondent that Coyote Valley Entertainment Enterprises ("CVEE") possesses the

"casino assets," not the Tribe. (6 Con.CT. 1645-1646.) The sole assets subject to attachment are "casino assets."

Various orders ensued, which are the subject of consolidated appeals A158171, A158172 and A158173. (8 Con.CT 2362-2367, 2381-2384.) One of the orders subjected CVEE and its parent corporation, the Coyote Economic Development Corporation ("CEDCO"), to a number of judicial processes, including compelled discovery and compelled participation in a future debtor's examination. (8 Con.CT 2365-2367.) CEDCO and CVEE are third parties to this suit and are not subject to the Court's jurisdiction due to their sovereign immunity. (2 CT 303-304, 322-323.)

As related to the Tribe, CEDCO and CVEE's later failure to respond to a document request ("First Document Request"), as amended, the Court awarded sanctions against the Tribe, which are the subject of this appeal. (1 CT 63-81.) The Tribe did not produce documents held by CEDCO and CVEE because the Tribe was not in control of the documents requested, due to the fact that CEDCO and CVEE are separate sovereigns that cannot be compelled by the Tribe to produce the requested documents, and also because the Tribal Court Injunction was binding upon individuals representing the corporations as well. (See *infra*, Argument I and II.) As to the documents held by the Tribe itself, the Tribal Court Injunction prevented disclosure. (See *infra*, Argument III.) The Tribe also did not provide the documents requested because the request violated the time bar set forth in CCP § 708.030(b). (See *infra*, Argument IV.) Finally, by the time the Tribe's response to the Motion to Compel Responses to Amended First Document Request ("Motion to Compel") was due, the Court had determined that the case was at an impasse because of the conflicting court

rulings, which mooted any active case or controversy. (See *infra*, Argument V.)

STATEMENT OF APPEALABILITY

This appeal arises from an Amended Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's Amended First Set of Requests for Production of Documents and Sanctions ("Amended Order"), entered on January 2, 2020 in an unlimited civil case, granting Respondent's Motion to Compel to First Document Request, as amended and for sanctions in the amount of $11,348.00. (1 CT 295-296). Appeal of the Amended Order is expressly authorized under California Code of Civil Procedure, § 904.1(a)(12), as the amount of the monetary sanctions awarded exceeds five thousand dollars ($5,000).

STATEMENT OF FACTS

I. THE HISTORY PRIOR TO THE FIRST DEBTOR'S EXAM.

On April 23, 2018 the AAA, lacking jurisdiction, closed a case filed by Respondent against the Tribe. (4 Con.CT 1106.) In response, Respondent filed a motion for sanctions pursuant to CCP § 128.5 and § 177.5 on June 27, 2018, which was granted in the Sanction Order in the amount of $86,457 and $1,500, respectively, on December 10, 2018. (4 Con.CT 1145-1174; 6 Con.CT 1519-1525.) The Sanctions Order is on appeal under case number A156459. (Notice of Appeal.) (6 Con.CT 1622.)

On December 19, 2018, Respondent sought attorney fees as the prevailing party on the motion to compel arbitration. (6 Con.CT 1570-1592.) On the same day, he sought attorney fees and costs on appeal as related to *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal. App. 5th 565, 568 ("*Findleton II*"). (6 Con.CT 1529-1534.) The Court

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

To collect the money in the Sanctions Order, Respondent made an application for an examination ("Debtor's Exam") (6 Con. 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"); 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.) (7 Con.CT 1845-1850; 7 Con.CT 2042-2058.)

On February 14, 2019, the Coyote Valley Tribal Court issued the Tribal Court TRO (with a copy served on Mr. Findleton) ordering the following: 1) Mr. Findleton and all those in active concert or participation with him and *any* individual, including officers, staff and representatives of the Tribe, are restrained from engaging in judgment collection proceedings in the State Court (including the Debtor's Examination) against the Tribe's property, 2) the Foreign Judgments obtained by Mr. Findleton must be domesticated by the Tribal Court pursuant to the Coyote Valley Enforcement of Judgments Ordinance ("Judgments Ordinance") in order to attach against the Tribe's personal property; and 3) the Judgments Ordinance is the exclusive law governing the means by which judgments against the Tribe's property may be executed. (7 Con.CT 1946, 1951-1952;

emphasis added; Judgments Ordinance available at 7 Con.CT 1954-1964.) The Tribal Court TRO therefore applied to any individuals working for or representing the Tribe, CEDCO or CVEE. (*Id*.)

II. THE FIRST AND SECOND DEBTOR'S EXAM AND RELATED TRIBAL AND STATE COURT ORDERS.

The first Debtor's Exam ("First Debtor's Exam") was held on February 15, 2019 at which the Tribe produced the Tribal Administrator, the most senior employee of the Tribe, who reports directly to the Tribal Council. (4 Con.CT 1092.) The Tribe raised the Tribal Court TRO at the exam after having seeking judicial notice of it. (1 RT 28: 18-25, 29: 1-3; 7 Con.CT 1946-1953.)

On April 5, 2019, the Tribal Court Injunction affirmed the TRO and provided extensive analysis of why the Tribe's Judgments Ordinance must be followed. (7 Con.CT 1965-1982.)

The second Debtor's Exam was held on April 26, 2019 ("Second Debtor's Exam"). The Tribe produced the Tribe's Treasurer to testify under oath. (3 RT 74: 24-25.)

As related to the Debtor's Exams, the Court issued three orders ("the Orders"), which are the subject of consolidated appeals A158171, A158172 and A158173. (8 Con.CT 2362-2367, 2381-2384.) The "Order Denying Defendant's Amended Motion for Clarification" purportedly subjected CVEE and CEDCO to a number of judicial processes, including compelled discovery and compelled participation in a future debtor's examination. (8 Con.CT 2365-2367.) CVEE is the owner of the Coyote Valley Casino. (6 Con.CT. 1645-1646.) The order granting an undertaking stated that CVEE was subject to "set-aside" and "execution, attachment, garnishment, levy

and other lawful encumbrance" of its property. (8 Con.CT 2381-2384.) CEDCO is a federally chartered corporation wholly owned by the Tribe. CVEE is a subsidiary of CEDCO chartered pursuant to the "CEDCO Subdivisions Tribal Ratification Ordinance." (8 Con.CT 2215-2224.) Their background is discussed below in Argument Sections I.D.3 and I.E.3, respectively.

III. LETTERS SUBMITTED TO THE COURT BY CEDCO AND CVEE.

In response to the Orders, on June 19, 2019, CVEE and CEDCO sent letters to the Court and Respondent, through their separate legal counsel Sara Dutschke Setshwaelo, informing them that they did not intend to comply with the Orders or any compelled discovery, nor would they consent to attachment. (2 CT 303-304, 322-323.) The letters informed the Court that CEDCO and CVEE are third parties to this suit not subject to the Court's jurisdiction due to their sovereign immunity. (*Id.*) Moreover, the letters explained that they are separate sovereigns from the Tribe and they had not waived their sovereign immunity as to this matter. (*Id.*) Moreover, the letters stated that the Orders purported to assert jurisdiction over CEDCO and CVEE without affording them basic rights of due process or notice. (*Id.*) They informed the Court, "that to the extent the Orders purport to assert jurisdiction over CVEE [and CEDCO] they are not lawful, lack authority, and should be vacated or modified accordingly." (2 CT 304 and 323).

IV. RESPONDENT'S FIRST SET OF DOCUMENT REQUESTS.

Respondent during this time period sent the First Document Request to the Tribe. (1 CT 177-186.) It pertained to three classes of documents:

those held by CEDCO, those held by CVEE, and those held by the Tribe. (1 CT 183-185.) The request was made on August 13, 2019 (1 CT 185.), the text of which was amended on August 28, 2019 without withdrawing the August 13, 2019 set. (1 CT 89-99.) The First Document Request was not a new set designed to restart the filing date. (*Id*.) It simply contained textual amendments. (*Id*.)

The document production request was addressed to the "Coyote Valley Band of Pomo Indians," but impermissibly defined such term to include not only the Tribal government but also "(1) any entity controlled, owned or managed by the [Tribe], including any wholly owned, federally or tribally chartered corporation of DEFENDANT, including but not limited to (a) the [CEDCO] and (b) [CVEE], [. . .] and (3) the directors, officers, subsidiaries, predecessors, successors, assigns, agents, servants, employees, investigators, attorneys and all other persons and entities representing or acting on behalf of the [Tribe] or of any of the above-described entities." (1 CT 93.) The document production request included all financial records of the Tribe, CEDCO and CVEE dating back to January 1, 2007, every document related to any entities' participation in the New Market Tax Credit Program, every document related to the establishing, staffing, funding, managing and regulating the Coyote Valley Tribal Court, including the salary and benefits paid to its judge, the organic documents of the Tribe, CEDCO, CVEE, and the Coyote Valley Tribal Court. (1 CT 96-99.) It only contained two requests (numbers 6 and 8) regarding the location, type and amount of casino assets—the only assets that are subject to judgment collection (1 CT 99.)

V. THE OCTOBER 25, 2019 HEARING REGARDING THE PRODUCTION OF WITNESSES FOR A FUTURE DEBTOR'S EXAM.

Despite the letters, and over extensive written objections (*see* 11 CT 3190 to 3252), the Court at an October 25, 2019 hearing regarding the production of third party witnesses found that it could, again without litigating the issue, command CEDCO or CVEE to produce witnesses, including the Coyote Valley Casino's CFO for examination. (5 RT 400: 17-20, 401:3-5.) The Court understood the interconnection of the document production and the production of witnesses. "So [. . .] one thing [. . .] impacts significantly on [. . .] the production of documents [. . .]. But I don't think we ever got to, Mr. Peterson, whether you have people you're willing to identify and produce, and whether those people are actually willing to answer questions about casino assets." (5 RT 475: 13-20.) The Tribe's legal counsel at the hearing explained repeatedly that he could only agree to produce the "person most knowledgeable" from the Tribe. (5 RT 475: 6-11.) He explained he had no authority to bring a representative of CEDCO or CVEE. (*Id*.)

VI. THE TRIBE JUSTIFIABLY DID NOT PRODUCE THE REQUESTED DOCUMENTS.

During this time period, the Tribe did not provide the documents requested because the request violated the time bar set forth in CCP § 708.030(b) (discussed *infra*, Argument IV). The Tribe also did not produce documents held by CEDCO and CVEE because the Tribe was not in control of the documents requested because CEDCO and CVEE as separate sovereigns could not be compelled by the Tribe to produce the documents

(discussed *infra*, Argument I). As to the documents held by the Tribe itself the Tribal Court Injunction prevented disclosure (discussed *infra*, Argument III).

VII. RESPONDENT FILED A MOTION TO COMPEL.

As a result of not producing the documents, the Tribe faced a Motion to Compel, the response to which was due by December 2, 2019. (1 CT 63-81.) The Motion to Compel never mentioned the August 13, 2019 First Document Request and simply stated that the service date of the requests was 124 days after the previous Debtor's Exam (measured from August 28, 2019). (1 CT 69, 71-72.) Respondent acknowledged the Tribe's prior assertion of affirmative defenses and testimonial privilege preventing it from participating in the debt enforcement proceedings of the Court, including discovery. (1 CT 62, 73-77.) The Motion to Compel is devoid of any argumentation to why such affirmative defenses or testimonial privileges did not apply based in law and fact. (1 CT 63-81.) Instead he raised the disentitlement doctrine claiming, "Defendant's continuing contempt of this Court's order to compel arbitration" and the alleged intentional violation of the Court's orders deprived the Tribe of any defenses. (1 CT 63-64, 73-76.) The Motion to Compel is devoid of any mention that the AAA voluntarily ended the arbitration, finding it lacked jurisdiction, and never mentions that the Tribal Court Injunction is binding on the Tribe's officials, employees, and counsel because the Tribal Court possesses concurrent jurisdiction. (1 CT 61-83.) As to the various arguments that the Tribe had already raised over the preceding eight months, the answer was at each turn that the Tribe had "constructively

waived all privileges" due to the disentitlement doctrine. (For example, 1 CT 82.)

The Motion to Compel stated that the First Document Request did not implicate CEDCO or CVEE's sovereign immunity because the Court had quasi in rem jurisdiction over the "casino assets" with respect to which all sovereign immunity had been waived and such waiver somehow traveled with the transfer. (1 CT 83.) This nonsensical assertion had no legal citation. (*Id*.) Additionally, the motion claimed that the federal law of equitable estoppel applied to the casino assets so they could be treated as if they were legally owned and controlled directly by the Tribe. (*Id*.) (A key issue in the consolidated appeals.) Again, this had no legal citation. (*Id*.) Finally, Respondent creatively argued that somehow because the Tribe waived sovereign immunity in General Council Resolution No. 07-01, dated June 2, 2007, that it is binding all other entities that exist within the reservation. Again, there was no legal citation or explanation of this novel legal theory. (*Id*.)

VIII. THE NOVEMBER 22, 2019 THIRD DEBTOR'S EXAM.

In the intervening time between the filing of the Motion to Compel and the due date for the response to it, the Court held a third debtor's exam on November 22, 2019 ("Third Debtor's Exam") at which Tribal Chairman Michael Hunter was extensively examined by opposing counsel. (3 RT 70-205.)

The Tribe made statements that it is bound by the Tribal Court TRO, the Enforcement of Judgments Ordinance, and the Tribal Court Injunction in the February 15th (only the TRO was not in place at this hearing), April 26th, October 25th and November 22nd hearings. Finally, at the November

22nd hearing it became clear to the Court that the Tribe could not comply with any discovery. (7 RT 606: 4-18, 7 RT 616: 17-21, 7 RT 625: 23-25, 7RT 626: 1-19.) At the hearing the Court acknowledged that there were two competing orders to deal with and it was impossible to comply with both. (*Id*.) For that reason, the debtor examination proceedings ended in an aptly-described "impasse." (*Id*.) The Court stated that it would take no further action, and that the impasse would require a federal court resolution. (*Id*.)

IX. THE OPPOSITION TO THE MOTION TO COMPEL.

The opposition to the Motion to Compel ("Opposition") raised the untimeliness of the First Document Request being filed 109 days after the Second Debtor's Exam and argued that the textual amendments made on August 28, 2019 did not cure the time defect. Secondly, the Tribe raised the Court's acknowledgment, from just ten days prior, that the Tribe could not comply with Respondent's discovery requests due to the Tribal Court Injunction and that the logical next step was for Respondent to proceed to federal court. (1 CT 173-175.) There was no longer any actual controversy over whether the Tribe would or could comply because of the competing orders. (*Id*.) Relying on the Court's statements from the November 22nd hearing, the Opposition argued that the Motion to Compel was moot. (*Id*.)

X. THE DECEMBER 13, 2019 AND JANUARY 2, 2020 HEARINGS AND ORDERS ON THE MOTION TO COMPEL.

In an about-face, the Court's order contained many inapposite statements to its position expressed at the November 22, 2019 Third Debtor's Exam. (1 CT 295.) The recognition that the Tribal Court Injunction placed individuals under the Tribe's jurisdiction in a quandary no longer applied in the Court's eyes when documents were at issue,

despite the fact that those same individuals would be the ones producing said documents. (8 RT 667-668.)

The Court ordered the Tribe through its attorneys of record, to supply the Requested Documents "that are in the possession, custody, or control of Defendant, Defendant's attorneys, CEDCO and CVEE." (1 CT 295.) It also found that the Tribe "has the legal right to obtain upon demand any and all responsive documents in the possession of [CEDCO] and [CVEE] under the legal control test." (1 CT 295.) The test derived from CCP § 708.030. (1 CT 62.) On January 2, 2020 after a continued hearing, the Court amended the order to add sanctions in the amount of $11,348.00. (1 CT 296.)

XI. THE NOTICE OF DISAPPROVAL OF THE PROPOSED ORDER AND ITS DENIAL.

The Tribe filed a notice of disapproval of the order within the five-day window for disapproving of a proposed order pursuant to CRC 3.1312(a) with the reasons stated as proscribed by statute. (2 CT 299-341.) The rationale for disapproval was that the proposed order falsely asserted or implied that CVEE or CEDCO participated in the Opposition to the Motion to Compel, and that documents in their possession are subject to turnover by the Tribe. (2 CT 299-301.) The issue of control over documents was neither raised nor adjudicated in the Motion to Compel and a finding that the Tribe possessed control over all of the Requested Documents was an error, resulting in an ultra vires order. (*Id*.) A new judge assigned to the case denied the disapproval. (2 CT 354.) Thus, the erroneous sanction of the Tribe stands and is the subject of this appeal. (2 CT 363.)

STANDARD OF REVIEW

Whether the Court could use CCP § 708.030 and related CCP provisions (§§ 2031.010 - 2031.060) to circumvent CEDCO and CVEE's sovereign immunity from suit is a question of law reviewed 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).) Whether CCP § 708.030 can be the basis for sanctioning the Tribe's compliance with the Tribal Court Injunction is also a question of law.

Whether the document production request was timely in the first instance and whether compliance by the Tribe was moot due to the impasse the Court identified, and on which the Tribe reasonably relied, are both questions that need to be reviewed under the abuse of discretion standard. 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

I. THE SOVEREIGN IMMUNITY OF CEDCO AND CVEE, AS WELL AS THE TRIBAL COURT INJUNCTION, DIVEST THE TRIBE OF CONTROL OVER THE REQUESTED DOCUMENTS SUCH THAT SANCTIONING THE TRIBE FOR THEIR NON-PRODUCTION WAS AN ERROR.

The Court erred when it issued sanctions against the Tribe for failure to produce the Requested Documents in the possession, custody or control of CEDCO and CVEE because it failed to recognize that the Tribe does not have control over those documents due to the sovereign status of CEDCO and CVEE and because the Tribal Court Injunction applies to individuals in possession, custody or control of the Requested Documents.

A. The Court Lacked Jurisdiction Over CVEE and CEDCO.

As an initial matter, it is important to recognize the fundamental principle that a subpoena in excess of a court's jurisdiction is a nullity and properly quashed. (*Wemyss v. Superior Court in & for Alameda Cty*. (1952) 38 Cal.2d 616, 622 [Superior Court had no jurisdiction to issue the subpoena necessitating the court to quash it]). It is equally well settled that "although Indian tribes are not immune from lawsuits filed against them by the United States, the Indian tribes' sovereign status affords them immunity from state jurisdiction." (*Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247–48).

It is also clear that a sovereign tribal entity—not named as a party to the underlying case—is "entitled to immunity from the enforcement of a federal subpoena." (*U.S. v. James*, (9th Cir.1992) 980 F.2d 1314, 1320). In *James*, the Ninth Circuit held that an Indian tribe (absent a waiver) was entitled to immunity from the enforcement of a federal subpoena. Although the panel upheld a limited waiver because the Tribe had voluntarily provided the government with documents relevant to the case, there is no such waiver in this case. In this case, both CVEE and CEDCO are not subject to the Court's jurisdiction, nor its subpoena power. And, for reasons we shall explain *infra*, there was no waiver of immunity on the part of either CVEE or CEDCO.

B. Apparently Aware of its Lack of Jurisdiction Over CVEE and CEDCO, the Court Improperly Invoked a Discovery Doctrine Known as the "Control Test."

Although the issue was not litigated, the Amended Order states in part that the "[Tribe] has the legal right to obtain upon demand of any and all responsive documents in the possession of [CEDCO] and [CVEE] under

the legal control test and ORDERS as follows." (1 CT 295.) The Tribe expressly objected to and challenged this portion of the Amended Order, arguing that the proposed order asserts a finding on an issue that was not litigated in the underlying motion. (2 CT 299.)

The Tribe further objected that the proposed order falsely asserts or implies that CVEE or CEDCO participated in the Motion to Compel. (2 CT 300.) The Tribe again asserted that the issue of control over documents was neither raised nor adjudicated in the Motion to Compel and a finding to the contrary "would be an abuse of both the discretionary and jurisdictional powers of the court, likely resulting in an ultra vires order." (2 CT 300.)

The fact that the Court previously ordered that Defendant respond "without objection" does not override the fact that the Defendant has the absolute statutory right to address the issue of possession or control of the subject documents. Asserting such right is not merely raising an objection. (2 CT 300.) The Tribe further argued that:

> Section 708.030 does not permit the judgment creditor to obtain documents that are not in the possession, custody, or control of the judgment debtor. Nor does section 708.030 permit the judgment creditor to obtain an order compelling a third party to appear before the court or referee to answer questions about property or debt in which the judgment debtor has an interest. If the judgment creditor wants to discover such information directly from the third party, then the procedures of section 708.120 must be followed. *SCC Acquisitions,*

Inc. v. Superior Court (2015) 243 Cal.App.4th 741, 752-53.

(1 CT 300.)

The Court's reliance on *SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 752–53, is unavailing. (1 CT 73, 76.) The *SCC* opinion actually confirmed that third party documents may not be reached through the judgment debtor stating, "if the judgment creditor wants to discover such information directly from the third party, then the procedures of section 708.120 must be followed." (*Id.,* 243 Cal.App.4th at 752–53)

The Court did note a difference between discovery *about* a third party and discovery *from* a third party and that documents that are in the possession, custody, or control of the judgment debtor are not third party documents. (*Id*.) But that is a distinction not appropriate here, for reasons that we shall explain below.

C. CCP § 708.030 and the "Control Test" Require Actual, and Not Mere Theoretical, Control.

The evidence before the Court was insufficient to establish the Tribe's right to obtain Requested Documents in the possession of CVEE and CEDCO on demand due to a failure of Respondent to demonstrate actual, and not mere theoretical, control over the Requested Documents.

CCP § 708.030 requires a judgment debtor to produce documents within its possession, custody, or control. "Control" is defined as "the legal right to obtain documents upon demand." (*7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)* (9th Cir. 1999) 191 F.3d 1090, 1107.) "Theoretical" control is insufficient. (*Id*.) For a judgment debtor to be subject to CCP § 708.030, a showing of "actual control" is

required. (*Id*.) Having actual control over a requested document is different from having the practical ability to obtain a requested document. It is not enough that a party may have the "practical ability" to obtain requested documents from a non-party to a case. (*Seifi v. Mercedes-Benz U.S.A., LLC* (N.D.Cal. Dec. 16, 2014, No. 12-cv-05493-TEH (JSC)) 2014 U.S.Dist.LEXIS 173745, at *4.) The fact that a judgment debtor might be able to obtain a document from a non-party "if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control." (*State, Dept. of Taxation v. Eighth Judicial Dist. Court of Nev.* (Nev. 2020) 466 P.3d 1281, 1285.) If a non-party can legally refuse to turn over such documents to the judgment debtor without breaching any contract, then the judgment debtor is not considered to have actual control over the requested documents and is not required to hand over any such documents under CCP § 708.030. (*Genentech, Inc. v. Trs. of the Univ. of Pa.* (N.D.Cal. Nov. 7, 2011, No. C 10-2037 PSG) 2011 U.S.Dist.LEXIS 128526, at *5-6.)

This is because "[o]rdering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents." (*7-UP Bottling Co.,* 191 F.3d at 1108.) Furthermore, the rules of civil procedure provide a mechanism for seeking materials from a nonparty (*State Dept. of Taxation,* 466 P.3d at 1285.) Chapter 6, "Nonparty Discovery," of the CCP §§ 2020.010-2020.510, for example, provides that a nonparty may be compelled to testify or produce documents and other things. Importantly, CCP § 2025.410 also grants nonparties subject to a subpoena certain protections, such as quashing the subpoena—protections that would

be lost if a demand for document production could be made on nonparties who otherwise have no legal obligation to provide them.

Ordinarily, a "corporation must produce documents possessed by a subsidiary that the parent corporation owns or wholly controls." (*U.S. v. International Union of Petroleum & Industrial Workers* (9th Cir. 1989) 870 F.2d 1450, 1452.) The nonparty status of wholly owned subsidiaries, under typical circumstances, "does not shield their documents from production, since the crucial factor is that the documents must be in the custody, or under the control of, a party to the case." (*In re ATM Fee Antitrust Litig.* (N.D.Cal. 2005) 233 F.R.D. 542, 545.) That "crucial factor," however, does not exist in this case. In this instance, both the doctrine of sovereign immunity and the Tribal Court Injunction divest the Tribe of the ordinary, actual control a parent typically holds over its subsidiary entities.

D. The Sovereign Immunity of CEDCO Divests the Tribe of Actual Control Over the Requested Documents in CEDCO's Possession.

The doctrine of tribal sovereign immunity dictates a tribal sovereign "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity" (*Kiowa Tribe v. Mig. Techs.* (1998) 523 U.S. 751, 754) and extends to entities beyond the tribe itself when those entities are an "arm of the tribe." (*Cook v. AVI Casino Enters.* (9th Cir. 2008) 548 F.3d 718, 725.) "[T]he term 'suit' embodies the broad principle that the government is not subject to 'legal proceedings, at law or in equity' or 'judicial process' without its consent." (*U.S. v. Murdock Mach. & Eng'g Co. of Utah* (10th Cir. 1996) 81 F.3d 922, 931 (quoting *Belknap v. Schild* (1896) 161 U.S. 10, 16). Waivers of immunity cannot be implied through common law doctrines of equity. (*See Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1195-96 ["Regardless of the

equities, a court is not empowered to deprive an Indian tribe of its sovereign immunity"]; *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)* (6th Cir. 2019) 917 F.3d 451, 465 ["No court has ever applied the equitable doctrine of alter-ego/veil piercing to find a waiver of an Indian tribe's sovereign immunity...."]).

More broadly, tribal sovereign immunity "is not subject to diminution by the States," including state courts. (*Kiowa*, 523 U.S. at 756.) Yet, that is precisely what the Court is attempting to do through use of a "control test" that amounts to an inapplicable form of veil-piercing between a sovereign Indian tribe and two of its separate, sovereign corporations—namely, CEDCO and CVEE.

1. Respondent Does Not Contest that CEDCO Is Entitled to Sovereign Immunity from Unconsented Suit.

Respondent concedes, by word and action, that CEDCO is a sovereign tribal enterprise cloaked in the privileges and immunities of tribal sovereignty, including sovereign immunity from unconsented suit. He thrice states in submissions to the Court that CEDCO is entitled to sovereign immunity. (*See, e.g.,* 1 CT 82-83, falsely stating that Respondent's "document requests to [the Tribe] do not in any way implicate the sovereign immunity of CEDCO; 2 CT 360, falsely stating that CEDCO has "waived any claim of sovereign immunity by [its] general appearance" without support or even a reference to any appearance made general, specific or otherwise; and 2 CT 407, making the same unsubstantiated and unsupported claim.)

Of course, if CEDCO waived its immunity from unconsented suit then Respondent could easily subpoena CEDCO for the requested

documents and would not need to rely on a convoluted interpretation of the control test to obtain those documents, making Respondent's claim of any waiver of immunity on the part of CEDCO transparently thin.

2. Section 17 Corporations are Separate Legal Entities, Distinct from the Tribal Government, Are Entitled to Sovereign Immunity From Unconsented Suit, and Such Immunity May Only Be Waived Where Certain Conditions for Effectuating a Waiver in Accordance with Its Enabling Charter are Met.

Respondent's acknowledgments are in accordance with prevailing law. A tribal corporation chartered under Section 17 of the Indian Reorganization Act creates an "arm of the Tribe" that is entitled to sovereign immunity from unconsented suit. (*Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* (6th Cir. 2009) 585 F.3d 917, 921.) Absent a waiver by the corporation, its immunity is preserved. (*Amerind Risk Mgmt. Corp. v. Malaterre* (8th Cir. 2011) 633 F.3d 680, 685-686.)

Numerous courts, in describing the immunity of a Section 17 Corporation, have commented on the fact that a Section 17 Corporation is a distinct legal entity that is separate from the tribal government. (*See*, *e.g.*, *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation* (10th Cir. 1982) 673 F.2d 315, 320 ("Most courts that have considered the issue have recognized the distinctness of these two entities."); (*Inglish Interests, LLC v. Seminole Tribe of Fla., Inc.* (M.D.Fla. Jan. 21, 2011, No. 2:10-cv-367-FtM-29DNF) 2011 U.S.Dist.LEXIS 6123, at *9.) (A Section 17 Corporation "is not literally the Tribe in its traditional sovereign sense, but an incorporated 'arm' of the Tribe."); (*Gaines v. Ski Apache* (10th Cir. 1993) 8 F.3d 726, 729.) (An Indian tribe's government formed under Section 16 of the IRA and its corporations formed under Section 17 of the

IRA are "separate and distinct."); (*Atkinson v. Haldane* (Alaska 1977) 569 P.2d 151, 174.) ("In our view, the section 16 governmental unit and the section 17 corporate unit are distinct legal entities.") As the Ninth Circuit has noted, immunity for separate and distinct subordinate economic entities "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." (*Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047.)

The "historic purpose" noted by the Ninth Circuit is detailed in *Opinion No. M-36515, 65 Interior Decision 483*, which was heavily relied upon in *Atkinson v. Haldane*. (569 P.2d 151, 172.) Therein, the Solicitor examined the legislative history of the IRA, opining that the Act "makes clear the distinction between the organization of an Indian municipal government under section 16 [. . .] and that of a business corporation under section 17 of the act." (*Id*.) He concluded that:

> The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation,

> although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. *As a result, the powers, privileges and responsibilities of these tribal organizations materially differ*.

(*Id*. (emphasis added); 65 Int. Dec. at 484.)

The Solicitor's opinion accords with the legislative history of the IRA.

> The original Wheeler-Howard Bill, H.R. 7902 and S. 2755, 73d Cong., provided for a single chartered entity with all powers of government and such privileges of corporate organization as were necessary for effective tribal structure. In committee discussions, it was suggested that this type of organization would not suit the realities of Indian problems, primarily because of the difficulty in obtaining credit given the recognized sovereign immunity of the tribes. The Senate Report on S. 3645, the completely redrafted bill, distinguished the purposes of stabilization of tribal governmental organization and modernization of tribal economic activities through the corporate structure.

(*Atkinson v. Haldane* (Alaska 1977) 569 P.2d 151, 172.)

"Based on the legislative history of the Indian Reorganization Act, it is apparent that Congress envisioned two separate legal entities in sections 16 and 17 of the Act." (*Id*.) The second of these two separate legal entities—the Section 17 Corporation—possessing "*new* grants of powers." (*Id*. emphasis added.)

It is thus unmistakably true that the powers, privileges and responsibilities of a Section 17 Corporation, including the power to waive its immunity, are new and separate powers, which (as will be further detailed in Section I.D.3, below) the Department of the Interior has broad authority to bestow upon a Section 17 Corporation.

A Section 17 Corporation may of course waive its distinct and separate immunity if authorized in its incorporating charter, such as in accordance with a "sue or be sued clause." Importantly, however, "where the sue or be sued clause in a tribal corporate charter can only be made effective if certain requirements are met, the clause has no effect unless and until those requirements are met." (*Sanchez v. Santa Ana Golf Club, Inc.* (N.M.Ct.App. 2004) 104 P.3d 548, 552.) One court commenting on this doctrine in 2004 stated that it had "found no case holding that a sue or be sued clause expressly stating that the clause was ineffective unless certain requirements were met served as a waiver of sovereign immunity where the requirements were not met." (*Id*.)

3. CEDCO is a Section 17 Corporation, Separate and Distinct from the Tribal Government, Cloaked in Sovereign Immunity that May Only Be Waived Under Certain Conditions.

The Tribe formed CEDCO on September 27, 2012 as a federally chartered Tribal business corporation, pursuant to the Indian Reorganization Act ("IRA") of June 18, 1934, (48 Stat. 988), 25 U.S.C. §

5124, as amended. (8 Con.CT 2207-2008; 1 CT 132, CEDCO Charter, Article III.) In 2015, CEDCO's federal charter was amended, federally approved, and ratified by the Tribe. (1 CT 130-147, 8 Con.CT 2209-2210.) The U.S. Department of the Interior, Bureau of Indian Affairs, has since issued several "Certificate[s] of Good Standing and Compliance" to CEDCO recognizing that CEDCO is "a corporation chartered pursuant to Section 17" of the IRA and "duly authorized to transact business and to exercise the powers, privileges and immunities granted by [IRA] and embodied in its Federal Charter." (8 Con.CT 2211-2214.)

CEDCO's was established by the Tribe for the specific purposes of "(i) creating a legal structure which provides for the segregation of Tribal governmental assets and liabilities from Tribal business assets and liabilities, and (ii) creating a legal structure which provides for the segregation of discrete Corporation assets and liabilities into separate Corporation subdivisions, without divesting either the Corporation or the Tribe of the privileges and immunities arising pursuant to their legal status under federal and Tribal law." (1 CT 132.) In other words, CEDCO was organized, among other things, to "accomplish the segregation of Tribal governmental assets and liabilities from corporate assets and liabilities." (1 CT 134, CEDCO Charter, Article VII-D.) CEDCO is a "legal entity wholly owned by the Tribe, but is a distinct entity other than the Tribe. The activities, transactions, obligations, liabilities and property of the Corporation are not those of the Tribe." (1 CT 132-133, CEDCO Charter, Article IV-A.)

Under its federal charter, CEDCO possesses "all immunities from taxation and sovereign immunity from uncontested suit." (CT 133, CEDCO Charter, Article VIV-C.) In this respect, CEDCO's Corporate Board, and

only its Corporate Board, is authorized to waive the "Corporation's sovereign immunity" under specific limited circumstances:

> Waivers of the Corporation's sovereign immunity from suit must be considered by the Board on a transaction-by-transaction basis. Such waivers shall be limited to the extent of assets specifically pledged by the Board for that transaction. In order to waive the Corporation's sovereign immunity, the Board must take official action on each proposed waiver and by resolution set the conditions, terms and limits of the Corporation's waiver of immunity for that transaction. Nothing in this Charter shall be construed, interpreted or implied to have waived the sovereign immunity of the Corporation except as explicitly set out above.

(1 CT 134, CEDCO Charter, Article VIII-B.)

As the next Section shall demonstrate, the foregoing conditions have not been met in association with this case, including in association with any demand made by the Tribe to obtain the Requested Documents.

4. CEDCO Has Not Waived its Immunity from Unconsented Suit in Favor of Any Party to the Dispute, Including the Tribe.

CEDCO has neither waived its immunity from unconsented suit specifically in association with this case, nor has it generally waived its sovereign immunity in favor of the Tribe. As Article VIII-B of CEDCO's Charter makes clear, "nothing" in the Charter shall be "construed, interpreted or implied" to have waived the Corporation's sovereign

immunity except when "explicitly" done in accordance with a highly specific resolution of the Corporate Board. (1 CT 134.) Respondent has cited no such resolution from the Corporate Board granting a waiver of sovereign immunity to the Tribe or any other party to the dispute, and there is no record of any such resolution before the Court.

Because there is no record of a CEDCO waiving its immunity in favor of the Tribe, the Court or any party to the dispute, the Tribe can only presume that the Court is sanctioning the Tribe for its failure to obtain the Requested Documents in the possession of CEDCO based on a mistaken notion of an implied waiver of immunity on the part of CEDCO or a misapplied doctrine of equity. However, regardless of the equities, a court is not empowered to deprive a tribal sovereign of its immunity from unconsented suit. (*People of State of Cal. v. Quechan Tribe Of Indians* (9th Cir.1979) 595 F.2d 1153, 1155.) *accord Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1195–96 [no authority for the proposition that sovereign immunity may be overridden by application of equitable principles]). Nor may sovereign immunity be waived by implication. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58, 98.)

It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." (*Id*. at 58–59.) In any event, CEDCO cannot possibly be deemed to have waived their immunity by virtue of a suit to which they were not even a party. (*Heckman v. United States* (1912) 224 U.S. 413, 444–46.)

Perhaps most important, "[b]ecause a waiver of immunity is altogether voluntary on the part of [the sovereign], it follows that [the sovereign] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" (*Big Valley*

Band of Pomo Indians v. Superior Court (2005) 133 Cal. App. 4th 1185, 1193 [internal citations omitted].) In this instance, the sovereign in question is not the Tribe but CEDCO. Under its Charter, *any* waiver of immunity requires a resolution by the Corporate Board. This means that, unless the Corporate Board has issued a waiver of immunity in favor of the Tribe, the Tribe has no enforceable means to compel production of the Requested Documents in CEDCO's possession. As the Tribe explains below, this means the Tribe does not have actual control of those documents.

5. In the Absence of a Waiver of Immunity in Favor of the Tribe, the Tribe Has No Enforceable Means of Compelling CEDCO to Produce the Requested Documents and Therefore the Tribe Has No Control Over the Requested Documents in CEDCO's Possession.

In the absence of a waiver of immunity from CEDCO, the Tribe has no enforceable means of compelling CEDCO to produce the Requested Documents in its possession. In other words, the Tribe does not have a legal right to obtain the Requested Documents on demand. In the absence of a legal right to obtain the Requested Documents on demand, the Tribe does not "control" the documents in CEDCO's possession.

Respondent cites a number of provisions of the CEDCO Charter in his Motion to Compel to demonstrate why certain documents *should* be in the Tribe's possession. (1 CT 77-82.) However, the evidence before the Court was insufficient to establish the Tribe's actual, enforceable right to obtain documents from CEDCO on demand. In fact, the portions of CEDCO's charter cited by Respondent show that CEDCO's business affairs "shall be managed exclusively by [CEDCO's] Directors of the Corporate Board." (1 CT 79.) That being so, it would be entirely up to

CEDCO's Board of Directors whether or not to permit disposition of, or access to its business records.

Respondent points to the right of the Tribe to "inspect and copy" CEDCO's operating records. (1 CT 78.) Respondent also lists the various periodic reports that CEDCO is supposed to submit to the Tribe in accordance with the Charter. (1 CT 80.)

The problem with Respondent's list is that it is merely a list of *theoretical* reasons why The Tribe should have possession, custody, or control of certain of the Requested Documents. But in creating this list, Respondent completely ignores that the Tribe is subject to the same barrier to obtaining the Requested Documents as is Respondent. CEDCO's sovereign immunity prevents both Respondent *and* the Tribe from utilizing the power of a court to compel document production. As was stated by the Northern District Court of California, there is no legal control where there is no "mechanism [] to compel [the non-party] to produce those documents." (*Micron Tech., Inc. v. Tessera, Inc*., No. 06-80096, 2006 U.S. Dist. LEXIS 42072, 2006 WL 1646133, at *2 (N.D. Cal. June 14, 2006)). "Control must be firmly placed in reality." (*United States v. International Union of Petroleum & Industrial Workers* (9th Cir. 1989) 870 F.2d 1450, 1453-1454.) It cannot be implied "in an esoteric concept such as [an] 'inherent relationship.'" (*Id*.) Actual control must exist. (*Shimman v. Frank* (6th Cir. 1980) 625 F.2d 80, 98 n.36.)

In order for the Tribe to have actual control over CEDCO with regard to the Requested Documents, it would need to have an enforceable mechanism for demanding said documents. Without a waiver of sovereign immunity from CEDCO granted in favor of the Tribe, no such mechanism exists. The Tribe can demand the Requested Documents from CEDCO,

CEDCO can say "no" and the Tribe is without any mechanism to compel production of the documents because CEDCO's sovereign immunity precludes the Tribe from hailing CEDCO into a court of law. Accordingly, the Tribe does not have legal control over the Requested Documents. It was thus was an abuse of discretion for the Court to disregard and sidestep the sovereign immunity of CEDCO and order that their business and governance records be produced by the Tribe.

E. The Sovereign Immunity of CVEE Divests the Tribe of Actual Control Over the Requested Documents in CVEE's Possession.

As this explains, subdivisions of a Section 17 Corporation are entitled to the same privileges and immunities of the parent, including immunity from unconsented suit, where authorized or otherwise proscribed under the parent corporation's charter. Because of this immunity, and for reasons almost identical to those described in association with CEDCO, the Tribe does not have actual control over the Requested Documents in CVEE's Possession. As such, it was an abuse of discretion for the Court to sanction the Tribe for its inability to compel CVEE to produce the Requested Documents in its possession.

1. Respondent Does Not Contest that CVEE Is Entitled to Sovereign Immunity from Unconsented Suit.

Respondent, in his filings to the Court, concedes that CVEE is cloaked in the privileges and immunities of tribal sovereignty, including sovereign immunity from unconsented suit for the same reasons and in the same filings as his concessions regarding the immunity of CEDCO. (1 CT 82-83; 2 CT 360; 2 CT 407). Respondent's concessions comport with prevailing law, as explained below.

2. Subdivisions of Section 17 Parent Corporations are Separate Legal Entities, Distinct from the Tribal Government and the Parent Corporation, Are Entitled to Sovereign Immunity From Unconsented Suit, and Such Immunity May Only Be Waived Where Certain Conditions for Effectuating a Waiver in Accordance with Its Enabling Charter are Met.

As this Section shall explain, subdivisions of Section 17 parent corporations operate with a distinction and separateness akin to their parent corporations, and are limited only by the express restrictions of the Indian Reorganization Act. As such, the separate and distinct immunity possessed by Section 17 subdivision operates in a manner nearly identical to that of the parent.

In enacting the Indian Reorganization Act ("IRA"), the United States Congress "willingly ceded broad authority to [the Department of the Interior ("DOI")] and vested it with the sole discretion as to what powers may [be] authorized for IRA sec. 17 corporations." (*Blue Lake Rancheria Econ. Dev. Corp. v. Comm'r (2019)* 152 T.C. 90, 112.) The powers bestowed upon a Section 17 Corporation by DOI are limited only by the express limitations set forth in Section 17 of the Indian Reorganization Act itself. (*Id*. at 116.) Those restrictions are few: the Secretary of the Interior may not authorize a Section 17 Corporation to sell reservation land or lease the same for a period of more than 25 years, and the Secretary may not authorize incidental corporate powers that are inconsistent with tribal or federal law. (IRA, Sec. 17.)

Powers incidental to a Section 17 Corporation are powers, even nonessential ones, which are appropriate to the execution of the powers

expressly stated in the corporation's charter and aid the corporation in carrying out the express purpose for which it was created. This encompasses a "broad array of corporate powers … including the creation of *legally distinct subdivisions* whose assets are not collectible from the corporation as a whole." (*Blue Lake Rancheria Econ. Dev. Corp.*, at 114.) (emphasis added.) Given that DOI was vested with the sole discretion as to what powers may be given to a Section 17 Corporation, this would also include the power of a Section 17 parent corporation to bestow upon its subdivisions a distinct and independent sovereign immunity—waivable only by the subdivision's board of directors and in accordance with whatever conditional limitations are included in the subdivision's charter—provided such power aided the parent corporation in carrying out the purposes for which it was created.

3. CVEE Is a Subdivision of a Section 17 Corporation, Separate and Distinct from the Tribal Government and CEDCO, and Is Cloaked in Sovereign Immunity that May Only Be Waived Under Certain Conditions.

CEDCO was specifically formed for the purpose of "creating a legal structure which provides for the segregation of discrete Corporation assets and liabilities into *separate Corporation subdivisions*, without divesting either the Corporation or the Tribe of the privileges and immunities arising pursuant to their legal status under federal and Tribal law. (1 CT 132; emphasis added.) To accomplish that purpose, CEDCO's charter expressly provides CEDCO with the power:

> to create subdivisions of the Corporation (each, a "CEDCO Subdivision") for the purpose of legally segregating the assets and liabilities of

> discrete business endeavors of the Corporation regardless of common directorship; provided, that each CEDCO Subdivision shall have the same immunities under federal law as the Corporation and the Tribe, including but not limited to all immunities from taxation and sovereign immunity from unconsented suit. In addition, CEDCO Subdivisions shall possess all of the other rights and privileges granted by this Charter, and shall likewise be subject to its limitations, unless otherwise stated in the enabling document of said CEDCO Subdivision.

(1 CT 135.)

In accordance with the foregoing power, CEDCO formed CVEE on November 1, 2017. The Tribe ratified CVEE's charter on November 2, 2017 in accordance with CEDCO Subdivisions Tribal Ratification Ordinance. (1 CT 159; 8 Con.CT 2215-2224.)

CVEE was formed with the purpose "(1) to promote Tribal economic development and fund its government services through development and operation of one or more gaming facilities and related amenities; . . . and (4) to exercise all other powers necessary and reasonably connected with such purposes, which may legally be exercised by corporate subdivisions" of CEDCO. (1 CT 149, CVEE Charter Article 1.) Pursuant to its enabling charter, CVEE "is a legally segregated subdivision of CEDCO (a "CEDCO Subdivision"), wholly owned by the Tribe for the benefit of the Tribe and its Tribal members. The activities,

transactions, obligations, liabilities and property of CVEE are not those of CEDCO or the Tribe." (1 CT 150, CVEE Charter Section 4.01.)

Under its enabling charter, CVEE is "cloaked in the privileges and immunities of CEDCO and the Tribe, including but not limited to sovereign immunity from suit in any state, federal or tribal court." (1 CT 150, CVEE Charter Section 4.04.) Like CEDCO, CVEE is empowered to "waive its sovereign immunity from suit in accordance with Article VIII of [the CVEE] Charter." (1 CT 153, CVEE Charter Section 6.01(c).) But to do so requires action by the CVEE Board of Directors consistent with the authority and requirements contained in Article VIII of CVEE's charter. (1 CT 153, CVEE Charter Article VIII).

Article VIII of the CVEE charter contains a very precise procedure, and a number of limitations, regarding waivers of immunity of the subdivision. Specifically: waivers of sovereign immunity may only be granted in accordance with a resolution of the Subdivision board and only for contracts entered into and executed by the Board; no causes of action, self-help remedies or claims in law or equity shall be cognizable against CVEE except as explicitly set forth in the waiver and under no circumstances shall any claim for indirect, special, consequential or punitive damages be made, entertained or awarded against CVEE; unless otherwise agreed to by the CVEE corporate board by resolution, waivers of CVEE's sovereign immunity shall not extend to the levy of any judgment, lien or attachment upon the property of CVEE; enforcement of such waivers shall be limited to the extent of assets specifically pledged by the Board and in the event a waiver is silent as to the assets pledged, enforcement shall be limited to $10,000 per claim. (1 CT 153, CVEE Charter Article VIII.) Any waiver of sovereign immunity granted in

violation of the CVEE Charter is void, shall not be recognized and shall possess no legal or other compulsory force. (*Id*.)

Of particular importance, "[n]othing in [the CVEE] Charter shall be construed, interpreted or implied to have waived the sovereign immunity of CVEE, except as explicitly stated in [] Article [VIII of the CVEE Charter]." (*Id*.)

4. CVEE Has Not Waived its Immunity from Unconsented Suit in Favor of Any Party to the Dispute, Including the Tribe.

CVEE has neither waived its immunity from unconsented suit specifically in association with the dispute at hand, nor has it generally waived its sovereign immunity in favor of the Tribe. As with CEDCO, CVEE can only waive its immunity in accordance with a highly specific resolution of the Corporate Board. Respondent has cited no such resolution from the Corporate Board granting a waiver of sovereign immunity to the Tribe or any other party to the Dispute, and there is no record of any such resolution before the Court.

5. In the Absence of a Waiver of Immunity in Favor of the Tribe, the Tribe Has No Enforceable Means of Compelling CVEE to Produce the Requested Documents and Therefore the Tribe Has No Control Over the Requested Documents in CVEE's Possession.

In the absence of a waiver of immunity from CVEE, the Tribe has no enforceable means of compelling CVEE to produce the Requested Documents in its possession. As such, and for the very same reasons stated above in association with CEDCO, the Tribe does not have legal control over the Requested Documents. It was thus was an error for the Court to sanction the Tribe for its legal inability to obtain the Requested Documents

in the possession of CVEE.

F. The Tribal Court Injunction Divests the Tribe of Actual Control Over the Requested Documents in the Possession of CEDCO or CVEE.

While the inability of the Tribe to compel CEDCO or CVEE to produce the Requested Documents is perhaps the most facially obvious reason the Tribe does not have control over the documents, the Tribal Court Injunction may be the more compelling one.

1. The Tribal Court Injunction Applies to All Persons with the Legal Right to Possess the Requested Documents in the Possession of CEDCO or CVEE, Such that those Documents Cannot Be Produced without Violating Coyote Valley Tribal Law.

The Tribal Court Injunction permanently restrains and enjoins Respondent "and all those in active concert or participation with him and *any* individual, including officers, staff and representatives of the Tribe [] from engaging in judgment collection proceedings in the State Court (including conducting a Debtor's Examination) against the Tribe's property." (7 Con.CT 1980-1981; emphasis added.) The key word here is "any" individual, which would include officers and other persons who work for the Tribe, CEDCO or CVEE.

Respondent and the Court have a fundamental misunderstanding of the scope and effect of the Tribal Court Injunction. Respondent contends that, in order for the Tribal Court Injunction to have any effect, it must "displace and supersede the jurisdiction of [the] Court in [its] own proceedings." (1 CT 201.) Respondent's contention misses the mark, completely ignoring the matter at hand. Irrespective of whether the Tribal

Court Injunction displaces, supersedes or has any other effect on the jurisdiction the Superior Court, it is incontestable that the Tribal Court Injunction is binding on all individuals with legal access to the Requested Documents in the custody of CEDCO and CVEE. The Trial Judge's own words are instructive here. In explaining why he was of the opinion that the debtor's exam proceedings had come to an impasse, he stated that both the Superior Court and the Tribal Court "are courts of concurrent jurisdiction." (RT 604: 21-22.) Between those courts:

> there's orders of the state court and then there's orders of the tribal court that conflict. So fast-forward. We're here today. We've got a couple of deponents. They're supposed to answer questions, and I've ordered them to do that. However, the deponents are being told, and with a tribal court order, not to answer. So what do they do? They've got two courts telling them different things.
>
> I'm willing to hear from both [counsel for the Tribe and council for Respondent] as to what the next step ought to be, but I -- you know, I can make little orders about how you conduct an order of Examination of Judgment Debtor and who can be present. I can make little orders about -- I can have it held in the court, and I can see that decorum is made. But if the objection, basically, is that there's a tribal court

> order that says, "Don't comply with these questions," we're -- we're at an impasse.

(RT 605-606.)

In response to the Trial Judge's question regarding "what the next step ought to be," the Tribe reminded the Judge that Respondent had made several overtures for the course of many months that he would be filing a claim in federal court "as soon as humanly possible" to decide questions regarding the dueling state and tribal court jurisdictions. (RT 606-607.) The Trial Judge then went on to say:

> When [Respondent] suggested that he was filing in federal court, my mindset was, "Okay, well, then these people will have an order from *a court that is actually controlling*, both on our state court and on the tribal court." And that's rely the desirable thing … I can't order the Tribal Court to do "A," "B," or "C" … I can't do it. I don't have the authority to do that.

(RT 610-611; emphasis added.)

As correctly analyzed by the Court, the Tribal Court Injunction need not displace or supersede the jurisdiction of the State Court to retain its effect on those persons over whom the Tribal Court does have jurisdiction. Whether the Tribal Court's jurisdiction is exclusive or concurrent in that regard is immaterial to the fact that the Tribal Court Injunction is binding on all persons within the Tribal Court's jurisdiction, and the only court that (arguably) can displace or supersede that jurisdiction is a Federal court.

Until such time, the Tribal Court Injunction is binding upon any individual who is: a Tribal member;[2] a nonmember, when the conduct in question occurs on Tribal land;[3] a nonmember who has entered into a consensual relationship with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements, provided that the law being imposed upon the nonmember has a nexus to the consensual relationship;[4] a non-member whose conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe;[5] or, a nonmember whose behavior otherwise implicates the Tribe's sovereign right to protect tribal self-governance and to control its internal relations.[6]

The scope of Tribal jurisdiction covers a wide swath of individuals, but the Tribe need only describe its effect on those persons with legal

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[2] Tribal court subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law. There is no general federal statute limiting tribal jurisdiction over tribal members, and federal law acknowledges this jurisdiction. (1 Cohen's Handbook of Federal Indian Law § 7.02 (2019))

[3] A tribe may regulate the conduct of nonmembers on tribal land (*Knighton v. Cedarville Rancheria of N. Paiute Indians* (9th Cir. 2019) 922 F.3d 892, 902.)

[4] Tribes have jurisdiction to regulate consensual relations through taxation, licensing, or other means. However, the law imposed by the Indian tribe have a nexus to the consensual relationship itself. (*Id*.)

[5] A tribe may exercise civil authority over the conduct of nonmembers within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. (*Id*.)

[6] Indian tribes retain their inherent sovereign power to protect tribal self-government and to control internal relations. In accordance with that right, tribes may regulate nonmember behavior that implicates these sovereign interests. (*Id.)*

access to, and the legal right to hand over, the Requested Documents to the Tribe.

The business affairs of both CEDCO and CVEE are the duty and responsibility of their respective Corporate Boards. (1 CT 138, CEDCO Charter Article XI A; 1 CT 154, CVEE Charter Section 9.01.) With regard to CEDCO specifically, the business affairs of the Corporation are managed "exclusively" by the Directors of the Corporate Board. (1 CT 138, CEDCO Charter Article XI A.) The Tribal Council has no authority to direct the business affairs of the CEDCO, except through its status as the representative of the owner of the Corporation and as otherwise provided in the Charter. (*Id*.) Both Boards take corporate actions by a vote of all members of the respective boards at duly notice meetings with a quorum present. (CT 141-142, CEDCO Charter Sections J-K; CT 154-155, Sections 9.07-9.08.)

Each individual member of the CEDCO and CVEE Boards has a consensual relationship with the Tribe, through their voluntary acceptance of appointment to the Board. As part of their duties, the Board members manage the business affairs of the corporations, which implicitly includes the management of internal documents. The individual Board members thus have a nexus to Tribal Court Injunction, which prohibits any individual from participating in engaging in judgment collection proceedings in the State Court against the Tribe's property. The Superior Court's framing of the "control test" in the Amended Order as applied to the Tribe, considers the property of the Corporations as the property of the Tribe (otherwise, their would be no right or "control" over the documents). Notably, the duties of the CEDCO Board of Directors shall be performed in good faith, in a manner the Director believes to be in, or not opposed to, the best

interests of the Corporation. (1 CT 139, CEDCO Charter Article IX.E) Similarly, no action may be taken by the CVEE Board of Directors unless they believe the action will benefit the long-term interests of the Tribe and its Tribal members. (CT 149, CVEE Charter Article I.) Directors of both Boards could reasonably conclude that defying a Tribal Court order is in neither the best interest of CEDCO, CVEE or the Tribe.

To the extent other officers or employees of the Corporation have legal custody of any of the Requested Documents, they too would have a consensual relationship with the Tribe through their employment contracts and scope of duties to the Tribe.

Note too, that the principal and registered offices of CEDCO must be located on the Tribe's reservation. (CT 132, CEDCO Charter Article II.A-B.; CT 149-150, CVEE Charter Article II.) Thus any Requested Documents located in the Corporations' respective offices will be located on Tribal land. A member or nonmember attempting to access those documents would be subject to the Tribal Court Injunction because their conduct would threaten and have a direct effect on the political integrity, economic security and health and welfare of the Tribe because it would be in direct contradiction of a Tribal Court order intended to protect the wrongful demand of Tribal property and the levying of Tribal funds. Likewise such behavior implicates the Tribe's sovereign right to protect tribal self-governance and to control its internal relations, as any decision to produce the Requested Documents would undermine the rights and authority of the Tribal Court, which are rights protected and promoted under Federal law. "[T]ribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal

embodied in numerous federal statutes." (*N.M. v. Mescalero Apache Trib* (1983) 462 U.S. 324, 334-335.)

2. The Tribal Court Injunction Divests the Tribe of Actual Control over the Requested Documents in the custody of CEDCO and CVEE Because, as Non-Parties, Both Entities Can (and Should) Legally Refuse to Turn Over Such Documents to the Judgment Debtor without Breaching any Contract or Other Obligation.

As described in Section I.C, above, if a non-party can legally refuse to turn over such documents to the judgment debtor without breaching any contract, then the judgment debtor is not considered to have actual control over the requested documents and is not required to hand over any such documents under CCP § 708.030. (*Genentech, Inc. v. Trs. of the Univ. of Pa.* (N.D.Cal. Nov. 7, 2011, No. C 10-2037 PSG) 2011 U.S.Dist.LEXIS 128526, at *5-6.) The respective Corporate Boards of CEDCO and CVEE have affirmative duties to protect the interests of the Corporations and the Tribe. (1 CT 139, CEDCO Charter Article IX.E; CT 149, CVEE Charter Article I.) Those interests cannot be protected by violating Tribal law, including the Tribal Court Injunction. This is reason enough to explain why CEDCO and CVEE can legally refuse to turn over the Requested Documents in their possession without breaching any contract or similar duty. However, additional support is found in the fact that the Tribal Court Injunction specifically forbids all officers, employees, attorneys and others working on behalf of CEDCO and CVEE from engaging in judgment collection proceedings in the State Court.

For these reasons, the Tribe does not have control over the requested documents in CVEE and CEDCO's custody.

II. THE TRIBAL COURT INJUNCTION DIVESTS THE TRIBE OF ACTUAL CONTROL OVER THE REQUESTED DOCUMENTS IN THE POSSESSION OF THE TRIBE'S.

The Amended Order states that the Tribe must turn over any Requested Documents in the possession, custody or control of the Tribe's attorneys. However, any attorney for the Tribe would be subject to the Tribal Court Injunction, as they would have entered into a consensual relationship with the Tribe via an attorney services or similar contract. Respondent states that certain documents "attached to declaration" in the course of the proceedings are "obviously within [the Tribe's] possession, custody and control." (1 CT 71.) Putting aside arguments of attorney-client privilege, what Respondent fails to realize is that certain redacted forms of documents were voluntarily authorized for submission to the Court in association with the case. But "the mere fact … companies may have voluntarily furnished documents and information in the past does not compel a finding that [a] Defendant has legal control over the documents sought." (*Keahole Point Fish LLC v. Skretting Can. Inc.* (D.Haw. Apr. 9, 2013, No. 11-00675 LEK-KSC) 2013 U.S.Dist.LEXIS 204167, at *6-8.) Defendant has no means of compelling production of documents over which it has no legal control. (*Id*.)

III. THE TRIBAL COURT INJUNCTION PROHIBITS THE TRIBE FROM PRODUCING THE REQUESTED DOCUMENTS IN ITS POSSESSION, CUSTODY OR CONTROL.

As explained in Section I.F.1, above, under *Knighton* the Tribal Court Injunction applies to all persons who are Tribal members or who have a consensual relationship with the Tribe. The Tribal Court Injunction

need not displace or supersede the Court's jurisdiction for it to be binding on all such persons. As Chairman Hunter stated during the Third Debtor's Exam, as a member of the Tribal Council, he took an oath to uphold all Tribal laws, including the Tribal Court Injunction. (RT 583: 3-5.) The Injunction forbids any individual from engaging in judgment collection proceedings in the State Court. He, and every member of the Tribal Council—all of whom must be Tribal members[7]—are unable to produce, or aid in the production of, the Requested Documents without violating the Tribal Court Injunction.

Notably, there are only two Tribal bodies that have the authority to comply with the Amended Order: the Tribe's General Council and its Tribal Council. As explained below, both require votes cast by individual Tribal members to take governmental actions.

Under the Constitution, "the governing body of the Band shall be the General Council. In addition, there shall be elected from the General Council a Tribal Council." (2 Con.CT 329, Constitution Article IV, Section 2.) "All powers of the Band shall be vested in the General Council, including those powers delegated to the Tribal Council." (2 Con.CT 332-333, Constitution Article V Section 6.) The General Council delegated certain powers to the Tribal Council that ostensibly give the Tribal Council the authority to produce the Requested Documents on behalf of the Tribe. (For example, the delegated power to conclude agreements (2 Con.CT 344, Tribal Constitution Article VII Section 1(a)) combined with the "catch-all"

[7] Under Article VI, Section 2 of the Constitution, Tribal Council members must be members of the General Council. (2 Con.CT 334, Constitution.) Under Article V, Section 1, General Council members consist only of those Tribal members aged 18 or older. (2 Con.CT 330, Constitution.)

reserved power (2 Con.CT 348, Constitution Article VII Section 1(w)). But there is no individual with unilateral executive power to represent the Tribe or make decisions on its behalf.[8]

The General Council can only take a governmental action through the "initiative, referendum, repeal and recall procedures" specified in the Constitution. (2 Con.CT 329-330, Constitution Article IV Section 3.) Such procedures require a vote of the General Council, consisting solely of Tribal members over the age of 18. (2 Con.CT 354-358, Constitution Articles XI-XII.) Arguably, the General Council could convene to vote to produce the Requested Documents. However, the individuals voting to take such an action would be doing so in violation of the Tribal Court Injunction that is binding upon them. Not only would the participants be Tribal members, but also such vote would occur on the Reservation in a matter quintessentially governing the Tribe's internal affairs. (*Id*.) Tribal Court jurisdiction over a General Council vote of that nature certainly lies.

Like the General Council, the Tribal Council also takes governmental action through votes of individual Tribal members. (2 Con.CT 343, Constitution Article VI Section 6(g).) Those individuals are the Tribal members elected by the General Council to serve on the Tribal Council. (2 Con.CT 334, Constitution Article VI Section 1.) Any Tribal Council member participating in such a vote would be doing so in violation of the Tribal Court Injunction, as Tribal Court jurisdiction would lie for the same reasons as stated above in association with those individuals voting on a matter before the General Council.

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[8] Even the authority granted to the Chairman to serve as a contracting officer or agent requires approval by the Tribal Council as a whole. (2 Con.CT 338, Constitution Article VI, Section 4(a)(4).)

The Amended Order states that the Tribe:

> [s]hall produce and serve, without objections, on [Plaintiff], through his attorneys of record, any and all responsive documents to the [First Document Requests] to Defendant, dated August 28, 2019, including, but not limited to, any responsive documents that are in the possession, custody, or control of Defendant, Defendant's attorneys, CEDCO and CVEE.

(1 CT 295-296.)

The only persons (natural or otherwise) that can authorize the production and service of the Requested Documents on behalf of the Tribe, with or without objection, are the General and Tribal Councils. To do that would require votes of individuals clearly subject to, and prohibited to produce such documents by, the Tribal Court Injunction.

As the Court said when comparing the roles of the Tribal and State Courts, "they're both courts of competent jurisdiction. They're, you know, basically equal dignity courts under the law." (RT 620: 24-25; 621:1.) Then later, with regard to individuals subject to the Tribal Court Injunction, the Judge said "it's their court. And their court's made an order from -- as individuals, why shouldn't they follow it?" (RT 621: 4-6.)

Why this same logic was not applied to the production of documents in the Amended Order is a bit mystifying, because the same principles hold true. It is impossible for the Tribe to produce the Requested Documents without the individuals consisting of the General or Tribal Council violating the Tribal Court Injunction. They cannot, under law, do so without breaking the law. It was thus an astounding error for the Court to

order the Tribe to take an action that the Court knows it is prohibited from doing.

IV. THE COURT ABUSED ITS DISCRETION IN ORDERING COMPLIANCE WITH DISCOVERY THAT WAS UNTIMELY; RESPONDENT WAS EXCUSED BY LAW FROM RESPONDING.

The Tribe argued below that it was not required to respond to the Requested Documents because it was excused from doing so under codified law. (1 CT 171, 172.) CCP § 708.030(b) is clear with respect to excusing a judgment debtor's response if the judgment debtor has been examined within the preceding 120 days. The statute states that "the judgment debtor is not required to respond to any discovery so served." (CCP § 708.030(b)). The foregoing statute is clearly self-executing and excuses the judgment debtor from having to respond at all, not even to assert objections. The underlying motion (which gave rise to the order appealed from) was premised upon the First Document Request dated August 28, 2019. (1 CT 172-186.)

What Respondent omitted from his voluminous filing was the original First Document Request was actually dated August 13, 2019 ("Original First Set") (1 CT 172.) In fact, the Original First Set was not even mentioned, nor was it in the supporting declaration of Respondent's counsel. That omission showed that counsel was well aware of the untimeliness issue and that he attempted to sweep it under the rug.

Further proof that counsel is aware of the untimeliness issue is found in paragraphs 6 and 7 of the Navarro declaration, wherein he proclaims that the Amended First Set was served 124 days after the last debtor

examination, failing to mention (or even acknowledge) that the Original First Set was time-barred. (1 CT 85.)

The Original First Set was untimely. The CCP expressly limits the use of interrogatories and document requests in debtor examination proceedings. CCP §708.030(b) states that the judgment creditor may not serve inspection demands within 120 days after the judgment debtor has been examined. The judgment debtor was examined on April 26, 2019, as acknowledged in paragraph 7 of the Navarro declaration. (1 CT 85.) Thus, the Original First Set was invalid, having been served less than 120 days after April 26th.

Rather than acknowledge this, and advance the argument that somehow the Amended First Set cured the time-bar, Respondent sidestepped the issue as if the Original First Set never existed.

It is axiomatic that an amendment to a document *modifies* its predecessor; it does not terminate its existence. Where the original document is untimely, amending it cannot change that fact. To avoid the time bar, the Original First Set should have been withdrawn. By serving an amended version of the original, Plaintiff neither cured nor circumvented the time bar.

Amending the Original First Set was an attempt to modify or change its terms. "An amendment is 'any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, *which does not wholly terminate its existence*, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form,' a statute which adds to or takes away from an existing statute is considered an amendment." (*Huening v. Eu*

(1991) 231 Cal.App.3d 766, 775 [internal citations omitted; emphasis added]).

In addition to confirming that an amendment does not terminate its predecessor's existence the *Huening* panel applied a common-sense understanding of the effects of an amendment when addressing statutory construction which, as can be seen in the Court's reasoning, is broadly applicable to amendments in other judicial contexts.

The court disagreed, reading the term "amendment" in its normal sense. According to the court:

> The Random House Dictionary of the English Language (2d ed.1987) at page 66 defines amendment as '1. the act of amending or the state of being amended. 2. an alteration of or *addition* to a motion, bill, constitution, etc. 3. a change made by correction, *addition,* or deletion.' Similarly Black's Law Dictionary (5th ed.1979) at page 74 defines amendment as 'To change or modify for the better. To alter by modification, deletion, or *addition.*' Modification in turn is defined as 'A change; an alteration or amendment which introduces new elements into the details, or cancels some of them, *but leaves the general purpose and effect of the subject-matter intact.*' (Black's Law Dict., *supra,* at p. 905 [emphasis in original]; see also *Andersen v. Civil Service Com.* (1981) 122 Cal.App.3d 577, 579: "[m]odify' means 'to

> alter; to change an incidental or subordinate feature; enlarge, extend; limit, reduce.'

Id. at 776–77.

Accordingly, service of Respondent's August 28th set was not tantamount to a withdrawal of the Original First Set; it was an attempt merely to modify an already time-barred document. (1 CT 173.) Because the Tribe was not obligated to respond to the original, it was not obligated to respond to its amendment.

V. THE COURT ABUSED ITS DISCRETION BY CHANGING ITS POSITION ON A MOOT ISSUE WITHOUT NOTICE.

Ten days prior to the Tribe's opposition being due regarding the Motion to Compel the Court informed the parties:

> You've reached an impasse. *I'm not going to take any further action at this point*, because I understand what the impasse is about and I don't think that I am the appropriate court to make the determination that they need to ignore the order from the tribal court and obey the order by the state court. I've ordered, you know, the examinations, I've ordered them to answer the questions, and, you know, you've gone off and had this, you know, donnybrook, and that's where we are. *I don't believe that it's appropriate for me to do anything further than what I've done at this point.*
>
> And I'm sorry, but, you know, again, I think this was a controversy that should have been

> decided on the merits about ten or 11 years ago, and it wasn't, and it's kind of festered. And so I think until you have the federal court weigh in and indicate that, you know, this court's jurisdiction to make the orders that it made was appropriate, *we're at a stop, you know?* I'm sorry, but that's my – that's where we stand.

(7 RT 625-626; emphasis added.) The Court went even further and solicited from the Tribe's counsel a stipulation that Respondent had exhausted his State Court remedies in order to open the gateway to federal court. (7 RT 627.) Counsel acted on the Court's request and stipulated as requested. (7 RT 627.)

As such, in the Opposition to the Motion to Compel the Tribe raised the Court's acknowledgment, from just ten days prior, that the Tribe could not comply with the Respondent's discovery requests due to the Tribal Court Injunction and that the logical next step was for the Respondent to proceed to federal court. (1 CT 173-175.) There was no longer any actual controversy over whether the Tribe would or could comply because of the competing orders. (*Id*.) Relying on the Court's statements the Tribe acknowledged the Motion to Compel was moot. (*Id*.) Then on December 13, 2019, less than a month since the November 22nd hearing, the Court completely reversed its position on its continuing jurisdiction without any prior notice to the litigants, suddenly disagreeing that the controversy before its court was moot.

Doing so deprived the Tribe of fundamental fairness. Although a civil litigant is not entitled to the same robust due process requirements that apply in criminal proceedings, and is not guaranteed "any particular form or

method of procedure," the proceedings must comport with fundamental principles of fairness and decency." (*People v. Bona* (2017) 15 Cal.App.5th 511, 520.) It was fundamentally unfair to the Tribe for the Court to completely disregard its earlier rulings and pronouncements about the need to have a federal court determine its jurisdiction and that it would proceed no further on the matters before it.

CONCLUSION

The Tribe requests that the Amended Order be reversed and remanded back to the Court.

DATED: March 15, 2021

Respectfully submitted,

By /s/Keith Anderson

Keith Anderson

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

By /s/ Little Fawn Boland

Little Fawn Boland

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

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13900 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

Little Fawn Boland

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

CERTIFICATE OF SERVICE

I hereby certify that, on March 15, 2021, 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: March 15, 2021

By /s/ Little Fawn Boland

Little Fawn Boland

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