A156459

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

ROBERT FINDLETON, DOING BUSINESS AS TERRE CONSTRUCTION AND ALSO DOING BUSINESS AS ON-SITE EQUIPMENT,

Plaintiff and Respondent,

v.

COYOTE VALLEY BAND OF POMO INDIANS,

Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT FOR MENDOCINO COUNTY
NO. SCUK-CVG-12-59929
THE HONORABLE ANN C. MOORMAN

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE AND SUPPORTING DECLARATION OF DARIO NAVARRO

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ROBERT FINDLETON, DOING BUSINESS AS TERRE CONSTRUCTION AND ALSO DOING BUSINESS AS ON-SITE EQUIPMENT,

Plaintiff and Respondent,

v.

COYOTE VALLEY BAND OF POMO INDIANS,

Defendant and Appellant.

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE

Plaintiff-Respondent Robert Findleton ("Findleton") opposes the "Notice of Motion and Motion Requesting Judicial Notice" ("RJN") submitted to this Court on June 30, 2020 by Appellant Coyote Valley Band of Pomo Indians (the "Tribe") on the following five interrelated grounds as further elaborated in the accompanying Memorandum of Points and Authorities ["Memorandum"]: (1) irrelevance, (2) premature review of ongoing factual dispute in the superior court, (3) the Tribe's inequitable abuse of process in light of its continuing disobedience of the December 13, 2019 Order to Compel Production of Documents[1] that bear directly on the

1. Declaration of Dario Navarro (July 14, 2020) p. 25, ¶ 8(3) ["*Navarro Declaration*"], Record in Appeal No. A159823, Order Granting

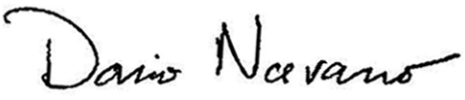
factual issues raised by the RJN, (4) the Tribe's lack of due diligence, untimeliness and prejudicial effect, and (5) the impropriety of judicial notice of the highly suspect May 23, 2019 *Elliott Recantation*.[2]

This Opposition to Appellant's Motion Requesting Judicial Notice is based on this notice of Opposition, the supporting Memorandum of Points and Authorities and accompanying Declaration of Dario Navarro.

Dated: July 14, 2020

Respectfully submitted,

LAW OFFICE OF DARIO NAVARRO



Dario Navarro
Attorney for Plaintiff and Respondent

Plaintiff's Motion to Compel Responses to Plaintiff's Amended First Set of Requests for Production of Documents (Dec. 13, 2019) pp. 1-2 [designated but not yet available], as amended in "Amended Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's Amended First Set of Requests for Production of Documents and Sanctions (Jan. 2, 2020) pp. 1-2.

2. Recantation Letter from Sonny J. Elliott, Chairman of the Northern California Intertribal Court System ("NCICS"), to Findleton's attorney of record, Dario Navarro (May 23, 2019) [attached as Exhibit 1 to RJN] (RNJ001-RJN-002) ["*Elliott Recantation*"].

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Findleton I *Determined State Court Jurisdiction.* On July 29, 2016, this Court issued *Findleton I*, its first published decision in this case, which expressly held under federal law both that **(i)** the Tribe "effected an express waiver of the [its] immunity that was clear and unequivocal" and **(ii)** such waiver "extended to judicial enforcement of the right to arbitrate and of any arbitration award, as indicated by the arbitration provisions of the agreements." (*Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194, 1217.) Crucially, this Court thereby expressly conferred undoubted jurisdiction on the Mendocino Superior Court to enforce the arbitration agreement. (*Ibid.*)

The Tribe's Improper Relitigation in Tribal Fora. Having lost on appeal in *Findleton I* and having failed to appeal that adverse decision, the Tribe improperly sought to *relitigate* the final determination of the issues decided in *Findleton I* in its first of two tribal lawsuits in the first of two different putative tribal fora (i.e., **Case No. NCICS-CV-2017-0001-JW** in NCICS) (OB 10, ¶ 3) on January 20, 2017, just over 6 months after *Findleton I* was decided. (RB 20-21, fn. 10.)[3]

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3. The *January 20, 2017 Tribal Petition* should not be confused with the September 15, 2017 *Tribal Petition* for injunctive relief, which is the subject of the RJN. (RJN006-RJN016.) The former was attached as Exhibit 1 to Defendant's Reply to Plaintiff's Opposition to Demurrer (Jan. 20, 2017) pp. 1-5, but never designated as part of the appellate record.

Final Determination of Obligation to Arbitrate. On April 24, 2017, the superior court issued its Order to Compel Arbitration.[4] (4CT 817-819.) On August 14, 2017, the California Court of Appeal denied the Tribe's petition for writ of mandate. (4CT 844, 888; 5CT 1124, ¶ 1.) On August 28, 2017, the California Supreme Court denied the Tribe's petition for review. (4CT 845.) After having exhausted all available appellate review of the April 24, 2017 Order to Compel Arbitration, the Tribe improperly sought to *relitigate* the issue that had been finally determined on August 28, 2017 by the California Supreme Court in a putative tribal forum on September 15, 2017, just **18 days** later, in a tribal action for declaratory and injunctive relief to negate the final result of the California state court appellate process. (RJN006-RJN162.)

***No Proof of Service or Certification of* Tribal Petition.** The missing *Tribal Petition* was submitted as Exhibit 2 to the RJN *with a blank, unsigned proof of service* (RJN004-RJN005) *for a* "Summons and Notice of Hearing" ["*Summons*"] (RJN003) *that itself indicated a complete lack of personal service on any party* (RJN004-RJN005). The *Summons* (RJN003), file-stamped September 18, 2017, makes no reference whatsoever to the *Tribal Petition,* nor any accompanying "Motion for Temporary Restraining Order and Preliminary Injunction" (September 15, 2017 "*Tribal Motion"*) [the main text of which is already in the record in this case in this appeal, absent its irrelevant exhibits (4CT 858-881)], nor to any accompanying "Appendix of Exhibits to Petition for Declaratory and Injunctive Relief and Motion for

4. Order After Hearing on Motion to Compel Mediation and Arbitration (signed Apr. 24, 2017 and filed Apr. 25, 2017) ["Order to Compel Arbitration"] at 4CT 817-819.

Temporary Restraining Order and Preliminary Injunction" ["*Tribal Appendix of Exhibits*"] (RJN041-RJN162).

No Lower Court Objection to Absence of Exhibits. The Tribe never formally offered the September 15, 2017 *Tribal Petition* into evidence in the trial court and never even noticed, much less objected to,[5] the absence of the exhibits in the *Tribal Motion* as introduced into evidence in the June 27, 2018 West Declaration[6] (4Ct 825-889, at 4CT 858-881), as the Tribe's legal counsel, Little Fawn Boland, unabashedly admitted in the *Boland Declaration* wherein she stated that, failing to exercise basic due diligence, she had been "previously unaware" that the West Declaration "was unstamped and the exhibits were not included." (RJN, Declaration of Little Fawn Boland (June 30, 2020) pp. 11-12 ("*Boland Declaration"*; see also Memorandum, p. 8:1-5.) The error was Boland's not Findleton's counsel.

Further, the Tribe misleadingly conflated the *Tribal Petition* with the *Tribal Motion* as one and the same document which it has combined as RNJ Exhibit 2, when they are actually two separate documents that were concurrently filed, neither of which individually bears any file-stamp, NCICS certification nor NCICS case number. (RJN 3, ¶ 3; 5, ¶ 2; *Boland Declaration,* p. 11, ¶ 3.) Similarly, the accompanying *Tribal Appendix of Exhibits* bears neither any date nor any case number. Thus, there is no way to confirm that the proferred uncertified *Tribal Petition* and *Tribal Appendix*

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5. Failure to lodge a timely objection waives the alleged error. (Evid. Code, § 353, subd. (a); *Pena v. Toney* (1979) 98 Cal.App.3d 534, 543.

6. Declaration of Colin C. West in Support of Motion for Sanctions and Pursuant to Local Rule 4.1 (June 27, 2018) ["West Declaration"] (4Ct 825-889, at 4CT 858-881).

of Exhibits actually consist of the true and correct filings the Tribe and *Boland Declaration* claim them to be. (*Boland Declaration,* p. 11, ¶ 3.)

In the AOB, the Tribe *completely omitted* any express reference to the September 8, 2017 threatening letter the Tribe sent to the American Arbitration Association ("AAA") (5CT 1125, ¶ 2; 4CT 848-849, at 849, ¶ 1) and referred misleadingly instead to what it described as seemingly inoffensive "ancillary communications to the American Arbitration Association . . . associated with the litigation" (AOB 8, ¶ 1), when, in fact, the Tribe's counsel Boland had attested under penalty of perjury on July 16, 2018 that between "August 28, 2017 and April 23, 2018, [she] sent a total of **21 emails** to the AAA and counsel for the AAA . . . [and] [she] received a total of **33 emails** from AAA and counsel for the AAA" for a total of 54 email exchanges.[7] In his RB, Findleton mentioned this glaring omission in the Tribe's AOB, not to widen the scope of appellate review to include all AAA communications with the Tribe, *as the Tribe has falsely claimed* (RJN 7-8), but rather merely to correct and clarify the Tribe's false and misleading characterization of its communications with AAA and preclude any subsequent claim by the Tribe that he would be estopped to deny the legitimacy of the Coyote Valley Tribal Court because he failed to object on appeal. (AOB 8-15; RB 20-21, fn. 10; 25-26, ¶ (1); 27, ¶ (1); 29 ¶ (9).)

Elliott Recantation *Not Court Document.* The *Elliott Recantation* is a litigation document that was addressed to Findleton's attorney, Dario Navarro, yet was *inexplicably* delivered *unsealed* in open court on the May 24, 2019 to Navarro by the Tribe's attorney of record, Little Fawn Boland,

7. Declaration of Little Fawn Boland (July 16, 2018) (5CT 926, ¶17-18, lines 3-6 [boldface added]); RT, Court Hearing (July 27, 2018) (6CT 1216, col. 2, p. 36:2-5.

who already knew its contents, on the day of the hearing on Findleton's application for a temporary restraining order ("TRO") and injunctive relief.[8] (*Navarro Declaration*, pp. 23-25, ¶¶ 3-7.) Only three days earlier on May 19, 2019, Sonny Elliott, the NCICS Judicial Council Chairman, had emailed to Findleton's counsel a letter in which Elliott emphatically confirmed:

> . . . that the 'Coyote Valley Tribal Court,' as well as the 'Coyote Valley Band of Pomo Indians Tribal Court,' is **NOT** associated, connected or related to the Northern California Intertribal Court System ("NCICS"). With that said, the Coyote Valley Band of Pomo Indians is a Tribe currently within the consortium of the NCICS.

(*Elliott Recantation*, Record in Appeal No. A158173, 9CT 2446, ¶ 1 [emphasis in original]; (*Navarro Declaration*, pp. 23-25, ¶¶ 3-7.)

At the May 24, 2019 hearing, defense counsel Boland's attempt to introduce the *Elliott Recantation* as an exhibit to her proferred declaration, which was never filed with the superior court nor admitted into evidence, caused Findleton's counsel immediately "to formally object to the submission" of the *Elliott Recantation* as an exhibit to Boland's declaration "as inadmissible and improper and it raises a serious question of witness

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8. The Tribe grossly mischaracterized the results of the May 24, 2019 hearing as "unsuccessful" in its Reply Brief. (ARB 13, fn. 3:8-9.) The hearing resulted in a denial of the TRO, but the superior court did issue a ruling from the bench granting an order to show cause why a preliminary injunction and an order for expedited discovery should not issue. Findleton later elected to withdraw his application "without prejudice to re-noting said Application in the future if necessary." (Record in Appeal No. A158173, 9CT 2589-2590.)

tampering."[9] The Tribe never responded to the Findleton's timely objection and never offered the declaration or the *Elliott Recantation* into evidence. Ms. Boland's professed *belief* "that the lower court admitted [her declaration] and took it under submission" is not admissible evidence and the record contradicts her belief. Far from settling the underlying factual dispute raised by the suspect *Elliott Recantation,* that letter only intensifies a continuing factual dispute in the lower court not yet ripe for appellate review. (*Navarro Declaration*, pp. 23-25, ¶¶ 3-7; *Boland Declaration,* p. 11, ¶ 2.)

ARGUMENT

I. THIS COURT SHOULD DENY JUDICIAL NOTICE OF THE SUBJECT TRIBAL DOCUMENTS BECAUSE THEY ARE TOTALLY IRRELEVANT TO THIS APPEAL.

A. The Tribe must show the proferred tribal documents are both relevant and constitute a matter that is of substantial consequence to the determination of the action.

Under Rule 8.252(a)(2)(A), the Tribe is required to demonstrate in its request for judicial notice that the tribal documents are relevant to the appeal. (Cal. Rules of Court, rule 8.252, subd. (a)(2)(A).) Under Evidence Code section 210, "'[r]elevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4; *People v. Roehler* (1985) 167 Cal.App.3d

9. RT, Ex Parte Hearing, Record in Appeal No. A159823 (May 24, 2019) p. 15, line 15-19 [record designated in Respondent's Notice Designating Record on Appeal (Nos. A158171, A158171, A158173) (Nov. 4, 2019) p. 3, Item, 2(a)(1)(d) [designating May 24, 2019 Reporter's Transcript].

353, 400.) Irrelevant evidence is inadmissible. (Evid. Code, § 350; *People v. Garcia* (1986) 183 Cal.App.3d 335, 343, fn. 6.) In addition to mere relevance, the Tribe has the burden of establishing that the subject tribal documents constitute a matter that is of "substantial consequence to the determination of the action." (Code Civ. Proc., § 469, subd. (d).] Obviously, if the tribal documents are not even relevant, they are *a fortiori* not of "substantial consequence to the determination of the action." (*Ibid*)

B. Since the facts to which the proferred tribal documents relate are not in dispute, they are not relevant.

Whatever the innocuous motives the Tribe may profess in attempting to rationalize its tribal court actions in this case, there is no disputing the essential facts constituting the violation of the Order to Compel Arbitration. First, the Tribe refused to obey that Order and continues to disobey it. (5CT 1125, ¶ 1:2-3; RB 57-58.) Second, the Tribe's resort to tribal court action had the effect of negating and obstructing the Order to Compel Arbitration. (5CT 1125, ¶ 1, 1126, ¶ 2; RB 58.) Further, the proferred *Tribal Petition* was not considered by the trial court. *Those facts are indisputable.* Thus, the proferred tribal documents may not, by definition, constitute *relevant evidence* because they do not have "any tendency in reason to prove or disprove *any disputed fact* that is of consequence to the determination of the action." (Evid. Code, § 210 [italics added].) Since the proferred tribal documents are irrelevant, they are inadmissible and should not be judicially notice. (Evid. Code, § 350; Cal. Rules of Court, rule 8.252, subd. (a)(2)(A); *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089.)

Neither do the proferred documents meet the "substantial consequence" standard. (Code Civ. Proc., § 469, subd. (d).) The Tribe falsely asserted

without elaboration that the proferred tribal documents constituted a matter of "substantial consequence to the determination of this action because each exhibit aids the Tribe to properly refute various statements made by the Respondent in the Respondent's Brief," but failed to identify to which of the "various statements" it was referring or demonstrate what relevance such uncited statements had to the outcome of this appeal. (RJN 4, ¶ 3.) The Tribe went on to claim falsely that each exhibit of the proffered tribal documents "also corrects an incomplete filing made by the Respondent," but, again, failed to identify *any* specific "incomplete filing" or how the tribal documents for which it seeks judicial notice would enhance the record in any meaningful or relevant sense to compensate for the alleged incompleteness. (RJN 5, ¶ 1.)[10] Finally, the Tribe falsely claimed, without citation, that Findleton has referred "to topics covered in these documents [that] are not in the appellate record" (RJN 5), but even if that were so, the solution would **not** be to introduce more documents concerning topics outside the appellate record, but, rather, to strictly limit review to the record, as Findleton has requested this Court to do. (RB 20-21, fn. 10.)

The Tribe's major relevance claim (RJN 6-7) *incredibly* rests on the *Findleton's* argument in his RB that the question whether the Tribe and its attorneys have deceived California courts about the legal status of the Coyote

10. In light of the Tribe's flagrant failure to correctly cite to the record or the RB, Findleton respectfully urges this Court to disregard any argument accompanied by such an incomplete or incorrect citation in violation of Rule 8.204(a)(1)(C). (*Ibid.*; *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 156 [citation to volume number of record required]; *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 589.)

Valley Tribal Court is "not ripe for review in this appeal as it is still the subject of a factual dispute in the trial court enforcement proceedings." (RB 20, fn. 10, ¶ 2.) Indeed, Findleton argued that any "formal determination of the facts" concerning that dispute would be "premature and unnecessary to affirm the Sanctions Order." (*Ibid.,* at pp. 20-21, fn. 10, ¶ 4, lines 2-4.) When an issue is not yet ripe for review, it is not yet relevant for consideration. (*Huff v. Securitas Sec. Servs. United States, Inc.* (2018) 23 Cal.App.5th 745, 762 [holding that where the "issue has not yet been decided by the trial court" it "is therefore not ripe for review" for "there is nothing . . . to review.'] ["*Huff*"].)

In response, the Tribe falsely denies "there are any active proceedings in the lower court regarding this alleged 'fraud on the court,' nor have there been since the Respondent's application was denied on May 24, 2019 and it was withdrawn on May 30, 2019." (RJN 6, fn. 2.) The Tribe is currently in contumacious violation of the December 13, 2019 Order to Compel Production of Documents, as amended January 2, 2020, which required, *inter alia,* the Tribe to produce documents by January 16, 2020 concerning the secretive creation of the Coyote Valley Tribal Court.[11] This is undeniably an active trial court factual dispute on this very issue in trial court enforcement proceedings. Thus, judicial recognition of the *Elliott Recantation* should be

11. Plaintiff's Amended First Set of Requests for the Production of Documents to Defendant (Aug. 28, 2019) p. 9, Document Request No. 3 ["Document Request No. 3"] [attached as Exhibit 1 to Supporting Declaration of Dario Navarro, accompanying Notice of Motion and Motion to Compel Responses to Plaintiff's Amended First Set of Requests for Production of Documents] [designated in Record in Appeal No. A159823, but not yet available].

summarily denied in anticipation of the development of a more complete trial court record on the issue. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493 ["*Preslie*"].)

C. The law of the case and the FAA preclude judicial notice.

Finally, the law of the case[12] and the FAA[13] make the proferred documents independently irrelevant and inadmissible since the state court has exclusive subject matter jurisdiction under the facts of this case, thereby rendering the results or filings of proceedings in tribal court judicially uncognizable in any state court proceedings. (*Findleton II,* 27 Cal.App.5th at p. 574; *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418.) Given the binding law of the case making resort to tribal court per se improper and extrajurisdicitional,[14] this Court should not take judicial notice of the redundant tribal court documents subject to its RJN because such judicial notice would subvert the law of the case and create a tribal court procedural

12. *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565, 574 ["As much as tribal exhaustion might have been desirable in the initial stages of this suit, to require a plaintiff to turn back the clock and exhaust previously unavailable remedies is contrary to judicial efficiency and prejudicial to an individual who brings suit in a forum available for immediate resolution of his claim."] ["*Findleton II*"] [quoting *Krempel v. the Prairie Island Indian Community* (1997) 125 F.3d 621, 623] [internal quotation marks omitted] ["*Krempel*"].)
13. Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. See text and authorities cited at RB 34, fn. 14.
14. *Findleton II,* 27 Cal.App.5th at p. 574.

obstacle contrary to the preemptive purpose and effect of the FAA to provide streamlined dispute resolution proceedings.[15]

II. THIS COURT SHOULD DENY JUDICIAL NOTICE OF THE SUBJECT TRIBAL DOCUMENTS BECAUSE THEY CONCERN AN ONGOING FACTUAL DISPUTE IN THE LOWER COURT.

Second, this Court should not take judicial notice of the tribal court documents because they relate to a *continuing factual dispute* in the lower court concerning the issue of whether the Tribe and its attorneys have, in an overt act constituting a "fraud on the court," deliberately misrepresented and concealed the fact that the putative Coyote Valley Tribal Court is not, and at all times relevant to the five pending appeals, has never been a duly constituted court of the NCICS. (RB 20-21, fn. 10; *Huff,* 23 Cal.App.5th at p. 762; *Preslie,* 70 Cal.App.3d at p. 493 [noting that judicial notice should not be taken of matters that should first be presented to the trial court for its initial consideration]; *People v. Hamilton* (1956) 191 Cal.App.3d Supp. 13, 21, 22 [same].)

III. THIS COURT SHOULD DENY JUDICIAL NOTICE OF THE TRIBAL DOCUMENTS BECAUSE THEY ARE PART OF A LARGER SET OF DOCUMENTS THAT THE TRIBE IS SUPPRESSING IN VIOLATION OF COURT ORDER IN A CONTINUING INEQUITABLE ABUSE OF PROCESS.

Third, this Court should not take judicial notice of the subject tribal court documents because they are part of a larger set of documents that the Tribe is suppressing in violation of court order in a continuing abuse of

15. (See text and authorities cited at RB 34, fn. 14.) As the *Concepcion* court noted, the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 341, 343-344 ["Concepcion"].)

process under fundamental principles of equity. (Civ. Code, § 3517 ["No one can take advantage of his own wrong."] As the California Supreme Court held in the seminal *MacPherson* decision, there "There may be no infringement 'upon the courts' inherent power to ignore the demands of litigants who persist in defying the legal orders and processes of this state." (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 279.) The Court should refrain from granting the Tribe any affirmative relief in the form of judicial notice or otherwise, until it starts obeying the orders of the superior court. (*Moffat v. Moffat* (1980) 27 Cal.3d 645, 652.)

IV. THIS COURT SHOULD NOT TAKE JUDICIAL NOTICE OF THE SUBJECT TRIBAL COURT DOCUMENTS BECAUSE THE RJN IS UNTIMELY AND REFLECTS AN INEXCUSABLE LACK OF DILIGENCE.

Although Rule 8.252(a) does not specify a specific deadline for filing an appellate motion requesting judicial notice, the *diligence* of the party requesting discretionary judicial notice should remain an important factor in the consideration of the reviewing court. (1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) § 5:162, p. 5-63 ["*Eisenberg*"].) The Tribe could have easily introduced the subject tribal documents at the appropriate opportunity in the lower court but negligently failed to do so. (RJN, *Boland Declaration,* pp. 11-12.) Although judicial notice may be requested at the time of briefing, "it is desirable in the interest of orderly judicial procedure" to make the request well before the brief-filing stage and certainly before the filing of the Tribe's Reply Brief when Findleton will have no opportunity to respond on the merits to the judicially noticed tribal documents. This is nothing less than prejudicial unfair surprise. (*Preslie,* 70 Cal.App.3d at 494.) Late judicial notice here would improperly delay and disrupt the expeditious administration of the appeal.

V. THE ELLIOTT RECANTATION IS NOT A PROPER SUBJECT OF JUDICIAL NOTICE.

The Tribe incorrectly asserted that the *Elliott Recantation* should be judicially noticed under Evidence Code section 452(c) [official judicial act] and 452(d) [official judicial record], as well as a nonexistent Evidence Code section of its own invention which it has denominated "Evid. Code § 459, subd. (h)," by which Findleton can only surmise the Tribe meant to refer to Evidence Code section 454(h) [facts and propositions not reasonably subject to dispute and capable of immediate and accurate determination]. Unfortunately for the Tribe, the one relevant case it sites, *Big Valley,* strongly supports denial of judicial notice. (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1192-1193 [declaration improper subject of judicial notice] ["*Big Valley*"].)

First, the *Elliott Recantation* is not an "[o]fficial act" of the "judicial" department of the tribal government under Evidence Code section 452(c). The *Elliott Recantation* was not correspondence issued in the regular course of business in accordance with standard departmental mailing practices because it **(i)** totally contradicted the content of a letter sent in the ordinary course of business three days earlier, **(ii)** was addressed to Findleton's attorney, Dario Navarro, but was delivered first unsealed, without an envelope to the Tribe's attorney, Little Fawn Boland, who, in turn, delivered the private letter to Navarro in open court on the day of a court hearing at which Boland intended but failed to introduce it into evidence, and **(iii)** contained new content that exactly corresponded the to Tribe's litigation position. (*Navarro Declaration*, pp. 23-25, ¶¶ 3-7.) Documents produced outside the regular course of business utilizing extraordinary mailing practices have been held ineligible for judicial notice under Evidence Code

section 452(c). (*Cruz v. Los Angeles* (1985) T73 Cal.App.3d 1131, 1134 [irregular mailing by coworker]; *Childs v. California* (1983) 144 Cal.App.3d 155, 162.)

Second, a written communication in a litigation context between an attorney to a party and a government attorney or government official acting under advice of counsel in a litigation context is not an official act under Evidence Code section 452(c). (*LaChance v. Valverde* (2012) 207 Cal.App.4th 779, 783.)

Third, *Big Valley* expressly held the "declaration of an adverse party is not a proper subject for judicial notice" under Evidence Code sections 452(d) & 452(h). (*Big Valley,* 133 Cal.App.4th at pp. 1192-1193.) Elliott's sudden reversal of his position on a crucial question of fact to support the litigation position of the Tribe transformed him into a hostile witness whose informal recantation, even less reliable than a declaration, became instantly ineligible as an official act of the tribal judicial department. (*Ibid.*)

Fourth, since the Tribe **(i)** provided no information about the legal authority with which the *Elliott Recantation* was made, **(ii)** no information about whether it reflected the result of a vote of the NCICS Judicial Council, **(iii)** no objective foundation for authentication, the Tribe has furnished this Court and with *insufficient* "information to enable it to take judicial notice of the matter." (Evid. Code, §§ 452, subd. (d); 452, subd. (h); 453, subd. (b); *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 743 [no assurance of authenticity].) Further, unsupported by a testimonial declaration *with adequate foundation*, the *Elliott Recantation* is merely unreliable, inadmissible hearsay and is, therefore, "reasonably subject to dispute." (Evid. Code, § 452, subd. (h); *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

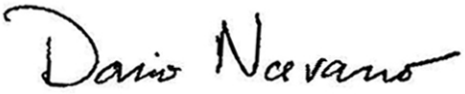
Fifth, judicial notice under Evidence Code section 452(d) is reserved for formal court records, not the litigation correspondence of judicial council administrators. (See, e.g., *Knoff v. San Francisco* (1969) 1 Cal.App.3d 184, 200 [grand jury transcripts]; *Tarrv. Merco Const. Engineers* (1978) 84 Cal.App.3d 707, 712, 714 [bankruptcy court records]; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1057 [judicial notice of complaint].) The Elliott Recantation is, thus, not subject to judicial notice under Evidence Code section 452(d).

CONCLUSION

This Court should summarily reject the latest attempt by the Tribe to introduce irrelevant and unreliable tribal court documents by means of judicial notice to distract this Court from holding the Tribe accountable for its contumacious violation of the Order to Compel Arbitration and other orders of the Mendocino Superior Court which it continues to flagrantly ignore and disobey. None of the proferred tribal documents in the RJN are relevant. All of them are integrally entangled in an ongoing factual dispute in the trial court. The Sanctions Order may be sustained and with ample evidence. The motion requesting judicial notice of the proferred tribal court documents should be summarily denied.

Dated: July 14, 2020

Respectfully submitted,
LAW OFFICE OF DARIO NAVARRO



Dario Navarro
Attorney for Plaintiff and Respondent

SUPPORTING DECLARATION OF DARIO NAVARRO

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and one of the attorneys of record herein for Plaintiff ROBERT FINDLETON ("Plaintiff" or "Plaintiff-Respondent"). I hold an LL.M. from the Yale Law School in New Haven, Connecticut, a J.D. from the Northwestern University School of Law in Chicago, Illinois, an M.P.A. from Princeton University in Princeton, New Jersey, and a B.A. from Marquette University in Milwaukee, Wisconsin.

2. The facts stated in this declaration are true of my own personal knowledge, except as to any matters stated on information and belief, and as to those matters, I am informed and believe them to be true. If called as a witness in this matter, I could and would competently testify to the matters set forth below.

3. The *Elliott Recantation,* attached as Exhibit 1 (RJN001-RJN002) to the "Notice of Motion and Motion Requesting Judicial Notice" ("RJN") filed by the Coyote Valley Band of Pomo Indians (the "Tribe") on June 30, 2020, was a letter dated May 23, 2019 putatively from Mr. Sonny Elliott, the Chairman of the Judicial Council of the Northern California Intertribal Court System ("NCICS"), addressed to me, yet it was inexplicably delivered to me *unsealed* in open court on the May 24, 2019 by the Tribe's attorney of record, Little Fawn Boland, Esq., who had access to its contents before I did, on the

same the day of the hearing on Findleton's application for a temporary restraining order ("TRO") and injunctive relief.

4. Only three days earlier on May 19, 2019, Mr. Elliott had sent me an email, through another court administrator, in which Mr. Elliott emphatically confirmed ". . . that the 'Coyote Valley Tribal Court,' as well as the 'Coyote Valley Band of Pomo Indians Tribal Court,' is **NOT** associated, connected or related to the Northern California Intertribal Court System ("NCICS"). With that said, the Coyote Valley Band of Pomo Indians is a Tribe currently within the consortium of the NCICS." This May 19, 2019 letter from Mr. Elliott appears in full as part of the Record in Appeal No. A158173, 9CT 2446, ¶ 1 [boldface capitalization in original]).

5. At the May 24, 2019 hearing in the superior court, defense counsel Little Fawn Boland, Esq., attempted unsuccessfully to introduce the *Elliott Recantation* as an exhibit to her proferred declaration. Ms. Boland never introduced either her declaration or the *Elliott Recantation* into evidence in the superior court nor did the Court make a formal ruling admitting those documents into evidence.

6. As soon as it became apparent that defense counsel Little Fawn Boland, Esq., was making some kind of attempt to offer the *Elliott Recantation* and her declaration into evidence, I immediately was prompted, as the transcripts of that hearing confirm, "to formally object to the submission" of the *Elliott Recantation* as an exhibit to Ms. Boland's

declaration "as inadmissible and improper and it raises a serious question of witness tampering." (RT, Ex Parte Hearing, Record in Appeal No. A159823 (May 24, 2019) p. 15, line 15-19 [record designated in Respondent's Notice Designating Record on Appeal (Nos. A158171, A158171, A158173) (Nov. 4, 2019) p. 3, Item, 2(a)(1)(d) [designating May 24, 2019 Reporter's Transcript].)

7. The Tribe never responded to my timely objection and never offered the declaration or the *Elliott Recantation* into evidence.

8. The Tribe is currently in violation of at least the following six orders of the Mendocino County Superior Court:

(1) Order After Hearing on Motion to Compel Mediation and Arbitration (signed Apr. 24, 2017 and filed Apr. 25, 2017) ["Order to Compel Arbitration"] at 4CT 817-819;

(2) Order Granting Plaintiff's Motion for Sanctions (signed and filed Dec. 10, 2018) ["Sanctions Order"] at 5CT 1124-1129;

(3) Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's Amended First Set of Requests for Production of Documents (Dec. 13, 2019) pp. 1-2 [designated for appellate record but not yet available as part of CT], as amended in "Amended Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's Amended First Set of Requests for Production of Documents and Sanctions (Jan. 2, 2020) pp. 1-2 [Record in Appeal No. A159823];

(4) Order Vacating Prior Order Awarding Costs/Attorney Fees and Awarding Costs/Attorney Fees on Appeal (signed Nov. 18, 2016; filed Nov. 21, 2016);

(5) Order after Hearing on Motion for Attorney Fees on Appeal (signed Feb. 15, 2019; filed Mar. 14, 2019); and

(6) Order after Hearing on Motion for Determination of Prevailing Party, Award of Attorney Fees, Etc. (Mar. 5, 2019)

9. Following his provision of public domain information to me by telephone and email in May 2019 concerning the legal status of the Coyote Valley Tribal Court and its relationship to the Northern California Intertribal Court System ("NCICS"), Mr. Michael Gadoua, the NCICS Court Operations Manager, was immediately terminated from his job on or around May 24, 2019, the day of Findleton's hearing on his application for declaratory and injunctive relief.

10. Defense Counsel Little Fawn Boland, Esq., announced the termination of Mr. Gadoua from his job as the NCICS Court Operations Manager in open court on May 24, 2019. (RT, Ex Parte Hearing, Record in Appeal No. A159823 (May 24, 2019) p. 54, line 7-14 [record designated in Respondent's Notice Designating Record on Appeal (Nos. A158171, A158171, A158173) (Nov. 4, 2019) p. 3, Item, 2(a)(1)(d) [designating May 24, 2019 Reporter's Transcript].

11. Each of the representatives of the Tribe subject to an order to appear for examination have obstructed, delayed and effectively prevented Plaintiff respondent Robert Findleton ("Findleton") and his legal counsel at each convened debtor's examination during 2019 by, among other means of obstruction, refusing to answer any questions about casino assets through reliance upon a claimed testimonial privilege based on a putative tribal court order that has never been formally recognized or given any legal effect by any decision or ruling of the California court system.

12. The Tribe was ordered by the Mendocino Superior Court to produced documents requested by Findleton pursuant to its December 13, 2019 Order to Compel the Production of Documents, as amended on January 2, 2020, by January 16, 2020, but the Tribe has failed to produce any of the requested documents and continues to refuse to comply with that Order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of July 2020 in South Lake Tahoe, California.

Dario Navarro

CERTIFICATE OF SERVICE

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE AND SUPPORTING DECLARATION OF DARIO NAVARRO

Case Name: *Findleton v. Coyote Valley Band of Pomo Indians*
Court of Appeal Case Number: A156459
Superior Court Case Number: SCUK CVG 12-59929

1. At the time of service, I was at least 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place. My business address is 3655 Memory Lane, South Lake Tahoe, CA 96150-4137. My electronic service address is mbarnes@terrecon.net.

2. I served a copy of *RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE AND SUPPORTING DECLARATION OF DARIO NAVARRO* ("said document") on the persons at addresses listed in items 4, 5, 6 and 7:

☑ **BY FIRST-CLASS MAIL:** I enclosed said document in a sealed addressed envelope and deposited the sealed envelope containing said document with the United States Postal Service with first-class postage fully prepaid at a United States Post Office in Somerset, California; and

☑ **BY ELECTRONIC MAIL:** I electronically served a true and correct courtesy copy of said document to said persons via electronic mail to the email addresses listed in item 7.

3. Said document was placed in the mail:

a. on *(date)*: **July 15, 2020**
b. at (*City and State*): **Somerset, California.**

4. The envelopes were addressed and mailed as follows to counsel of record for the Defendant-Appellant Coyote Valley Band of Pomo Indians ("Defendant-Appellant"):

Little Fawn Boland, Esq.
Ceiba Legal, LLP
35 Miller Avenue, No. 143
Mill Valley, CA 94941

Keith Anderson, Esq.
Ceiba Legal, LLP
35 Madrone Park Circle
Mill Valley, CA 94941

Glenn W. Peterson, Esq.
Peterson Watts Law Group, LLP
2267 Lava Ridge Court, Suite 210
Roseville, CA 95661

5. An additional copy of said document was addressed and mailed to the following attorney, representing the Coyote Economic Development Corporation ("CEDCO") and Coyote Valley Entertainment Enterprises ("CVEE") in this case:

Sara Dutschke Setshwaelo, Esq.
Partner, Kaplan Kirsch & Rockwell, LLP
595 Pacific Avenue, 4th Floor
San Francisco, CA 94133

6. I enclosed said document in a sealed addressed envelope and deposited the sealed envelope containing said document with the United States Postal Service with first-class postage fully prepaid at a United States Post Office in Somerset, California to the Honorable Ann C. Moorman, Presiding Judge, Mendocino County Superior Court:

Honorable Ann. C. Moorman
c/o Superior Court Clerk
100 North State Street
Ukiah, CA 95482

7. Electronic service address of each person served:

Little Fawn Boland, Esq.
Email: littlefawn@ceibalegal.com

Keith Anderson, Esq.
Email: keith@ceibalegal.com

Glenn W. Peterson, Esq.
Email: gpeterson@petersonwatts.com

Sara Dutschke Setshwaelo, Esq.
Email: ssetshwaelo@kaplankirsch.com

Honorable Ann C. Moorman
Email: DepartmentG@mendocino.courts.ca.gov

On (*date*): **July 15, 2020** at (*time*): 9 : 29 ☐ a.m. ☒ p.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in Placerville, California on the date indicated below:

Date: July 15, 2020

Margaret Barnes

Margaret Barnes