3rd Civil No. C098204

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT, DIVISION ONE

YAVAPAI-APACHE NATION, a federally recognized Indian tribe

Plaintiff, Respondent and Cross-Appellant,

vs.

LA POSTA BAND OF DIEGUENO MISSION INDIANS, a federally recognized Indian tribe

Defendant, Appellant, and Cross-Respondent.

APPELLANT'S REPLY BRIEF

Appeal from the Superior Court for the County of Sacramento
Case No. 34-2018-00238711-CU-MC-GDS
The Honorable Richard K. Sueyoshi

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INTRODUCTION

While Respondent Yavapai-Apache Nation ("YAN") uses barbed language to distract from its fruitful efforts to game the California court system, Appellant La Posta Band of Diegueno Missions Indians' ("La Posta's") appeal seeks definitive relief from this Court to stop YAN's forum shopping and misuse of its own tribal court. Despite YAN's repeated attempts to normalize its judicial contortions, nothing about the litigation history between the parties, or La Posta's request for extraordinary relief is "garden-variety."

Two decisions from this Court have found that YAN cannot prevail on its claims,[1] yet YAN's shell game has left the trial court unable to determine the actual set of facts upon which it is to base its ruling. La Posta's Motion for Preliminary/Antisuit Injunction ("Motion," Appellant's Appendix ("AA") pp. 771-797) sought alternate forms of injunctive relief to ensure enough stability for a ruling, but even that could not be heard before YAN changed the facts again. Had the trial court granted the Motion, based on this Court's holdings and rationale in *La Posta I* and *La Posta II*, the relief would have led to finality in La Posta's favor.

Instead, as a direct result of YAN's manipulations, the trial court denied the Motion, which led directly to the denial of La Posta's Motion for Summary Judgment ("MSJ," AA pp. 18-44), and now to an amended complaint that has restarted the decade-old litigation for a fourth time.

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[1] *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians* (Cal. Ct. App., June 28, 2017, No. D069556) 2017 WL 2791671 ("*La Posta I*"); *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians* (Cal. Ct. App., April 6, 2022, No. C091801) 2022 WL 10225893 ("*La Posta II*")

The Fourth District predicted this scenario years ago when it explained that if YAN obtained a tribal court judgment finding fraud, it would be:

> critical to understand the precise nature of any such 'fraud' finding. Questions could arise . . . as to whether any fraud judgment arising from the Tribal Court proceedings would or should be given effect in the face of the California jury's factual determination . . . that La Posta did not commit fraud. Issues could also arise regarding whether a 'negligent misrepresentation' . . . finding from the Tribal Court constitutes 'fraud' within the meaning of the Loan Agreement, and/or whether a particular 'fraud' finding would allow recourse to all or only a portion of the RSTF[2] assets.

La Posta I at *17. The Fourth District cautioned that "[i]f the Tribal Court reaches a factual conclusion regarding fraud that is inconsistent with the final judgment in this case, the question regarding the impact of such a determination in a California enforcement proceeding would seem to be one in which a California court may have a substantial interest and the jurisdiction to decide independently." *Id.* at *18.

What was once a "possible future controversy" is now reality. *Id.* at *17. The YAN Tribal Court's ("YAN Court's") fraud determination, the "2018 YAN Judgment" (AA pp. 563-578), directly conflicts with *La Posta I* and also does not constitute "fraud" within the meaning of the Second Amended and Restated Loan Agreement ("SARLA," AA pp. 265-314). Thus, according to *La Posta I*, now should have been the time for the trial court to determine whether YAN's home court judgement is recognizable

[2] RSTF refers to La Posta's Revenue Sharing Trust Fund Distribution payments. (See Opening Brief p. 7 n 2.)

and enforceable. But since this matter began in 2018, the trial court has avoided these issues entirely.

The first round of the trial court's errors were corrected by *La Posta II,* where this Court realized that while the San Diego jury found there was no false representation, the YAN Court "reached the opposite conclusion after considering the very same testimony . . . "even though [the Fourth District] believed the jury's verdict . . . effectively foreclosed the very same negligent misrepresentation claim that the tribal court ultimately sanctioned." *La Posta II* at *5. This Court also understood that the issue of fraud "likely will arise again and . . . reflects a clear misunderstanding of state law," prompting this Court to explain that negligent misrepresentation is a type of deceit, but it is not fraud, and a negligent false promise is not actionable at all. *Id.* at *12. Thus, the YAN Court's 2018 YAN Judgment cannot lead to the relief YAN seeks.

However, after remand, the trial court continued to operate without consideration of *La Posta I* or *II*. La Posta sought to stop YAN from using the two proceedings in tandem long enough for a fair opportunity to defend in California, but the trial court refused, and even refused to prohibit YAN from using new YAN Court's questionable rulings to interfere with the action below.

The trial court erred in multiple ways when it denied La Posta's Motion and Respondent Yavapai-Apache Nation's Brief ("Response") has failed to challenge La Posta's appeal in any meaningful way. Along with La Posta's Opening Brief, the reasons discussed below show the trial court's several errors denying Motion, and for these reasons, La Posta respectfully requests that the trial court's decision be reversed.

PROCEDURAL BACKGROUND

The Opening Brief contained a background including events up to May 26, 2023. The extensive procedural history demonstrates La Posta's numerous attempts to receive its day in court, and YAN's manipulation to prevent it. Since then, La Posta's need for relief has come into even sharper focus.

On May 26, 2023, La Posta filed its opening brief in the YAN Court of Appeals ("YAN COA") appealing the 2018 and 2023 YAN Judgments. (Appellant's Reply Appendix ("RA"), pp. 6-122.) On May 30, 2023, La Posta filed its Opening Brief here.[3]

In the trial court, on June 5, 2023, YAN filed its First Amended Complaint ("FAC") incorporating the 2023 YAN Judgment into the pleading, but otherwise substantively the same as the original complaint.[4] (RA pp. 124-130.) On June 5, 2023, YAN requested, and was granted, an additional 60 days to file its response with the YAN COA, until August 16, 2023. (RA pp. 132-133.)

On July 5, 2023, La Posta filed a demurrer of the FAC and raised several arguments, many of which have been or are presently before this Court:

1. YAN fails to allege facts sufficient to show that it has met the contractual prerequisites for a declaratory ruling.

    a. YAN does not have a finding of fraud.
    b. There is no negligent misrepresentation based on the underlying facts.

[3] Because of technical errors in the format of La Posta's appendix, the Certificate of Interested Entities or Persons, and failure to serve the Supreme Court and trial court judge, La Posta's initial filing were rejected. La Posta timely corrected the mistakes and refiled on June 13, 2023.

[4] The trial court refused to stay the action pending this appeal, on June 6, 2023, La Posta filed a Writ of Supersedeas seeking to stay the trial court action, which was ultimately denied on June 30, 2023.

c. YAN does not have a final determination.

2. The Court lacks subject matter jurisdiction to grant the relief YAN seeks.

3. There is another action pending between the parties on the same cause of action.

[4]. YAN has failed to allege facts to show that this Court can issue a declaration to obligate a non-party to act according to the parties' loan agreement.

(RA pp. 135-156.) On July 10, 2023, La Posta stipulated to allow YAN an additional 60 days to file its Response brief, until September 11, 2023.

On August 16, 2023, YAN filed its Response in the YAN COA. (RA pp. 160-222.) On August 23, 2023, La Posta filed its Reply in the YAN COA. (RA pp. 227-257.)

Despite the extension here, YAN failed to file on time and the Clerk sent an overdue notice, allowing YAN until September 28, 2023, to file its Response. YAN filed its Response as instructed, on September 28, 2023.

On October 6, 2023, the YAN COA issued an order scheduling oral argument for November 9, 2023, and has ordered the parties to file their briefs in this appeal with the YAN COA by October 19, 2023. (RA pp. 259-260.)

On October 13, 2023, YAN filed its opposition to La Posta's demurrer. (RA pp. 262-282.) La Posta filed its reply supporting its demurrer a day after filing this Reply. La Posta's demurrer will be heard on October 26, 2023.

ARGUMENT

I. Standard of Review

YAN is simply wrong to argue that this Court's review is confined to an abuse of discretion standard. (Response. p. 16.) "This Court's review of a preliminary injunction may trigger any or all of the three standards of appellate review:"

- The trial court's evaluation and weighing of the parties' likelihood of success on the merits and the balance of harm is reviewed for abuse of discretion;
- The trial court's application of legal principles is reviewed de novo; and
- The trial court's findings of fact are reviewed under the substantial evidence standard.

Anderson v. Cnty. of Santa Barbara (2023) 94 Cal. App. 5th 554, 568 (cleaned up); *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712 ("The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review.") And the trial court "has no discretion to act capriciously or in a manner that transgresses the confines of the applicable principles of law." *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.

YAN's Response makes clear that here, a *de novo* review of the underlying decision is appropriate. YAN confirms that "the court never reached the likelihood of success on the merits because . . . it held that La Posta could not establish irreparable injury." (Response p. 17.) The likelihood of success on the merits is a necessary element for a preliminary injunction; irreparable injury is not an element of a preliminary injunction.[5] *Butt v. State of California*: (1992) 4 Cal.4th 668, 677–678 (listing the

[5] Nor is irreparable harm a requirement for an antisuit injunction, which requires "exceptional circumstances." *E.g., Advanced Bionics Corp. v. Medtronic, Inc*., 29 Cal. 4th 697, 706 (2002), as modified (Mar. 5, 2003).

elements necessary for a preliminary injunction). Ignoring required elements and imposing new elements is an error of law. *E.g.*, *Jamison v. Department of Transportation* (2016) 4 Cal.App.5th 356, 362 (When "the likelihood of prevailing on the merits depends upon a question of pure law . . . it can sometimes be determinative over the other factor, for example, when the defendant shows that the plaintiff's interpretation is wrong as a matter of law and thus the plaintiff has no possibility of success on the merits.")

II. The trial court abused its discretion by ignoring the principles of equity at issue here.

The parties' years of litigation have shown that the facts and the law are on La Posta's side—nonetheless, La Posta must continue to defend its right to continued existence because YAN's manipulations stall La Posta's opportunity to be heard. Equity required the trial court to stop YAN's multiple proceedings to hear La Posta's MSJ on the complaint YAN pled.

"[E]quity recognizes that we live in a changing world and equitable remedies are flexible, capable of expanding to meet the increasing complexities of these changing times." *Lickiss v. Fin. Indus. Regul. Auth.*, (2012) 208 Cal. App. 4th 1125, 1133. And "[t]he object of equity is to do right and justice. *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 770. Accordingly, a court has broad discretion in exercising its equitable powers. *Petrolink, Inc. v. Lantel Enterprises*, (2022) 81 Cal. App. 5th 156, 166.

But while equity empowers a court, it also sets boundaries. Relevant here is the fundamental principle that: **"Equity abhors a multiplicity of actions . . . Courts should not be in collision."** *Simmons v. Superior Court in and for Los Angeles County* (App. 1950) 96 Cal.App.2d 119, 130 (emphasis added). Because of this strong policy, "[e]quity jurisdiction may be exercised to prevent multiplicity of suits where one of two individuals involved in dispute institutes or is about to institute against the other several

actions depending on same legal questions and similar fact issues, whether successively or simultaneously." *Wellborn v. Wellborn* (1945) 67 Cal.App.2d 540.

The trial court simply ignored this core precept of equity and by doing so, abused discretion. "Discretion is abused in the legal sense whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence." *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527

The circumstances here go far beyond a typical scenario where there are multiple proceedings on the same cause of action. Here, YAN has been actively and flagrantly using its own court to conduct simultaneous proceedings on the same causes of action over several years with very clear intentions of using its own court to obtain rulings to mitigate its losses in California courts. Put differently, it is only because of YAN's duplicate lawsuits that this case lingers today—with only one court, this dispute would have ended with *La Posta I*, and again with *La Posta II*.

Through multiple simultaneous proceedings, YAN gamed the system by obtaining and introducing the 2023 YAN Judgment upon which the trial court denied the MSJ by finding that the brand-new judgment created an issue of material fact. (AA pp. 1553-1554.) The 2023 YAN Judgment did not exist when La Posta filed its MSJ—YAN used its home court to undercut La Posta's right to summary judgment. Equity was necessary to pause YAN's gamesmanship long enough to be heard, but the trial court acted with unwarranted deference to a governmental plaintiff (and the court it solely funds and controls) outside the bounds of reason and rewarded YAN for its manipulation of the two courts. Denying the Motion was an abuse of discretion. Equity guides this appeal and requires reversal.

III. YAN does not argue to uphold any threshold showing for a preliminary injunction.

The standard for a preliminary injunction is clear—there are two elements:

> This court has traditionally held that trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the [movant] will prevail on the merits at trial. The second is the interim harm that the [movant] is likely to sustain if the injunction were denied as compared to the harm that the [non-movant] is likely to suffer if the preliminary injunction were issued.

IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69–70. There is no threshold requirement of irreparable injury to the preliminary injunction analysis.

Instead of opposing La Posta's argument that the trial court erred by improperly imposing a threshold requirement, YAN discards the issue as irrelevant and acknowledges that there are only two elements. According to YAN, "[c]ourts certainly have discretion to analyze one factor before another, and may choose to do so depending on the particular case before them—sometimes, it may make sense to start with likelihood of success on the merits and sometimes it may make sense to start with equitable factors such as the balance of harms." (Response p. 21.) But the trial court did more than simply flip the common law elements, it took *ultra vires* action and added a new, third, threshold requirement if irreparable injury.

Nonetheless, according to YAN, "[t]he key point here . . . is that La Posta cannot justify even a garden-variety preliminary injunction—much less an antisuit injunction—because it cannot show any injury from the proceedings sought to be enjoined." (Response p. 23.) Then, YAN spends

its time arguing that "La Posta failed to establish that it would suffer irreparable injury." (Response p. 21; p. 25 n. 4.)

YAN's argument fails for the same reasons the trial court erred—*irreparable harm is not a dispositive requirement for a preliminary injunction, let alone a separate threshold requirement*. While courts do discuss irreparable injury when considering preliminary injunctions, it is not treated as an exclusive element:

> To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the ***irreparable injury or interim harm*** that it will suffer if an injunction is not issued pending an adjudication of the merits.

White v. Davis (2003) 30 Cal.4th 528, 554 (emphasis added).[6] *White* makes it clear that "ordinarily," a movant must show an irreparable injury "or" an interim harm. *Id*. This seems conclusive that a showing of immediate, irreparable injury is not a third, separate factor, and not even a required factor. See *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 n. 5 (requirements incorporating "irreparable injury" are "simply different ways of describing the 'interim harm' factor.")

The trial court failed to recognize that "[t]he goal" of the analysis "is to minimize the harm that an erroneous interim decision would cause." *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 283, as modified on denial of reh'g (Nov. 20, 2020); citing *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73. That goal, to minimize interim harm, is not wholly dependent on an irreparable injury.

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[6] YAN relies on this exact quote from *White* and argues that "it is hornbook law that irreparable injury is generally the sine qua non for preliminary injunctive relief." (Response pp. 8-9.) But *White* clearly states that irreparable injury ***or*** interim harm is necessary. The disjunctive term "or" means that either type of harm will suffice.

Finally, YAN misunderstands what constitutes an irreparable injury. YAN uses the term quite literally, as if an irreparable injury is one that may never actually be repaired. But this is both self-serving and misleading. "The concept of 'irreparable injury' . . . does not concern itself entirely with injury beyond the possibility of repair or beyond possible compensation in damages." *Wind v. Herbert* (1960) 186 Cal.App.2d 276, 285. Instead, "[t]he term 'irreparable injury' means that species of damages whether great or small, that ought not to be submitted to on the one hand or inflicted on the other." *Id*. (cleaned up).

With *White*, *Cohen,* and *IT Corp*., it is clear that the trial court relied on a flawed analysis. And with *Wind*, it is clear that YAN's Response misses the mark. With a clear understanding of the two elements necessary for a preliminary injunction, La Posta easily meets the requirements, discussed next.

IV. La Posta both predicted and demonstrated interim harm caused directly by the trial court's interim decisions.

An analysis of interim harm "involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo." *14859 Moorpark Homeowner's Ass'n v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402. That list is not exhaustive. Explained more fully:

> The showing of potential harm that a [movant] must make in support of a request for preliminary injunctive relief may be expressed in various linguistic formulations, such as the inadequacy of legal remedies or the threat of irreparable injury, but whatever the choice of words it is clear that a [movant] *must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the*

merits.

Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471 (emphasis added).

And with this, courts must keep in mind that this is a balancing test: "[t]he more likely it is that the [movant] will ultimately prevail, the less severe must be the harm that the [movant] alleges will occur if the injunction does not issue." *King v. Meese* (1987) 43 Cal.3d 1217, 1226. Put plainly, *irreparable harm is only a consideration within the interim harm analysis, and the interim harm does not need to be "severe" when there is a very strong likelihood of success on the merits.*

To put this in context here, when La Posta filed the Motion, the status quo considers the scenario after remand from *La Posta II* and La Posta's pending MSJ. (See AA Ex. 10.) More directly, YAN pled, but did not have a final determination of fraud and La Posta sought summary judgment on that pleading. (AA pp. 31.) YAN could not defeat the MSJ and sought to change the facts to put forth a case it never pled. La Posta filed the Motion to enjoin YAN's deliberate efforts to disrupt the status quo. La Posta had no other remedies available.

In the Motion, and again in the Opening Brief, La Posta made a showing of interim harms, including those codified by CCP § 526. The trial court erred by not considering those interim harms.

A. La Posta was deprived of the right to be heard on its MSJ.

La Posta had a right to be heard on its MSJ and predicted that YAN would interfere with that right. The prediction was ultimately proven true as the Motion was denied and the MSJ was denied as a direct consequence. The trial court's erroneous decision on the Motion was an interim, if not irreparable, harm depriving La Posta of the right to be heard.

"Because [a summary judgment motion] is potentially case dispositive and usually requires considerable time and effort to prepare, [it] is perhaps the most important pretrial motion in a civil case." *Cole v. Superior Court* (2022) 87 Cal.App.5th 84, 88–89, *review denied (Mar. 22, 2023).* La Posta had a right to summary judgment based on YAN's pleading:

> The pleadings play a key role in a summary judgment motion and set the boundaries of the issues to be resolved at summary judgment. The scope of the issues to be properly addressed in a summary judgment motion is generally limited to the claims framed by the pleadings. A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion.

Jacobs v. Coldwell Banker Residential Brokerage Co. (2017) 14 Cal.App.5th 438, 444 (cleaned up); *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493. ("The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues and to frame the outer measure of materiality in a summary judgment proceeding." (cleaned up).)

After *La Posta II*, La Posta prepared its MSJ based on YAN's pleading. (AA Ex. 1.) It was clear that YAN's pleading was wholly insufficient and summary judgment was inevitable, which prompted YAN to return to its abandoned alternate lawsuit to once again cure an adverse California ruling.

A fundamental tenant of California's jurisprudence is that:

> [a] party may not oppose a summary judgment motion based on a claim, theory, or defense that

> is not alleged in the pleadings. Evidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings.

California Bank & Trust v. Lawlor (2013) 222 Cal.App.4th 625, 637, *as modified (Dec. 20, 2013)* (cleaned up). But this is what YAN did.

With the Motion, La Posta simply sought to be heard on its MSJ, which was based on the case YAN pled. (AA pp. 777-778.) The Motion sought to maintain the status quo. Had the status quo been maintained, the lawsuit would have concluded—*La Posta II* all but resolved the case. However, by denying injunctive relief, the harm predicted in the Motion came to pass and YAN obtained a new tribal court judgment which provided the sole basis for the trial court to deny the motion for summary judgment.

YAN's charade—which it argues was expressly authorized by this Court—robbed La Posta of its opportunity to conclude this case and finally stop a decade of YAN's games. (See Response pp. 27-28.) Once again, YAN was able to use its own court to prosecute its case and thereby fundamentally change its complaint below to avoid certain summary judgment.

B. *La Posta I* and *La Posta II* are at risk of being rendered meaningless without this Court's intervention.

La Posta was harmed because the trial court's denial of the Motion rendered *La Posta I* and *La Posta II* meaningless by the time the MSJ was heard. Unless this Court acts, YAN's scheme will effectively eliminate the integrity of this Court's past rulings and effectively make *La Posta I* and *La Posta II* meaningless.

La Posta has prevailed in two appeals, the first found that upon YAN's sole factual theory there was no negligent misrepresentation. The

second found that a judgement subject to change was not final and that negligent misrepresentation is not fraud. Both cases are dispositive of YAN's allegations and cause of action in the case below.

However, by allowing YAN to hastily obtain and present a new judgment from its own court, the trial court allowed YAN to bypass this Court's prior rulings and attack La Posta's reliance on *La Posta I and II* as collateral attacks on its newly acquired home court judgment. (*E.g.,* RA pp. 273-274 (arguing that the trial court cannot "second-guess" the YAN Court's finding of negligent misrepresentation.)

Consider YAN's conduct from an outsider's perspective—any litigant faces a better chance of success when he can use two courts to his advantage, cherry-picking favorable decisions among them. And defendants are less likely to seek a dispositive motion if it would only serve to allow a party to use another court to remedy weaknesses in their case while the dispositive motion is pending. The conduct here is untenable. Because the trial court chose to recognize and legitimize YAN's dual track litigation tactic, it allowed YAN to play two courts at once. California courts are harmed by YAN's conduct and La Posta is harmed by YAN's conduct.

C. YAN's gamesmanship is a harm to California public policy.

California's strong public policy against multiplicity of proceedings was degraded when the trial court allowed YAN to proceed in two courts on the same cause of action. The policy protects litigants. La Posta and California are harmed by YAN's manipulation of the courts and YAN's gamesmanship.

Simultaneous lawsuits on the same cause of action is a harm. "A single cause of action cannot be the basis for more than one lawsuit." *Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853, 856; citing 4 Witkin,

Cal. Procedure (4th ed. 1997) Pleading, § 35, p. 95. This is harm is best exemplified by the public policies supporting res judicata:

> Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.

Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 897 (cleaned up); Cf. *Kaepa, Inc. v. Achilles Corp*. (5th Cir. 1996) 76 F.3d 624, 627 ("allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in inequitable hardship and tend to frustrate and delay the speedy and efficient determination of the cause." (cleaned up).)

It cannot be reasonably disputed that YAN has used its home court advantage throughout this litigation. When YAN lost in San Diego, it used the YAN Court to bypass the unfavorable jury verdict. When YAN lost in this Court, it used the YAN Court to bypass *La Posta II*. This tactic has already been recognized by this Court.[7]

Because it is so uncommon, the risks associated with defending the same causes of action in two fora is not often evaluated. La Posta is quite literally required to defend against unconstrained and unlimited facts and accusations. Where one court can control the process and the evidence, there is absolutely no control when two separate courts address the same issues at the same time.

[7] See, *e.g,*. *La Posta II* at *4-5 (describing several times YAN used of its own court following adverse decisions in California.)

This is put plain by YAN's conduct, where the case pled could not succeed so manipulation in a second court allowed substantively change its case without formally changing its pleading. This is the harm California's policy aims to prevent.

D. La Posta has met several of the interim harms codified by CCP § 526.

In addition to the common law, the Legislature has codified certain circumstances as interim harms with CCP § 526. Essentially, CCP § 526 identifies several *prima facie* interim harms to supplement, not displace, the common law analysis.

YAN argues that "[n]othing in Section 526 dispenses with the . . . the rule that even a garden-variety preliminary injunction will not issue absent a threat of irreparable injury." (Response p. 26 n 5.) YAN is partially correct—under § 526, the Legislature did not dispense of any requirements, but rather it supplied a list of interim harms. The problem with YAN's argument is that only CCP § 526(a)(2) expressly requires a showing of an irreparable injury, and YAN has ignored the rest of the law.

In its Opening Brief, La Posta met its burden to show that CCP § 526(a)(2)-(6) and (b)(1) applied.[8] The trial court erred by wholly ignoring

[8] See § 526: (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action; (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual; (4) When pecuniary compensation would not afford adequate relief; (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings . . . (b) An injunction cannot be granted . . . (1) To stay a judicial proceeding pending at the

the law. Upon this Court's *de novo* review, a finding that any of the subsections in § 526 apply, coupled with the uncontested showing that La Posta is likely to succeed on the merits would warrant reversal.

Under the cannons of statutory construction, the guiding principle is that a "statute will be construed with a view to promoting rather than to defeating its general purpose and the policy behind it." *Lowman v. Stafford* (1964) 226 Cal.App.2d 31, 38. As to the mechanics of interpreting a statue, court's "look to the statute's words and give them their usual and ordinary meaning in order to effectuate the purpose of the law." *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 817 (cleaned up). And when construing statutes, "when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725.

When courts consider the interplay between legislation and the common law, courts are mindful that "[t]he common law is only one of the forms of law and is no more sacred than any other . . . it may be changed at the will of the Legislature, unless prevented by constitutional limitation." *Lowman* , at 39. Accordingly, courts "begin with the presumption that, by its legislation, the Legislature did not intend to alter or displace the common law," so, "[i]f possible, we construe statutes as consonant with existing common law, attempting to reconcile the two." *Id*. After an analysis of the statute, if "there is no rational basis for harmonizing the statutory scheme and the common law, then the statute prevails, and settled common law principles must yield." *Id*.

The language in § 526 is not ambiguous, so the plain meaning controls. And there is no suggestion that the Legislature intended to wholly

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commencement of the action in which the injunction is demanded, unless the restraint is necessary to prevent a multiplicity of proceedings.

replace the common law. So the analysis looks to harmonize with the common law, if possible. Applying these rules, it is clear that the Legislature intended to identify circumstances when a court may issue an injunction and to set the standards for those circumstances without displacing the common law as a catch-all. The use of "may" is consistent with common law, both of which provide that the issuance of an injunction is within the discretion of the court. *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999

Each subsection in § 526 identifies a particular interim harm sufficient for a court to exercise discretion. The Legislature used the common law term "irreparable injury" in § 526(a)(2), but only in § 526(a)(2), which means that the Legislature did not intend a showing of irreparable harm under any of the other subsections. This construction harmonizes the CCP with the common law.

The Legislature identified several factual circumstances—*i.e.*, interim harms—where a court has discretion to issue an injunction without a showing of an irreparable injury. And at the same time, the Legislature left the common law analysis intact for instances and circumstances not described in § 526, recognizing that the law cannot anticipate every circumstance where a party may seek an injunction. For example, this court has explained that:

> [N]othing in Code of Civil Procedure section 526 suggests that the Legislature intended the list of grounds therein, authorizing issuance of preliminary injunctions, to be exclusive. Indeed, the Legislature has enacted various statutes specifically authorizing the granting of injunctive relief in many situations and on various grounds not contemplated by Code of Civil Procedure section 526. (See statutory grants of power to issue injunctive orders collected in 2 Witkin, Cal. Procedure (2d ed.

> 1970) Provisional Remedies, § 49, p. 1498.) Civil Code sections 4351 and 4359 are express grants of authority in cases arising under the Family Law Act. This authority is supplemental to that set forth in Code of Civil Procedure section 526. It is therefore unnecessary to find express authorization for the injunctions in Code of Civil Procedure section 526.

In re Marriage of Van Hook (1983) 147 Cal.App.3d 970, 983–984. The Court continued to explain that "[w]hile [CCP § 526] explicitly refers to various situations where money damages would not afford adequate relief . . . those forms of inadequacy of legal remedy are not prerequisites but are rather, once again, grounds for issuance of preliminary injunctions." *Id*. at 984; see also *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1452 ("An application for an injunction against a party or any other person may be granted as provided by Code of Civil Procedure sections 526–529. No memorandum of points and authorities need be filed unless required by the court.")

Here, La Posta has made a showing of likelihood of success on the merits, discussed below, and identified several of the interim harms described in CCP§ 526: that YAN's conduct manipulating two courts threatens La Posta's rights in the California proceedings and threatens to render *La Posta I* and *La Posta II* ineffectual (see § 526(a)(3)); that pecuniary compensation cannot be calculated and will not compensate for the harm of YAN's manipulations (see § 526(a)(4) & (5)); and that restraint is necessary to prevent a multiplicity of judicial proceeding (see § 526(a)(6) and (b)(1)).

Accordingly, the trial court erred, as a matter of law, when it ignored § 526 and abused discretion by not issuing an injunction according to the provisions in § 526.

E. YAN only argued that two of La Posta's interim harms are not irreparable harms.

In its Response, YAN relied upon the faulty premise that an irreparable injury is dispositive of whether a preliminary injunction may issue, and argues that La Posta has not shown an irreparable injury only because "La Pota's claimed harm—that it will have to incur additional fees litigating in two fora and that the now Final Judgment will undermine its efforts to prevent YAN from enforcing the San Diego Judgment against its RSTF payments—do not constitute irreparable harm." (Response p. 25 n 1 (citation to the record omitted).)

With the proper understanding of interim and irreparable injury, discussed above, YAN's argument is quickly rejected, and the authority it relies on in a footnote is not instructive here. (Response pp. 25-26 n 4.)

First, *Eight Unnamed Physicians v. Med. Exec. Comm.*, (2007) 150 Cal.App.4th 503, 515*, as modified on denial of reh'g* (May 22, 2007) is not helpful as it is limited to whether there is an exception to the exhaustion of administrative remedies, and because the expense of the administrative process is normal the expense is not an irreparable injury. No court has extended this limited holding to analyze an interim injury as an element of a preliminary injunction.

Next, *IT Corp. v. Cnty. of Imperial* is not helpful because the injunction sought in that case would not change the plaintiffs ability to act under its permit—it would only prohibit plaintiff from unpermitted activity and the economic loss attributed to the unpermitted activity. (1983) 35 Cal.3d 63, 75. The gist of *IT Corp*. is that an injunction cannot be used to allow wrongdoing.

YAN's reliance on *Nomadix, Inc. v. Guest-Tek Interactive Entmt. Ltd*, (C.D. Cal., Apr. 24, 2020) No. 219CV04980ABFFMX) 2020 WL 3023308, at *2.is misplaced because the federal factors for a permanent

injunction specifically include "irreparable injury," which is a very different standard the California's rules for a preliminary injunction.

But also, YAN relies on *Nomadix* for the premise that being "disadvantaged in its litigation position at trial is insufficient to show irreparable injury." (Response p. 26 n. 4.) However, in the footnote to this passage YAN quotes, the federal court explained that the defendant's claimed injury was too speculative to be considered irreparable. *Nomadix* at *2 n 1.

Nomadix was premised on assumptions and speculation, which is not the case here, as the predicted harms actually occurred after the trial court denied injunctive relief. Here, (1) the YAN Court did issue a new final judgment finding negligent misrepresentation; (2) YAN sought to admit, and the trial court actually admitted, the new decision; (3) the trial court denied La Posta's MSJ solely on the question of fact related to the new judgment; (4) YAN has in fact filed its FAC based on the new judgment, restarting the decade old litigation for the fourth time; and, (5) La Posta has appealed the new judgment to the YAN Court of Appeals, staying its effectiveness until that appellate court opines, but the trial court has accepted the new judgment nonetheless. Here, there is no speculation—there is interim, if not irreparable, injury.

Finally, YAN relies on *Green v. Cnty. of Riverside*, (2015) 238 Cal.App.4th 1363, 1369, where the court considered whether evidence of "cocaine intoxication" was admissible under Evidence Code § 352. *Green* explained that section "352 is not designed to avoid damage from relevant, highly probative evidence; rather the prejudice that is to be avoided applies to evidence that uniquely tends to evoke an emotional bias against [a party] which has very little effect on the issues." *Id.* at 1369 (cleaned up). It is unclear how *Green* has any bearing on any of the arguments here. Admissibility is not the primary issue—it is the gamesmanship

demonstrated in YAN's two concurrent lawsuits that support equitable relief here.

Considering the several harms raised by La Posta, and YAN's failure to refute them with analogous authority, La Posta meets the interim harm element, both under the common law and CCP § 526. Accordingly, with this Court's finding that there is *any* interim harm, when balanced with the likelihood of success on merits, the outcome favors a preliminary injunction.

V. The trial court did not address, and YAN did not refute, La Posta's likelihood of success on the merits.

YAN confirmed that "the [trial] court never reached the likelihood of success on the merits." (Response p. 17.) The practical effect of the trial court's failure to address this element, and YAN's decision not to offer any counter-arguments on this critical element, is that the Court's *de novo* review may simply consider whether La Posta has met its burden to show it is likely to succeed on the merits.

And significantly, the additional effect of the trial court and YAN's silence on this element makes this Court's balance of harms more straightforward. When balancing the preliminary injunction elements, "the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue." *King v. Meese* (1987) 43 Cal.3d 1217, 1227. "Thus, '... if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction *notwithstanding that party's inability to show that the balance of harms tips in his favor*.'" *14859 Moorpark Homeowner's Ass'n,* 63 Cal.App.4th at 1407 (emphasis in original); *quoting Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 447.

La Posta's likelihood of success on the merits is strong and fully detailed in La Posta's Opening Brief. Without multiple proceedings, La Posta would have prevailed on its MSJ. Because the trial court and YAN only addressed the interim harm element, La Posta will rely on its Opening Brief for its arguments on this element.

VI. La Posta's appeal is not foreclosed by La Posta's decision not to appeal the denial of the antisuit injunction.

In every effort to shortcut the merits of La Posta's appeal, YAN mischaracterizes the Motion as one exclusively for an antisuit injunction, then misinterprets the trial court's decision as providing three alternative bases to deny an antisuit injunction. (Response pp. 18-21.) YAN cannot simply pick its preferred position and claim that the denial of the antisuit injunction "is the only issue now before this Court." (Response p. 27.)

The Motion and reply make it clear that La Posta sought alternate forms of relief—a preliminary injunction or an antisuit injunction. As the procedural history makes clear, La Posta sought protection from interim harm as YAN manufactured a new YAN Court Judgment and YAN singlehandedly destroyed La Posta's avenue for summary judgment by abusing the trial court's timeline,

To prevent YAN from litigating the same action in multiple fora, La Posta filed its Motion seeking, as evident by the title, an antisuit injunction, but also alternative relief of a preliminary injunction.[9]

[9] Under the circumstances, La Posta had no other options. The trial court had made it clear that it would not require YAN to submit its YAN Court Judgments to any formal recognition process—*i.e.*, the TCCMJA or comity. Without such process, La Posta had no avenue to prove the YAN Judgments were contrary to California law and policy, obtained unfairly and without due process, and issued by a court that did not respect or reciprocate with California's courts.

In the Motion, La Posta first argued that it "easily meets the standards for a preliminary injunction," relying on California Code of Civil Procedure ("CCP") § 556(a)(2)-(6) and (b)(1), as well as the common law elements. (AA pp. 785-788.) Then, La Posta explained that it also met the "exceptional circumstances" for an antisuit injunction. (AA pp. 788-793.) La Posta sought *ex parte* relief to hear the Motion sooner. (AA Ex. 6.) The trial court denied *ex parte* relief, finding that "this is a delicate legal issue," and that it "should not be decided on a shortened-time briefing schedule."[10] (AA pp. 769-770.)

Without *ex parte* relief, YAN pressed its own court and obtained its 2023 YAN Judgment before the Motion was fully briefed. (See AA Ex. 15, 17.) With the changed circumstances—*i.e.*, YAN's new unpled 2023 YAN Judgment—La Posta acknowledged in the reply to the Motion that it was likely that the passage of time had rendered an antisuit injunction inappropriate, but not moot. (AA pp. 893, 895-896.) So, La Posta advanced primarily the argument for its alternate relief, that it was still entitled to a preliminary injunction. (AA p. 903.)

When the trial court ruled on the Motion it acknowledged, and ruled upon, all of La Posta's arguments—rulings denying both preliminary and

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[10] The trial court and YAN, still to this day, misunderstood the premise of an antisuit injunction. (AA p. 769 ("Whether a tribal court can or should be enjoined under these circumstances is a significant legal issue.").) An antisuit injunction does not enjoin another *court*—it enjoins the *party* from proceeding in another court. See *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 704 (2002), *as modified* (Mar. 5, 2003) ("We recognize this is a case of first impression, but note that nearly 100 years ago, this court observed that '[t]he courts of this state have the same power ***to restrain persons within the state*** from prosecuting actions in either domestic or foreign jurisdictions which courts of equity have elsewhere.'" (quoting *Spreckels v. Hawaiian Com. etc. Co.* (1897) 117 Cal. 377, 378.) (emphasis added).)

antisuit injunctive relief—which made each decision independently appealable. (AA Ex. 24.) And because YAN argued mootness in its opposition to the Motion, the trial court ruled on the issue of mootness, too. *Id*.

As to the ruling on mootness, the trial court found that "La Posta argues that it will appeal the final judgment . . . Assuming this occurs, and that the final judgment is not yet considered final such that the matter is not moot, the Court will still deny the motion as set forth below." (AA p. 997.) Thus, according to the trial court, the question of an antisuit injunction is not moot.

As to the ruling denying the antisuit injunction, while La Posta disagrees with the trial court's decision, La Posta has recognized that such relief would be inequitable.[11] To issue an antisuit injunction after La Posta's appeal to the YAN Appellate Court would foreclose YAN's ability to defend itself against La Posta's appeal—a far different circumstance from seeking to enjoin YAN *before* it could return to the YAN Court to resurrect its stale lawsuit to collaterally attack *La Posta II*. La Posta still maintains the trial court erred but elected not to appeal that aspect order. Instead, La Posta appealed the trial court's decision to "deny the motion even under traditional standards governing preliminary injunctions." (AA p. 998.)

As to the preliminary injunction, in its reply to the Motion, La Posta explained that even though an antisuit injunction may not be appropriate,[12] the trial court has equitable powers to issue the alternate relief La Posta

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[11] "It is axiomatic that one who seeks equity must be willing to do equity." *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 180 (2000) (cleaned up).

[12] However, La Posta has did not waive its right or concede that it could not obtain an antisuit injunction (Reply § III.)

sought—a preliminary injunction to bar the use of the 2023 YAN Judgment in the California litigation. (AA pp. 891-906.) La Posta has never suggested "that it abandoned its motion for an antisuit injunction" (Response p. 20) and contrary to YAN's argument, La Posta sought a "garden-variety preliminary injunction" in the Motion as an alternate relief. (See Response p. 25.)

Put simply, YAN is wrong to argue that the trial court supplied *three* reasons to deny a *single* request for relief—the trial court's decision provided *three* reasons to deny *three* alternate arguments: mootness; antisuit injunction; and, preliminary injunction. (AA pp. 997-999.)

VII. YAN's abandonment of its YAN Court Action is a matter of fact, not law.

While the Opening Brief aptly presents La Posta's position that during oral argument for *La Posta II*, YAN's counsel confessed that its YAN Court Action was abandoned, it its Response, YAN takes the argument one step further and argues that this Court, with *La Posta II*, "plainly contemplated further proceedings." and essentially encouraged multiple proceedings: "The Court did not specify the forum in which those further proceedings would take place, which is entirely appropriate because that issue was not presented." *Id*. (Response p. 28 citing *La Posta II* at *11.)

If the consequences were not so dire for La Posta, this argument could be easily set aside as it is so far-fetched the response seems painfully apparent. First, *La Posta II* did not entice YAN to resume its YAN Court Action and engage multiple proceedings on the same facts and causes of action. Second, judicial estoppel does not apply because the issue of abandonment was a factual one, not a legal one. YAN did not make a legal argument that the trial court action was viable or abandoned. YAN made a factual statement to this Court that the tribal court action was abandoned.

The ruling that YAN did not have a final determination was not a legal ruling on whether the tribal court action was abandoned—*La Posta II* considered the fact that it was abandoned.

The trial court erred by adopting YAN's farce, and judicial estoppel arguments cannot now be used to soften YAN's factual admission to justify multiple proceedings on the same causes of action.

VIII. The trial court erred taking judicial notice of the 2023 YAN Judgment.

Here, YAN has elected not to argue or supply any factual or legal authority opposing La Posta's arguments that the trial court erred when it overruled La Posta's objections to judicial notice of the 2023 YAN Judgment.[13]

With its opposition to the Motion, YAN requested judicial notice of the 2023 YAN Judgment under Evidence Code § 452(d) and (h). La Posta objected to recognition under § 452(h). (AA Ex. 15.) The trial court overruled La Posta's objections. (AA p. 999.) This was an error.

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[13] For an appellant, "[t]he absence of cogent legal argument or citation to authority allows this court to treat the contention as waived." *Cahill v. San Diego Gas & Elec. Co*., (2011) 194 Cal. App. 4th 939, 956. However, the Respondents do not have the same expectations. Appellants have the burden of affirmatively demonstrating error in the appealed judgment or order, and a court may accept or reject appellants' arguments even if respondents ignore or agree with them. See, e.g., *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) Accordingly, this Court may accept or reject on the appealed order on any lawful ground, whether or not that ground was advanced on appeal by respondents. E.g., *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18–19. But a respondent's failure to address appellant's arguments, this Court is not obligated to develop an argument for respondent. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106. The only task here is to determine whether the appellant has demonstrated reversible error.

The key to La Posta's argument here is that admissibility under § 452(d), which only takes "judicial notice only established the existence and content of the probation report, not the truth of any factual statements contained therein." *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1096, is far different than judicial notice under § 452(h), takes judicial notice of the facts as indisputable.

The long history of defending against YAN's attacks has shown that YAN will exploit anything and everything possible to unjustly seize La Posta's RSTF. Allowing recognition of the 20232 YAN Judgment under § 452(h) opens another possible avenue for exploitation. As noted in the Opening Brief, if recognized under (h), YAN will later claim that the 2023 YAN Judgment is "not reasonably subject to dispute," essentially that the document is indisputable and accurate.

Not only has La Posta appealed the 2023 YAN Judgment, showing that it cannot be taken as indisputable fact, La Posta has also argued and continues to maintain that the 2023 Judgment should not be recognized by California Courts for several reasons: it is not a finding of fraud; it is issued without jurisdiction because of La Posta's sovereign immunity; and, it is not recognizable under the Tribal Civil Court Money Judgment Act ("TCCMJA"), CCP § 1731 *et seq*., or principles of comity.[14]

At bottom, the YAN Judgment should not be given the benefit of being "indisputable" under § 452(h), which will certainly cut unjustly

[14] These arguments are best summarized in La Posta's Opening Brief in the *La Posta II* matter: (1) YAN's judicial system did not afford due process; (2) the YAN Cour was not impartial; (3) there are doubts about the integrity of the judgments (4) it conflicts with a final California jury verdict and *La Posta I*; (5) it is repugnant to the public policy of the State, *i.e*., res judicata and collateral estoppel; (6) the YAN Court did not extend comity to the California courts; and, (7) its interpretation of the SARLA is incorrect. *La Posta II* found it unnecessary to rule on these arguments, which leaves them viable. *La Posta II* at *12.

against La Posta's forthcoming dispositive motions. As YAN did not address this argument, and the trial court offered no basis for overruling La Posta's objections, this Court's review is a legal one, and the law favor's La Posta's position here.

CONCLUSION

For these reasons, and the reasons stated in La Posta's Opening Brief, La Posta respectfully requests that this Court find that the trial court both erred as a matter of law and abused its discretion by applying the incorrect legal standard to La Posta's Motion and reverse the denial of the Motion.

Further, La Posta respectfully requests that this Court find that La Posta is likely to succeed on the merits because YAN's claims fail as a matter of law, vacate any orders inconsistent with this finding, and remand this matter for further proceedings consistent with this opinion.

Respectfully submitted,

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Dated: October 18, 2023

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Appellant's Reply Brief was produced using 13-point Roman type and contains approximately 9,034 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 18, 2023

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PROOF OF SERVICE

La Posta Band of Diegueno Mission Indians v. Yavapai-Apache Nation
3rd Appellate Dist. Court of Appeal
Case No C098204

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Kent, State of Michigan. My business address is Cesar Chavez Ave., S.W., Ste. 250, Grand Rapids, Michigan 49503.

On October 18, 2023, I served true copies of the following document(s) described as **APPELLANT'S REPLY BRIEF** and **APPELLANT'S REPLY APPENDIX VOLUME 1 OF 1,** and **APPELLANT'S REQUEST FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

BY ELECTRONIC SERVICE: I served the documents on the persons listed in the Service List (below) by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

BY MAIL: I served the documents to the Honorable Richard Sueyoshi and the California Supreme Court at the addresses listed on the Service List.

/s/ Scott Funke

SERVICE LIST

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