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

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO STRIKE; MEMORANDUM; PROPOSED ORDER

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OPPOSITION TO MOTION TO STRIKE

To the Honorable J. Anthony Kline, Presiding Justice, and the Honorable Associate Justices, James A. Richman and Therese M. Stewart, of the Court of Appeal of the State of California, First Appellate District, Division Two:

INTRODUCTION

Pursuant to California Rules of Court, rule 8.54(a)(3), Plaintiff-Respondent Robert Findleton ("Findleton") opposes the frivolous and totally unmeritorious putative Motion to Strike[1] filed on June 14, 2021 by

1. Although the Tribe has denominated its improper filing, "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" ("MTS" or "Motion to Strike"), in the final section of the Motion to Strike the Tribe requests

the Defendant-Appellant Coyote Valley Band of Pomo Indians ("Tribe"). (Cal. Rules of Court, rule 8.54, subd. (a)(3).) As will be explained in greater detail in the accompanying Memorandum, the Tribe cites a total of *only five cases*[2] in support of its Motion to Strike, *none of which offer any support whatsoever* for the unprecedented, meritless arguments the Tribe has mistakenly advanced. (MTS 10, 14, 16, 17.) Since the Tribe's Motion to Strike is both "frivolous" under Rule 8.276(a)(3) and constitutes an "unreasonable violation" of the California Rules of Court under Rule 8.276(4), the reviewing court should consider imposing sanctions *sua sponte*. (Cal. Rules of Court, rule 8.276, subds. (a)(3)-(4).)

No Legal Basis for Motion to Strike Motions. Rule 8.204(e)(2) only creates a right to file a motion to strike "briefs," not the appellate motions of the opposing party. (Cal. Rules of Court, rule 8.204, subd. (e)(2).) The Appellate Rules provide no legal basis whatsoever for a motion to strike the motion of an opposing party; the only permitted response is to file an "opposition" to the motion opposed. (*Id.,* rule 8.54, subds. (a)(3) & (c).) More specifically, the Tribe's Motion to Strike Findleton's Motion to Request Judicial Notice[3] and Motion to Dismiss[4], *qua motions*, lacks any basis whatsoever in law, including:

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the reviewing court to strike the Respondent's Brief in Appeal No. A159823 (MTS 17:7-20), although the RB conforms to all the requirements of California Rules of Court, rule 8.204 ("Rule 8.204").

2. The Tribe cites a sixth 1996 case, *Sade*, as subsequent history to the 1979 *Wende* decision, but grossly misrepresented both cases. (*People v. Wende* (1979) 25 Cal.3d 436, 440 ["*Wende*"]; *In re Sade C.* (1996) 13 Cal.4th 952, 994, fn. 22 ["*Sade*"].) See section III.D, *infra*.
3. Respondent Robert Findleton's Motion to Request Judicial Notice; Memorandum; Declarations; Proposed Order (filed May 27, 2021) ("MRJN" or "Motion to Request for Judicial Notice").
4. Respondent's Motion to Dismiss Appeals with Supporting Memorandum, Declarations, and Proposed Order (filed May 28, 2021) ("MTD" or "Motion to Dismiss").

(1) the California Code of Civil Procedure (Code Civ. Proc., §§ 435-437 [providing for motion to strike only certain pleadings filed in superior court only]);

(2) the "Rules Applicable to All Courts" or the "Appellate Rules," as respectively set forth in Titles 1 and 8 of the California Rules of Court (Cal. Rules of Court, rules 1.1-1.300, 8.1-8.1125, esp. 8.54 [no provision for motion to strike any other motion]);

(3) the First District Court of Appeal Local Rules (Ct. App., First Dist., Local Rules of Ct., rules 1-21 [no provision for motion to strike any other motion]);

(4) any extant California court decision; or

(5) any other applicable legal authority.

Rule 8.204(c)(1) Does Not Apply to Appellate Motions. By its own terms, Rule 8.204 of the Appellate Rules, including subdivision (c)(1) of Rule 8.204, only applies to the "[c]ontent and format of *briefs*," not appellate motions. (*Id.* at 8.204 [see heading and text] [italics added]; 8.7 [rule headings are "substantive"].) Further, as used in the Appellate Rules, "briefs" is a term of art expressly defined in Rules 8.200 and 8.10(7) that means only:

(1) "an appellant's opening brief" (Cal. Rules of Court, rule 8.200, subd. (a)(1));

(2) "a respondent's brief" (*Id.,* rule 8.200, subd. (a)(2));

(3) "a reply brief" (*Id.,* rule 8.200, subd. (a)(3));

(4) "petitions for rehearing, petitions for review, and answers thereto" but excluding "petitions for extraordinary relief in original proceedings." (*Id.,* rule 8.10, subd. (7).)

The term appellate "brief" does not include an appellate "motion" and the Appellate Rules governing the content and format of "briefs" do not apply to "motions." Consequently, the Tribe's attempt to strike two motions filed

by Findleton by relying on Rule 8.204(e)(2) is *completely frivolous* and must be rejected by the reviewing court. (MTS 10:11-18, 17:1-21.)

No Grounds for Striking Respondent's Brief. Without any coherent argument (MTS 10-18), without any citation to a single *supporting* court decision (MTS 10-18), and without alleging a single violation of any applicable rule of civil procedure or rule of court (MTS 10-18), the Tribe includes, apparently as an afterthought, in the final section of its MTS on "Relief Requested" (MTS 17:7-20) a completely frivolous entreaty to the reviewing court that "the Respondent's Brief" in Appeal No. A159823 "should be stricken with Respondent required to file a new brief" (MTS 17: 7-8) that meets the requirements set forth in California Rules of Court, rules 3.1113(d) and 8.204(c)(1), although the page-length limitation of Rule 3.3113(d) only applies to memoranda filed in "superior courts" under Rule 3.10 and the word count of Respondent's Brief, as defense counsel has expressly conceded, falls well below the 14,000-word limitation of Rule 8.204(c)(1). (MTS, Declaration of Little Fawn Boland (June 14, 2021) p. 20, ¶ 5:15-16 ["Boland Declaration"]; Cal. Rules of Court, rules 3.10 [limiting the application of Title 3 to "civil cases in superior courts"]; 3.1113, subd. (d) [limiting the length of memoranda filed in superior courts to "15 pages" except those relating to summary adjudication motions], & 8.204, subd. (c)(1) [limiting the length of an appellate "brief" produced on a computer to "14,000 words"].)

The Tribe and its defense counsel were *inexcusably unaware* (MTS 15) that Title 3 of the California Rules of Court, also known as the "Civil Rules," applies only to "civil cases in the superior courts," not to appeals, which are, of course, governed by Title 8 of the California Rules of Court, known as the "Appellate Rules." (*Id.,* at rules 3.1 [providing that the rules in Title 3 "may be referred to as the Civil Rules"]; 3.10 [limiting Civil Rules to superior court cases]; 8.4 [expressly providing that the Appellate

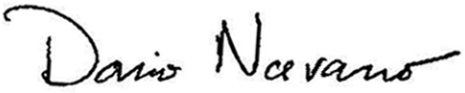
Rules of Title 8 apply to "[a]ppeals from the superior court" and that the Appellate Rules apply to "motions . . . in the Courts of Appeal].)

Basis of Opposition. This opposition to the Tribe's Motion to Strike is based on **(1)** the accompanying Memorandum of Points and Authorities, **(2)** the supporting Declaration of Dario Navarro, **(3)** the May 27, 2021 Motion to Request Judicial Notice, **(4)** the Motion to Dismiss, **(5)** the three Respondent's Briefs filed in Appeal Nos. A156459, A158171, A158172, A158173, and A159823, and the record and papers filed in those five pending appeals.

Dated: **June 26, 2021**

Respectfully submitted,

LAW OFFICE OF DARIO NAVARRO



Dario Navarro
Attorney for Plaintiff and Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

On April 6, 2021, the reviewing court set May 28, 2021 as the deadline for Findleton's "single" "motion to dismiss" "addressing all appeals for which dismissal is requested (including, if appropriate, A159823)." (Order issued Apr. 6, 2021, p. 2:19-22.) In addition, the reviewing court ordered that "such motion and any opposition may cite the record filed in any of the appeals, identifying the record or records cited by appeal number." (*Id.,* p. 2:23-25.) The reviewing court further ordered that it "will take judicial notice of the records cited as appropriate" and the "parties may also submit evidence by declaration and request for judicial notice." (*Id*., at p. 2:25-27.) The April 6, 2021 order set no other deadline for any other motion, application, or brief.

On April 16, 2021, the reviewing court granted Findleton's unopposed March 29, 2021 motion to augment the record to include Plaintiff's Status Conference Statement and the reporter's transcript of the April 26, 2019 debtor's examination of Amanda Pulawa. (Order issued April 16, 2021.)

On May 27, 2021, Findleton filed his seven-volume Motion to Request Judicial Notice, which included all 266 pages of the initial March 16, 2021 response of the U.S. Department of Justice under the Freedom of Information Act (FOIA) to his August 1, 2019 FOIA request for information about grant funding for the Northern California Intertribal Court System ("NCICS"). The extraordinary length of the MRJN reflects both the Tribe's prior refusal to provide any documents whatsoever in response to the Order to Compel Production[5] and Findleton's decision to

5. Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's Amended First Set of Requests for Production of Documents (Dec. 13, 2019), as amended on January 2, 2020 to specify monetary sanction in

share *all the documents* produced in response to his FOIA request in the interest of transparency and full disclosure.

On May 28, 2021, Findleton filed his Motion to Dismiss challenging, *inter alia,* the subject matter jurisdiction of the reviewing court to entertain the Tribe's misplaced appeals of three interlocutory orders in Appeal Nos. A158171, A158172, and A158173 and the improper appeal of the underlying nonappealable discovery order in Appeal No. A159823, and seeking dismissal of all five appeals under the disentitlement doctrine given the Tribe's flagrant and persistent violation of the April 24, 2017 Order to Compel Arbitration,[6] Order to Compel Production and other orders of the lower court.

On June 8, 2021, the Tribe filed an application for a 120-day extension of time in which to file opposition papers to Findleton's Motion to Dismiss and his Motion to Request Judicial Notice. The supporting declaration of defense counsel, Little Fawn Boland, Esq. (June 8, 2021 Boland Declaration"), *falsely stated* that Findleton has accused the "seven person [Coyote Valley] Tribal Council, the NCICS Judicial Council, the Hopland Band of Pomo Indians Tribal Council, the Manchester Band of Pomo Indians, the Cahto Indian Tribe, the Chief of the Coyote Valley Tribe, and present and former staff and officials of the foregoing bodies" of "coordinating a vast conspiracy against him." (Application for Extension of Time to File Opposition Papers (June 8, 2021), supporting June 8, 2021 Boland Declaration, p. 6 (p. 3 of the declaration), ¶ 1.) Findleton has never

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the amount of $11,348.00 ("Order to Compel Production") (1CT 215-220, 295-297).

6. Order on Hearing after Motion to Compel Mediation and Arbitration (signed Apr. 24, 2017; filed Apr. 25, 2017) ["Order to Compel Arbitration"] (4CCT 1137-1139). All references to the "Consolidated Clerk's Transcript" of Appeal Nos. A158171, A158172, and A158173 shall appear in the generic citation form, "[volume]CCT [page number]," for example, as in 9CCT 2495.

made any such accusation and the record is devoid of any evidence that he has. The accusation is a *complete fabrication* of defense counsel Boland.

On June 9, 2021, the reviewing court granted the Tribe only a 60-day extension in which to file opposition papers "to and including August 13, 2021." The reviewing court added that "[n]o further extensions of time will be granted." (Order issued June 9, 2021, p. 1, ¶ 1.)

On June 13, 2021, the Tribe filed a second application for an extension which it styled as an amendment to its June 8, 2021 application for an extension and purported to seek "clarification" from the reviewing court whether the August 13, 2021 extension deadline set for the opposition papers also applied to a hitherto unmentioned "Motion(s) to Strike." (Application for Extension of Time to File Opposition Papers (June 8, 2021), cover letter from defense counsel, p. 1, ¶ 1.) The June 13, 2021 application repeats the same *false statement* that Findleton has accused a large number of tribes, tribal agencies, tribal governmental bodies as well as their present and former staff of a "vast conspiracy against him." (*Id.,* at p. 7 [p. 3 of declaration], ¶ 1.)

On June 14, 2021, the Tribe filed its Motion to Strike without even waiting for the reviewing court to decide whether to grant its June 13, 2021 application for an extension of time in which to file that motion.

On June 16, 2021, the reviewing court denied the Tribe's application for an extension "as moot since appellant has already filed the motion to strike." (Order of Apr. 16, 2021.)

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ARGUMENT

I. THERE ARE NO LEGAL GROUNDS WHATSOEVER TO STRIKE THE RESPONDENT'S BRIEF.

A. The Respondent's Brief fully complies with the content, word count and format requirements of Rule 8.204.

Since the Respondent's Brief in Appeal No. A159823 fully complies with all applicable requirements of Rule 8.204 of the California Rules of Court, there is *absolutely no legal basis* to strike it and the Tribe's Motion to Strike must be found to be completely without merit and frivolous in the extreme under Rule 8.276(a)(3). (Cal. Rules of Court, rules 8.204, 8.276, subd. (a)(3).) Even the Tribe's defense counsel has expressly conceded that she personally "verified" that the word count of "13,876 words" (RB 58) presented in Findleton's Certificate of Compliance (RB 58) and found it to be exactly correct. (MTS, Boland Declaration, p. 20, ¶ 5:15-16.) So, there is no violation of the 14,000 word count limit of Rule 8.204(c)(1) and no grounds to strike the Respondent's Brief on that basis. (Cal. Rules of Court, rule 8.204, subd. (c)(1).)

Further, the challenged Respondent's Brief complies with every single mandatory content and format requirement of Rule 8.204 because it contains, among other required content, the following:

(1) "a table of contents and a table of authorities" (RB 3-5, 6-12) (Cal. Rules of Court, rule 8.204, subd. (a)(1)(A));

(2) "a separate heading or subheading" summarizing each point made in the argument with supporting "citation of authority" (RB 13-57) (Cal. Rules of Court, rule 8.204, subd. (a)(1)(B));

(3) copious "citation to the volume and page number of the record" (RB 13-57) (Cal. Rules of Court, rule 8.204, subd. (a)(1)(C)); and

(4) the correct 13-point permissible Times New Roman font with correct margins, paper size, page numbering, one-and-a-half-

spaced lines of text and identifying information (RB 13-57) (Cal. Rules of Court, rule 8.204, subd. (b)).

B. The Tribe's argument that the Respondent's Brief must comply with *superior court* Rule 3.1113(d) is frivolous and totally unmeritorious in the extreme.

Astonishingly, the Tribe mistakenly argues that the Respondent's Brief must satisfy the "statutory criteria [sic]" of "CRC 3.1113(d)" (MTS 17:7-9), which contains a 15-page limit that applies only to certain legal memoranda filed in *superior court.* (Cal. Rules of Court, rules 3.1113, subd. (d); 3.10 [limiting the application of the Civil Rules of Title 3 to "civil cases in superior court"].) Further, this argument is *unsupported by any citation to legal authority* for the *obvious reason* that superior court Civil Rules of Title 3 of the California Rules of Court do not apply to appeals; Appellate Rules apply to California appeals from superior courts. (*Id.,* rule 8.4 [expressly providing that the Appellate Rules of Title 8 apply to "[a]ppeals from the superior court"].)

Under well-established precedent, the reviewing court should not even consider such a frivolously mistaken argument because it *lacks any citation to legal authority* and is obviously incorrect. (*Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 383 [noting that appellate court "need not consider an argument for which no authority is furnished"] ["*Dabney*"]; *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284 ["*20th Century*"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["*Badie*"]; *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 138 ["*Horowitz*"].)

The Tribe seems *embarrassingly unaware* that that Title 3 applies only to civil cases in superior court and Title 8 applies to appeals from superior court as evidenced by it *catastrophically incorrect statements* that **(1)** "the term 'memorandum' appears to mean essentially the same thing in

both the courts of appeal and the trial courts" (MTS 15:7-8), and **(2)** the California Rules of Court are "silent with respect to any distinction between a memorandum supporting a motion in this [appellate] court and one supporting a motion in the trial courts" (MTD 15:14-16). Even a cursory review of Rules 3.10 and 8.4 clearly reveals Title 3 superior court Civil Rules never apply to appeals from superior court, appellate filings or appellate proceedings. (Cal. Rules of Court, rules, 3.10 & 8.4.) The scope of application of Title 3 and Title 8 is as obvious as the Tribe's conflation of the two is blatantly incorrect.

C. The Tribe's *perfunctory demand* that four important arguments in the Respondent's Brief be stricken lacks any reasoned argument or citation to legal authority.

Without providing any supporting argument whatsoever and without citation to any legal authority, the Tribe just *perfunctorily demands* that "Respondent should be required to file the new brief with Arguments I(C)(2)-(5), II, III and IV all stricken." (MTS 17:10-12.) This arbitrary demand must be ignored by this court because it is unsupported by any analysis or citation to legal authority. (*Dabney,* 104 Cal.App.4th at p. 383; *20th Century,* 86 Cal.App.4th at p. 284; *Badie,* 67 Cal.App.4th at pp. 784-785; *Horowitz,* 79 Cal.App.3d at p. 138.) Further, the Tribe's reference to "I(C)(2)-(5), II, III and IV" is hopelessly confused. The Respondent's Brief contains no argument section "I(C)(2)-(5)," but Respondent's Motion to Dismiss does. (Compare RB 24-25 *with* MTD 32-43.) Did the Tribe intend to demand those arguments be stricken from the Motion to Dismiss as a condition precedent to refiling an *unchanged* Respondent's Brief? The argument is totally incoherent.

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D. The Tribe's unprecedented argument that the length and substance of Findleton's Motion to Dismiss and Motion to Request Judicial Notice must somehow cause a defect in the Respondent's Brief is frivolous and totally unmeritorious.

The Tribe appears to be arguing that the length, substance and even case citations in Findleton's Motion to Dismiss and Motion to Request Judicial Notice must somehow create a defect in the subsequently filed Respondent's Brief that requires the reviewing court to strike the Respondent's Brief. (MTS 6-18.) Astonishingly, the Tribe has gone to great lengths to show that there is substantial similarity between some of the arguments in Findleton's respondent's briefs and his motion to dismiss and motion to request judicial notice (MTS, Boland Declaration, pp. 19-20), as if this were some kind of impermissible and unfair form of argument, as if Findleton were under some kind of implicit duty to raise an argument in one and only one filing in these appeals and nowhere else, as if this reviewing court were required to restrict its review of each of Findleton's filings in complete isolation from every other filing. (MTS 6, ¶ 1:3-8, 8, ¶ 3:10-20, 9:1-21, 10:1-9, 10:21-23, 11-13:12-17.) This argument reveals such an egregious misunderstanding of the appellate review process as to beggar belief and must be deemed frivolous and unmeritorious in the extreme. More specifically, the Tribe takes *meritless exception* to the similarity of arguments in Findleton's three Respondent Briefs and his Motion to Dismiss and argues that any mention of the issues the Tribe specifically raises must be arbitrarily confined to only one of the Respondent's Brief or somehow Findleton will have made an impermissible "surreply." (MTS 10-13.)

First, once again, the Tribe fails to cite a single case, a single rule of civil procedure or a single rule of court in support of its bizarre theory and all of its arguments should, on that basis alone, be disregarded by the reviewing court. (MTS 6-18; *Dabney,* 104 Cal.App.4th at p. 383; *20th*

Century, 86 Cal.App.4th at p. 284; *Badie,* 67 Cal.App.4th at pp. 784-785; *Horowitz,* 79 Cal.App.3d at p. 138.)

Second, the Tribe made the utterly frivolous argument that Findleton's Motion to Dismiss must be stricken because it addresses arguments that "relate solely to discovery topics" in Appeal No. A159823, apparently ignoring that the April 6, 2021 order of this Court expressly authorized Findleton to file a motion to dismiss all five appeals, "including, if appropriate, A159823." (Order issued Apr. 6, 2021, p. 2:19-22.) In other words, the Tribe is absurdly arguing that Findleton's Motion to Dismiss must be stricken because it *fully complies* with the April 6, 2021 order of this Court by seeking dismissal of an appeal that this Court has expressly identified as subject to Findleton's dismissal motion. (*Id.*) Obviously, this argument is incoherent and should be disregarded by the reviewing court.

Third, all of the arguments[7] which the Tribe incorrectly claims may be mentioned only once in a Respondent's Brief concern: **(1)** the reviewing court's lack of subject matter jurisdiction to hear the appeals (MTS 11),

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7. The specific arguments that the Tribe *falsely claims* may not be mentioned both in a respondent's brief and motion to dismiss are as follows: **(1)** preemption or supersession of tribal court jurisdiction and tribal law by the Federal Arbitration Act ("FAA"), at MTD, Argument Part I.C.2, pp. 36-37, **(2)** preclusion of tribal court jurisdiction by mandatory equitable rules of issue preclusion or collateral estoppel, at MTD, Argument Part I.C.3, pp. 37-40, **(3)** the Tribe's fatal failure to file a mandatory *Hurtado* choice-of-law determination motion in the lower court, MTD, Argument Part I.C.5, pp. 43-44, **(4)** lack of jurisdiction of reviewing court to review interlocutory appeals, MTD, Argument Part. II, pp. 44-47, **(5)** lack of jurisdiction of reviewing court to hear appeals from non-parties tribal corporations, CEDCO and CVEE, MTD, Argument Part IV, p. 48, **(6)** lower court's discretion to ignore foreign tribal court orders based on foreign tribal law prohibiting post-judgment discovery in the lower court, MTD, Argument Part I.C.4, pp. 40-43, **(7)** lack of jurisdiction of the reviewing court to review that part of Appeal No. 159823 which contests the merits of the underlying Order to Compel Production, MTD, Argument Part III, pp. 47-48. (MTS 10-13.)

(2) Findleton's request that the reviewing court exercise its discretion to dismiss all five appeals under the disentitlement doctrine arising from the Tribe's obstructive conduct in violation of the April 24, 2017 Order to Compel Arbitration and other lower court orders (MTS 11-13), **(3)** the Tribe's waiver of any claim that the law of a foreign tribal jurisdiction should displace California and federal law in the lower court by having conspicuously failed properly to raise that issue in a *Hurtado* choice-of-law determination motion, all of which *may be robustly argued and should be robustly argued* in the three respondent's briefs and Findleton's Motion to Dismiss. (MTS 11.)

Subject Matter Jurisdiction. It is *absolutely elementary* that arguments establishing the reviewing court's lack of *subject matter jurisdiction* may be argued in both the respondent's brief in connection with the underlying merits and in a motion to dismiss, where lack of subject matter jurisdiction is a primary legal basis for such a motion. (*Sequoia Park Assocs. v. County of Sonoma* (2009) 176 Cal.App.4th 1270, 1276 [commending counsel for thorough "attention" paid to "jurisdictional issues"]; *Marbury v. Madison* (1803) 5 U.S. 137, 175-180 [holding the high court lacked "original jurisdiction," after a thorough consideration of the merits, to issue a writ of mandamus ordering U.S. Secretary of State James Madison to deliver certain judicial commissions because the statute authorizing such original jurisdiction was unconstitutional]; 1 *CEB,* § 11.6, p. 11-9 [grounds for motion to dismiss]; 1 *Eisenberg,* §§ 5:9 – 5:37, pp. 5.2 – 5-22 [same].)

Further, contrary to the Tribe's idiosyncratic view of "common sense" (MTS 13:22), it is only to be expected that issues relating to subject matter jurisdiction and a long litany of misconduct triggering the application of the disentitlement doctrine should consume more space in a motion to dismiss than in a respondent's brief because such topics constitute the limited

permissible bases for dismissal, whereas a respondent's brief must *also* address the wide range of other issues raised, misrepresented or omitted in an appellant's opening brief. (1 *CEB,* § 11.6, p. 11-9 [grounds for motion to dismiss]; 1 *Eisenberg,* §§ 5:9 – 5:37, pp. 5.2 – 5-22 [same]; 2 *Eisenberg,* §§ 9:65 – 9:74, pp. 9-22 – 9-25 [discussing breadth of subject matter in respondent's brief].)

Violations of Lower Court Orders. The Tribe's frivolous mischaracterization of certain arguments in Findleton's Motion to Dismiss as an impermissible "surreply" reveals a fundamental misunderstanding of the purpose and meaning of the arguments raised in the respondent's briefs and the Motion to Dismiss. (MTS 10-13.) In the Motion to Dismiss, Findleton expressly challenged the Tribe's improper, repeated resort to two different putative tribal courts as instances of obstructive litigation misconduct in overt violation of the April 24, 2017 Order to Compel Arbitration and other lower court orders, thereby triggering the application of the disentitlement doctrine. (MTD 7-12, 14-25, 28-44.) As a means of establishing that the Tribe's repeated resort to two different putative tribal courts was improper and constituted unjustifiable litigation misconduct, Findleton expressly argued in Part I.C.1.5 of his Motion to Dismiss that the putative tribal courts had no jurisdiction or that the Tribe's resort to those tribal courts was otherwise abusive and impermissible. (MTD 34-44.) Those arguments did not constitute an impermissible surreply to any issue on the merits *per se*, but, rather, were framed as grounds for applying the disentitlement doctrine. (MTD 34-44.)

Findleton raised similar arguments challenging the validity and relevance of the putative tribal court orders in his Respondent's Brief in Appeal A159823 (RB 29-36), but not to show intentional obstructive litigation misconduct, but to show that the tribal court orders and tribal law in no way eliminated, restricted or impaired the Tribe's "possession,

custody, or control" of the requested documents and constituted "absolutely *no legal bar* to compliance with the Order to Compel Production" (1CT 215-220) by the Tribe, its attorneys of record and the two tribal subsidiaries, CEDCO and CVEE. (MTD 29-37, at 29:7-11.) There was nothing improper in raising similar arguments concerning the conspicuous lack of enforcement jurisdiction of the two putative tribal courts over the arbitration agreement for two different purposes:

(1) to show that resort to the two putative tribal courts was *completely unjustifiable* and must, therefore, be considered *obstructive litigation misconduct* in violation of lower court orders to arbitrate and submit to post-judgment discovery (MTD 29-37); and

(2) to show that **(a)** any putative tribal court orders resulting from such illicit forum shopping, as well as any tribal laws on which such putative orders were supposedly based, presented *absolutely no legal bar to tribal compliance* with the Order to Compel Production and **(b)** such putative tribal laws and orders must be treated as legally void or without legal effect in a state superior court, and, consequently, should be ignored by California state courts. (RB 29-37.)

In short, the same or similar arguments about the inherent legal impropriety in the Tribe's resort to putative tribal judicial process and any resulting putative tribal court orders resulting from such forum shopping could be marshalled to establish that the Tribe's illicit resort to two putative tribal courts **(1)** constituted obstructive litigation misconduct in violation of lower court orders which triggered the application of the disentitlement doctrine and **(2)** did not and could not lawfully relieve the Tribe of its paramount obligation to obey the Order to Compel Production. (MTD 29-37; RB 29-37.)

Tribal Failure to File Required *Hurtado* Motion. Findleton offered his argument that the Tribe's conspicuous failure to properly raise its

choice-of-law claim in a required *Hurtado* choice-of-law determination motion in the lower court in support of two discrete points of law in his Motion to Dismiss and his Respondent's Brief. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581.) In his Respondent's Briefs, Findleton argued that the Tribe's failure to file the required *Hurtado* motion established that the putative tribal court order and related tribal law did not lawfully bar compliance with the Order to Compel Production because the Tribe waived its choice-of-law challenge by failing to file the required *Hurtado* motion in the lower court (RB 32-33). In Findleton's Motion to Dismiss, Findleton argued that the Tribe's failure to file the required *Hurtado* motion was further evidence of obstructive litigation misconduct that triggered the application of the disentitlement doctrine. By failing to file the required *Hurtado* motion, the Tribe had never properly brought before the state court its choice-of-law challenge and, thus, any subsequent reliance on tribal law or putative tribal court orders constituted unjustified obstruction in violation of the Order to Compel Arbitration and other superior court orders. (MTD 34, 43-44.)

The Tribe has been unable to point to any legal authority whatsoever in its Motion to Strike (MTS 4-18) that would prohibit Findleton's argumentative use of the Tribe's failure to properly raise its choice-of-law challenge. Findleton *correctly relied* on the Tribe's failure to file a required *Hurtado* motion in support of two discrete but related points of law: **(1)** the Tribe's obligation to obey the Order to Compel Production after having waived any challenge to the lower court's choice-of-law decision for failure to raise the issue by means of a *Hurtado* choice-of-law motion (RB 29, 32-33), and **(2)** as evidence of obstructive litigation misconduct triggering the application of the disentitlement doctrine. (MTD 34, 43-44.)

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E. The Tribe's argument that the timing of Findleton's Motion to Dismiss and Motion to Request Judicial Notice was somehow improper or unfair is without any basis in law and utterly frivolous and meritless in the extreme.

The Tribe has repeatedly made the untenable argument to this reviewing court that Findleton "used 21 months between the time he first raised the disentitlement doctrine" and the date on which he filed his motion to dismiss and motion to request judicial notice to prepare those motions. (MTS 7-8.) This argument is irrelevant and incoherent.

First, the Tribe fails to a cite a single legal authority—not a case, nor a rule of civil procedure, not a rule of court—that provides any legal grounds whatsoever in support of its argument that the timing of Findleton's motions or briefs constitutes a basis for striking any of Findleton's briefs or motions in this appeal and should be disregarded for want of any supporting legal authority alone. (*Dabney,* 104 Cal.App.4th at p. 383; *20th Century,* 86 Cal.App.4th at p. 284; *Badie,* 67 Cal.App.4th at pp. 784-785; *Horowitz,* 79 Cal.App.3d at p. 138.) Further, what scant authority the Tribe does cite, *it inexcusably and egregiously misrepresents*. The Tribe falsely and misleadingly presents the following string citation in support of the proposition that "there is a strong policy preference to hear motions to dismiss as early in the appellate process as possible." (MTS 16:14-16.)

> See, e.g., *People v. Wende* (1979) 25 Cal. 3d 436, 443, (disapproved on other ground[s] [sic] 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.")

Unfortunately for the Tribe, nowhere in *Wende* or *Sade* does either court state such a "strong policy preference" to hear motions to dismiss as early as possible in the appellate process. (*People v. Wende* (1979) 25 Cal.3d

436, 436-447 ["*Wende*"].) That is a *complete fabrication* of defense counsel. Further, the above parenthetical quotation from *Wende* is precisely the basis on which the California Supreme Court did, in fact, disapprove of *Wende,* making the explanatory phrase in the Tribe's citation of subsequent history that *Wende* was "disapproved on other ground[s] [sic]" equally *false and misleading*. (*In re Sade C.* (1996) 13 Cal.4th 952, 994, fn. 22 ["*Sade*"].*)* Further, *Wende* concerned a technical point of *appellate criminal procedure* that *Sade* and the California appellate courts have held to be inapplicable to *civil appeals.* (*Sade,* 13 Cal.4th at pp. 978-983; *People v. Smith* (2005) 127 Cal.App.4th 896, 899; *Wende,* 25 Cal.3d at p. 440; *In re Olsen* (1986) 176 Cal.App.3d 386, 389-392; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1117, fn. 2; MTS 6-18.) For a more detailed discussion of the Tribe's misrepresentation of the *Wende* and *Sade* decisions, see section III.D, *infra*.

Second, Findleton has offended no extant California decision, no rule of civil procedure, no rule of court in filing his motion to dismiss and motion to request judicial notice when he did pursuant to court order. (Order issued Apr. 6, 2021, p. 2.) As a leading treatise on California appellate procedure has emphasized, there "is no prescribed time period for filing a motion to dismiss" and that California appellate courts may prefer to "defer a decision" on a motion to dismiss to permit a full understanding of the relevance of the merits to the dismissal decision. (1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) §§ 5:39, 5:42, pp. 5-22, 5-23 ["*Eisenberg*"]; *Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, 40, superseded by statute on other grounds as stated in *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1336-1337 [reviewing court deferred ruling on respondent's motion to dismiss based on argument by party that required "delving into the record and the merits of the appeal"]; *Stockton Theaters, Inc. v Palermo* (1952) 109

Cal.App.2d 616, 619, disapproved in part on other grounds in *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 475 [same]; 1 California Civil Appellate Practice (Cont.Ed. Bar 3d ed. 2019) §§ 11.7, 11.82, pp. 11-91 – 11-10 [motion to dismiss], 11-56 – 11-57 [motion to request judicial notice] ["*CEB*"].)

Third, the Tribe's frivolous timing argument fatally ignores the incontrovertible fact that the timing of both the motion to dismiss and motion to request judicial notice was approved and ordered by the reviewing court in its order of April 6, 2021. (Order issued Apr. 6, 2021, p. 2:19-27.) Thus, the Tribe may not be heard to complain about a briefing schedule with respect to which it had an opportunity to object, and which was subsequently ordered by the court. (*Id.*)

Fourth, the Tribe's argument conveniently overlooks the telling fact that the Tribe had precisely the same amount of time to prepare a response to Findleton's disentitlement argument as Findleton had to prepare it in the first instance given that Findleton had so transparently placed the Tribe on notice of his intention to pursue that legal theory "21 months" ago. (MTS 7-8.) Thus, the Tribe, far from being disadvantaged by Findleton's early revelation of his appellate legal strategy, had the same opportunity to research and develop a defense to the disentitlement argument as Findleton had to research and develop the original argument. The Tribe's *unsupported* timing arguments are completely meritless and should be ignored by the reviewing court. (*Dabney,* 104 Cal.App.4th at p. 383.)

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II. SINCE THE APPELLATE RULES PROVIDE ABSOLUTELY NO GROUNDS TO FILE A MOTION TO STRIKE THE *MOTION* OF AN OPPOSING PARTY, THE TRIBE'S MOTION TO STRIKE MUST BE SUMMARILY DENIED.

A. Rule 8.54(a)(3) only permits the Tribe to file an "opposition" to each of Findleton's motions, *not a motion to strike*.

The Tribe's Motion to Strike improperly seeks to have Findleton's Motion to Dismiss and his Motion to Request Judicial Notice *stricken* (MTS 10-18), although there is no legal basis for filing a motion to strike the *motion* of an opposing party. The only response permitted by the Appellate Rules to a motion to dismiss or a motion to request judicial notice is an "opposition." (Cal. Rules of Court, rule 8.54, subds. (a)(3) & (c); 1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) § 5:246 – 5:251, pp. 5-95 – 5-96 ["*Eisenberg*"].) The Appellate Rules only permit a motion to strike a defective *brief,* not the *motion* of an opposing party. (*Id.,* rule 8.204, subd. (e)(2); *C.J.A. Corporation v. Trans-Action Financial* (2001) 86 Cal.App.4th 664, 673 [motion to strike applied to *brief*] ["*CJA Corporation*"]; 1 *Eisenberg*, § 5:194 – 5:202, pp. 5-74 – 5-75; 1 California Civil Appellate Practice (Cont.Ed. Bar 3d ed. 2019) §§ 11.61 – 11.62, pp. 11-41 – 11-43 ["*CEB*"].)

The term "briefs" is defined in Rules 8.200 and 8.10(7) to mean only an appellant's opening brief, a respondent's brief, a reply brief, petitions for rehearing, petitions for review, and answers to such petitions. (Cal. Rules of Court, rules 8.200, subds. (a)(1)-(3) & 8.10, subd. (7).) *Motions are not briefs* and the rules applicable to briefs are not applicable to motions as evident from the wording of the rules themselves. Rule 8.54 is the sole appellate rule that applies to appellate motions. (*Id.,* rule 8.54.) Rule 8.54 is open-ended, flexible, yet "prescribes the general formality for motions in a reviewing court." (1 *Eisenberg,* § 5:44, p. 5-23; see also *id.,* §§ 5:238 – 5:261.5, pp. 5-93 – 5-98.) Again, Rule 8.54(a)(3) only permits the party

opposing an appellate motion to file an "opposition," but makes no mention of, and does not permit the filing of, a *motion to strike* the motion of the opposing party. (Cal. Rules of Court, rule 8.54, subd. (a)(3).)

B. The Tribe's motion to strike Findleton's motions must be denied as an unauthorized, sanctionable abuse of process.

To the extent the Tribe's Motion to Strike is seeking to have Findleton's motions stricken, it is pursuing a procedural remedy in *overt violation of the applicable rules of court undertaken solely for delay*, which can only have the predictable result of vexatiously prolonging the pending appeals, unnecessarily increasing litigation costs, and taxing the resources of the reviewing court and the opposing party in what clearly amounts to an inexcusable and deliberate abuse of judicial process. In short, the Tribe's utterly groundless Motion to Strike must be deemed to constitute a sanctionable frivolous motion that constitutes an "unreasonable violation" of the Appellate Rules. (Cal. Rules of Court, rules 187 & 8.276, subd. (a)(3)-(4); *Dana Commercial Credit v. Ferns & Ferns* (2001) 90 Cal.App.4th 142, 146-147 [holding appellate courts have inherent authority to sanction party for filing frivolous motion on appeal]; *Styles v. Mumbert* (2008) 164 CA4th 1163, 1169-1170; *Campagnone v. Enjoyable Pools* (2008) 163 Cal.App.4th 566, 570 ["unreasonable violation" of Appellate Rules sanctionable under Rule 8.276(a)(4)].)

III. NONE OF THE FIVE CASES CITED BY THE TRIBE IN ITS MOTION TO STRIKE PROVIDE ANY SUPPORT WHATSOEVER FOR THE FRIVOLOUS LEGAL THEORIES ON WHICH THE MOTION IS BASED.

The Tribe has frivolously advanced two completely meritless arguments in its MTS: **(1)** the Respondent's Brief can somehow be stricken as defective because the length, case citations and arguments in his MTD and MRJN somehow give rise to a defect in the RB and somehow displease the Tribe (MTD 10-18); and **(2)** the California Rules of court somehow

authorize the Tribe to file a motion to strike the motions of the opposing party (MTS 4-18). The Tribe mistakenly and misleadingly cites only five cases in support of these frivolous arguments although none of the five cases offer any support whatsoever for such untenable claims.

A. *CJA Corporation* offers no support whatsoever for any legal argument raised by the Tribe in its Motion to Strike.

First, the Tribe misleadingly cites the 2001 decision of the Court of Appeal in *CJA Corporation* in support of its first egregiously mistaken legal claim that a "Motion to Strike is the Proper Remedy to Address the Defects in Respondent's MTD and RJN," the subheading in section I.A of the MTS. (MTS 10:11-12.) (*C.J.A. Corporation* 86 Cal.App.4th at p. 673.)

In *CJA Corporation,* the reviewing court granted "a motion seeking to strike several passages in appellants' opening *brief* on the ground they refer to evidence that is not a part of the record." (86 Cal.App.4th at p. 673 [italics added].) The Tribe has made no claim whatsoever that Findleton's RB, MTD or MRJN refer to evidence not in the record. (MTS 6-18.) Further, *CJA Corporation* provides absolutely no support whatsoever for the claim that a motion to strike is a proper or permissible remedy to address alleged defects in an opposing party's motion to dismiss or motion to request judicial notice. (86 Cal.App.4th at pp. 664-674.) *CJA Corporation* literally says *absolutely nothing* about the use of a motion to strike filed under Rule 8.204(e)(2) as a permissible "[r]emedy" (MTS 10:11) to address defects in the motions of an opposing party. (86 Cal.App.4th at pp. 664-674.) In sum, *CJA Corporation is totally irrelevant* to the Tribe's mistaken claim in section I.A of its MTS and does not even concern the issue frivolously raised by the Tribe. (MTS 10) Thus, the Tribe's argument in MTS, section I(A) (MTS 10), should be disregarded *en toto* to the same extent as if the Tribe had cited no legal authority whatsoever. (*Dabney,* 104 Cal.App.4th at p. 383; *20th Century,* 86

Cal.App.4th at p. 284; *Badie,* 67 Cal.App.4th at pp. 784-785; *Horowitz,* 79 Cal.App.3d at p. 138.)

B. *Williams* offers no support whatsoever for any legal argument raised by the Tribe in its Motion to Strike.

Second, the Tribe cites in the abstract the 1948 decision of the California Supreme Court in *Williams* for the untethered proposition that "if the disposition of a motion to dismiss an appeal requires a consideration of an appeal upon its merits, the motion must be denied" without mentioning the exceptions to this rule. (MTS 14:6-7, citing *Williams v. Duffy* (1948) 32 Cal.2d 578 ["*Williams*"], cert. den. (1948) 335 U.S. 840 [93 L.Ed. 391, 69 S.Ct. 57].) The Tribe, however, nowhere in its MTS explains how the disposition of Findleton's motion to dismiss would require "a consideration of an appeal upon its merits" *nor could it truthfully make such a claim*; instead, the Tribe merely makes an untethered assertion that the merits are somehow implicated in the Motion to Dismiss without any explanation or citation to the MTD. (MTS 13:12-13 [claim asserted without citation to MTD or explanation], 14:5-6; *Williams,* 32 Cal.2d at p. 581.) Since Findleton's Motion to Dismiss all five appeals is based on jurisdictional grounds and the disentitlement doctrine, none of his arguments in the MTD require a consideration of the underlying merits of the appealed lower court orders nor does the MTD in any way rely upon or invoke the underlying merits. (MTD 4-49.) Indeed, Findleton emphasized in his disentitlement argument that "it is well-established that 'the merits of the appeal are irrelevant to the application of the [disentitlement] doctrine.'" (MTD 29:26-27 – 30:1-3, quoting *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265 ["*Ironridge*"] and also citing *Stone v. Bach* (1978) 80 Cal.App.3d 442, 448 ["*Stone*"] [alleged invalidity of challenged trial court order irrelevant].)

The Tribe raises the irrelevant holding in *Williams*, however, in apparent support of its argument in I(D) that the Findleton's "Motion and Supporting Memorandum Exceed Both the Page and Word Limits Typically Applicable to Motions." (MTS 13-14.) *Williams* says absolutely nothing about any limitation of word count or page length for an appellate motion or supporting memorandum. (*Williams,* 32 Cal.2d at pp. 578-583.) In an incoherent discussion that defies decipherment, the Tribe offers *Williams* in support of an argument in which **(1)** the Tribe concedes that there are no applicable appellate rules restricting the word count or number of pages of appellate motions or memoranda (MTS 13) but insists that **(2)** there "should be" (MTS 14:1) and **(3)** as an example, apparently, of why there "should be" such limitations the Tribe points out that the disposition of motions to dismiss must not require consideration of the merits. (MTS 13-14.) This is a fundamentally *unintelligible argument* for which *Williams* offers no support whatsoever whether by example or in principle. (*Williams,* 32 Cal.2d at pp. 578-583.) Consequently, the Tribe's argument must be disregarded. (*Dabney,* 104 Cal.App.4th at p. 383.)

C. *Johnson* offers no support whatsoever for any legal argument raised by the Tribe in its Motion to Strike.

Third, in addition to *Williams*, the Tribe offers the 1932 decision of the California Supreme Court in *Johnson* in further support of its bizarre argument regarding why there "should be" a rule restricting the word count and page length of appellate motions and memoranda. (MTS 13-14.) (*Johnson v. Sun Realty Co.* (1932) 215 Cal. 382 ["*Johnson*"].) *Johnson,* like *Williams,* merely stands for the abstract proposition, irrelevant here, that a motion to dismiss must not depend for its disposition on a consideration of the merits. (*Johnson,* 215 Cal. at p. 383.) For the same reasons *Williams* is utterly inapposite *Johnson* is as well. *Johnson* says nothing whatsoever about word count or page limits, nor does it exemplify

in any way or support an argument in favor of the arbitrary adoption of a new appellate rule on word count or page length of appellate motions and memoranda. (*Johnson,* 215 Cal. at pp. 382-383.) Again, the Tribe's unintelligible argument must be ignored for want of any supporting legal authority. (*Dabney,* 104 Cal.App.4th at p. 383.)

D. *Wende* offers no support whatsoever for any legal argument raised by the Tribe in its Motion to Strike.

Fourth, the Tribe cites the 1979 decision of the California Supreme Court in *Wende*, a case concerning an arcane issue of *criminal appellate procedure,* i.e., "whether the Court of Appeal was required . . . to make a review of the entire record before determining that the [criminal] appeal was frivolous," in the context of this civil appeal in factitious support of its argument in Section I(E) of its MTS that the "Court Should Assert its Discretion to Narrow the Issues and Length of the MTD Because the MTD Is Filed At [sic] a Disfavored Time." (MTS 16:8-10; *People v. Wende* (1979) 25 Cal.3d 436, 440 ["*Wende*"].) *Wende* had absolutely nothing whatsoever to do with the discretion of a reviewing court to narrow the issues on appeal or impose new length limitations on appellate motions. (*Id.,* at pp. 436-447.) The Tribe's reliance on *Wende* for support of such discretionary authority is completely misplaced and frivolously mistaken.

Under the broad subheading of its argument in MTS, Section I(E), the Tribe *falsely cites Wende* for the proposition that **(1)** "there is a strong policy preference to hear motions to dismiss as early in the appellate process as possible" (MTS 16:14-16) and then **(2)** parenthetically quotes the following, subsequently disapproved, *obiter dictum* from *Wende,* a decision concerning criminal appellate procedure, as if it were applicable in the context of a civil appeal: "Once the record has been reviewed thoroughly, little appears to be gained by dismissing the appeal rather than deciding it on its merits." (MTS 16:18-19, citing *Wende*, 25 Cal.3d at p.

443.) The Tribe never explains how these untethered propositions it has mistakenly harvested from *Wende* have any bearing on its argument that the reviewing court has discretion to limit the scope of issues on appeal or reduce the length limits applicable to appellate motions. (MTS 16.)

Nowhere in *Wende* does the California Supreme Court ever state or even hint that there is a "strong policy preference" to hear dismissal motions as early as possible in the appellate process. (*Wende,* 25 Cal.3d at pp. 436-447.) This is a *complete fabrication of defense counsel* that blatantly misrepresents the reasoning and holding in *Wende.* (*Id.*) Further, even the proposition embedded in the quoted *obiter dictum* from *Wende* was *expressly disavowed* in a subsequent 1996 decision of the California Supreme Court. (*In re Sade C.* (1996) 13 Cal.4th 952, 994, fn. 22 ["*Sade*"].) In *Sade,* the California Supreme Court rejected any suggestion that *Wende* should be construed "to bar dismissal of an appeal in favor of decision on the merits." (*Id.*) While noting that a decision of the Fourth District Court of Appeal had construed *Wende* as barring dismissal in favor of a decision on the merits, the *Sade* majority emphasized: "We do not. . . . we believe that dismissal is permissible." (*Id.,* discussing *In re Andrew B.* (1995) 40 Cal.App.4th 825, 844.) The Tribe cited *Sade* as subsequent history to *Wende* (MTS 16:17), but with an explanatory phrase falsely indicating that *Sade* "disapproved" of *Wende* "on other ground[s] [sic]." (MTS 16:17.) *That characterization was incorrect. Sade* disapproved of *Wende* on precisely the grounds which were embodied in the Tribe's quoted *obiter dictum* about a supposed procedural preference for a decision on the merits over dismissal based on a frivolous appeal. (*Sade,* 13 Cal.4th at p. 994, fn. 22.) No such procedural preference exists in a criminal or civil appellate context. (*Id.*)

Finally, the Tribe failed to explain how *Wende,* which addressed an issue of *criminal appellate procedure*, had any application in the context of

a *civil appeal* given that *Sade* "held that . . . *Wende* procedures are not applicable to a civil appeal." (*People v. Smith* (2005) 127 Cal.App.4th 896, 899; *Sade*, 13 Cal.4th at pp. 978-983; *Wende,* 25 Cal.3d at p. 440; MTS 6-18.) The Tribe's reliance on *Wende* overlooks the uncomfortable fact that California appellate courts have generally "confined . . . *Wende* to *criminal appeals*." (*Sade,* 13 Cal.4th at p. 462, fn. 2, citing *In re Olsen* (1986) 176 Cal.App.3d 386, 389-392.) Further, California appellate courts have generally declined to apply *Wende* in the context of California civil appeals. (See cases collected at *Sade,* 13 Cal.4th at p. 462, fn. 2, citing *inter alia Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1117, fn. 2 [distinguishing *Wende* in the area of civil appeals]; *Grillo v. Smith* (1983) 144 Cal.App.3d 868, 873, fn. 3 [same].) *Wende* must, therefore, be deemed *totally inapplicable* to this appeal for the propositions which the Tribe has falsely attributed to that decision. (MTS 16.) The Tribe's related argument in MTS, Section I(E), must be treated as if totally unsupported by legal authority and disregarded. (*Dabney,* 104 Cal.App.4th at p. 383.)

E. *Hixson* offers no support whatsoever for any legal argument raised by the Tribe in its Motion to Strike.

Fifth, the Tribe *apparently* cites *Hixson* for proposition Rule 8.204(e)(2) authorizes a party to file a motion to strike a *brief* for failure to comply with the content and format requirements of Rule 8.204 and the reviewing court to **(1)** order the offending brief returned for corrections and refiling within a specified time, **(2)** strike the offending brief with leave to file a new brief within a specified time, or **(3)** disregard the noncompliance. (Cal. Rules of Court, rule 8.204, subds. (e)(2)(A)-(C); *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268 ["*Hixson*"].) Unfortunately for the Tribe, *Hixson* provides **(1)** no authority whatsoever for using a motion to strike a motion of an opposing party **(2)** nor any basis whatsoever to have stricken a respondent's brief, such as the one filed by Findleton, which does not

violate in any respect Rule 8.204, **(3)** nor any support for the Tribe's absurd argument that the length of Findleton's MTD and MRJN should somehow cause the RB to become defective. (*Hixson*, 209 Cal.App.4th at pp. 267-269.) In short, *Hixson* provides no support whatsoever for any argument frivolously advanced by the Tribe in its Motion to Strike and, thus, such mistaken arguments should be disregarded because they are unsupported by any legal authority. (*Dabney,* 104 Cal.App.4th at p. 383.)

In conclusion, none of the five cases cited by the Tribe offer any support for *any of the frivolous arguments* advanced in its Motion to Strike, which should be disregarded *en toto* by the reviewing court and treated as a "frivolous motion" filed in "unreasonable violation" of the California Rules of Court under Rule 8.8276(a)(3)-(4). (Cal. Rules of Court, rule 8.276, subds. (a)(3)-(4).)

IV. SINCE THE BOLAND DECLARATION IN SUPPORT OF THE TRIBE'S MOTION TO STRIKE MISLEADINGLY MISUSES MATHEMATICAL TERMINOLOGY, LACKS FOUNDATION, LACKS RELEVANCE AND CONSISTS LARGELY OF IMPROPER OPINION TESTIMONY AND SPECULATION IN VIOLATION OF THE EVIDENCE CODE, IT SHOULD BE COMPLETELY DISREGARDED BY THE REVIEWING COURT.

A. Since the Boland Declaration mistakenly uses the scientific concept of *random selection* to describe an obviously biased, nonrandom sampling procedure, it must be disregarded by the reviewing court.

Defense counsel Boland mistakenly and improperly uses the scientific concept of *random selection,* more commonly referred to as *random sampling,* in the phrase "randomly selected cases" to describe in the Boland Declaration (MTS 20, ¶ 4:8, 10) the obviously biased, non-random sampling of ten cases she *apparently* selected from two personally selected arguments in Findleton's Motion to Dismiss for the *irrelevant purpose* of determining the number of times any of the ten selected cases also appeared

in the Respondent's Brief. (MTS 20, ¶ 4.) In short, she confessed to taking a random selection of ten cases from a biased sample of cases that supposedly appeared in sections I.C.4 and section III of the MTD, although she does not reveal which ten cases she selected from the MTD nor what four cases she claims also appeared in the RB nor the procedure she used to assure randomness. (MTS 20, ¶ 4.)

Since Boland Declaration claims that a random selection of cases was taken from a non-random sample of cases from the MTD, such biased selection could not possibly have produced a random sample and so the false claim of scientific random sampling must be disregarded. As the California Supreme Court observed in *Duran*, "A 'random sample' is one in which each member of the population has an equal probability of being selected for inclusion in the sample." (*Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 43 [internal quotation marks omitted] ["*Duran*"], quoting Saks & Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts* (1992) 44 Stan. L.Rev. 815, 821, fn. 48; Mann, Introductory Statistics (Wiley 7th ed. 2010) 5-6, 8.) Under that definition, Ms. Boland's "sample" was not random because she deliberately chose two arguments from which to take a supposedly randomized selection of cases. (MTS, Boland Declaration, p. 20, ¶ 4.) Her biased selection of arguments biased her sample.

Each member of the population of cases in the MTD did not have an equally probability of being selected for inclusion in the sample. (*Duran,* 59 Cal.4th at p. 43; Levy & Lemeshow, Sampling of Populations: Methods and Applications (Wiley 1991) pp. 43-44.) This is an elementary sampling error that cannot possibly produce a random sample. As one federal district court correctly explained earlier this month, "[r]andom selection from a non-random sample does not produce a random sample." (*United States v. Age* (E.D.La. June 2, 2021) Criminal Action No. 16-32

Section M (1), at *28, fn. 106 [embedded Casetext link; not yet available in Westlaw] [internal quotation marks omitted] [unpublished opinion] ["*Age*"].) Indeed, the Second Circuit has emphasized that it "is irrational to gauge . . . an inherently non-random sample . . . by its potential for randomness." (*United States v. Rioux* (2d Cir. 1996) 97 F.3d 648, 655 ["*Rioux*"]; *United States v. Carmichael* (E.D.La. 2006) 467 F.Supp.2d 1282, 1296 [same] ["*Carmichael*"].) Thus, the Boland Declaration must be disregarded as "irrational" to the extent that it incorrectly uses a technical statistical term to suggest misleadingly that the declarant actually employed a scientific random sampling technique when, by definition, such could not have occurred since the chosen sample from the population of cases was non-random and biased. (*Rioux,* 97 F.3d at p. 655; *Duran*, 59 Cal.4th at p. 43; *Carmichael,* 467 F.Supp.2d at p. 1296.)

B. Since Boland Declaration averments violate the rules of evidence, it must be disregarded.

The substantive provisions of the Boland Declaration are all inadmissible for lack of foundation and relevance, while consisting of inadmissible opinion testimony and speculation. (Evid. Code, §§ 305 [irrelevant], 403 [lacks foundation], 702 [speculation; lacks personal knowledge], 800-803 [improper opinion testimony].) Findleton objects to the Boland Declaration as inadmissible evidence.

In her June 14, 2021, Ms. Boland relates how she prepared a table of topics that were addressed in both Findleton's Motion to Dismiss and his first two respondent's briefs. (MTS, Boland Declaration, pp. 19-20, ¶ 3.) As previously established, such an overlap of topics is routine and to be expected while offending no rule of court or rule of civil procedure or extant California decision. (See Argument, Parts I-III, *supra.*) Consequently, Ms. Boland's averments constitute *irrelevant evidence* because they are devoid of "any tendency in reason to prove or disprove

any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. McAlpine* (1991) 53 Cal.3d 1289, 1303-1304 [testimony must be relevant] ["*McAlpine*"].)

Ms. Boland goes on to make a similar comparison between the arguments in Findleton's Motion to Dismiss and his June 14, 2021 Respondent's Brief and is shocked to find once again an overlap of arguments between the two. (MTS, Boland Declaration, pp. 20, ¶ 4.) Again, such overlap in topics address is routine and offends no legal authority. (See Argument, Parts I-III, *supra.*) Again, Ms. Boland's averments must be deemed to be *irrelevant evidence* as they are wholly lacking in any probative value whatsoever. (Evid. Code, § 210; *McAlpine*, 53 Cal.3d at pp. 1303-1304.)

Further, she assumed the pose of an expert witness in her own case by invoking statistical terminology which she clearly did not understand and obviously misused. (See Argument Part IV.A., *supra*.) Ms. Boland is not qualified as an expert witness to give testimony about the random sampling of cases to ascertain some frequency distribution. (Evid. Code, § 720.) She is not qualified to give statistical opinion testimony based on supposed random sampling of a population of cases. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547 [noting that the "purpose of expert testimony, to provide an opinion beyond the common experience, dictates that the witness possess uncommon, specialized knowledge"].) The Boland Declaration must be disregarded in its entirety as improper opinion testimony by an unqualified witness. (*People v. Jones* (2017) 3 Cal.5th 583, 602; *McAlpine,* 53 Cal.3d at p. 1308.)

Finally, Ms. Boland concedes that Findleton's word count of 13,876 words is accurate, but "drew the conclusion" from the word count alone that the arguments presented in the Motion to Dismiss "plainly cannot fit" in the Respondent's Brief in Appeal No. A159823. Apparently, Ms.

Boland is speculating that since the word count of the Respondent's Brief was so close to the maximum permitted length of 14,000 words that Findleton somehow plotted to improperly extend his arguments in the Motion to Dismiss. First, this is pure inadmissible speculation and lacks any foundation. (Evid. Code, § 702.) Second, it is incoherent. The Motion to Dismiss was filed May 28, 2021, fully 17 days prior to the completion and filing of the Respondent's Brief on June 14, 2021. Thus, it would have been effectively impossible for Findleton or his legal counsel to have plotted to improperly extend arguments in the Respondent's Brief on May 28, 2021 prior to the completion of the Respondent's Brief. Finally, Findleton's arguments consisting of similar topics presented for different purposes in his Motion to Dismiss and his last Respondent's Brief are entirely appropriate, reasonable and consistent with all applicable legal authority. (See Argument, Parts I-III, *supra.*) The Boland Declaration is inadmissible and should be ignored by the reviewing court.

CONCLUSION

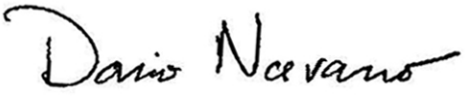
The Tribe expressly concedes that the Respondent's Brief in Appeal A159823 does not violate any applicable rule of court, but believes there "should be" such a rule and urges the reviewing court to strike Findleton's Respondent's Brief, his Motion to Dismiss, and his Motion to Request Judicial Notice because they offend the Tribe's "common sense." (MTS 13-14.) Unsurprisingly, the Tribe is unable to cite any legal authority that the idiosyncratic sensibilities of a litigant create law. Indeed, the Tribe is literally unable to cite a single judicial decision that actually supports its unprecedented and transparently meritless arguments. From beginning to end, the Tribe's Motion to Strike is a protracted, meandering, disorganized exercise in frivolity completely untethered to any legal authority whatsoever and devoid of coherent argument.

Consequently, Findleton respectfully requests that this reviewing court summarily deny the Tribe's groundless Motion to Strike and award costs and attorney's fees to Findleton as prevailing party pursuant to *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565, 576.

Date: June 26, 2021

Respectfully submitted,

LAW OFFICE OF DARIO NAVARRO



Dario Navarro
Attorney for Plaintiff and Respondent

[PROPOSED] ORDER

In the absence of any demonstrable supporting legal or factual grounds, the Motion to Strike filed on June 14, 2021 by Appellant Coyote Valley Band of Pomo Indians is **DENIED**.

DATED: _____

_____
PRESIDING JUSTICE

CERTIFICATE OF SERVICE

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO STRIKE; MEMORANDUM; PROPOSED ORDER

Case Name: ***Findleton v. Coyote Valley Band of Pomo Indians***
Appellate Case Nos: A156459, A158171, A158172, A158173, A159823
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 residence or 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 TO STRIKE; MEMORANDUM; PROPOSED ORDER*** ("said document") on the persons identified below as hereinafter specified:

☑ **BY E-FILE SERVICE:** I electronically uploaded a true and correct copy of said document in Portable Document Format (PDF) to Express Network (a service provider for Odyssey eFileCA, as designated by the Mendocino County Superior Court), for E-Filing to the Honorable Ann C. Moorman, Presiding Judge, Mendocino County Superior Court, as listed in paragraph 3; and

☑ **BY ELECTRONIC MAIL:** I electronically served and sent by email a true and correct copy of said document in Portable Document Format (PDF) to the persons listed in paragraph 4 of this Certificate of Service at each of their respective email addresses as listed in said paragraph 4.

3. Said document was sent by E-File Service, via Express Network, to

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

On *(date)*: **June 26, 2021**

CERTIFICATE OF SERVICE CONTINUED:

(RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO STRIKE; MEMORANDUM; PROPOSED ORDER)

4. Electronic service address of each person served:

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Email: ssetshwaelo@kaplankirsch.com

On *(date)*: **June 26, 2021**

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: June 26, 2021

Margaret Barnes