No. C087445

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CYNTHIA LOPEZ
Plaintiff and Appellant,

v.

ERIC QUAEMPTS, DAVID TOVEY, and THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION
Defendants and Respondents.

Appealing an Order of the Superior Court of the State of California,
County of Sacramento, Case No. 34-2017-00206329-CU-FR-GDS
The Honorable David I. Brown

RESPONDENTS REPLY BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Rule 8.208.

Dated: November 15, 2019 Samuel L. Phillips, Attorney at Law

By: */s/ Samuel L. Phillips*
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I. Introduction

Defendant/respondent ERIC QUAEMPTS hired plaintiff/appellant CYNTHIA LOPEZ, Ph.D., (hereinafter "Appellant") to serve as defendant/respondent CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION's (hereinafter CTUIR) First Foods Policy Program Manager. Defendant/respondent DAVID TOVEY was at all times relevant the Executive Director of CTUIR with authority over Mr. QUAEMPTS. The CTUIR is located in the State of Oregon (hereinafter collectively referred as to "Respondents" failed to return to work. She filed suit in Sacramento County Superior Court asserting fraud, negligent misrepresentation, fraudulent misrepresentation and unfair business practices as causes of action, against all three defendants. All of Dr. LOPEZ's causes of action arose from her original hiring. She is not making a claim for wrongful termination. She did not file a claim with the CTUIR Tribal Court nor did she file a suit in any United States District Court.

On or about April 27, 2018, the Honorable David I. Brown of the Sacramento County Superior Court entered an order quashing and dismissing Appellant's First Amended Complaint (FAC) on the grounds the doctrine of sovereign immunity bars Dr. LOPEZ's causes of action against CTUIR and its employees, ERIC QUAEMPTS (hereinafter

"QUAEMPTS") and DAVID TOVEY (hereinafter "TOVEY"). Dr. LOPEZ contends Mr. QUAEMPTS and Mr. TOVEY knowingly misled Dr. LOPEZ on the amount of staff and budget she would have in order to induce her to accept employment with CTUIR. Because these defendants were knowingly making false representations during the recruitment process, Appellant contends Respondents' alleged illegal actions are outside of their CTUIR responsibilities. Therefore, the doctrine of sovereign immunity does not apply.

However, the trial court correctly concluded Mr. QUAEMPTS and Mr. TOVEY's solicitations were only made pursuant to their employment with CTUIR. Therefore, they were not acting in their personal capacities. Thus, the doctrine of sovereign immunity bars Dr. LOPEZ's action in state court.

II. Counter Statement of the Facts

Defendant CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United State Bureau of Indian Affairs, 82 Fed.Reg. 4915 (Jan. 17, 2017). The CTUIR is a confederation of three tribes: the Cayuse, the Umatilla, and the Walla Walla. These tribes lived near the Columbia River and the Blue Mountains in what is now northeastern Oregon State and southwestern Washington. (Memorandum of Points and Authorities in Support of

Motion to Quash/Dismiss Plaintiff's First Amended Complaint, Record pages 1061:24-1062:4.)

In 1855, the Tribes entered into a treaty with the United States, in which 6.4 million acres of tribal lands were ceded in exchange for a reservation homeland of 250,000 acres in the northeastern region of Oregon State. *See* Treaty with the Walla, Wall, Cayuse, and Umatilla Tribes, 12 Stat. 945 (June 9, 1855), ratified Mar. 8, 1859, proclaimed Apr. 11, 1859 (hereinafter "TREATY"). Congress later allotted and diminished the Umatilla Indian Reservation to 172,000 acres. In the TREATY, the CTUIR reserved the exclusive right to fish on the Umatilla Indian Reservation and the right to fish at usual and accustomed fishing stations outside of the Reservation. *Sohappy v. United States* (D. Or. 1969) 302 F.Supp. 899; *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (1979) 443 U.S. 658. The CTUIR also reserved the right to hunt, gather traditional foods and medicines, and graze cattle on the "unclaimed" lands outside of their Reservation. The CTUIR protects, and tribal members still exercise, these Treaty rights. A key component of the CTUIR's protection of its Treaty rights is the First Foods Policy Program (hereinafter "FFPP"). The CTUIR have a rich culture based in 'part upon the life cycle of the traditional foods the Tribes ate prior to European contact (referred to as "First Foods"). The CTUIR's FFPP provides proactive planning and policy analysis and development to protect, restore,

and enhance these "First Foods" and the exercise of associated rights reserved in the Treaty. (Memorandum of Points and Authorities in Support of Motion to Quash/Dismiss Plaintiff's First Amended Complaint, Record page 1062:5-21.)

The CTUIR adopted a Constitution and Bylaws in 1949 ("Constitution"), creating the Tribe's current political system. The Constitution serves as the CTUIR's governing document, and provides for the establishment of a tribal government, the conduct of tribal elections, qualifications for tribal membership, and the powers of its governing body, the Board of Trustees. The Board of Trustees is made up of a chair and eight members. The Board is elected by the General Council, which is comprised of all tribal members age 18 and older. (See generally CTUIR.org/about-us). (Memorandum of Points and Authorities in Support of Motion to Quash/Dismiss Plaintiff's First Amended Complaint, Record Page 1062.)

The CTUIR has also established a number of tribal laws and policies pursuant to its governing authority. The CTUIR currently administers 29 tribal statutes covering a wide range of subject matters. (See generally http://ctuir.org/about-us/ctuir-codesstatuteslaws). In addition, the CTUIR administers a number of tribal policies. As relevant to the instant case, the Tribal Personnel Policies Manual (TPPM), which sets forth the employment terms for tribal government employees, was approved and

adopted by the CTUIR's governing body, the Board of Trustees, by Resolution 14-059 (November 10, 2014). (See Declaration of Daniel W. Hester at ¶ 3, Record Pages 1080-1082.) The TPPM is attached as Exhibit 1 to the Declaration of Daniel W. Hester. (*Id.*, Record Pages 1084-1138.) The CTUIR has also adopted a Tribal Tort Claims Code that has been in effect since March 2000. (*Id*. at ¶ 8, Record Page 1081) A copy of the CTUIR Tribal Tort Claims Code is attached as Exhibit 2 to the Declaration of Daniel W. Hester. (*Id.*, Record Page 1140-1153.) The Tribal Tort Claims Code requires that a claimant first file a tort claim notice to designated tribal officials and that suit may be filed in the Umatilla Tribal Court sixty (60) days thereafter (Section 1.09).

As a federally-recognized Indian tribe, the CTUIR has exercised the authority under the Indian Self-Determination Act to contract with the Department of the Interior (hereinafter "DOI") to provide various governmental services previously provided by the Bureau of Indian Affairs, a DOI agency. (See Declaration of Paul Rabb at ¶ 2, Record Page 1157.) The CTUIR entered a self-governance compact with the DOI under the Indian Self-Determination Act dated January 30, 2006 ("Compact") that remains in effect to this day. (*Id*. at ¶ 3, Record Page 1157). The purpose of the Compact is set forth in Article I Section 2 of that document, which provides that the

> compact is to carry out Self-Governance as authorized by Title IV of Pub. L. 93-638, as amended, that…transfer[s] control to Tribal governments, upon Tribal request and through negotiation with the United States government, over funding and decision-making of certain Federal programs as an effective way to implement the Federal policy of government-to-government relations with Indian Tribes.

A copy of the Compact is attached as Exhibit 1 to Paul Rabb's Declaration. (*Id.*, Record Page 1160-1164.)

Pursuant to Article II, § 2 of the Compact, the CTUIR and DOI enter annual funding agreements to fund the governmental programs that the CTUIR administers under the Compact. The CTUIR entered a multi-year funding agreement for the 2010-2014 period dated December 17, 2009 ("MYFA"). (See Declaration of Paul Rabb at ¶ 4, Record Page 1157.) A copy of the MYFA is attached as Exhibit 2 to Paul Rabb's Declaration. (*Id.*, Record Pages 1166-1180)

Indian Self-Determination Act funding pursuant to the MYFA was provided to the CTUIR for the First Foods Policy Program. (See Declaration of Paul Rabb at ¶¶ 5-6, Record Page 1157.) Indian Self-Determination Act funding was also provided for the Executive Director position held by Defendant David Tovey, and the Natural Resources Department Director position held by Defendant Eric Quaempts. (*Id*. at ¶ 7, Record Page 1158.)

All Defendants are located in Oregon. (FAC at ¶ 11, Record Page 1038.) Plaintiff acknowledges that she interviewed in Oregon, relocated to

Oregon, and worked in Oregon. (FAC at ¶¶ 5, 14, 21, Record Page 1036-1040.) The Plaintiff, Cynthia Lopez, interviewed with the CTUIR, including with QUAEMPTS, and was hired in October 2013 to serve as the CTUIR First Foods Policy Program manager within the CTUIR's Department of Natural Resources at the CTUIR governmental offices on the Umatilla Indian Reservation. (See Declaration of Daniel W. Hester at ¶ 5, Record Page 1081.) (FAC at ¶ 22, Record Pages 1039-1040.) Plaintiff served as the First Foods Policy Program manager from October 16, 2013 to March 20, 2015. (*Id*. at ¶ 5, Record Page 1036-1037.) As previously noted, the CTUIR First Foods Policy Program is included within the scope of the CTUIR's Compact with DOI under the Indian Self-Determination Act, and the related multi-year funding agreement.

On March 20, 2015, Plaintiff left her position to take Family Medical Leave, as authorized by Section 4.12 of the CTUIR's TPPM. (See Declaration of Daniel W. Hester at ¶¶s 3 and 5, Record Pages 1080-1081.) Plaintiff failed to return to work following her Family Medical Leave (which was scheduled to end on June 12, 2015), resulting in the end of her employment relationship with the CTUIR. (*Id*., Record Page 1082)

Appellant concedes QUAEMPTS and TOVEY were acting within the scope of their employment with CTUIR. (FAC ¶¶ 1, 3 and 12, Record Pages 1035-1036, 1038.) Funding for the positions of Respondents QUAEMPTS and TOVEY are paid by CTUIR and are included in the

CTUIR's Compact. (Declaration of Paul Rabb, Record Page 122-123.) The lower court has also acknowledged that all of the allegations against QUAEMPTS and TOVEY were carried out while they were acting in their roles as tribal officials and as Appellant's supervisors. (Order to Quash/Dismiss Plaintiff's First Amended Complaint, Record Page 1520:8-22.) She further concedes defendants and respondents are located in the State of Oregon. (FAC ¶ 11, Record Page 1038.) All communications with Appellant were conducted over the telephone or through electronic mail. (FAC ¶ 20, Record Page 1039.)

III. Procedural Background

On or about January 13, 2017, appellant CYNTHIA LOPEZ filed a Complaint for Damages against ERIC QUAEMPTS, DAVID TOVEY, and THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION for fraud, negligent misrepresentation, fraudulent misrepresentation and unfair business practices in recruiting her for the FFPP manager position. (Complaint for Damages, Record Pages 001-0011.)

On or about March 23, 2017, Respondents filed their Motion to Quash/Dismiss Plaintiff's Complaint on the grounds that the causes of action were barred by the Doctrine of Sovereign Immunity and Appellant failed to exhaust her remedies through the Federal Tort Claims Act. (Record Pages 0014-144.) The Court heard the motion on or about April

26, 2017. After taking the matter under submission, the Court vacated its tentative ruling and denied the motion "without prejudice" in order to accommodate Appellant's request to (1) amend the pleading and (2) conduct "limited discovery regarding 'ratification', which [at oral argument] Plaintiff's counsel argued had a bearing upon the tribal immunity arguments in this case." (Court's Minute Order, Record Page 486.) After conducting discovery, which including motions for a protective order (Record Pages 494-525) and Motion to Compel (Record Pages 526-550), Appellant filed a First Amended Complaint for Damages on or about October 2, 2017. (FAC, Record Pages 1035-1047.)

On or about November 1, 2017, respondents and filed their Motion to Quash/Dismiss Plaintiff's First Amended Complaint on the grounds of sovereign immunity and failure to exhaust the Federal Tort Claims Act remedies. (Motion to Quash, Record Page 1056-1182.) Appellant again argued the alleged criminal conduct occurred in the pre-employment stage and that the individual Respondent's conduct was by definition outside the scope of their employment with CTUIR. (Plaintiff's Opposition to Defendant's Motion to Quash/Dismiss Plaintiff's First Amended Complaint., Record Pages1186-1425.) In the Court's detailed order, it granted Respondents' Motion and dismissed the First Amended Complaint as the Court lacked jurisdiction. (Order to Quash /Dismiss Plaintiff's First Amended Complaint, Record Page 1474-1503.) The Court property

rejected each of Appellant's various arguments as to why tribal immunity should not apply.

IV. Legal Argument

A. Standard of Review

"On a motion to quash service of summons, the plaintiff bears the burden of proving by a preponderance of the evidence that all jurisdictional criteria are met. [Citations.] The burden must be met by competent evidence in affidavits and authenticated documents; an unverified complaint may not be considered as supplying the necessary facts." (*Nobel Farms, Inc.v. Pasero* (2003) 106 Cal.App.4th 654, 657-658.)

"In the absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has subject matter jurisdiction over an action against an Indian tribe is a question of law subject to our *de novo* review." (*Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369 [64 Cal.Rptr.3d 23].) But "[w]hen the facts giving rise to jurisdiction are conflicting, the trial court's factual determinations are reviewed for substantial evidence. [Citation.] Even then, we review independently the trial court's conclusions as to the legal significance of the facts." (*CenterPoint Energy, Inc. v. Superior Court* (2007) 157 Cal.App.4th 1101, 1117.) The Court affirms a trial court's order if correct on any theory. (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th, 15-16.)

In this matter there are no conflicting underlying facts as to jurisdiction. Simply put, the CTUIR placed an advertisement for an open position in the tribe on the Umatilla Indian Reservation in Oregon. Appellant accepted that position and was disillusioned with it once she started. This litigation ensued. Because there is not a dispute as to the underlying facts, this appeal should be reviewed *de novo*.

B. Sovereign Immunity Standards Generally

"Indian tribes have long been recognized as possessing a common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58; *Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, [134 S.Ct. 2024] ("*Bay Mills*"). It has been settled law in federal courts for over a century that Indian tribes are sovereign governments immune from suit. *Thebo v. Choctaw Tribe of Indians* (8th Cir. 1895) 66 F. 372. Sovereign immunity is necessary to Indian self-governance. *Bay Mills, supra.* California courts likewise recognize the doctrine of tribal sovereign immunity. *See Boisclair v. Superior Court* 51 Cal.3d at 1157; *Ameriloan v. Superior Court* (2009) 169 Cal.App.4th 81; *People v. Miami Nation Enterprises* (2014) 223 Cal.App.4th 21. Tribal sovereign immunity applies in both state and federal courts. *Linneen v. Gila River Indian Community* (9th Cir. 2002) 276 F.3d 489, 492; *Pan American Co. v. Sycuan Band of Mission Indians* (9th Cir. 1989) 884 F.2d 416. Sovereign immunity extends to claims for

declaratory and injunctive relief, as well as for damages, and cannot be defeated by a claim that the tribe acted beyond its power. *Imperial Granite Co. v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269. Sovereign immunity is a jurisdictional, and not a discretionary doctrine. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 1053 n. 6, rev'd on other grounds, 474 U.S. 9 (1985). Because the doctrine was created under federal law, tribal sovereign immunity "is not subject to diminution by the states." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 756 ("*Kiowa*").

Consequently, Indian tribes cannot be joined in litigation absent an *express waiver* of their sovereign immunity. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) (dismissing litigation where necessary tribe did not waive sovereign immunity). A waiver of tribal immunity *cannot be implied*. Rather, it must be expressed unequivocally. *Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182. As a federally-recognized Indian tribe, the CTUIR is indisputably immune from this suit unless it has expressly waived its immunity. Nothing in the record shows, or can show, that any such waiver exists.

C. Sovereign Immunity Applies to Quaempts and Tovey as They Were Acting in Their Official Capacities at All Times Relevant to This Matter

Appellant is correct in stating that the main question in this matter is whether or not Respondents can invoke Sovereign Immunity in this matter. The heart of this matter lies in one question. Were respondents QUAEMPTS and TOVEY acting within their official capacity in hiring Plaintiff? If the answer to this question is yes, then QUAEMPTS and TOVEY can avail themselves of tribal immunity and this suit cannot be resurrected.

Appellant primarily relies on the matter of *Lewis v. Clark* (2017) 137 S.Ct. 1285 to support her theory of liability. However, Appellant misinterprets the holding of *Lewis* in saying that "the U.S. Supreme Court has already squarely decided that individuals sued personally cannot invoke tribal sovereign immunity." (Appellant's Opening Brief (hereinafter "AOB"), Page 21)

What the *Lewis* Court actually held was, "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." The Court continued, "[t]hat an employee was acting within the scope of his employment at the time the tort was committed is not, *on its own*, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity" (emphasis added). *Lewis* at 1289.

Appellant takes the position that the *Lewis* court stated that tribal immunity is barred any time a suit is brought against an employee in an individual capacity. However, the language of the *Lewis* decision makes it clear that there are two questions that must be answered. First, there must be a determination as to whether the Respondents were acting in their official capacity and second, which party, the tribe or the individuals, is the real party in interest.

I. Sovereign Immunity Extends to Tribal Employees Acting in Their Official Capacity.

The Ninth Circuit has held that sovereign immunity extends to tribal employees, provided they are "acting in their official capacity and within the scope of their authority." *Cook v. AVI Casino Enterprises, Inc.* (9th Cir. 2008) 548 F.3d 718, 727. Sovereign immunity applies with equal force both on and off reservation, and for both governmental and commercial activities. In *Kiowa,* 523 U.S. at 760, the Supreme Court held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off reservation." California courts have followed this rule. *See, e.g., Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 390 (reversing trial court and holding that tribal casino was immune from suit under sovereign immunity for activities taken by the casino off tribal property.)

In *Cook*, the court observed that the principles that motivate the immunizing of tribal officials from suit – protecting a tribe's treasury, as well as preventing a plaintiff from bypassing tribal immunity simply by

naming a tribal official – apply equally to tribal employees when they are sued in their official capacity. *Cook* at 727. The individual respondents, QUAEMPTS and TOVEY, are clearly sued in their official capacities; this can be seen in both the AOB and FAC. Appellants First Amended Complaint at paragraph 13 states, "Plaintiff is informed and believes, and thereon alleges, that each of the Defendants was, at all times herein mentioned, the agent, employee, partner and/or representative of one or more of the remaining Defendants and was acting within the course of such relationship at the time of the events described herein. …". (Record Page 1038) The fact that QUAEMPTS and TOVEY were acting in their official capacity is also supported in paragraphs 1, 3, and 12 of the FAC. (Record pages 1035-1038.) In *Cook*, as here, the Appellant sued individual employee defendants in name, but sought recovery from the tribe by alleging that it was vicariously liable for its employees' actions.

When tribal officials "act 'in their official capacity and within the scope of their authority,'" they are protected by sovereign immunity because their acts are the acts of the sovereign. *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1046. Further, Appellant cannot circumvent sovereign immunity through mere artful pleading in her FAC. *Cook,* 548 F.3d at 727. Here, CTUIR had an open employment position, and the individual Respondents, in the course and scope of their employment with the CTUIR, filled the position by hiring Appellant. These acts can *only* be for the benefit of the sovereign.

Despite her argument Appellant is actually asserting claims against the individually-named Respondents in their official, not individual capacities. Moreover, recent cases have applied a "remedy sought" analysis to determine whether tribal sovereign immunity would apply to a tribal

employee. *Maxwell v. County of San Diego* (9th Cir. 2012) 697 F.3d 941. Those cases expressly recognize that where the tribe is the real, substantial party in interest, tribal sovereign immunity bars a suit against the tribal employees.

In this matter the individual respondents were employees of the CTUIR. The individual respondents hired and supervised the Appellant in their official capacities as members of the CTUIR. Thus, all of QUAEMPTS and TOVEY's actions were for the benefit of the CTUIR. The Appellant would have no cause of action if she had not taken the position offered by QUAEMPTS. Thus the tribe itself would be liable for any money awarded to Appellant as it was the CTUIR who were, in fact, employing the Appellant. Because the tribe would be liable to the Appellant it is the tribe who is the real, substantial party in interest which bars any suit against tribal employees including QUAEMPTS and TOVEY.

II. Quaempts and Tovey Hired Appellant to be the FFPP Manager In Their Official Capacity as Employees of the CTUIR

One of the true undisputed facts in this matter is that Appellant was hired by respondent QUAEMPTS to be the FFPP manager for the CTUIR. Both individual Respondents were employed by the CTUIR when hiring and supervising Appellant. Without their positions at the CTUIR they would have no reason or purpose to recruit or hire anyone on behalf of the CTUIR. It is clear that the hiring and supervision of Appellant was done by the individual respondents in their respective roles at the CTUIR. If this were not the case then the individual respondents would have no authority

to hire Appellant to work for the CTUIR. Thus, QUAEMPTS and TOVEY were, at all times, acting on behalf of the tribe when hiring the FFPP Manager.

Furthermore, the lower court has pointed out that all of the allegations against QUAEMPTS and TOVEY were carried out while they were acting in their roles as tribal officials and as plaintiff's supervisors. (Order to Quash/Dismiss Plaintiff's First Amended Complaint, Record Page 1520:8-22.) Now that it has been established that the individual Respondents were acting in their official capacity when hiring the Appellant, we look to Court precedent.

It is clear that a tribe's sovereign immunity extends to tribal officials when they act in their official capacity and within the scope of their authority. (*Trudgeon v. Fantasy Springs Casino*, (1999) 71 Cal.App.4th 1340, 1347.) Furthermore, when a tribal official acts in their official capacity and within the scope of their authority they are protected by sovereign immunity because their acts are the acts of the sovereign (*Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1046.) It is only when officials act beyond their scope of authority that they lose their entitlement to sovereign immunity. (*Imperial Granite Company v. Pala Band of Mission Indians* (1991) 940 F.2d 1269, 1271.) As the court recognized, Appellant has not alleged any conduct of the individual Respondents that was done outside of their scope of authority which includes hiring and supervision. (Order to

Quash/Dismiss Plaintiff's First Amended Complaint, Record Page 1521:10-12.)

Appellant has argued throughout this matter that QUAEMPTS acted outside of his employment due to the alleged off reservation criminal conduct. However, the lower court also was not persuaded by this argument stating, "This is a civil lawsuit, not a 'criminal' action. Moreover, Appellant has not cited any authorities involving 'criminal conduct' or 'illegal conduct' alleged as against a tribe or its personnel upon facts similar to those alleged here, such that even if this Court were to *assume arguendo* that 'criminal conduct' was potentially at issue, Appellant has not shown that this means tribal immunity would not exist or has been waived. Appellant's conclusory framing of Respondents' conduct as 'criminal' and 'illegal' thus is not determinative." (Order to Quash/Dismiss Plaintiff's First Amended Complaint, Record Page 1517:2-7.)

Appellant has had ample time to research and find legal precedent for this claim but has failed to support her stance that QUAEMPTS was acting outside of his official capacity by the alleged criminal activity of false and misleading advertising. This is evident by the fact that Appellant has not included this argument in her Opening Brief. Rather, Appellant misinterprets *Lewis'* holding and takes the position that it is simply the act of naming QUAEMPTS and TOVEY individually that is determinative.

III. Simply Naming the Individual Respondents as Individuals in the Pleading Caption is not Determinative

Appellant unequivocally takes the position that, "*Lewis* bars QUAEMPTS and Tovey, who were both sued in their individual capacities from asserting sovereign immunity. Appellant expressly sought personal money judgments against QUAEMPTS and Tovey. (4 CT 1045)" (AOB, Page 22.) Respondents, however, take issue with this. The FAC does not allege that QUAEMPTS and TOVEY engaged in any personal conduct outside or beyond their official capacity as CTUIR employees. Further, there are no factual allegations suggesting that the two men engaged in any scheme or set out on any course of action outside of their official hiring capacities. The *Lewis* court clearly stated that a matter where the relief sought is "only nominally against the official and in fact is against the official's office and thus the sovereign itself," is an official-capacity suit. *Lewis* at 1292. This is because the real party in interest is the government entity not the named official. *Id.* Most importantly the *Lewis* court noted that in the determination of whether a suit is an official or individual capacity suit, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 1290.

The above findings by the *Lewis* court are contrary to Appellant's argument that, "Dr. Lopez clearly seeks personal liability against Quaempts

and Tovey. The mere fact their tortious acts may have been within the course and scope of their employment with the CTUIR does not change the analysis." (AOB, Page 25.) Appellant further states that, "[t]he court does not have the authority to convert the allegations by the master of the complaint from 'individual' to 'official.'" (AOB, Page 27.) However, Respondents take the position that *Lewis*, and *Lewis'* admittedly recent progeny, have undisputedly given the Court the authority to look past the characterizations in the pleading in order to determine if the individual or the Tribe is the real party in interest.

This is demonstrated in the matter of *Brown v. Garcia,* (2017) 17 Cal.App. 5th 1198, which came out after, and further refined, the *Lewis* decision. Similar to the case at bar, the *Brown* court faced a situation in which tribal leaders, acting in their official capacity, disenrolled certain members of their tribe due to multiple violations of tribal and state laws. *Id.* at 1200. The disenrolled members then sued for defamation based on the allegations contained in the order. *Id.* The tribal leader respondents then moved to quash the summons and complaint as barred by sovereign immunity. Appellant argued sovereign immunity was inapplicable because they were suing respondents only in their individual capacities and were not seeking relief from the tribe itself. *Id.* at 1201. The court granted the motion to quash and concluded that the evidence brought by the tribal

leaders established that they were acting within their scope of tribal authority. *Id.*

In their analysis of this issue the court stated that the plaintiff's, "assert the court erred in finding the litigation barred by sovereign immunity because the complaint seeks damages only from the individual plaintiffs, not the Tribe, and because there is no allegation the allegedly defamatory statements were made on the tribes behalf. Appellant asserts that these points are determinative. Here, too, the law does not support their position." *Id.* at 1204.

In *Brown*, as in the case at bar, the Appellant relies on *Lewis* in an attempt to break sovereign immunity and sue tribal leaders in their individual capacities. In addressing that issue the court stated,

> "plaintiffs contend their lawsuit falls under the remedy-focused general rule applied in *Maxwell*, *Pistor* and *Lewis*, and hence the court erred in finding the action barred by sovereign immunity. We disagree. The wrongs alleged in those cases were garden variety torts with no relationship to tribal governance and administration. In those circumstances, sovereign immunity does not shield individually named tribal officers or employees from state tort liability." *Id.* at 1206.

The court further states that the matter before them was different than the evidence in *Lewis* as the *Brown* evidence showed that respondents were tribal offices who were acting within the scope of their authority.

Our matter is completely analogous to that of *Brown.* Here, Appellant is claiming that she is suing QUAEMPTS and TOVEY in their individual capacity but admits in her pleading that at all times they were

acting in their roles as tribal employees. The Appellant is making the same argument as the appellant in *Brown*, namely that the court erred in its determination that sovereign immunity applies because they are intending this as an individual capacity complaint. Finally, such as in *Brown*, Appellant attempts to use *Lewis* to authorize this action. The *Brown* court clearly found that *Lewis* did not authorize actions to continue just because they may be couched in individual capacity terms. As such, Respondents argue that there is sufficient authority to support their position that the court can look past the pleadings to determine who the real party in interest is and if sovereign immunity applies.

Furthermore, if Appellant's position that simply bringing a suit that names a defendant as an individual, alone, would bar sovereign immunity, then sovereign immunity would cease to exist. If the Court were to entertain Appellant's position, all future plaintiffs could circumvent sovereign immunity by naming respondents in their individual capacity in the pleading. Surely this is not what the *Lewis* court contemplated. Because QUAEMPTS and TOVEY were acting in their official capacity during the recruitment, hiring, and supervising of Appellant the order of the lower court finding that sovereign immunity applies should be upheld

IV. Pre-employment Contacts are not Sufficient to Give California Jurisdiction Over This Matter

Appellant briefly argues that it was the pre-employment contacts of QUAEMPTS and TOVEY which were allegedly fraudulent and illegal in an attempt to give California jurisdiction over this matter. As a starting point, California would only have jurisdiction over this matter if sovereign immunity does not apply. However, respondents continue to take the position that any such pre-employment contacts were minimal and would

not meet the recognized bases for a court to exercise personal jurisdiction in this matter. The recognized bases are (1) physical presence in the forum state; (2) domicile in the forum state; (3) general appearance in the forum state; (4) contractual consent; and (5) minimum contacts between defendant and the forum state. (California Code of Civil Procedure § 410.10 et. al.) The first four of these bases do not apply here as the CTUIR is not physically present or domiciled in California, and they have never made a general appearance nor given any contractual consent waiving personal jurisdiction during this litigation. Because Appellant cannot argue that first four bases of personal jurisdiction apply, she continues to assert that the CTUIR made sufficient minimum contacts with California to justify personal jurisdiction over all Respondents.

Personal jurisdiction depends on the facts of each case. The relevant test is whether California has a sufficient relationship with the defendants and the litigation to make it reasonable to require the defendants to defend the action in California courts. California courts cannot exercise jurisdiction over parties on a basis inconsistent with the Constitution of the state or of the United States. Cal. Civ. Pro. § 410.10. Due process requires a substantial connection between the defendant and the forum state. U.S.C.A. Const. Amend. 14.

An exploration of minimum contacts generally looks at several factors. First, the extent to which Appellant's lawsuit relates to defendant's activities or contacts with California. Here, Appellant has argued that she lived in California before moving to Oregon; she read about the possible job opening while she was in California; she currently lives in California; "misrepresentations were made in the City and County of Sacramento"; she received telephone calls and emails from unnamed employees of the

CTUIR; and she looked at the vacancy announcement and position description on the CTUIR website while she was in California. (FAC ¶¶ 5, 10, 20-22, Record Pages 1036-1040.)

Appellant cannot demonstrate "substantial" contacts point out that the CTUIR's Reservation is located in Oregon and Plaintiff's work took place in Oregon exclusively. Furthermore, each of Respondent's "contacts" with California must be assessed individually. *Calder v. Jones* (1984) 465 U.S. 783, 790.

Stone v. State of Texas (1999) 76 Cal.App.4th 1043 is similar to the facts presented here. In *Stone,* like in the case now before this Court, the defendant employer was located outside of California, never came to California, and was offering the plaintiff a position outside of California. The plaintiff alleged that because he signed an employment contract while in California, this created personal jurisdiction. The *Stone* court established that even the place of contracting is not dispositive on the issue of personal jurisdiction, but that where the consequences of performing that contract would be felt is of far greater importance. *Id.* at 1048.

In the instant matter, each respondent has even less significant contacts with California than was present in *Stone.* California has no connection to the consequences of Appellant's employment in Oregon. All of the respondents are located in Oregon. (FAC ¶ 11, Record Page 1038.) Appellant acknowledges that she interviewed in Oregon, relocated to Oregon, and worked in Oregon. (FAC ¶¶ 5, 14, 21, Record Pages 1036-1040.)

Further, the *Stone* court found that the party failed to meet the purposeful availment prong of the minimum contacts test. This further requires that Respondents "have performed some type of affirmative

conduct which allows or promotes the transaction of business within the forum state. A contract with an out of state party does not automatically establish purposeful availment in the other party's home forum." *Id.* at 1048, internal citations omitted. Appellant has never pled, and can never plead, any facts to support any conduct by Respondents that shows purposeful availment of California.

As the court found in *Stanley Consultants, Inc. v. Superior Court* (1978) 77 Cal.App.3d 444:

> To hold that a foreign corporation has subjected itself to the judicial jurisdiction of California by the simple act of employing a California resident to perform services not within the State of California would be totally inconsistent with the Constitutions of this state and of the United States[.] *Id.* at 451.

In this matter, a federally-recognized Indian tribe should be afforded at least the same level of deference as a corporation. Appellant simply cannot show sufficient minimal contacts to convey personal jurisdiction over any of the Respondents due to "pre-employment contacts". The lower court agrees with Respondent's position stating, "Plaintiff does not offer any authorities for the novel proposition that tribal immunity does not apply to suits arising from an employee's 'pre-employment' contacts with the Tribe. In *Kiowa*, the Supreme Court stated, 'Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.' (118 S.Ct. at p. 1705). If negotiations leading to a contract were not immune, the exemption would emasculate the immunity." (Order to Quash/Dismiss Plaintiff's First Amended Complaint, Record Pages 1514-1515.)

D. Appellants Ratification Theory Does Not Apply to the Facts of this Case

Appellant's ratification argument is based on a false premise which ultimately makes it rather confusing and amounts to no more than a red herring. Appellant is essentially arguing that the CTUIR by "ratifying" the alleged illegal conduct of QUAEMPTS and TOVEY has waived sovereign immunity. This argument stems from the fact that the CTUIR's employee manual states that it does not authorize any tribal employee to engage in unlawful conduct in the performance of their job duties and that if the employees do engage in said conduct they may be held personally and legally liable for damages." Thus, Appellant argues, by allegedly ratifying the actions of the individually named defendant the tribe has adopted those actions which were allegedly outside the scope of their employment and because of this the CTUIR has waived sovereign immunity.

This Appellate court would have to make multiple findings of fact in order for this ratification argument to have any teeth. First, the court would have to find that the CTUIR did not know that QUAEMPTS and TOVEY were going to hire someone to fill the vacant FFPP Manager position.

Second, the court would then have to find that QUAEMPTS and TOVEY were acting outside the scope of their employment in filling the vacant position.

Third, the court would have to find that an illegal act, such as false advertising or deceptive advertising, actually occurred.

Fourth, if an illegal act in fact happened the court would have to find that said illegal act is inherently outside of any possible scope of authority that Quaempts and Tovey had.

Fifth, the court would then have to find that because the illegal acts were outside of QUAEMPTS and TOVEY's authority sovereign immunity

is waived. Finally, if any allegedly illegal act waived sovereign immunity for QUAEMPTS and TOVEY the court would have to additionally find that an alleged tribal ratification of the acts actually adopted those legal acts for the tribe which would somehow waive sovereign immunity. The lower court wisely pointed out that, to permit simply alleging crime and 'ratification' to equate to waiver of sovereign immunity essentially destroys sovereign immunity in virtually any circumstance. "A plaintiff need merely allege in state court that criminal acts occurred, even by tribal officials in their official capacities, and all tribes ... will lose their sovereign immunity." (Order to Quash/Dismiss Plaintiff's First Amended Complaint, Record Page 1440:9-13.)

Appellant has also not presented a clear theory of how the CTUIR's alleged ratification of QUAEMPTS and TOVEY's action waives sovereign immunity. Appellant has included a thorough explanation of "ratification," that one can "ratify" an illegal act by later adopting the illegal act as their own, as it pertains to contracts but has not cited to any cases that relate the ratification of illegal actions to the loss of sovereign immunity. Furthermore, the entire ratification argument is based on the false premise that "[i]t is undisputed that *after* Dr. Lopez commenced her lawsuit and while sovereign immunity was at issue, the CTUIR voluntarily elected, by express ratification, to adopt the alleged fraudulent and illegal pre-employment actions of Quaempts and Tovey," (AOB at 33) and that "the CTUIR expressly and *voluntarily* ratified its employees' actions in an effort to cover them under the umbrella of sovereign immunity. (4 CT 1041 at ¶ 34; RT 51:5-10.)" (AOB at 29)

Respondents vigorously dispute this characterization of the events and would note that Appellant's claim that the CTUIR expressly and

voluntarily ratified these actions cites to their own FAC at ¶ 34. (FAC, Record page 1041.) As stated above "an unverified complaint may not be considered as supplying the necessary facts." (*Nobel Farms, Inc.v. Pasero* (2003) 106 Cal.App.4th 654, 657-658.) Appellant's First Amended Complaint is not verified thus it cannot be used to supply any necessary facts. Appellant does not point to any part of the 1554 page record where the CTUIR takes the position that it ratified any actions *after* the beginning of this litigation. Because of this we must look to what that record actually reflects.

During a discovery dispute earlier in this matter the lower court acknowledged that, "the Tribe has stipulated that CTUIR approved of the recruitment and hiring of Cynthia Lopez for the position of Program Manager of the First Foods Policy Program" (emphasis in original) (Minute Order, Record Page 1031.) The court also stated that "[n]othing in the plaintiff's moving or reply papers provides good cause for addition discovery *given that the ratification theory does not provide an exception to sovereign immunity*." (Emphasis in original) (Minute Order, Record Page 1034.) Again, Appellant still has not pointed to any authority to support its position that ratification is an exception to sovereign immunity.

Respondents argue that, given the previous findings of the lower court, it is apparent that this matter is not a ratification matter at all. It is a matter of agency. "An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification." (California Civil Code § 2307.) Because this matter does not deal with subsequent acts of the tribe it can only be determined that, as stated above, the CTUIR approved the recruitment and hiring of Appellant and tasked QUAEMPTS and TOVEY to hire and oversee her *prior* to this suit being

filed. So the CTUIR gave QUAEMPTS and TOVEY the authority to hire Appellant in their official capacity. QUAEMPTS and TOVEY hired and supervised appellant in their official capacity. The actions of QUAEMPTS and TOVEY are inextricably linked to their positions within the CTUIR which makes this an official capacity suit.

E. The Federal Tort Claims Act Is the Exclusive Remedy Available to Appellant

Appellant, in support of her claim that the Federal Tort Claim Act (FTCA) is inapplicable, cites to two unpublished cases. One of these cases is out of Arizona, *Sears v. Gila River Indian Community* (D. Ariz. Sept. 25, 2013) CV-12-02203-PHX-ROS, 2013 WL5352990, which relies on *Robinson v. U.S.* (E.D. Cal. Jan 27, 2011) 2:04 CV 0073 4RRB0DAD, 2011 WL 302784 which was heard in the Eastern District of California. Because these two cases are unpublished they should not be considered by this Court. However, Respondents will address these cases should the court choose to consider them.

Appellant relies on *Robinson* stating, "['[U]nless the United States actually supervised and controlled the day-to-day operations of the construction project, the Tribe was an independent contractor, not an employee. Thus the actions of the Tribe cannot be attributed to the United States for the purpose of imposing liability under the FTCA."] (AOB, Page 34.) However the *Robinson* case was essentially a construction matter in which the Court was asked to find "What personal liability, if any, does the United States, as a trustee of Indian lands, have to third parties." *Robinson* at 6. In *Robinson* the Plaintiff brought his case against the United States government after he stated that a tribe interfered with his easement by constructing homes and a casino on said easement.

While the *Robinson* matter dealt indirectly with a tribe it was actually about whether or not the United States had waived its own sovereign immunity. "[T]he tribe is clearly neither a necessary nor an indispensable party. The suit affects solely the federal treasury." *Robinson* at 10. *Robinson* is therefore inapplicable to our case as it does not address tribes, tribal sovereign immunity, or individual liability of tribal members.

Respondents continue to take the position that the FTCA applies to this matter and is the exclusive remedy available to any tort claim against the United States, as well as a tribe or tribal employee acting within the scope of an Indian Self-Determination Act contract. Furthermore, the Food First Policy Program, and Defendants Quaempts and Tovey, are funded under the Tribe's Compact and multi-year funding agreement with the United States Department of the Interior under the Indian Self-Determination Act. Appellant incorrectly argues that, "[t]his case does not involve any federal employees or the federal government." (AOB, Page 33.) Appellant immediately follows this statement by correctly stating that, '[t]he FTCA governs tribal employees who engage in activities in furtherance of federal contracts, and are thus deemed federal employees and covered by the Act. (25 U.S.C. § 450f(c).)" (AOB, Pages 33-34.)

Thus, Appellant's proper and exclusive remedy is to bring her suit under the FTCA. 28 U.S.C. § 2679. Appellant is attempting to sue the CTUIR, as well as individual tribal employees, for alleged acts regarding her employment with the CTUIR's FFPP, which is a program funded under the Tribe's Compact and multi-year funding agreement with the Department of the Interior under the ISDA. (Declaration of Paul Rabb, Record Pages 122-123.) Funding for the positions of Respondents QUAEMPTS and TOVEY are paid by CTUIR and are included in the

Compact. (Declaration of Paul Rabb, Record Page 122-123.) Thus, any actions of the individual Respondents are covered by the FTCA.

It is important to understand how the FTCA applies to the CTUIR and all tribes generally. Briefly, through the FTCA the United States has waived its own sovereign immunity with regard to tort liability for suits in federal court under the limited circumstances, "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Congress extended this same coverage to tribes and tribal employees for claims "resulting from the performance of functions" under an ISDA contract, grant agreement, or cooperative agreement through the 1990 amendments to the Indian Self-Determination Act (ISDA). Public Law 101-512 §314 provides:

> an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs…or the Indian Health Services…while carrying out any such contract or agreement. . .[and]. . .its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement.

It further provides that any

> civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor, or tribal employee covered by this section, shall be deemed an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act. 28 U.S.C. § 2679, See 25 CFR § 900.204 ("...no claim may be filed against a self-determination contractor or employee based upon performance of functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA.")

As such, the FTCA provides the exclusive remedy available to any tort claim against the United States, as well as a tribe or tribal employee acting within the scope of an ISDA contract. Because the alleged tortious conduct in this case involves activities by tribal employees who were acting within the scope of their employment and within the scope of the CTUIR's Compact with the Department of the Interior under the ISDA, the FTCA applies.

F. Appellant Has Failed to Exhaust Tribal Remedies

In order for this case to proceed in any court the Appellant must show that she has exhausted all tribal remedies. Appellant has argued that she does not need to exhaust tribal remedies as, "in this case there is no requirement of claim exhaustion because the claims here involve intentional torts recognized under California statute or common law which are not recognized by the tribal courts." (AOB, Page 34.) However, the United States Supreme Court has recognized the right of tribal courts to determine, as a threshold step, the scope of their own jurisdiction over a claim, as a matter of self-government and self-determination. This doctrine, known as the tribal exhaustion doctrine, requires that claims be brought first in a tribal forum, before a plaintiff can proceed in state or federal court. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians* 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987).

The CTUIR has adopted the TPPM to address disputes regarding a tribal employee's employment with the CTUIR. The CTUIR has also adopted a comprehensive Tort Claims Code, which provides a limited waiver of tribal sovereign immunity to permit suits in Tribal Court for the tortious activities of the CTUIR or its employees. Appellant failed to avail

herself of any of the remedies provided to her under the CTUIR's Torts Claims Code. (Declaration of Daniel Hester, Record Pages 42-44.)

The merits of the FAC causes of action are irrelevant. Appellant's FAC, in sum, alleges that Defendants QUAEMPTS and TOVEY, while employed by the CTUIR, fraudulently and negligently induced Appellant to accept an employment offer with the CTUIR's Department of Natural Resources. Respondents deny Appellant's allegation. The Appellant has failed to exhaust her tribal remedies.

Appellant has pled both pre and post-employment conduct. This matter undisputedly deals with an employee suing her employers and supervisors. The fact that some actions took place prior to her first day of employment is immaterial and, in any event, Appellant has failed to support the novel positions that pre-employment contacts can give rise to any kind of action. Given that Appellant's claim is based solely on employment matters, she is required to utilize the available remedies of the TPPM and TCC.

As Appellant failed to exhaust tribal remedies before presenting her claims in state court, the Appellate court must not reverse the decision of the lower court.

V. Conclusion

Pursuant to the foregoing, the court order quashing the First Amended Complaint should be affirmed.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 9,096 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/ Samuel L. Phillips*
Samuel L. Phillips
Attorney for
Defendants/Respondents

PROOF OF SERVICE

CASE NAME: *Lopez v. Quaempts, et al.*
Cal. Court of Appeal, 3rd Dist., Case No.: C087445

I, the undersigned, hereby certify that I am a citizen of the United States, over the age of eighteen years, and am not a party to the within action. I am employed in the City of San Jose in the County of Santa Clara, California, and my business address is: Borton Petrini, LLP, 95 South Market Street, Suite 400, San Jose, California 95113.

On the date listed below, I served the foregoing document described as

RESPONDENTS REPLY BRIEF

on the other party(ies) in this action, through his/her/their attorneys of record, as indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Proof of Service was executed on November 18, 2019, at San Jose, California.

/s/*Sharon Wilson*
SHARON WILSON