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Attorney for Defendant
Robert Findleton

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COYOTE VALLEY BAND OF POMO INDIANS, a federally recognized Indian tribe,

PLAINTIFF,

v.

ROBERT FINDLETON, doing business as Terre Construction and On-Site Equipment; ANN C. MOORMAN, Judge of the Superior Court of Mendocino County, California, in her official capacity; SAVINGS BANK OF MENDOCINO COUNTY, a California corporation; JOHN AND JANE DOES 1-10; ABC CORPORATIONS 1-10; and XYZ LLCs 1-10,

DEFENDANTS.

CASE NO. 4:22-cv-00607-JST

REPLY IN SUPPORT OF ROBERT FINDLETON'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(1) and (6)

Date: December 22, 2022
Time: 2:00 p.m.
Judge: Hon. Jon S. Tigar
Location: Oakland, Zoom videoconference

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INTRODUCTION

The fundamental defect identified by this Court in its August 12, 2022 order granting defendants' motions to dismiss is that the relief requested, determining that the state court lacks jurisdiction and the enforcement of contrary tribal court orders, is directly barred by the *Rooker-Feldman* doctrine. This court has no subject matter jurisdiction to sit in review of state court judgments and findings that the state court has jurisdiction and exercised that jurisdiction in finding the tribe waived tribal immunity by express consent and by its actions.

The Tribe fails to overcome the *Krempel* line of cases which do not require exhaustion of tribal court remedies where no operational tribal court existed at the time of the petition. The state trial and appellate courts have held that *Krempel* applies. That finding is law of the case, *Rooker-Feldman* bars review in this district court of the application of *Krempel* and exhaustion of tribal court remedies.

Findleton filed a claim, as disclosed in his June 13, 2022 Petition for Appointment of Neutral Arbitrator in the state court action. (See Request for Judicial Notice ("RFJN"), accompanying this Reply, Petition for Appointment attached as Exhibit A ("Exh.")). On July 29, 2011 Findleton timely filed a formal tribal administrative claim. (See July 29, 2011 Notice of Claims for Money and/or Damages, attached as Exh. 6 to Exh. A to RFJN). The tribe's attorney at the time, Lester J. Marston stated:

> . . . Mr. Findleton's Notice of Claim is deemed sufficient for presentation to the Tribal Counsel.

Exh. 6 to Exh. A to RFJN at 2.

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The Tribe's SAC fails to overcome the absolute bar of the *Rooker-Feldman*[1] doctrine, this court cannot sit in review of state court rulings on voluntary and express consent to waive tribal immunity as to disputes over the construction contract, that the Tribe had agreed to arbitration of those construction disputes and that *Krempel* applies relieving Findleton of any further burden of submitting to tribal court jurisdiction and the enforcement of tribal court orders where such tribal court was not operational at the time Findleton filed his petition in state court to compel mediation and arbitration under the contract.

ARGUMENT

1. The Application of the *Rooker-Feldman* Doctrine Deprives This Court of Jurisdiction.

As the court found in granting the motions to dismiss the First Amended Complaint ("FAC") what the Tribe seeks is to reverse state court findings, rulings and judgments that the Tribe waived sovereign immunity, that the Tribe agreed to arbitration of disputes and that *Krempel v. The Praire Island Indian* Community, 125 F.3d 621 (8th Cir. 1997) ("*Krempel*") applies and exhaustion of tribal court remedies is not required where there was no operational tribal court at the time of the petition to compel arbitration.

The *Rooker-Feldman* doctrine bars district court subject matter jurisdiction where, as here, the plaintiff seeks to overturn prior state proceedings where it was the loser. By contrast, the exceptions raised by plaintiff apply where the relief sought is against the opposing party and thus there is no bar because the district court is not requested to sit in review of prior state court proceedings and undo and reverse those prior state court adjudications. The Tribe seeks

[1] *Rooker v Fidelity Trust*, 263 U.S. 413 (1923); *D.C. Court of Appeals v Feldman*, 460 U.S. 462 (1983).

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to undo the state court's findings on waiver of sovereign immunity, consent to arbitration and application of *Krempel*.

The tribe argues that an exception to *Rooker-Feldman* lies where "a federal plaintiff . . . [complains] of a legal injury caused by an adverse party." Tribe's Opposition ("Oppo.") at 10:8-9 *citing Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003). *Noel* is inapplicable where the wrong that the Tribe seeks this United States District Court to remedy is a series of rulings by the Mendocino County Superior Court and the First District Court of Appeal. That is precisely the type of remedy barred by *Rooker-Feldman.*

Noel involved a horse trade gone bad. A horse named Red Hot Prospect was purchased by Sandra Hall for $750 and Eric Noel agreed to train Red as a show jumper and pay expenses. Apparently, Ms. Hall provided initial seed capital and Noel provided sweat equity, imagining a sale price of $30,000 to $50,000.

Red became collateral for a series of obligations between Ms. Hall and Noel, including sale of Hall's mobile home to Noel to be paid out of sales proceeds from the sale of Red. Noel taped phone calls from Hall without her consent, Hall absconded with Red, and the Halls busted up the mobile home, disconnecting the power and shutting off the water. Red was eventually sold at auction with Hall's husband Brian making the winning bid of $710.

A plethora of lawsuits followed: four litigated in Washington State courts: two small claims actions filed regarding the mobile home, one in state court for the investment in Red and one for violation of privacy and wiretapping laws in state court. Then a federal case was filed in the United States District Court for the District of Oregon.

The state suit in Skamania County involved the investment Hall and Noel had in Red. Noel sought an accounting and dissolution of partnership. The court found a valid partnership

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agreement which Noel violated by taping Ms. Hall's telephone conversations. The Skamania court dismissed the wire tape claims based on a pending Clark County suit. Thus, the breach of fiduciary duty claims based on the wiretapping was not decided by the Skamania court. See *Noel*, *supra*, 341 F.3d at 1153.

Ms. Hall filed suit in Clark County regarding the wiretapping and privacy claims. The Clark County court found that Noel violated Ms. Hall's privacy rights and awarded damage and attorney fees. *Noel, supra*, 341 F.3d at 1153. In the midst of this flurry of state proceedings, Noel filed in the United States District Court for the District of Oregon seeking damages from the Halls for violation of the federal and state wiretapping laws, damage to the mobile home and other claims. *Noel, supra*, 341 F.3d at 1153.

Rooker prevents a federal plaintiff from seeking federal district court review of prior state court proceedings where the injury claimed of is the adverse state ruling. *Noel* carves a narrow recognized exception to *Rooker-Feldman*, where the wrong sought to be rectified was done by the adverse party, not the state court. The *Noel* court's reasoning is illustrative here as the court distinguishes between prior state court judgments which are barred by *Rooker-Feldman* and claims of damage against the adverse party, which are not.

The *Noel* court stated the exception as follows:

> On the other hand, where the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, *Rooker-Feldman* does not bar jurisdiction.

Noel, supra, 341 F.3d at 1163

This exception was applied as follows:

> The pending suit in Skamania County Superior Court therefore does

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> not prevent Noel from pursuing his fiduciary duty claim simultaneously in his federal court suit, and we reverse the district court's dismissal of that claim.

Noel, supra, 341 F.3d at 1165.

In *Noel* there had been no state court finding, ruling or judgment on the breach of fiduciary duty claims Noel made against Ms. Hall with respect to their partnership agreement regarding Red. Thus, there was still a live controversy on that issue, and *Rooker-Feldman* did not apply, there was no prior state court decision being disputed in the federal court, rather the wrong was by the adverse party. In stark contrast, here the Tribe complains of state court findings regarding waiver of tribal immunity, consent to arbitrate and applicability of *Krempel.*

More applicable to the current matter is *GASH Associates v. Village of Rosemont*, 995 F.2d 726 (7th Cir. 1993). The *GASH* court stated the application of the *Rooker-Feldman* doctrine as follows:

> The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.

GASH, supra, 995 F.2d at 728.

The injuries that the Tribe complains of are not injuries caused by Findleton, rather, the Tribe, situated as a serial sore loser, complains of the treatment it got in state court. As the *GASH* court stated, this re-litigation of prior adverse state rulings is barred by *Rooker-Feldman.*

The *GASH* court held as follows:

> To put this differently, the injury of which GASH complains was caused *by* the judgment, just as in *Rooker, Feldman,* and *Ritter* [*Ritter v. Ross*, 992 F.2d 750 (7th Cir. 1993)]. GASH did not

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> suffer an injury out of court and then fail to get relief from state court; its injury came from the judgment confirming the sale, rather than requiring the Village to condemn the building independently of the foreclosure, as GASH had demanded.

GASH, supra, 995 F.2d at 729 (emphasis in original).

The Tribe's SAC requests this court to give effect to tribal court orders overturning state court rulings, findings and judgments. The Tribe's SAC seeks to have this district court divest the state court of jurisdiction after more than a decade of litigation in state court. A clearer application of the jurisdictional bar of *Rooker-Feldman* could not be found.

With respect to the Tribe's citation of *Gonzales v. Parks*, 830 F.2d 1033, 1036 (9th Cir. 1987), the issue was exclusive federal jurisdiction over bankruptcy proceedings which divest the state courts of concurrent jurisdiction, as held in *In re Gruntz*, 202 F.3d 1074, 1077 (9th Cir. 1999). As the appellate court in *Findleton III* found, the trial court in 2017 granted Findleton's motion to compel mediation and arbitration and had jurisdiction to do so because the tribe waived its sovereign immunity and consented to state court jurisdiction. *Findleton III*, 69 Cal.App.5th 736, 747 (2021).

In addition, *Findleton III*, quoting the trial court's December 2018 Order granting sanctions, stated:

> Though at each stage the Tribe has argued that the trial court lacks jurisdiction to take any action in this dispute, as the recent appellate opinion points out, in *Findleton I*[,] 'we necessarily decided that the tribe has waived its sovereign immunity and therefore conferred jurisdiction on the superior court . . . not to resolve the underlying dispute but to enforce the arbitration clauses in the agreements.'

Findleton III, supra, 69 Cal.App.5th at 749.

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State court jurisdiction is law of the case. The Tribe's arguments to defeat the law of the case by seeking essentially another round of appellate review in federal court is barred by *Rooker-Feldman*. Because the state courts have ruled that the tribe consented to waiver of tribal immunity and "therefore conferred jurisdiction on the superior court", the tribe's citation to *Lawrence II* (*Ute Indian Tribe of the Uintah & Ouray Reservation*, 22 F.4th 892 (10th Cir. 2022), *cert. denied sub nom Becker v. Ute Indian Tribe et al.*, 21-1340, 2022 WL 4+657178 (U.S. Oct. 3, 2022) is inapposite. In *Lawrence II*, the court found a lack of consent. By contrast, as shown in *Findleton III*, the state court has found the tribe consented to state court jurisdiction.

California state courts are not reliant on the United States Congress for conferral of jurisdiction. Rather, the California Constitution confers such jurisdiction in Article VI. The dispute presented by Findleton to the superior court was a contract dispute where the tribe waived immunity and consented to state court jurisdiction and for the last ten years has actively participated in that state litigation. What Congress has not gifted the Tribe is a get out of court free card when it loses in state court. That is what the *Rooker-Feldman* doctrine is all about.

The Tribe's citation of *In re Pavelich*, 229 B.R. 777 (9th Cir. B.A.P. 1999) is inapplicable as to an exception to the application of *Rooker-Feldman*, because, as in *Gruntz* and *Gonzales*, federal courts have exclusive jurisdiction of bankruptcy proceedings. The Tribe's reliance on *Merrell v United States*, 140 F.2d 602 (10th Cir. 1944) is inapposite because the state probate court was there held to have exclusive jurisdiction not subject to federal collateral attack. Findleton accepts this holding, the state court proceedings are exclusive, not subject here to federal collateral attack.

The subject matter jurisdiction of the state court has been ruled upon and is law of the case. The waiver of tribal immunity has been ruled on and is law of the case. Such decisions of

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the state court cannot be attacked, in effect on appeal, in the federal district court. *Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc.*, 387 F.Supp.2d 671, 674-675 (W.D.La. 2005)(*Jena*).

In *Lawrence II* a non-Indian sued the Tribe in state court for breach of contract to pay percentage of mining revenue. Subsequently, the Tribe filed suit in federal district court to challenge state court subject matter jurisdiction. The Court found the Tribe did not consent to state court jurisdiction. By contrast, here, on appeal of an order quashing service of petition to compel mediation, the appellate court held there was an express consensual waiver of tribal immunity by the acts of the tribe in agreeing to the Third Amendment Agreement and by Resolution CV-08-20-08-03. *Findleton I*, 1 Cal.App.5th 1194, 1216 (2016) ("These acts effected an express waiver of the Tribe's sovereign immunity that was clear and unequivocal . . ."); *Findleton II,* 27 Cal.App.5th 565, 572-573 (2018) ("By adopting the Tribal Resolution and thereby consenting to judicial enforcement of the right to arbitrate in any court having jurisdiction, the Tribe waived its sovereign immunity as to attorney fees incurred in enforcing that right and conferred on the state court jurisdiction to award such fees"); *Findleton III, supra,* 69 Cal.App.5th at 757 ("Application of the disentitlement doctrine here is amply justified. The Tribe has willfully refused to comply with the trial court's order compelling mediation and arbitration for four years.")

As found by the state trial court and by the court of appeal, the tribe waived sovereign immunity, and thereby vested the state court with jurisdiction. The tribe has participated in the state court proceedings for ten years. Things didn't go their way, now they want a start over in federal court. *Rooker-Feldman* bars that mulligan.

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2. *Krempel* Is Dispositive of the Tribal Court Exhaustion Issue

Rather than address the law of the case that *Krempel* applies and exhaustion of tribal remedies was not required of Findleton, the Tribe seems to concede that no tribal court was available but that somehow the mere existence of 'tribal remedies' prevents *Krempel* from applying. Oppo. at 6:2-7:7. Even assuming that tribal laws were in effect in 2012 when Findleton filed his petition to compel mediation and arbitration, there was no operational tribal court, thus, as the state courts have found, *Krempel* applies to relieve Findleton of exhaustion of non-existent tribal court remedies.

The Tribe's law was in a constant state of flux, in 2007 the Tribe repealed all of their ordinances except for handful of ordinances. See Exh. B to RFJN, August 14, 2007 Repeal of Certain Tribal Laws. In addition, as found by both the state trial court and confirmed by the appellate court, there was no tribal court in existence or operational in 2012 when Findleton filed his petition to compel arbitration. *Findleton II*, *supra,* 27 Cal.App.5th at 574 ("Here, there is no evidence before the trial court that there was a tribal court in existence in 2012 when Findleton first filed his petition to compel arbitration in superior court.")

Defendant's reliance on the Ninth Circuit's decision in *Knighton* in this context is misplaced. Oppo. at 8:26-9:10:2; *Knighton v. Cedarville Rancheria of Northern Paiute Indians,* 922 F.3d 892 (9th Cir. 2019). *Knighton* is easily distinguished and inapposite as relied on by the Tribe. *Knighton* did not involve an attempt, as has occurred here, by a tribal court to divest the jurisdiction of a state court after years of state court litigation. *Knighton, supra*, 922 F.3d at 898.

Rather, in *Knighton*, the plaintiff Tribe first filed a tort suit against defendant Knighton, a non-Indian and former tribal employee, in tribal court, which rightfully had primary jurisdiction.

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Knighton, supra, 922 F.3d at 898. Defendant Knighton then challenged the tribal court's subject matter jurisdiction in federal court, which held the tribal court had jurisdiction.

In *Knighton*, there was no issue of competing jurisdiction between a state and tribal court, nor any waiver of tribal sovereign immunity, nor years of state court litigation prior to the creation of the tribal court. Further, unlike the present case, the applicable tribal rules of the tribal Personnel Manual were in existence and known to the non-Indian litigant during the term of the relevant contract. *Knighton, supra,* 922 F.3d at 902.

In the present case, the record is clear that there was no applicable tribal law in existence when the contract was formed. *Findleton* I, 1 Cal.App.5th 1194 at 1199, fn. 3, 1207, fn. 8 (noting that there were no "tribal codes or laws in effect at the time" so at Findleton's "request it was clarified . . . that if no tribal law covered an issue it would be governed by federal law."). Indeed, *Knighton* held that "the Personnel Manual regulated the conduct . . . that forms the basis of the Tribe's claims against Knighton and conferred jurisdiction over her conduct as Tribal Administrator on the Community Council." *Knighton, supra,* 922 F.3d at 906.

Thus, if *Knighton* is relevant to this case at all, it is to suggest that the uncontested absence of any tribal law applicable to Plaintiff Findleton when the relevant contracts were initially formed effectively divested the Defendant Tribe of any jurisdiction whatsoever over his conduct. *Knighton* does not suggest that the subject matter jurisdiction of the state court should be in any way divested or diminished by this court given the Tribe's express waiver of sovereign immunity and the post hoc creation of Tribes's tribal court after approximately five years of litigation in the state forum. *Findleton* I, supra, 1 Cal.App.5th at p. 1217 [express waiver]; *Findleton* II, 69 Cal.App.5th 736, at 9, 11-13 [following *Krempel*].

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3. The Tribe Lacks Candor, Consistency and Compunction In Arguing That Findleton Failed to Timely File a Claim.

The Tribe, in blatant disregard of their Rule 11 duty of candor to the Court, argues that Findleton failed to comply with the Tribal Claims Ordinance. (Oppo. at 8:11-14); FRCP Rule 11(b). Attached to the accompanying Request for Judicial Notice at Exhibit A is Findleton's June 13, 2022 Notice of Petition and Petition for Appointment of Neutral Arbitrator. RFJN, Exh. A. Attached to that Notice, as an exhibit, is the Declaration of Mr. Findleton, authenticating his July 29, 2011 Notice of Claim. (July 29, 2011 Notice of Claim, attached as Exhibit 6 to Declaration of Robert Findleton, attached to Petition for Appointment of Neutral Arbitrator, Exh. A to RFJN).

Mr. Findleton's July 29, 2011 Notice of Claim expressly references Tribal Code 1.10 and makes a claim "upon the Coyote Valley Band of Pomo Indians." If there were any doubt that this claim was in compliance, that doubt evaporates with the August 10, 2011 letter of the Tribe's then attorney, Lester J. Marston, to Findleton's then attorney Lawrence R. Watson. The Tribe's attorney, Marston, stated:

> The Notice of Claim for Money And/Or Damages ("Notice of Claim") submitted and signed by Mr. Findleton as claimant includes the information described in section 1.10.30, is signed by the claimant, and thus is complete as to the requirements of the Claims Ordinance.

August 10, 2011 letter from Lester J. Marston, attached as Exh. 7 to June 13, 2022 Petition for Appointment, attached as Exh. A to RFJN, simultaneously filed with this Reply.

Counsel, no matter how zealous, have an obligation to provide full and complete facts to the Court on points of contention, including adverse facts. Clearly the Tribe was aware of Mr. Marston's letter, which is dispositive of the issue of proper pre-petition notice of claim. There is no merit to the Tribe's argument that Findleton did not make a proper claim under the Tribe's Claim Ordinance.

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CONCLUSION

The Tribe has failed to address the grounds identified by this Court in granting the motions to dismiss their FAC, *Rooker-Feldman* deprives this Court of subject matter jurisdiction to sit in review of state court proceedings that have reached findings, rulings and judgments. The state courts have already held, and it is law of the case, that *Krempel* applies, relieving Findleton of any requirement to file in a tribal court that did not exist. Finally, Findleton clearly made a pre-petition claim under the Tribal Ordinance, as Mr. Marston admitted.

This Court should grant the pending motions to dismiss with prejudice, as the Tribe identifies no new facts, nor are there any, allowing them to amend around *Rooker-Feldman* and *Krempel*.

Date: October 13, 2022

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