A150374

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

BROWN ET AL.

Plaintiffs and Appellants

v.

GARCIA ET AL.

Defendants and Respondents.

Appeal from the Judgment of the Lake County Superior Court

Case No. CV-415928, Hon. Richard C. Martin, Presiding

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

The undersigned certifies that there are no interested entities or persons required to be listed under rule 8.208 of the California Rules of Court that the justices should consider in determining whether to disqualify themselves as provided in rule 8.208(e)(2).

April 10, 2017

CEIBA LEGAL, LLP

By /s/ Little Fawn Boland
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Attorney for Appellants Brown et al.

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STATEMENT OF THE CASE

Appellants Brown et al. ("***Appellants***") filed a complaint ("***Complaint***") in May 2016 alleging that Respondents Garcia et al. ("***Respondents***") committed the intentional torts of defamation (first cause of action) and false light (second cause of action) against Appellants. (CT 016-017.) The Appellants sued the Respondents in their personal capacities, because the Respondents published statements that the Appellants committed thirty-two (32) crimes. (CT 008-015.) The Complaint set forth that each published "crime" was a false statement, and that Respondents never offered any supporting evidence of the crimes purportedly committed by Appellants. (CT 004-017.) In publishing the "crimes," Respondents knew the statements were false or had serious doubts as to the truth of such statements and acted with malice, oppression and fraud. (CT 017.) In addition, Respondents knew the publication of such statements would create a false impression about Appellants and they acted with reckless disregard for the truth. (*Id*.) The Complaint further set forth that Respondents' wrongful conduct was a substantial factor in causing harm to Appellants' property, business, trade, profession, and occupation; Appellants' standing in the community was and continues to be harmed; Appellants' reputations were and continue to be harmed; and Appellants suffered and are suffering shame, mortification and reputational harm. (*Id*.) Finally, the complaint sought damages from the Respondents in their individual capacities.

Respondents filed a motion to quash the summons and complaint, alleging that Respondents were being sued in their official capacities as purported tribal officials of the Elem Indian Colony of Pomo Indians ("Tribe"). (CT 018-051.) The motion to quash alleged that the underlying defamatory publications were made pursuant to a law entitled, "Tribal Sanctions Of Disenfranchisement, Banishment, Revenue Forfeiture, and Disenrollment And the Process for Imposing Them Ordinance No.

GCORD08412" ("Disenrollment Ordinance"), and thus Respondents' actions were allegedly carried out in accordance with their official duties. (CT 019.) The motion to quash alleged that Respondents were entitled to the Tribe's sovereign immunity from suit. (*Id.*)

Appellants opposed the motion to quash, again arguing that only money damages were sought from Respondents in their individual capacities and not from the Tribe's coffers and in any event, the Respondents acted outside the scope of their authority in publishing the defamatory statements because the Disenrollment Ordinance is not a valid tribal law and the statements were unsubstantiated falsehoods. (CT 052-085.) The Parties argued the case on July 11, 2016, and Appellants later filed a supplementary brief with additional legal authority in support of their opposition to the motion to quash. (CT 097-103.)

On November 1, 2016, the lower court granted the motion to quash, finding that it lacked subject matter jurisdiction over Respondents, relying on the Tribe's sovereign immunity from suit. (CT 104-112.) As we will explain in this brief, the lower court erred in its application of the law and misapplied the test that determines whether Respondents are shielded by sovereign immunity. Instead of utilizing a well-established remedy-based analysis, the lower court concluded that Respondents' defamatory publications were made within their scope of authority. The lower court improperly reached this conclusion based on questionable evidence, and without providing Appellants an adequate opportunity to conduct discovery on the factual issues.

STATEMENT OF APPEALABILITY

This appeal is from the judgment of the Lake County Superior Court and is authorized by the Code of Civil Procedure, section 904.1 subdivision (a)(3). (Cal. Rule of Court, rule 8.204(a)(2)(B).)

STATEMENT OF FACTS

I. OVERVIEW

This is a tort case concerning Respondents' publication of defamatory statements against Appellants and whether Appellants are entitled to monetary damages from Respondents in their individual capacities as a result.

II. APPELLANTS' CASE

Appellants and Respondents are all members of the Tribe, a federally recognized tribe located in Lake County, California. (CT 006.) On or about March 28, 2016, Respondents publicized thirty-two crimes that the Appellants allegedly committed to tribal members and to at least one tribal member's employer. (CT 008-015.) The defamatory criminal allegations were against every adult who challenged the purported election of the Respondents. Examples from the six pages of outlandish criminal allegations are as follows:

> (Crime 24) Violated the Elem Constitution and Bylaws and tribal custom and tradition by committing treason against the Tribe, consisting of the acts described herein, in that those acts betrayed the trust of the people of Elem and violated the duty of elected officials to maintain allegiance to, and act in the best interest of, the Tribe at all times.
>
> (Crime 29) Violated the Elem Constitution and Bylaws and tribal custom and tradition and California criminal laws by assault and harassment of members and their minor children living on the Rancheria, including but not limited to flattening tires, breaking windshields, yelling all night, beeping horns, playing loud music, speeding and driving recklessly on residential roads.
>
> (Crime 30) Violated the Elem Constitution and Bylaws and tribal custom and tradition and California criminal laws by purporting to authorize illegal dumping by non-members on the Rancheria and by collecting dumping fees from non-

> members and resident members without General Council authorization.

(CT 013-015.)

The six pages of boilerplate criminal accusations against the Appellants (Crimes 1-32 above) are false. (CT 015.) No proof was or has ever been provided by the Respondents.

Respondents claimed that they were protected by the doctrine of sovereign immunity because they claimed that their defamatory publications were made in the context of the Disenrollment Ordinance, a tribal law. (CT 016.) The Appellants argued that the Respondents' focus on the Disenrollment Ordinance was a red herring and in any event the law is not in effect.[1] The Appellants argued that the suit was in fact an individual capacity suit, and the appropriate inquiry was a remedy-focused analysis to determine whether the individual capacity suit could proceed, citing to *Maxwell v. County of San Diego* (2013) 705 F.3d 1075 and *Pistor v. Garcia* (2015) 791 F.3d 1104. (CT 100-101.) Appellants contended that under this test, sovereign immunity was not a barrier and the suit could proceed. Appellants

[1] The Tribe's Constitution states at Article II, Section 4 that any rules or regulations established regarding membership, including the "loss of membership," must be approved by the United States Secretary of the Interior. (CT 016.) The Disenrollment Ordinance establishes regulations addressing the loss of membership and it was not submitted to the Bureau of Indian Affairs' Superintendent for approval. On April 4, 2016, Superintendent Troy Burdick, acknowledged in writing that the Bureau of Indian Affairs had not approved the Disenrollment Ordinance. (CT 016.) In an amicus brief submitted in a related case, attorneys for the United States of America emphasized that "as indicated by documents submitted by Petitioners, the disenrollment ordinance may be invalid under the Tribe's constitution because it has not been approved by the Department of the Interior." (Brief for the United States of America as Amicus Curiae, at 8, *John et al. v. Garcia et al.* (Jan. 10, 2017) 3:16-cv-02368-WHA.)

also alerted the lower court that issues of material fact precluded dismissal of the case at this stage in the proceedings. (CT 102-103.)

Appellants sought money damages from Respondents in their personal capacities, and sought no relief from the Tribe or tribal coffers whatsoever, regardless of whether Respondents were purportedly seated as tribal officials. (CT 004-017, 052-085.) Significantly, on November 12, 2016, a faction of the Tribe elected a new Executive Committee and as such some of the Respondents no longer comprise the Tribe's purported Executive Committee. The Appellants have not and will not substitute the Respondents for the recently elected Executive Committee because the Appellants do not seek damages against the Tribe or its representatives. The Appellants seek damages against the Respondents, the private individuals who intentionally colluded to intentionally harm the Appellants by publishing defamatory and false statements.

III. RESPONDENTS' CASE

In response to Appellants' allegations, Respondents alleged that they were all tribal officials at the time of the defamatory and false light publications and accordingly the lower court lacked jurisdiction. (CT 018-051.) Specifically, Respondents alleged that they are entitled to sovereign immunity as tribal officials acting in their official capacities within the scope of their authority when they published the defamatory statements because they did so pursuant to the Disenrollment Ordinance, that the dispute is an intra-tribal matter, and that the Tribe has exclusive jurisdiction over disputes related to tribal law. (*Id.*) Respondents completely failed to address the intentional tortious conduct alleged and whether such publication could subject Respondents to personal liability for damages to Appellants, regardless of their purported roles within the Tribe and regardless of any tribal law they alleged to be acting under. They refused to address who would ultimately be liable for any money judgment as the real party in interest, and

succeeded in creating a misperception of the issues in the case, framing the suit as an intra-tribal matter. Additionally, Defendants claimed that they were acting pursuant to their official authority, but they failed to cite to any case law that provides tests or standards for establishing their actions were taken within official capacities. (*See* CT 024-026.) Rather, Defendants cited cases discussing the overarching principles of Indian law and stating general rules that officials may be immune from suit when acting in their official capacities. (CT 025-026.)

STANDARD OF REVIEW

Appellants contend that the lower court misapplied relevant law. Through this misapplication, the court analyzed unnecessary factors and evidence. Mixed issues of law and fact are reviewed de novo by appellate courts. (*Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289 n.19.) More specifically, "[w]hether tribal immunity bars suit is a question of law that [appellate courts] review de novo." (*People v. Miami Nation Enterprises* (2016) 2 Cal. 5th 222, 250.)

ARGUMENT

The lower court erred in its application of law and misapplied the test that determines whether Respondents—individuals alleged to have committed intentional torts—are shielded by sovereign immunity. The lower court determined that a remedy-based analysis should be used, but then deviated from the standards articulated in the main cases that apply this test in a similar context, *Maxwell v. County of San Diego* (9th Cir. 2013) 705 F.3d 1075 and *Pistor v. Garcia* (9th Cir. 2015) 791 F.3d 1104. The lower court believed that it "must look at the evidence to determine whether the allegations were brought against Respondents because of acts done in their official capacities, and whether retaining jurisdiction would interfere with the Tribe's own administration and implementation of its own actions." (CT

109.) Under the lower court's test, it considered two factors that should not have been part of its analysis: (1) whether the publication of the defamatory criminal allegations were actions taken in Respondents' official capacities; and (2) whether allowing the case to proceed would interfere with tribal administration. (*Id.*) Neither of these factors should have been considered in a suit filed against individuals in their individual capacities, regardless of their purported tribal government affiliation. [2]

I. INDIVIDUAL CAPACITY SUITS DO NOT REQUIRE AN ANALYSIS OF WHETHER ACTIONS TAKEN WERE WITHIN THE SCOPE OF DUTIES

So long as any remedy will operate against officers individually, and not against the sovereign, individual tribal officers are liable, and not shielded by immunity, when sued in their individual capacities. (*Pistor v. Garcia* (2015) 791 F.3d 1104, 1113 (internal citation and quotation omitted).) To determine whether a suit against the Respondents could proceed, the lower court should have focused on the essential nature and effect of the relief sought. A focus on the relief sought would have demonstrated that sovereign immunity did not apply because the Respondents were sued in their individual capacities. As such, an analysis of the scope of Respondents' duties was improper, especially in light of the fact that Appellants offered no evidence to allege and Respondents offered no evidence to prove that the Tribe was the real party in interest. The Appellants vociferously argued that the Tribe had no liability in the case. The lower court simply ignored the Respondents' failure to controvert this point.

[2] To the extent that issues of official capacity and interference with tribal administration are relevant in this case, such issues present questions of fact that should not have been decided by the lower court at this stage in the proceedings. At a minimum, this case should be remanded so that Appellants can conduct discovery over these factual issues. (*See* Part III, *infra*.)

a. Respondents Were Not Sued in Their Official Capacities

While tribal officials are sometimes immune when sued in their official capacities, tribal officials are not immune when sued in their individual capacities. (*See Lamere v. Superior Court* (2005) 131 Cal. App. 4th 1059, 1065 ("It is quite true that individual tribal members have no sovereign immunity from suit *unless* they are acting in official capacities on behalf of a tribe.") (emphasis in original).) The Complaint does not allege that any actions were taken on behalf of the Tribe, in any official capacity. (CT 004-017.)

Tribal officials are not immune from suit when sued in their individual capacities, as is the case here. The general rule is "that individual capacity suits related to an officer's official duties are generally permissible." (*Maxwell, supra,* 705 F.3d at 1088, 1088 (hereafter "*Maxwell*.") Numerous courts have determined that "tribal sovereign immunity cases do not question the general rule that individual officers are liable when sued in their individual capacities." (*Id*. at 1089; *see also Native Am. Distrib. v. Seneca-Cayuga Tobacco Co*. (10th Cir. 2008) 546 F.3d 1288, 1296.)

The main test that courts use to determine if tribal officers have been sued in their individual capacities is the remedy-based approach set forth in *Maxwell* and *Pistor,* and purportedly used by the lower court here. (CT 107-108 ("the focus must be on the remedy sought by the plaintiff").) Courts sometimes also look at whether the alleged conduct could be attributed to the tribal government (*Maxwell* at 1088), or whether the Defendant acted "out of personal interest rather than for the benefit of the tribe" (*Turner v. Martire* (2000) 82 Cal. App. 4th 1042, 1055.) Appellants provided briefing demonstrating why they prevail under each of these tests. (CT 056-058.) Though the lower court's order is less than clear about which tests it actually used in its analysis, it is clear here that the court erred by completely disregarding the first, "remedy-based" test, and by not fully considering or

allowing Appellants to conduct discovery regarding the second and third tests.

Though the lower court did not fully assess the latter two tests, under either standard, Appellants' suit constitutes a suit against Respondents in their individual capacities. Concerning the second test, "[a]ctions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." (*Lewis v. Clarke* (2016) 320 Conn. 706, 718, *cert. granted*, 137 S. Ct. 31 (U.S. Jun. 13, 2016) (No. 15-1500).) The claims involve much more than negligence—they involve intentional torts. That the claims alleged are intentional torts also supports a finding against immunity based on the third test, acting out of personal interest. The Appellants' filings allege that Respondents attacked their political opposition in a self-serving way, a quintessential act of personal interest.

The lower court found that "Plaintiffs have failed to show by a preponderance of the evidence that Defendants were acting outside the scope of their official tribal capacities when they drafted and circulated the document that is the subject of their claims" and accordingly, dismissed the case. (CT 111.) The lower court also determined that the evidence supports a finding that the defendants "were acting within the scope of their tribal authority, on the Tribe's behalf." (CT 111.) Such determinations were made without allowing Appellants an opportunity to perform adequate discovery. Moreover, a finding that Respondents acted within or outside of their scope of authority is not necessary for this individual capacity suit to proceed. A remedy-based analysis conclusively demonstrates that the Tribe is not the real party in interest.

b. Remedy-Based Analysis Does Not Require an Inquiry into Scope of Duty

The remedy-based approach asks whether a suit seeks damages from individuals, or from the tribal treasury. (*See, e.g.*, *Davis v. Lubenau* (Wash. Ct. App. Nov. 19, 2014) No. 72330-81, at 7 ("[I]n individual capacity suits against tribal officers, the court should engage in a 'remedy focused analysis' to determine whether the tribe is the real, substantial party in interest . . . .").) Under this approach, courts should focus on "the essential nature and effect of the relief sought." (*Maxwell* at 1088 (citation omitted).) Appellants seek to hold individuals accountable for individual actions. Because Appellants sought relief from Respondents personally, "the sovereign is not the real, substantial party in interest." (*Id.* (citation omitted); *see also Pistor* at 1114.)

In *Pistor*, the Ninth Circuit explained that the question of whether defendants were acting pursuant to a state or tribal law did not matter for purposes of the sovereign immunity analysis. (*Id.* at 1114–15.) The defendants in *Pistor* claimed they took all alleged actions "solely in their capacities as tribal officials" and within the scope of their authorities under the tribal gaming ordinance. (*Id.* at 1109.) The Ninth Circuit determined that it did not need to analyze whether the defendants acted within the scope of their authority. The issue of whether defendants acted under state or tribal law was necessary for assessing the elements of a Section 1983 claim. But it was not necessary for the court to analyze which law the defendants were acting pursuant to, and if their actions were within the scope of that law, when addressing the sovereign immunity issue. Likewise here, the sovereign immunity question can be answered independent of an analysis of scope of authority.

Similarly in *Maxwell*, tribal defendants were ostensibly acting within the scope of their authorities when responding to a medical emergency. Yet, the court did not conduct an analysis of scope of authority, because it was

not necessary. Rather, the court held that the suit could proceed because the tribal defendants were sued "in their individual capacities for money damages" and those damages would "come from their own pockets, not the tribal treasury." (*Maxwell* at 1089.)

The "remedy sought" and "scope of authority" principles should not be conflated in individual capacity suits. (*See Maxwell* at 1089.) Some individual capacity suits have referred to "scope of authority" principles but this is only because "allegations of acts outside an officer's authority are by definition individual capacity claims." (*Id.*) Individual capacity suits may proceed whether an individual acted within or outside their authorized scope of duties. However, a consideration of whether a defendant acted within the realm of official duties is not proper in individual capacity suits. It is possible that related considerations may be helpful in deciding substantive matters (*see* Part II.a, *infra*), but they are not necessary factors at this stage of the litigation.

In contrast, the lower court's decision turned on whether Respondents were acting within the scope of their official duties. (CT 111.) Such a consideration is not relevant to an individual capacity suit, like the one here. The lower court instead should have used the "remedy-based" analysis to decide if the suit could proceed. Under this test, Respondents are not protected by sovereign immunity and the lower court has jurisdiction to hear the matter. The most important consideration is whether the relief sought is from the individual defendants or the tribal treasury. (*See Pistor* at 1112.) Appellants have only requested damages from Respondents as private persons, not from the tribal treasury.

c. Defendants Have Not Shown that a Judgment Would Impact the Tribal Treasury

Appellants do not seek damages from the Tribe or any tribal entities. To the contrary, Appellants have made abundantly clear they "absolutely

disclaim any relief from the Tribe or its agencies." (CT 058-059.) Notably, the Tribe elected new officials on November 12, 2016. The current tribal officials are not the exact same individuals as the named Defendants in the complaint (who are the Respondents in this appeal). The Appellants are not seeking to add or substitute those new officials as Respondents. This is because the underlying suit was brought against the Respondents in their individual, personal capacities, seeking damages directly from their pockets. (*See, e.g., Grand Canyon Skywalk Dev. LLC v. Cieslak* (2015 D. Nev.) 2015 WL 4773585, at *3 ("A suit brought against federal, state or tribal officers or employees in their individual capacities does not implicate sovereign immunity because the plaintiff seeks money damage not from the government, state, or tribal treasury but from the individual defendants personally."); *Zaunbrecher v. Succession of David* (2015 La. Ct. App.) 181 So. 3d 885, 889 (holding that sovereign immunity does not bar a suit against tribal employees "in their individual capacities" because "[a]ny damages will come from their own pockets, not the tribal treasury.").)

Any award in this case would be executed only against the individual Respondents and not against the tribal government. (*See Kentucky v. Graham* (1985) 473 U.S. 159, 166.) "[I]t has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions, that question is easily answered." (*Larson v. Domestic Foreign Corp.* (1949) 337 U.S. 682, 687.) The question here is easily answered because the underlying suit against Respondents seeks to recover damages for the personal actions of those specific individuals.

A recent matter pending before the Supreme Court of the United States sheds additional light on this question. *Lewis v. Clarke* is a tort case that was argued before the Supreme Court on January 9, 2017. *Lewis v.*

Clarke, supra, No.15-1500, 137 S. Ct. 31. As is the case here, *Lewis* involves a tort claim against a tribal employee. Any day, the Supreme Court will decide "[w]hether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." (Brief for the Petitioners at (I), *Lewis v. Clarke*, No. 15-1500 (Nov. 14, 2016).)

The parties in *Lewis* disagree about whether a specific tribal employee is protected by sovereign immunity from a tort claim. But both parties agree that a remedy-based analysis is imperative to determining whether sovereign immunity is applicable. Both sides make clear that if a tribe is not a real party in interest, sovereign immunity does not prevent the suit from moving forward. And, both sides agree that inquiring into who will ultimately pay the damages is imperative to establishing the real party in interest.

The Petitioner argued that the Court should follow *Maxwell's* "remedy-sought approach" and inquire "whether the relief sought in the litigation would run against the sovereign or only against the officer personally." (*Id*. at 10.) The Respondent claimed that because "[t]he Tribe bears the financial burden of any adverse judgment here [. . .] it is the real party in interest." (Brief for Respondent at 2, *Lewis v. Clarke,* No. 15-1500 (Dec. 14, 2016).) The Respondent explained that a sovereign is the real party in interest when "a plaintiff seeks specific relief involving property or money held by the sovereign." (*Id*. at 11 (citing *Larson v. Domestic & Foreign Commerce Corp.*, *supra,* 337 U.S. at 703.)

Following the reasoning of either the Petitioner or Respondent in *Lewis v. Clarke*, Appellants must prevail because they do not seek monetary relief from the Tribe. The Respondents in this case provided no evidence whatsoever that the Tribe would be financially responsible for the intentional torts the Respondents are alleged to have committed.

Rather than presenting evidence to show that any judgment would operate against the tribal treasury, Respondents have only expressed—over and over again—that their tortious actions were taken within the scope of their official duties. The lower court incorrectly faulted Appellants for "provid[ing] no evidence in support of their contention that Defendants are not tribal officials or were not tribal officials at the relevant time." (CT 110.) But, this evidence is not necessary. As previously pointed out, individual capacity suits may proceed regardless of whether the Respondents acted within or outside of their scope of authority. Moreover, if scope of authority is to be analyzed it cannot be done so at this stage in the proceedings as it presents a question of fact. (*See* Part III, *infra*.)

II. THE LOWER COURT CONSIDERED ADDITIONAL FACTORS THAT ARE NOT RELEVANT AT THIS STAGE IN THE PROCEEDINGS OR TO THE UNDERLYING CLAIMS

The lower court determined that the allegations in the Complaint amounted to a non-justiciable internal dispute. (CT 111.) In so ruling, the lower court misapplied the remedy-based test and mistakenly considered evidence that is not appropriate at this stage in the proceedings, and is not relevant to the substantive claims in the Complaint. The lower court believed that in order for the case to move forward, it was necessary for to conduct an analysis of "whether Defendants were authorized to publish the document and disenroll Plaintiffs." (*Id.*) Any possible authorization to publish the document may be raised as a defense to the substantive claims in the complaint, but it is not a defense to the lower court exercising jurisdiction over this case. Additionally, the lower court should not have conducted an analysis of whether Respondents were authorized to disenroll Appellants, because resolution of the tort claims involving the publication of false and

defamatory statements has no bearing on whether Respondents may proceed to remove a tribal member from the rolls of the Tribe.[3]

a. The Court Considered Fact-Based Evidence that Goes to the Heart of the Substantive Claims

The lower court's ruling was based in part on a belief that the court had to decide whether Respondents were authorized to publish the materials in question. While authorization to publish may be a defense to a defamation claim, it is not a defense to the court's exercise of jurisdiction over this case and thus not appropriate in this early stage of the proceedings. To the extent that "issues of jurisdiction and substance are intertwined" the court should not attempt to resolve any factual disputes. (*People v. Superior Court* (*Plascencia*) (2002) 103 Cal. App. 4th 409, 429); *see* Part III, *infra*.)

By deciding that Respondents were authorized to publish the defamatory criminal allegations, the lower court essentially asserted a defense to the defamation claim, and found that Respondents' publication was privileged. California's defamation law only applies to "unprivileged" statements and publications. (Cal. Civ. Code §§ 45–46.) One possible ground for asserting that a publication is privileged is by claiming that it was published "[i]n the proper discharge of an official duty." (*Id.* at § 47(a).) Any claim of privilege is a question of fact that cannot be properly assessed by Appellants without discovery, and should not have been considered by the lower court at this stage in the proceedings and certainly should not be used

[3] Whether the Tribe has a right to disenroll the Appellants is the subject of a petition for habeas corpus currently pending in *John, et al. v. Garcia, et al.* (2016) 3:16-cv-02368-WHA. It is wholly inappropriate for the lower court to have decided based on a cursory review of Respondents' filings that the Tribe or the Respondents, allegedly acting on behalf of the Tribe, possessed the right to disenroll the Appellants. The question was not before the lower court and yet it decided to insert itself in the middle of an issue that is not for a State court to decide especially given its irrelevance to a garden-variety tort case. (*See* Part II.b, *infra*.)

to find the lower court did not have jurisdiction to hear the merits of Appellants' request for relief.

Further, Respondents and the lower court disregarded the fact that even actions taken under color of law can still be grounds for an individual capacity suit. Indeed, "individual capacity" suits are generally filed against individuals associated with a governmental entity and thus are usually taken under color of law. "By its essential nature, an individual or personal capacity suit against an officer seeks to hold the officer personal liable for wrongful conduct taken in the course of her official duties." (*Pistor* at 1114 (emphasis in original) (citation omitted).)

b. The Resolution of the Underlying Substantive Claims Will Not Have any Effect on the Disenrollment Actions

The lower court also considered additional factors that are not relevant to the underlying claims. In its application of the *Maxwell* test, the court stated that "[u]nless the remedy sought will somehow encroach upon the tribe's sovereignty, suits against tribe officials and employees in their individual capacities are permissible." (CT 107-108 (citing *Maxwell* at 1088).) In analyzing whether the suit here would infringe on tribal sovereignty, the court assumed it had to decide whether Respondents were authorized to disenroll Appellants. (CT 111.) The lower court then found that such a question "requires an impermissible analysis of Tribal law and constitutes a determination of a non-justiciable intra-tribal dispute." (*Id.*)

Respondents never truly explained why this intentional torts case between private parties constitutes an intra-tribal dispute. Respondents claimed that the court would have to "intrude upon" tribal law and tradition to determine who would prevail on the merits of the case. (CT 024-026.) But such an intrusion is not necessary given that individual capacity claims are allowed whether a defendant acted within or outside of their scope of authority. It was not necessary for the lower court to find the Disenrollment

Ordinance was valid. These claims by Defendants were merely attempts to mislead the lower court and reframe a private tort suit as a non-justiciable intra-tribal dispute.

Deciding whether Respondents were authorized to take a disenrollment action against Appellants is not necessary for the defamation claims to proceed. The underlying complaint is not asking the court to take any actions regarding disenrollment. Appellants do not wish to use this forum to resolve any disenrollment disputes. The lower court erred in believing Respondents' mischaracterization of the case.

In fact, the resolution of the substantive claims in this forum will not have any effect on disenrollment actions taken by Respondents, or any other person or entity. This is true regardless of whether Appellants prevail or lose on the substantive tort claims. Though the alleged defamatory actions arise out of actions taken relating to disenrollment, resolution of tort-based claims will not require Respondents to act or withhold action regarding the Tribe's disenrollment decisions. An investigation of whether Respondents are authorized to disenroll Appellants is not necessary or appropriate to hearing the substantive claims in the Complaint.

III. OUTSTANDING ISSUES OF FACT PRECLUDE DISMISSAL OF THE COMPLAINT

The lower court made an impermissible determination of the facts related to the merits of this case in order to make a ruling on Respondents' motion to quash. Although a motion to quash is normally directed at defects in personal jurisdiction, as opposed to subject matter jurisdiction, California courts have authorized Indian tribes and their alleged officials to specially appear and invoke immunity from suit by using a "hybrid motion to quash/dismiss." (*Boisclair v. Superior Court* (1990) 51 Cal. 3d 1140, 144 n.1.) Under this hybrid motion, when a defendant moves to quash service, the plaintiff has the burden of establishing jurisdiction by a preponderance

of the evidence. (*Dill v. Berquist Construction Co*. (1994) 24 Cal. App. 4th 1426, 1440; *R. E. Sanders & Co. v. Lincoln-Richardson Enterprises, Inc*. (1980) 108 Cal. App. 3d 71, 74.) "A motion to quash, like most pretrial motions made in civil cases, does not involve a determination of facts related to the merits of the case." (*Borsuk v. Appellate Div. of the Superior Court* (2015) 195 Cal. Rptr. 3d 581, 585 (quotation omitted).)

Appellants produced ample evidence to show that the lower court could properly exercise jurisdiction over Appellants' claims. (CT 052-085.) And, Respondents never adequately countered such evidence, instead choosing to distract the lower court by either producing information irrelevant to the Appellants' tort claims or offering the "fact" that when defaming and publicizing information that showed Appellants in a false light, "Defendants at all times were serving as tribal officials in both determining who was and was not liable to the Tribe pursuant to Ordinance GCORD08412." (CT 018-051.)

Respondents' motion to quash hinged entirely on a question of fact—namely, whether Respondents were properly entitled to tribal immunity. Respondents claimed that if they were acting in their official capacities when defaming and publicizing information that showed Appellants in a false light, then the motion to quash must be granted. Given the conditional nature of their argument, it follows that the lower court had to first engage in an impermissible determination of a question of fact as to whether Respondents committed the defamatory acts in their personal capacities. This is properly a question for a jury, and nonetheless cannot be determined in ruling on a motion to quash.[4] (*See, e.g., Stock W. Corp. v. Taylor* (1991) 942 F.2d 655,

[4] Civil litigants in California are guaranteed the right to trial by jury by Article 1, Section 16, of the California Constitution. And while this right applies to issues of fact only, see 7 Witkin, Cal. Procedure, § 81 (5th ed. 2008) ("The right to a trial by jury is a right to have the jury try and determine

665 (overturning dismissal on tribal immunity grounds because the district court did not permit the plaintiff "to pursue detailed discovery into the nature of [the official]'s duties . . . and any connection between" defendant's "'official' duties" and the alleged tortious conduct).)

What is more, because of the material facts at issue, the scope of authority question was not one that could be decided via a motion to quash. Courts in this state have been clear: "[w]hether an employee has acted within the scope of his employment is ordinarily a factual issue to be resolved by the trier of fact" and is not properly determined under a motion to quash. (*Fowler v. Howell* (1996) 50 Cal. Rptr. 2d 484, 487; *see also Borsuk v. Appellate Division of Superior Court, supra,* 195 Cal. Rptr. 3d at 585 ("A motion to quash, like most pretrial motions made in civil cases, does not involve a determination of facts related to the merits of the case") (quotation

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issues of fact."), courts in this state have held that the Constitution requires a "healthy skepticism of removing factual questions from juries." (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal. App. 4th 1320, 1328; *see also Exline v. Smith* (1855) 5 Cal. 112, 113.) Thus, where the material facts regarding a jurisdictional issue "turn on disputed facts or require credibility determinations, the jury must make these factual findings before the trial court decides whether the facts, as determined by the jury," establish jurisdiction. S*tofer v. Shapell Indus., Inc*. (2015) 233 Cal. App. 4th 176, 179; see also *People v. Superior Court (Plascencia),* 103 Cal. App. 4th 409, 429 (2002) (holding that a court "may not resolve genuinely disputed facts where the question of jurisdiction is dependent on the resolution of factual issues going to the merits" and that, rather, the trial court "assumes the truth of allegations . . . unless controverted by undisputed facts in the record"); *Pennsylvania Health & Life Ins. Guaranty Assn. v. Sup. Ct.* (1994) 22 Cal. App. 4th 477, 480 (holding that only "[w]hen the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law"); *Zayas v. Estado Libre Asociado de Puerto Rico* (2007) No. 04-1017, 2007 WL 7126530, at 16 ("Only after the facts have been settled can the court determine whether the actions were objectively reasonable so as to fall under the qualified immunity umbrella. Questions of facts are to be determined by a jury".)

omitted); *San Diego Police Officers Assn. v. City of San Diego* (1994) 35 Cal. Rptr. 2d 253, 256 ("Ordinarily, scope of employment is a factual question.").)

In total disregard of the established law of this state, the lower court's ruling was fully dependent on a finding that Respondents acted within the scope of their authorities, which finding necessarily required the court to determine facts related to the merits of Appellants' claims. As argued above, the lower court erred in considering the scope of authority issue because it was not necessary to answer the sovereign immunity question. The scope of authority issues presented an analysis of facts that was not only unnecessary, but was also conducted incorrectly by the lower court.

In its analysis, the lower court considered numerous factors regarding the scope of authority. If the lower court's consideration of these additional factors was permissible, the lower court had a duty to allow Appellants to conduct discovery to assist in determining whether it had jurisdiction to proceed. Questions regarding the Respondents' scope of duties, authorization to act, and any possible privileges should not have been dispositive at this stage in the proceedings. Consideration of these issues presented a situation "where issues of jurisdiction and substance are intertwined." (*Plascencia* at 429.) To the extent that "a jurisdictional issue turns upon disputed facts intertwined with the merits of the case, the court should not resolve the factual dispute prior to trial but should employ a summary judgment standard." (*Id.*)

The lower court viewed the issues of substance and jurisdiction as intertwined. It however failed to abide by its obligation to review the motion to quash using a summary judgment standard, which views evidence in a light most favorable to the non-moving party. Rather, the lower court disregarded Appellants' allegations and evidence, and assumed the truthfulness of statements made by Respondents. For instance, the lower

court made an independent determination, relying on the assertions of the Respondents and disregarding evidence submitted by Appellants, that the Disenrollment Ordinance was currently in effect.[5] (CT 111.)

Under California law, Appellants were required to establish jurisdiction by a preponderance of the evidence. Accordingly, Appellants provided the evidence necessary for the lower court to properly determine that it could exercise jurisdiction. Respondents plainly failed to provide evidence sufficient to refute a finding that the court could properly exercise its jurisdiction. Instead, the court took it upon itself to engage in further determinations of fact, which it did not have the authority to do. Under California law, the lower court's determination of facts related to the merits of the case was wholly improper, and thus its ruling on Respondents' motion to quash should be reversed.

If the Appeals Court finds that questions of fact exist, this case must be remanded so that the Appellants may conduct discovery regarding all factual issues related to Respondents' actions and authority.

CONCLUSION

For the foregoing reasons, Appellants request that the lower court decision quashing the Summons and Complaint is reversed and remanded for further proceedings.

Respectfully submitted,

DATED: April 10, 2017

By /s/ Little Fawn Boland

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[5] *See* fn 1, *supra*.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 7,337 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By /s/ Little Fawn Boland
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Attorney for Appellants Brown et al.

CERTIFICATE OF SERVICE

I hereby certify that, on April 10, 2017, a true and correct copy of:

APPELLANTS' OPENING BRIEF

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DATED: April 10, 2017

By /s/ Little Fawn Boland
LITTLE FAWN BOLAND

STATE OF CALIFORNIA
Court of Appeal, First Appellate District

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