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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, et al., Plaintiffs and Appellants, v. CALIFORNIA GAMBLING CONTROL COMMISSION, Defendant and Respondent.	D074339 (Super. Ct. No. 37-2017-00050038-CU-MC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed, with the imposition of sanctions.

Manuel Corrales, Jr. for Plaintiffs and Appellants.

Xavier Becerra, Attorney General, Sara J. Drake, Assistant Attorney General, T. Michelle Laird and Neil D. Houston, Deputy Attorneys General, for Defendant and Respondent.

In several previous opinions, this court has addressed the dispute arising out of the decision of the California Gambling Control Commission (the Commission) to withhold funds that would otherwise be payable to the California Valley Miwok Tribe from the Indian Gaming Revenue Sharing Trust Fund (RSTF) due to uncertainty regarding the tribe's authorized governing body. Most notably, in *California Valley Miwok Tribe v. California Gambling Control Com.* (2014) 231 Cal.App.4th 885 (*CVMT 2014*) we held that the Commission was justified in continuing to withhold the RSTF funds until the federal Bureau of Indian Affairs (BIA) establishes a government-to-government relationship with a tribal leadership body for the purpose of entering into a contract for benefits under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301, et seq. (ISDEAA).[1]

It is undisputed that the BIA has not yet recognized any tribal leadership body for the purpose of entering into a contract for ISDEAA benefits. Indeed, a new federal lawsuit was recently initiated against the BIA because of its refusal to do so. Nevertheless, in the instant lawsuit, in December 2017, a faction of purported tribal members, who claim to represent the California Valley Miwok Tribe and its General

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1 Our other opinions related to the instant dispute are as follows: *California Valley Miwok Tribe v. California Gambling Control Commission* (Apr. 16, 2010, D054912) [nonpub. opn.]; *California Valley Miwok Tribe v. California Gambling Control Commission* (Dec. 18, 2012, D061811) [nonpub. opn.]; and *California Valley Miwok Tribe v. California Gambling Control Commission* (June 16, 2016, D068909) [nonpub. opn.].

Council, filed a new lawsuit against the Commission.[2] Plaintiffs contend that due to certain events that occurred since we issued *CVMT 2014*, including the death of a member of a competing tribal faction, the Commission is now required to distribute the RSTF funds to a representative of the Plaintiffs. The trial court sustained the Commission's demurrer, concluding among other things, that the lawsuit is barred by principles of res judicata premised on our opinion in *CVMT 2014*, which sets forth the conditions under which the Commission will be required to resume distribution of the RSTF funds, and which Plaintiffs did not establish were present. As we will explain, the trial court properly sustained the demurrer on the basis of res judicata, and we accordingly affirm the judgment.

Further, on our own motion, after giving notice and affording an opportunity for opposition and a hearing, we impose sanctions on Plaintiffs' attorney, Manuel Corrales, Jr., in the amount of $850.00 for filing an objectively frivolous appeal.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On several previous occasions we have set forth the factual background relating to the Commission's decision to withhold RSTF funds from the California Valley Miwok

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2 The complaint alleges that the plaintiffs in the instant lawsuit are the California Valley Miwok Tribe, the General Council of the tribe (allegedly consisting of Silvia Burley, Rashel Reznor and Angela Paulk), and individual tribal members Silvia Burley, Rashel Reznor, Angela Paulk and Tristian Wallace (collectively, Plaintiffs). The complaint defines the California Valley Miwok Tribe as the tribe having "a governing body under the leadership of Silvia Burley . . . who has been duly elected and appointed as the Tribe's Chairperson."

Tribe, which stems from a long-running tribal leadership and membership dispute between different tribal factions that has resulted in actions in state courts, federal courts and administrative agencies. We once again set forth the relevant details, supplemented by relevant recent developments shown by documents in the trial court record, as well as documents that are properly subject to judicial notice.[3]

A. *The History of the Tribal Dispute*

We begin with a summary of the tribal leadership and membership dispute concerning the California Valley Miwok Tribe. Our opinion in *CVMT 2014* quoted extensively from *California Valley Miwok Tribe v. Jewell* (D.D.C. 2013) 5 F.Supp.3d 86 (*Jewell*) for the factual background of the tribal leadership dispute. Although, *Jewell* remains the most thorough summary of the tribal leadership dispute contained in a published judicial opinion, a more recent summary is set forth in a June 1, 2017 unpublished opinion in *California Valley Miwok Tribe v. Zinke* (E.D. Cal., June 1, 2017, No. CV 2:16-01345 WBS CKD), *affd.* 745 Fed.Appx. 46 (9th Cir. Dec. 11, 2018), from which we quote here:

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[3] The parties have submitted multiple requests for judicial notice in connection with this appeal, and the Commission has opposed judicial notice of some of the documents submitted by Plaintiffs. Specifically, the Commission opposes judicial notice of exhibits 2 through 6 in Plaintiffs' request for judicial notice filed August 22, 2019. For the reasons set forth in the Commission's September 6, 2019 opposition to Plaintiffs' request for judicial notice, we decline to take judicial notice of exhibits 2 through 6 in Plaintiffs' request for judicial notice filed August 22, 2019. In all other respects we grant the requests to take judicial notice filed by the parties on January 18, 2019; May 5, 2019; May 13, 2019; August 22, 2019 and September 23, 2019.

"In 1915, John Terrell of the Office of Indian Affairs conducted a census of 'Sheepranch Indians' in Calaveras County, California. . . . At the time of the census, there were thirteen Sheepranch Indians. . . . In 1916, the United States acquired a 0.92 acre parcel of land, known as 'Sheep Ranch Rancheria,' for these Indians. . . .

"In 1934, Congress passed the Indian Reorganization Act ('IRA'), which required the BIA to hold elections where a tribe would decide whether to accept provisions of the IRA, including provisions permitting tribes to organize and adopt a constitution. 25 U.S.C. §§ 5123, 5125. The BIA found that there was only one eligible adult Miwok Indian, Jeff Davis, living on the rancheria in 1935. . . . He voted in favor of adopting the IRA but the Tribe never pursued formal organization. . . .

"Amended in 1964, the California Rancheria Act authorized the termination of federal recognition of California Rancherias by distributing each rancheria's assets to the Indians residing on the rancheria. . . . At that time, Mabel Dixie was the sole Miwok resident on the land. . . . . She voted to accept the land distribution plan and terminate the trust relationship between the federal government and the Tribe. . . . The BIA failed, however, to take the necessary steps to complete the termination of the rancheria. . . .

"Mabel Dixie died in 1971 and an Administrative Law Judge ordered the distribution of her estate. . . . Her common law husband and four sons, including Yakima Dixie, received an undivided interest in the land. . . . By 1994, Yakima Dixie represented that he was the only living descendant of Mabel and recognized Tribe member. . . .

"A. Leadership Dispute

"In 1998, [Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace] [(]the Burley faction[)] received [Yakima's] permission to enroll in the Tribe. . . . In September 1998, the BIA met with Dixie and Burley in order to discuss formal organization of the Tribe. . . . The BIA noted that it believed that the original tribal membership was limited to the heirs of Mabel Dixie because of the land distribution during probate. . . . The Tribe's membership then expanded with the addition of the Burley faction. . . .

"In November 1998, the BIA drafted, and Dixie and Burley signed, Resolution #GC-98-01 ('1998 Resolution'). . . . The 1998 Resolution listed Dixie and the four member Burley faction as Tribe members. . . . It also

> established 'a General Council to serve as the governing body of the Tribe.' . . . In 1999, Burley submitted Dixie's resignation as tribal chairman to the BIA, but Dixie claimed he did not resign. . . . The BIA affirmed the General Council's authority as the governing body of the Tribe in February 2000 and continued to recognize the General Council and Burley's leadership through 2005. . . .
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> "In February 2004, Burley submitted a tribal constitution to the BIA 'in an attempt to demonstrated that it is an "organized" Tribe' under the IRA. . . . The BIA rejected the constitution because it did not reflect the involvement of 'the greater tribal community.' . . . . The BIA restated this position in February 2005 when it concluded that it did not recognize any tribal government or tribal chairperson for the Tribe." (*California Valley Miwok Tribe v. Zinke* (E.D. Cal., June 1, 2017, No. CV 2:16-01345 WBS CKD), administrative record citations omitted.)

As particularly relevant here, as we set forth in *CVMT 2014*, "[i]n a February 2005 letter, the BIA stated that 'it did not recognize Burley as the tribal Chairperson, but rather, a "person of authority" within the Tribe' and that ' "[u]ntil such time as the Tribe has organized, the Federal government can recognize no one, including [Dixie], as the tribal Chairman." . . . The BIA concluded by stating that it "does not recognize any tribal government" for the Tribe "[i]n light of the BIA's [March 2004 Decision] that the Tribe is not an organized tribe." ' (*Jewell, supra,* 5 F.Supp.3d at pp. 93-94, citations omitted.) In July 2005, the BIA suspended the Tribe's contract for ISDEAA benefits. (*Jewell*, at p. 94.)" (*CVMT 2014, supra,* 231 Cal.App.4th at p. 893.)

Since 2005, Burley has been involved in a series of federal lawsuits and administrative proceedings to attempt to obtain BIA recognition of her leadership of the California Valley Miwok Tribe. We need not detail the history of those proceedings up until 2014, as they are described in *CVMT 2014, supra,* 231 Cal.App.4th at pages 893-896. Suffice it to say, that on the date of our opinion in *CVMT 2014,* the litigation and

administrative proceedings were ongoing, and the BIA had not yet recognized any authorized tribal representative.

Much has occurred with respect to the tribal leadership dispute since 2014, but, as we will describe, the dispute is not yet resolved and the BIA still does not recognize any authorized tribal representative. The first significant development occurred on December 30, 2015, when Assistant Secretary—Indian Affairs for the United States Department of the Interior (AS-IA), Kevin Washburn, issued a decision stating that the membership of the California Valley Miwok Tribe was "not limited to five individuals," as Burley had contended, but that the tribe's membership was "properly drawn from the Mewuk Indians for whom the Rancheria was acquired and their descendants." AS-IA Washburn stated that "Ms. Burley and her family do not represent the [California Valley Miwok Tribe]," and that the General Council created by Burley in 1998 was not a valid representative body of the tribe. AS-IA Washburn suggested that one approach to properly reorganizing the tribe would be to file a petition for a Secretarial election pursuant to 25 C.F.R Part 81.[4]

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4 Under federal law, "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—[¶] (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and [¶] (2) approved by the Secretary pursuant to subsection (d) of this section." (25 U.S.C § 5123(a).) "Pursuant to subsection (a)(1), the Secretary has promulgated several rules governing special elections. *See generally* 25 C.F.R. pt. 81. Compliance with these rules is a prerequisite for the Secretary's approval of a proposed constitution." (*California Valley Miwok Tribe v. U.S.* (D.C. Cir. 2008) 515 F.3d 1262, 1264.)

The Burley faction filed a lawsuit in federal court in an attempt to overturn AS-IA Washburn's decision. The district court denied relief. (*California Valley Miwok Tribe v. Zinke* (E.D. Cal., June 1, 2017, No. CV 2:16-01345 WBS CKD).) The Ninth Circuit later affirmed the district court's decision. (*California Valley Miwok Tribe v. Zinke* (9th Cir. 2018) 745 Fed.Appx. 46.)

In December 2017 Yakima Dixie died. Dixie had been one of the members of the tribal faction opposing Burley's claim to tribal leadership. (*CVMT 2014*, *supra*, 231 Cal.App.4th at pp. 892-896.) As we will later explain in more detail, the Plaintiffs filed the instant lawsuit in December 2017, claiming that Dixie's death resolved the tribal leadership dispute and established that the General Council that Burley created in 1998 was the valid governing body of the tribe.

The next significant development took place in December 2018 when the BIA authorized a Secretarial election, in which the eligible voters of the California Valley Miwok Tribe would vote on whether to adopt or reject a proposed constitution. An election was held on April 15, 2019, in which the proposed constitution was adopted by a vote of 143 to 12. However, on May 30, 2019, the BIA issued a decision stating that the April 15, 2019 Secretarial election was invalid. The BIA explained that the election was

invalidated because genealogical information showed that many of the persons participating in the election were not in fact descendants of eligible groups.[5]

On June 27, 2019, Burley, purporting to represent the California Valley Miwok Tribe, proposed that the BIA enter a contract for ISDEAA benefits for fiscal years 2019 through 2021 with her as the tribal representative. On July 23, 2019, the BIA returned Burley's proposal without action. The BIA explained, "Since issuance of the . . . decision dated December 30, 2015, by the Assistant Secretary-Indian Affairs, the Department of the Interior has not recognized a governing body for the California Valley Miwok Tribe, including for purposes of contracting pursuant to 25 U.S.C. § 5321(a)(1) . . . . Your proposal does not meet the threshold requirement for contracting by a recognized tribal government . . . ."[6]

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5 As Plaintiffs did not provide us with a copy of the proposed tribal constitution, it is not clear what impact the constitution would have had on Burley's claim to be an authorized tribal representative. We note that the Burley faction apparently opposed the Secretarial election, as it filed an unsuccessful lawsuit attempting to enjoin the Secretarial election before it occurred.

6 A self-determination contract under 25 U.S.C. § 5321(a)(1) is a contract for benefits under the ISDEAA. "[T]he ISDEAA creates a mechanism for the negotiation of self-determination contracts: ["]The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof.["] [25 U.S.C.] § 5321(a)(1). 'Under a self-determination contract, the federal government supplies funding to a tribal organization, allowing [the Tribe] to plan, conduct and administer a program or service that the federal government otherwise would have provided directly.' " (*Rancheria v. Hargan* (D.D.C. 2017) 296 F.Supp.3d 256, 260.)

On September 12, 2019, Burley, on behalf of herself and the California Valley Miwok Tribe, filed a complaint for injunctive and declaratory relief against the federal government and federal government officials, including the United States Department of the Interior and the BIA. The lawsuit expressly challenges the federal government's refusal to recognize an authorized tribal representative and the BIA's refusal to enter in the proposal for ISDEAA benefits requested by Burley in June 2019 based on her claim to represent the tribe.

B. *The History of the Burley faction's Litigation Against the Commission*

As we explained in *CVMT 2014*, "pursuant to the Indian Gaming Regulatory Act of 1988 (18 U.S.C. § 1166 et seq.; 25 U.S.C. § 2701 et seq.), the State of California has entered into tribal-state gaming compacts with the various tribes in California authorized to operate gambling casinos (collectively, the Compacts). (See Gov. Code, §§ 12012.25-12012.53 [ratifying tribal-state gaming compacts].) The Compacts set forth a revenue-sharing mechanism under which tribes that operate fewer than 350 gaming devices share in the license fees paid by the tribes entering into the Compacts, so that each 'Non-Compact Tribe' in the state receives 'the sum of $1.1 million per year.' (Compact, § 4.3.2.1.) 'Non-Compact Tribes' are defined as '[f]ederally-recognized tribes that are operating fewer than 350 Gaming Devices. . . .' (Compact, § 4.3.2.(a)(i).) It is undisputed that the [California Valley Miwok Tribe] is a Non-Compact Tribe, as it

operates no gaming devices and is federally recognized." (*CVMT 2014, supra,* 231 Cal.App.4th at pp. 888-889, footnotes omitted).[7]

"The annual payment of $1.1 million to each Non-Compact Tribe is drawn from the Indian Gaming Revenue Sharing Trust Fund (RSTF) described in the Compacts. (Compact, § 4.3.2.1.) The Commission administers the RSTF, with the Compacts providing that '[t]he Commission shall serve as the trustee of the [RSTF].' (Compact, § 4.3.2.1.(b).) According to the Compacts, '[t]he Commission shall have no discretion with respect to the use or disbursement of the trust funds. Its sole authority shall be to serve as a depository of the trust funds and to disburse them on a quarterly basis to Non-Compact Tribes.' (Compact, § 4.3.2.1.(b).) Further, a provision in the Government Code directs that the Commission 'shall make quarterly payments from the Indian Gaming Revenue Sharing Trust Fund to each eligible recipient Indian tribe within 45 days of the end of each fiscal quarter.' (Gov. Code, § 12012.90, subd. (e)(2).)" (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 889.)

"The Commission does not dispute that, like all Non-Compact Tribes, the [California Valley Miwok Tribe] is eligible for an annual $1.1 million payment under the terms of the Compacts. However, starting in 2005, the Commission, acting as trustee of the RSTF, suspended its quarterly disbursements to the [California Valley Miwok Tribe]

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7 As we did in *CVMT 2014*, "[w]e quote from the Compacts as entered into by the State of California with various tribes in 1999." (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 889, fn. 4.) We previously explained that although "the standard language used in more recent compacts between the State of California and other tribes is different from the language used in earlier compacts" the difference in language is not significant to our analysis. (*Ibid*.)

and decided to hold the funds indefinitely in trust for the Tribe for later distribution. The Commission began withholding the distribution of the RSTF funds to the [California Valley Miwok Tribe] when it became aware of a dispute over the tribe's membership and leadership as evidenced by ongoing proceedings and litigation involving the BIA's relationship with the [California Valley Miwok Tribe]. . . . The Commission 'takes the position that it lacks the authority or jurisdiction to independently assess the legitimacy of a purported tribal leader or tribal leadership group, and instead relies upon the assessments and conclusions of the Department of the Interior, acting through the Bureau of Indian Affairs . . . , as reflected in the final administrative actions of that agency.' Therefore, the Commission has suspended its disbursement of the RSTF funds to the [California Valley Miwok Tribe] 'pending [the] BIA's recognition of an authorized . . . Tribe leader or leadership group with which to conduct its government[-]to[-]government business.' " (*CVMT 2014*, *supra*, 231 Cal.App.4th at pp. 889-890.)[8]

In January 2008, purporting to represent the California Valley Miwok Tribe as its "selected spokesperson," Burley filed a lawsuit against the Commission in San Diego County Superior Court (the 2008 Action.) (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 896.) Against the Commission, the first amended complaint in the 2008 Action sought (1) a writ of mandate under Code of Civil Procedure section 1085; (2) an injunction; and

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8 As of the quarter ending September 30, 2018, the Commission was holding $15,088,001.99, of RSTF funds payable to the California Valley Miwok Tribe, as well as $868,605.51 in accrued interest on the withheld distributions.

(3) declaratory relief.[9] All three causes of action sought the same fundamental relief, namely an order requiring the Commission to pay over the RSTF funds to the California Valley Miwok Tribe, with Burley as its leader, to distribute according to her discretion. (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 896.) Specifically, all three causes of action presented the common issue of whether, in carrying out its duty as a trustee of the RSTF, the Commission is legally justified in maintaining a policy of withholding the RSTF funds from the Tribe until the federal government establishes a government-to-government relationship with a tribal leadership body for the purpose of entering into a contract for ISDEAA benefits. (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 896.) The relief sought by Burley on behalf of the California Valley Miwok Tribe was opposed by a competing tribal faction, including Dixie, which was granted leave to intervene. (*Ibid*.)[10]

We issued four separate appellate opinions in the course of the parties' litigation of the 2008 Action.

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9 Although the record in this appeal contains certain documents from the 2008 Action, we have taken judicial notice, on our own motion, of the remainder of the appellate record from that case. We observe that the original complaint in that matter expressly alleged a cause of action for breach of fiduciary duty against the Commission, alleging that "The Commission's . . . conduct as herein alleged constitutes a breach of its . . . fiduciary duties under the Compact and under State law." Although the cause of action was deleted from the first amended complaint, that complaint still retained substantive allegations of breach of fiduciary duty within the cause of action for injunctive relief. That cause of action alleged that the Commission's decision to withhold the RSTF funds was "a breach of its fiduciary duties" and requested an order from the court requiring that the Commission "discharge its fiduciary . . . duties."

10 As we explained in *CVMT 2014*, the competing tribal faction was comprised of "[Dixie], along with Velma WhiteBear, Antonia Lopez, Antone Azevedo, Michael Mendibles and Evelyn Wilson, all of whom claim[ed] to be members or tribal council members of the tribe as led by [Dixie]." (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 894.)

First, in 2010 we reversed the trial court's order sustaining the Commission's demurrer based on its conclusion that the California Valley Miwok Tribe, as represented by Burley, lacked capacity or standing to sue. (*California Valley Miwok Tribe v. California Gambling Control Com'n* (Apr. 16, 2010, D054912) [nonpub. opn.].)

Next, in 2012 we granted mandamus relief on behalf of the California Valley Miwok Tribe, lifting a stay of proceedings imposed by the trial court. (*California Valley Miwok Tribe v. The Superior Court of San Diego County* (Dec. 18, 2012, D061811) [nonpub. opn.].)

Our third opinion, set forth in *CVMT 2014*, *supra*, 231 Cal.App.4th 885, affirmed the trial court's summary judgment in favor of the Commission on each of the causes of action. As we explained, the issue presented was "whether based on a dispute about the leadership and membership of the Tribe, the Commission is legally justified in holding the RSTF funds in trust for the Tribe until the federal government recognizes a tribal leader with whom to conduct government-to-government business for the purpose of entering into a contract for ISDEAA benefits." (*Id*. at p. 899.) We answered affirmatively, holding that "*the BIA's resumption of contracting for ISDEAA benefits with the Tribe will establish that an authorized leader exists to receive funds on behalf of the Tribe. At that point, the proper party to receive the distribution of the RSTF funds will no longer be 'reasonably in dispute' . . . , and the Commission will accordingly have a duty under the Compacts and the Government Code to distribute the RSTF funds to the Tribe.*"

(*Id*. at p. 909, italics added.)[11] Thus, 2014 CMVT plainly established that the Commission was justified in withholding the RSTF funds *until* the BIA resumed contracting for ISDEAA benefits with the California Valley Miwok Tribe.

Our final opinion in the 2008 Action, filed in 2016, affirmed the trial court's award of costs in favor of the Commission, rejecting the California Valley Miwok Tribe's contention that it was protected by tribal sovereign immunity from incurring any

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11 In *CVMT 2014*, we also rejected another argument made by Burley on behalf of the tribe she purported to represent. As we explained, "the Tribe contends that regardless of the eventual outcome of the tribal membership and leadership dispute, the five tribal members that Burley claims to currently constitute the Tribe have a vested interest in receiving the RSTF funds that accumulated while the tribal leadership and membership dispute was pending. The Tribe argues that any future tribal members are currently only *potential* members who have no right to RSTF funds accumulated before they became tribal members." (*CVMT 2014*, *supra*, 231 Cal.App.4th at pp. 909-910, fn. omitted.) We explained that the argument failed on the basis, among others, that the Compacts establish that the Commission " 'shall have no discretion *with respect to the use or disbursement of the trust funds*.' (Compact, § 4.3.2.1.(b), italics added.) Accordingly, it is not the role of the Commission, nor of this court in ruling on the scope of the Commission's duty with respect to the RSTF funds, to determine how the RSTF funds should be distributed *within* the Tribe once the internal tribal dispute is resolved and the Commission identifies an authorized tribal representative to receive the accumulated RSTF funds on behalf of the Tribe.' " (*Id*. at p. 910.) We specifically quote this portion of *CVMT 2014* here because in their reply brief, Plaintiffs have once again suggested that, if we were to order the Commission to release the RSTF funds to the California Valley Miwok Tribe, we should also order that the RSTF funds accumulated up until a certain date be distributed to the Burley faction alone. Although we have already considered and rejected that argument, Plaintiffs improperly disregard our prior holding and continue to advance the argument without acknowledging *CVMT 2014*.

obligation to pay costs. (*California Valley Miwok Tribe v. California Gambling Control Commission* (June 16, 2016, D068909) [nonpub. opn.].)[12]

C. *The Instant Lawsuit*

The instant lawsuit was filed on December 27, 2017. Similar to the 2008 Action, the complaint was filed by Burley on behalf of the California Valley Miwok Tribe, which she purports to represent as the chairperson of the tribe. However, the instant lawsuit also includes several other plaintiffs who were not expressly involved as parties in the 2008 Action. Specifically, the Plaintiffs also include the tribe's purported General Council (which is allegedly comprised of Burley, Rashel Reznor and Angela Paulk), as well as the following individuals who claim to be members of the tribe: Burley, Reznor, Paulk and Tristian Wallace.

The complaint alleges four causes of action: (1) injunctive relief; (2) declaratory relief; (3) writ of mandate; and (4) breach of fiduciary duty. Except for the breach of fiduciary cause of action, which simply incorporates the allegations of the foregoing

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12 A fifth opinion from this court, filed in 2018, arises out of a 2017 lawsuit which also involved the Commission and the leadership dispute of the California Valley Miwok Tribe. (*California Valley Miwok Tribe v. Everone* (July 16, 2018, D072141 [nonpub. opn.].) We have taken judicial notice, on our own motion, of the pleadings in that lawsuit. The lawsuit was filed by Burley, on behalf of the tribe, against the Commission and against individual defendant Chad Everone, whom the complaint alleged controlled Dixie and was attempting to take over the tribe for his own financial purposes. In the complaint, ignoring our holding in *CVMT 2014*, Burley, on behalf of the tribe, once again claimed that the Commission was required to distribute the RSTF funds even though the BIA had not yet recognized an authorized tribal representative. The causes of action against the Commission were resolved on demurrer or voluntarily dismissed and were not the subject of any appeal. Our opinion affirmed the trial court's granting of a special motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16) in favor of Everone.

paragraphs of the complaint, the causes of action contain long and unfocused allegations that set forth the history of the tribal leadership and membership dispute. The common factual premise of all of the causes of action is Dixie's death on December 12, 2017. According to the complaint, "[h]e was the one who disputed Burley's Tribal leadership that created a 16-year-long Tribal leadership dispute which the Commission claims prevented it from distributing the Tribe's Revenue Sharing Trust Fund ('RSTF')." The complaint alleges, "Now that Dixie has died, the General Council under Burley's leadership becomes the governing body authorized to receive the funds," and "[t]he death of Dixie on December 12, 2017, has mooted the Tribal leadership dispute which the Commission claimed since 2005 prevented it from releasing those funds. There are now no competing claims to those proceeds." The relief sought by each cause of action is premised on the contention that due to Dixie's death, the tribal leadership dispute has been resolved, and that the Commission is therefore obligated to distribute the RSTF funds to Burley or to the tribe's General Council, which Burley contends is the tribe's legitimate governing body.[13]

Specifically, the first cause of action for injunctive relief requests "that the Court issue an order directing the Commission to release and pay to the General Council the

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13 The factual situation described in the complaint, and the possible significance of Dixie's death, has clearly been overtaken by the events of the two years since this action was filed, which have included an invalidated Secretarial election, the BIA's refusal to enter into a contract for ISDEAA benefits with the tribe as represented by Burley, and Burley's filing of a lawsuit against the federal government.

RSTF money it has been withholding from the Tribe since 2005, and to thereafter pay the Tribe every quarter the Tribe's quarterly payments of its share of RSTF money under the Compacts." Plaintiffs further request that "the Court order the Commission to render an accounting concerning the withheld RSTF money, and pay the Tribe a correct amount in interest on those funds."[14]

The second cause of action for declaratory relief alleges that "the Commission has wrongfully withheld presently from the Tribe over $11 million in RSTF payments" and

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14 As a basis for the request for an accounting and the payment of a different interest rate, the injunctive relief cause of action alleges:

> "98. In addition, the Commission is purporting to give the Tribe an unreasonably low interest rate, i.e., less than 4%, on the withheld funds, when the tribe is entitled to more than 7%, if not 10%. Upon information and belief, the Commission is using the Tribe's money to invest in stocks and bonds, or other risky and unauthorized investments. At no time has the Commission obtained permission from the Tribe or provided it with an accounting on how it is investing the Tribe's funds.
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> "99. Accordingly, the Commission has breached its fiduciary duties and obligations under the Compacts, and under the law, by refusing to release to the Tribe in care of the Tribal council its RSTF money, by refusing to pay the Tribe appropriate interest on the RSTF money it is withholding, and, upon information and belief, by using the Tribe's withheld RSTF money to make personal investments contrary to the interests of the Tribe and its members. In addition, the Commission has never provided an accounting on the now over $13 million in RSTF money it has been withholding since 2005, which is a further breach of its fiduciary duties. Once the Commission deposited the Tribe's RSTF payments in a separate account, the Commission created a second, sub-trust, which gave rise to fiduciary obligations to provide a detailed accounting to the Tribe and its members concerning those funds. The Commission's failure such an accounting to the Tribe [*sic*] concerning those funds is a breach of its fiduciary duties." (Emphasis omitted.)

requests "a judicial determination of the Commission's duty to pay these withheld funds to the Tribe in care of its authorized representative and Chairperson, Silvia Burley . . . ."

The third cause of action for writ of mandate alleges that "[p]ursuant to Gov. Code, §§ 12012.90(e)(2) and 12012.75, the Commission has a legal ministerial duty to distribute RSTF monies to the Tribe, a Non-Compact tribe eligible to receive such funds, and not to withhold RSTF money from the Tribe on grounds not provided for under the Compacts and under federal and state law." As part of this cause of action, the complaint alleges, "the Commission is not 'withholding' those funds, but has diverted them to another account and is using those funds for its own purposes." Plaintiffs allege that the Commission is "falsely asserting that it cannot release the money to the Tribe until the BIA recognizes its Tribal Council and Tribal leadership" and that "[t]his claim is simply a ruse so as to allow the Commission to continue to divert the Tribe's RSTF payments into a separate account for its own use."

The Commission filed a demurrer to the complaint on three grounds. Specifically, the Commission contended that (1) Plaintiffs lacked standing to pursue their lawsuit because they did not represent the California Valley Miwok Tribe (in light of the leadership dispute) and had no present legal interest in the RSTF funds; (2) the issues presented in the complaint were outside of the court's jurisdiction because they concerned a federal issue regarding the proper leadership and membership of an Indian tribe; and (3) Plaintiffs' claims were barred by res judicata based on the final judgment reflected in *CVMT 2014*, *supra*, 231 Cal.App.4th 885. To establish that the BIA had not yet recognized an authorized tribal representative as required in *CVMT 2014* as a

precondition for releasing the RSTF funds, the Commission relied upon, among other things, the December 2015 decision of AS-IA Washburn, which stated that the United States did not recognize any leadership for the tribe.

The trial court sustained the demurrer based on lack of standing and res judicata. Specifically, the trial court sustained the demurrer based on *res judicata* as to *all* of the Plaintiffs. The trial court explained, "[T]he issues in the operative complaint and the complaint in [the 2008 Action] are the same. Regardless of the theory and title Plaintiffs attach to the various causes of action, Plaintiffs seek the same relief in both this and the 2008 [Action]—payment of RSTF monies." Further, the trial court explained that even though only the California Valley Miwok Tribe was a plaintiff in the 2008 Action, the other Plaintiffs here were in privity with the tribe, making the doctrine of claim preclusion applicable to all of the Plaintiffs. Quoting our holding in *CVMT 2014*, the trial court concluded that "absent allegations that the BIA has resumed contracting for ISDEAA benefits with the California Valley Miwok Tribe or allegations that the BIA has otherwise recognized 'a tribal government that represents the Tribe as a whole[,]' Plaintiffs' claims are barred by the doctrine of res judicata."[15]

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15 The judicially-noticed documents that we have described in our summary of the current relevant factual background establish the undisputed fact that the BIA has still not recognized an authorized tribal representative and still has not entered into a contract for ISDEAA benefits with any representative of the California Valley Miwok Tribe. Indeed, in September 2019, Burley filed a lawsuit against the federal government which alleges that the BIA has refused to enter into a contract with an authorized tribal representative for ISDEAA benefits.

With respect to standing, the trial court held that in light of the December 2015 decision of AS-IA Washburn, which established "that the BIA does not recognize [Burley] as the authorized leader of the California Valley Miwok Tribe and does not recognize the 1998 General Council as a valid representative of the Tribe" the complaint "fails to allege facts sufficient to establish the General Council and Individual Plaintiffs' standing to pursue this lawsuit against the Commission for recovery of RSTF monies." Among other things, the trial court explained that Dixie's death did "not obviate the 2015 decision that neither Burley nor [Dixie] is an authorized representative of the Tribe." However, the trial court ruled that the California Valley Miwok Tribe itself (as opposed to the individual plaintiffs and the General Council) adequately pled that it had standing to pursue the lawsuit. The trial court concluded the issue was controlled by our holding in *California Valley Miwok Tribe v. California Gambling Control Com'n* (Apr. 16, 2010, D054912) [nonpub. opn.], in which we held there was no ground for a demurrer based on lack of standing with respect to claims brought by California Valley Miwok Tribe, as represented by Burley. Therefore the trial court held that "the complaint alleges facts sufficient to establish Plaintiff California Valley Miwok Tribe's standing."

The trial court entered judgment in favor of the Commission, and Plaintiffs filed a timely appeal from the judgment.

II.

DISCUSSION

A. *Standard of Review*

" 'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

B. *Res Judicata Bars The Action in Its Entirety*

Although the trial court sustained the demurrer based on standing as to *most* of the Plaintiffs, and based on res judicata as to *all* of the Plaintiffs, as we will explain, we conclude that the doctrine of res judicata bars the action as to all of the Plaintiffs, and we accordingly affirm the trial court on that basis. We need not and do not reach the issue of standing.

1. *The Law of Res Judicata*

There are two separate types of res judicata: claim preclusion and issue preclusion. "Claim preclusion, the ' " 'primary aspect' " ' of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties.

[Citation.] Issue preclusion, the ' " 'secondary aspect' " ' historically called collateral estoppel, describes the bar on relitigating issues that were argued and decided in the first suit." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).) As we will explain, we find that claim preclusion resolves this appeal.

"Claim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824, italics deleted.)

To determine whether the two lawsuits involve the same cause of action for the purpose of claim preclusion, " 'California law approaches the issue by focusing on the "primary right" at stake: if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.' . . . [¶] Under the 'primary rights' theory adhered to in California, there is only a single cause of action for the invasion of one primary right and the harm suffered is the significant factor. . . . A primary right is the right to be free of a particular injury. . . . 'The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.' " (*Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 675-676 (*Cal Sierra*), citations omitted.)

Claim preclusion bars claims "that could have been raised in the first proceeding" and does not require "actual litigation of issues." (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1164.)

In contrast, "[i]ssue preclusion prohibits the relitigation of issues argued and decided in a previous case, *even if the second suit raises different causes of action*. . . . Under issue preclusion, the prior judgment conclusively resolves an issue *actually litigated and determined* in the first action. . . . [I]t can be asserted only against a party to the first lawsuit, or one in privity with a party. . . . [¶] . . . 'Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding. [Citations.]' . . . In summary, issue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings*, *supra*, 61 Cal.4th at pp. 824-825, original italics omitted, italics added, citations omitted.)

2. *Claim Preclusion Bars Plaintiffs' Lawsuit*

As we will explain, all of the requirements for the application of claim preclusion are present here.

a. *The Same Parties or Parties in Privity with Them*

First, as we have explained, claim preclusion requires that the prior lawsuit and the present lawsuit be " 'between the same parties or parties in privity with them.' " (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) Here, of course, the Commission is the defendant in both lawsuits. Further, as we will explain, although the 2008 Action was brought by the California Valley Miwok Tribe *alone* (as represented by Burley), while the instant lawsuit was brought by the California Valley Miwok Tribe (as represented by Burley) together with several *other* plaintiffs, the additional plaintiffs in the instant lawsuit are all in privity with the California Valley Miwok Tribe.

"The concept of privity for the purposes of res judicata or collateral estoppel refers 'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights . . . and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel. [Citations.]' . . ." . . . 'Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the . . . party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . . ." ' " (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1069-1070, citations omitted (*Citizens for Open Access*).) "A nonparty alleged to be in privity must have an

interest so similar to the party's interest that the party acted as the nonparty's ' " 'virtual representative' " ' in the first action." (*DKN Holdings, supra*, 61 Cal.4th at p. 826.) "Our Supreme Court has recognized that: 'Privity is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise. . . .' In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." (*Citizens for Open Access*, at p. 1070.)

Here, as the Commission points out, although the 2008 Action was filed in the name of the California Valley Miwok Tribe (as represented by Burley), during the litigation of that action it became clear that the individual plaintiffs in this action—Burley, Reznor, Paulk and Wallace—along with the now-deceased Dixie, were alleged to be the sole members of California Valley Miwok Tribe and therefore were the individuals who should allegedly receive the distribution of the RSTF funds from the Commission. Among other things, the Commission points to appellate briefing from the 2008 Action, in which the California Valley Miwok tribe stated in 2014 that the RSTF funds that the Commission was withholding should be distributed to "the [California Valley Miwok Tribe] that, during this period time [was] comprised of five (5) enrolled members. These five enrolled members are: (1) Yakima Dixie; (2) Silvia Burley; (3) Rashel Reznor; (4) Anjelica Paulk; and (5) Tristian Wallace," and "these five enrolled members . . . alone, have a vested interest and an exclusive claim to these 'paid out' and separately deposited RSTF proceeds." (Emphasis omitted.) Further, as explained in the California Valley Miwok Tribe's appellate reply brief filed in 2014 in the 2008 Action, a central

goal of the litigation was to obtain recognition for Burley's General Council (which the briefing referred to as "the Tribal Council"). Specifically, the lawsuit sought an order requiring the Commission to "accept the Burley faction as the Tribal Council authorized to receive the subject RSTF payments, and Burley as the authorized Tribal Chairperson."

In light of the admissions by the California Valley Miwok Tribe that the 2008 Action sought to obtain (1) RSTF payments for the individual Plaintiffs here (Burley, Reznor, Paulk and Wallace); and (2) an order requiring the Commission to accept Burley's General Council as the authorized tribal representative to receive the RSTF funds, we conclude that the General Council as well as the individual Plaintiffs (Burley, Reznor, Paulk and Wallace) were in privity with the California Valley Miwok Tribe in the 2008 Action because those parties' interests in the outcome of the 2008 Action were "so similar to the [California Valley Miwok Tribe's] interest that the party acted as the nonparty's ' " 'virtual representative' " ' " in the 2008 Action (*DKN Holdings*, *supra*, 61 Cal.4th at p. 826), and it would be fair to bind those parties to the result obtained in the 2008 Action. (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1070.) Indeed, although Plaintiffs make several arguments in an attempt to defeat res judicata, they make no attempt to dispute that each of them were in privity with the California Valley Miwok Tribe in the 2008 Action.

b. *There Was a Final Judgment on the Merits*

There is no dispute that the next requirement for claim preclusion is met in that there was a final judgment on the merits in the 2008 Action. (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.)

c. *The Same Cause of Action Is Involved in Both Actions*

Finally, as we have explained, to determine whether the 2008 Action and this action involve the same cause of action we focus on whether the same primary right is at issue. "A primary right is the right to be free of a particular injury. . . . 'The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.' " (*Cal Sierra*, *supra*, 14 Cal.App.5th at p. 676, citation omitted.) We ask whether the "two actions involve the same injury to the plaintiff and the same wrong by the defendant." (*Id*. at p. 675.)

The injury to the plaintiff and the wrong by the defendant in the 2008 Action is clear: the California Valley Miwok Tribe, as represented by Burley, alleged that it was being wronged by the Commission's act of withholding the RSTF funds pending the BIA's recognition of an authorized tribal representative. In this action, the identical injury and wrongful conduct is alleged. As in the 2008 Action, Plaintiffs believe they are being wronged by the Commission's act of withholding the RSTF funds until the BIA recognizes an authorized tribal representative.

Plaintiffs argue that this case involves a different cause of action from the 2008 Action because it concerns an extended time period, in that the RSTF funds at issue here include those that were earned and withheld in subsequent quarters, after final judgment was entered in the 2008 Action. Specifically, Plaintiffs contend that "[e]ach quarter when the Commission places the Tribe's RSTF payments in this separate account, instead of distributing them to the Tribe, a new cause of action arises." Plaintiffs state that "[e]ach quarter when [the Commission] published its report explaining why it was withholding

those [RSTF] funds, a new cause of action arose, because the Commission's action each quarter involved distinct episodes of wrongful withholding of the Tribe's RSTF money regarding the same subject matter."

In support of their argument, Plaintiffs cite Code of Civil Procedure section 1047, which states that "[s]uccessive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom." However, the citation of that authority begs the question of whether a new cause of action has arisen. As we have explained, a cause of action in the context of a res judicata analysis consists of a primary right to be free from the same alleged wrong doing. Here, the Commission's identical alleged wrongdoing of withholding the RSTF funds continues to occur regardless of the length of the time period involved. Therefore, no new cause of action is at issue in this lawsuit for res judicata purposes despite the fact that an extended time period is at issue.

The case law that Plaintiffs cite to support their contention that a new cause of action arises when the wrongdoing occurs in a subsequent time period is also inapposite.

First, in *Yates v. Kuhl* (1955) 130 Cal.App.2d 536, the plaintiff sued the defendant in a first lawsuit based on specific physical actions the defendant had taken to wrongfully restrict the flow of water onto the plaintiff's land, including destroying a dam. (*Id*. at p. 538.) After the plaintiff prevailed in the first lawsuit, the plaintiff brought a second lawsuit based on additional physical acts by the defendant in restricting water flow onto the plaintiff's land occurring after the trial in the first lawsuit. (*Id*. at pp. 538-539.) *Yates* rejected the defendant's contention that the second lawsuit was barred by res judicata

because the second lawsuit arose from separate wrongful physical acts that occurred after the plaintiff prevailed in the first lawsuit. (*Id*. at pp. 539-540.) Here, in contrast, the identical alleged wrongdoing and injury is alleged here and in the 2008 Action, namely, the Commission continues to withhold the RSTF funds until the BIA recognizes an authorized tribal representative.

Next, in *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, the plaintiff brought a lawsuit against a county, challenging certain annual assessments imposed on property owners in unincorporated areas. After plaintiff was unsuccessful in challenging the assessment for fiscal year 1984-1985, he brought a second lawsuit challenging the assessment for fiscal year 1985-1986. (*Id*. at pp. 1296-1298.) *Frommhagen* held that a different primary right (and thus a different cause of action) accrued each fiscal year, so that the res judicata issue must be analyzed under the doctrine of issue preclusion rather than claim preclusion. As *Frommhagen* explained, "In the parlance of the 'primary right theory,' those paying charges have a primary right to have the charges properly calculated and imposed *each* year. Consequently, we believe appellant's second complaint attacking the 1985-1986 charges is not based on the same cause of action as that underlying his first complaint. It follows that appellant's first action is not a complete bar to his second action." (*Id*. at p. 1300.) *Frommhagen* is inapposite because Plaintiffs are not alleging that they have been required, in different time periods, to pay different charges that have been improperly calculated each time. Instead, this case involves the Commission's *ongoing policy* of withholding the RSTF funds. Finally, *Silva v. Reclamation Dist. No. 1001* (1919) 41 Cal.App. 326 is inapposite

for the same reason as *Frommhagen*: it deals with the application of res judicata when there were successive acts of imposing assessments on the plaintiff.

In short, both the 2008 Action and this action involve a single primary right, namely the Plaintiffs' contention that the Commission is engaging in wrongdoing by following the policy of withholding the RSTF funds until the BIA recognizes an authorized tribal representative. The fact that this lawsuit involves *subsequent* quarters of RSTF payments that the Commission continues to withhold under the policy it has followed since 2005 does not change the fact that both actions involve the identical primary right claimed by Plaintiffs to receive those payments.

Plaintiffs also contend that claim preclusion does not apply because the instant case raises two issues that were not litigated in the 2008 Action concerning the Commission's duties as a fiduciary of the withheld RSTF funds. Specifically, Plaintiffs contend that because the Commission is withholding the RSTF funds, they should be provided with an accounting so that they may determine how the Commission is handling their funds. Second, Plaintiffs contend that the Commission is providing them with an inadequate interest rate on the RSTF funds, or may otherwise be mishandling the funds.

Plaintiffs are correct that these issues were not expressly litigated in the 2008 Action. However, Plaintiffs' argument fails because claim preclusion does not require that an issue *actually be litigated* in the previous action, as long *as it could have been litigated* and involves the same primary right. Under the claim preclusion aspect of res judicata, " ' "If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on

it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." ' " (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589-590.)

Here, as we have explained, the primary right at issue in the 2008 Action was the Commission's alleged wrongdoing of causing injury by withholding the RSTF funds from the California Valley Miwok Tribe. Falling within the scope of the alleged injury are all of the subsidiary issues that arise out of the Commission's alleged wrongdoing, including, as Plaintiffs contend here, that in the course of withholding the funds the Commission has failed to provide an accounting and has failed to obtain an adequate interest rate for the funds. Indeed, in the 2008 Action, plaintiff alleged that the Commission was not fulfilling its duties as a fiduciary of the RSTF funds, although it was vague about the nature of that breach. (See fn. 9, *ante*.)

Documents in the record from the 2008 Action, of which we have taken judicial notice, show that for many years the Commission has provided quarterly public disclosures of the amount of the RSTF funds that it has accumulated on behalf of the California Valley Miwok Tribe and the interest that has been earned on those funds. Therefore, there is no reason that the 2008 Action could not have litigated the issue of whether the Commission's quarterly public disclosures provided a sufficient accounting of the RSTF funds withheld from the California Valley Miwok Tribe and whether the Commission was obtaining an adequate amount of interest on those funds. In sum, as all

of the allegations in the instant action concern the same primary right that was already litigated to final judgment in the 2008 Action between the same parties or parties in privity with them, the instant action is barred by the doctrine of claim preclusion.

3. *Issue Preclusion Bars Plaintiffs from Seeking an Order Requiring the Commission to Release of the RSTF Funds Prior to the BIA's Resumption of Contracting for ISDEAA Benefits With the Tribe*

We could end our analysis with our conclusion that the doctrine of claim preclusion bars all of the claims set forth in Plaintiffs' lawsuit. However, because the doctrine of issue preclusion also applies here and provides a separate and compelling ground for rejecting Plaintiffs' argument that res judicata does not bar this lawsuit because a new cause of action arises each time the Commission withholds a quarterly RSTF payment, we now turn to that issue.

In contrast to claim preclusion, issue preclusion does not depend on whether a new lawsuit asserts *the same cause of action* as a previously litigated lawsuit. (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) Instead, issue preclusion "prevents relitigation of previously decided issues." (*Ibid*.) Specifically, issue preclusion applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id*. at p. 825.) All of those requirements are present here.

Regarding the first and fourth requirements for issue preclusion, we have already established (and Plaintiffs do not attempt to dispute) that there was a final adjudication in the 2018 Action and that the Plaintiffs are the same as, or in privity with, the plaintiff in 2018 Action.

To satisfy the second and third requirements for issue preclusion, there must be an "identical issue" that was "actually litigated and necessarily decided in the first suit." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) These requirements are plainly present here. In *CVMT 2014*, we expressly framed the issue as "whether, based on a dispute about the leadership and membership of the Tribe, the Commission is legally justified in holding the RSTF funds in trust for the Tribe until the federal government recognizes a tribal leader with whom to conduct government-to-government business for the purpose of entering into a contract for ISDEAA benefits." (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 899.) We answered in the affirmative, explaining that "the BIA's resumption of contracting for ISDEAA benefits with the Tribe will establish that an authorized leader exists to receive funds on behalf of the Tribe." (*Id*. at p. 909.) In this case, the issue presented is whether, under the present circumstances, the Commission is justified in withholding the RSTF funds. It is undisputed that the BIA has not yet resumed contracting for ISDEAA benefits with the California Valley Miwok Tribe. Therefore, based on the issue we decided in *CVMT 2014*, the Commission is *still* justified in withholding the RSTF funds from the tribe, and issue preclusion therefore bars Plaintiffs' attempt to obtain an order requiring the Commission to release the RSTF funds at the present time.

Moreover, even though some of the RSTF funds that Plaintiffs seek to obtain in this lawsuit were withheld by the Commission *after* the 2008 Action was finally adjudicated, the issue resolved in *CVMT 2014* was whether Commission is justified in withholding RSTF funds from the tribe "*until* the federal government recognizes a tribal

leader with whom to conduct government-to-government business for the purpose of entering into a contract for ISDEAA benefits." (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 899, italics added.) Therefore, under the doctrine of issue preclusion, Plaintiffs may not attempt to obtain a different resolution of that issue in this lawsuit by contending that the Commission is required to release the quarterly payments that were withheld *after* the 2008 Action was adjudicated.

In sum, based on the doctrines of claim preclusion and issue preclusion, Plaintiffs are not entitled to any of the relief that they sought in this lawsuit. The trial court properly sustained the demurrer without leave to amend.

C. *Sanctions*

Prior to holding oral argument on the merits of this appeal, we issued a notice to Plaintiffs and their counsel, Manuel Corrales, Jr., stating that we were considering imposing monetary sanctions on them for the filing and continued pursuit of an objectively frivolous appeal in light of the previous opinions of this court, including *CVMT 2014*, and the undisputed facts set forth in the documents submitted to the court by the parties in their requests for judicial notice. On behalf of himself and his clients, Mr. Corrales has filed a written opposition to the imposition of sanctions. Further, we entertained oral argument regarding the imposition of sanctions at both the regularly scheduled hearing held on the merits of the appeal, and later at a separate hearing held specifically on the issue of sanctions.

Our authority to impose sanctions is set forth in Code of Civil Procedure section 907, which provides, "When it appears to the reviewing court that the appeal was

frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." Further, California Rules of Court, rule 8.276(a) states that, on our own motion, we "may impose sanctions . . . on a party or an attorney for: [¶] (1) Taking a frivolous appeal or appealing solely to cause delay."

Under the well-settled standard adopted by our Supreme Court, "an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) "Thus, we may impose sanctions *either* when an appeal indisputably has no merit, or when it is filed for an improper purpose." (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 188, italics added.) Under this dual approach, "[t]he subjective standard looks to the motives of the appealing party and his or her attorney, while the objective standard looks at the merits of the appeal from a reasonable person's perspective. [Citation.] Whether the party or attorney acted in an honest belief there were grounds for appeal makes no difference if any reasonable person would agree the grounds for appeal were totally and completely devoid of merit." (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 556-557 (*Kleveland).*)

"[S]anctions should be used sparingly to deter only the most egregious conduct." (*Kleveland, supra,* 215 Cal.App.4th at p. 557.) " '[A]ny definition [of a frivolous appeal] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct,

even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.' " (*In re Reno* (2012) 55 Cal.4th 428, 513.) "An unsuccessful appeal, . . . ' "should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit, or involves facts which are not amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension, modification, or reversal of existing law." ' " (*Kleveland*, at p. 557.)

Here, as we will explain, we need not speculate on the subjective motives of Plaintiffs and Mr. Corrales in filing this appeal because, under the objective standard, "any reasonable attorney would agree that the appeal is totally and completely without merit" (*Flaherty*, *supra*, 31 Cal.3d at p. 650), and indeed, this action has been frivolous from its inception, due to the doctrine of res judicata.

In *CVMT 2014*, we held that the Commission is legally justified in withholding the RSTF funds "until the federal government recognizes a tribal leader with whom to conduct government-to-government business for the purpose of entering into a contract for ISDEAA benefits" because "the BIA's resumption of contracting for ISDEAA benefits with the Tribe will establish that an authorized leader exists to receive funds on behalf of the Tribe." (*CVMT 2014*, *supra*, 231 Cal.App.4th at pp. 899, 909.) It is undisputed that BIA has not yet resumed contracting for ISDEAA benefits with the California Valley Miwok Tribe. Thus, as we have explained, the doctrines of claim preclusion and issue preclusion preclude Plaintiffs from seeking an order requiring the Commission to release the RSTF funds. The trial court sustained the Commission's

demurrer on precisely that basis, quoting extensively from *CVMT 2014* and concluding that the action was barred by res judicata.

Although the trial court based its ruling on res judicata, Plaintiffs' entire legal argument on res judicata in their opening appellate brief was only three pages long. Further, although the trial court's res judicata ruling was based on our opinion in *CVMT 2014*, Plaintiffs did not cite *CVMT 2014 anywhere* in their opening appellate brief, including in their res judicata argument. Plaintiffs' three pages of briefing regarding res judicata contains no legal citations regarding the basic law pertaining to either claim preclusion or issue preclusion, and Plaintiffs made no attempt to analyze, based on the required elements, whether issue preclusion or claim preclusion applies here. Instead Plaintiffs' sole argument on res judicata was that their lawsuit was not barred because "[e]ach quarter when the Commission places the Tribe's RSTF payments in this separate account, instead of distributing them to the Tribe, a new cause of action arises."[16] As we have explained, that argument plainly lacks merit based on both claim preclusion *and* issue preclusion. Anyone who reads *CVMT 2014* would understand we ruled that the

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16 Plaintiffs' argument in the trial court on the issue of res judicata was even more undeveloped than their appellate argument and contained no legal citations. The *entirety* of Plaintiffs' argument on res judicata in the trial court under the heading "Plaintiffs' Claims Are Not Barred by Res Judicata" was as follows: "No prior court decision decided whether the Commission must now disburse the RSTF payments to the four-member Tribe in light of Dixie's death. Changed circumstances show that this issue was never previously decided. No court has decided that the Commission need never release the RSTF payments to the Tribe. [¶] The Commission cannot now claim it must wait for the BIA to decide who is the authorized leader of the Tribe. That issue is moot in light of Dixie's death. Res judicata does not bar these claims."

Commission could continue to withhold the RSTF funds from the California Valley Miwok Tribe *until* the BIA resumed contracting for ISDEAA benefits.

In opposition to the imposition of sanctions, Plaintiffs raise several arguments, none of which have merit.

First, in an argument that they failed to make in their briefing of this appeal, Plaintiffs present an illogical and implausible mischaracterization of our holding in *CVMT 2014*. Latching onto *CVMT 2014*'s general discussion of the scope of the Commission's duty as a fiduciary of the RSTF funds, Plaintiffs point to the statement that "the Commission is required to take a reasonable approach, under the circumstances, in deciding whether the tribal leadership and membership dispute has been resolved such that it may resume distribution of the RSTF funds." (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 907.) Based on this language, Plaintiffs contends that *CVMT 2014* allows them to file suit against the Commission for release of the RSTF funds whenever they believe the Commission should be taking a *different* approach to deciding whether the tribe's membership and leadership dispute has been resolved.[17] As Plaintiffs state, "the Commission could now take an *alternative reasonable approach* in releasing the

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17 According to Plaintiffs, the purportedly reasonable approach the Commission should adopt involves a complicated and fact-specific analysis based on Dixie's death, the Washburn decision, other historical facts about the California Valley Miwok tribe, and the extent of the tribe's current membership, that neither we nor the Commission are qualified or authorized to decide. Plaintiffs do not dispute that it is beyond our jurisdiction to resolve a tribal membership issue. Further, we made clear in *CVMT 2014* that "[t]he Commission has no authority, either under the Compacts or the Government Code, to resolve intratribal disputes over membership and leadership." (*CVMT 2014*, *supra*, 231 Cal.App.4th at p. 907.)

RSTF payments by *identifying specific members* to whom it could distribute the funds." However, that argument is plainly and obviously without merit because of our holding in *CVMT 2014* that the Commission is justified in continuing to withhold the RSTF funds *until* the BIA resumes contracting for ISDEAA benefits with the tribe. No reasonable person reading *CVMT 2014* could conclude that we intended to allow Plaintiffs to file successive lawsuits against the Commission whenever Plaintiffs believe we should order the Commission to take a *different* approach to determining whether the tribal leadership and membership and leadership dispute has been resolved.

Next, Plaintiffs contend that this appeal is not frivolous because their claims include an allegation that the Commission is breaching its fiduciary duty by earning insufficient interest on the RSTF funds. Plaintiffs appear to contend that because this claim was not litigated in the 2008 Action, it is not barred by res judicata and is therefore a viable and nonfrivolous part of this appeal. They are indisputably wrong. Plaintiffs' simplistic argument overlooks the doctrine of claim preclusion, which bars any claim that *could have been* litigated as part of the primary right at issue in the 2008 Action. Moreover, "sanctions for an appeal which is partially frivolous are appropriate if the frivolous claims are a *significant* and *material* part of the appeal." (*Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010.) The breach of fiduciary claim alleging an insufficient interest rate is relatively insignificant in light of the entire complaint, which focuses on Plaintiffs' claim that the Commission should be ordered to release to RSTF funds. Indeed, without establishing that they are entitled to a release of the withheld RSTF funds, there is no reason for plaintiffs to obtain a ruling at this time on whether

they should receive a higher interest rate on those funds. Thus, because the breach of fiduciary duty claim is not a significant and material part of this appeal, we would still impose sanctions based on the rest of the appeal regardless of our view of the breach of fiduciary duty claim.

Finally, at oral argument Plaintiffs' counsel, Mr. Corrales, argued that Plaintiffs should not be sanctioned because this appeal was reasonably focused on obtaining a modification or expansion of the existing law that controls here, namely our opinion in *CVMT 2014*. (See *Kleveland*, *supra*, 215 Cal.App.4th at p. 557 ["An unsuccessful appeal . . .' "should not be penalized as frivolous if it . . . makes a reasoned argument for the extension, modification, or reversal of existing law." ' "].) Specifically, Mr. Corrales contended that this appeal was filed to advocate that we adopt a modification of *CVMT 2014* by endorsing *alternative* approaches that the Commission could be required to take in determining if RSTF funds must be released. We reject this argument because it simply does not square with the content of Plaintiffs' appellate briefing. As we have explained, Plaintiffs did not cite *CVMT 2014 anywhere* in their opening appellate brief. Because Plaintiffs' opening appellate brief did not even acknowledge the existence of *CVMT 2014*, it certainly cannot be understood as making an argument that we should *modify or expand* our holding in *CVMT 2014*.

We must also address the declarations submitted by Plaintiffs to support their opposition to the imposition of sanctions.

First, Mr. Corrales's declaration explains that he called opposing counsel to offer to dismiss this appeal in April 2019, shortly before the Commission's respondent's brief

was due, conditioned on certain stipulations, but was rebuffed. However, Mr. Corrales's offer to dismiss the appeal is not relevant to the reason that we are imposing sanctions. Mr. Corrales did not offer to dismiss his appeal because he realized he was pursuing a frivolous appeal that was barred by res judicata. Instead, as Mr. Corrales explained, he offered to dismiss the appeal because he believed that, due to the certification of the Secretarial election on May 30, 2019, a rival tribal faction would likely gain control of the tribe, defeating Plaintiffs' claim that the RSTF funds should be paid to Burley as the leader of the tribe.[18]

Second, Plaintiffs submitted two lengthy declarations by an Indian law expert, Peter D. Lepsch, who represents the California Valley Miwok Tribe in recent federal litigation and administrative proceedings. Lepsch acknowledged that the BIA is *still* refusing to recognize Burley's General Council as the authorized tribal leadership and has not entered into a contract for ISDEAA benefits. Nevertheless, Lepsch set forth the arguments that he is currently making in the federal proceedings as to why the BIA should recognize Burley's leadership. According to Lepsch, in that context "Mr. Corrales' arguments are meritorious and not frivolous." We find Lepsch's comments to be completely irrelevant. Lepsch's declarations do not acknowledge or address the issue of res judicata and are therefore of no assistance to this court. The holding of *CVMT 2014* made it crystal clear that the Commission is justified in

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[18] As we have explained, because the BIA invalidated the Secretarial election, a rival tribal faction does not currently have control of the tribe, and thus, the basis for Mr. Corrales's offer to dismiss the appeal no longer exists.

withholding the RSTF funds *until* the BIA resumes contracting for ISDEAA benefits with the California Valley Miwok Tribe, *regardless* of what arguments Burley is currently making to the federal authorities.

Third, Plaintiffs submit a vague and boilerplate declaration by a civil litigation attorney based in San Diego, who states that he has reviewed Plaintiffs' appellate briefing and our opinion in *CVMT 2014*. Without further specific discussion, the attorney concludes that the arguments contained in Plaintiffs' briefs "are meritorious and *not* frivolous." That vague and unsupported statement does not change our conclusion as to the objectively frivolous nature of this appeal. (Cf. *J.B.B. Investment Partners Ltd. v. Fair* (2019) 37 Cal.App.5th 1, 19, fn. 15 ["in light of the evidence of the total lack of merit of the appeal, together with the history of this case, the vague statements by two additional attorneys that they believed this appeal 'had merit' does not change our conclusion."].)

Finally, at the oral argument on the issue of sanctions, Plaintiffs asked to file a declaration by attorney Edward J. McIntyre, who has expertise in the area of legal ethics and professional responsibility. Based on a review of certain documents related to this matter, McIntyre opined that Mr. Corrales did not violate the Rules of Professional Conduct or any provision of the State Bar Act (Bus. & Prof. Code, § 6000, et seq.) because Mr. Corrales *subjectively* believed he had a good faith basis to assert the arguments made in this appeal. At oral argument, we received the McIntyre declaration and deferred decision on whether to allow it to be filed. In the interest of giving Plaintiffs

a full opportunity to present their case against the imposition of sanctions, we hereby accept the McIntyre declaration for filing.

Although we have considered the content of the McIntyre declaration, we find it to be inapposite to whether sanctions should issue in this case. Specifically, the McIntyre declaration is not persuasive here because it addresses whether Mr. Corrales's conduct in this appeal would warrant the imposition of discipline by the State Bar, which, as McIntyre explains, focuses on the issue of the attorney's *subjective* bad faith. As we have explained, subjective bad faith is not a requirement for the imposition of sanctions under Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(a), which authorize the imposition of sanctions for an appeal that is *objectively* frivolous, regardless of whether the party or attorney acted in an honest belief that there was a reasonable ground for the appeal. (*Kleveland*, *supra*, 215 Cal.App.4th at pp. 556-557.)

Numerous courts have imposed sanctions on appellants who unreasonably fail to acknowledge that an appeal is barred by res judicata. (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 194 ["Given the numerous independent grounds rendering this appeal frivolous including, among others, res judicata, . . . we have no difficulty in concluding that Appellants and their counsel objectively and subjectively understood their appeal was frivolous when filed."]; *Weber v. Willard* (1989) 207 Cal.App.3d 1006, 1010 ["The superior court's finding of res judicata is proper, and no reasonable attorney would contend, as does appellant, that the final federal judgment should be ignored merely because state courts have jurisdiction to entertain federal civil rights suits. Appellant's nonsensical interpretation of res judicata is a frivolous ground for his appeal, making the

appeal totally and completely without merit."]; *Henry v. Clifford* (1995) 32 Cal.App.4th 315, 324 [plaintiff's case clearly lacked merit because of res judicata from a prior lawsuit, and the appeal from the trial court's sustaining demurrer on res judicata and statute of limitations was frivolous]; *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1432 [rejection of plaintiff's identical arguments in an appeal in a prior lawsuit against the same defendant, rendered repeated assertion of the same arguments frivolous, especially when the same attorney represented plaintiff in both actions].) After reviewing the record and the applicable law, and considering the argument of counsel, we conclude by clear and convincing evidence (*San Bernardino Community Hospital v. Meeks* (1986) 187 Cal.App.3d 457, 470), that "any reasonable attorney would agree that the appeal is totally and completely without merit" because this action is clearly barred by res judicata. (*Flaherty*, *supra*, 31 Cal.3d at p. 650.) Plaintiffs' arguments on appeal are *not* "supported by a careful reading of the record or the law nor could these arguments be reasonably characterized as presenting unique issues or arguing for extension, modification, or reversal of existing law." (*Kleveland*, *supra*, 215 Cal.App.4th at p. 557.) Indeed, Plaintiffs do not even identify the basic legal standards applicable to a res judicata analysis, and they fail to either cite or discuss *CMVT 2014*, on which the trial court based its res judicata ruling. Accordingly, we will impose sanctions for an objectively frivolous appeal pursuant to Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(c).

"We may order a litigant, his attorney, or both to pay sanctions on appeal." *(Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 36.) Here, we determine that because there is no indication that, as laypersons, Plaintiffs had the necessary legal expertise to understand that this appeal was plainly barred by res judicata, we will not impose sanctions on them. Instead, we will impose sanctions solely upon Mr. Corrales, who does have the necessary legal expertise to understand the objectively frivolous nature of this appeal. In so doing, we stress that we are imposing sanctions solely because this appeal is objectively frivolous. Based on the record before us, we are unable to assign any subjective bad faith to Mr. Corrales.

" 'Courts, with increasing frequency, have imposed additional sanctions, payable to the clerk of the court, to compensate the state for the cost to the taxpayers of processing a frivolous appeal.' " (*Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1064.) In reported cases, the amount of sanctions is "generally, but not exclusively, based on the estimated cost to the court of processing a frivolous appeal. . . . In 2008, our colleagues in the First Appellate District cited a cost analysis by the clerk's office of the Second Appellate District indicating 'the cost of processing an appeal that results in an opinion by the court to be approximately $8,500.' " (*Kleveland, supra*, 215 Cal.App.4th at p. 560, citing *In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 520.) In this case, because we find no evidence of subjective bad faith on the part of Mr. Corrales in filing this objectively frivolous appeal, we will diverge from the practice of basing the amount of sanctions on the cost of processing an appeal and will impose

sanctions in a more moderate amount. Although the amount does not come near to compensating the public for the cost of processing this appeal, we will impose sanctions against Mr. Corrales in the amount of $850.00.

DISPOSITION

The judgment is affirmed. We find this appeal to be objectively frivolous and accordingly assess sanctions against Manuel Corrales, Jr., in the amount of $850.00, which sum shall be paid to the clerk of this court within 30 days of the issuance of the remittitur in this matter. This opinion constitutes a written statement of our reasons for imposing sanctions, as required by *Flaherty*, *supra*, 31 Cal.3d at p. 654.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.