IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT FINDLETON,

Plaintiff and Appellee,

v.

COYOTE VALLEY BAND OF, POMO INDIANS

Defendant and Appellant.

Case No. A158171, A158172 and A158173

Superior Court of California, Mendocino County
No. SCUK-CVG-12-59929
Hon. Ann C. Moorman

APPELLANT'S REPLY BRIEF

Little Fawn Boland (SBN 240181)
CEIBA LEGAL
35 Miller Avenue No. 143
Mill Valley, California 94941
Tel: (415) 939-7797
littlefawn@ceibalegal.com

Keith Anderson (SBN 282975)
35 Madrone Park Circle
Mill Valley, California 94941
Tel.: (401) 218-5401
attorneykeithanderson@gmail.com

Attorneys for Defendant and Appellant,
Coyote Valley Band of Pomo Indians

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Respondent's Brief ("RB") puts squarely before this Court the question of whether American Indians, Indian tribal governments and Indian tribal corporations should be afforded the same due process rights as other American citizens, American governments and American corporations. The fact that an appellate court must decide this question is not merely outrageous. It is a reminder that in 2021, American Indians remain something less than full American citizens.

Respondent takes the remarkable position that affording tribal governments with the full rights of due process is "frivolous and unmeritorious in the extreme." (RB 46.) Respondent veils his assertion by disingenuously reframing Appellant's *actual* argument that the Tribe, Coyote Valley Entertainment Enterprise ("CVEE") and the Coyote Economic Development Corporation ("CEDCO") have *all* been denied due process into an *imagined* argument that *merely* CVEE and CEDCO have been denied due process. (*Compare* AOB 25 *with* RB 46-47.) While the Tribe takes umbrage with Respondent's claim that the deprivation of due process to non-parties whose property rights have been decided without notice or a right to trial is somehow acceptable, the matter the Tribe has put to this Court of Appeals to decide is whether the *Tribe's* due process rights were violated by the Court.

Contrary to Respondent's belief, the law does not permit a court to use equitable remedies as an end-around to the Constitutional mandate that no person may be found to have committed an inequitable or fraudulent conveyance for a

determinate sum of money unless that person has been served with a duly noticed motion asserting such a claim and has been provided with the opportunity for a jury trial. (AOB 30-32.) The Tribe received no such notice, and despite repeated pleas to the Court, it was denied the chance for such trial before the Court summarily ruled that an inequitable or fraudulent conveyance had occurred.

It cannot be emphasized enough that the Tribe deliberately and expressly contracted with Respondent to have matters decided under Tribal law and under Tribal court jurisdiction. (CT 1120.) Though the Tribe's contractual rights have yet to be respected, the reasoning for its insistence should be readily apparent. American Indian tribes are routinely treated, as the Tribe is now, as enemy combatants for whom the normative rules of justice do not apply. Until 1849, the Bureau of Indian Affairs was under the United States Department of War.[1] Although the Bureau of Indian Affairs has since been a subdivision within the Department of the Interior, it is evident that the notion of American Indians as the enemy still holds sway.

At its core, Respondent's Brief asks this Court to apply a lower standard of due process reserved for persons like Yaser Esam Hamdi[2] and others suspected of crimes committed against the American government in a time of war—persons

[1] A predecessor to the Department of Defense.
[2] The appellant in *Hamdi v. Rumsfeld* (2004) 542 U.S. 507.

[3] As well as the sovereign immunity of CEDCO and CVEE.
[4] Except on RB 26, where Respondent claims that the Tribe is judicially estopped
[2] The appellant in *Hamdi v. Rumsfeld* (2004) 542 U.S. 507.

who are referred to as "enemy combatants" for the purpose of denying them the rights of full American citizenry.

Nothing Respondent says—not the backwards contention that the Court's orders are non-appealable, the misguided faith in the power of equitable estoppel to defeat due process or his arguments to suppress evidence contrary to his conspiratorial allegations—can change the fact that a judge of the Mendocino County Superior Court determined in a summary proceeding that an American Indian tribe committed an offense of great magnitude without a noticed motion of the claim against it, without the right to engage in discovery, without the right to an evidentiary trial, without the right to bring forth witnesses in its defense, and without an opportunity to defend itself before a jury of its peers. This, above all else, is the central issue with which this Court must contend.

II. COMPARING THE RELIEF REQUESTED IN THE NOTICED MOTION FOR UNDERTAKING AND EXECUTION TO THE REMEDIES GRANTED DEMONSTRATES THE LACK OF DUE PROCESS AFFORDED THE TRIBE.

On February 27, 2019, Respondent filed a consolidated motion with the Court. (CT 1845.) His filing made *one*, *and only one*, prayer for relief. Specifically, he requested that "unless [the Tribe] promptly provides an undertaking (for the full amount of the sanctions award), the court clerk should issue a writ of execution directed to the levying officer where the levy is to be made or to any registered process server." (CT 1849.) The motion of February

27th, entitled a "Notice of Motion, Motion for an Order Requiring an Undertaking to Stay an Execution on Order Awarding Sanctions; Motion for Order Directing Issuance of Writ of Execution" ("Motion for Undertaking and Execution"), was the only noticed motion filed by Respondent in association with this appeal.

On April 29, 2019, the Court issued a benignly entitled "Order Granting Plaintiff's Motion for an Order Requiring Undertaking to Stay Execution on Order Awarding Sanctions and Motion for Order Directing Writ of Execution" ("Undertaking and Execution Order") finding that Respondent had committed an inequitable or fraudulent conveyance in concert with one of the Tribe's sovereign economic enterprises, CVEE, and setting aside certain casino assets in the lawful possession of CVEE as garnishable by Respondent in the execution of "any money judgment issued by the Court." (CT 2383.)

The Undertaking and Execution Order vastly expanded the relief sought by Respondent in its moving papers. Respondent's motion—its *only noticed motion* filed in association with the matters subject to this appeal—asked *only* for a writ of execution in the absence of an undertaking. The order, by contrast, found the Tribe committed an inequitable or fraudulent transfer, a serious civil offense, and purported to unwind the transaction to attach against the property of an innocent third party. The relationship (or rather lack thereof) between what Respondent requested of the Court in its moving papers and the remedies granted to Respondent by the Undertaking and Execution Order represents a shocking deprivation of the most basic principles of due process on its face.

By way of background, Respondent submitted an "Application and Order for Appearance and Examination" to the Court on January 11, 2019 in effort to compel the Tribe to appear and furnish information to aid in enforcement of an ill-gotten money judgment awarded against the Tribe in the amount of $86,457.00 ("Sanctions Order"). (CT 1593;1545-1546.) In response, the Tribe filed with the Court the "Defendant's Motion for Exemption from Enforcement of a Money Judgment" on February 11, 2019 ("Motion for Exemption"). (CT 1642-1657.) Therein, the Tribe argued that the Tribe's Judgments Ordinance was the governing law applicable to collection of a debt by a judgment creditor against the Tribe and that it was exempt from judgment because it did not hold any assets subject to recovery pursuant to the Sanctions Order. (*Id*.)

Shortly thereafter, on February 27th, Respondent filed the Motion for Undertaking and Execution, which did not address the issues raised in the Tribe's Motion for Exemption. (CT 1845-1850.) The Tribe then filed a "Defendant's Amended Motion for Clarification" ("Amended Motion for Clarification") on March 28, 2019, wherein the Tribe argued that four money judgments against it must be clarified to prevent the injustice of Respondent garnishing assets not subject to recovery under the terms of both the Court's prior Demurrer ruling and the putative waiver of sovereign immunity granted to Respondent by the Tribe. (CT 1898-1906.)

On April 11, 2019, the parties filed three submissions. The Tribe filed the "Defendant's Combined Opposition to Plaintiff's Motion for an Undertaking to

Stay Execution on Order Awarding Sanctions and Plaintiff's Motion for Order Directing Issuance of a Writ of Execution" ("Tribe's Combined Opposition"). (CT 2042-2058.) The Tribe's Combined Opposition argued that only Tribal law applied to Respondent's judgment enforcement actions. (*Id*.) For reasons that are as obvious as they are important, the Tribe did not address issues related to inequitable or fraudulent conveyance. It was not until later that same day that Respondent would, for the first time, allege inequitable or fraudulent conveyance in his filings with the Court.

On April 11, 2019, and in response to Tribe's Motions for Exemption and Clarification, Respondent filed a "Plaintiff's Notice of Amended Opposition and Opposition to Defendant's Motion for Exemption from Enforcement of Money Judgment; Memorandum of Points and Authorities; Declaration of Robert Findleton; Proposed Order" and "Plaintiff's Opposition to Defendant's Motion for Clarification; Memorandum of Points and Authorities; Proposed Order" on April 11, 2019." (CT 2059-2071.) In these *oppositions* (*i.e.*, not noticed motions), Respondent first raised the issue of an alleged inequitable or fraudulent conveyance. (*Id*.)

The Tribe, at its first opportunity, put the Court on notice in its "Defendant's Reply to Plaintiff's Opposition to Defendant's Amended Motion for Clarification" and "Defendant's Reply to Plaintiff's Amended Opposition to Defendant's Motion for Exemption from Enforcement of a Money Judgment," both filed on April 18, 2019, that claims of inequitable or fraudulent conveyance

needed to be brought by separate, formal motion and that, in any event, the Tribe demanded its right to due process to defend against any such allegations. (CT 2226-2233; 2236-2248.)

Respondent also filed its "Plaintiff's Response to Defendant's Combined Opposition to Plaintiff's Motion for an Undertaking to Stay Execution on Order Awarding Sanctions and Plaintiff's Motion for Order Directing Issuance of a Writ of Execution; Memorandum of Points and Authorities; Proposed Order" on April 18, 2019. (CT 2249-2262.) Therein, Respondent repeated its allegations of inequitable or fraudulent conveyance. (*Id*.) Notably, however, Respondent did not raise in his brief the issue for purposes of unwinding a legal transfer of assets. The issue was raised only for the limited purpose of arguing in favor of a writ of execution in the absence of an undertaking. (*Id*.)

The Court held a summary proceeding regarding the collective motions and oppositions of the parties on April 26, 2019. During the summary proceeding, it became clear that the Court was entertaining the issuance of an inequitable or fraudulent conveyance in the absence of proper notice or the right to a trial. It was also clear during the summary proceeding that Respondent was not merely attempting to invoke the theory of fraudulent or inequitable conveyance for the purpose of opposing the Tribe's motions in a defensive manner, but was additionally attempting to use such theories offensively to unwind a legal transaction between the Tribe and CVEE. As recorded in the Court transcript, Counsel for Respondent stated:

> [the Tribe] made the counter argument in their papers that somehow we're required to initiate a new action against a third party under the Avoidable Transactions Act as a fraudulent conveyance … [a]nd that is not what the Avoidable Transactions Act says. It actually says in the last section … that in addition to the actions under the statute, equitable estoppel is permitted.

(3 RT 229:12-230:6)

Respondent then goes onto say a moment later that the Court has "ample authority" under the Uniform Voidable Transaction Act ("UVTA") "which allows the Court to rely on equitable estoppel" to:

> treat all of the casino assets, wherever they are held within the Tribe, CEDCO or CVEE, as a basically reorganized asset of the judgment debtor and allow us to pursue, through the Tribe, all the Casino assets, wherever they are held within the Tribe, CEDCO or CVEE, as a basically reorganized asset of the judgment debtor and allow us to pursue, through the Tribe, all the casino assets wherever they are held, pierce the corporate veil, as necessary, to obtain information and obtain recovery from those entities.

(3 RT 230:10-20.) Such a solution, according to Respondent, would "make[] it very easy" to take the assets of an innocent third party without the hassle of "having to sue." (3 RT 231:12-13.)

In other words, Respondent argued that the Court has the authority to use equitable remedies, including equitable estoppel, to sidestep the customary due process rights of Respondent and other third parties.[3] While such actions would certainly make life "very easy" on Respondent (and many others with unmeritorious claims to other people's property), the notion that any such actions are actually legal could not be further from the truth. As this brief explains in detail below, the law requires a defendant have a right to a jury trial.

Upon the revelation that Respondent was actually seeking to unwind a lawful transaction, without notice or trial, during a summary proceeding, counsel for the Tribe twice demanded to the Court that the Tribe be afforded its full rights to due process, including any rights afforded under the UVTA. (3 RT 233:7-234:9.)

Counsel for Respondent argued to the Court that affording full rights of due process to the Tribe would be "a waste of time." (3 RT 231:18.) The Court apparently agreed. The presiding judge immediately signed both an Order Denying Defendant's Motion for Clarification ("Clarification Order") and an Order Denying Defendant's Motion for Exemption from Enforcement of a Money

[3] As well as the sovereign immunity of CEDCO and CVEE.

Judgment ("Exemption Order"). (3 RT 239:1-11.) Three days later, the Court signed the Undertaking and Execution Order. (CT 2383.)

All three orders (collectively referred to herein as the "Orders"), however, ruled on matters far in excess of what was requested by the moving parties.

With regard to the Amended Motion for Clarification, the Tribe motioned the Court to include the phrase "recourse is limited to casino assets" in four prior money judgments. (CT 1899.) In response, the Clarification Order held that sovereign non-parties to the case could be hailed into a court of law to which they had not consented and described the scope of future discovery. (CT 2366.)

With regard to the Motion for Exemption, the Tribe motioned the Court to exempt it from money judgment on the basis that it not hold any assets subject to recovery under the Court's judgment order and that, in any event, such determinations should be made in a Tribal forum. (CT 1645, 1649.) In the response, the Exemption Order held that the Tribe's motion lacks any cognizable evidentiary foundation and is subject to equitable estoppel under federal common law to prevent an injustice. (CT 2363.) The thrust of this Order effectively turns Tribal law into an unrecognized work of fiction.

With regard to Respondent's Motion for Undertaking and Execution, Respondent motioned the Court to order an undertaking and writ of execution. (CT 1848-1849.) In response, the Undertaking and Execution Order held that (1) the Tribe and sovereign non-parties to the case had effectuated an inequitable or

fraudulent conveyance, and (2) Respondent has the legal right to garnish or levy upon the property of sovereign non-parties to the case. (CT 2382-2383.)

Thus, as explained in the Tribe's Opening Brief, and in this Reply Brief, the Orders vastly exceeded the Court's authority and the relief requested in the moving papers of the parties.

III. THE COURT'S ORDER REGARDING THE MOTION FOR UNDERTAKING SHOULD BE OVERTURNED.

The Undertaking and Execution Order found that the Tribe's transfer of the "casino assets" "constitutes an inequitable or fraudulent conveyance that is not judicially cognizable under the federal common law doctrine of equitable estoppel or the state law doctrines of judicial estoppel or evidentiary estoppel under Evidence Code section 623." (CT 2382.) It further held that "the putative transfer of any and all of the casino assets (. . .) is hereby set aside (. . .) as an inequitable or fraudulent conveyance under the federal common law doctrine of equitable estoppel." (CT 2383.) The issue of estoppel is addressed in the AOB in a plurality of facets. (AOB 26-31, 39-43.) Respondent's brief fails to address several of them. Where it is addressed, the presentation is a muddled and misguided analysis.

A. Respondent Failed to Prove that the Court Did Not Err in its Application of Judicial Estoppel

Judicial estoppel is addressed at AOB pp. 32-36. The Respondent's Brief fails to address these arguments and, in fact, does not address the issue of judicial estoppel at all.[4]

Judicial estoppel differs from equitable estoppel. A party may invoke equitable estoppel to prevent his opponent from changing positions if (1) he was an adverse party in the prior proceeding; (2) he detrimentally relied upon his opponent's prior position; and (3) he would now be prejudiced if a court permitted his opponent to change positions. (*Jackson v. Cty. of Los Angeles* (1997) 60 Cal. App. 4th 171, 183–84 [citations omitted]).

Equitable estoppel focuses on the relationship between the parties, and is designed to protect litigants from injury caused by less than scrupulous opponents. By contrast, judicial estoppel focuses on the relationship between the litigant and the judicial system, and is designed to protect the integrity of the judicial process. By definition, *equitable estoppel requires privity, reliance, and prejudice* because the doctrine concentrates on the relationship between the parties to a specific case. (*Jackson, supra,* 60 Cal. App. 4th at 183–84 [citations omitted]).

[4] Except on RB 26 where Respondent claims that the Tribe is judicially estopped to "change its position on appeal," but does not explain how the elements of judicial estoppel are satisfied on this record. No mention is made of what position was previously taken by the Tribe, relied upon by this Court, and thus subject to estoppel. The Court's reliance upon judicial estoppel to ballast the underlying orders is neither acknowledged nor addressed in the Respondent's Brief.

Conversely, none of these elements is required under the judicial estoppel doctrine. The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather, it is the intentional assertion of an inconsistent position that perverts the judicial machinery." (*Id.* [citations omitted]).

Judicial estoppel applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Id*.)

Judicial estoppel enables a court to protect itself from manipulation. The interested party is thus the court in which a litigant takes a position incompatible with one the litigant has previously taken. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935, 959-60.) Here, there was no prior proceeding in which the Tribe took an inconsistent position. (AOB 34-35.) By finding that judicial estoppel applied in the Undertaking and Execution Order, the Court in essence held that the Tribe manipulated and perverted the judicial process. Though the Court repeatedly stated that it was unwilling to look into any such bad faith, the Court nonetheless issued an order that concluded otherwise when it simply signed the order provided with a one-word modification. The Undertaking and Execution Order is therefore unsupported by the facts presented and caused a misapplication of the law of judicial estoppel.

B. Respondent Did Not Address the Court's Deficiencies in How it Applied Evidentiary Estoppel.

Evidentiary estoppel is addressed at AOB pp. 37-38. The doctrine arises from Evidence Code § 623 and, broadly speaking, prohibits a party from taking a different position at trial than they did at an earlier time if the other party would be harmed by the change of position. The Respondent did not address any of the deficiencies raised in the Opening Brief with regard to evidentiary estoppel. The deficiency that stands out the most is the absence of evidence that Respondent relied on statements or representations from the Tribe, or even that such statements were made, let alone how Respondent relied upon such statements to his injury. (AOB 38.)

C. Respondent Mistakenly Believes Equitable Estoppel can Circumvent the Full Rights of Due Process Afforded a Defendant Accused of Committing an Inequitable or Fraudulent Conveyance.

The California Constitution guarantees the right to a jury trial in causes of action for fraudulent conveyance where the recovery sought is a determinate sum of money. (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 756-757.) "The Court has expressly cautioned that the right to a trial by jury 'cannot be avoided by merely calling an action a special proceeding or equitable in nature.'" (*Id*. at 754-755.)

In an attempt to avoid the express prohibition against using equitable estoppel to avoid the due process rights of a defendant facing a fraudulent

conveyance claim, Respondent turns to federal law. But, as Section D below of this Reply Brief shows, federal law contains the same effective prohibitions.

The Supreme Court has held that, at least from the defendant's perspective, fraudulent transfer and preference actions are legal in nature (as opposed to equitable), which means the right to jury trial exists for these actions. (*Granfinanciera, S.A. v. Nordberg* (1989) 492 U.S. 33; *Langenkamp v. Culp* (1990) 498 U.S. 42) Certain claims in bankruptcy cases are immune from this general requirement. But otherwise, the right to a jury trial exists. (*Schoenthal v. Irving Trust Co.* (1932) 287 U.S. 92; *Katchen v. Landy* (1966) 382 U.S. 323; *Langenkamp v. Culp* (1990) 498 U.S. 42.) Neither a Court nor Congress may reframe a legal cause of action into one born of equity for the purpose of diminishing patent rights to due process. While Congress "may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment" under certain conditions, "it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." (*Granfinanciera v. Nordberg* (1989) 492 U.S. 33, 51-52.)

Moreover, the federal common law of equitable estoppel—even if it could be used to bypass the ordinary standards of due process for claims of fraudulent transfer—cannot ordinarily be used offensively or as a "sword." In all but one narrow application not relevant to Respondent's claim, the federal common law of equitable estoppel must be used defensively or as a "shield." It cannot be used as

an independent cause of action to support a claim for relief, such as to motion a court to unwind a legal transaction between a defendant and a non-party.

The only instance in which the federal common law of equitable estoppel may be used as an independent cause of action is in the context of ERISA claims. Respondent contends, unpersuasively and without support of the law, that this Court of Appeals should ignore the fact that every instance in which a court has permitted use of the federal common law of equitable estoppel as an independent cause of action has been in the ERISA context. In doing so, he fails to acknowledge that ERISA law is a unique statutory framework under which Congress and the courts permit equitable estoppel to prevent injustices caused by fiduciaries against unsophisticated parties. The dispute here arises under a construction contract without any fiduciary duties owed. As the Tribe explains in Section D below, the application of ERISA law is inapposite to the matters at hand.

The discussion of the application of federal common law principles of equitable estoppel, however, is largely moot. Respondent's only noticed motion made a claim under California state law. Specifically, Respondent's Motion for Undertaking and Execution requested relief under CCP § 917.9(b). The Court was thus restrained to apply California law with regard to any ruling. Noticing a motion under CCP § 917.9(b) and then litigating wholly different federal matters is a breach of the Tribe's due process rights. Fundamental due process requires

that a court order adjudicate only matters that were properly litigated before it. (AOB 29.)

Respondent attempts to get around the inescapable truth that his motion for relief was made under state law (and state law only) claiming that (1) because CEDCO, the parent company to CVEE, was chartered under federal law, federal laws of equity may be applied against the Tribe and (2) when an Indian Tribe waives sovereign immunity, actions against it may then automatically be adjudicated under federal law principles. (RB 46-47.)

CEDCO is not a party to this appeal. The Tribe fails to see, nor did Respondent explain, how an Indian tribe's decision to charter a corporation under federal law makes the Tribe itself subject to common law principles of equitable estoppel in the face of the underlying action being brought under state law. (RB 33-34.)

Respondent's argument that a waiver of sovereign immunity automatically unleashes the floodgates of consent to all federal law is preposterous. (*Id*.) First and foremost, it is well-understood that Indian tribes may, and routinely do, waive sovereign immunity to be hailed into court to be adjudicated under only certain bodies of law. For example, a Tribe may waive sovereign immunity on the condition that only Tribal law is applied in any proceedings against it. Respondent's argument suggests that an Indian tribe, once waiving immunity, cannot place such limitations on its consent to be sued—which is patently false. When an Indian tribe consents to a waiver of sovereign immunity, such tribe

possesses an indefeasible right to "prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185 (quoting *Missouri River Services v. Omaha Tribe of Nebraska* (8th Cir. 2001) 267 F.3d 848, 852.)

Secondly, if a waiver of sovereign immunity automatically created a "federal issue" (*i.e*., a federal question), it would mean that federal courts would always have federal question jurisdiction over a dispute involving an Indian tribal party based purely on the existence of a waiver of immunity. This too is patently false. "Federal question jurisdiction does not exist merely because an Indian tribe is a party or the case involves a contract with an Indian tribe." (*Stock W., Inc. v. Confederated Tribes of the Colville Reservation* (9th Cir. 1989) 873 F.2d 1221, 1225.) Nor "does it exist if 'the real substance of the controversy centers upon' something other than the construction of federal law." (*Longie v. Spirit Lake Tribe* (8th Cir. 2005) 400 F.3d 586, 590 (quoting *Littell v. Nakai* (9th Cir.1965) 344 F.2d 486, 488).)

Most importantly, however, Respondent's protracted argumentation on this topic must be seen for what it is: a red herring. Neither the presence of a federal charter, nor the presence of a putative waiver of immunity, can be used as the justification to override the mandates of both the California <u>*and*</u> United States Constitutions that guaranty the right of a jury trial to any person accused of an

inequitable or fraudulent conveyance. The Court erroneously denied the Tribe of that right.

D. Respondent's Equitable Estoppel Arguments are Muddled and Without Merit.

Ignoring the Tribe's authorities holding that California law does not recognize equitable estoppel as an independent cause of action and that it "acts defensively only" (AOB 26), Respondent belabors his assertion that federal law controls this issue (RB 33), but is unable to defend this position without significant overreaching.

Respondent's analysis is distinctly muddled, but he seems to imply that the federal doctrine is applied the same way as the California doctrine, "but parses the controlling criteria into five elements instead of four." (RB 34, n. 19.) Thus implying, perhaps, that it does not matter whether the Court applied state law or federal law on this issue, because the same result would be reached. The problem is, Respondent fails to address the central point that California law is indisputably clear in its limitation of the doctrine to defensive applications. In other words, it is to be used only as a "shield" and not as a "sword." To sidestep the reality of this clear prohibition, Respondent continues to reference a federal common law doctrine that does not exist outside of a small body of ERISA cases. (AOB 26-27.) Only in ERISA cases does federal case law condone the *offensive use* of the equitable estoppel doctrine. Outside of ERISA cases, federal case law is

harmonious with California law in its limitation of the doctrine to strictly defensive applications.

In *United States v. Georgia-Pac. Co.* (9th Cir. 1970) 421 F.2d 92, the court summarized as follows (emphasis added; footnotes omitted):

> A party's silence, for example, will work an estoppel if, under the circumstances, *he has a duty to speak*. [fn.] A common example of this occurs when a plaintiff knowingly permits a defendant to make expenditures or improvements on property the latter believes to be his, but which in fact the plaintiff knows to be the plaintiff's property. In this case, equity may decree that *the plaintiff is estopped from asserting title* to the property in question. [fn.] As the court in *Management & Investment Co. v. Zmunt*, 59 F.2d 663, 664 (6th Cir. 1932), said:
>
> 'It is axiomatic that *equity will not grant relief* to one who has stood by and permitted the expenditure of large sums of money upon the faith and belief that he does not deem his rights to be violated.'
>
> In the instant case, the facts show that Government has engaged in just that kind of conduct which would render *it liable to the* ***defense*** *of equitable estoppel*,

> subject to the possible immunity therefrom enjoyed by Government, to be discussed hereafter.

(*Id.* at 96-97 (emphasis added).)

The Tribe was under no duty to inform Findleton of the transfer of "casino assets."[5] The uncontested evidence before the court showed a legitimate business reason for the transfer, and that it happened at a time when the Tribe had no dealings with Findleton. Such evidence is routinely relied upon in employment cases involving wrongful termination and discrimination claims. In discrimination cases, an employer's evidence of legitimate business justifications for an employee's termination are often accepted in granting summary judgment in favor of the employer. *Aguilar v. Atl. Richfield Co*. (2001) 25 Cal. 4th 826, 849, as modified (July 11, 2001); see also *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal. 4th 317, 363 [summary judgment is appropriate when, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred"].

[5] The Respondent claimed that the "Tribe was under an affirmative legal duty to disclose the November 16, 2017 transfer of "casino assets" to Findleton by producing "documentary evidence" of such transfer to avoid a presumption that the ownership of the "casino assets" remained with the Tribe. (Solicitor of the United States Department of the Interior ["Interior Solicitor"], Timber as a Capital Asset of the Blackfeet Tribe (Dec. 16, 1958) Opinion No. M-36545, at pp. 1-4, at p. 2 ["Opinion M-36545]." (RB 37.) Opinion M-36545 is a legal opinion that advised the tribe in question that it must memorialize the sale of a capital asset in writing. (CT 2081.) There is *nothing* in the opinion that would create a general obligation for the Tribe to disclose the transfer to Respondent.

Very similar evidence was before the court (sworn declarations) in the proceedings which produced the underlying orders.

Moreover, the proceedings before the Court underlying the subject orders were not proceedings wherein the Tribe was postured as a plaintiff, or in a manner whereby it sought money or property or other relief from Respondent. Simply put, there was nothing cognizable to be estopped, at least nothing that would harmonize with the limitations of the doctrine of equitable estoppel under California law.

Under Ninth Circuit precedent, "[a]n equitable estoppel will be found only where all the elements necessary for its invocation are shown to the court." The test in this circuit was reiterated in *Hampton v. Paramount Pictures Corp*. (9th Cir. 1960) 279 F.2d 100, 104, 84 A.L.R.2d 454. There is no substantial evidence in the record for the Respondent to establish all the applicable elements, which are: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *California State Board of Equalization v. Coast Radio Products* (9th Cir. 1955) 228 F.2d 520, 525.

1) Equitable estoppel is rarely available against a government and is not available in this case.

As demonstrated above, Respondent was not permitted to wield equitable estoppel as a "sword" for the purpose of proving an inequitable or fraudulent

conveyance. Nor can it be used to sidestep the requirements of a jury trial. If somehow this Court disagrees with the Tribe and finds that the Court could apply equitable estoppel in the manner it did, then it must also review the claims of equitable estoppel under a higher standard applicable to sovereign governments.

The Tribe contends that the Court erred in the manner in which it applied the federal common law doctrine of equitable estoppel to the Tribe, as a government. (AOB 39-43.) Specifically, the Tribe contends that, with respect to the orders on appeal, the Court not only failed to make any specific findings as to any of the four traditional elements of federal common law equitable estoppel, but also did not describe at all in any of its analysis of the other factors relevant to equitable estoppel as applied to sovereign governments. (*See* e.*g*. *Lavin v. Marsh* (9th Cir. 1981) 644 F.2d 1378, 1382) ("to invoke estoppel against the Government, the party claiming estoppel must show 'affirmative misconduct' as opposed to mere failure to inform or assist"). The Tribe illustrated the specific fact-finding and legal determinations the Court would have been required as matter of law to undertake in order properly to apply equitable estoppel against a sovereign government as summarily ordered by the Court. (AOB 42-43.)

Respondent does not contend that the Court undertook to make the required specific fact-finding and legal determinations necessary to clear the "high bar" for invoking equitable estoppel against a sovereign government like the Tribe. Nor could he because the Court did not do so. In fact, the record is devoid of any indication that the Court applied this heightened standard. (Tellingly, while

Respondent recites certain factual contentions of his that he believes demonstrates "affirmative misconduct" and "serious injustice" (RB 45), he does not, and cannot, point to any specific trial fact-findings by the Court in this regard to draw the conclusions sought by Respondent. Quite the opposite, the record shows that the Court did not afford the Tribe the opportunity for a trial focused on the circumstances surrounding the Tribe's sovereign legislative act of conveying the "Casino assets" in furtherance of obtaining the New Market Tax Credit financing necessary to benefit its tribal members. Nor was a trial held to establish any facts necessary for the undoing of that transfer on the grounds it constituted an "inequitable or fraudulent conveyance" when invoking the federal common law doctrine of equitable estoppel against the Tribe.

The Superior Court, in fact, expressly declined to engage in an inquiry on this issue. (3RT 144-146, 191, 237-239.) In particular, there was no trial of a question of fact by the court regarding the circumstances of the transfer of the "Casino assets" or of Respondent's alleged reliance thereon. (*Id*., CT 2362-63, 2381-83.)

2) The Tribe may raise the heightened standard for equitable estoppel for governments in this appeal.

Respondent claims that this higher standard is no longer available because it was not raised below. However, the record shows, the Tribe was practically jumping up and down complaining that if the unwinding of an alleged fraudulent conveyance was on the table then due process was needed and that equitable

estoppel could not be used against the Tribe. The heightened standard for governments is a subtopic to the issues raised. Preventing the Tribe from raising this issue on appeal is not appropriate.

Depriving a litigant the right to address an issue on appeal is to avoid a "bait and switch," which "subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) It cannot be said that the Tribe is engaging in a bait and switch tactic. The Tribe was imploring the Court to permit the Tribe to defend itself with appropriate due process, to no avail.

Neither do Respondent's procedural objections amount to much with respect to the Tribe's contention that the Court erred in the manner in which it applied the federal common law doctrine of equitable estoppel to the Tribe (which Respondent expressly admits is a *sovereign Indian government*). This is particularly so given the procedural posture of the proceedings in which *Respondent* first raised the issue of asserting equitable estoppel under federal common law against the Tribe in the context of opposing the Tribe's Exemption Motion. (CT 2067-2069.) The Tribe contested the application of equitable estoppel against the Tribe in connection with the transfer of the "casino assets" to CVEE. (CT 2230, "Secondarily, principles of equitable and judicial estoppel should not be applied because the Tribe did not commit any bad act and they cannot be applied to 'unwind' the transfer.") Thus, the parties contested, and the Court had the

opportunity to consider the issue whether Respondent carried his heavy burden to meet the "high bar" for invoking equitable estoppel against a sovereign government like the Tribe.

The fact that the Superior Court ultimately failed to take into account the fact that the Tribe was a sovereign government, and did not weigh and consider all the factors that as a matter of law are required for applying the federal common law doctrine of equitable estoppel against a sovereign government, does not preclude, as Respondent suggests, the Tribe now arguing on appeal that the Superior Court erred in the manner in which it applied the federal common law doctrine of equitable estoppel to the Tribe when issuing the orders on appeal. This is not a case like *Nellie Gail* wherein *the party seeking to assert* a defense of equitable estoppel (which is actually *Respondent* in this case) failed to assert or argue the equitable defense at a six-day bench trial below but now wants to argue the merits of the defense on appeal. (*See* RB 44; *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997-998.)

3) The purported waiver of sovereign immunity does not negate the necessity for applying the higher standard.

Likewise, there is no legal authority, and Respondent does not cite to any such authority, supporting Respondent's contention that the requirements for invoking the federal common law doctrine of equitable estoppel against a sovereign government like the Tribe "necessarily" do not apply whenever a government has waived sovereign immunity in one limited aspect. (RB 44.) Nor is

this a reasonable legal conclusion in the context of the situation at hand: just because a government may waive sovereign immunity in a *limited* way with respect to a specific contract transaction does not, and should not, mean that *all* sovereign immunity is waived by the sovereign such that the high bar for applying equitable estoppel in connection with *every* later legislative act of the sovereign is automatically lowered to that of a mere private party litigant. While reviewing Respondent's argument, one should replace the word "Tribe" throughout with the words "State of California" to see how Respondent's argument does not make sense. (RB 44.)

In any event, the Tribe is not claiming "immunity" in connection with the application of equitable estoppel against a sovereign government like the Tribe. (RB 44-45.) Rather, the Tribe is arguing that Respondent was required to prove all of the elements necessary for invoking that doctrine in the first place, Respondent failed to do so, and, with respect to the Orders on appeal, the Court erred in the manner in which it applied the federal common law doctrine of equitable estoppel to the Tribe, as a sovereign government. (CT 2067-2069; 3RT 135-139, 144-146, 191, 235, 237-239.)

IV. THE COURT'S ORDER REGARDING THE MOTION FOR CLARIFICATION SHOULD BE OVERTURNED.

There are two issues with the Clarification Order. First, it was an abuse of discretion not to clarify the four pending money judgment orders. Second, the

Clarification Order also is a discovery order that improperly requires the Tribe to produce CEDCO and CVEE for the debtor's examination and related discovery.

A. It was an Abuse of Discretion Not to Clarify the Past Money Judgments.

When this Court reviews the Clarification Order it should not do so as a whole, but should instead look at the clarification requested and the amount of time that had passed since the issuance of the various subject orders, as related to each pending money judgment. They were:

1) The order entered on March 5, 2019 declaring Respondent the prevailing party and awarding attorney fees and costs; and

2) The order entered on March 14, 2019 granting attorney fees and costs on appeal;

3) The order entered on December 10, 2018 granting sanctions; and

4) The order entered by Judge Henderson on November 4, 2016 granting attorney fees and costs on appeal. (CT 1899.)

The Court found the clarifications to be unnecessary, but also expressed reservations about the passage of time. (3 RT 117:9-20.) As to the most recent money judgment (the prevailing party order awarding attorney fees and costs), the Court could have easily reconsidered the order. The relief requested was the type of relief permitted by statute and Amended Motion for Clarification was timely under CCP § 1008(e), even if the Tribe stated that it was not filing under such

statute, but rather broadly couching its arguments as matters of subject matter jurisdiction and therefore not subject to time limitations. (AOP 45.)

Defining the assets available for attachment in the orders is a matter of subject jurisdiction because the Court's jurisdiction is limited by the parameters of the waiver of sovereign immunity that limited attachment to "casino assets" only. There is no doubt that subject matter jurisdiction can be raised at any time. Thus, any of the orders could have, and should have been, considered by the Court.

As to all the money judgments addressed in the Motion for Clarification, including the Sanctions Order, a judge has the inherent right, *sua sponte*, to modify his or her own rulings. (AOP 46.)

The Court's refusal to add the phrase "recourse is limited to casino assets" grants Respondent a free path to go after Tribal assets having no relation to casino assets. A processor, sheriff or other levying agent would have no reasonable way of knowing that recourse is limited to casino assets.

Tellingly, Respondent has dug in his heals to avoid the insertion of the phrase "recourse is limited to casino assets," despite his agreement that the requested language would properly limit the scope of the orders to authorize only lawful recourse. (RB 19-28.)[6] The requested clarification would prevent such injustice.

[6] The Court should take notice that Respondent dedicates *nine pages* of his Brief to attempting to stop the inclusion of language in the judgment orders that Respondent agrees properly identifies the limited scope of assets to which recourse is permitted under the law of the case.

B. The Clarification Order is an Impermissible Post-Judgment Discovery Order Directing the Tribe to Make CEDCO and CVEE Available for a Debtor's Exam.

The Clarification Order should also be overturned as a post-judgment discovery order because it is impermissibly requiring the Tribe to make available at the debtor's exam *of the Tribe*, CEDCO and CVEE "officers, representatives, employees or agents." (CT 2365-2367.)

The Tribe is NOT raising these arguments on behalf of CEDCO and CVEE as Respondent contends. The Tribe is well aware it does not have standing to argue on their behalf. That is precisely the Tribe's point. The Tribe, CEDCO and CVEE are not one in the same, as Respondent contends, but rather three legally distinct sovereign entities. Neither CEDCO nor CVEE are parties to this case, have never made any appearance, and have never intervened. The Clarification Order is clearly placing the onus of performance on the Tribe. It is patently false that the Clarification Order is an innocuous description of who may be called to question at the Debtor's Exam. It is in fact setting up *the Tribe* to be held in contempt for failing to produce CEDCO and/or CVEE for questioning and discovery, which it is without authority to do.

The best evidence is Appeal A159823. The Court issued a $11,348 sanction against *the Tribe*, not CEDCO or CVEE, for failing to force CEDCO and CVEE to produce responsive documents. (Motion to Consolidate Appeals, at 4-5.) The legal basis of the Tribe's alleged obligation to produce CEDCO and CVEE—sovereign

non-parties to the case—are the discovery rulings in the Clarification Order and Undertaking and Execution Order.[7]

Thus, because the Clarification Order is requiring the Tribe to take an affirmative act *vis-à-vis* sovereign non-parties, the Clarification Order should be overturned. There is no substantial evidence to support this obligation in the record and the estoppel theories presented to justify such an obligation being placed on the Tribe are erroneous.

V. THE COURT'S ORDER REGARDING THE MOTION FOR EXEMPTION SHOULD BE OVERTURNED.

The Motion for Clarification sought to make clear that only "casino assets" were available for attachment, whereas the Motion for Exemption sought to make clear that Tribal property was *exempt* from attachment. Specifically, because the Tribe does not possess "casino assets," it feared its governmental funds would be wrongfully sought by Respondent to satisfy the money judgments. (CT 1647-1648.) The Court stated that the relief requested (1) lacked "any cognizable evidentiary foundation" and (2) is "subject to equitable estoppel under federal common law to prevent an injustice." Equitable estoppel, was not available to the

[7] To forecast what will be discussed in detail in the forthcoming Opening Brief due on March 1, 2021 the Tribe will be discussing how Respondent and the Court defined the Tribe as one in the same as CEDCO and CVEE for purposes of interrogatories and other discovery requests and deemed their non-compliance to be the non-compliance of the Tribe. This artifice serves Respondent and is directly linked to the discovery language set forth in the Clarification Order.

Court as a basis to deny the motion, as has been extensively briefed. For that basis alone the Exemption Order should be overturned.

VI. EACH OF THE THREE ORDERS IS APPEALABLE.

The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126, 32 Cal.Rptr.2d 275, 876 P.2d 1074.) The right to appeal is "wholly statutory." (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5, 118 Cal.Rptr.3d 571, 243 P.3d 575.) A trial court's order is appealable only when a statute permits the appeal. (*Ibid*.; *Griset v. Fair Political Practices Com*. (2001) 25 Cal.4th 688, 696, 107 Cal.Rptr.2d 149, 23 P.3d 43.)

In the case of a post-judgment order (*i.e*., an order entered after an appealable judgment) an appeal is authorized if the order: (1) adjudicates an issue different from the issues decided in the judgment; (2) affects the judgment or relates to its enforcement; and (3) the order is not preliminary to a later judgment. (*Marriage of Tim & Wong* (2019) 32 Cal.App.5th 1049, 1054.) We shall demonstrate below that the three orders underlying these appeals meet one or more of the required criteria or, alternatively, are worthy of this Court's discretionary review such as, for example, where appellate courts have exercised their discretion to treat an appeal from a post-judgment discovery order as a writ of mandate.

The Respondent's Brief contains a plurality of assertions that the underlying orders are non-appealable under Code of Civil Procedure Section 904.1(a)(1), primarily because they are interlocutory. (RB at pp. 16, 41-43.)

Respondent's arguments are not persuasive, primarily because he has mischaracterized the nature of the underlying orders and completely ignored where appealability is conferred directly by statute, including subparts of Section 904.1(a). The best example of this is the Sanctions Order, which was timely appealed and now before this Court as Case No. A156459.

A. The Sanctions Order is Appealable, Either as an Order or Judgment.

The Sanctions Order awarded approximately $88,000 in monetary sanctions against the Tribe and is therefore a reviewable interlocutory order under Code of Civ. Proc. Section 904.1(a)(12) or, if it is considered an interlocutory *judgment*, under Section 904.1(a)(11). This is well-settled. (*Van v. LanguageLine Solutions* (2017) 8 Cal.App.5th 73, 79; *People v. Indiana Lumbermens Mut. Ins. Co*. (2014) 226 Cal.App.4th 1, 10–11 (appeal may only be taken by party against whom sanctions were imposed); *Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296, 1302–1304 (referee's order imposing sanctions is directly appealable without further action from the court when the reference was a general reference under CCP § 638(a)).

B. The Exemption Order Is An Appealable Post-Judgment Order By Code.

Orders granting or denying a claim of exemption are directly appealable. (Cal.Code Civ.Proc., § 703.600; see also *Schwartzman v. Wilshinsky*, (1996) 50 Cal. App. 4th 619, 626).

C. The Undertaking and Execution Order Is An Appealable Post-Judgment Enforcement Order.

Section § 904.1, subdivision (a)(2) provides that an order made after an appealable judgment is itself appealable. The April 29, 2019 Undertaking and Execution Order arose from proceedings before the Court to enforce the money judgment entered on the Sanctions Order.

Interpreting this code section, the California Supreme Court has recognized certain prerequisites to the appealability of post-judgment orders: (1) the issues raised by the post-judgment order must be different from those arising from an appeal from the judgment; (2) the order must either *affect the judgment or relate to it by enforcing it* or staying its execution; (3) the underlying judgment must be final; and (4) the challenged order must be a final determination of the rights of the parties and not be appealable as part of later proceedings. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651 & fn. 3, 652-656; (accord *Fin. Holding Co. LLC v. The Am. Inst. of Certified Tax Coaches, Inc*. (2018) 29 Cal. App. 5th 663, 674). Each one of these requirements has been met. It is indisputable that the Sanctions Order is an appealable judgment or order (its on appeal under A156459) and equally indisputable that an order enforcing it is appealable under Supreme Court precedent, including *Lakin*. The Undertaking and Execution Order affected the judgment and is related to its enforcement or staying its execution. Finally, it was a final determination of the parties' rights which were not reviewable as part of later proceedings.

D. The Clarification Order Is An Appealable Post-Judgment Order.

The Tribe filed the Amended Motion for Clarification to challenge the subject matter jurisdiction of the Court to enforce four money judgments over any assets that exceeded the limited scope of the Tribe's waiver of sovereign immunity, which only made "casino assets" available for attachment. (AOP 45.) The four money judgments were:

1) The order entered on March 5, 2019 declaring Respondent the prevailing party and awarding attorney fees and costs; and
2) The order entered on March 14, 2019 granting attorney fees and costs on appeal;
3) The order entered on December 10, 2018 granting sanctions; and
4) The order entered by Judge Henderson on November 4, 2016 granting attorney fees and costs on appeal.

(CT 1899.)

The issues raised by the Tribe in the Amended Motion for Clarification were of great importance, as can be seen in the Court's interrelated ruling in the Undertaking and Execution Order that found "*all* money judgments issued by this Court (. . .) are subject to immediate execution against any and all of the Casino's traceable accounts." (CT 2382 emphasis added.)

Specifically, the Court had before it in the Tribe's "Defendant's Reply to Plaintiff's Opposition to Defendant's Amended Motion for Clarification", which the Tribe requested be read together with its "Defendant's Reply to Plaintiff's

Amended Opposition to Defendant's Motion for Exemption from Enforcement of a Money Judgment" (CT 2237), the following arguments with regard to the enforcement of judgments:

- The waiver of sovereign immunity associated with the underlying contracts limits recourse to casino assets.
- Language limiting recourse to casino assets should be inserted into the Court's orders as a matter of clarification.
- The insertion of language into the Court's orders is not subject to statutory time limits (*i.e.*, is not time-barred) because the clarification at issue speaks to subject matter jurisdiction, which is by rule never time-barred.
- The Tribe has a valid claim of exemption from the collection of money judgments because it does not possess any "casino assets."
- The Coyote Valley Enforcement of Judgments Ordinance ("Judgments Ordinance") is the exclusive law to be followed to enforce this Court's judgment orders and is the exclusive law to be followed in association with enforcement and collection

> procedures, such as debtor's exams and writs of execution.
>
> • The Judgments Ordinance may be properly applied to Defendant and his enforcement and collection efforts under principles of Federal Indian law.
>
> • This Court must give significant deference to the Tribal Court's determination that the Judgments Ordinance is the exclusive law to be followed with regard to enforcement of this Court's judgment orders.

(*Id*.)

In response, the Clarification Order found that the words "casino assets" do not need any explanation, that the motion was premature as to all four of the money judgments, lacked a statutory basis and that the Court's jurisdiction was not limited by the conditions of the waiver of sovereign immunity. (CT 2365-2367.)

The Clarification Order is an order enforcing the Sanctions Order, the prevailing party order and the March 14, 2019 and November 4, 2016 orders granting attorney fees and costs on appeal. Thus, under *Lakin* and Code of Civ. Proc. Section 904.1(a)(2) it is appealable because it affects those judgments and is related to their enforcement or the staying of their execution. Finally, all four judgments are final determinations of the parties' rights which are not reviewable as part of later proceedings.

Alternatively, the Clarification Order is reviewable as a post-judgment discovery order because it expressly provided for who may be questioned during a future debtor's exam and defined what they may be asked about stating,

> that in pursuing recourse against the "Casino assets," Respondent may question Defendant, CEDCO, CVEE or any of their officers, representatives, employees or agents and undertake such investigation as may be permitted by applicable law during the course of the debtor's examination concerning any asset that was held in an account of the Defendant's Casino business during the term of the contract between the parties or any asset traceable to such account regardless of the party to whom or the account to which it was transferred.

(CT 2365-2367.)

An appellate court may exercise its discretion to treat an appeal from a post-judgment discovery order as a writ of mandate. This has been done with some frequency by appellate courts where appealability was not clear, or not settled in intra-district decisions.

The appealability of post-judgment discovery orders appears unsettled among California's several appellate districts, and even within the same districts. An example of this is found in the Fourth District, which issued conflicting

holdings less than a week apart in *Macaluso v. Superior Court* (2013) 219 Cal.App.4th 1042 (finding that post-judgment discovery order was appealable) and *Fox Johns Lazar Pekin & Wexler, APC v. Superior Court* (2013) 219 Cal.App.4th 1210 (finding post-judgment discovery order was not appealable). The Second District (in *Yolanda's, Inc. v. Kahl & Goveia Commercial Real Estate*, (2017) 11 Cal.App.5th 509) casts doubt on the ability to appeal a post-judgment discovery order, and seems to align its decision with *Fox Johns*, in that the post-judgment discovery order is not appealable. However, *Finance Holding Co.*, *supra*, decided two years after *Yolanda's Inc.*, casts doubt on *Yolanda's* holding, and suggests that a post-judgment discovery order is appealable.

This Court should reach the conclusion that the Clarification Order is an appealable post-judgment discovery order, but only if this panel concludes that appealability is not clearly provided under the Supreme Court's holding in *Lakin* and Section 904.1(a)(2).

VII. THE COURT (AND RESPONDENT) USED THE EXCLUDED EVIDENCE AGAINST THE TRIBE. IT MUST BE ADDRESSED ACCORDINGLY.

The Court excluded evidence proffered by the Tribe regarding its conveyance of the "Casino assets." Yet, the Court permitted Respondent to use the very same evidence to "prove" the existence of an inequitable or fraudulent conveyance. Moreover, the Court used this same evidence to order a set aside of

the conveyance. It is unjust to allow one party to use evidence to support its claims while preventing another party from using the *exact same evidence* to do the same.

The Court excluded two categories of statements presented in four declarations:[8] (1) averments regarding the Tribe's motive for the transfer of the "casino assets"; and, (2) the fact that the Tribe transferred the "casino assets" to CVEE. [9] (3RT 160, 163, 168-219.) The Court sustained the objections regarding motive for various reasons unrelated to equity, whereas the facts of the conveyance were not admitted based on principles of equity. (*Id*.)

Despite the exclusion of these two categories of evidence for the purpose of the Tribe demonstrating that a legal conveyance of assets had occurred, the excluded facts were used by the Court *against the Tribe, and to the benefit of Respondent*, to support a finding of fraudulent or inequitable transfer in the Undertaking and Exclusion Order. The Tribe used the record to explain how this came to be. The Tribe also used the record to explain how a request to clarify past orders' applicability to "casino assets" led to the issuance of the Clarification Order, which was in actuality a discovery order expressly providing for third

[8] Appellant introduced a declaration from Ghazal Mahdavian to support the Motion for Exemption. The Appellant also introduced declarations from Michael Hunter, Keith Anderson, and Little Fawn Boland in support of the motions for exemption and clarification.

[9] Respondent's summary entitled "Appendix A Chart of Evidentiary Rulings by Trial Court" is not an accurate reflection of the discussion and rulings. It should not be used by this Court. The evidentiary objections are discussed in the April 26, 2019 hearing transcript at 3RT 160, 163, and 168-219.

parties to be questioned during a future debtor's exam and defining what they may be asked during the exam.

Given that the excluded facts wound up forming the basis of the Undertaking and Execution Order and the Clarification Order, there is no reason that the Tribe cannot mention the excluded evidence. (RB 30 and generally throughout the RB.) Respondent did not cite to any supportive law for such contentions. Like the Court, the Respondent also continues to use the excluded facts when it suits his purpose, yet complains when others do the same. Respondent twisted the information provided by the Tribe regarding its lawful conveyance of Casino assets to CVEE to demonstrate an alleged fraudulent intent. The Tribe is entitled to raise a defense and necessarily mention the excluded evidence because the Court (and Respondent) made the excluded evidence an issue.

The simple truth is the Court held that the motive for the conveyance giving rise to this appeal was either inequitable or fraudulent without any evidence supporting Respondent's contention, while at the same time excluding evidence to the contrary. Incredibly, the Court would not even admit into the evidentiary record the existence of the conveyance, but then (somehow) ordered the conveyance to be set aside.

The Statement of Facts properly described the record as it exists on these issues. (AOB 11-24.) The parties opted to use a Clerk's and Reporter's Transcript as the record for these consolidated appeals. CRC 8.832(a)(3)(A) and (B) set forth

that the Clerk's Transcript includes "any (. . .) document filed or lodged in the case in the trial court" and "[a]ny exhibit admitted in evidence, refused, or lodged." Excluded evidence is part of the record on appeal but cannot be used to prove the truth of the matter asserted to reverse an order of the Court. (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1105.) The discussion of the lack of substantial evidence for the Court's orders and how the excluded evidence was used against the Tribe to benefit Respondent in the AOB is consistent with this rule.

VIII. THE EVIDENTIARY RULINGS ARE PROPERLY BEFORE THIS COURT OF APPEALS.

The Tribe has been consistent that the Court's evidentiary rulings were erroneous. It did not fail to properly respond to Respondent's evidentiary objections. In addition, the manner in which it has addressed these issues in this appeal is proper. As such, the evidentiary rulings are properly before this Court of Appeals for review.

A. The Tribe's Underlying Briefing, Statements in the Reporter's Transcript and Arguments Set Forth in the AOB Demonstrate a Consistent Position that the Court's Evidentiary Rulings Were Erroneous.

The Court opted not to issue the evidentiary rulings in an ancillary written order and instead generally memorialized the rulings as to motive and the transfer in the Undertaking and Execution Order. (8CT 2381-2384.) It concluded that the transfer of the "casino assets" "constitutes an inequitable or fraudulent conveyance

that is not judicially cognizable under the federal common law doctrine of equitable estoppel or the state law doctrines of judicial estoppel or evidentiary estoppel under Evidence Code section 623." (8CT 2382)

The Court's reliance on estoppel to exclude the fact of the conveyance was an error. (AOB 37-38 and Reply Brief.) It was also an error to exclude evidence related to motive, and to then rule that a possible motive was fraud. Evidence Code §354 permits a verdict or findings to be set aside, by reason of an erroneous exclusion of evidence, if the error complained of "resulted in a miscarriage of justice and it appears from the record that: (a) The substance, purpose, and relevance of the excluded evidence was made known to the Court by the questions asked, an offer of proof, or by any other means." During the hearing of April 26, 2019 the Tribe explained the relevance of its proffered evidence and challenged the objections made by Respondent thereat. (3RT 160, 163, 168-219.) The inapplicability of estoppel to deem the transfer as excluded was also briefed. (Defendant's Reply to Plaintiff's Opposition to Defendant's Amended Motion for Clarification at 2-4.) Moreover, the Tribe repeatedly raised during the summary proceedings that it appeared Respondent and the Court were trying to establish a fraudulent motive without due process. (For example, 3 RT 233:7-234:9.)

It is an injustice and a violation of due process that the Court summarily concluded that the conveyance was deemed unwound, and that a possible motive for the conveyance was fraud, without affording the Tribe an opportunity for a jury trial. There is zero evidence in the record related to a fraudulent motive, and

yet that is what the Undertaking and Execution Order says. The Court made many statements throughout the hearing about not wanting to get into the Tribe's motive, and yet the proposed Undertaking and Execution Order pending before it contained strong language regarding a fraudulent motive. The judge signed it, making only a single one-word edit. The order stated in no uncertain terms that an "inequitable *or* fraudulent transfer" occurred. (CT 2383 emphasis added.)

The Tribe has been consistent as to these objections and in pointing out the dearth of facts in the record to support the Court's conclusion that a fraudulent transfer occurred, that estoppel could be used against a government in the manner it was, or that the conveyance could be set aside. Each required fact finding and a trial, which was not permitted.

B. A Separate Appeal to Object to the Court's Evidentiary Rulings is Not Required.

This appeal is the correct place to review the Court's errors with regard to the evidentiary objections. A separate appeal regarding the evidentiary objections was not necessary. (RB 30.) Respondent misstated the import of *McCoy v. Pacific Maritime Assn* (2013) 216 Cal.App.4th 283, 294 fn. 2. It simply stated that if an evidentiary ruling is not challenged in an appeal that it need not be addressed by the reviewing court. It says nothing about needing to file a separate appeal regarding evidentiary objections. Moreover, Respondent intimates that an objection-by-objection appeal is needed. That makes no sense in this case because the sustained objections fit neatly in the two broad categories, both of which were

extensively briefed in the AOB. The central point of the AOB is that the Court determined that the conveyance was either inequitable or that there was a fraudulent motive and set aside the fact of such conveyance based on inapplicable theories of equity and without affording due process to the Tribe. Following *McCoy*, because the Tribe raised concerns about the evidentiary rulings they should be addressed on appeal.

IX. TO THE EXTENT THE ORDERS ON APPEAL DID NOT FIND THAT THE ENFORCEMENT OF JUDGMENTS ORDINANCE IS THE GUIDING LAW FOR THE COLLECTION OF THE MONEY JUDGMENTS AWARDED BY THE COURT THEY SHOULD BE REVERSED.

Extensive briefing and argumentation was offered in relation to all three orders regarding the Tribe's assertion that only the Tribe's Enforcement of Judgments Ordinance ("Ordinance") governed Respondent's collection of the money judgments. Despite this, the three orders on appeal are silent on this issue. Respondent raised the *Knighton* and *Atkinson Trading Co.* cases in the Respondent's Brief to argue that, because the contract was executed in 2008 and the Ordinance dates to 2017, "the required 'nexus to the consensual relationship' reflected in the August 20, 2008 Third Amendment" placed the Ordinance beyond the expectations of the contracting parties. (RB 49.) Contrary to Respondent's contention, *Knighton* and *Atkinson* are supportive of the Tribe's position and are fatal to that of the Respondent. With regard to *Knighton*, the Tribe implored the

Court to spend time reading it, extensively briefed it, and brought copies to the Court, which was met with silence in the Court's Orders. (Opposition to the Motion for Undertaking and Request for Writ of Execution 9-10 CT 2051-2052; Defendant's Reply to Plaintiff's Opposition to Defendant's Amended Motion for Clarification 8-10; the Tribe's discussion of *Knighton* is available at 3 RT 150, 153, 158-160, 166 and 220).

The RB contains the following "*Knighton* (. . .) [holding tribal law and policies that *preexisted* the contract formed the required consensual relationship on which tribal jurisdiction could be based]." (RB 49 emphasis added.) This holding for *Knighton* could not be further from the truth. *Knighton v. Cedarville Rancheria* (9th Cir.) No. 17-15515 (March 13, 2019) resoundingly states that a law need not to be in effect at the time the contract was entered into in order to be binding on a non-member, so long as a lawful rationale for regulating a non-member's conduct exists, such as in the case of a consensual relationship.

As related to Respondent, the critical question in regard to the Judgments Ordinance is whether a consensual relationship either exists, or existed, with regard to the non-member in question. Contracts gave rise to this case. In fact, the rational for applying the rule in *Knighton* to compel Respondent (and the Court) to comply with the Judgments Ordinance is stronger than the rational for compelling plaintiff Knighton to comply with Cederville law, because Respondent alleges that a contractual relationship *still* exists with the Tribe as he continues his attempts to enforce terms of the contracts allegedly compelling the Tribe to arbitration. Also

even stronger than in *Knighton* is the fact that the Judgments Ordinance was adopted on December 14, 2017 and the judgment enforcement activities that the Tribe is arguing violate Tribal law did not commence until 2019.

It is not clear whether *Knighton* overrules *Atkinson*, but either way it does not matter. *Atkinson* requires that a tax or regulation imposed by the tribe have a nexus to the consensual relationship itself; thus, a nonmember's consensual relationship in one area does not trigger tribal civil authority in another. Respondent argues that there is no nexus between the Enforcement of Judgments Ordinance and contracting.

Putting aside that Respondent agreed to abide by Tribal law by contract, the parties entered into contractual services agreement that meets the threshold of a "consensual relationship." Money judgments often arise from contractual disputes and other civil litigation. It is completely foreseeable that a civil money judgment deriving from a contractual dispute could be governed by tribal laws regarding enforcement of money judgments. The new argument raised by Respondent regarding the Enforcement of Judgment Ordinance must fail because it is primarily premised on the misguided assertion that a contractor could never expect collection efforts could arise under tribal law. That a tribal government would not, or could not in the future, enact legislation regarding debt collection in the mode of state governments is absurd.

Finally, Respondent argues that the Tribe's failure to bring a "*Hurtado choice of law determination motion*" means the Court did not need to follow the

Enforcement of Judgments Ordinance. (RB 49.) It is false that choice of law cannot only be raised by way of such motion. Under California law, "[a] separate choice-of-law inquiry must be made with respect to <u>each</u> issue in a case." (*S. A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co.*, (9th Cir. 1981) 641 F.2d 746, 749 (*citing Beech Aircraft Corp. v. Superior Court of Los Angeles* (1976) 61 Cal.App.3d 501, 518) (emphasis added)).

When the enforcement of judgments arose, the applicability of the Judgments Ordinance had to be addressed by the Court to determine whether the governing law agreed to by the parties should apply to the various enforcement processes, including the debtor's exam, and the request for the undertaking and writ of execution. The determination should have been made with regard to this specific issue irrespective of whether the Court had made previous determinations regarding the governing law to be applied with regard to other aspects of the case. (*See e.g.*, *Beech Aircraft Corp. v. Superior Court* (1976) 61 Cal. App. 3d 501, 518 ("The mootness of the choice of law issue [to one matter in the case] does not affect the resolution of other choice of law issues in the case. Each choice of law issue requires separate consideration")). "The objective … is 'to determine the law that most appropriately applies *to the issue involved*.'" (*Id.* (quoting *Reich v. Purcell,* 67 Cal. 2d 551, 555, (1967)) (emphasis in *Beech*)).

None of the arguments raised regarding the Ordinance defeat the Tribe's contention that the Court's refusal to apply it, and require Respondent to comply with it, was erroneous.

X. CONCLUSION

For the reasons set forth in this Reply Brief, the three orders should be reversed and remanded.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that this brief contains 12,810 words, including footnotes and was written in 13 point font. In making this certification, I have relied on the word count of the computer program used to prepare the brief. The word count excludes the tables, the cover information, the Certificate of Interested Entities or Persons, this certificate, any signature block, and any attachments.

By /s/ Little Fawn Boland

Little Fawn Boland

By /s/ Keith Justin Anderson

Keith Justin Anderson

Attorneys for Defendant and Appellant,
Coyote Valley Band of Pomo Indians

CERTIFICATE OF SERVICE

I hereby certify that, on February 1, 2021, a true and correct copy of:

APPELLANT'S REPLY BRIEF

was served on Dario Navarro, Michael Scott, Timothy Pemberton, and Thomas Gede, counsel for Respondent electronically through this Court's e-filing system.

DATED: February 1, 2021

By /s/ Little Fawn Boland

Little Fawn Boland

By /s/ Keith Justin Anderson

Keith Justin Anderson

Attorneys for Defendant and Appellant,
Coyote Valley Band of Pomo Indians

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **Findleton v. Coyote Valley Band of Pomo Indians**
Case Number: **A158171**
Lower Court Case Number: **SCUKCVG1259929**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **littlefawn@ceibalegal.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF - APPELLANTS REPLY BRIEF	Consolidated Appeals Findleton Reply MASTER FOR FILING

Service Recipients:

Person Served	Email Address	Type	Date / Time
Little Fawn Boland Ceiba Legal, LLP 240181	littlefawn@ceibalegal.com	e-Serve	2/1/2021 11:55:11 PM
Timothy Pemberton Court Added	manzanita@gbis.com	e-Serve	2/1/2021 11:55:11 PM
Thomas Gede Morgan, Lewis & Bockius, LLP	tom.gede@morganlewis.com	e-Serve	2/1/2021 11:55:11 PM
Keith Anderson CEIBA Legal, LLP	keith@ceibalegal.com	e-Serve	2/1/2021 11:55:11 PM
Michael Scott Law Offices of Michael P. Scott 139188	empeescottesquire@gmail.com	e-Serve	2/1/2021 11:55:11 PM
Dario Navarro Law Office of Dario Navarro 102575	navdar@gmail.com	e-Serve	2/1/2021 11:55:11 PM
Keith Anderson	attorneykeithanderson@gmail.com	e-	2/1/2021

282975		Serve	11:55:11 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

2/1/2021

Date

/s/LITTLE FAWN BOLAND

Signature

BOLAND, LITTLE FAWN (240181)

Last Name, First Name (PNum)

Ceiba Legal, LLP

Law Firm