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 SOUTHERNDISTRICT OF CALIFORNIA CASE NO. 3 :23-cv-00908-AGS-JLB

APPELLANTS' REPLY BRIEF

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The trial court's denial of remand, dismissal and sanctions must be reversed because the JIV is not an indispensable party, since the Plaintiff-Appellants' only remaining damages remedy against Condon-Johnson Assoc, (CJA) and the Bishop will not affect any legal interest of the Jamul Indian Village (JIV).

Plaintiff-Appellants seek no injunction of the JIV's ownership, title, use or interest in any property. In fact, now that the soil nails' desecration has already occurred, Plaintiff-Appellants no longer seek any injunction whatsoever, since there is no practical means of enjoining desecration that's already occurred.

There is no dispute in the evidence that CJA was obligated not to desecrate the families' remains, and that it could have installed the soil nails without desecrating the remains. Hence, CJA remains liable for the damages caused by its desecration, which will have no effect on any legal interest of the JIV, which is an unnecessary third party to Plaintiff-Appellants' fraudulent conveyance claims, and which remarkably neither the trial court or CJA denies. JIV need not have been, and wasn't sued, while Plaintiff-Appellants seek their remaining damages remedy against CJA and the Bishop.

Contrary to CJA's erroneous claims, the FAC never sought to enjoin any construction of the JIV's hotel casino project; nor any injunction of JIV whatsoever.

Rather, the FAC merely sought to enjoin CJA's desecration of the families' remains, before any desecration took place, which is no longer possible.

CJA fails to address the undisputed fact that now that the installation of the soil nails has been completed, Plaintiff-Appellants can no longer obtain injunctive relief, since as a practical matter there is no longer any means of preventing or remediating the desecration that occurred during installation, since the trial court took 9 months to erroneously deny the emergency motion to remand and dismiss Plaintiff-Appellants' claims. Hence, now that the desecration has occurred, Plaintiff-Appellants' only remaining remedy is damages, since no injunction can restore the families' remains to their condition before they were desecrated. See, JIV's press release which is judicially noticeable. "Topping Off of Hotel Tower," July 12, 2024.[1]

Moreover, Plaintiff-Appellants have never sought to set aside JIV's title to the cemetery. They have only sought to set aside the effectiveness of the transfer as between the Bishop and Appellants only, so as to allow Appellants to collect damages from the Defendants and not from the JIV. 6ER1153, ¶40-42;[2] 2ER170, ¶39.

Thus, since a damage award is the only remedy remaining against CJA, and

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[1] https://www.jamulcasino.com/hotel-tower-topping/.

[2] The citations to the First Amended Complaint in the Opening Brief should be to 6ER1141-1161, and not 5ER1141-61.

which has no effect on any JIV legal interest, the JIV is not an indispensable party, and the dismissal and sanctions must be reversed. Moreover, since neither the FAC, or the proffered SAC, allege any federal claim, this action must be remanded to the Superior Court.

1. All Plaintiff-Appellants and their counsel filed the appeal of the trial court's orders and all resulting amended judgments denying remand, dismissing the action, and awarding sanctions.

Contrary to CJA's erroneous assertion, the Notice of Appeal, the Representation Statement, the Opening Brief, the Corporate Disclosure Statement, and this Court's Docket, all identify that all Plaintiff-Appellants and their counsel, Patrick Webb and Webb & Carey APC (now known as Law Offices of Patrick Webb, following the retirement of Kevin Carey from the firm) filed the notice of appeal and opening brief in this appeal. 2ER30, 153; Dkt.#18.1, 1-2, and 79.

The notice of appeal identifies that all Plaintiffs and their counsel, Patrick Webb and Webb & Carey APC, are appealing the trial court's orders denying remand, dismissing the action, and awarding sanctions. It is signed by one of the attorneys representing all of the Plaintiffs, himself and his firm, Webb & Carey APC, as further identified in the Representation Statement, 2ER151, per Fed. R. App. P. 32, which provides that "Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by **one** of the party's

attorneys." Moreover, Ninth Circuit Rule 25-5 further provides that where, as here, the Appellants are represented by co-counsel, only lead counsel must be identified by the signatory "/s" on all electronic filings. CJA also concedes, at AB 37, that Patrick Webb's appearance for himself and Webb & Carey APC, as Appellants, was accepted for filing on September 4, 2024. Dkt. 17.

The cover of Appellants' Opening Brief (AOB) identifies that it was filed on behalf all Plaintiffs, and their counsel, Patrick Webb and Webb & Carey APC, all of whom are Appellants, and was accepted for filing. Dkt.#18.1. The summary of argument therein, states: "Plaintiff-Appellants, Walter Rosales et al., joined by their counsel, appeal from a district court order and amended judgment, 1-ER2, and 4, denying their motion to remand, granting Defendant-Appellees...motions to dismiss and $203,379.15 in sanctions..." Moreover, the AOB was filed and signed by Patrick Webb as attorney on behalf of all "Plaintiff-Appellants and their counsel." AOB, 79.

Contrary to CJA, the August 1, 2024 Amended Judgment was appealed, and filed in the Excerpts of Record. 1ER2. The notice of appeal identifies that "all orders entered in this case and subsumed in the judgment," including all subsequent amended judgments, arising from the denial of remand, dismissal and award of sanctions, including "the May 31, 2024 ruling from the bench, ECF##89 and 90," and the August 1, 2024 Amended Judgment, are being appealed. 2ER30.

Moreover, when Patrick Webb and Webb & Carey's insurance defense counsel Charles Grebing's motion to withdraw as co-counsel on appeal was granted on December 2, 2024, Patrick Webb and the Law Offices of Patrick Webb filed a notice of appearance and substitution of counsel for Patrick Webb and Webb & Carey APC, as appellants. Dkt.##40 & 41.

2. All Plaintiff-Appellants properly appealed the denial of their motion to alter or amend the judgment, per Fed. R. Civ. P. Rules 15, 59 and 60.

Contrary to CJA's erroneous assertion, all Appellants have properly appealed the denial of their timely motion to alter or amend the judgment, within 30 days of entry of judgment. 3ER363; 2ER30. Moreover, the AOB properly sets forth the standard of review for an order denying a Rule 59 and 60 motion, which includes any error at law as to the denial of remand or granting a dismissal when the JIV is not an indispensable party, which are also "necessarily abuses of discretion," AOB, 32, and which are listed in the issues presented. AOB, 31.

As set forth in Plaintiff-Appellants' motion, 3ER365, the trial court was required to alter or amend a manifestly unjust judgment in clear error, per Fed. R. Civ. P. Rules 59 and 60. And when it didn't the denial was appealed. 2ER30.

Here, Plaintiff-Appellants' properly identify the errors at law, and the abuses of discretion, in the denial of remand in violation of 28 U.S.C. §1447(c), where there

is no federal question or diversity jurisdiction, and in the granting of dismissal, where the JIV is an unnecessary third party and not an indispensable party, since the only remaining remedy of damages does not affect a protectable interest of the JIV, and Plaintiff-Appellants no longer seek any injunctive relief whatsoever.

Contrary to CJA, Plaintiff-Appellants have consistently claimed the same errors at law since they moved for remand, 5ER945-1160, opposed the original motion to dismiss, 3ER422-23, 487-581, moved to alter or amend the judgment. 6ER363-420, 2ER168-202, and opposed sanctions, 2ER154-188, 246-362. These same errors and abuses of discretion were the basis for Plaintiff-Appellants' pre-judgment offer to further amend the FAC, beginning with the motion to remand and continuing through the motion to amend the judgment, when an injunction could no longer prevent the desecration that already occurred, and only damages were sought against CJA and the Bishop. See, for e.g., 5ER968, 3ER516-17, 2ER166-188. Plaintiff-Appellants clearly appealed, and certainly haven't waived, these errors at law and abuses of discretion, all of which were first raised before the trial court.

CJA simply fails to address Plaintiff-Appellants' undisputed right to proffer the SAC, as an example of how the FAC can be amended to further clarify that Plaintiff-Appellants seek only damages against CJA and the Bishop that do not affect any legal interest of the JIV. Appellants set forth their right to amend their complaint, under

the liberality of Rules 15, 59 and 60, in the AOB's jurisdiction and statement of the case. See AOB 30, citing *U.S. v. Webb,* 655 F.2d 977, 979 (9th Cir. 1981) and *Foman v. Davis,* 371 U.S. 178, 182 (1962), finding denial of leave to amend without specifying a reason is an abuse of discretion. See also, *Turner v. Burlington Northern Santa Fe Railroad*, 338 F.3d 1058, 1063 (9th Cir. 2003), citing *McDowell v. Calderon*,197 F.3d 1253, 1254 n. 1 (9th Cir. 1999), quoting 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995).

Here, the trial court refused to file the proffered SAC, without specifying any reason on the merits why the SAC could not be amended to delete any injunction whatsoever, and to more clearly seek only damages against CJA and the Bishop. Instead, the trial court erroneously denied the motion procedurally claiming that Plaintiffs hadn't "met and conferred" before filing the post-judgment motion, 7ER1375-76, when, in fact, Chambers Rule 5 does not apply to Rule 59/60 motions after trial. AOB 30-31; *Goodson v. Perez-Pantoja*, No. 20-16468, *4 (9th Cir. 2021).

Contrary to CJA, Plaintiff-Appellants are entitled to timely proffer the SAC in support of their Rule 59/60 motion. 2ER170. *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996), citing *Wilburn v. Pepsi-Cola Bottling Co.*, 492 F.2d 1288, 1290 (8th Cir. 1974), reversing the district court's denial of leave to file an amended complaint after grant of a Rule 59 motion. See also, *Manchouck v. Mondelez Int'l, Inc.*, 603 F.

App'x 632, *2 (9th Cir. 2015), citing *Vincent v. Trend W.*, 828 F.2d 563, 570 (9th Cir. 1987), a proposed amended complaint to cure its defects may be presented in opposition to a motion to dismiss or in support of a Rule 59 or 60 motion to amend a judgment; *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1084-88 (9th Cir. 2014), reversing dismissal without leave to amend, since the trial court should have, as here, granted the Rule 59/60 motion to allow amendment of the complaint to cure defects; *Feinstein v. Service Solutions Group LLC*, 464 F. App'x 670, *4 (9th Cir. 2012)(per F.R.A.P. 32.1) allowing filing of amended complaint in support of Rule 60 motion; *Clemans v. Yates*, No. 07-1162, at *7 (S.D. Cal. Mar. 12, 2010); *Thomas v. Donovan*, Case No.: 3:19-02181 (S.D. Cal. Aug. 28, 2020) (same).

Hence, the denial of Plaintiff-Appellants' Rule 59/60 motion must be reversed and leave to file the SAC must be granted, as a matter of law to correct abuses of discretion, per the liberality in granting such amendments under Rules 15, 59 and 60, based on the erroneous denial of remand and granting of dismissal, where the JIV is not an indispensable party.

3. The trial court erred as a matter of law and abused its discretion by failing to remand.

The trial court erred as a matter of law and abused its discretion in exercising supplemental jurisdiction over Plaintiff-Appellants' state law claims, where there was

no diversity or federal question in the operative FAC. 28 U.S.C. §1447(c). There is nothing improper about the filing of the FAC. It timely supplanted the original complaint completely, since a party may amend its complaint once as matter of course without leave of court within 21 days after serving it. Fed. R. Civ. P. 15(a)(1); 6ER1139. Whether the FAC won the race to the state court before CJA filed its notice effecting removal is now irrelevant, because whether void in state court, it was not determined to be void in federal court, where it was timely filed on May 18, 2023, 6ER1139-61, per Rule 15(a). Thus, the FAC became the operative complaint, as supplemented by the proferred SAC. Hence, contrary to CJA's erroneous assertion, "The original complaint... [is] thereafter non-existent," *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967), and does not control the subsequent exercise of supplemental jurisdiction after all federal claims were deleted.

Regardless whether the removal was proper, all grounds for exercising supplemental jurisdiction were timely removed in the FAC. Since there is no diversity and no federal question in the FAC, the court abuses its discretion if it does not decline to exercise jurisdiction over the remaining supplemental state court claims under 28 U.S.C. §1367(c)(1)-(4), particularly where there are novel state law desecration and fraudulent transfer claims, and the claims over which the court allegedly had original jurisdiction have been dismissed.

CJA's citation of *Sparta Surgical v. NASD*, 159 F.3d 1209 (9th Cir. 1998), is inapposite. First, it was overruled in part. *Merrill Lynch v. Manning*, 578 U.S. 374, 379 (2016). Second, as a federal securities exchange action, it does not apply to California's unique state law claims for desecration and fraudulent transfer. Third, it does not address the trial court's abuse of discretion in excercising supplemental jurisdiction where, as here, all federal claims have been dismissed. It merely held that remand couldn't be compelled where there were facts in the amended complaint that were within original federal jurisdiction under the federal securities exchange act; which is not the case here.

Here, there are no remaining federal original jurisdiction claims. It therefore remains an abuse of discretion not to remand the case to state court pursuant to 1447(c), which still provides that when the district court loses subject matter jurisdiction upon dismissal of the federal claims, there is no longer a case and controversy over which the district court may exercise supplemental jurisdiction, and "the case shall be remanded."

CJA cannot deny that Plaintiff had the right to amend the state court complaint to remove all federal claims in order to have the case remanded to the Superior Court. *Smith v. Allison*, No. 22-cv-0306, *1-3 (E.D. Cal. 2022) remanding after declining to exercise supplemental jurisdiction when, as here, all federal claims were voluntarily

dismissed following removal; *Ramotnik v. Fisher*, 568 F. Supp. 2d 598, 602-03 (D. Md. 2008), plaintiff, as here, may amend to dismiss all federal claims to destroy federal jurisdiction and have the case remanded to state court.

Nor can CJA deny that plaintiffs cannot be deprived of their choice of forum, or the right to have California courts decide the issues of California law that govern their claims, since federal courts are not considered "experts in the law of the state," particularly concerning California's unique statutory regulation of desecration and fraudulent transfers. *Millar v. BART*, 236 F. Supp. 2d 1110, 1114 (N.D. Cal. 2002), granting remand; *Hanover Ins.Co. v. Fremont Bank*, 68 F. Supp. 3d 1085, 1110 (N.D. Cal. 2014), the court must exercise discretion in deciding whether to exercise jurisdiction over a non-federal claim originally filed in state court; *Baldwin v. Safeway*, 1999 WL 129539, *3 (N.D. Cal. 1999), §1447(c) requires remand following dismissal of all federal claims after removal; *Co. of Madera v. Picayune Rancheria*, 467 F. Supp. 2d 993, 996-97, 1001-3 (E.D. Cal. 2006), following *Okla.Tax Comm'n v. Graham*, 489 U.S. 838, 840-42 (1989). and holding 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, [therefore] [s]ince the Court has no subject matter jurisdiction over this case," "this Court must remand this case to state court

pursuant to 28 U.S.C. §1447(c)," which still provides: where "the district court lacks subject matter jurisdiction, the case shall be remanded."

Here, CJA has failed to identify any federal question in the FAC, which has completely supplanted the original state complaint, and thereby preempts CJA's arguments at AB 45-46, concerning construction on Indian trust land, since those claims have been deleted in the FAC. Contrary to the original state complaint's 100 foot buffer, the FAC makes no claim to enjoin any activity on any JIV trust land (where the casino and hotel were built). Nor does the Compact or IGRA govern CJA's acts on the cemetery next door, where there are no gaming activities whatsoever. The FAC/SAC merely seeks damages for CJA's desecration on the California fee simple cemetery, which the Supreme Court holds is not subject to federal jurisdiction, *Okla. Tax Comm'n,* at 840-42, and certainly does not interfere in any way with the balance of jurisdiction between state and federal courts over a fee simple cemetery, which has nothing to do with gaming and is not a "federal interest."

Contrary to CJA's erroneous assertion, AB 48-49, the FAC does not make any claim that Defendants owe Plaintiff-Appellants duties as persons under NAGPRA. The FAC's claims are based solely upon Defendants' duties not to desecrate human remains under California law and Plaintiff-Appellants' ownership rights in their families' remains per HSC §7100 and California common law.

Moreover, the FAC/SAC alleges that the families' remains were desecrated in violation of California law on fee simple land, and not on any Indian trust land, and thus there is no allegation requiring a determination as to NAGPRA's definition of federal or tribal trust land. 2ER171, ¶2, 175, ¶18-19; 6ER1442, ¶2, 1146, ¶19-20. In fact, NAGPRA 25 U.S.C. §3009, saves, and does not preempt, California's remedies for Defendants' breach of California law.

In fact, the FAC/SAC raises no question as to "order of priority" of ownership of the remains, which is undisputedly with the Appellants, as a matter of law, and the same under California's HSC §7100, and NAGPRA's 25 U.S.C. §3002(a)(1), contrary to CJA's erroneous claim. *Thorpe v. Borough of Jim Thorpe* (*Thorpe*), 2011 U.S. Dist. Lexis 135242, *8-10 (M.D. Pa. 2011) tribe has no ownership in lineal descendants' remains; AOB, 49. As CJA concedes, AB 49, HSC §8016 is inapplicable here, since no state agency or museum has jurisdiction over the remains. The FAC/SAC simply makes no claim under NAGPRA, since it seeks no remedy on federal or tribal trust land, and only seeks damages arising on fee land under California law.

As noted throughout, as a practical and legal matter, Plaintiff-Appellants no longer seek any injunction whatsoever, since no injunction can prevent or remedy the desecration that has already occurred, which is further clarified in the SAC, which

seeks no injunction whatsoever.

Now that CJA rushed to install the soil nails, Appellants' only remaining remedy is damages, as reflected in the proferred SAC, which seeks no injunction and only damages and a declaration as to Plaintiff-Appellants' ownership rights in their families remains, and that the deed transferring the Bishop's interest in the cemetery will be deemed ineffective as between Plaintiff-Appellants and the Bishop only, so that Plaintiff-Appellants can recover damages against CJA and the Bishop, and explicitly does not affect or otherwise invalidate the JIV's title to the cemetery. 2ER188:12-17.

Moreover, the FAC's prior attempt to prevent CJA's desecration on state fee land did not raise a federal question and would have had no affect on any legal interest of the JIV, since CJA's contract did not require desecration of the families' remains, and since it did not seek to enjoin any construction of the casino hotel on Indian trust land on parcels 04 and 05.

It is not artful pleading for the Plaintiff-Appellants to see if either defendant would attempt to remove the case and then exercise their absolute right to amend to dismiss all federal claims, in favor of remanding their purely state law claims. *Polo v. Innoventions Intl.*833, F.3d 1193, 1196 (9th Cir. 2016), citing *Caterpillar* at 392; *Big Bear Lodging Assoc.v. Snow Summit*, 182 F.3d 1096, 1106, n.9 (9th Cir. 1999);

Heacock v. Rolling Frito-Lay Sales, No. 16-0829, at *7 (W.D. Wash. 2016). "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).

There is nothing disingenuous in deleting all federal claims to stay in state court, particularly since the FAC seeks no remedy on federal trust land, and faithfully follows the prior rulings that found seeking remedies on federal trust land to be barred, and made no rulings as to Appellants' state law desecration and fraudulent transfer claims on fee land, which have never been found to be frivolous.

CJA cannot deny that once the FAC failed to allege diversity or a federal question, the trial court abused its discretion in exercising supplemental jurisdiction over the state law desecration and fraudulent transfer 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. Where the FAC contains no claims within the court's original federal jurisdiction, there is no "same case or controversy" over which the court has discretion to exercise supplemental jurisdiction. All that's left is a purely state law dispute, which must be remanded to state court. *Hillman v. Pacificorp*, No. 21-cv-00848, *16-18 (E.D. Cal. 2022), *Lamar Central Outdoor v. Mike*, No. 22-00885, *3 (C.D. Cal. 2022), ECF #6-1, 27-28/33, and *Co. of Madera*, at 996-1003, all following *Okla. Tax Comm'n,* at 840-42, and

granting remand because a tribe's fee simple property under state law, as here, does not establish federal jurisdiction, since such "fee simple title...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.

Similarly, the CJA cannot deny that the Supreme Court has not created, nor upheld the *Bell* futility exception to the remand rule, and has "clearly stated irreconcilable reasoning," with the futility doctrine, holding "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).

Hence, such "intervening higher authority" frees this Court to find no discretion to dismiss rather than remand this action, upon this appeal of the district court's finding of futility. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc); unlike *Tribe v. City of Seattle*, 56 F.4th 1179, 1190 (9th Cir. 2022), where the Appellants did not argue the futility exception was irreconcilable with the reasoning of *Int'l Primate*.

Nor has CJA denied that 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; the last of which is *Spivey v. Chitimacha Tribe of La.,*

79 F.4th 444, 448-49 (5th Cir. 2023).[3]

Nor can CJA deny that even this Court has twice held that where the amended complaint states no original federal question or diversity, the court should exercise its discretion to remand the remaining state law claims to state court, per 28 U.S.C. §1447(c). *Polo v. Innoventions Intl.*833, F.3d 1193, 1196 (9th Cir. 2016); *Bruns v. N.C.U.A.* (*Bruns*), 122 F.3d 1251, 1257-58 (9th Cir. 1997), both finding a plaintiff may avoid removal, as here, by amending to delete all federal claims. and citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Most importantly CJA can't deny that this Court holds "Section 1447(c) is mandatory, not discretionary... even if futile." *Bruns,* 1257-58, citing *Roach*, at 49, and *Smith*, at 1142, and holding: "Upon determining that it lacked subject matter jurisdiction, the district court was required to remand Bruns' claims against the non-federal defendants to the state court."

Since there is no authority establishing the futility of Appellants' desecration and fraudulent transfer claims against CJA and the Bishop, with "absolute certainty,"

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[3] *Maine Ass'n v. Comm'r, Maine DHS*, 876 F.2d 1051, 1053–54 (1st Cir.1989); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 214 (3d Cir.1997); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 540 (3d Cir.1994); *Roach v. W. Va. Regional Jail(Roach)*, 74 F.3d 46, 48–49 (4th Cir. 1996); *Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 496 (6th Cir.1999); *Dempsey v. JP Morgan*, 272 Fed.Appx. 499, 503–04 (7th Cir.2008); *Smith v. Wis. Dep't of Agric.(Smith)*, 23 F.3d 1134, 1140 (7th Cir.1994); *Roberts v. BJC Health System*, 452 F.3d 737 (8th Cir.2006); *Hill v. Vanderbilt Capital Advisors*, 702 F.3d 1220, 1225–26 (10th Cir.2012); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir.1999).

Polo at 1198-99, since the FAC/SAC does not attempt to foreclose on the fee property which is not subject to federal jurisdiction, set the deed aside as to the JIV, or affect any interest of the JIV, let alone its sovereignty, see Section 4 below, the Court's order must be reversed and the case remanded to state court. *Bruns* at 1257-58.

Strojnik v. Driftwood Hosp. Mgmt., No. 21-16060, *3 (9th Cir. May 24, 2022), is unpublished, and not precedent since the proferred SAC states proper claims, unlike in *Strojnik*, and the Plaintiff-Appellants are not vexatious litigants subject to pre-filing restrictions. Similarly, *Global Rescue Jets v. Kaiser*, 30 F.4th 905 (9th Cir. 2022), is inapposite, since there is no "absolute certainty" that Appellants' claims cannot be amended by the SAC, which seeks no injunction and makes no claim making the JIV an indispensable party. Hence, the trial court's abuse of discretion in failing to remand must be reversed and the action remanded to state court.

4. JIV remains an unnecessary third party to this action, and therefore cannot be an indispensable party under Rules 12(b)(7) and 19.

The district court's order and judgment must still be reversed, because they do not identify any interest of the JIV that is affected by an award of damages against CJA and the Bishop, which is the only remedy remaining in the FAC/SAC, which seeks no injunction whatsoever. Hence, JIV is neither a necessary, required or indispensable party under Rules 12(b)(7) and 19.

To begin with, contrary to CJA's erroneous assertion, AB 56, the FAC/SAC's fraudulent transfer claims are timely per Civil Code §3439.09, since they were filed on May 18, 2023, 6ER1139, within one year of the claimant's discovery of the Bishop becoming a debtor to Plaintiff-Appellants for having allowed CJA's desecration on the cemetery in February 2023, §3439.09(a), 6ER1146, ¶19, and not more than seven years after the September 7, 2017 fraudulent transfer was recorded. §3439.09(c); 6ER1152, ¶37.

Moreover, as a practical matter, the Plaintiff-Appellants can no longer seek an injunction, 2ER 170, ¶39, since no injunction can prevent or remedy the desecration that has already occurred, and since the soil nails cannot be removed without further desecration. The remaining damages remedy against CJA and the Bishop for desecration, fraudulent transfer and conversion has no effect on any legal interest of the JIV, including its ownership of the cemetery. Hence, JIV remains an unnecessary third party to this action; and therefore cannot be an indispenable party.

CJA ignores the fact that circumctances have dramatically changed since the FAC was filed on May 18, 2023. Since the soil nails were installed at the time of dismissal on February 29, 2024, there was no longer any injunction available that could have prevented, or remedied, the desecration that had already occurred. Thus, the only then remaining remedy in the FAC was damages against CJA and the

Bishop, which is further clarified in the SAC, which seeks no injunction whatsoever. 2ER188.

Additionally, neither the FAC or the SAC seeks any remedy on any JIV trust land; nor do they seek to enjoin any use of the cemetery by the JIV; nor do they challenge JIV's recognition, sovereign interests, performance of its tribal gaming Compact, or any claim to the families' remains. *Thorpe* at *8-10, finding the tribe was not an indispensable party, since it had no ownership interest in the families' remains, as a matter of law, since the lineal descendants are still living and since the tribe waived any such claims, as here, upon their interment. AOB 49. None of which CJA denies, retreating to the superceded allegations in the original complaint which have been deleted and that as a practical matter can longer be made, and, in fact, are no longer made in the SAC, which remains timely per Rules 15, 59 and 60.

Nor is the JIV a real party in interest, since CJA and the Bishop have no sovereign immunity, are independently liable for their own torts, and since the FAC/SAC seeks no injunction on tribal land or of construction at the hotel, as CJA concedes citing *Lewis v. Clarke,* 581 U.S. 155, 167-68 (2017) finding the tribe is not an indispensable party, where, as here, contractor independently liable, even if indemnified for its own torts; *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013).

Here, the FAC/SAC seeks only damages from CJA and the Bishop, who remain independently liable for failing to prevent the soil nails from desecrating the families' remains. This distinguishes this action from all of the prior litigation cited by CJA that sought injunctive relief on Indian trust land. Both the FAC/SAC faithfully follow the prior court's admonitions not to seek injunctive remedies on the JIV's trust land, where the casino/hotel was constructed.

Contrary to CJA's erroneous assertion, neither the FAC, or the SAC, seeks to set aside JIV's deed to, or ownership of, the cemetery. Rather, the FAC/SAC only seeks to set aside the effectiveness of the transfer, as between the Plaintiff-Appellants and the Bishop, and not as between the JIV and anyone else, in order to hold only the Bishop liable for damages caused by its fraudulent transfer. 6ER1153, ¶40-42; 2ER170, ¶39.

The fact that the trial court stated it could not "see any way of making the Plaintiffs' case, without taking away some JIV property interest," 7ER1453, is proof of its error, since an award of damages against CJA and the Bishop can be made without affecting any JIV property interest. *UKB v. U. S.*, 480 F.3d 1318, 1326-27(Fed. Cir. 2007); *Karuk Tribe of Cal. v. U.S.*, 27 Fed. Cl. 429,431-32 (1993), "a monetary award from the [defendant] to the plaintiff" was not a direct interest of the interveners, since, as here, they were not subject to the judgment; *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; *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 did not have a 'direct, substantial, and legally protectable' interest in the underlying case.

That is the whole point of Civil Code §3439.08's election of remedies. Plaintiff-Appellants have the right to have the court declare the deed ineffective as between the Plaintiff-Appellants and the Bishop only, without suing the grantee JIV, or foreclosing on the property, so that the Bishop remains liable to Plaintiff-Appellants for the damages caused by the fraudulent transfer for no consideration. There is still no evidence that such damages will affect the JIV's title, sovereignty or property at all.

> ...[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 grantor and the grantee the conveyance remains in full effect. *Ahmanson* at 343; *Patterson* at 770; *McGee* at 476; AOB, 53.

California law is clear, that the JIV is neither a necessary, required, nor an indispensable party to the FAC/SAC's claims for fraudulent transfer. California's

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). Remarkably, none of which the trial court or CJA addresses, and simply ignores without mention, because it can't be denied, as a matter of law.

Neither the trial court or CJA denies Plaintiff-Appellants' right to elect remedies under Civil Code §§3439.07(a)(1) and 3439.08(b)(1)(A) to have the transfer avoided as to the debtor Bishop only, "to the extent necessary to satisfy creditor's judgment," 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, or foreclose on, the cemetery parcel, since title is irrelevant to the debtor Bishop's personal liability for damages under the UVTA for the fraudulent transfer, regardless whether transferred to a third party, like the JIV. *Id*. The JIV has not been, and need not be sued, because contrary to the District Court's error at law, the JIV has no direct legal interest in Plaintiff-Appellants' personal injury damage claims against CJA and the Bishop, who remain independently liable for their own negligent desecration of the families' remains. There is no evidence that a damages award would have any legal effect on the JIV's hotel project, which was undenied by CJA. 2ER193-94, 199,

3ER391, 459.

This has been the law for nearly 90 years, which both the trial court and CJA totally ignore, which explains the court's fundamental failure to see that a damages award against the debtor for fraudulent transfer has no effect on the unnamed third party transferee. A third party transferee, like the JIV, is not a necessary, required or indispensable party to a fraudulent transfer action, where, as here, no foreclosure is sought against the fraudulently transferred property. *See, McGee, Ahmanson Bank, Patterson, Diamond Heights, Asset Securities, Rempel, Acacia,* and *Scherping*, at AOB 53, and more recently, *Oracle, Tatung,* and *Qingdao*, AOB 54.

> [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 Securities* at843, *Rempel* at *1; *Acacia* at *5; AOB 54.

None of which the trial court or CJA even mentions, let alone distinguishes; nor do they deny that "[s]ince 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*, 1992 U.S. Dist. LEXIS 8954,*9-10; *Diamond Heights* at 304, finding creditor free to exclude the grantee, as here, from the fraudulent transfer action seeking only damages against the debtor.

Hence, the judgment granting dismissal and sanctions must be reversed, and

remanded to state court, because contrary to the trial court's erroneous view, the FAC/SAC seeks no injunctive relief whatsoever, and will take nothing from the JIV, which is neither a necessary, required or indispensable party to this action, as a matter of law. 2ER182-83, ¶¶39-41; 2ER306-13.

5. Sanctions must be reversed, because the JIV is not an indispensable party to the only remaining claim for damages arising from desecration on the fraudulently transferred cemetery.

Sanctions still cannot be awarded where it is certainly not reckless and more than reasonably debatable to seek an award of damages for Defendants' truly heinous torts that will not affect any legal interest of the JIV. No court has found the JIV to be indispensable to an action for desecration on fraudulently transferred California fee land. The prior actions relied upon in the trial court's order were never limited to fee land. The JIV has only been found indispensable, where injunctive relief was sought on JIV's trust land. AOB 65-69. And in none of the prior cases were Appellants' claims found to be frivolous or harassing because the JIV was found indispensable. *Id.*

Now that the desecration has occurred and faithful to the prior rulings, no injunction is sought whatsoever, an award of damages against Defendants will have no legal effect on the JIV. As noted above, Plaintiff-Appellants were well within their rights to timely file the FAC deleting all federal claims, and proffer the SAC in

support of their Rule 15, 59/60 motion, confirming that since the desecration has already occurred, no injunction can be, or is being, sought, thereby demonstrating more clearly how their remaining damage claims will not affect any JIV interests. CJA and the trial court simply ignore the fact that the remaining damage claims do not seek any injunction whatsoever. It is certainly not sanctionable for Plaintiff-Appellants to demonstrate what they learned from the prior actions, and how their original claims have been, and may be, amended with extreme liberality to prevent the JIV from becoming an indispensable party, *Foman*, at 182, AOB 30, which makes the trial court's denial of leave to amend an abuse of discretion. *U.S. v. Webb* at 979, AOB 30.

CJA cannot and does not deny that California law holds CJA and the Bishop liable for damages for the desecration of the families' remains, and that these claims are not frivolous or in bad faith. SAC. 2-ER175, ¶18; AOB 70-72. Moreover, they are not immune from such damages because the Bishop fraudulently attempted to avoid such liability by transferring the cemetery to a third party who is immune, but has not been, and need not be, sued by Plaintiff-Appellants, who have elected, per Civil Code §§3439.07(a)(1) and 3439.08(b)(1)(A), not to sue the JIV, invalidate the JIV's deed, or foreclose on the property.

Most importantly, the only evidence in the record is that Plaintiff-Appellants'

damage claims are based upon "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); 2ER306 and 3ER474-001-002.[4] Neither the trial court or CJA dispute these expert opinions. Hence, the sanctions must be reversed, particularly since Plaintiff-Appellants' fraudulent transfer claims are identical to the 582 other fraudulent transfer claims made by the sex abuse plaintiffs without sanctions in SDSC Case No. 23-0007391.

Plaintiff-Appellants and their counsel simply cannot be sanctioned for attempting to state "arguable claims" that are "fairly debatable," "objectively reasonable under the circumstances," and not frivolous, since they are "well-grounded in fact and law," with a "plausible basis, even if weak," where there is no evidence that they were used for an improper purpose or that "there is no chance of success," particularly since Appellants were denied a jury trial, and counsel has a non-sanctionable obligation to zealously keep the JIV from becoming indispensable.

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[4]Expert Paul Laurin and Patrick Webb's declarations were timely filed per the court's schedule for all post-judgment fee motions. 1ER016:6-8. *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983), trial court retains jurisdiction over fee motions even after notice of appeal filed.

Hudson at 1159; *Zaldivar* at 830; *In re Zilog*, at1007; *United Nat'l*, at 1117; *Strom* at 1059; AOB 72-75. As in *Hudson,* at 1162, this Court "cannot conclude that no set of facts could be presented to support" the FAC/SAC's claims that do not directly affect any JIV interest.

Moreover, the trial court ignores that sanctions are unawardable where they are are disproportionate, unable to be paid by Appellants, and would put Appellants' counsel out of business. 3ER474-018,¶52;[5] *Keegan* at 243; *Doering* at 196, *Sassower* at 81; AOB 76-77. Contrary to CJA's erroneous assertion, Plaintiff-Appellants and their counsel certinaly did not forfeit their timely challenge of the unreasonableness of the sanctions, per the court's schedule of the post judgment motions, both in the trial court 2ER246-3ER362, 3ER438-474-056, and in this appeal. AOB 76-77.

Here, the district court's finding that the FAC/SAC is frivolous and in bad faith is still based upon an erroneous view of the law, since the JIV cannot be an indispensable party to this action, as a matter of law, because the action does not seek to foreclose on the cemetery, nor affect any legal interest of the JIV. Therefore, the sanctions should be reversed, or alternatively reduced consistent with this Court's

[5] *Erceg v. Fairbanks*, 95 F.2d 850, 854 (9th Cir. 1938), owner's valuation probative and admissible.

instructions as requested in 2-ER154-164, 246 through 3-ER-362.[6] *Hudson* at 1163-64; *Primus* at 650; AOB 78.

Conclusion

The District Court's order and amended judgment, 1ER2-18, denying remand, dismissing for lack of an indispensable party and granting sanctions must be reversed, and the case remanded, as an error at law and abuse of discretion, because the FAC/SAC states no federal claim, and is not frivolous or in bad faith. Plaintiff-Appellants' claims are more than fairly debatable and objectively reasonable after competent inquiry, because the JIV is not an indispensable party, as a matter of law, since it 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' only remaining remedy of damages.

Dated: December 20, 2024

LAW OFFICES OF PATRICK D. WEBB
/s/Patrick D. Webb
Patrick D. Webb
Attorneys for all Appellants and their Counsel

[6] Contrary to *Momox,* AB 68, Appellants preserved the unreasonable fee arguments and cited to voluminous calculations submitted to the trial court, which need not be repeated in a brief, so long as included in the Excerpts of Record. Cir. Rules 28-2.7: "A party need not resubmit material included with a previous brief," and 30-1.4.

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 6,974 words.

Dated: December 20, 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' REPLY 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 December 20, 2024.

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

Executed on December 20, 2024, San Diego, California.

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

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