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

APPELLANTS' OPENING BRIEF

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DATED: September 4, 2024 **LAW OFFICES OF PATRICK D. WEBB**

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Summary of Argument

Plaintiff-Appellants, Walter Rosales et al.,[1] joined by their counsel, appeal from a district court order and amended judgment, 1-ER2, and 4, denying their motion to remand, granting Defendant-Appellee, The Roman Catholic Bishop of San Diego, a Corporation Sole (the Bishop), and Defendant-Appellee, Condon-Johnson & Associates, Inc. (CJA), a geotechnical subcontractor, separate motions to dismiss and $203,379.15 in sanctions, based on an alleged failure and inability to join the Jamul Indian Village (JIV), pursuant to Fed. R. of Civ. P, Rules l2(b)(7), 11, 19, 28 U.S.C. § 1927, and the district court's inherent authority.

On June 20, 2024, the Bishop filed a Notice of Suggestion of Bankruptcy and Automatic Stay of Proceedings in this Court. Dkt. 3; 2-ER19. On July 31, 2024 this Court ruled that the automatic bankruptcy stay does not apply to Plaintiff-Appellants' claims against CJA. Dkt. 14.1.

This appeal arises from the Bishop and CJA's desecration of the Plaintiff-Appellants' families' human remains and funerary objects in the Jamul cemetery, owned and operated by the Bishop on non-federal fee simple land since 1912. The Bishop breached its fiduciary duty to prevent CJA from installing 120 soil nails in the cemetery property. These soil nails are made of steel, 35 feet long and 4 inches

[1] The Plaintiff-Appellants are individually listed in Excerpts of Record, 2-ER170 and 6-ER1141.

in diameter and were drilled into the cemetery property, where 20,000 cubic yards of soil was removed, thereby desecrating the families' remains, in order to support the foundation for an adjacent hotel. The Bishop attempted to avoid liability therefore by fraudulently transferring the cemetery to the JIV for no consideration. First Amended Complaint (FAC) 6-ER1141, ¶¶1-9, 18-29, 30-43; Second Amended Complaint (SAC), 2-ER170, ¶¶1-9, 18-28, 30-42; 4-ER724-727.

Plaintiff-Appellants filed this action alleging statutory and common law negligence and conversion causes of action under California law, against both the Bishop and CJA. 6-ER1141, ¶¶18-29, 44-49, and 2-ER170, ¶¶ 18-28, 44-62. They also filed a breach of fiduciary duty and fraudulent transfer claim against the Bishop, pursuant to the common law and Civil Code §3439 et seq. 6-ER1141, ¶¶30-43, and 2-ER170. ¶¶29-42.

Once the soil nails were installed, on May 23, 2024, the SAC was filed to show that the FAC, though it sought to set aside the deed as to the Bishop, did not seek to set aside the deed as to the JIV, and it could be further amended to seek damages, without seeking any remedy challenging JIV's deed/title to, or enjoining the use of, the cemetery, or affecting any other interest of the JIV, contrary to the court's finding. 1-ER10; 2-ER170-88. These claims are not futile, nor in bad faith or for an improper purpose, are objectively reasonable, not legally baseless, and do not affect any interest of the JIV.

Both the FAC and the SAC are based upon the reasonable inquiry by at least two competent attorney experts, Patrick Webb and Paul Laurin, who formed an undisputed reasonable belief that their claims are well grounded in fact and are warranted by existing law and a good faith argument for the extension, modification or reversal of existing law. Nor do these claims make the third party JIV an indispensable party to this action, as a matter of law; all of which precludes dismissal without a jury trial. 6-ER1141-612, 2-ER166-67, ¶¶2-3, 170-88, 306-313, 3-ER-474-001-018, ¶¶32-33, 524-35. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000); *Winnemem Wintu v. USDOI*, 725 F.Supp.2d 1119, 1131(E.D. Cal. 2010). It is beyond doubt that the Plaintiff-Appellants allege a set of facially plausible facts supporting claims for damages. *Bell Atlantic Corp. v. Twombly* (*Twombly*), 550 U.S. 544, 555, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009). The FAC/SAC, along with the expert attorneys declarations, ER2-166-67, ¶¶2-3, 306-13, 3-ER-474-001-018, 525-30, raise more than fairly debatable triable issues of material fact as to the Appellees' liability under the Health & Safety Code (HSC), Public Resources Code (PRC), Penal and Civil Codes, particularly §3439 et seq., when the Bishop fraudulently transferred the cemetery in an attempt to avoid liability for the subsequent desecration on the property.

Despite the fact that the amended complaints raise no federal questions, nor diversity among the parties, CJA wrongfully refused to stipulate to remand the action

to the Superior Court. 5-ER986. This was rank forum shopping to avoid assignment of the action to Superior Court Judge Eddie Sturgeon, who was assigned 582 other identical claims that the Bishop has violated Civil C. §3439.04, in the second round of sex abuse cases in San Diego. Compare the complaints in SDSC Case Nos. 23-7391, 5-ER1060-86, with Case No. 23-14849, in 5-ER1048 at 1088-1108. Contrary to CJA's erroneous claim, there is no difference between the Bishop's fraudulent attempt to avoid liability to the Plaintiffs in the sex abuse cases, and the attempt to avoid liability to Plaintiff-Appellants here, all of which made the Bishop a debtor to both groups of Plaintiffs under Civil C. §3439.04. 3-ER474-018, ¶¶11-16, 3-ER537-39, ¶¶34-39. 43. CJA also used removal to prevent Judge Sturgeon from executing his stated inclination to rule on the requested injunction, while the soil nails were being installed. 3-ER474-11; 5-ER1048-53.

Plaintiff-Appellants' purely state law claims should therefore be remanded, pursuant to 28 U.S.C. §§1447(c), and 1367, since there is no original federal question nor diversity jurisdiction allowing the court to exercise supplemental jurisdiction over such state law claims, and since no remedies are sought on federal land, or affecting any interest of the JIV.

Where there is no original federal jurisdiction over the FAC, the District Court has no jurisdiction to exercise discretion or retain jurisdiction over supplemental state law claims it never acquired, and "the case shall be remanded." 28 U.S.C.

§1447, Sections 1 and 2 *infra*.

The District Court's dismissal and sanctions must therefore be reversed, because the JIV is neither a required, nor an indispensable, party to Plaintiff-Appellants' state law damage claims against the Bishop and CJA, as a matter of law, and contrary to the District Court's erroneous application of whatever is left of the "remand futility doctrine." The Plaintiff-Appellants make no claim against any interest of the JIV, and seek neither damages, nor title to the cemetery, from the JIV. Therefore, the Bishop and CJA can be ordered to pay Plaintiff-Appellants' damages for their independent liability without affecting any lawful interest of the JIV. "Since Plaintiff does not seek damages against the grantee [here the JIV], nor to foreclose on the property, the grantee has no direct interest in the fraudulent conveyance," as a matter of law. *U.S. v. Scherping*, 1992 U.S. Dist. LEXIS 8954, *9-10 (D. Minn.1992); 2-ER309-313, ¶¶8-12; 3-ER474-01-018, ¶¶32-33, 525-530, and Section 3 *infra*.

As set forth in both the FAC, 6-ER1141-61, and SAC, 2-ER170-88, there is nothing frivolous or in bad faith in Plaintiff-Appellants' claims that the Bishop and CJA breached their continuing fiduciary duties to protect the families' remains from unlawful desecration without notice, consent and just compensation, in violation of HSC §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011-12, 8015-16, 8102, 8301.5, 8553, 8558, 8560, 8580, 103060, PRC §§5097.9-5097.99, the Penal Code

§§487 and 622 ½, the California Const., Article I, §§1,3, 4, 7, 13, 19, 24 and 31. and California common law, pursuant to the Bishop's obligations under Cal. Corp. C. §10007, the Bishop's Articles of Incorporation as amended, Canon Law, and the Rules and Regulations of the Roman Catholic Church. 2-ER166-67, ¶¶2-3, 170-81, 306-13, 3-ER474-014, ¶32-33, 534-35, and 5-ER1017-18, 6-ER1141-61.

Moreover, there is nothing frivolous or in bad faith in Plaintiff-Appellants' claims that the Bishop is independently liable for breach of its fiduciary duties and fraudulent transfer of the cemetery to the JIV without consideration, particularly where, as here, the cemetery property was allowed to be used for non-cemetery purposes, without the required permits, consultation, and pre-transfer hearing before the Superior Court, which permits and hearings were not obtained in violation of the above referenced Cal. Constitution, statutes and common law. Sections 3-5 *infra*.

Hence, contrary to the District Court's erroneous ruling, the JIV has no direct legal interest in Plaintiff-Appellants' personal injury and property claims against the Bishop and CJA, who remain independently liable for their own negligent desecration of the families' remains. Moreover, there is no evidence that the JIV's hotel project required the desecration of the remains in order to be completed, which was never denied by CJA. 2-ER193-94, 199, 3-ER391, 459. Compliance with the law would have protected the remains and would have had no effect on completion of the JIV's hotel. Since Plaintiff-Appellants' amended action does not deprive JIV

of any right, title or interest whatsoever, JIV is not an indispensable party. It has not been, and need not be, sued, and has no legal interest in the Bishop's fraudulent attempt to avoid personal liablity to Plaintiff-Appellants for desecration on the property. Therefore, the underlying dismissal and sanction award must be reversed, and the action remanded to Superior Court. Sections 3-5, *infra*.

Jurisdiction and Statement of the Case

Plaintiff-Appellants' FAC was filed in both Superior Court before the notice of removal became effective, 5-ER896, fn. 1, and the District Court on May 18, 2023, 6-ER1141-61, pursuant to Rule 15(a)(1). CJA erroneously refused to stipulate to remand Plaintiff-Appellants' FAC, despite the lack of a federal question or diversity among the parties, and erroneously claimed that the court had supplemental jurisdiction to dismiss Plaintiff-Appellants' state law claims under 28 U.S.C. §1367. 6-ER1164. The District Court erroneously dismissed the action on February 29, 2024, pursuant to Fed. R. Civ. P., Rules 12(b)7 and 19, finding Plaintiff-Appellants' claims to be frivolous and a bad faith attempt to harm the JIV, who the Court erroneously found to be an absent indispensable party. 1-ER4. The District Court found all other pending motions to be moot. 1-ER2, 4-16.

The SAC, was filed in support of Plaintiff-Appellants' motion to amend the judgment on May 23, 2024, 2-ER170, pursuant to Fed. R. Civ. P. 15(a)'s presumption and extreme liberality in favor of granting leave to amend to "facilitate a decision on the merits;" *Foman v. Davis,* 371 U.S. 178, 182 (1962), finding denial of leave to amend without specifying a reason an abuse of discretion; *U.S. v. Webb,* 655 F.2d 977, 979 (9th Cir. 1981); particularly, where, as here, there are changed circumstances since the soil nails have been installed. The motion was erroneously denied on May 31, 2024, for failing to have met and conferred. 7-ER1393, even

though motions "after trial" were excepted from Chamber Rule 5's meet and confer requirement. 7-ER1375-77; *Goodson v. Perez-Pantoja*, No. 20-16468, *4 (9th Cir. 2021), finding Rule 59-60 motions are post-trial motions.

The dismissal was timely appealed on June 13, 2024, per 28 U.S.C. §1291. 6-ER1212.

Issues Presented

The claims at issue are:

1. Whether the district court had jurisdiction with which to dismiss Plaintiff-Appellants' state law claims without a trial;

2. Whether the JIV is an indispensable party to Plaintiff-Appellants' claims against the Bishop and CJA; and

3. Whether Plaintiff-Appellants and their counsel should be sanctioned for allegedly filing frivolous claims in bad faith.

Standard of Review

Dismissal of an action pursuant to Fed. R. Civ. Proc., Rules 12(b)(7) and 19, is reviewed for an abuse of discretion, while the underlying legal conclusions are reviewed *de novo*. *Salt River Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012). Whether certain conduct is sanctionable is a legal issue reviewed *de novo*. *Hudson v. Moore Business Forms* (*Hudson*), 835 F.2d 1156, 1159 (9th Cir. 1988).

"A district court necessarily abuses its discretion when its ruling is based on an erroneous view of the law or on an erroneous assessment of the evidence," particularly determining the legal sufficiency of state causes of action for desecration and fraudulent transfer. *Cooter Gell v. Hartmarx*, 496 U.S. 384, 405, (1990); *Fox v. Vice*, 563 U.S. 826, 839 (2011); *Millar v. BART*, 236 F. Supp. 2d 1110, 1114 (N.D. Cal. 2002).

Where, as here, there are intertwined jurisdictional and substantive disputed facts coextensive with the merits on appeal, they "must be resolved at trial by the trier of fact," and cannot be decided on a motion to dismiss. *Rivas v. Napolitano*, 714 F.3d 1108, 1113 (9th Cir. 2011); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987).

Dismissal is so harsh a penalty it should not be imposed except in the most extreme cases. *Raiford v. Pounds*, 640 F.2d 944, 945 (9th Cir. 1981). This is not one of those cases.

Statement of Facts and Parties

A. Desecration of Plaintiff-Appellants' Families' Remains

This action arises from the desecration of the Plaintiff-Appellants' families' human remains interred at the Jamul cemetery, a .84 acre site known as parcel 597-080-06, which was dedicated as a cemetery and has been owned and operated by the Bishop since 1912, and has never been part of any federal reservation or trust land. 2-ER170, 174, 5-ER984, 986, 988-995, 1017-18. This recorded dedication of the cemetery to cemetery purposes, pursuant to HSC §§8551-8558, is not affected by any subsequent conveyance or nonuse, without approval of the Superior Court as required by HSC §§8550-8561, which has not occurred. 5-ER981-82, ¶6.

Plaintiff-Appellants, as next of kin, lineal descendants, near relatives, and personal representatives of more than 100 of their family members that have lived, died and been interred at the cemetery for 170 years, own, control and have standing to sue for damages and injuries-in-fact to their families' human remains and funerary objects, pursuant to California common law, and HSC §§7001, 7100; PRC §§5097.9-5097.994, and Penal C. §§487 and 622 ½, which standing is not in the JIV. 2-ER170, 173-74, ¶9; *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992)*; Christensen v. Sup. Ct.*(*Christensen*), 54 Cal. 3d 868, 893-94, 896-97 (1991)*; Thorpe v. Borough of Jim Thorpe* (*Thorpe*), 2011 U.S. Dist. Lexis 135242, *8-10 (M.D. Pa. 2011); *Sinai Mem. Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 197.

The families' remains and funerary objects include grave goods, cultural patrimony, and sacred objects, in burial sites below, on and above, the cemetery property, as a part of the death rites of their culture, as defined in HSC §§7001, 7004, 7009, 7013, and 8012, and PRC §§5097-5097.994. These burial sites include full bodily incubations and the deposit of cremated remains, including the decedents' hair, clothing and personal property, according to their long held religious beliefs. 2-ER171, as corroborated by judicial notice of the Cal. Dept. Of Health Permits for Disposition of Human Remains, and County Death Certificates. 5-ER1010-15, under Fed. R. Evid., Rule 201.

B. The Bishop and CJA's Breach of Fiduciary and Trust Duties to Prevent the Desecration of the Families' Remains

This is not the first time the interment of human remains have had to be protected from subsequent development. However, as with most things, there is a right way, and a wrong way, in which to protect those in a cemetery.

Here, the Bishop and CJA have negligently breached their statutory and fiduciary trustees' duties to protect the families' remains from unlawful conversion and desecration, without notice, consent, the required permits, consultation, pre-deprivation hearings, repatriation, reinterment with dignity, cultural tradition, religious rites, and just compensation due Plaintiff-Appellants in violation of HSC §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011-12, 8015-16, 8102, 8301.5,

8553,8558, 8560, 8580, 103060, PRC §§5097.9-5097.99, the Cal. Penal Code §§487 and 622 ½, Civil Code §3439 et seq., and California common law, which constitute *per se* negligence under Evid. C. §669 and Rest. 2nd of Torts, §§158-74, 188, 211, 214-15,870-71. 2-ER172-73, ¶¶6-8, and cases cited therein; 2-ER 171, 175-84, ¶¶17-28, 29-42, 43-48.

Neither the Bishop, nor CJA have sovereign immunity for having contracted with the JIV. *Lewis v. Clarke*, 137 S. Ct.1285, 1292 (2017); *Maxwell v. Co. of San Diego*, 708 F.3d 1075, 1087-89 (9th Cir. 2013); 3-ER390-92.

Appellees' statutory and common law violations have unlawfully denied the Plaintiff-Appellants:' (1) ownership and control of their families' remains; (2) free exercise of their religious burial rites, which do not allow their dead to be desecrated once interred in violation of Cal. Const., Art. I, §§1,3, 4, 7, 13, 19, 24, 31, and includes the rights to maintain the cemetery and grave sites, reasonable access to it, visitation to pay respect for those interred there, and the right to be buried there; and (3) their personal property rights in their families' remains, when they were illegally desecrated, without due process, notice, consent, or just compensation. 2-ER175-79, ¶18-28, 6-ER1141-61.

The Bishop and CJA have thereby proximately caused the illegal conversion, desecration and removal of the families' human remains, without Plaintiff-Appellants' knowledge and consent, and interference with the free exercise of their

religious burial rites, thereby causing severe personal bodily injury, including severe emotional distress, which the California Supreme Court finds akin to torture of the living, *Christensen* at 895, and irreparable general and consequential damages to their personal property in their remains, in an amount subject to proof at trial, but believed to be at least as much as the $195.5 million in settlements paid by Service Corp. Intl., owner/operator of the cemeteries in Menorah Gardens, Fla. and Mission Hills, Cal., 5-ER985, ¶28, and the civil penalties of $6 million as a result of the installation of 120 soil nails, per PRC §5097.994. 2-ER179, §28, 182-83, ¶40-41, 184-85, ¶¶47-48, 985, ¶28, 6-ER1141-61.

On September 7, 2017, the Bishop unlawfully conveyed the cemetery to the JIV in violation of Civil C.§3439.04(a)(1), for no consideration, in an attempt to avoid liability for any subsequent desecration of the families' remains on the cemetery; just as has been alleged to have been done by the Bishop in over 582 other real property transfers in the second round of San Diego sex abuse cases, 3-ER474-007-009, ¶¶11-16, 3-ER537-40, ¶¶34-39. 43, and 5-ER1060-86, and thereby entitling Plaintiff-Appellants to a similar amount of damages against the Bishop as a result of the fraudulent conveyance of the cemetery in an attempt to avoid this liability under both Civil C. §3439 et seq. and common law. 2-ER182-83, ¶¶40-43, 6-ER1141-61.

These facts are admitted since Appellees have filed no answer denying them.

Fed. R. Civ. P., Rule 8(b)(6). These facts are also presumed to be true while facing Appellees' motions to dismiss. *Twombly*, at 570; *Newman v. Sathyavaglswaran* (*Newman*), 287 F.3d 786, 788 (9th Cir. 2002).

Argument

1. Plaintiff-Appellants' Amended Complaint supercedes all prior complaints, raises no federal question or diversity jurisdiction, and must therefore be remanded.

Only actions pleading facts within original federal jurisdiction may stay removed to federal court. Where, as here, there is no diversity of citizenship, an amended action can only stay removed, if a federal question is presented on the face of the amended complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Provincial Gov't of Marinduque v. Placer Dome*, 582 F.3d 1083, 1091 (9th Cir. 2009). "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, at 392.

Jurisdiction may not be established on a theory that the plaintiff has not pled in the complaint. *Merrell Dow v. Thompson*, 478 U.S. 804, 809, n. 6 (1986). The allegations of the complaint determine whether it is removable. *Great North R. Co. v. Alexander*, 246 U.S. 276, 282 (1918); *Caterpillar* at 392, n. 7. Where the plaintiff "can maintain her claims on both state and federal grounds, she may ignore the federal question, assert only state claims, and defeat removal." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996).

There is a "strong presumption" against removal jurisdiction, and the defendant always has the burden to establish removal is proper. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Duncan* at 1485. The removal statutes are strictly construed against removal. *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir.1988); *Takeda v. N.W. Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir.1985). Federal jurisdiction must be rejected if there is any doubt as to whether the amended claims are within original federal jurisdiction. *Matheson v. Progressive Ins.,* 319 F.3d 1089, 1090 (9th Cir. 2003).

As in *Caterpillar*, here there is no diversity, and the FAC avoids federal jurisdiction by exclusive reliance on state law, having deleted all federal question claims, and superceding all prior complaints, when it was filed as a matter of course in district court pursuant to Rule 15(a)(1). 5-ER896, fn. 1, and 6-ER1141-1161. "The original complaint...[is] thereafter non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967).

Contrary to CJA's misrepresentation, 6-ER1166, the FAC is certainly not "nearly identical" to the original state action, having deleted, as was Plaintiff-Appellants' absolute right, all federal question claims, pursuant to Rule 41. Compare ER1088-1108, with 6-ER1141-61 and 2-ER170-88.

Here, Plaintiff-Appellants had every right to file both federal and state claims in state court to see if either defendant would attempt to remove the case, and then

dismiss their federal claims, and have their case remanded to state court. *Big Bear Lodging Assoc.v. Snow Summit*, 182 F.3d 1096, 1106, n.9 (9th Cir. 1999). "[T]he plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). "There is nothing 'inherently invidious' or in 'bad faith' about using deliberate tactics to defeat federal jurisdiction;" nor is there anything "wrong with plaintiffs having a preference for state court." *Heacock v. Rolling Frito-Lay Sales*, No. 16-0829, at *7 (W.D. Wash. 2016).

"Plaintiff's preference for state court is no less honorable than Defendant's for federal court." *Oettinger v. Home Depot*, 2009 WL 2136764, *7 (N.D. Cal. 2009); *Andrade v. Ford Motor Co.*, Case No. 22-cv-00291, at *8 (S.D. Cal. 2023), granting motion to remand."As master of his complaint, plaintiff is entitled to use deliberate tactics to defeat federal jurisdiction." *Weber v. Ritz-Carlton*, No. 18-03351, at *5 (N.D. Cal. 2018).

"Plaintiff has the option to voluntarily dismiss all federal law claims [as here] and have this case remanded to the...Superior Court [and] amend the complaint..." *Smith v. Allison*,No. 22-cv-0306, at *6-*7 (E.D. Cal. 2022); *Ramotnik v. Fisher*, 568 F. Supp. 2d 598, 602-03 (D. Md. 2008), amending, as here, to dismiss all federal claims to destroy federal jurisdiction is not bad faith.

> [I]t is not bad faith for a plaintiff to bring both State and federal claims in State court and then, upon removal, seek dismissal of the federal claims and remand to State court. Such a remand is the risk that a

> removing defendant takes...Plaintiff's prompt correction illustrates a good faith attempt to remedy the error and prevent this Court from adjudicating a case that does not belong in federal court. *Ramotnik*, at 603.

See also, *Millar v. BART*, 236 F. Supp. 2d 1110, 1114 (N.D. Cal. 2002), granting remand based upon judicial economy, comity, and timeliness of the filing of the FAC, "since requiring plaintiff to litigate in federal court a case that would be based entirely on state law would: (1) deprive plaintiff of his chosen forum, and (2) deny plaintiff the right to have California courts decide the issues of California law that govern his claims," since federal courts are not considered "experts in the law of that state," particularly concerning desecration and fraudulent transfers; *Hanover Ins.Co. v. Fremont Bank*, 68 F. Supp. 3d 1085, 1110 (N.D. Cal. 2014); *Baldwin v. Safeway*, 1999 WL 129539 (N.D. Cal. 1999), finding §1447(c) requires remand following dismissal of all federal claims after removal. Here, there is nothing "federal" about Plaintiff-Appellants' purely state law claims. This is particularly true, since there is no federal preemption of California's HSC, PRC, Penal Code and common law protection of the families' remains, since federal law provides a specific savings clause for all of Plaintiffs' state law claims. NAGPRA, 25 U.S.C. §3009, provides:

> Nothing in this chapter shall be construed to- (3) deny or otherwise affect access to any court; (4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or (5) limit the application of any

State... law pertaining to theft or stolen property."

See for e.g., *Koniag, Inc. v. Andrew Airways*, No. 13-cv-00051, *6-7, *10 (D. Alaska 2014), finding no federal subject matter jurisdiction, where neither ANILCA or NAGPRA preempted Plaintiff's state court claims for trespass, ejectment and quiet title, based upon NAGPRA's savings clause; *Na Iwi v. Dalton*, 894 F. Supp. 1397, 1405 (D. Haw. 1995); *Kickapoo Traditional Tribe v. Chacon*, 46 F. Supp. 2d 644, 651 (W.D. Tex. 1999), finding NAGPRA's savings clause, 25 U.S.C. §3009(5), "'does not limit the application of any State ...law," and also finding that the tribe had no standing concerning desecration of remains owned by lineal descendants, as here; *Romero v. Intern. Term. Co.*, 358 U.S. 354, 363 (1959); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001); both finding no exclusive federal jurisdiction because of the savings clause in 28 U.S. C. §1333(1).

"To allow removal based simply on [the fact that federal claims could have been, but weren't pled] would defeat the plaintiff's choice of forum protected by the savings clause." and "deny the plaintiff the exercise of his option of remedies," and forum. *Zoila-Ortego v. B.J. Titan Services*, 751 F.Supp. 633, 636 (E.D. La. 1990); *Kemp v. Los Angeles,* 172 F.Supp. 66, 68 (S.D. Cal. 1959).

Therefore, a defendant is not permitted to remove an action based upon NAGPRA claims that were not pled in the FAC, because it would defeat the plaintiffs' right to choose the state court forum for their state law remedies under the

saving clause of 25 U.S.C. §3009. *Millar* at 1113-14.

Nor, contrary to the district court's ruling, 1-ER8-9, do Plaintiff-Appellants' claims arise under the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq., which has nothing to do with Plaintiffs' families' remains, and under which Plaintiffs make no claim in the FAC/SAC. *Co. of Madera v. Picayune Rancheria*, 467 F. Supp. 2d 993, 996-97 (E.D. Cal. 2006), holds on very similar facts, "the Court lacks jurisdiction because the face of the complaint shows that no federal causes of action are pled, and... that tribal immunity is a defense and is no basis for finding a federal question."

> [S]ince this case involves the construction of a hotel and a spa and application of local land use and health laws, there is no authority that suggests that the IGRA is so broad as to encompass this case: this case is simply about the construction of a hotel...this Court has no jurisdiction. Since the Court has no subject matter jurisdiction over this case, the Court must remand. *Co. of Madera*, 996-97...
>
> The complaint is not a federal cause of action. Instead, the only claim is a nuisance abatement claim based on the failure to obtain a demolition permit and a grading permit as required by the Madera County Code....State law claims that arise from duties that are independent of gaming are potentially valid claims. *Id*., at 1001.
>
> The duty to obtain these permits appears to arise from the performance of construction activities and not from gaming...The claim does not attempt to regulate the gambling or the games being played at the casino in any way. [There is inadequate description of] the location or the connection of the hotel to the casino or how construction of the hotel is a gaming activity. Given the strict construction against removal, and that doubts over the propriety of removal lead to remand...the Tribe has not adequately shown that the nuisance abatement action is

> "completely preempted" through the IGRA. Thus, it appears that the court lacks subject matter jurisdiction and, as required, this Court must remand this case to state court pursuant to 28 U.S.C. § 1447(c). *Id*., at 1003.

Therefore, since the FAC deletes all prior federal claims, supercedes all prior complaints, raises no federal questions, and the parties are not diverse, Plaintiffs remain entitled to the forum of their choice in Superior Court for their exclusive reliance on state law claims and the FAC must be remanded, per 28 U.S.C. §1447., which provides: where "the district court lacks subject matter jurisdiction, the case shall be remanded."

2. Remand is Mandatory and there is No Discretion to Exercise Supplemental Jurisdiction when there is no Federal Question or Diversity Jurisdiction.

Remand of Plaintiff-Appellants' purely state law claims is mandatory pursuant to 28 U.S.C. §§1367 and 1447(c). Where, as here, the FAC/SAC state no federal question or diversity jurisdiction, the court has no original jurisdiction with which to exercise discretion over supplemental state law claims. 28 U,.S.C. §1367 provides that the court must have original jurisdiction before it shall have supplemental jurisdiction over any related state court claims:

> ...in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. *Id*.

28 U.S.C. §1447 further provides for mandatory remand of any action where there is no original jurisdiction: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

Contrary to the district court's order, 1-ER7-9, without original federal jurisdiction under 28 U.S.C. §1367, the court simply has no discretion to exercise supplemental jurisdiction it never acquired, whether there is any remaining life in the *Bell* remand futility doctrine or not. The Supreme Court has declined to apply a futility exception to the remand rule, and noted "the literal words of §1447(c).. on their face, give no discretion to dismiss rather than remand an action." *Int'l. Primate Prot. Lg.v. Admin. of Tulane*, 500 U.S. 72, 89 (1991). Every circuit to have addressed the doctrine, but the Ninth, has now rejected it, finding that remand is mandatory, when, as here, there is no original federal jurisdiction. *Spivey v. Chitimacha Tribe of La.,* 79 F.4th 444, 448-49 (5th Cir. 2023).

The U.S. Supreme Court further holds: "[T]he Court lacks jurisdiction because the face of the [operative] complaint shows that no federal causes of action are pled, and... that tribal immunity is a defense and is no basis for finding a federal question," *Okla.Tax Comm'n v. Graham*, 489 U.S. 838, 840-42 (1989). Similarly, *Hillman v. Pacificorp*, No. 21-cv-00848, *16-18 (E.D. Cal. 2022), and *Lamar Cent. Outdoor v. Mike*, No. 22-00885, *3 (C.D. Cal. 2022), ECF #6-1, 27-28/33, granted remand because a tribe's fee simple property under state law [as here] does not establish

federal jurisdiction, since, as a matter of law, such "fee simple title to the parcels in question is a creature of state law not subject to adjudication" in federal court, and that any purported defense based on tribal immunity does not create a federal question. *Okla. Tax Comm'n,* at 840-42.

"Federal and state courts frequently have concurrent jurisdiction over a given case." *Polo v. Innoventions Intl.*833, F.3d 1193, 1196 (9th Cir. 2016). When this is so, a plaintiff may choose the state court system, and avoid removal by stating none of the concurrent federal claims. *Polo* at 1196 citing *Caterpillar* at 392; *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1988).

Removal is permitted only "if the federal court could have exercised original jurisdiction in the first instance. 28 U.S.C. § 1441(a), (b)." *Polo* at 1196. But where the amended complaint states no original federal question or diversity, the case must be remanded to state court. 28 U.S.C. §1447(c); *Polo* at 1196, "In an ordinary removal case, '[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.' §1447(c)....rather than dismiss[ed]. *Bruns v. Nat'l Credit Union Admin.*(*Bruns*), 122 F.3d 1251, 1257-58 (9th Cir. 1997). Remand is the correct remedy because a failure of federal subject-matter jurisdiction means only that the federal courts have no power to adjudicate the matter." "What the statute requires is remand '[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction.'" *Polo* at 1196.

"Section 1447(c) is mandatory, not discretionary," "even if futile." *Bruns* at 1257-58.

Moreover, the Ninth Circuit has further held that the District Court's reliance on the futility doctrine in *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir.1991) is misplaced, since "the *Bell* rule has been questioned, and may no longer be good law." *Polo* at 1197, citing *Int'l. Primate, supra* at 89, and *Bruns*, at 1257-58, citing *Roach*, *infra* at 49, six years after *Bell*, all declining to find a futility exception to the remand rule.

"In the wake of *Int'l. Primate*, a number of other circuits have expressly rejected the futility doctrine. *Hill v. Vanderbilt Capital Advisors*, 702 F.3d 1220, 1225–26 (10th Cir.2012) (collecting cases[2])." *Polo* at 1198. Following the Supreme Court's holding: "our court has held that '[t]he plain language of § 1447(c) gives no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction.' *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 557–58 (10th Cir.2000). Other circuits agree that remand under § 1447(c) is mandatory."[3] *Hill* at 1226. Most recently, *Spivey v. Chitimacha Tribe of La.,* 79

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[2] *Dempsey v. JP Morgan*, 272 Fed.Appx. 499, 503–04 (7th Cir.2008); *Roberts v. BJC Health System*, 452 F.3d 737 (8th Cir.2006); *Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 496 (6th Cir.1999); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 540 (3d Cir.1994); *Maine Ass'n v. Comm'r, Maine DHS*, 876 F.2d 1051, 1053–54 (1st Cir.1989).

[3] Citing *Coyne*, 183 F.3d at 496;*Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir.1999); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 214 (3d Cir.1997); *Roach v. W. Va. Regional Jail*, 74 F.3d 46, 48–49 (4th Cir.

F.4th 444, 448 (5th Cir. 2023), held "in accordance with the statute's plain text and the great weight of authority from across the country, that §1447(c) means what it says, admits of no exceptions, and requires remand even when the district court thinks it futile." "Without jurisdiction the court cannot proceed at all in any cause," and certainly cannot dismiss this action with prejudice. *Id.,* 448-49, citing *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

Here, as in the more recent *Polo* and *Bruns*, and contrary to the District Court's finding, "remand is not futile under the *Bell* standard," because as set forth more particularly in the next section, a California state court would not dismiss this action, since JIV is not an indispensable party, particularly under Civil Code §3439 et seq., since Plaintiff-Appellants damage remedies make no claim affecting any interest of the JIV, including title to the cemetery, and since the Bishop and CJA remain liable for their desecration of remains, even where title remains in the JIV.

Thus, the District Court had no discretion to dismiss Plaintiff-Appellants' supplemental state court claims under 28 U.S.C. §1367, and remand remains mandatory under 28 U.S.C. §1447(c). *Polo*, 1197; *Bruns*, 1257-58. Since there is no authority establishing futility of Appellants' claims with "absolute certainty," particularly where the FAC/SAC does not attempt to foreclose on the property or set

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1996); *Smith v. Wis. Dep't of Agric.*, 23 F.3d 1134, 1140 (7th Cir.1994).

the deed aside as to the JIV, the Court's order should be reversed and the case remanded to state court. *Id*.

3. JIV is neither a required, nor indispensable, party to Appellants' claims.

The district court's order, 1-ER4, must be reversed, because the court fails to identify any interest of the JIV that is affected by Plaintiff-Appellants' amended damage claims that do not seek to enjoin any interest of the JIV. Hence, the JIV is neither a required, nor indispensable party to Plaintiff-Appellants' state law damage claims against the Bishop and CJA, which seek no remedy affecting any legal interest of the JIV, as a matter of law.

Neither the FAC, nor the SAC, deprive the JIV of title to, nor challenge the JIV's ownership or use of, the cemetery. Contrary to the court's erroneous finding, 1-ER-10, 7-ER1371-72, neither "seek to set aside or undo" the deed to the JIV, and only seek to invalidate the transfer as between the Bishop and the Plaintiff-Appellants to allow recovery of the full value of the property from the Bishop, without foreclosing on the cemetery. 6-ER1141-61; 2-ER170-188. Nor can they enjoin any construction now that the soil nails have been installed, and can't, as a practical matter, be removed without further desecration. The FAC and SAC damages remedy will not affect title, or any other interest of the JIV, since it is a mere third party grantee of the Bishop's fraudulent transfer of the cemetery for no consideration to avoid personal liability for the desecration of the families on the

premises.

Plaintiff-Appellants make no claim to invalidate any ordinance, rule, regulation, contract, Compact, or property right of JIV. Nor do they seek any remedy affecting any interest of the JIV, particularly since, as a matter of law, the JIV has no claim to, right, title, interest in, or control over, the families' remains, nor do they make any such claim, because the tribe has no legal interest where the lineal descendant Plaintiff-Appellants are still living. 2-ER170, ¶¶1,2, 6-13; HSC §§7001-14, 7050.5, 7100, 8011, 8012; PRC §§5097.9-5097.994, and Penal C. §§487 and 622 ½; *Christensen*, at 893-94, 896-97; *White v. Univ. of Cal.*, 765 F.3d 1010, 1016 (9th Cir. 2014); *Newman*, at 798; *Thorpe*, at*10-11, denying dismissal because the tribe was not an indispensable party, since it had no interest in the remains, and, as here, irrevocably waived any claim to the families' remains prior to their disposition; *Bonnichsen v. U.S. Army*, 969 F.Supp.614, 622, fn. 6, 623-24 (D. Or. 1997); *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. (2004).

Plaintiff-Appellants make no claim as to the recognition or authority of the JIV, nor any claim that the casino is not built on Indian land; nor requiring any decision as to whether the JIV has title to, exercises governmental power over, or claims any interest in, any real property, unlike the prior actions referenced in the trial court's order. 1-ER4; 2-ER170, ¶¶1,2, 6-13. In fact, the trial court's order totally ignores the JIV's lack of legal interest in Plaintiff-Appellants' personal injury

and personal property claims, and the JIV's waiver of any claim as to disposition of Plaintiff-Appellants' families' remains. 1-ER6-11.

The Bishop remains liable for damages resulting from the fraudulent transfer of the cemetery to the JIV with the actual intent to hinder, delay, or defraud Plaintiff-Appellant creditors of the Bishop. Such intent is established, as a matter of law, on the face of the recorded deed for no consideration, 5-ER997, where, the Bishop did not receive a reasonably equivalent value in exchange for the transfer, while the Bishop was engaged or was about to engage in business for which its remaining assets were unreasonably small in relation to the business, and/or while the Bishop intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due, as it now claims in its Bankruptcy proceeding; all of which is in violation of the Uniform Voidable Transaction Act (UVTA), Civil Code §3439.04(a)(1) and (2), (b)(4), (5), (7), (8), (9), (10), and California's fraudulent conveyance common law. 2-ER181-83, ¶¶36-42; expert Laurin's Decl. 2-ER306-13.

The UVTA prevents a debtor from transferring its property for no consideration to avoid liability, just as a property owner is not permitted to transfer a polluted parcel to an immune government third party to avoid liability for the pollution on its property. *Cadillac Fairview v. United States*, 41 F.3d 562, 565 (9th Cir. 1994), denying summary judgment to rubber manufacturers who had "arranged

to transfer contaminated styrene to Dow...that led to the release of the hazardous substances;" *Lick Mill Creek Apts. v. Chicago Title*, 231 Cal.App.3d 1654, 1663 (1991), "any transfer of contaminated land carries with it the responsibility for cleanup costs."

California law holds that the Bishop's fraudulent transfer will be set aside as to the Bishop's creditors only (and not as to the JIV), where, as here, it was recorded without consideration on its face to hinder, delay and avoid the Bishop's personal liability to the creditors for desecration on its property under Civil Code §3439 et seq. "It is conceded that if the deed[] in question w[as] made without consideration [as here] and that thereafter the [Grantor Bishop] became insolvent, the presumption that said deed w[as] made with intent to hinder, delay, and defraud creditors, and particularly the plaintiff, would attach," as a matter of law. *Chichester v. Mason* (1941) 43 Cal.App.2d 577, 583; *Rousseau v. Hurtado* (1954) 122 C.A.2d 705, 716; *Trimble v. Trimble* (1933) 219 Cal. 340, 342.

"Under the UVTA, it is the transfer made...by the debtor which, when made with the requisite intent or without sufficient consideration, is wrongful and, ... [for which] the debtor is liable in damages." *Aghaian v. Minassian*, (2020) 59 Cal.App.5th 447, 458. "We are not aware of any principle of law or equity which affords immunity to a fraudulent defendant who by his deceitful practice induces a creditor to forbear his efforts to collect his debt." *Pashley v. Pacific Elec. Ry. Co.*,

25 Cal.2d 226, 234 (1944). The Bishop is simply not permitted to "profit from its own fraud." *Diaz v. United States*, 223 U.S. 442, 458 (1911); *Wiley v. County of San Diego*, 19 Cal.4th 532, 537-38 (1998); *Aviation Data v. AMEX*, 152 Cal.App.4th 1522, 1533 (2007); *Dennis v. BofA*, 34 Cal.App.2d 618, 623-24 (1939); Civil Code §1668, all contracts that "directly or indirectly exempt anyone from responsibility for his own fraud...are against the policy of the law."

Moreover, the UVTA does not require that third parties to the transfer, like the JIV, must be made parties to the action against the debtor. *Nagel v. Westen*, (2021) 59 Cal.App.5th 740, 750; Civil Code §3439.07(a)(3)(C). Civil Code §3439.08(b)(1)(A) further provides the Plaintiff-Appellant/creditors with an election of remedies to have the transfer avoided as to the debtor Bishop only, where the debtor is "the person for whose benefit the transfer was made," in the fraudulent attempt to avoid liability to the plaintiff creditors for desecration on the cemetery. Plaintiff-Appellants do not, and need not, state a claim to quiet title to the cemetery parcel, since title is irrelevant to the debtor/Bishop's personal liability under the UVTA for the fraudulent transfer, regardless whether transferred to a third party, like the JIV. *Id*.

Hence, contrary to the District Court's error at law, the JIV has no direct legal interest in Plaintiff-Appellants' personal injury claims against the Bishop and CJA, who remain independently liable for their own negligent desecration of the families'

remains, particularly since there is no evidence that the JIV's hotel project required the desecration of the remains to be completed, which was undenied by CJA. 2-ER193-94, 199, 3-ER391, 459. Appellees were required to protect the remains in the cemetery as required by the HSC, PRC, Penal Codes and common law set forth above, which would have had no effect on completion of the JIV's hotel. *Id*.

Since Plaintiff-Appellants' amended action will not deprive JIV of any right, title or interest whatsoever, JIV is not an indispensable party. It has not been, and need not be, sued, and has no legal interest in the Bishop's fraudulent attempt to avoid personal liablity to Plaintiff-Appellants for desecration on the property; and therefore the underlying dismissal and sanction award must be reversed, and the action remanded to Superior Court.

California state and federal courts have held for nearly 90 years that a third party, like JIV, is not a necessary, required or indispensable party to fraudulent transfer claims against the Bishop, particularly where, as here, no foreclosure is sought. *McGee* v. *Allen* (1936) 7 Cal.2d 468, 476; *Ahmason Bank v. Tepper* (1969) 269 CalApp.2d333, 343; *Patterson* v. *Missler* (1965) 238 Cal.App.2d 759, 770; *Diamond Heights Village v. Financial Freedom* (2011) 196 Cal.App.4th 290, 304; *Asset Sec. Corp. v. Asset Base Resources*, 252 B.R. 840, 843 (Bankr. S.D. Fla. 2000); *U.S. v. Rempel*, 2001 WL 650345, *1 (D.Alaska 2001). *Acacia Corp.Mgmt., v. United States*, No. 07-1129, *5 (E.D. Cal. 2013); *U.S. v. Scherping*, 1992 U.S. Dist. LEXIS

8954,*9-10 (D. Minn.1992).

For e.g., *Oracle v. Appleby*, Case No. 16-02090, at *18 (N.D. Cal. Sep. 22, 2016) specifically denied motions to dismiss finding third party transferees were not indispensable parties; *Tatung Co. v. Shu Tze Hsu*, 43 F. Supp. 3d 1036, 1066 (C.D. Cal. 2014) holds that a third party transferee and assignee for benefit of creditors "is not a necessary or indispensable party" "under Rule 19" to a fraudulent transfer action against the Debtor; and *Qingdao Tang-Buy Int'l v. PSA*, Case No. 15-00624, at *13 (N.D. Cal. Dec. 3, 2015), also holds that a third party lienor was not an indispensable party under Rules 12(b)(7) and 19 to a Civil Code §3439 claim against the Debtor.

> [A] third person through whom a fraudulent conveyance passes...is not a necessary party to a proceeding to set aside the conveyance [as between the creditor and the debtor]... *Asset Sec. Corp. v. Asset Base Resources*, 252 B.R. 840, 843 (Bankr. S.D. Fla. 2000)...They are not, therefore, necessary parties. *U.S. v. Rempel*, 2001 WL 650345, *1 (D.Alaska 2001). *Acacia Corp. Mgmt., LLC v.United States*, No. 07-1129, *5 (E.D. Cal. 2013).

Here, the District Court's order fails to address the fact, that the 2017 deed does not avoid the Bishop's liability for fraudulently conveying the cemetery without consideration to hinder, delay and avoid the Bishop's personal liability as to the Plaintiff-Appellants only, for the subsequent desecration on the cemetery in violation of Civil Code §3439 et seq. Nor does the order address the fact that a damages award against the Bishop for fraudulent transfer, or CJA's desecration, has no effect

on any legal interest of the JIV, including its' title, ownership or use of the property; all of which will remain unaffected.

Moreover, the Court's order fails to address the fact that Plaintiff-Appellants had every right under Civil Code §3439 et seq., not to seek any relief against the third party, JIV, and only seek objectively reasonable monetary damages against the debtor/Bishop, which does not affect title as between the debtor/Bishop and the grantee/JIV. Hence, awarding damages against the Bishop for fraudulent transfer will only find the Bishop's fraudulent transfer ineffective as to the creditor/Plaintiff-Appellants, and will have no effect on any legal interest of the JIV, and will take nothing from the JIV. As the Court's order admits, 1-ER7, Civil Code §3439.07(a)(1) "permits avoidance of the transfer" by the Plaintiff-Appellants (not anyone else) "'to the extent necessary' to satisfy the creditors' judgment" against the debtor/Bishop. Therefore such damages can be ordered without affecting any lawful interest of the JIV. "Since Plaintiff does not seek damages against the grantee [here the JIV], nor to foreclose on the property, the grantee has no direct interest in the fraudulent conveyance." *Scherping*, at *9-10.

> ...[A] judgment in favor of a creditor, in a fraudulent conveyance action...sets aside the conveyance insofar as it affects the creditor... as between the creditor and the grantee the conveyance is ineffective; but **as between the grantor and the grantee the conveyance remains in full effect**." *Ahmason Bank v. Tepper*, 269 Cal. App. 2d333, 343 (1969); *Patterson* v. *Missler* (1965) 238 Cal.App.2d 759, 770 (same); *McGee* v.*Allen,*(1936) 7 Cal.2d 468, 476) (same).(emphasis added)

For example, a plaintiff/creditor is free to exclude the grantee, as here, from the fraudulent conveyance cause of action against the debtor, since the plaintiff/creditor sought only a personal judgment against the debtor. *Diamond Heights Village*, at 304, and conceded by the Court during argument, 7-ER1364-65.[4]

Thus, the legal interest the JIV has in the cemetery parcel, will continue, and will not be disturbed, affected or changed in this action, since the JIV is not a party to, nor bound by, any judgment awarding damages in favor of the Plaintiff-Appellants on their Civil Code §3439 claims against the Bishop, for fraudulently attempting to avoid liability to them for no consideration. This is not a quiet title action, and the remedy for the Bishop's fraudulent conveyance merely finds the transfer ineffective as between the Bishop and Plaintiff-Appellants, and does not affect the transfer of title to the cemetery as between the Bishop and the JIV. 2-ER182-83, ¶¶39-41, 187-88, ¶62 and prayer; 2-ER306-13.

The District Court simply fails to acknowledge the law that JIV is neither a required nor indispensable party in this action against the Bishop and CJA for the desecration of the families' remains, where, as here, it does not have a direct interest in the subject of the claim. *UKB v. U. S.*, 480 F.3d 1318, 1326-27(Fed. Cir. 2007);

[4] Thereby distinguishing *Monterey Housing v. Pinnacle*, 2015 WESTLAW 1737691, *2(N.D. Cal. 2015), 7-ER1364, where the transferee was to be prohibited from transferring the property, which remedy is not sought here.

Kansas v. United States, 249 F.2d 1213, 1226 (10th Cir. 2001), "although the tribe had an economic interest in the suit's outcome," its economic interest was not a sufficiently direct interest to make the tribe a required party; *Karuk Tribe of Cal. v. U.S.*, 27 Fed. Cl. 429,431-32 (1993), denied intervention because "a monetary award from the [defendant] to the plaintiff" was not a direct interest of the interveners, where, as here, they were not subject to the judgment; *Antoine v. U.S.,*637 F.2d 1177, 1181-82 (8th Cir. 1981); *Ute Dist. Corp. v. Norton*, 43 Fed. Appx. 272, 279 (10th Cir. 2002), and *Alameda W&S Dist. v. Browner*, 9 F.3d 88, 90, 91 (10th Cir. 1993). finding the [tribe] does not have a 'direct, substantial, and legally protectable' interest in the underlying case.

Therefore, JIV is not a necessary, required or indispensable party under the four Rule 19(b) factors:

(1) JIV will not be prejudiced by a damages award against the Bishop and CJA for violation of state law, since JIV has no protectable interest in the tortious desecration on the cemetery;

(2) Plaintiffs' damage remedies will not directly affect any legal interest of the JIV; *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001), where, as here, "plaintiffs' action focuses solely on the propriety of [the Bishops's and CJA's action], the absence of a Tribe does not prevent the plaintiffs from receiving their requested declaratory relief;" *Kansas,* at1226; *Antoine*, at 1181-

82,"the [existing defendants] may be held liable... regardless of the presence or absence of other potential parties;"

(3) 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; and

(4) Plaintiff-Appellants have no alternative remedy other than damages against the Bishop and CJA, for the illegal desecration of the families' remains in violation of California law, now that the soil nails have been installed.

Hence, the District Court's order granting dismissal and sanctions for lack of an indispensable party must be reversed, and the action must be remanded to state court.

4. None of the Prior Actions make Plaintiff-Appellants' claims frivolous or in bad faith; nor are they issue preclusive, since they were not on the merits, involved different claims, different defendants, and arose on federal trust land.

A. The District Court Erred at Law by Ignoring the Compelling Differences between the Prior Actions and the Action here.

The District Court erroneously found Plaintiff-Appellants' claims were frivolous and in bad faith, claiming certain prior actions, not decided on the merits, found the JIV to be an indispensable party to decidedly different claims against different defendants, under federal election law and Indian land allotments affecting

JIV's neighboring trust land; none of which are present here; and all of which Plaintiff-Appellants had a right to litigate, even if ultimately unsuccessful. This is why none of these prior actions were found to be frivolous for lack of an indispensable party, no sanctions were levied, and why they were dismissed without prejudice and therefore are not issue preclusive. Nor did any find Plaintiff-Appellants or their counsel to be vexatious litigants or restricted filers. 3-ER474-001-018, 524-27, ¶¶ 2-7.

The mere fact that a plaintiff has had numerous suits dismissed against him is an insufficient ground upon which to make a finding of frivolousness. *Goolsby v. Gonzales*, Case No. 11-394, 2014 WL 2330108, at *1-2 (E.D. Cal. 2014); *Garcia v. Baldwin*, Case No.19-00184, *6 (E.D. Cal. 2019), 8 adverse decisions in 7 years were not vexatious, where, as here, there was no evidence that the claims were patently without merit, and *Moy v. U.S.*, 906 F.2d 467, 470 (9th Cir. 1990). None of which were addressed in the Court's order. 1-ER4-16.

Contrary to CJA's false claims, Plaintiff-Appellants have never been told by any court that their state law claims for desecration against the Bishop and CJA are "barred," "precluded," or "have no legal basis," due to the JIV being an indispensable party to such claims. 2-ER166-67, ¶¶2-3, 3-ER524-530, ¶¶2-10.

Contrary to the district court's erroneous, unsupported and highly prejudicial conclusion that Plaintiff-Appellants and their counsel filed this action in bad faith,

the prior actions cannot provide support for that conclusion, as a matter of law, since they involved different claims, defendants and property and were not on the merits. Here, the court simply ignored the facts establishing a good faith basis for the Plaintiff-Appellants' claims for desecration, conversion and fraudulent conveyance, which must be presumed to be true on a 12(b)(7) motion. *Twombly* at 570. 2-ER166-67, ¶¶2-3, 170-88, 306-13, 3-ER474-001-56, 524-43, 5-ER980-86. Neither Appellee denies the desecration, conversion and transfer of the cemetery for no consideration occured.

Moreover, Plaintiff-Appellants' counsel, and their expert creditors' rights attorney, have testified to their good faith belief that these claims are not futile for lack of an indispensable party, nor in bad faith or for an improper purpose, and are objectively reasonable and not legally baseless, since an award of damages will not affect title or any interest of the JIV. 2-ER166-67, ¶¶2-3, 306-13, 3-ER474-001-56, 524-43, 5-ER980-86. Thus, the District Court's erroneously prejudicial conclusion as to Plaintiff-Appellants motivation for filing their claims is an error at law, since there is ample evidence that the FAC/SAC is based upon the reasonable inquiry by at least two competent attorney experts, who formed a reasonable belief that they are well grounded in fact and warranted by existing law and a good faith argument for the extension, modification or reversal of existing law, and which facts do not make the third party JIV an indispensable party to this action, as a matter of law. 2-

ER166-67, ¶¶2-3, 306-13, 3-ER474-014, ¶32-33, 524-36. There is no contrary evidence and no prior decision finding otherwise.

Plaintiff-Appellants faithfully followed all of the prior decisions, even though not on the merits and therefore not issue preclusive, and filed none of the same claims, against the same defendants, on federal trust land affecting any property, leadership, or management interest of the JIV, in this action. 3-ER474-001-018, 524-27, ¶¶2-7. A prior action only precludes subsequent litigation of an issue, if it was "actually and necessarily decided at the previous proceeding [and is] identical to the one which is sought to be relitigated," and "ended with a final judgment on the merits." *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948); *Syverson v. IBM*, 472 F.3d 1072, 1078 (9th Cir. 2007); *Whelan v. Abell*, 48 F.3d 1247, 1255-56 (D.C. Cir. 1995).

> Where "[t]he causes of action and factual issues litigated were different, [as here] the doctrines of *res judicata* and collateral estoppel are therefore inapplicable." *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981)."Issues of fact are not identical if the legal standards governing their resolution are significantly different, even if the factual setting of both suits is the same." *Waltz v. U.S.D.O.A.*, 251 F.R.D. 491, 497-98 (E.D.Cal. 2008).

All of the referenced prior actions refusing to exercise jurisdiction due to the absence of an indispensable party, were without prejudice under Rules 19 and 41(b), and therefore not on the merits. *Pesnell v. Arsenault*, 490 F.3d 1158, 1161 (9th Cir. 2007); *Hells Canyon v. U.S.F.S.,* 403 F.3d 683,690, n.8 (9th Cir. 2005).

Therefore, Plaintiff-Appellants' action cannot be found to be frivolous or in bad faith, based upon the prior dismissals without prejudice, since they had no preclusive effect because they were not identical claims and were not decided on the merits. *Semtek Int'l. v. Lockheed*. 531 U.S. 497, 505, (2001); *Costello v. United States*, 365 U.S. 265, 286-87 (1961), *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866).

> If the first suit was dismissed for defect of pleadings, or parties..or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit...
>
> [T]he defendant may sometimes prevail because the court determines that it has no subject matter jurisdiction, [since] personal jurisdiction of indispensable parties is lacking...In such cases, the resulting judgment of dismissal is not a determination of the claim, but rather a refusal to hear it, and the plaintiff may thereafter pursue it in an appropriate forum or when the preconditions have been met. *Struna v. Shepherdstown Planning Comm.*, No. 09-77, *8 (N.D.W.Va. 2011), citing *Costello* 286-87.

Here, since each of the prior cases dismissed for lack of an indispensable party were dismissed without prejudice, based on completely different claims, parties, and properties, Plaintiff-Appellants had the right to file this action for the Appellees' desecration on non-federal California fee property. *United States v. Hatter*, 532 U.S. 557, 566 (2001), no issue preclusion where the court did not reach the merits of the Cherokee Nation's claim; *Commissioner*. at 599-600; *Syverson* at 1078: *Freeman*

v. San Diego Realtors Ass'n., 322 F.3d 1133, 1143, fn. 8 (9th Cir. 2003), "The suit... has no relevant issue preclusive effects here because the pertinent issues are not 'identical;'" *Followay Productions Inc. v. Maurer*,603 F.2d 72, 76 (9th Cir. 1979); *Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir.1964); *Picayune Rancheria v. U.S.D.O.I.*, No. 16-0950, at *13 (E.D. Cal. 2017); *Univ. of Pittsburgh v. Varian Medical*, 569 F.3d 1328, 1332 (Fed. Cir. 2009).

Moreover, the court's bad faith finding is erroneously based on an incomplete record of the pleadings in the prior actions and opposing counsel's hearsay declarations falsely claiming that the prior actions brought the same desecration claims, against the same defendants on the same property; when, in fact they didn't. 3-ER474-001-018, 525-30, ¶¶3-9. None of the prior actions adjudicated any claim on parcel 06, nor any desecration claim against the Bishop or CJA, which claims hadn't even accrued until March 2023. *Id*.

Here, the Court's order must be reversed, having erroneously ignored the compelling differences between the prior actions and this action, and the incomplete record of the prior actions, having failed to obtain complete copies of the relevant pleadings, and relied upon inadmissible hearsay as to what was ruled upon. 3-ER474-001-018, 525-30, ¶¶3-9; *U.S. v. BaslerTurbo-67*, 1996 U.S. LEXIS 4685, *7-8 (9th Cir. 1996), "It is not enough that the party introduce the decision of the prior court..."

Moreover, since the non-identical issues raised in the prior actions are beyond the face of the pleadings here, and raise triable issues of fact, they therefore require a trial on their merits, before they can be held to establish that there is no subject matter jurisdiction for lack of an indispensable party or that Appellants' claims are frivolous. *Fong v. United States*, 300 F.2d400, 403 (9th Cir.1962); *U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003); *Khoja v. Orexigen Therapeutics, Inc.*,899 F.3d 988, 999 (9thCir.2018); All of which were also ignored in the Court's order.

Just like the LCO Band of Chippewas, the Appellees' have misrepresented what was decided in the prior actions, without providing a proper record, in an impermissible attempt to "try to leverage [their] failure to follow the prescribed statutory procedures into an unreviewable decision," "by taking advantage of Rule 19. We cannot condone this kind of ploy." *Thomas v. United States*, 189 F.3d 662, 664, 669 (7 Cir. 1999), finding Chippewa Band was not a required or indispensable party to an action alleging that federal defendants had failed to follow administrative procedures. Neither should this Court condone CJA's improper use of Rule 19, where Appellees have failed to provide a proper record, and none of the referenced prior actions have established Plaintiff-Appellants' claims are frivolous or in bad faith.

B. The Compelling Differences between the Prior Actions and this Action that were Ignored by the District Court's Order.

None of the prior actions referenced in the Court's order, involved any of Plaintiff-Appellants' desecration claims against the Bishop and CJA on the cemetery parcel 06. They only found the JIV to be indispensable to different claims arising on the federal trust lands on parcels 04 and 05; none of which are raised here. The Court's order does not describe how the desecration by CJA on parcel 06, for which the Bishop remains liable for having fraudulently transferred the property, are the same claims in any of the referenced prior actions; nor how any interest of the JIV would be directly affected by a damage award here against the Bishop or CJA.

Unlike any of the prior actions referenced by the Court, this action makes no claim as to the sovereign authority of the JIV, nor any claim that the casino is not built on Indian land, nor requiring any decision as to whether the JIV has title to, or exercises governmental power over any property; which were the only 3 claims made in the referenced prior actions arising on federal trust land, against different defendants, upon which the JIV was found to be an indispensable party; none of which are made here, 2-ER170-88, or were addressed in the Court's order. 1-ER4-16. The following is a summary of the differences ignored by the District Court. 3-ER474-001-17, 525-30, ¶¶3-9:

- *Rosales v. U.S.D.O.I.*, No. 22-16196, *2 (9th Cir. 2023) is an unpublished

memorandum decision of this Court affirming dismissal for lack of a simple short statement of Plaintiffs' claims under Rule 8, where the trial court denied monetary sanctions. The JIV was not held to be an indispensable party to the Plaintiffs desecration damage claims against the government, since the JIV has no interest in the Plaintiffs' remains, and no remedy was sought on federal trust lands of the JIV.

● *JAC v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), contrary to the District Court's reference, was not even filed by the Plaintiff-Appellants or their counsel; but by the 501(c)(3) non-profit Jamul Action Committee, a church and 4 non-Indian local residents. It did not make any desecration claims, and was limited to Administrative Procedure Act claims against the U.S. Dept. Of Interior, NIGC, the BIA, and one tribal member, for violating the Indian Reorganization Act, the Indian Gaming Regulatory Act, the 10th Amendment state's rights, and NEPA, arising on federal trust land, challenging whether the U.S. had lawfully recognized the JIV as a tribe. 3-ER474-001-17, 525-30, ¶¶3-9. None of these claims are made here, or concern the cemetery, the Bishop or CJA.

● *Rosales v. United States*, 89 Fed. Cl. 565, 572 (2009), was also not filed by the Plaintiffs, but was originally filed by the JIV. The Federal Circuit affirmed dismissal for lack of jurisdiction under the Tucker Acts' six year statute of limitations; but did not affirm the trial court's dicta as to whether the JIV was an indispensable party. Case No. 2010-5028. The appeal involved two consolidated

actions against the U.S. DOI for breach of fiduciary duty, a taking of parcels 04 and 05 (not parcel 06) without just compensation, pursuant to the Tucker Acts, 28 U.S.C. §1491(a)(1) and 28 U.S.C. §1505, and violations of 16 U.S.C. §470, 25U.S.C.§§13, 450 et seq., 461, 1301 et seq., 2701-2721, 3601 et seq., 42 U.S.C.§§ 1981,1982,1985 1986, and 4321-6I; none of which claims are made here, or concern the cemetery parcel 06, the Bishop or CJA.

- *Rosales v. CalTrans*, 2016 WL 124647, at *11 (2016) is an action against CalTrans for desecration of Walter Rosales brother's remains that were dug up and removed from parcel 04 owned in trust by the United States and dumped on a CalTrans' construction site; again, none of which claims are raised here or could be raised here, since none of the families' remains here were desecrated on any land owned by the United States.

- *Rosales v. U.S.*, 73 F. App'x 913, 914 (9th Cir. 2003), is an published non-precedential opinion dismissing without prejudice, declaratory relief against the United States in which Plaintiffs sought a trust patent and Indian allotment in parcel 04, allegedly held in trust by the United States for the JIV, pursuant to 25 U.S.C. §§335, 345, 348, and the Indian Reorganization Act, 25 U.S.C. §465 and 28 U.S.C. §1353. None of these claims are made, nor could be made here, since the cemetery parcel 06 has never been owned by the United States, nor taken into trust for the JIV, as admitted in H.R. 6443, pending in Congress.

Thus, contrary to the Court's order, Plaintiff-Appellants followed the prior decisions, and have raised none of the referenced prior claims in this action. Where the JIV was found to be indispensable in the prior litigation, it was only because Plaintiffs sought to enjoin acts on the federal trust land, parcels 04 and 05; none of which is sought here. 2-ER170-88, 6-ER1141-61.

There is no evidence that JIV's contracts would be affected, since they do not require desecration of the families' remains and can be performed without illegally desecrating the families' remains, which has not been denied. Plaintiff-Appellants do not seek to set aside any such agreement, and do not seek any injunction of construction as the soil nails have now been installed, and can't be removed without further desecration. 2-ER187-88, ¶62, and prayer. Plaintiff-Appellants' damages remedy will not operate against any alleged legal interest of the JIV.

Plaintiff-Appellants seek damages against the Bishop and CJA. The remedies in this action do not compel JIV to do anything, or refrain from doing anything. These remedies require no "affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Shermoen v. U.S.*, 982 F.2d 1312, 1320 (9th Cir. 1992).

Therefore, since the JIV has no direct interest in the subject of Plaintiff-Appellants' damage claims, the JIV is neither a required, nor indispensable, party to this action under Rule 19, and CJA's claim to the contrary, based on the non-

identical prior actions, is lacking in any colorable legal merit, patently frivolous, baseless and made without reasonable and competent inquiry, as a matter of law. *Republic of Philippines v. Pimentel*, 553U.S. 851, 867 (2008); *Shermoen*, at1318; *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999), reversing the dismissal of plaintiffs' Certificates of Degree of Indian Blood (CDIB) claims, finding the Tribe was not an indispensable party, since the Tribe's claim to an interest was patently frivolous, because there was no evidence that the Tribe had "a legitimate claimed interest in Plaintiffs' CDIB claim," just as the tribe has no claim in the families' remains here; *Yellowstone County v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996), finding the tribal court had no legally protected interest in the tax collected from the defendant; *Citizen Band Potawatomi Indian Tribe v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994).

Hence, none of the prior actions has established that Plaintiff-Appellants' claims are frivolous or in bad faith, since the JIV is not an indispensable party to Plaintiff-Appellants' claims against the Bishop and CJA, since the prior actions were not adjudications on the merits, and did not involve identical claims, against identical parties, arising on the cemetery.

5. Sanctions Must be Reversed, since Plaintiff-Appellants' claims are Not Frivolous, Nor Filed for an Improper Purpose, and are Well Grounded in Fact and Law after Reasonable Inquiry and More than Fairly Debatable and Objectively Reasonable.

There is nothing frivolous or in bad faith in suing the Bishop for allowing CJA to desecrate the families' remains on a dedicated cemetery. No Court has found the JIV to be indispensable to an action for desecration on fraudulently transferred California fee land. It is simply untrue that these same claims were ever filed in any of the prior cases cited in the Court's order. 1-ER4-16.

California's statutory and common law both prohibit all forms of desecration of human remains and any interference with unimpeded visitation in violation of the HSC, PRC and Penal Codes, and common law, as set out in the FAC/SAC. 2-ER175-77, ¶18. *Eden Mem. Park Assoc. v. Sup. Ct.* (1961) 189 Cal.App.2d 421,424-25, prohibiting building a freeway on a dedicated cemetery; *Hornblower v. Masonic Cem.Assoc.* (1923) 191 Cal. 83, 91, prohibiting the abandonment of a cemetery and any interference with the remains buried there; *People v. Van Horn*, (1990) 218 Cal.App.3d 1378, 1391-92, 1398, prohibiting removal of Indian grave goods in violation of PRC §5097.99; *Weisenberg v. Truman* (1881) 58 Cal. 63, 69, prohibiting the trustees of the L.A. pueblo's dedicated cemetery from allowing unlawful desecration; *Cypress Lawn v. Lievre*, (1921) 55 Cal.App. 228, 229, prohibiting interference with unimpeded right to visit the cemetery; and *Heiligman v. Chambers*

(Okla. 1959) 338 P.2d 144, 146, prohibiting defacing the burial plot or disturbing the body of Plaintiff's Cherokee grandmother.

> Whether the right of an heir to visit [their deceased] is considered an easement, license, or privilege, it cannot be extinguished by the subservient fee owner through conveyance to another...the owner cannot unreasonably interfere with the rights of the holder of the easement. *Cmlth. Dept. Fish & Wildlife Res. v. Garner*, 896 S.W.2d 10, 12-14 (Ky. 1995).

"[P]roperty dedicated to cemetery purposes shall be held, occupied and used exclusively...for cemetery purposes. HSC §8553 et seq." *Peebler v. Olds* (1942) 56 Cal.App.2d 8, 11; *Pomona Cemetery v. BOS* (1942) 49 Cal.App.2d 626, 630. "property dedicated for use...as a cemetery...cannot be alienated, and is not subject to prescription;" *Faust v. Mitchell Energy* (La.App.2d Cir. 1983) 437 So.2d 339, 342; *Hayes v. Steiger* (1888) 76 Cal. 555, 562, upholding the families' right to continue using a cemetery after conveyance.

Damages are awarded for any interference with the disposition of a families' remains whenever they have been mishandled, HSC §8102, *Allen v. Jones* (1980) 104 Cal.App.3d 207, or negligently maintained by the cemetery owner. *Chelini v. Nieri* (1948) 32 Cal.2d 480; *Quechan Indian Tribe v. U.S.* 535 F.Supp.2d 1072, 1106, 1121-22 (S.D. Cal. 2008), owner *per se* liable for allowing irreparable damage to the sites in violation of PRC §§5097.5-.9, and Penal C. §622 ½; *Palmquist v. Standard Acc. Ins. Co.,* 3 F.Supp. 358, 360 (C.D. Cal. 1933); *Christensen*, at 893-97.

Therefore, Plaintiff-Appellants have properly stated non-frivolous claims for personal injury and property damage caused by the Bishop and CJA's negligence, breach of fiduciary duty, and conversion, in violation of the Cal. Constitution, HSC, PRC, Penal Codes, and common law. 2-ER170-179, ¶¶1-28; 6-ER1141-61. These claims are not sanctionable, since they "are not frivolous, nor filed for an improper purpose," and were filed "after reasonable inquiry by a competent attorney, who formed a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law," and is "objectively reasonable under the circumstances." Rule 11(b)(1); 2-ER166-67, ¶¶2-3, 170-88, 306-313, 3-ER474-001-018, 524-36; 6-ER1141-61; *Roberts v. Peat, Marwick*, 857 F.2d 646, 654 (9th Cir. 1988); *Golden Eagle v. Burroughs*, 801 F.2d 1531, 1536 (9th Cir. 1986); *Hudson*, 1159. Nor have they unreasonably or vexatiously multiplied the proceedings in this case. Nor are there any fees or expenses that were not reasonably incurred to respond to these non-frivolous claims, as defined in Rule 11 and 28 U.S.C. §1927. In fact, §1927 sanctions apply "'only to unnecessary filings and tactics once a lawsuit has begun.' *In re Keegan*, 78 F.3d at 435. It does not apply to the filing of a complaint. *Id*." *Meza-Perez v. Sbarro LLC*, Case No.19-00373 at *6 (D. Nev. 2020), denying sanctions under §1927.

Plaintiff-Appellants cannot be sanctioned for claims that are "objectively

reasonable under the circumstances," and are not frivolous or used for an improper purpose. *Hudson* at 1159; *Estate of Blue v. Co. of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997). The subjective intent of the pleader filing a nonfrivolous claim is not sanctionable. *Zaldivar v. Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986).

Here, there simply is no evidence of any improper purpose found by the District Court, since, sections 3 and 4 *supra,* demonstrate that this action brings no claim rejected by any of the prior decisions referenced in the Court's order, and since this action seeks no remedy affecting the interest of the JIV, as a matter of law, who need not be, and was not sued, unlike *G.C. & K.B. Invs., Inc., v. Wilson*, 326 F.3d 1096, 1110 (9th Cir. 2003). Here, the sanctions order under Rule 11, §1927, and the court's inherent authority, must be reversed since there is no clear and convincing evidence that the claims were frivolous and brought in bad faith. *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2007).

Sanctions cannot be awarded for the filing of a non-frivolous complaint, for which a response would have had to be filed in any event. Rule 11(c)(2)*; Cooter Gell v. Hartmarx.* 496 U.S. 384, 406-407 (1990). CJA's overly broad and erroneous allegations of frivolous litigation and bad faith are insufficient to support sanctions. *Coltrade Intern. v. U.S.*, 973 F.2d 128, 132 (2d Cir. 1992).

> The key question in assessing frivolousness is whether a complaint states an arguable claim — not whether the pleader is correct in his perception of the law. *Zaldivar,* 780 F.2d at 830, 832...ultimate failure

> on the merits is irrelevant. *Id*. In addition, because of the objective standard applicable to Rule 11 analyses, a complaint that is found to be well-grounded in fact and law cannot be sanctioned as harassing, regardless of the attorney's subjective intent. *Id*.; see also *Golden Eagle*, 801 F.2d at 1538. *Hudson* at 1159.

There is no "improper purpose" in filing a complaint, as here, "well grounded in fact and warranted by existing law." *Zaldivar* at 830; *Newton v. Thomason*, 22 F.3d 1455, 1463-1464 (9th Cir. 1994). "[A] nonfrivolous complaint cannot be said to be filed for an improper purpose." *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987); *Newton v. Thomason*, 22 F.3d 1455, 1463-1464 (9th Cir. 1994).

An "argument need not be correct to be considered made in good faith." *In Re Yagman*, 796 F.2d 1165, 1187, amended, 803 F.2d 1085 (9th Cir. 1986). *Still v. Williams* 919F.2d 516, 527 (9th Cir. 1990); *Warren v. Carlsbad* 58 F.2d 439, 444 (9th Cir. 1995)*; Hudson* at 1161; *Grolsche v. DoveBid*, No. 11-00763, *4-5 (N.D. Cal. 2011); finding claims that failed on the merits were not legally baseless or frivolous. Sanctions must be reversed "against a party or counsel whose only sin was being on the unsuccessful side of a ruling..." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3rd Cir. 1987).

Sanctions must be reversed when the claims have a "plausible basis, [even] a weak one." *United Nat'l Ins. Co. v. R&D Latex*, 242 F.3d 1102, 1117 (9th Cir. 2001). To be frivolous the claims must have "no chance of success and no reasonable argument to extend, modify or reverse the law as it stands," neither of which were

or could be established here, particularly without a jury trial. *Strom v. U.S.* 641 F.3d 1051, 1059 (9th Cir. 2011); *Roberts* at 646, and *Berrey v. Plaintiff Inv. Funding LLC,* No. 14-847, *4-5 (D. Ariz. 2015), denying sanctions.

Moreover, Appellants' counsel has a professional and non-sanctionable obligation to attempt to seek a remedy that does not affect any legal interest of the JIV. Sanctions are not allowed where they "conflict with the primary duty of an attorney to represent his or her client zealously." *Operating Eng. Pension v. A-C Co.,* 859 F.2d 1336, 1344 (9th Cir. 1988). Attorneys cannot "be deterred from pursuing legal remedies because of a fear of personal liability. To decide otherwise would...prevent counsel from devoting their entire energies to their clients' interests.""If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court." *In re Marriage of Flaherty,* 31 Cal.3d 637, 647 (1982). Sanctions cannot "be used 'to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.'" *Yagman*, at 1182; *Zaldivar* at 834; *Greenberg,* at 887; *Hudson*, at 1160. When considering sanctions, all doubts must be resolved in favor of the signer of the papers. *Assoc. Indem. Corp. v. Fairchild*, 961 F.2d 32, 34 (2nd Cir. 1992).

Rule 11 is not a fee shifting provision; sanctions are to deter bad faith conduct, not to compensate the prevailing party. *Business Guides Inc. v. Chromatic Comm.*

Ent. Inc., 498 U.S. 533, 553 (1991); *U.S. ex rel. Leno v. Summit Const.*, 892 F.2d 788, 791 fn. 4 (9th Cir. 1989); Rule 11(c)(2). Sanctions are not to be punitive in nature. *Goodyear v. Haeger*,137 S.Ct. 1178, 1186 (2017); *Xue Lu v. United States*, 921 F.3d 850, 859 (9th Cir. 2019), "A court may not shift fees if the same work would have been done ...to contest the non-frivolous claims in the suit.'" Sanctions are not allowed to reimburse opposing parties for their costs of defense. *Hudson* at 1160. The court is not required to impose a monetary sanction at all. Rule 11(c); Committee Notes, 146 F.R.D. 401, 587, (1993).

Attorneys' fees are not allowed where, as here, there is no evidence of improper or vexatious conduct or subjective "ill intent." *United States v. Manchester Farming*, 315 F.3d 1176, 1182 (9th Cir. 2 003). Rule 11 sanctions are reserved "for the rare and exceptional case where the action is clearly frivolous, legally unreasonable, or without legal foundation, or brought for an improper purpose," and not where it is more than fairly debatable and objectively reasonable, as here, because of the "chilling effect" that such sanctions can have on an attorney's enthusiasm and creativity in pursuing theories to aid the client. Committee Notes, 146 F.R.D. 401, 587-588 (1993); *OEP Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1998).

A court considering sanctions, must also consider the filers' inability to pay. ER474-018, ¶52; *In re Keegan.* 154 F.R.D. 237, 243 (N.D. Cal. 1994). "Courts must

be careful not to impose monetary sanctions so great they are punitive--or that they might even drive the sanctioned attorney out of practice," as here. 3-ER474-018, ¶52; *Doering v. Union County*, 857 F.2d 191, 196 (3rd Cir. 1988); *Sassower v. Field*, 973 F.2d 75, 81 (2nd Cir. 1992). Rule 11 is an extraordinary remedy that must be exercised with extreme caution, since sanctions can have an unintended detrimental impact on an attorney's career and well-being. *Conn v. CSO Boriorquez,* 967 F.2d 1418, 1421 (9th Cir. 1992).

Here, sanctions must be reversed because the District Court erred at law, finding Plaintiff-Appellants' claims to be frivolous, when they are neither "baseless or made without reasonable and competent inquiry," because the JIV is not an indispensable party, as a matter of law, and is a non-required third party grantee, who needn't be, and wasn't, sued, since it has no interest in Plaintiffs' families' remains, and Plaintiff-Appellants seek no remedy affecting any interest of the JIV. Sections 3 and 4, *supra*; 2-ER170-88, 306-13, 3-ER474-001-018, 525-30,¶¶3-9; *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir.1997). As in *Hudson,* at 1162, this Court "cannot conclude that no set of facts could be presented to support" Plaintiff-Appellants' FAC/SAC claims that do not directly affect any JIV interest.

Here, there is no evidence that Plaintiff-Appellants and their counsel acted in bad faith, since it is more than fairly debatable and objectively reasonable that the JIV is not an indispensable party--it is a matter of law. In sanctioning counsel,

"[c]ourts may not invoke [inherent] powers without a `specific finding of bad faith.'" *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993); *Primus Auto v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). Here, the district court's finding of bad faith is based upon an erroneous view of the law, since the JIV cannot be an indispensable party to this action, because the action does not seek to foreclose on the cemetery, nor affect any interest of the JIV. Sections 3 and 4; 2-ER170-88, 306-13, 3-ER474-001-018, 525-30,¶¶3-9.

Therefore, the sanctions should be reversed, or alternatively remanded to be reduced consistent with this Court's instructions as requested in 2-ER246 through 3-ER-362. *Hudson* at 1163-64; *Primus* at 650.

Conclusion

The District Court's order, 1-ER4, denying remand, dismissing for lack of an indispensable party and granting sanctions must be reversed, and the case remanded, as an error at law, because there is no diversity, Plaintiff-Appellants' amended claims raise no federal question, and are not frivolous or in bad faith. Moreover, they are more than fairly debatable and objectively reasonable after competent inquiry, because the JIV is not an indispensable party, as a matter of law, and is a non-required third party grantee, who needn't be, and wasn't, sued, and has no interest in the families' remains or any other interest affected by Plaintiff-Appellants' remedies.

Dated: September 4, 2024 **LAW OFFICES OF PATRICK D. WEBB**

/s/Patrick D. Webb
Patrick D. Webb
Attorneys for Plaintiff-Appellants and their Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and a 14-point font and contains 13,954 words.

Dated: September 4, 2024.

Respectfully submitted,

/s/Patrick D. Webb
Patrick D. Webb
Attorneys for Appellants

CERTIFICATE OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 402 W. Broadway, Ste 400, San Diego, Cal. 92101.

I hereby certify that I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 4, 2024.

I declare that I am a member of the Bar of this Court at whose direction the service was made.

Executed on September 4, 2024, San Diego, California.

By: /s/Patrick D. Webb
Patrick D. Webb

Email: pwebb@webbcarey.com