

A156459, A158171 / A158172 / A158173, A159823

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO**

ROBERT FINDLETON
Plaintiff and Respondent

v.

COYOTE VALLEY BAND OF POMO INDIANS
Defendant and Appellant.

Appeal from a Judgment of the Mendocino County Superior Court
No. SCUK-CVG-12-59929,
Hon. Ann C. Moorman, Presiding

**APPELLANT’S NOTICE OF MOTION TO STRIKE “MOTION TO
DISMISS APPEALS AND SUPPORTING MEMORANDUM” AND
REQUEST FOR JUDICIAL NOTICE WITH SUPPORTING
MEMORANDUM OF POINTS AND AUTHORITIES**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

APPELLANT’S NOTICE OF MOTION TO STRIKE “MOTION TO DISMISS APPEALS AND SUPPORTING MEMORANDUM” AND REQUEST FOR JUDICIAL NOTICE 4

MEMORANDUM OF POINTS AND AUTHORITIES 5

I. INTRODUCTION..... 5

II. STATEMENT OF FACTS 7

III. ARGUMENT..... 10

 A. A Motion to Strike is the Proper Remedy to Address the Defects in Respondent’s MTD and RJN. 10

 B. The MTD is an Impermissible Respondent’s Surreply to Several Topics for Which Briefing was Complete..... 10

 C. The MTD Addresses Topics That Belong Solely in Appeal A159823, For Which Briefing is Not Complete. 12

 D. The Motion and Supporting Memorandum Exceed Both the Page and Word Limits Typically Applicable to Motions. 13

 E. The Court Should Assert its Discretion to Narrow the Issues and Length of the MTD Because the MTD Is Filed At a Disfavored Time. 16

IV. RELIEF REQUESTED..... 17

DECLARATION OF LITTLE FAWN BOLAND 19

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

CASES

<i>C.J.A. Corp. v. Trans-Action Fin'l Corp.</i> (2001) 86 Cal.App.4th 664, 673.....	10
<i>Hawran v. Hixson</i> (2012) 209 Cal. App. 4th 256, 268.....	17
<i>In re Sade C.</i> (1996) 13 Cal. 4th 952).....	16
<i>Johnson v. Sun Realty Co.</i> (1932) 215 Cal. 382.....	14
<i>People v. Wende</i> (1979) 25 Cal. 3d 436, 443.....	16
<i>Williams v. Duffy</i> (1948) 32 Cal.2d 578.....	14

STATUTES

CRC 3.1113(e).....	16
CRC 3.1113(g).....	16
CRC 3.1113(d).....	passim
CRC 8.204(c)(1).....	passim
CRC 8.204(e)(2).....	17
CRC 8.54.....	15
CRC 8.54(a)(1)	15
CRC 8.54(a)(2)	15
CRC 8.54(a)(3)	14
CRC 3.1113(b)	15

APPELLANT’S NOTICE OF MOTION TO STRIKE “MOTION TO DISMISS APPEALS AND SUPPORTING MEMORANDUM” AND REQUEST FOR JUDICIAL NOTICE

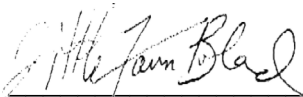
Appellant, the Coyote Valley Band of Pomo Indians (“Tribe”), moves this Court to strike Respondent’s “Motion to Dismiss Appeals and Supporting Memorandum” (“MTD”) improperly filed on May 28, 2021 and the Request For Judicial Notice (“RJN”) improperly filed on May 27, 2021, and require the Respondent to re-file corrected versions of both documents within thirty (30) days, with sixty (60) days for Appellant to respond consistent with this Court’s June 9, 2021 extension order.

The Tribe brings this motion because: (1) the MTD is an impermissible respondent’s surreply to several topics for which briefing was completed and, as such, Argument I(C)(2) at Pg. 36-37, Argument I(C)(3) at Pg. 37-40, Argument I(C)(5) at Pg. 43-44, Argument II at Pg. 44-47, and Argument IV at Pg. 48 of the supporting memorandum should be stricken in their entirety; (2) the MTD addresses discovery topics that belong solely in appeal A159823, for which briefing is not complete, and as such Argument I(C)(4) at Pg. 40-43 and Argument III should be stricken in their entirety; (3) the supporting memorandum exceeds the 15-page limit typically applicable to motions under California Rules of Court (“CRC”) 3.1113(d), and the MTD should be stricken in its entirety, accompanied by a court order that the Respondent submit a conforming document; (4) if the 14,000 word

limit under CRC 8.204(c)(1) applies rather than the 15-page limit under CRC 3.1113(d), then the MTD is lacking a Certificate of Compliance and the MTD should be stricken in its entirety, accompanied by a court order that the Respondent submit a conforming document; (5) if neither CRC 3.1113(d) nor CRC 8.204(c)(1) are applicable to the MTD, meaning that there are no statutory limits on motions filed in this Court, then this Court should assert its discretion to find the MTD and RJN excessive and strike the MTD and RJN and require a sensible amount of pages/words consistent with the spirit and intent of motion practice be filed for both documents.

Dated: June 14, 2021

Respectfully submitted,



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the MTD, Respondent violated both the law and policy of this Court. First, the MTD violates fundamental appellate conduct policy that a motion to dismiss not be used as a tool to advance or otherwise manipulate the hearing of the case on the merits. Arguments I(C)(2) through IV all relate to the merits of the dispute for which briefing has ended or is still ongoing, and for which leave to file has not been granted. Second, the MTD is an audacious disregard of the 15-page limit for memoranda under CRC 3.1113(d). Combined with its exhibits and the matters for which judicial notice is requested, the MTD occupies 1,440 pages of material. Third, if the 14,000-word limit under CRC 8.204(c)(1) applies, and not CRC 3.1113(d), then the MTD is lacking a Certificate of Compliance and should be stricken until it conforms with CRC 8.204(c)(1). Fourth, whether or not there is an applicable statutory limit on motions filed in this Court, judicial discretion should be exercised to limit the excessive MTD and RJN to a more sensible amount of pages/words because this MTD was not fairly filed at the earliest possible date, a requirement that is not codified but extant in numerous published decisions.

Ample bases exist to grant this Motion to Strike and require the Respondent to re-file corrected versions of both documents within thirty (30)

days, with sixty (60) days for Appellant to respond consistent with this Court's June 9, 2021 extension order.

II. STATEMENT OF FACTS

Respondent first raised the disentitlement doctrine with the lower court on August 9, 2019. (Motion Objecting to Plaintiff's Use of Appendix at 2, 3, 6-8.) Later, in this Court of Appeals, Respondent claimed that a disentitlement-based dismissal was warranted due to a fraud on the court stating that,

[d]ue to the seriousness of the Tribe's apparent litigation misconduct and its ongoing contumacious violation of multiple lower court orders, Findleton will *shortly* be filing a motion to dismiss this appeal under the disentitlement doctrine. A formal determination of the facts relating to the aforementioned fraud on the court by this appellate court would be premature and unnecessary to affirm the Sanctions Order. The appellate court should be aware, however, that Findleton contests the question of the legitimacy of the CV Tribal Court as a constituent court of NCICS *and will be litigating this issue in the superior court* in his efforts to enforce four outstanding money judgments against the Tribe.

(Respondent's Brief of March 6, 2020 at fn. 10, pg. 20-21.) (Emphasis added.) Respondent clearly used the 21 months between the time he first raised the disentitlement doctrine and the time he filed his motion to prepare a

1,355-page filing, including the MTD and RJN, adding to the already voluminous record.

The MTD, inclusive of declarations, is 85 pages and 21,986 words in total.¹ The Notice and Memorandum—exclusive of the tables, cover information, signature blocks, and attachments—is 13,334 words. The Notice is 9 pages long. The Memorandum is 36 pages long.

The RJN is 71 pages and 16,405 words. Inclusive of attachments, it totals 1,355 pages. It contains 27 exhibits with multiple subparts. Combined, the MTD and RJN total 1,440 pages.

Argument I(C)(2) at Pg. 36-37, Argument I(C)(3) at Pg. 37-40, Argument I(C)(5) at Pg. 43-44, Argument II at Pg. 44-47, and Argument IV at Pg. 48 relate to preemption by the Federal Arbitration Act, the application of collateral estoppel and issue preclusion, the alleged requirement to file a *Hurtado* choice of law motion, the alleged interlocutory nature of the appeals, and the standing of CEDCO and CVEE.

These topics are fully addressed in Respondent’s Briefs that were filed for: (1) A156459; (2) A158171 / A158172 / A158173. Boland Declaration at ¶3. Some of these same topics were addressed again in the Respondent’s Motion to Strike the Appellant’s Reply Brief in consolidated appeals A158171 / A158172 / A158173. *Id.* Putting the MTD side by side with those

¹ See Declaration of Little Fawn Boland (“Boland Declaration”) herein at ¶2 regarding the calculation of words in the MTD and RJN.

prior filed documents, one can see that each topic has already been addressed. *Id.* In the MTD, which includes significant amounts of text that was “cut and pasted” verbatim from previous filings, Respondent took the opportunity to change certain previously made arguments, attempting to improve upon them, and impermissibly rebutting topics briefed in Appellant’s Reply Briefs and Appellant’s Opposition to the Respondent’s Motion to Strike in consolidated appeals A158171 / A158172 / A158173. *Id.*

Argument I(C)(4) at Pg. 40-43 and Argument III, starting on page 47 and ending on page 48, relate solely to discovery topics addressed in the Respondents Brief for Appeal A159823, which the Respondent filed today and for which a Reply Brief will be due by Appellant in the coming weeks. Boland Declaration at ¶4. Upon receiving the Respondent’s Brief for Appeal A159823 today, Appellant compared it side by side with the MTD. *Id.* The arguments raised in the MTD fit directly with the arguments raised in the Respondent’s Brief. *Id.* Ms. Boland ran a search in the Respondent’s Brief using the search feature in Adobe Acrobat of approximately ten randomly selected cases found in Argument I(C)(4) and Argument III of the MTD. Boland Declaration at ¶4. Of the approximately ten randomly selected cases, four appeared in the Respondent’s Brief. *Id.* The discovery topics addressed in the MTD are topics that should have been raised in the Respondent’s Brief. It is evident that the supplemental arguments regarding matters of discovery

in the MTD were not included in the Respondent’s Brief because Respondent had reached his word count limit. Thus, Respondent’s inclusion of the supplemental arguments in the MTD—which have no bearing on the disentitlement doctrine or the argumentative bases of the MTD—represents an obvious attempt to impermissibly circumvent the word count limitations in the Respondent’s Brief. Case and point, the Certificate of Compliance attached to the Respondent’s Brief in Appeal A159823 attested that the Brief was 13,876 words in total. Clearly the discovery arguments in the MTD could not fit in the A159823 Respondent’s Brief.

III. ARGUMENT

A. A Motion to Strike is the Proper Remedy to Address the Defects in Respondent’s MTD and RJN.

When a brief, or part of a brief, fail to comply with the Rules of Court, the opposing party may file a motion to strike the brief in whole or in part; or the Court of Appeal may order the brief stricken (or corrected) on its own motion. (CRC 8.204, subd (e)(2); see *C.J.A. Corp. v. Trans-Action Fin’l Corp.* (2001) 86 Cal.App.4th 664, 673, [granting motion to strike “several passages” in brief that referred to evidence not in record].)

B. The MTD is an Impermissible Respondent’s Surreply to Several Topics for Which Briefing was Complete.

Arguments, I(C)(2) at Pg. 36-37, I(C)(3) at Pg. 37-40, I(C)(5) at Pg. 43-44, II at Pg. 44-47, and IV at Pg. 48 of the supporting memorandum are merits-based argumentation on topics for which briefing is complete and

which are not part of the disentanglement argument raised by Respondent.

Those arguments need to be stricken in their entirety.

The following is a table showing the topic and Respondent's Briefs addressing the topics.

	Location in Motion	Briefing Status	Respondent's Briefs
Preemption by the Federal Arbitration Act	I(C)(2) Pg. 36-37	Complete	A156459 at 34, 35-37, 70 A158171-73 at 48-50 A159823 at 31-32
Application of collateral estoppel / issue preclusion	I(C)(3) Pg. 37-40	Complete	A158171-73 at 16, 33-39, 44-47 A159823 at 33
Requirement to file a <i>Hurtado</i> choice of law motion	I(C)(5) Pg. 43-44	Complete	A158171-73 at 49 A159823 at 32-33
Interlocutory nature of the appeals	II Pg. 44-47	Complete	A158171-73 at 4,12, 14, 16, 41-43 A159823 at 24-25
Standing of CEDCO and CVEE	IV Pg. 48	Complete	A158171-73 at 25-26 A159823 at 52 with 17-20, 29, 41-56 all interrelated to the topic

In many instances, the text in these pages is lifted verbatim from earlier Respondent's Briefs. The rehashing of past arguments in Argument I(C)(2) at Pg. 36-37, Argument I(C)(3) at Pg. 37-40, Argument I(C)(5) at Pg. 43-44, Argument II at Pg. 44-47, and Argument IV at Pg. 48 reveals important points supporting that they be stricken in their entirety: (1) Respondent's memorandum is unnecessarily excessive; (2) Respondent is attempting to circumvent the page/word limitations applicable to the prior

submitted Respondent Briefs; (3) the Motion is inextricably entangled in the merits of the underlying appeals, making dismissal wholly inappropriate without reaching the merits on those topics; (4) the motion either invites or requires an examination of the entire record; (5) the MTD is impermissibly responding directly to topics for which a Reply Brief has already been filed; and (6) the MTD serves as a supplemental brief, or surreply, taking another “bite at the apple” on topics for which leave to file supplemental briefs has not been granted.

C. The MTD Addresses Topics That Belong Solely in Appeal A159823, For Which Briefing is Not Complete.

Argument I(C)(4) at Pg. 40-43 and Argument III, starting on page 47 and ending on page 48, need to be stricken in their entirety because those arguments relate solely to discovery topics addressed in Appeal 159823, which was filed today in the Respondent’s Brief, and for which a Reply Brief has not yet been filed. The following is the table of the arguments that are related solely to A159823 and for which briefing is incomplete.

Application of the Tribal Court’s orders to post judgment discovery	I(C)(4) Pg. 40-43	Ongoing	A159823 at 29-37
Lack of subject matter jurisdiction in appeal A159823	III Pg 47-48	Ongoing	A159823 at 24-27

The appropriate place to raise these arguments is in the Respondent’s Brief for that appeal. In fact, these arguments and some of the cases

discussed in the MTD are mentioned in the Respondent's Brief; but a lot of the arguments and cases in Argument I(C)(4) and Argument III are not in the Respondent's Brief.

This shows (1) that the Respondent's memorandum is unnecessarily excessive; (2) Respondent is attempting to circumvent the page/word limitations applicable to the Respondent Brief filed today in Appeal A159823 (Respondent used 13,876 words and could not have fit these arguments in their entirety without vastly exceeding the word count in the Respondent's Brief); (3) the MTD is inextricably entangled in the merits of the underlying appeal, making dismissal wholly inappropriate without reaching the merits on these discovery topics and without the Appellant having an opportunity to file a Reply Brief in the underlying appeal; (4) the MTD either invites or requires an examination of the entire record for Appeal A159823; and (5) the MTD serves as a supplemental brief, taking another "bite at the apple" on topics for which leave to file supplemental briefs has not been granted.

Argument I(C)(4) at Pg. 40-43 and Argument III, starting on page 47 and ending on page 48, need to be stricken in their entirety.

D. The Motion and Supporting Memorandum Exceed Both the Page and Word Limits Typically Applicable to Motions.

We acknowledge that the rules applicable to "briefs" in this Court are not explicitly made applicable to "motions" and/or "memoranda" in this Court. However, analogous statutory law and common sense suggest they

should be. First, from a common sense standpoint, why should a motion be under the same word count rules as a brief? A motion should be more limited in its word and page counts. After all, a motion to dismiss in this Court is considered a non-merits-based disposition. Usually, if the disposition of a motion to dismiss an appeal requires a consideration of an appeal upon its merits, the motion must be denied. *Williams v. Duffy* (1948) 32 Cal.2d 578, 197 P.2d 341, *cert. denied* 69 S.Ct. 57, 335 U.S. 840, 93 L.Ed. 391; see also *Johnson v. Sun Realty Co.* (1932) 215 Cal. 382, 10 P.2d 460 [holding that an objection that an appeal is without merit will not be considered on motion to dismiss]. By their nature, motions to dismiss concern a non-merits based challenge to the appeal. Accordingly, it is nonsensical that a motion's supporting memorandum be treated as a brief in terms of page or word count.

Another aspect that should imply a page/word limit on a memorandum supporting a motion made in this Court is the fact that the timeline for filing an opposing brief is relatively short; i.e., 15 days. (CRC 8.54(a)(3)). The notion that an appellant would have only 15 days to oppose a limitless filing is inherently unrealistic, thus another suggestion that memoranda supporting a motion in this Court be subject to a common sense limitation that would in no case exceed the limits applicable to a merits brief.

CRC 8.54 requires a party filing a motion in the appellate court to “stat[e] the grounds and the relief requested and identify [. . .] any documents

on which the motion is based.” (CRC 8.54(a)(1).) But the rule also requires the moving party to file a “memorandum.” (CRC 8.54(a)(2).) Even though the rule does not use the wording of the former rule, which required “points and authorities” (former CRC 41(a) [amended and renumbered as CRC 8.54 on Jan. 1, 2007]), there can be no mistaking that the required memorandum must establish that the law and facts support the moving party’s argument. Thus, the term “memorandum” appears to mean essentially the same thing in both the courts of appeal and the trial courts. CRC 3.1113 requires that memoranda supporting motions in the trial court must contain a statement of facts, a concise statement of the law, evidence and arguments relied upon, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. CRC 3.1113(b).

And, while the appellate rules in Title 8 are apparently silent on page/word limits applicable to memoranda, the rules are equally silent with respect to any distinction between a memorandum supporting a motion in this court and one supporting a motion in the trial courts. While CRC, Title 8, makes no mention of page/word limits, Title 3 does. CRC 3.1113(d) states that a memorandum in support of a motion may not exceed 15 pages, except motions for summary judgment, in which case the limit is increased to 20 pages. CRC 3.1113(d). Other parts of this rule require advance permission

from the court and provides that a memorandum that exceeds the limit must be considered as a late-filed paper. CRC 3.1113(e) and CRC 3.1113 (g).

If CRC 8.204(c)(1) applies setting forth a 14,000 limit, then the MTD is also not in conformity with the rule because it does not contain a Certificate of Compliance denoting the word count. It should be stricken and refiled with such certificate. If CRC 3.1113(d) applies, then the page limit should be 15 pages and it should be stricken to conform.

E. The Court Should Assert its Discretion to Narrow the Issues and Length of the MTD Because the MTD Is Filed At a Disfavored Time.

The Court should assert its discretion to find the MTD and RJN excessive and force the Respondent to narrow the issues by shortening the MTD.

This point makes even more sense when one considers that there is a strong policy preference to hear motions to dismiss as early in the appellate process as possible. See, e.g., *People v. Wende* (1979) 25 Cal. 3d 436, 443, (disapproved on other ground by, *In re Sade C.* (1996) 13 Cal. 4th 952) (“Once the record has been reviewed thoroughly, little appears to be gained by dismissing the appeal rather than deciding it on its merits.”) Respondent knowingly waited since the “Respondent’s Brief” filed on March 6, 2020 to file this MTD at a time when briefing is complete in 4 of 5 of the appeals and A159823 is not consolidated with the other appeals, except for purposes of sharing of the record.

IV. RELIEF REQUESTED

CRC 8.204(e)(2) provides in part: “If a brief does not comply with this rule: [¶] If the brief is filed, the reviewing court may, on its own or a party’s motion, with or without notice: [¶] (A) Order the brief returned for corrections and re-filing within a specified time; [¶] (B) Strike the brief with leave to file a new brief within a specified time; or [¶] (C) Disregard the noncompliance.” *Hawran v. Hixson* (2012) 209 Cal. App. 4th 256, 268.

First, the Respondent’s Brief should be stricken with Respondent required to file a new brief that meets the statutory requirements for memoranda under CRC 3.1113(d). Second, the Respondent should be required to file the new brief with Arguments I(C)(2)-(5), II, III and IV all stricken. Third, if the 14,000 word limit under CRC 8.204(c)(1) applies rather than the 15-page limit under CRC 3.1113(d), then the MTD is lacking a Certificate of Compliance and the MTD should be stricken in its entirety, accompanied by a court order that the Respondent must submit a conforming document. Fourth, if neither CRC 3.1113(d) nor CRC 8.204(c)(1) are applicable to the MTD, meaning that there are no statutory limits on motions filed in this Court, then this Court should assert its discretion to find the MTD and combined RJN are excessive. The Court should strike the MTD and RJN and require a new submission with a sensible amount of pages/words consistent with the spirit and intent of motion practice.

The new MTD should be filed within thirty (30) days of this Court's order with the Opposition to the MTD and the RJN due sixty (60) days later, consistent with the extension order issued on June 9, 2021.

The RJN should be denied as moot because the MTD is being stricken. It should be resubmitted with the new MTD. When it is resubmitted, it should have all the exhibits raised in argument I(C)(4) at Pg. 40-43 and argument III at Pg. 47-48 stricken. They should be submitted as part of appeal A159823 because they solely relate to that appeal.

Specifically they are 1) MRJN, Exhibit 21-A, vol. 7, Pg. 1267-1269, MRJN, 2) Exhibit 21-B, vol. 7, Pg. 1270-1276 and 3) MRJN, Exhibit 22, vol. 7, Pg. 1277-1278.

Dated: June 14, 2021

Respectfully submitted,



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DECLARATION OF LITTLE FAWN BOLAND

I, LITTLE FAWN BOLAND, declare as follows:

1. I am an attorney duly licensed to practice in the State of California, and I am one of the attorneys for Appellant, Coyote Valley Band of Pomo Indians. I am a member in good standing of the State Bar of California. The facts stated in this declaration are true of my own personal knowledge. If called as a witness in this matter, I could and would competently testify to the matters set forth below.

2. I calculated the word counts described herein by (i) converting the MTD and RJN from the downloaded PDF file into a document in Microsoft Word, (ii) deleting all the text that is not permitted to be counted, and (iii) running the word count program in Microsoft Word.

3. I went through the two Respondent's Briefs that were filed for (1) A156459 and (2) A158171 / A158172 / A158173. I also went through the Respondent's Motion to Strike the Appellant's Reply Brief in consolidated appeals A158171 / A158172 / A158173. I prepared the table comparing the MTD to those prior filings to confirm that these topics were extensively briefed already by the Respondent. I put the documents side by side and compared each topic in detail to find that the Respondent, while cutting and pasting verbatim with some text, also took the opportunity to change arguments and attempt to improve upon them and address topics later found in Appellant's Reply Briefs and Appellant's Opposition to the Respondent's

Motion to Strike the Appellant's Reply Brief in consolidated appeals A158171 / A158172 / A158173.

4. Upon receipt of Respondent's Brief, which was filed today in case number A159823, I put it side by side with Argument I(C)(4) at Pg. 40-43 and Argument III starting on page 47 and ending on page 48. The arguments raised in the MTD fit directly with the arguments raised in the Respondent's Brief. I ran a search in the Respondent's Brief using the search feature in Adobe Acrobat of approximately ten randomly selected cases found in Argument I(C)(4) and Argument III of the MTD. Of the approximately ten randomly selected cases, four appeared in the Respondent's Brief. The conclusion I drew is that while the discovery topics in the MTD fit within the arguments raised in the Respondent's Brief, the Respondent did not put them there because he desired to add more than could fit in the Respondent's Brief by using the MTD to impermissibly supplement his arguments.

5. I verified in the Certificate of Compliance that Respondent's Brief in Appeal used 13,876 words, which is how I drew the conclusion that these arguments plainly cannot fit in the A159823 Respondent's Brief.

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

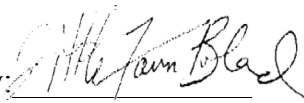
Dated: June 14, 2021

By:  _____

Little Fawn Boland (SBN 240181)

CERTIFICATE OF SERVICE

I hereby certify that, on June 14, 2021, a true and correct copy of: APPELLANT’S NOTICE OF MOTION TO STRIKE “MOTION TO DISMISS APPEALS AND SUPPORTING MEMORANDUM” AND REQUEST FOR JUDICIAL NOTICE WITH SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES was served on Dario Navarro, Michael Scott, Timothy Pemberton, and Thomas Gede, counsel for Respondent electronically through this Court’s e-filing system.

By: 
Little Fawn Boland

*Attorney for Defendant and Appellant,
Coyote Valley Band of Pomo Indians*

Document received by the CA 1st District Court of Appeal.