NO. 24-3754

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES, et al.,

Appellants,

v.

THE ROMAN CATHOLIC BISHOP OF SAN DIEGO, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
DISTRICT COURT CASE NO. 3:23-CV-00908-AGS-JLB

APPELLEE CONDON-JOHNSON & ASSOCIATES, INC'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 (a), Defendant-Appellee Condon-Johnson & Associates, Inc. (Condon-Johnson) is a privately-owned corporation with no parent corporation and there is no publicly-held company that owns 10% or more of the stock of Condon-Johnson.

DATED: November 6, 2024

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall
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INTRODUCTION

Appellants-Plaintiffs[1] and their counsel Patrick Webb have engaged in 20-plus failed lawsuits with various shifting and meritless theories against the Jamul Indian Village of California (Tribe or Village) and anyone who is involved in the Tribe's projects over the past few decades. The feud stems from the early 1990s when new leadership of the Tribe chose to build and operate a casino on tribal land. Plaintiffs opposed the plan, lost, and have relentlessly sought to interfere with the development of the Tribe's property and projects before tribal tribunals, administrative boards, and multiple courts, all without success.

This case against the Tribe's subcontractor Defendant-Appellee Condon-Johnson & Associates, Inc. ("Condon-Johnson") and Defendant-Appellee Roman Catholic Bishop of San Diego ("Diocese"; collectively, "Defendants"),[2] represents the latest in Plaintiffs' crusade against the Tribe and effort to upset the ownership and use of the

[1] Plaintiffs are Walter Rosales, Estate of Karen Toggery, Estate of Louis Ayhule Gomez, Estate of Helen Cuerro, Estate of Walter Rosales' Unnamed Brother, Estate of Dean Rosales, Estate of Marie Toggery, Estate of Matthew Toggery, April Louise Palmer, Elisa Welmas, and Marcia Spurgeon. [6-ER-1171.]

[2] This appeal is stayed as to the Diocese. [9th Cir. Dkt. 14.]

Tribe's land. Specifically, Plaintiffs seek to set aside a 2017 grant deed of a cemetery plot from the Diocese to the Tribe, arguing that it was fraudulently conveyed. Plaintiffs also seek to enjoin development of the Tribe's hotel on the Tribe's casino property.

As should have come as no surprise to Plaintiffs and their counsel given multiple other warnings received from various tribunals, including this Court, dismissal of Plaintiffs' lawsuit was required under Federal Rules of Civil Procedure ("Rules") 19 and 12(b)(7) because the Tribe is a required and indispensable party that cannot be joined to this lawsuit due to its sovereign immunity. The Tribe has an interest in defending the legality of the land transfer, not having the transaction declared void, and defending Plaintiffs' efforts to interfere with the Tribe's use and ownership of its property.

Unable to counter the controlling authority and the explicit allegations in Plaintiffs' operative complaint establishing that the Tribe's interests will be impaired if Plaintiffs' requested relief is granted, Plaintiffs' arguments on appeal shift course from those made during the pre-judgment proceedings in the district court and instead focus on untimely and meritless arguments raised in Plaintiffs' motion for reconsideration of the judgment. For example, despite having

previously conceded that the district court had jurisdiction, Plaintiffs now argue the district court lacked original jurisdiction and therefore remand was mandatory. However, the district court recognized this argument was not previously raised and was based on a "re-imagined" "atextual" reading of Plaintiffs' complaint. Plaintiffs also now focus on allegations in their untimely second amended complaint and "expert" declarations, which were improperly attached to a declaration in support of a reply brief filed in connection with Plaintiffs' post-judgment motion for reconsideration. [6-ER1391, 1399.]

Plaintiffs' opening brief does not challenge the district court's order denying reconsideration or the district court's findings that the second amended complaint and expert declarations submitted by Plaintiffs were untimely. Plaintiffs have therefore forfeited challenge of those rulings. And, even if considered on the merits, Plaintiffs' have failed to establish clear error.

Plaintiffs' challenge of the district court's award of sanctions against Plaintiffs and their counsel, Patrick Webb, equally lacks merit. Procedurally, non-parties Patrick Webb and Webb & Carey APC, failed to appeal and non-party Webb & Carey APC, has not joined in the Appellants' Opening Brief. Substantively, the district court's order

finding this case to be frivolous and filed in bad faith was well-supported. As noted by the district court, instead of withdrawing their frivolous pleading during Rule 11's safe harbor provision, Plaintiffs and their counsel "doubled down on their frivolous filing." [7-ER-1399.] Plaintiffs' after-the-fact justifications and attempts to re-write their complaint in the context of a post-judgment reconsideration motion were properly rejected.

In addressing the myriad of lawsuits pursued by the Plaintiffs against the Tribe, this Court stated in *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 989 (9th Cir. 2020) that it hoped its opinion "will finally put an end to these claims." The district court, here, held similar hopes: "Perhaps this case will differ from the dozens preceding it, with plaintiffs finally laying down arms and accepting their losses." [1-ER-15.] As evidenced by this appeal, Plaintiffs refuse to be dissuaded and ignore what they have been told by multiple courts: the Tribe is an indispensable party to litigation involving the ownership and control of its property and construction thereon.

Plaintiffs' complaint against Condon-Johnson was frivolous and sanctions were warranted. The judgment and amended judgment of the district court should be affirmed.

STATEMENT OF JURISDICTION

Federal Subject Matter Jurisdiction

Condon-Johnson invoked the district court's jurisdiction under the federal removal statute, 28 U.S.C. § 1441(a), because Plaintiffs' complaint raised claims under both federal law and state law. [6-ER-1171-1211.] The district court was permitted to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1441(c).

The district court also had jurisdiction because Plaintiffs sought declaratory relief and an order imposing an injunction on the Tribe's federal trust lands in addition to remedies sought related to the Tribe's property. 28 U.S.C. § 2202. [6-ER-1210-1211; *see also* 6-ER-1146-1161, ¶¶19, 40, 65.] Plaintiffs' requested relief, specifically the request to enjoin activity on Indian lands, involves the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). IGRA completely preempts state laws regarding gaming on Indian lands. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433–35 (9th Cir. 1994). Condon-Johnson's construction of a casino hotel is governed by the Tribal-State Compact between California and the Jamul Indian Village

(IGRA Compact)[3] because the hotel is being constructed on federal trust lands and is defined as part of the Gaming Facility under the IGRA Compact. IGRA Compact § 2.12 (defining Gaming Facility as including "all rooms, buildings, and areas, including hotels, parking lots, and walkways, a principal purpose of which is to serve the activities of the Gaming Operation and Facility").[4]

Scope of Appeal

The district court entered judgment on February 29, 2024. [3-ER-421.] On March 27, 2024, Plaintiffs and only non-party Patrick Webb filed a "Motion to Alter, Amend, or Revise the Judgment (Rules 54, 59) or in the Alternative, Motion for Relief from Judgment (Rule 60)" (motion for reconsideration). [3-ER-363.]

On May 31, 2024, the district court denied the motion and the clerk was directed to enter an amended judgment. [1-ER-3.] On June 13, 2024, Plaintiffs filed their notice of appeal from the judgment.

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[3] *Available at* https://www.bia.gov/sites/default/files/dup/assets/asia/oig/pdf/508_compliant_2016.12.05_jamul_indian_village_tribal_state_gaming_compact_0.pdf (Aug. 8, 2016).

[4] *See* Tribal-State Compact Between the State of California and the Jamul Indian Village of California (2016): https://www.ca.gov/archive/gov39/wp-content/uploads/2017/09/Final_Jamul_Indian_Village_Compact_8.8.16.pdf (the "Compact").

[2-ER-30.] On August 1, 2024, the district court filed its amended judgment. [1-ER-2.] Neither the Plaintiffs nor the non-parties have filed a notice of appeal from the amended judgment. [6-ER-1350.]

This Court has jurisdiction over Plaintiffs' challenges to the judgment pursuant to 28 U.S.C. § 1291. However, the notice of appeal filed by Plaintiffs does not include non-parties Patrick Webb, Webb & Carey APC, or the Law Offices of Patrick D. Webb as parties to the appeal. [2-ER-30-31.] Wingert Grebing, counsel for non-parties Webb & Carey APC and Patrick Webb, did not sign the notice. [*Id*.] And, while non-parties "Patrick D. Webb and Law Offices of Patrick D. Webb"[5] are identified on the cover of the opening brief as being represented by "Patrick D. Webb of the Law Offices of Patrick D. Webb," non-party Webb & Carey APC has not only failed to join in the notice of appeal, it has not joined in Appellants' Opening Brief or been included as an identified entity in the corporate disclosure statement. Thus, this Court lacks jurisdiction to consider the non-parties' appeal.

[5] Once sanctions were awarded, the "Law Offices of Patrick D. Webb" purported to represent Plaintiffs in seeking reconsideration of the judgment; however, no formal substitution of counsel was filed. [*See, e.g*. 3-ER-363.]

STATEMENT OF THE ISSUES

(1) Whether non-parties have waived their challenge on appeal by failing to timely file a notice of appeal and/or failing to join in the filing of Plaintiffs' opening brief.

(2) Whether challenges based on new issues raised in Plaintiffs' motion for reconsideration have been waived.

(3) Whether the district court erred in denying Plaintiffs' motion to remand.

(4) Whether the district court abused its discretion in dismissing this action under Rules 12(b)(7) and 19 because the Tribe is a required and indispensable party that cannot be joined due to its sovereign immunity.

(5) Whether the district court abused its discretion in awarding sanctions in favor of Condon-Johnson pursuant to Rule 11, 28 U.S.C. § 1927, and the Court's inherent authority.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Tribe and Its Reservation

There is no dispute that the Tribe is a federally recognized Indian tribe entitled to sovereign immunity. *See Jamul Action Comm. v.*

Simermeyer, 974 F.3d 984, 989 (2020) ("Jamul Indian Village is a federally recognized Indian tribe with the same privileges and immunities, including tribal sovereign immunity, that other federally recognized Indian tribes possess.").

In 1912, the Diocese was "deeded a small parcel in Rancho Jamul, San Diego County, California, . . .for use as an Indian cemetery." *Id.*. "No more than a portion of the land has ever been used as a burial ground." *Id*. "On the remainder of the parcel," "several families of Kumeyaay Indians have made their home for generations." *Id*. In 1982, the Diocese gave the families "the greater part" of the original grant in two parcels that did not include the cemetery. *Id.* Eventually, the Bureau of Indian Affairs "recognized" those families as a tribe—the "Jamul Indian Village"—and the "United States took" those two parcels "into trust" for them. *Id*.; 25 U.S.C. § 2703(4).

In 2017, the Diocese formally deeded the last parcel, officially designated as assessor's parcel number "597-080-06," to the Tribe, which houses a cemetery, a church, and a parking lot ("the disputed parcel"). [1-ER-5; 4-ER-680 (grant deed); 4-ER-706 (Figures 1-3 and 2-1 depicting the disputed parcel as including cemetery, church, and church parking lot), 3-30 ("Church property" includes "a cemetery and

small church").] Thus, the Tribe is the record title owner of the disputed parcel.

The Tribe's reservation, which consists of six acres of land in Jamul, California, is held in trust by the United States on behalf of the Tribe and constitutes "Indian lands" as defined by IGRA. *Jamul Action Comm.*, 974 F.3d at 989 ("The Diocese and a local family transferred about six acres to the United States, including the greater part of the Indian cemetery and an adjoining parcel of private land, which the government accepted into trust for the benefit of the Jamul Indians."); 25 U.S.C. 2703(4).

B. The Tribe's Casino Hotel Project and Condon-Johnson

The trust parcels are where the Tribe decided to "build and operate a casino" and hotel. *Jamul Action Comm.*, 974 F.3d at 990 (recognizing "construction and operation of a casino" occurred on the Tribe's "federal trust land"). [See 4-ER-685 (Tribe is "lead agency"), 4-ER-706 (Figure 2-1 depicting casino hotel on "Jamul Indian Village Reservation" along with existing Jamul casino); 4-ER-676, ¶6.][6]

[6] *Draft Tribal Environmental Impact Report Jamul Casino Hotel and Event Center Project* (Sept. 2022), *available at*

C.W. Driver, LLC contracted with the Jamul Indian Village Development Corporation dba Jamul Casino, a governmental instrumentality of the Tribe, to perform general contractor services for the casino hotel project. [4-ER-673, ¶6.] Condon-Johnson performs subcontractor services for the construction of the project pursuant to the work order issued by C.W. Driver, LLC to Condon-Johnson on December 19, 2022. [*Id*.]

C. Prior Litigation

For three decades, Plaintiffs have engaged in legal disputes with the Tribe and those doing business with the Tribe. *See Rosales v. United States*, 89 Fed. Cl. 565, 571 (2009) (citing fourteen prior legal actions by Plaintiffs). The disputes stem from a leadership election in the 1990s in which Plaintiffs lost. *Jamul Action Comm.*, 974 F.3d at 989. Thereafter, new leadership of the Tribe sought to "build and operate a casino" and hotel on the Tribe's land. *Id.* at 990. Plaintiffs opposed, and in the years thereafter, proceeded to bring over 20 legal actions before "tribal tribunals, administrative boards, and federal courts in the courts of California and the District of Columbia, all without success." *Id.*

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https://ceqanet.opr.ca.gov/2022050410/2/Attachment/7lo1GG (TEIR). [4-ER-684-832.]

Plaintiffs' claims over the last three decades have involved shifting legal theories, yet all are targeted at undermining the Tribe's ability to govern itself and control its lands. *See Rosales v. State Dep't of Transp.*, D066585, 2016 WL 124648 (Cal. Ct. App. Jan. 12, 2016) ("appellants have been in a decades-long dispute with members of the [Tribe] for control and management of the Tribe and its land."), *review denied* (Apr. 20, 2016).

The following is a summary of Plaintiffs' recent cases involving allegations of human remains desecration related to the construction of Jamul casino.

- *Rosales, et al. v. U.S. Dep't of Interior, et al.*, No. 2:20-cv-00521-KJM-KJN (E.D. Cal. June 7, 2020) (sanctioning Plaintiffs represented by Webb by dismissing second amended complaint with prejudice for failing to comply with Rule 8, noting "[t]his action is one of many others like it, all unsuccessful and all based on similar claims about the construction of a casino on land owned by the Jamul Indian Village . . . . In each of these disputes, the plaintiffs have alleged their families' remains were wrongly disinterred")), *aff'd* No. 22-16196 (9th Cir. Aug. 28, 2023) (mem.).

- *Rosales, et al. v. Dutschke, et al.*, 279 F.Supp.3d 1084, 1088, 1093 (E.D. 2017) (Plaintiffs represented by Webb sued federal government, County of San Diego, and private parties, including C.W. Driver, for claims of human remains desecration due to the Jamul casino construction on the same reservation where the casino hotel is being constructed; court dismissed due to failure and inability to join Tribe due to sovereign immunity), *aff'd* 787 F. App'x 406 (9th Cir. 2019) (mem.);

- *Rosales, et al. v. State Dep't of Transp.*, D066585, 2016 WL 124647, at *1 (Cal. Ct. App. Jan. 12, 2016), *review denied* (Apr. 20, 2016) (Plaintiffs represented by Webb sued state agency asserting mistreatment of human remains and funerary objects; court affirmed dismissal "on the ground that the Tribe is an indispensable party that may not be named because it is entitled to sovereign immunity," noting Plaintiffs "have been in a decades-long dispute with members of the [Tribe] for control and management of the Tribe and its land" "involve[ing] seemingly endless litigation, with commensurate negative results for" Plaintiffs).

- *Rosales, et al. v. United States*, 89 Fed. Cl. 565, 571–75, 584, 588 (2009) (Plaintiffs represented by Webb claimed human remains desecration on land owned by the Tribe regarding the Jamul casino construction occurring on the same reservation where the casino hotel is being constructed; court dismissed for failure and inability to join Tribe due to sovereign immunity).

- *Rosales, et al. v. United States, et al.*, No. 07cv0624, 2007 WL 4233060, at *1, *2, *6 (S.D. Cal. Nov. 28, 2007) (Plaintiffs represented by Webb sued federal government, agencies, committees and officials for alleged desecration of human remains at the disputed parcel due to the Jamul casino construction on the same reservation where the casino hotel is being constructed stating "Plaintiffs request the Court stop construction activities on three pieces of land known as Parcels 04, 05, and 06"; dismissing for, *inter alia*, inability to join Tribe due to sovereign immunity), *dismissed for failure to prosecute*, No. 08-55207 (9th Cir. Aug. 12, 2008).

- *Rosales, et al. v. United States, et al.*, 73 F. App'x, 913, 914 (9th Cir. 2003) (mem.) (finding Tribe was necessary and

indispensable under Rule 19 because Tribe "claimed jurisdiction over the parcel of land at issue" and United States could not adequately represent interests of Tribe; affirming dismissal), *cert. denied* 541 U.S. 936 (2004).

This lawsuit is yet another iteration of the same story: Plaintiffs and their attorney Webb abuse the judicial process to directly and indirectly control the Tribe's activities and harass the Tribe and others who do business with the Tribe.

II. PROCEDURAL BACKGROUND

A. The Original Complaint, Removal, and Voluntary Dismissal

On April 5, 2023, Plaintiffs filed a complaint in San Diego County Superior Court, Case No. 37-2023-00014849 ("original complaint"). [1-SER-256.][7] The original complaint alleged that Defendants negligently and wrongfully desecrated Plaintiffs families' remains and funerary objects in violation of federal law, wrongfully converted Plaintiffs' property, and that the Diocese breached a fiduciary duty and common law trust duty to Plaintiffs for management

[7] Plaintiffs have not included the original complaint in their excerpts of record despite its relevance to this appeal. [1-ER-6 (district court order referencing original complaint); *see* 2-SER-472-492.]

of their families' human remains and funerary objects. [1-SER-256-279.]

Plaintiffs expressly asserted a right to relief under the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.*, the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa *et seq.*, and the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 *et seq.* [1-SER-259, 261-262, 265, 267-268, 273, 275-279; 1-ER-6 ("Plaintiffs' initial state-court complaint explicitly relied on many federal statutes for their claims.").] Plaintiffs also sought to enjoin Condon-Johnson from constructing the casino hotel project, which is governed by the IGRA Compact, on behalf of the Tribe. [1-SER-274-279; 4-ER-704, 1.1.] And Plaintiffs sought to have the disputed parcel currently owned by the Tribe judicially returned to the Diocese through an action to void the 2017 transfer. [*Id.*]

Plaintiffs deliberately did not name the Tribe in their suit as they are obviously aware Ninth Circuit case law prohibits their claims against the Tribe due to sovereign immunity. *See, e.g.*, *Jamul Action Comm.*, 974 F.3d at 955; *see also Rosales v. Dutschke*, 787 F. App'x 406, 407 (9th Cir. 2019) (mem.).

On May 8, 2023, shortly after being served with Plaintiffs' original complaint, Condon-Johnson timely removed the case to the district court. [1-SER-280, 288; 1-ER-6.]

B. The Operative Complaint, Removal, and Ineffectual First Amended Complaint

Two days after Condon-Johnson filed the notice of removal, Plaintiffs electronically filed a second complaint in San Diego County Superior Court, Case No. 37-2023-00020640 ("operative complaint") while the original federal action was pending. [1-SER-254, ¶¶9-13; 2-SER-472.] The operative complaint is nearly identical to the original complaint except Plaintiffs merely deleted references to federal law. [6-ER-1171-1190 (redline).]

A few hours after filing the operative complaint, Plaintiffs voluntarily dismissed the original federal action without an order of the district court. [*See* Case No. 23-cv-0849-DMS-DEB (S.D. Cal.), Dkt. No. 4.] Prior to being served with the operative complaint, Condon-Johnson removed it to federal court on May 17, 2023. [1-SER-254, ¶¶11-12, ¶¶13-14; 2-SER-493, 495-554.]

The following day—*after* removal was effectuated—Plaintiffs attempted to file a first amended complaint in the state court, further

deleting additional federal references. Plaintiffs then filed a "Notice of Filing of Amended Complaint" in the district court. Plaintiffs falsely asserted that the first amended complaint was "filed in San Diego County Superior Court *before* any notice of removal was filed in the state court's register of actions, and before removal of the action became effective." [1-SER-255, ¶15; 2-SER 555 (emphasis added).]

The first amended complaint was never filed in federal court and was always purported by Plaintiffs to have been filed solely in state court. [6-ER-1139 ("[Plaintiffs] hereby provide notice that the attached First Amended Complaint, exhibit A, was filed in San Diego Superior Court . . .").] Removal was therefore effective on May 17. [1-SER-254-255, ¶¶13-14; 2-SER-495-496.] The district court found "the fact that the plaintiffs tried to amend the . . . operative complaint in the state court after it was removed is absolutely void." [7-ER-1392.]

C. The Allegations of Plaintiffs' Operative Complaint Seek to Void Title to the Tribe's Property and to Enjoin the Tribe's Construction of a Casino Hotel

Much like Plaintiffs' prior lawsuits, Plaintiffs' operative complaint seeks to thwart construction activity occurring on the Tribe's land. [6-ER-1205-1211.] The work was authorized and directed by, and is being performed by, the Tribe, through a subcontractor, Condon-

Johnson. [4-ER-673, ¶6.] Plaintiffs allege that Condon-Johnson is liable for the desecration of human remains purportedly belonging to Plaintiffs' ancestors. [6-ER-1191-1192, ¶¶1-2.][8] As for the Diocese, Plaintiffs assert it fraudulently transferred ownership of the disputed parcel to the Tribe in 2017 in order to hinder, delay, or defraud creditors, and "to avoid liability for desecration . . .." [6-ER-1203, ¶¶39, 40.] "Plaintiffs seek to *set aside the transfer* of the cemetery property now known as 597-080-06, and to have the court *recognize The Roman Catholic Bishop of San Diego*, a corporation sole, *as the true titled owner* of that property." [*Id.* (emphasis added).] Plaintiffs' allegations make clear that the relief sought directly and adversely affects the Tribe's interests. [6-ER-1146-1161, ¶¶19, 40.]

Plaintiffs also seek an injunction restraining "Defendants, and their officers, agents, servants, employees and all persons in active concert with them" from "dumping, grading, excavating, operating heavy equipment, moving dirt and/or gravel, or any other construction

[8] Like prior lawsuits, Plaintiffs' operative complaint and arguments on appeal lump all Defendants together without specifying the basis for their respective liability. [2-SER-531-551; *see, e.g.*, *Rosales*, 279 F.Supp.3d at 1087 (noting Plaintiffs' failure to comply with federal pleading requirements); *see also Rosales v. Dutschke*, No. 15-1145, 2016 WL 1756962, at *1, *3 (same).]

activities, involving the soils within 100 feet of the cemetery on the parcel known as 597-080-06 . . . .” [2-SER-549, ¶65.] All persons in active concert with Condon-Johnson necessarily includes the Tribe. Plaintiffs also demand the removal of all soil nails, *ibid.*, which would need to be removed from tribal trust lands where they are installed and would effectively halt and prevent construction of the casino hotel.

D. The District Court Denies Remand

Plaintiffs moved for an order remanding the case claiming that their ineffective first amended complaint no longer supported federal subject matter jurisdiction. [5-ER-945.] Condon-Johnson disagreed, arguing that (1) the filing of the first amended complaint did not oust the district court’s jurisdiction; (2) Plaintiffs’ claims either involve direct federal questions or necessarily require resolution of substantial federal questions; (3) remand would reward Plaintiffs for subverting the rules; (4) that Plaintiffs had engaged in artful pleading; and (5) that Plaintiffs’ request to enjoin activity on tribal lands conducted pursuant to an IGRA Compact requires determination of a substantial question of federal law. [5-ER-907-937.] Condon-Johnson also argued that Plaintiffs’ claims were completely preempted. [*Id*.]

The district court found that the first amended complaint was filed in state court "[a]fter the second removal." [1-ER-6.] The district court also found it unnecessary to resolve whether the first amended complaint raised substantial issues of federal law, noting that even if a federal court "has dismissed all claims over which it has original jurisdiction," it "may decline to exercise supplemental jurisdiction" over any remaining causes of action. 28 U.S.C. § 1367(c)(3). [1-ER-8.] However, after weighing the factors under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—the district court found that remanding this frivolous action was not warranted. [1-ER-9.]

E. The District Court Dismisses the Action Under Rule 19(b) Because the Tribe is a Necessary and Indispensable Party

Condon-Johnson moved to dismiss on multiple grounds, including that under Rule 19 the Tribe is a required and indispensable party that cannot be joined due to its sovereign. [4-ER-642-671.] The district court agreed. [1-ER-9-11.]

Preliminarily, the district court rejected Plaintiffs' "misguided legal position that surfaces in nearly all plaintiffs' arguments[,]" urging that the Tribe is not the record title owner of the disputed parcel, and

that the Diocese's 2017 deed was "void when recorded," thereby vitiating the Tribe's ownership interest in the "cemetery plot." [1-ER-7.] As explained by the district court, California Civil Code section 3439.07(a)(1) has no effect on title whatsoever—unless and until a fraudulent-transfer claim is proven. [1-ER-7 ("[T]he Village does have an ownership interest in the 'cemetery plot.' And there's no guarantee that—even if plaintiffs were successful—they could unwind the entire transfer.").]

The district court then determined that the Tribe qualified as a required party under Rule 19(a), observing the Tribe has claimed title to the disputed parcel since 2017 through a recorded deed. Plaintiffs explicitly request "set[ting] aside" and "void[ing]" that ownership interest and unwinding seven years of stewardship now over that land. [1-ER-10; SER-36.] "This—combined with the more immediate impact on the ongoing construction in support of the Village's hotel—plainly implicates the Village's property interest. So, it is a necessary party." [*Id.*]

The district court then determined that its joinder was not feasible due to the Tribe's sovereign immunity—an issue that is uncontested in this appeal. [*Id.*] The district court next considered whether, "in equity

and good conscience" under Rule 19(b), the action may proceed without the Tribe. [1-ER-10-12.] The district court found that the importance of the Tribe's sovereign immunity strongly outweighed any other equitable considerations, and that dismissal was proper under Rule 19. [1-ER-11-12.]

Finally, the district court noted that even if some of Plaintiffs' claims arise under California law that fact does not alter the dismissal analysis because the analogous state rule concerning joinder, California Code of Civil Procedure section 389, adopts Rule 19's language "practically in its entirety." [1-ER-11.] Therefore, under either rule the outcome is the same. [*Id*. (citing *Rosales*, 2016 WL 124647, at *11–12 ("Given that the [Tribe] may not be joined as a result of its sovereign immunity, the trial court reasonably concluded that dismissal of the action was appropriate.")).]

F. The District Court Finds Sanctions Are Warranted

"After surveying the legal carnage of the past few decades—including plaintiffs' 20-plus failed lawsuits with various shifting and meritless theories," the district court determined that sanctions were warranted for litigating this action in bad faith and for the frivolousness of the Plaintiffs' position and case. [1-ER-12, 14 ("[T]his campaign of

harassment will not end until plaintiffs and their attorney are held to account for abusing the legal process.").] The parties were then ordered to meet and confer regarding Condon-Johnson's attorneys' fees. [1-ER-16.]

G. The District Court Denies Plaintiffs' Motion for Reconsideration and Awards Condon-Johnson Compensatory Sanctions of $119,509

After the district court's entry of judgment, Plaintiffs and non-party Patrick Webb filed a motion for reconsideration. [3-ER-363-400.] Webb & Carey APC, did not. [*Id.*] The motion was denied because Plaintiffs failed to meet and confer pursuant to Civil Chambers Rule 5.[9] [7-ER-1393.] Additionally, the district court found that on the merits Plaintiffs failed to submit arguments based on new evidence or an intervening change of law. [*Id.*] Plaintiffs' arguments that their operative complaint did not seek to overturn title to the Tribe's property and that the Tribe had no interest in the case were frivolous, and even Plaintiffs' ineffectual first amended complaint sought a remedy affecting the Tribe and its interests. Further, Plaintiffs' arguments based on a proposed second amended complaint were improper and untimely

[9]https://www.casd.uscourts.gov/judges/schopler/docs/Schopler%20CIVIL%20Chambers%20Rules.pdf

given they were raised in a reply brief in support of Plaintiffs' motion to reconsider and the second amended complaint was attached to a declaration in support of the reply brief. [7-ER-1355-1399, 1453.] And, again, even if considered on the merits, these arguments lacked merit and were frivolous. [*Id*.]

The district court also noted that Plaintiffs had previously conceded in their opposition to Condon-Johnson's motion for sanctions, which was filed prior to their motion for reconsideration, that the court had original jurisdiction over their operative complaint. [7-ER-1391; *see* 3-ER-471-472 ("[F]iling the FAC [in state court post-removal] and seeking remand 'with all due speed,' is actually evidence of Plaintiffs' good faith in preventing this Court from exercising jurisdiction over claims that don't belong in federal court.") ("Hence, [Condon Johnson] is not entitled to any attorneys' fees incurred for voluntarily electing to file a notice of removal of the [operative] complaint, since it voluntarily sought to litigate in federal court, and then failed to stipulate to remand, after the FAC stated no federal claim.").]

The district court explained, "[t]his was actually a point that the Court had looked at in some detail early on in the proceedings, and it

didn't end up making it into my order on the motion to dismiss because I thought the plaintiffs had abandoned that point." [7-ER-1391; see 7-ER-1360-61, citing 5-ER-895 ("[P]laintiffs are not challenging CJ's removal of the second state court action before the first amended complaint was filed. Rather, plaintiffs challenge CJ's refusal to stipulate to remand once the first amended complaint was filed, since the Court has no reason to exercise supplemental jurisdiction, since all claims over which it had jurisdiction have been dismissed or superseded by timely amendment.").]

However, in seeking reconsideration, Plaintiffs changed course and argued original jurisdiction was lacking over their operative complaint. [3-ER-384-387.] The district court correctly rejected Plaintiffs' shifting arguments. And, for the same reasons, the district court refused to consider Plaintiffs' motion to reconsider awarding sanctions. [7-ER-1370] ("These arguments are late and appear to be an improper second bite at the apple or possibly third." "At some point, enough is enough.") [7-ER1399-1400.] The district court also commented that it "found the case was frivolous" and therefore "declined to remand" under the futility doctrine. [7-ER-1363.]

Thereafter, Condon-Johnson was awarded $119,509 in sanctions. [1-ER-2-3.] Plaintiffs' appeal does not challenge the reasonableness of the attorney's fees award.

SUMMARY OF ARGUMENT

This Court has jurisdiction over the Plaintiffs' appeal of the district court judgment. However, this Court lacks jurisdiction to resolve non-parties' appeal based upon their failure to timely file a notice of appeal. Additionally, non-party Webb & Carey, APC failed to file a brief and thus any challenge to the district court's judgment has been waived.

The district court did not abuse its discretion in refusing to remand this action. Once Condon-Johnson filed the notice of removal in state court and it was served on Plaintiffs on May 17, Plaintiffs' effort to file a first amended complaint the next day in state court was ineffective. Further, even if considered, the first amended complaint seeks to void the deed transfer from the Diocese to the Tribe and prays for injunctive relief involving activities undertaken by the Tribe on its property. Plaintiffs also seek to enjoin activity on "Indian" lands as defined by IGRA. These claims raise substantial federal questions and were therefore within the jurisdiction of the district court.

The arguments raised by Plaintiffs on appeal present new theories never argued in support of its motion to remand or in opposition to Condon-Johnson's motion to dismiss. The second amended complaint upon which Plaintiffs premise their arguments was never filed as a separate pleading in the district court or the state court, but instead was attached to Plaintiffs' counsel's declaration filed with their reply brief in support of Plaintiffs' motion for reconsideration. [2-ER-170.] The expert declarations filed by Plaintiffs with their reply were also untimely and correctly rejected by the district court. [2-ER-305-13.]

The motion for reconsideration was denied on multiple grounds—and the district court's exercise of discretion in denying reconsideration has not been challenged on appeal. Instead, the starting point for Plaintiffs' challenges is the incorrect presumption that issues raised for the first time in a motion for reconsideration preserves an issue for appeal. The issues have not been preserved and challenge of the district court's order denying reconsideration has been waived.

The district court had original jurisdiction and properly exercised its discretion in resolving Plaintiffs' pendent claims. This also avoided further protracted and futile litigation. Dismissal was required under

Rule 19 because the Tribe is a required and indispensable party that cannot be joined. This ruling is consistent with multiple other decisions dismissing Plaintiffs' claims involving the Tribe's property and construction thereon.

Having found that the Tribe has a legally protected interest that no other party can adequately protect[10], the district court appropriately found under Rule 19(b) that this case in "equity and good conscience" may not proceed without the participation of the Tribe. As previously recognized by this Court, there is a "'wall of circuit authority' in favor of dismissing an action where a tribe is a necessary party." *See Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 848, 858 (9th Cir. 2019) (quoting *White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (*Diné Citizens*)).

Additionally, this Court "'ha[s] regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.'" *Id.* (quoting *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (*Hull*)). Accordingly, "[a]lthough Rule 19(b) contemplates balancing the factors, when the

[10] Plaintiffs do not argue that the Tribe's sovereign, economic, and property interests could be represented by any other party to this action.

necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *White*, 765 F.3d at 1028 (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994)) (internal quotation marks omitted). Accordingly, the district court acted well within its discretion under Rule 19(b) in determining that the Tribe was an indispensable party and that this case should not "in equity and good conscience" proceed without it.

Finally, the district court did not abuse its discretion in awarding sanctions to Condon-Johnson under three separate authorities—Rule 11, its inherent authority, and under 28 U.S.C. § 1927. The district court properly exercised its discretion in awarding Rule 11 sanctions because Plaintiffs' case and position were frivolous and harassing. The district court sought to deter Plaintiffs from continuing their decades-long crusade against the Tribe and baseless assertion the Tribe is not a necessary and indispensable party in cases when, as here, the Tribes' interests are at stake. Lawsuits such as this waste resources of not only the parties, but also the judiciary. [1-ER-13–14.]

The district court was also within its discretionary to award inherent authority sanctions for the same reasons. [1-ER-12–13.]

Plaintiffs do not dispute their purpose was to harass the Tribe and its business partners and abuse the judicial process, which alone justifies an inherent sanctions award.

Finally, sanctions pursuant to 28 U.S.C. § 1927 were not clearly erroneous given plaintiffs at a minimum acted recklessly with knowledge, which Plaintiffs do not dispute. [1-ER-13.] As found by the district court, "Plaintiffs and their attorney leveraged this suit in bad faith" given the decades-long crusade of 20-plus failed lawsuits "to undermine the Village leadership's decisions and to harass those doing business with the Village". [1-ER-12, 14.] This finding is well-supported thereby preventing a finding of clear error.

STANDARDS OF REVIEW

A. Jurisdictional Questions are Reviewed De Novo

Questions of subject matter jurisdiction and removal are reviewed de novo. *Kruse v. State of Hawaii*, 68 F.3d 331, 333 (9th Cir.1995). Denial of a motion for remand is also reviewed de novo. *Abraham v. Norcal Waste Systems, Inc*., 265 F.3d 811, 819 (9th Cir. 2001).

Plaintiffs' reliance on *Rivas v. Napolitano,* 714 F.3d 1108 (9th Cir. 2013) to argue questions of fact prevented the district court from

finding the Tribe was a necessary and indispensable party lacks merit. The decision in *Rivas* involved the doctrine of consular nonreviewability which deprives courts of subject matter jurisdiction. *Id*. a 1111.[11] No similar doctrine is at issue here, nor have Plaintiffs identified any factual issues that prevented resolution of whether the Tribe was an indispensable party. [AOB-32.]

B. The District Court's Order Denying Reconsideration is Reviewed for Clear Error

This Court reviews a district court's denial of a motion for reconsideration for abuse of discretion. *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000). Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Id*. at 890 (citation omitted). Indeed, "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id*. (citing *389*

[11] Plaintiffs' citation to *Millar v. Bay Area Rapid Transit Dist.*, 236 F.Supp.2d 1110 (N.D. Cal. 2002) is equally inept. That decision did not address the standard of review whatsoever. *Id*. at 1118.

Orange Street Partners, 179 F.3d 656, 665 (9th Cir. 1999)). A Rule 59(e) motion may also *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation. *See id.*

C. The District Court's Decision to Dismiss is Reviewed for Abuse of Discretion and Its Weighing of Factors is Reviewed for Clear Error

This Court reviews a district court's decision to dismiss an action for failure to join a required party for abuse of discretion; however, underlying legal conclusions are reviewed de novo. *Diné Citizens*, 932 F.3d at 851; *Hull*, 305 F.3d at 1022. Under the abuse of discretion standard, this Court will affirm the district court unless the Court has "a definite and firm conviction that the court below committed clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1278 (9th Cir. 1980) (internal citations omitted).

When reviewing an order dismissing a case under Rule 12(b)(7) for failure to join a party, the Court accepts as true the complaint's allegations and draws all reasonable inferences in a plaintiff's favor. *Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 996, n.1 (9th Cir. 2011). However,

"the court may consider evidence outside the pleadings[.]" *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960) (maps showing the interests of absent landowners and affidavits were used as evidence to establish that the absent parties must be joined); *Tinoco v. San Diego Gas & Electric Co*., 327 F.R.D. 651 (S.D. Cal. 2018) ("A court may consider extraneous evidence when deciding a Rule 12(b)(7) motion without converting it into a motion for summary judgment.") (citation omitted).

D. An Order Imposing Sanctions is Reviewed for Abuse of Discretion

The imposition of sanctions by the district court is reviewed for abuse of discretion. *See Holgate v. Baldwin*, 425 F.3d 671, 675–76 (9th Cir. 2005) (a district court does not abuse its discretion in awarding Rule 11 sanctions unless its decision is based on an erroneous view of the law or a clearly erroneous assessment of the evidence).

Plaintiffs erroneously assert that whether certain conduct is sanctionable is a legal issue reviewed *de novo*, citing *Hudson v. Moore Bus. Forms*, 835 F.2d 1156, 1159 (9th Cir. 1988). [AOB-32.] However, the Supreme Court has expressly overruled the three-tiered approach applied in *Hudson*: "we reject petitioner's contention that the Court of Appeals should have applied a three-tiered standard of review." *Cooter*

& Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (*Cooter*). Instead, "an appellate court should apply an abuse-of-discretion standard in reviewing *all* aspects of a district court's Rule 11 determination." *Id.* (emphasis added).

For sanctions issued under 28 U.S.C. § 1927, this Court reviews a district court's factual findings against an attorney based on a clearly erroneous standard. *Kanarek v. Hatch*, 827 F.2d 1389, 1391 (9th Cir. 1987), *implied overruling on other grounds as recognized in Stanley v. Woodford*, 449 F.3d 1060, 1063 (9th Cir. 2006). Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). If the district court's account of the evidence is plausible in light of the entire record, the court of appeals may not reverse, even if it would have weighed the evidence differently. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

Finally, a district court's exercise of its inherent powers is reviewed for an abuse of discretion. *See Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807 (9th Cir. 2002).

ARGUMENT

I. PLAINTIFFS' AND NON-PARTIES' WAIVER OF ISSUES ON APPEAL

A. Non-Parties Failed to File a Notice of Appeal

As relevant here, Congress has prescribed:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(a); *see also* Fed. R. App. P. 4(a)(1)(A) (implementing § 2107(a)). Timely filing is an absolute prerequisite to the initiation of an appeal. *Bowles v. Russell*, 551 U.S. 205, 209–10 & n. 2 (2007); *Evans v. Synopsys, Inc*., 34 F.4th 762, 768 (9th Cir. 2022) (holding that deadline to file a notice of appeal for prospective intervenors is the same as the deadline for parties).

Plaintiffs were represented in the district court by Patrick D. Webb of Webb & Carey APC prior to the award of sanctions. [6-ER1336.] In awarding sanctions in favor of Condon-Johnson, the district court held Plaintiffs, "their attorney, and their attorney's firm jointly liable for paying the assessed penalty." [1-ER-15.] Thereafter, non-parties Patrick D. Webb and Webb & Carey, APC were represented by attorney Charles R. Grebing of Wingert Grebing. [*See,*

e.g., 2-ER-154.]

On June 13, 2024, Plaintiffs filed a notice of appeal from the judgment. The notice states that "Plaintiffs appeal" to this Court. [2-ER-30-31.] While the caption page for the notice of appeal identifies both Law Offices of Patrick D. Webb, and Wingert Grebing, the notice was also signed only by Patrick D. Webb and not counsel for the non-parties. [*Id*.]

The representation statement filed with the notice of appeal identifies Patrick D. Webb of Webb & Carey APC as counsel for Plaintiffs. Counsel for non-parties "Patrick D. Webb and Webb & Carey APC" is identified as Wingert Grebing. Not until September 4, 2024, did Mr. Webb enter a notice of appearance for Plaintiffs, "Appellant Patrick D. Webb," and "Appellant Webb & Carey APC." [9th Cir. Dkt 17.]

The non-parties have therefore waived their challenge on appeal, and judgment should be affirmed as to them.

B. Non-Party Webb & Carey APC Also Failed to File an Opening Brief and Therefore Judgment Against it Should be Summarily Affirmed

If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the

appeal. Fed. R. App. Proc. 31. Webb & Carey APC has failed to file an opening brief and therefore the judgment should be summarily affirmed as to it.

C. Plaintiffs and Non-Parties Have Forfeited Challenge of the District Court's Order Denying Reconsideration

As a general rule, a party does not preserve an issue for appeal by raising it for the first time in a motion to reconsider the judgment. *See, e.g., N.E. by & through C.E. & P.E. v. Seattle School District*, 842 F.3d 1093, 1095, n. 1 (9th Cir. 2016) (argument waived where plaintiffs "raised it only in a motion for reconsideration, which does not suffice to preserve the issue for appeal").

Plaintiffs' motion for reconsideration raised new arguments regarding the district court's alleged lack of original jurisdiction. In a reply brief to their motion, Plaintiffs asked the district court to consider their never-filed second amended complaint as a basis for reconsidering and denying Condon-Johnson's motion to dismiss. The district court ruled that the arguments were untimely and unconvincing. [Section I. G; 7-ER-1391.] Plaintiffs do not argue that the district court abused its discretion in so ruling and fail to identify exceptional circumstances that warrant this Court's consideration of their arguments for the first

time on appeal. *See Gieg v. DDR, Inc*., 407 F.3d 1038, 1046 n. 10 (9th Cir. 2005) ("An appellate court will not consider arguments not first raised before the district court unless there are exceptional circumstances.").

Furthermore, it is Plaintiffs' burden on appeal to present the Court with legal arguments to support its claims. *See Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999) (failure to raise issue in opening brief waives issue on appeal). An argument waived by failure to raise it in appellant's opening brief cannot be raised for the first time in appellant's reply brief. *Maljack Productions, Inc. v. GoodTimes Home Video Corp*., 81 F.3d 881, 886 n.7 (9th Cir. 1996).

Plaintiffs have not adequately challenged the district court's order denying their motion for reconsideration. The order is not identified in Plaintiffs' Statement of Issues or Summary of Argument. Plaintiffs have also not briefed the standard of review governing the denial of a reconsideration motion. While Plaintiffs reference in passing that the district court ruled they failed to meet and confer in connection with the motion for reconsideration (AOB-30-32), Plaintiffs have failed to provide the district court's Civil Chamber Rule 5 or any coherent

argument regarding that ground for the district court's ruling. Accordingly, challenge of the district court's order denying Plaintiffs' motion for reconsideration has been waived. *See Moran v. Screening Pros, LLC*, 25 F.4th 722, 728 n. 6 (9th Cir. 2022) (despite the opening brief's reference to a claim and single citation to a statute, the failure to refer to claims in the summary of summary of his argument or to advance a specific and distinct argument that defendant willfully or negligently violated that statute results in waiver of the issue on appeal).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REMAND

A. The District Court Had Original Jurisdiction

1. The Operative Complaint Controls

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a); *see, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 563 (2005); 28 U.S.C. § 1331 (a district court's original jurisdiction extends to, among other things, claims that arise "under the Constitution, laws, or treaties of the United

States"). The filing of a copy of the notice of removal with the clerk of the state court, "shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 U.S.C § 1446(d); *Ackerman v. ExxonMobil Corp*., 734 F.3d 237, 249-250 (4th Cir. 2013) (any post removal action by state court is void ab initio).

Condon-Johnson timely filed a notice of removal in compliance with 28 U.S.C. § 1446(a). Once written notice was provided to Plaintiffs "of removal of [the] civil action" and "a copy of the notice [was filed] with the clerk of [the] State court," which was done on May 17, this "effect[ed] the removal and the State court [could] proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d); [1-SER-254, ¶¶13-14;]. Plaintiffs' "amended complaints" are therefore irrelevant. As noted by the district court, "[P]laintiffs repeatedly argue that the Court lacked original federal jurisdiction based on the lack of a federal claim in the first amended complaint, but the relevant complaint for jurisdictional purposes is not the amended complaint but the complaint as it stood at the time of removal." [7-ER-1360 (citing *Harris v. Verizon*, 84 F. App'x 958, 959 (9th Cir. 2003)).]

Removal jurisdiction based on a federal subject matter is determined from the complaint as it existed at the time of removal, not

as subsequently amended. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979). This rule overrides the general rule that an amended complaint typically "supersedes the original, the latter being treated thereafter as non-existent." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999). Plaintiffs' arguments contradict this binding precedent.

If federal claims existed at the time of removal, a later amendment deleting all federal claims does not affect the federal court's subject matter jurisdiction, even though only state law claims remain. *Sparta Surgical Corp. v. National Ass'n of Secur. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998), *abrogated on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374 (2016) ("[P]laintiff may not compel remand by amending a complaint to eliminate the federal question upon which removal was based.").

Plaintiffs' multiple efforts to amend their pleadings by selectively dismissing claims that formed the basis of removal did not divest the district court of jurisdiction. Plaintiffs' operative complaint includes both state law claims and inherently federal law claims, which permitted the district court to exercise supplemental jurisdiction over the state law claims. 28 U.S.C. § 1441(c).

2. Plaintiffs Cannot Avoid Federal Jurisdiction by Artful Pleading

"Under the artful pleading doctrine, 'a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint.'" *Lippitt v. Raymond James Financial Services, Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003). "Artful pleading exists where a plaintiff articulates an inherently federal claim in state law terms." *Brennan v. Southwest Airlines Co.*, 134 F.3d 1405, 1409 (9th Cir. 1998). A substantial federal question also exists where "the claim is necessarily federal in character, or where the right to relief depends on the resolution of a substantial, disputed federal question." *Lippitt*, 340 F.3d at 1041–42 (citations omitted).

While Plaintiffs argue they are the "master" of their complaint, and are free to choose the forum for this action (AOB-39), this Court has held "this principle is not without limitation." *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 769–70 (9th Cir. 1986) (citation omitted) (plaintiff's assertion for first time after removal that complaint involved only state law claims was found to be "disingenuous" and an "attempt to evade the jurisdiction of the Northern District, which has been acting swiftly to dismiss similar suits as frivolous"). Plaintiffs are

"not [] allowed to conceal the true nature of a complaint through 'artful pleading.'" *Id.* at 766 (citation omitted).

Similarly, here, Plaintiffs' original complaint contained claims arising under the Constitution and laws of the United States. [Section II. A, B.] Only after Condon-Johnson removed the action to the district court did Plaintiffs file a second complaint in state court, asserting for the first time that they only intended to litigate claims involving California state law. As in *Bright*, Plaintiffs' assertion that its claims only involve state law is disingenuous and simply an attempt to evade federal jurisdiction through artful pleading. *See Bright*, 780 F.2d at 770.

This is especially true given that, as in *Bright*, prior federal courts have dismissed similar frivolous claims by Plaintiffs and their counsel. [Section, I. C.]

3. Putting Aside Plaintiffs' Deletion of Federal Statutes, Their Operative Complaint Still Raised Substantial Questions of Federal Law

The operative complaint, even with the deletion of references to federal statutes, still alleges claims within the original jurisdiction of the district court because resolution of the claims will involve substantial questions of federal law. [*See* Section II. B.] A substantial federal question exists if the issue is (1) necessarily raised, (2) disputed,

(3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance of power. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Plaintiffs' request to enjoin the casino hotel construction activities requires resolution of several questions of federal law for several reasons.

First, Plaintiffs seek to enjoin activity on "Indian lands" as defined by IGRA, activity that is subject to extensive federal legislation and regulation. [2-SER-550.] Plaintiffs suggest the cemetery stretches beyond the disputed parcel. [5-ER-966 ("'We don't know the boundaries of the cemetery, because it dates back to the 1800's, maybe earlier.' There, as here, the cemetery included a larger area outside the existing fence.").] Plaintiffs requested the district court to prohibit Condon-Johnson from "disturbing in any way, any Native American human remains, and the items associated with their human remains. . .that have been interred at the cemetery." [2-SER-549-50.] Because the casino hotel project is *adjacent* to the disputed parcel and is on federal trust land, Plaintiffs seek to enjoin activity on federal trust land. A substantial federal question exists regarding whether such land could be subject to injunction under state law given that it is held in

trust for the Tribe and the casino hotel construction occurring there is subject to the IGRA Compact. [*See* Statement of Jurisdiction.]

Second, Plaintiffs request an injunction on any construction activities within 35 feet per the original complaint or within 100 feet of the cemetery per the operative complaint which Plaintiffs argue is based on *CEQA Guidelines.* [2-SER-548, ¶62; 2-SER-516.] Such an injunction necessarily includes construction of the casino hotel on Indian trust land adjacent to the cemetery. This construction is connected to the Jamul casino and is pursuant to the IGRA Compact. [1-SER-67.] The TEIR explicitly references, follows, and was issued pursuant to Section 11 of the IGRA Compact. [1-SER-67-68.]

Plaintiffs' right to relief necessarily depends on whether the Tribe, State of California, or the federal government has jurisdiction over activities on the Tribe's lands. This question is of substantial import because, in the context of gaming on Indian lands, the Supreme Court has held that "Indian sovereignty and the congressional goal of Indian self-government" are "important federal interests." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216–17 (1987).

Third, the balance of jurisdiction among the federal government, state governments, and Indian tribes is generally a matter for Congress,

not the states. *Id.* at 214; *see United States v. Wheeler*, 435 U.S. 313, 323 (1978). This federal issue is capable of resolution in federal court without disrupting the federal-state balance of power because the "congressionally approved balance of federal and state judicial responsibilities" as to Indian tribes is heavily weighted on the federal side. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005).

Fourth, resolution of Plaintiffs' claims would also require the district court to determine whether Plaintiffs actually own the human remains and objects at issue and whether such remains are located on federal or tribal lands and thus subject to NAGPRA. If NAGPRA applies instead of the California Native American Graves Protection and Repatriation Act (CalNAGPRA), the order of priority for ownership of human remains changes. *Compare* 25 U.S.C. § 3002(a) *with* Cal. Health & Safety Code § 8016.

Plaintiffs claim ownership in Native American remains as "lineal descendants," asserting that they "exclusively own, control and have immediate right to posses[s] the[] personal property rights in their families' remains." [2-SER-544, ¶45.] Despite deleting explicit references to federal law throughout their operative complaint and

ineffectual amended pleadings, Plaintiffs continue to assert that they have exclusive rights to ownership to human remains based on federal law. This is important because although NAGPRA provides priority to the "lineal descendants of the Native American" for any Native American human remains and associated funerary objects discovered on federal or tribal lands, CalNAGPRA does not. 25 U.S.C. § 3002(a); Cal. Health & Safety Code § 8016. Rather, when both lineal descendants and tribes assert repatriation claims to human remains, a mediation process ensues to determine who should receive the remains under CalNAGPRA. Cal. Health & Safety Code § 8016.

CalNAGPRA also only imposes requirements on an "agency", which is defined as a "political subdivision of the state", or on a "museum," which is defined as "an agency, museum, person, or entity, including a higher educational institution, that receives state funds." Cal. Health & Safety Code § 8012. Only agencies and museums owe duties to lineal descendants in regard to inventorying and repatriating human remains that are within the control of the agency or museum under CalNAGPRA. NAGPRA, on the other hand, broadly governs "[a]ny person who knows, or has reason to know, that such person has

discovered Native American cultural items on Federal or tribal lands after November 16, 1990." 25 U.S.C. § 3002(d)(1).

Plaintiffs do not allege that any Defendant is an agency or museum; instead, Plaintiffs allege Defendants owe them duties based on being persons under NAGPRA for casino hotel construction activities, further demonstrating that Plaintiffs' claims are federal.

Fifth, Plaintiffs' claims also require a determination of whether their claims concern federal or tribal land such that NAGPRA applies. Plaintiffs allege the desecration is occurring at the cemetery and that the cemetery "include[s] a larger area outside the existing fence" with "no certainty on how far beyond those fences grave sites might exist." [5-ER-966.] Accordingly, Plaintiffs' claims require determination of whether NAGPRA applies to the disputed parcel and the adjacent land housing the Tribe's casino and hotel project (land that is held by the United States in trust for the Tribe).

4. Plaintiffs' Ineffective First Amended Complaint Does Not Change the Analysis

Plaintiffs' assertion that the "FAC was filed in [state court] before the notice of removal became effective" is demonstrably false. [AOB-30; *see* Section II. D.] Plaintiffs cite to a footnote in their district

court reply brief as "evidence" supporting this key issue. [*Id.* (citing 5-ER-896, n.1).] By contrast, Condon-Johnson submitted detailed evidence regarding the timing of the filings. [1-SER-254-255, ¶¶11-15; 2-SER-493-554.]

Furthermore, even if the allegations in Plaintiffs' late and improperly-filed first amended complaint are considered, they support a finding that the district court had subject matter jurisdiction. [6-ER-1141-1161.] Plaintiffs' reliance on *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), is therefore misplaced. In *Caterpillar*, a district court improperly denied a plaintiff's motion to remand the case back to state court. The plaintiff correctly argued that the parties lacked complete diversity: one of the initial defendants was a citizen of the same state as the plaintiff. *Id*. at 64–66. No similar jurisdictional flaw exists here. [Section II, C.]

Plaintiffs' efforts to void the deed for the disputed parcel and prayer that Defendants and "all persons in active concert with them" be restrained from construction activities involving the Tribe's property (6-ER-1160) and for Defendants to "[c]ease and remove the installation of all soil nails in the cemetery property . . . and to cease interfering [with] access to the cemetery property . . .." (6-ER-1161), clearly

implicate the Tribe's sovereign and property interests and require the Tribe to act on its federal trust lands. Plaintiffs' belated effort to submit a second amended complaint reinforces their need to back-pedal from explicitly pled claims establishing the district court's jurisdiction.

5. The Record Does Not Support a Finding of Any Changed Circumstances

Plaintiffs' suggestion of "changed circumstances" and statements that soil nails have been installed (apparently to imply the injunctive relief they explicitly and implicitly request is moot) are unsupported by any reference to the record and should be ignored. [AOB-30, 48, 58.]

6. Arguments Based on Plaintiffs' Post-Judgment Reconsideration Motion Have Been Forfeited and Lack Merit.

Plaintiffs' arguments based on the "second amended complaint" and "expert" declarations which they attached to a declaration to a reply brief in support their post-judgment motion to reconsider are even more attenuated. [AOB-24, 25, 30.]

Even if Plaintiffs had not waived challenge of the reconsideration order, the district court was well within its discretion in refusing to consider a re-imagined pleading that was attached to a declaration

submitted with a reply brief and filed post-judgment without leave to amend (and well after the safe harbor provision for sanctions expired). [Section II. D.] Further, as noted by the district court, the "evidence" offered by Plaintiffs' "experts" was not only presented too late, but it was also based on an atextual reading of Plaintiffs' complaint as not seeking to affect title to the Tribe's property. [7-ER-1398-1399.]

B. The District Court Appropriately Balanced Judicial Economy, Convenience, Fairness and Comity in Deciding to Exercise Pendent Jurisdiction

There was a substantial federal question to anchor jurisdiction as the district court found, but even if not, the court appropriately exercised its discretion in deciding whether to decline, or to retain, supplemental jurisdiction over state law claims considering factors "of economy, convenience, fairness, and comity." *See Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997). While acknowledging that in the "usual case" in which all federal law claims are eliminated before trial, the balance of these factors will point toward declining to exercise jurisdiction over the remaining state law claims, the district court did not find this to be the usual case. [1-ER-8.]

Instead, the district court determined that "this case is frivolous." [1-ER-8.] And further that "remand will aid neither judicial economy

nor convenience nor fairness. It would merely force the parties to brief, yet again, issues now ready for resolution as well as saddle another court with the burden of reviewing the voluminous record and legal arguments. But the outcome would not change." [*Id*.]

As to comity, the district court recognized the significant federal concern for vindicating tribal sovereign immunity, which "is a matter of federal law." [*Id*. (citing *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc*., 523 U.S. 751, 759 (1998)).] Additionally, Plaintiffs' request for an injunction to halt Condon-Johnson's construction work, which is based on the Tribe's TEIR, a requirement of the IGRA Compact, touches on several issues of federal interest. [1-ER-8-9 (citing 25 U.S.C. § 2710(d)(7)(A)(ii) and (d)(8) and *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997)).] Finally, the district court found that remand would be futile and waste valuable judicial time and resources. [1-ER-9 (citing *Bell v. City of Kellogg*, 922 F.2d 1418, 1424–25 (9th Cir. 1991) (affirming remand denial in a "futile" case, even though court lacked "subject matter jurisdiction")).]

Plaintiffs' argument that the district court erred in refusing to remand hinges primarily upon the unsupported conclusion that the

district court lacked original jurisdiction. For the reasons addressed above, Plaintiffs' argument fails.

Plaintiffs' argument that the futility exception in *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991), is no longer the law of this Circuit also lacks merit. As addressed by the district court, *Bell* has not been overturned. [7-ER-1362.] Despite that the exception was criticized in *Polo v. Innoventions International, LLC*, 833 F.3d 1193, 1198 (9th Cir. 2016), it has been relied upon in other decisions by this Court. *See, e.g., Strojnik v. Driftwood Hospitality Management, LLC* (9th Cir., May 24, 2022, No. 21-16060) 2022 WL 1642234, at *1; *Sauk-Suiattle Indian Tribe v. City of Seattle* 56 F.4th 1179, 1190, (9th Cir. 2022) *cert. denied* 144 S.Ct. 74 (2023) ("But in *Polo*, we declined to find that the exception had been overruled. *Id*. And just this year in *Global Rescue Jets*, we applied the exception and held that the district court had properly dismissed the action based on futility. 30 F.4th at 920 & n.6. Our precedent thus continues to recognize the futility exception.").

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION

A. The District Court Did Not Abuse Its Discretion in Determining That the Tribe is a Required Party Under Rule 19(a)

Plaintiffs argue based on their "amended complaints" that this case should proceed without the Tribe because the Tribe "has no direct legal interest in Plaintiffs'-Appellants' personal injury and property claims" against the Diocese and Condon-Johnson, who allegedly remain independently liable for their own negligent desecration of the families' remains. [AOB-28.] Under Rule 19(a), the determination of whether an absent party has a protected interest that potentially may be impaired in an action "is a practical one and fact specific." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The district court's finding that the Tribe had a legally supported interest that may be impaired by this action is well-supported; Plaintiffs have shown no abuse of discretion.

According to Plaintiffs, the Tribe has no interest at stake in the litigation because the disputed parcel "has been owned and operated by the [Diocese] on non-federal fee simply land since 1912." [AOB-23.] This ignores the deed transfer, and that the Tribe has exercised stewardship over the parcel for the last seven years now. [Section I. A.]

Plaintiffs next assert that the Tribe's ownership of the disputed parcel is void because the Diocese deeded it in September 2017 to avoid liability to Plaintiffs for alleged desecration that was to occur due to the Tribe's construction of the casino hotel *years in the future*. [AOB-24, 36, 53.] This argument makes no sense. It also does not change the practical reality that Plaintiffs' fraudulent conveyance theory seeks a judicial declaration that the deed transferring the Tribe the property is void.

Plaintiffs also ignore that they challenge the Tribe's use of the property regardless of record title ownership. [AOB-28 ("[T]here is no evidence that the [Tribe's] hotel project required the desecration of the remains in order to be completed . . .."; AOB-36 asserting the right to control families' remains, including reasonable access).] And, Plaintiffs gloss over the fact that their claim is time-barred.

The Diocese conveyed the disputed parcel on August 31, 2017 [5-ER-999; *see also* AOB-36, conceding the conveyance was recorded on September 7, 2017.] The relevant statute provides a four-year statute of limitations. Cal. Civ. Code § 3439.04(a)(1). Thus, any claims Plaintiffs would have had, if any, have been barred since at least

September 2021, over a year before Plaintiffs filed this action on May 10, 2023. [1-SER-256.]

Finally, Plaintiffs argue that their claim for fraudulent transfer against the Diocese has no impact on the Tribe. This argument fundamentally ignores that in order for Plaintiffs to establish their claims, they must first establish that the Tribe's property was fraudulently conveyed by the Diocese and therefore the transaction is void. [7-ER-1392-1393.] The Tribe has a protected interest in the ownership of the disputed parcel.

This Court has held that Indian tribes satisfy this Rule 19 standard in a wide range of cases involving contractual, commercial, cultural, and governmental sovereign interests. *See, e.g.*, *Jamul Action Comm.*, 974 F.3d at 988, 997–98 (challenging federal recognition of tribal government); *Diné Citizens*, 932 F.3d at 847 (seeking to vitiate on-reservation mining permit); *White*, 765 F.3d at 1015 (asserting historic and cultural claims to Native American human remains); *Hull*, 305 F.3d at 1018, 1022 (protecting tribal interest in tribal-state gaming compact); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (holding tribe had a legally protected interest in the lease term and had to be joined under Rule 19).

Here, Plaintiffs' complaint seeks to affect the Tribe's ownership and use of its land and to enjoin construction that would directly affect the Tribe and its economic, contractual, and sovereign interests, including ownership of and use of its land, its casino hotel project, and its existing contracts, including contracts to construct the casino hotel and the IGRA Compact. As the district court found, the "reimagined" second amended complaint was "just as frivolous as the first amend[ed] complaint and the original one" and the court could not "see any way of making the plaintiffs' case here without" "taking away some of the Jamul Indian Village's property interests." [7-ER-1453.]

The ruling in *Rosales v. Dutschke* equally applies here:

> The JIV's interest in its tribal status, in real property in which it claims title and in the tribal-state Gaming Compact, cannot be adjudicated without its formal presence. Should the court grant relief to plaintiffs and enjoin defendants from conducting excavation and construction activities on the JIV cemetery land, the judgment would be highly prejudicial to the JIV, who would be deprived of an opportunity to govern activities on its property if determined to be the proper owner.

279 F.Supp.3d at 1093–94; *see also Jamul Action Comm.*, 974 F.3d at 998 ("Equity and good conscience do not permit an action disputing the Village's status as a federally recognized tribe and its ownership of land in a suit in which the Village cannot be joined.").

The district court did not abuse its discretion in determining that the Tribe was a required party under Rule 19(a) given the important sovereign, economic, and contractual rights and interests of the Tribe at stake in this action.

B. The Tribe's Sovereign Immunity is Uncontested

Plaintiffs do not contest the Tribe's sovereign immunity and do not claim any waiver or abrogation of tribal sovereign immunity relative to the claims in this case. Instead, Plaintiffs argue the Diocese and Condon-Johnson do not have sovereign immunity and can be sued for their alleged torts. [AOB-35.] Whether or not the named parties to Plaintiffs' lawsuit have sovereign immunity is beside the point.

Plaintiffs cite to *Lewis v. Clarke*, 581 U.S. 155 (2017), which involved a suit brought against a tribal employee in his individual capacity and *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), which involved a suit against an officer of the tribal fire department in his individual capacity. In both cases the tribe's sovereign immunity was not implicated because the employee/officer, not the tribe, was the real party in interest. *Lewis*, 581 U.S. at 159; *Maxwell*, 708 F.3d at 1088. Here, the opposite is true. Plaintiffs have

deliberately avoided naming the Tribe despite seeking relief involving Tribal land and construction of the Tribe's casino hotel.

C. No Other Existing Party Represents the Sovereign, Economic, and Property Interests of the Tribe

A determination under Rule 19(a)(1) that an absent party's ability to protect its interest will be impaired, requires evaluation of whether the existing parties will adequately represent the absent party's interest. *Diné Citizens*, 932 F.3d at 852. The burden of making a showing of inadequate representation is minimal. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538, n.10 (1972).

Plaintiffs do not contest, and thus concede, that existing parties do not adequately represent the Tribe's interests. While Plaintiffs argue that "the Bishop and CJA have continuing duties to protect the families' remains, which can be adequately enforced by a judgment in absence of the tribe, and which will not prevent the Plaintiff-Appellants from obtaining their damages Remedy[,]" (AOB-58) this argument does not address the Tribe's sovereign interests in protecting its ownership and use of its property and in constructing the casino hotel casino.

The existing parties here, Condon-Johnson and the Diocese, do not and cannot adequately represent the Tribe's sovereign interests,

because these entities do not have any ownership stake in the property and are not owners or operators of the casino hotel. They will not "undoubtedly make all" of the arguments of the Tribe, which is what must be shown to defeat a Rule 19 motion. *Diné Citizens*, 932 F.3d at 852; *see also Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 48 F.4th 934, 945 (9th Cir. 2022).

D. The District Court Did Not Abuse Its Discretion Under Rule 19(b) in Deciding That "in Equity and Good Conscience" This Action Should Not Proceed Without the Tribe

The district court did not abuse its discretion in determining that dismissal was required under Rule 19(b). Plaintiffs' arguments to the contrary based upon their "amended damage claims" ignore the explicit allegations of their operative complaint and are based on evidence filed post-judgment that was rejected for multiple (unchallenged) reasons by the district court. [AOB-48-57.]

As this Court has recognized, when the absent party is a tribe asserting sovereign immunity, "there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as one of those interests compelling by themselves, which requires dismissing the suit." *Diné Citizens*, 932 F.3d at 857 (citation and

quotation marks omitted). Although this Court still considers any other relevant equitable considerations under Rule 19(b), dismissal for nonjoinder generally is required "where there is a potential for injury to the interests of the absent sovereign." *Republic of Philippines v. Pimental*, 553 U.S. 851, 867 (2008). And even though dismissal may leave the plaintiff without a remedy, that "result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Hull*, 305 F.3d at 1025; *see also Pit River Home and Agr. Co-op. Ass'n v. U.S.*, 30 F.3d 1088, 1102–03 (9th Cir. 1994) (stating same).

Accordingly, the district court did not abuse its discretion in finding that protection of tribal sovereign immunity strongly outweighed any other equitable considerations under Rule 19(b) under the circumstances of this case.

IV. THE DISTRICT COURT APPROPRIATELY EXERCISED ITS DISCRETION IN AWARDING SANCTIONS

The district court properly awarded Condon-Johnson sanctions under Rule 11, 28 U.S.C. § 1927, and its inherent authority. [1-ER-14.]

As this Court recognizes, "[t]he two problems that Rule 11 addresses . . . are 'frivolous filings' and the use of judicial procedures as a tool for 'harassment.'" *Hudson*, 836 F.2d at 1159. In its discretion, the district court determined both Rule 11 grounds were satisfied—Plaintiffs' complaint was frivolous, and it was harassing. [1-ER-13.] "Sanctions are mandatory if the court concludes that Rule 11 has been violated." *Id.* Rule 11 does not require a showing of bad faith. *Bus. Guides, Inc. v. Chromatic Comms. Enters.*, 498 U.S. 533, 548–49 (1991).

Plaintiffs do not dispute that the more than 20 legal actions spanning several decades are harassing to the Tribe and to those with which the Tribe does business.[12] Instead, Plaintiffs argue that their complaint is nonfrivolous and therefore cannot be harassing. [AOB-70, 74.] For the reasons addressed above, Plaintiffs' argument must be rejected.

The district court found Plaintiffs' case and position to be frivolous. [1-ER-13–14.] Indeed, the court referred to Plaintiffs'

[12] Numerous courts in the last thirty years have held that Plaintiffs may not bring a suit which impacts the Tribe's property interests and rights without joining the Tribe as a party and that because the Tribe cannot be joined due to sovereign immunity, Plaintiffs' claims must be dismissed. [Section I. C.]

contention that the Tribe had "no interest at all in the 'cemetery plot'" as an entirely "misguided legal position." [1-ER-7.] As the court recognized, the California Code provision Plaintiffs rely upon for their contention, Cal. Civ. Code § 3439.07(a)(1), has "no effect on title whatsoever—unless and until a fraudulent-transfer claim is proven." [1-ER-7.] The court properly exercised its discretion in holding, the Tribe clearly "*does* have an ownership interest in the 'cemetery plot.'" [1-ER-7 (emphasis in original)]. Plaintiffs' operative complaint seeks to set aside and void that ownership interest. [1-ER-9–10; Section I. A.] This, combined with the impact of Plaintiffs' complaint on construction of the Tribe's hotel project, the court held "plainly implicates the Village's property interest. So, it is a necessary party." [1-ER-010.] The court held it was a "meritless and frivolous legal argument" to try to "unwind[] . . . the Village's ownership." [7-ER-1370.] No jury trial is needed to determine Plaintiffs' claims are frivolous, as Plaintiffs allege, nor does Rule 11 or the cases Plaintiffs cite support such a proposition. [AOB-74–75.]

That the Tribe is a necessary and indispensable party to this action should have come as no shock to Plaintiffs, the court noted, because courts have consistently made such a "finding each time

[Plaintiffs] attempted to deprive the Village of land." [1-ER-010 (citing *Rosales*, 73 F. App'x at 914; *Rosales v. Dutschke*, 279 F.Supp.3d 1084, 1093–94 (E.D. Cal. 2017), *aff'd*, 787 F. App'x 406 (9th Cir. 2019)).] The district court did not abuse its discretion in finding Plaintiffs' case and position to be frivolous under Rule 11.

Plaintiffs assert that Rule 11 sanctions must not chill an attorney's duty to zealously advocate for his clients. [AOB-75.] Yet the Supreme Court has instructed that Rule 11's "central purpose" is to "deter baseless filings in district court." *Cooter*, 496 U.S. at 393. That was precisely the district court's aim here. The district court asked, "What type of sanction is required to deter future abuses?" [1-ER-15.] Because "[j]udicial admonishment and even outright dismissal have been ineffective" the court held that "[a]t a minimum, a monetary penalty is due (and likely overdue)." *Id.* As the district court recognized, "[t]he judicial system should provide finality. So, plaintiffs must at long last pay a price for continuing their campaign—without legal cause and in the face of stern and escalating judicial warnings." [1-ER-4.]

The district court also permissibly imposed sanctions under its inherent discretionary authority, finding the "suit was brought in bad

faith for the purposes of harassment and raised a frivolous position" due to the reasons set forth above. [1-ER-13.] Plaintiffs' suggestion that sanctions may not be awarded for harassment for nonfrivolous actions does not apply to sanctions issued pursuant to the court's inherent authority. None of the cases Plaintiffs cite for such a position involve inherent authority sanctions; only Rule 11 sanctions. [AOB-74 (citing *Coltrade Intern., Inc. v. U.S.*, 973 F.2d 128, 129 (2d Cir. 1992) (addressing Rule 11 sanctions, not inherent authority sanctions); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 825 (9th Cir. 1986), *abrogated by Cooter*, 496 U.S. 384 (same); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1533 (9th Cir. 1986), (same); *Hudson*, 836 F.2d at 1157 (same); *Newton v. Thomason*, 22 F.3d 1455, 1463 (9th Cir. 1994) (same); *Greenberg v. Sala*, 822 F.2d 882, 883-884 (9th Cir. 1987) (same)).] Indeed, the Ninth Circuit has held that "Rule 11 is not a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of civil cases." *Zaldivar*, 780 F.2d at 829–30 (citations omitted), *overruled on other grounds by Cooter*. Rule 11 "does not repeal or modify existing authority of federal courts to deal with abuses of counsel under 28 U.S.C. § 1927 or under the court's inherent power to discipline attorney misconduct." *Id.*

Plaintiffs argue they are unable to pay and therefore sanctions may not be awarded. [AOB-76.] For support, they cite a conclusory declaration by Patrick Webb unsupported by any probative evidence and attached to Plaintiffs' opposition to Condon-Johnson's motion for sanctions. Webb's declaration states Plaintiffs are of limited financial means and cannot afford to pay sanctions and that "Webb & Carey is not capable of paying the demand, and would be forced out of business by such an award." [3-ER-474-018.] "[T]he sanctioned party ha[s] the burden to produce probative evidence of his inability to pay the sanctions." *Gaskell v. Weir*, 10 F.3d 626, (9th Cir. 1993). No such evidence was ever presented here.

Additionally, although "ability to pay" is a "factor relevant to determining reasonableness," *Matter of Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986), Plaintiffs' inability to pay argument was forfeited for failure to raise it when filing their motion to strike the reasonableness of Condon-Johnson's fees. [2-ER-249–300.] Moreover, nowhere did Patrick Webb argue below that he was unable to pay the sanctions or that he would be forced out of business as a result, much less submit any probative evidence as support.

If an applicant satisfies its burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be reasonable. *Intel Corp. v. Terabyte*, 6 F.3d 614, 622 (9th Cir. 1993). The district court found Condon-Johnson's rates and hours to be reasonable and the sanctions based thereon were therefore reasonable. [7-ER-1422–35.]

Plaintiffs' appeal does not challenge the reasonableness of the attorneys' fees award. Thus, if this Court upholds the district court's sanctions award under Rule 11, 1927, or its inherent authority, this Court need not examine the reasonableness of the attorneys' fees award which is not in question.[13]

Plaintiffs and their counsel do not deny their conduct is harassing and abusive of the legal process. Rather, they argue an improper purpose may not be found "regardless of the attorney's subjective

[13] Plaintiffs claim that, as an alternative to reversing the sanctions award, the sanctions should be "remanded to be reduced with this Court's instructions as requested in 2-ER246 through 3-ER-362." [AOB-78.] Plaintiffs cite 116 pages of excerpts of record containing arguments Plaintiffs submitted to the district court, but not to this Court. Plaintiffs fail to explain which sanctions should be "reduced" and by how much. This argument is waived for lack of development. *See, e.g.*, *Momox-Caselis v. Donohue*, 987 F.3d 835, 843 (9th Cir. 2021). Simple citation to voluminous records containing previous arguments made below without explanation is insufficient to preserve the argument on appeal.

intent" so long as the action is nonfrivolous. [AOB-74.] Plaintiffs' counsel claims he had a duty to bring over 20 lawsuits across several decades in various venues to protect his Plaintiffs' interests, despite the clear and established inability to sue the Tribe or join the Tribe as a necessary party, Plaintiffs' mounting defeats, and various admonitions and sanctions issued in multiple jurisdictions. [AOB-74–75.]

There is a difference between zealous advocacy and abuse of the legal process. The district court found Plaintiffs and their counsel engaged in the latter. [1-ER-012.] As such, the district court was permitted to issue sanctions on that basis alone. *See In re Intel Securities Litigation*, 791 F.2d 672, 675 (9th Cir. 1986) (court has inherent power to impose sanctions when "counsel has "'willfull[y] abuse[d] judicial process' or otherwise conducted litigation in bad faith") (citation omitted); *see also Western Systems, Inc. v. Ulloa*, 958 F.2d 864, 873 (9th Cir. 1992); *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). Regardless, the district court additionally found Plaintiffs' position and case were entirely frivolous

and issued sanctions under its inherent authority for that reason too. [1-ER-013.][14]

Lastly, the district court issued sanctions under 28 U.S.C. § 1927. [1-ER-013.] Section 1927 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States. . .who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Plaintiffs argue sanctions under section 1927 require a showing of bad faith. [AOB-73.] As the district court recognized, a showing of subjective bad faith is not required for section 1927 sanctions; recklessness plus knowledge is sufficient. [1-ER-013 (citing *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002)).] Plaintiffs do not dispute their actions were reckless and that they had knowledge.

[14] Plaintiffs argue attorneys' fees are not allowed when there is no evidence of improper or vexatious conduct or subjective ill intent. [AOB-76.] For this argument, Plaintiffs cite *United States v. Manchester*, which is a case concerning Hyde Amendment attorneys' fees and costs under 18 U.S.C. § 3006A. *Manchester* is clearly inapposite to this case in which the district court applied sanctions under entirely different authority—Rule 11, its inherent powers, and 28 U.S.C. § 1927.

Rather, Plaintiffs argue section 1927 does not apply to the filing of a complaint. [AOB-72.] Yet, the district court's award of section 1927 sanctions was not limited to the Plaintiffs' filing of their action; the district court also found that Plaintiffs "raised a frivolous position," *i.e.*, that the Tribe was not a necessary and indispensable party. [1-ER-13.] That frivolous position was taken by Plaintiffs not only in their initial original complaint, but also in their operative complaint, their first amended complaint, their second amended complaint, their motion to remand, their opposition to Condon-Johnson's motion to dismiss, their opposition to Condon-Johnson's motion for sanctions, and in their motion for reconsideration. This conduct permits "shift[ing] the entire financial burden of an action's defense, including attorneys' fees," when, as here, "the entire course of proceedings was unwarranted and should not have been commenced *or pursued*." *Blixseth v. Yellowstone Mountain Club, LLC*, 854 F.3d 626, 632 (9th Cir. 2017) (emphasis added). The district court's section 1927 ruling was therefore not clearly erroneous and should be upheld. *See Kanarek*, 827 F.2d at 1391.

The district court did not abuse its discretion in awarding sanctions under Rule 11 or its inherent authority, nor did it commit any

clear error in awarding sanctions under section 1927. The district court's sanctions award should be affirmed.

CONCLUSION

Based on the foregoing, the judgment should be affirmed.

DATED: November 6, 2024

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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Kendra J. Hall
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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Appellee Condon-Johnson & Associates, Inc. hereby advises the Court that it is not aware of any related cases pending in this Court.

DATED: November 6, 2024

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellee's Brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,997 words.

DATED: November 6, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using appellate CM/ECF system on November 6, 2024.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

DATED: November 6, 2024

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