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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

ACRES BONUSING, INC., a Nevada  
 Corporation, and JAMES ACRES, an  
 individual,

Plaintiffs,

vs.

Lester Marston, *et al.*,

Defendants.

Case No.: 3:19-cv-05418-WHO

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MOTION TO DISMISS [F.R.Civ.P.  
 12(b)(1), (2)]**

Complaint Filed: August 28, 2019  
 Hearing Date: February 26, 2020  
 Time: 2:00 p.m.  
 Judge: Hon. William H. Orrick

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## INTRODUCTION

Plaintiffs James Acres ("Acres"), an individual, and Acres Bonusing, Inc. ("ABI"), a Nevada Corporation,<sup>1</sup> are suing ten lawyers;<sup>2</sup> three law firms with<sup>3</sup> which those lawyers are in some way associated; Blue Lake Rancheria<sup>4</sup> Tribal Court Chief Judge Lester Marston ("Judge Marston"); Blue Lake Rancheria Tribal Court Clerk Anita Huff ("Clerk Huff"); Blue Lake Rancheria elected Vice Chair/Tribal Administrator/Tribal Associate Judge/Blue Lake Casino & Hotel ("Casino") CEO Arla Ramsey ("Ramsey"); and former Tribal Casino executive/Tribal government Economic Development Director Thomas Frank ("Frank"). Plaintiffs seek compensatory damages of \$4,000,000, punitive damages, treble damages to be proven at trial, and disgorgement of compensation received from the Blue Lake Rancheria and/or related persons and entities for legal and other services rendered by Defendants and personnel of the Blue Lake Rancheria's Tribal Court in connection with the Tribe's lawsuit (*Blue Lake v. ABI*) to recover what the Tribe paid to ABI for a server-based tablet gaming system that failed to perform as Acres had represented it would.

By this motion, specially-appearing Defendants Judge Marston, Clerk Huff, Ramsey, Frank, "Rapport and Marston," Tribal attorneys Rapport and DeMarse, and Tribal Court associate judges/law clerks Burrell, Vaughn and Lathouris (unless otherwise specified, the foregoing defendants will be referred to herein as the "Blue Lake Defendants") hereby seek an order dismissing

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<sup>1</sup> The Complaint, ¶ 8, identifies James Acres as ABI's owner and employee. According to the Nevada Secretary of State's website, ABI's Entity Number is E0004252007-4, and Plaintiff James Acres is identified as ABI's President, Secretary, Treasurer and Director. A true copy of the Nevada Secretary of State's listing for ABI is attached as Exhibit 1 to the Request for Judicial Notice lodged herewith.

<sup>2</sup> Defendants David Rapport, Ashley Burrell, Cooper DeMarse, Darcy Vaughn, Kostan Lathouris, Michael Chase, Daniel Stouder, Amy O'Neill, Megan Yarnell, and Amelia Burroughs.

<sup>3</sup> Boutin Jones, Inc., Janssen Malloy, LLP, and "Rapport and Marston, an association of attorneys." In this Memorandum, "Rapport and Marston" appears in quotation marks because, as shown by the Declarations of David Rapport (¶¶ 3-5, Exhibit DR-1) and Lester Marston (¶ 24, Exhibit LM-12) lodged herewith, "Rapport and Marston" is an association of sole practitioners and as such had no legal relationship with either the Tribe or the Casino; rather, defendants David Rapport and Lester Marston each had separate contractual relationships directly with the Tribe.

<sup>4</sup> The Rancheria ("Tribe") is a federally-recognized Indian Tribe for which the federal government holds title to land in Humboldt County in trust as Indian country. Complaint, ¶ 9.

the entire action on the grounds that: (a) the Blue Lake Defendants all are cloaked with the Tribe's sovereign immunity to unconsented suit, which consent has not been given, thus depriving this Court of jurisdiction over Plaintiffs' action against them (F.R.Civ.P. 12(b)(1) and/or (2)); (b) Blue Lake Defendants Judge Marston, Clerk Huff, Ramsey, "Rapport and Marston," Rapport, Vaughn, Burrell, DeMarse, and Lathouris possess either absolute judicial or prosecutorial immunity, thus depriving this Court of jurisdiction over them or the claims asserted against them (F.R.Civ.P. 12(b)(1) and/or (2)); and (c) Blue Lake Defendant Frank possesses absolute testimonial immunity (F.R.Civ.P. 12(b)(1) and/or (2)).

### PLAINTIFFS' CLAIMS

Plaintiffs allege eight purported claims for relief, the first seven of which, ostensibly are asserted only by Plaintiff ABI:

1. Defendants Ramsey, Frank, Boutin Jones, Janssen Malloy, Stouder, O'Neill, Burroughs and Yarnell allegedly committed the tort of "wrongful use of civil proceedings" (*i.e.*, malicious prosecution) against ABI<sup>5</sup> in the Tribe's filing and prosecution of *Blue Lake v. ABI* in the Tribe's court, and/or defending the Tribal Court, Judge Marston and Clerk Huff in federal lawsuits filed by Plaintiff Acres;

2. Defendants Rapport, "Rapport and Marston," Judge Marston, Clerk Huff, DeMarse, Vaughn, Burrell, Lathouris, and Chase allegedly aided and abetted the Tribe's "wrongful use of civil proceedings" in connection with *Blue Lake v. ABI* and Acres' federal lawsuits;

3. Defendants "Rapport and Marston," Judge Marston, David Rapport, Clerk Huff, Burrell, DeMarse, Vaughn, Lathouris and Chase allegedly conspired with the Tribe<sup>6</sup> and the Tribe's other attorneys to commit the tort of wrongful use of civil proceedings in *Blue Lake v. ABI*;

4. Defendant Judge Marston allegedly breached his fiduciary duty (based on Illinois law) to Plaintiffs by failing to disclose that he also was serving as the attorney for the Tribe and Defendant

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<sup>5</sup> Claims 1-7 are asserted solely on behalf of ABI. Plaintiff Acres joins only in Plaintiffs' Eighth Claim (RICO), a claim that Acres could have asserted in the Superior Court, but apparently chose not to assert.

<sup>6</sup> The Casino has no legal identity separate from the Tribe itself. Ramsey Declaration, ¶ \*.

1 Ramsey in matters unrelated to *Blue Lake v. ABI*, and by failing to recuse himself from *Blue Lake v.*  
 2 *ABI* at the outset of that litigation;

3 5. Defendants Judge Marston, Ramsey, Frank, Clerk Huff, "Rapport and Marston,"  
 4 Boutin Jones, Rapport, Burrell, DeMarse, Vaughn, Lathouris, Chase, Stouder and O'Neill, and  
 5 Janssen Malloy, allegedly aided and abetted Defendant Judge Marston's alleged breach of his  
 6 fiduciary duty to ABI;

7 6. Defendant Judge Marston's alleged non-disclosure of the full scope of his activities on  
 8 behalf of the Tribe constituted constructive fraud, on which ABI allegedly relied to its detriment;

9 7. Defendants Ramsey, Frank, Clerk Huff, "Rapport and Marston," Rapport, Burrell,  
 10 DeMarse, Vaughn, Lathouris, Chase, Stouder and O'Neill and Boutin Jones allegedly aided and  
 11 abetted Judge Marston's alleged constructive fraud;

12 8. Based on the same facts, Defendants operated or managed the Tribal Court as a  
 13 racketeering enterprise, entitling Plaintiffs to relief in the form of treble money damages under 18  
 14 U.S.C. § 1964(c) ("RICO") and to, "Disgorgement of all compensation received by defendants from  
 15 Blue Lake, Blue Lake Casino, Ms. Ramsey, and any related entity, after a date to be determined at  
 16 trial, but in no event later than August 1, 2015."

17 Plaintiffs concede that the first seven claims are virtually identical to the seven causes of  
 18 action Acres unsuccessfully asserted against these same Defendants, on the same facts, in the  
 19 California Superior Court action entitled *Acres v. Marston*, currently on appeal to the California  
 20 Court of Appeal in Sacramento. (Complaint, ¶ 32).<sup>7</sup> Although Acres named these Defendants as  
 21 individuals in the Superior Court action, the Superior Court found, based on an in-depth analysis of  
 22 the facts and applicable case law, that these Defendants actually were being sued in their official  
 23 capacities, and dismissed the action based on Defendants' respective tribal, judicial and/or

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 26  
 27 <sup>7</sup> The only material differences between Acres' Superior Court action and this action are that  
 28 ABI was not a party to the former, and Plaintiffs assert a RICO claim that Acres, who owns and  
 controls ABI, failed to assert in the Superior Court.



prosecutorial immunities.<sup>8</sup> The same facts warrant the same result in the case at bar.

### MATERIAL FACTUAL ALLEGATIONS

For the purpose of this motion to dismiss, Plaintiffs' long and vitriolic Complaint must be analyzed in light of the following core set of facts:<sup>9</sup>

1. The Blue Lake Rancheria is federally-recognized Indian Tribe. Complaint, ¶ 9;
2. The federal government holds in trust for the Tribe the land on which the Tribe owns and operates the Blue Lake Casino & Hotel ("Casino") (Complaint ¶¶ 9, 10, 12) pursuant to a Class III gaming compact with the State of California;<sup>10</sup>
3. The Casino is an enterprise fund of the Tribe itself, operated under the direction of the Tribe's governing body, the Business Council, of which Defendant Ramsey is the elected Vice Chair. Complaint, ¶¶ 9, 12, 13; Declaration of Arla Ramsey lodged herewith, at ¶ 5 ("Ramsey Declaration");
4. The Tribe's Tribal Court was created by the Tribe's governing body in the exercise of its inherent sovereign power to establish and administer a judicial system. (Complaint, ¶ 11)
5. Defendant Judge Marston was, at all times relevant to this action, under contract to the Tribe to serve as the Chief Judge of the Tribal Court (Complaint, ¶ 16); Declaration of Lester Marston, lodged herewith, at ¶ 1 ("Marston Declaration"). Whatever the Complaint may allege about Judge Marston's purportedly non-judicial activities unrelated to the proceedings in *Blue Lake v. ABI*, the Complaint does not allege any interactions between Defendant Judge Marston and either Plaintiff

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<sup>8</sup> A copy of the Superior Court's Minute Order (hereinafter "Minute Order") granting the Blue Lake Defendants' motion to quash service and dismiss is attached as Exhibit 2 to the Request for Judicial Notice lodged herewith.

<sup>9</sup> In the context of a Rule 12(b)(1) motion to dismiss on the basis of sovereign immunity, "the party asserting subject matter jurisdiction has the burden of proving its existence," *i.e.*, that immunity does not bar the suit. No presumptive truthfulness attaches to a plaintiff's allegations, and the district court may consider evidence outside the Complaint. See *Pistor v Garcia*, 791 F3d 1104, 1111 (9th Cir. 2015).

<sup>10</sup> The Tribe's Compact is the tenth listed on the California Gambling Control Commission's website, <http://www.cgcc.ca.gov/?pageID=compacts>. A true copy of the Compact, downloaded from the Gambling Control Commission's website on 1/3/2020, is attached as Exhibit 3 to the RJN lodged herewith.

1 except as Marston presided over *Blue Lake v. ABI* as the Tribal Court's Chief Judge. (Marston  
2 Declaration, ¶¶ 4, 14, 37);

3 6. The Complaint's only allegations against Clerk Huff involving Plaintiffs are that in  
4 her capacity as Court Clerk, she conversed with and provided information and documents to Acres,  
5 and received filings from and provided copies of orders and rulings to the parties in *Blue Lake v.*  
6 *ABI*. (Complaint, ¶¶ 41, 42, 61, 62, 63, 81, 85, 88, 104, 123, Huff Declaration, ¶¶ 2, 4, 5);

7 7. Defendants Burrell, DeMarse and Vaughn are independent attorneys who contract  
8 from time to time with Defendants Marston and Rapport, and also are Associate Judges of the Tribal  
9 Court. (Complaint, ¶¶ 19, 20, 21) These Defendants allegedly either rendered assistance to  
10 Defendant Judge Marston as he presided over *Blue Lake v. ABI*, or performed research and drafted  
11 memoranda for Defendant Rapport in defense of the *Acres v. Blue Lake I and II* lawsuits.  
12 (Complaint, *e.g.*, ¶¶ 73, 77, 78, 79, 81, 84);

13 8. Defendant Lathouris is an independent attorney who contracted from time to time to  
14 perform legal research and draft orders for Judge Marston in *Blue Lake v. ABI*. (Complaint, ¶ 22);

15 9. Defendant Frank was a high-level Casino executive and the Tribe's Director of  
16 Business Development who received a copy of a demand letter sent to ABI, executed two  
17 declarations under penalty of perjury and verified answers to Interrogatories filed in *Blue Lake v.*  
18 *ABI*. (Complaint, ¶¶ 14, 48, 122);

19 10. Defendant "Rapport and Marston," is an association of sole practitioners, "exact form  
20 unknown" (Complaint, ¶ 17), with whom Defendants Marston, Rapport, Vaughn, Burrell, DeMarse  
21 and Lathouris are associated in some manner, but which the Complaint does not allege had any role  
22 in initiating or representing the Tribe in prosecuting *Blue Lake v. ABI*;

23 11. Defendant Rapport has served as the Tribe's legal counsel since 1983 (Complaint, ¶  
24 18), but is not alleged to have had any role in initiating or prosecuting *Blue Lake v. ABI*, and whose  
25 only role in the defense of *Acres v. Blue Lake I and II* was allegedly to "ghost write" some  
26 memoranda in that litigation (Complaint, ¶ 208). The Tribe contracts directly with Defendant  
27 Rapport to serve as its attorney (Rapport Declaration, ¶ 3);

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12. In 2010, Acres' company, ABI, and the Tribe, dba the Casino,<sup>11</sup> entered into a contract under which the Tribe was to advance ABI \$250,000 to develop and implement a server and tablet-based "iSlot" gaming system for the Casino. (Complaint, ¶ 48) A dispute arose between the Tribe and Acres over the interpretation of the contract and the performance of the iSlot system, and in January, 2016, the Tribe, dba the Casino, sued Acres and ABI in the Tribe's Tribal Court, alleging causes of action for breach of contract, tortious breach of the covenant of good faith and fair dealing, money had and received, unjust enrichment, and specifically against Acres, fraudulent inducement. (Complaint, ¶¶ 53, 54, 67)

13. Acres/ABI, represented only by Acres, moved the Tribal Court for an order dismissing the action for lack of jurisdiction and for judgment on the pleadings, and the Tribe moved to strike ABI's answer for lack of legal counsel. Defendant Judge Marston denied Plaintiffs' challenge to the Tribal Court's jurisdiction and their motion for judgment on the pleadings, and granted the Tribe's motion to strike ABI's answer because ABI was not represented by legal counsel, but gave ABI 45 days in which to obtain legal counsel and file a responsive pleading. (Complaint, ¶¶ 95, 96; Marston Declaration, ¶¶ 15, 16);

14. Acres then filed suit against the Tribal Court, Judge Marston and Clerk Huff in the U.S. District Court for the Southern District of California ("*Acres v. Blue Lake I*"), challenging the Tribal Court's jurisdiction. (Complaint, ¶ 67);

15. *Acres v. Blue Lake I* was transferred to the Northern District of California, where it was assigned to this Court, which granted the defendants' motion to dismiss, holding that:

"Because tribal court jurisdiction is at least colorable, not futile, and neither motivated by a desire to harass nor conducted in bad faith, Acres is required to exhaust his tribal remedies before bringing his lawsuit in federal court, and defendants' motion [to dismiss for failure to exhaust tribal remedies] is GRANTED."<sup>12</sup>

16. While the Tribal Court action was still pending, Acres filed a second lawsuit in this

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<sup>11</sup> Under IGRA, at § 2710(b)(2)(A), and § 6.2 of the Tribe's Class III gaming compact with the State of California, only the Tribe may have a proprietary interest in gaming conducted on the Tribe's Indian lands.

<sup>12</sup> Plaintiffs did not appeal from this dismissal, giving the Court's determination collateral estoppel effect as to the same set of facts as are asserted in Plaintiffs' current Complaint.

1 Court (*Acres v. Blue Lake II*), this time contending that the Court should stop the Tribal Court  
 2 proceedings because the Court was biased against Acres, and that Defendant Judge Marston had  
 3 failed to recuse himself despite an alleged conflict of interest arising from his having served as the  
 4 Tribe's attorney in a lawsuit against the California Department of Motor Vehicles to obtain  
 5 recognition of a Tribal Court domestic relations order. (Complaint, ¶ 76);

6 17. This Court allowed Acres to conduct limited discovery relative to the "good faith  
 7 exception" to the general rule that federal courts must require exhaustion of tribal court remedies.  
 8 Acres obtained four years of billing records from Defendant Marston, subject to a protective order  
 9 that limited Acres' use of those records solely to that lawsuit and solely on the issue of the  
 10 application of the aforementioned "good faith exception."<sup>13</sup>

11 18. Judge Marston recused himself without having made any rulings on the merits of *Blue*  
 12 *Lake v. ABI*, and after he appointed retired California Court of Appeal Justice James Lambden to  
 13 preside over further proceedings in *Blue Lake v. ABI*, this Court dismissed *Acres v. Blue Lake II* as  
 14 moot. (Complaint, ¶ 111);

15 19. Justice Lambden entered summary judgment in favor of Acres, after which Blue Lake  
 16 voluntarily dismiss its claim against ABI. (Complaint, ¶ 113);

17 20. Defendants Boutin Jones and Janssen Malloy represented Blue Lake at various stages  
 18 of the *Blue Lake v. ABI* Tribal Court litigation. (See, e.g., Complaint, ¶¶ 48, 81, 90, 91);

19 21. The Boutin Jones Defendants represented Blue Lake, Judge Marston and Clerk Huff  
 20 in the *Acres v. Blue Lake* federal court litigation. (See, e.g., Complaint, ¶¶ 48, 81, 90, 91);

21 22. Defendant Rapport, in his capacity as the Tribe's tribal attorney, provided assistance  
 22 to the Boutin Jones Defendants in successfully defending against the *Acres v. Blue Lake* federal court  
 23 litigation, but had no role in the *Blue Lake v. ABI* Tribal Court litigation. (Rapport Declaration, ¶¶  
 24 6-10);

25 23. Defendant DeMarse assisted Defendant Rapport in defending against the *Acres v.*  
 26 *Blue Lake* federal litigation. (Complaint, ¶ 128; Rapport Declaration, ¶ 7-10);

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27 <sup>13</sup> The Order re: Discovery, including the Protective Order, is attached as Exhibit 4 to the  
 28 Request for Judicial Notice lodged herewith.

24. Defendants Vaughn, Burrell and Lathouris served as law clerks to Defendant Judge Marston while the latter presided over *Blue Lake v. ABI*, performing legal research, drafting orders, and in one instance taking notes during a court hearing. (Complaint, ¶¶ 64, 77, 79, 126, 127, 129)

## ARGUMENT

### **I. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE BLUE LAKE DEFENDANTS ARE CLOAKED WITH TRIBAL, OFFICIAL, JUDICIAL AND PROSECUTORIAL IMMUNITY, THUS WARRANTING DISMISSAL WITHOUT LEAVE TO AMEND PURSUANT TO F.R.Civ.P. 12(b)(1)**

#### **A. The Tribal Court, the Casino and the Blue Lake Defendants are Cloaked with the Blue Lake Rancheria's Sovereign Immunity From Suit**

##### **1. The Blue Lake Rancheria Possesses Sovereign Immunity**

As a federally-recognized Indian tribe, the Tribe cannot be sued unless it has expressly consented to be sued. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ["Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."]; see also *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). Sovereign immunity has two aspects: (1) submission to the jurisdiction of the forum in which a claim is asserted; and (2) consent to the creation of the substantive right to the relief sought. *U.S. v. Testan*, 424 U.S. 392, 399 (1976).

Tribal sovereign immunity is not a discretionary doctrine that may or may not be applied as a remedy depending on the equities of a given situation; rather, it presents a threshold jurisdictional question to be determined as a matter of federal law. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). A Tribe's sovereign immunity extends to the Tribe's governmental and commercial activities, whether they occur on or off of a reservation. See *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, *id.*, at 523 U.S. 751. If a defendant asserts sovereign immunity, the burden of sustaining the Court's jurisdiction shifts to the plaintiff. See, e.g., *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015).

Tribal sovereign immunity also extends to an entity that is an "arm of the Tribe." *White v. Univ. of Calif.*, 765 F.3d 1010, 1025 (9th Cir. 2014). In determining whether an entity is entitled to sovereign immunity as an "arm of the tribe," courts examine the following factors: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and

1 management, including the amount of control the tribe has over the entities; (4) the tribe's intent with  
 2 respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe  
 3 and the entities." *Id.* [ internal quotations and citations omitted]. In this case, both the Tribal Court  
 4 and the Casino satisfy *White's* five factors.

5 The Tribal Court was established by tribal law in the exercise of the Tribe's sovereign judicial  
 6 power (Complaint, ¶ 10), and thus is not merely an "arm of the Tribe," it is an integral component of  
 7 the tribal government itself, to which the *White* factors simply do not apply. *See, e.g., Iowa Mut. Ins.*  
 8 *Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

9 According to the Complaint (¶¶ 11, 36, 37, 64), and as buttressed by Defendant Ramsey's  
 10 Declaration (at ¶¶ 4, 5), the Casino easily satisfies *White's* five factors: it was created by the Tribe to  
 11 generate revenues for the Tribe's governmental purposes under IGRA; it is wholly owned and  
 12 operated by the Tribe itself on the Tribe's Indian trust lands; it is not separately organized from the  
 13 Tribe itself (Ramsey Decl., at ¶ 5); under the Tribe's federally-approved gaming ordinance, profits  
 14 from gaming at the casino are deposited directly in Blue Lake's general treasury, and under IGRA,  
 15 can only be used for governmental purposes approved by the Department of the Interior."  
 16 (Complaint, ¶ 11, 37; Ramsey Decl., ¶ 5; 25 U.S.C. § 2710(b)(2)(a), and § 6.2 of the Compact.) *See*  
 17 *also, Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) [fact that Tribe created,  
 18 owned and operated casino to raise governmental revenues sufficed to qualify casino as arm of the  
 19 Tribe.]

## 20 2. The Tribe's Sovereign Immunity Also Cloaks the Blue Lake Defendants

21 A Tribe cannot act except through its officials. Thus, a Tribe's sovereign immunity extends  
 22 not only to its arms, but also to tribal officials when they act in their official capacity and within the  
 23 scope of the authority the Tribe lawfully may confer upon them. For example, in *Hardin v White*  
 24 *Mtn. Apache Tribe*, 779 F.2d 476 (9th Cir 1985), the plaintiff sued the Tribe and tribal officials as  
 25 individuals, seeking declaratory and injunctive relief and damages for excluding him from the  
 26 Reservation despite his claim of the right to access trust land his parents had leased from the Tribe.  
 27 *Id.* at 478. The Ninth Circuit determined that because the tribal officials were sued for acts taken in  
 28 their representative capacity and within the authority that the Tribe validly had delegated to them,

1 they were actually being sued in their official capacities, and thus were cloaked with the Tribe's  
 2 sovereign immunity, requiring dismissal of the action. *Id.* at 479-80; see also *Maxwell v. County of*  
 3 *San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013) (explaining the holding in *Hardin*: "[T]he plaintiff  
 4 had sued high-ranking tribal council members for voting to eject him. Holding the defendants liable  
 5 for their legislative functions would therefore have attacked the very core of tribal sovereignty.")  
 6 (citations omitted).

7 Similarly, in *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir.  
 8 1991), tribal officials were sued for carrying out the Tribe's order to block a road across the  
 9 Reservation that the plaintiff used to access a quarry. The plaintiff argued that the officials had  
 10 exceeded the scope of their authority, and thus were not entitled to share in the Tribe's immunity.  
 11 The district court rejected that argument, and the Ninth Circuit affirmed, holding: "Even if the  
 12 complaint is liberally construed to allege that the tribal officials themselves "blocked" the road, . . .  
 13 [t]here is no allegation that closing the road to Imperial exceeded the officials' authority granted by  
 14 the Band; quite the contrary, the Band clearly authorized the closure." *Id.*, 940 F.2d at 1271.<sup>14</sup>

15 Since *Hardin* and the other above-cited cases were decided, the Ninth Circuit and the  
 16 Supreme Court have adopted a "remedy focused" or "real party in interest" approach to analyzing  
 17 whether tribal officials or employees can be sued individually for actions taken within the course and  
 18 scope of their authority. For example, in *Maxwell, supra*, the Ninth Circuit held that a  
 19 tribally-employed paramedic could be sued individually for damages caused by his gross negligence  
 20 in the course of responding to an off-Reservation call pursuant to an agreement between the Tribe  
 21 and a local fire protection district, because an award of damages against the "low-ranking" employee  
 22 would not impact the Tribe itself, but with the caveat that:

23 While individual capacity suits against low-ranking officers typically  
 24 will not operate against the sovereign, we cannot say this will always  
 25 be the case. In any suit against tribal officers, we must be sensitive to  
 26 whether "the judgment sought would expend itself on the public  
 treasury or domain, or interfere with the public administration, or if  
 the effect of the judgment would be to restrain the [sovereign] from

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27 <sup>14</sup> See also, *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968) [tribal attorney may  
 28 qualify as a "tribal official" if actions are "clearly tied to their roles in the internal  
 governance of the tribe"].



1                   *acting, or to compel it to act."*

2     *Maxwell*, 708 F.3d at 1088 (quoting *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992)  
3     (alteration in original) (emphasis added).

4             In *Lewis v. Clarke*, 137 S.Ct. 1285 (2017), the Supreme Court took essentially the same  
5     approach as in *Maxwell*. *Lewis* arose from a collision on an interstate highway within Connecticut  
6     caused by Clarke, an employee of the Mohegan Tribal Gaming Authority who was driving patrons of  
7     the Mohegan Sun Casino to their homes off the Tribe's lands. Plaintiffs sued Clarke in his individual  
8     capacity in state court, which held that tribal sovereign immunity barred the damage suit against  
9     Clarke. The United States Supreme Court held that courts cannot simply rely on the characterization  
10    of the parties in a complaint, but rather must determine in the first instance whether the remedy  
11    sought is truly against the sovereign – *i.e.*, whether the tribe is the real party in interest. *Lewis*, 137  
12    S.Ct. at 1290. The Supreme Court characterized the suit against Clarke as one to recover for his  
13    personal actions, which "will not require action by the sovereign or disturb the sovereign's property."  
14    Therefore, "immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in  
15    interest." *Id.* at 1291.

16            In *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015), the Court held that a tribal police  
17    chief and tribal casino employees could be sued individually based upon their wrongful detention  
18    and theft of money from successful gamblers who had broken no laws, because imposing liability for  
19    money damages would not "expend itself on the [tribal] treasury or domain, or interfere with [tribal]  
20    administration, . . . [or] restrain the [Tribe] from acting." Under the Indian Civil Rights Act, 25  
21    U.S.C. § 1302, the Tribe could not have conferred that authority on the defendants.

22            The case at bar falls within the *Hardin*, *Imperial Granite*, and *Littell* line of cases, rather than  
23    *Lewis* and *Maxwell*. Although the Blue Lake Defendants are named as individuals, the Tribe is the  
24    real party in interest, because the Tribe, not any of the Blue Lake Defendants, sued Plaintiffs in the  
25    Tribal Court. The Tribe appointed Defendants Judge Marston and Clerk Huff, and both were  
26    exercising the Tribe's judicial powers through the operation of the Tribal Court. In the exercise of  
27    his authority as the Tribe's chief judicial officer, Judge Marston retained the services of Defendants  
28    Burrell, Vaughn and Lathouris to assist him in exercising the Tribe's governmental powers in *Blue*



1 *Lake v. ABI*. The Tribe retained Defendant Rapport as its General Counsel, and through him  
 2 Defendant DeMarse, to provide the Tribe with legal advice and representation in defending against  
 3 Acres' federal court attacks on the Tribe's sovereign powers.

4 Unlike a damage action against a low-level tribal casino employee who negligently operates a  
 5 tribally-owned vehicle on a state highway (*Lewis*), or against a low-level tribal paramedic who is  
 6 grossly negligent at the scene of an off-Reservation emergency (*Maxwell*), Acres' suit, if allowed to  
 7 proceed, will intrude upon and hobble the very operation of the executive and judicial branches of  
 8 the Tribe's government – the executive branch's decision to sue (even ultimately unsuccessfully) to  
 9 protect tribal assets, and the judicial branch's ability to preside over litigation would be deterred. In  
 10 these respects, Acres' suit is indistinguishable from legal actions against the tribal officials and  
 11 officers who barred and ejected a non-member from their Tribe's reservation (*Hardin*), or who  
 12 carried out their Tribe's decision to prevent access to a Reservation road (*Imperial Granite*) –  
 13 lawsuits that were dismissed on sovereign immunity grounds because the underlying actions were  
 14 those of the respective Tribes, and judgment for plaintiffs would interfere with the administration of  
 15 tribal government or would restrain the Tribe from acting or compel it to act in ways contrary to  
 16 lawful tribal powers and policy.

17 Plaintiffs undoubtedly will contend, based on this Court's ruling in *JW Gaming v. James*, No.  
 18 3:18-cv-02669-WHO (Oct. 2018), *aff'd.*, 778 Fed.Appx. 545 (9th Cir. 2019) (memorandum), that  
 19 because the Blue Lake Defendants are being sued individually for money damages, they are not  
 20 cloaked with either Tribal or official immunity. The facts underlying *JW Gaming* make it easily  
 21 distinguishable from those alleged in Plaintiffs' Complaint.

22 In *JW Gaming*, individuals who happened to be tribal officials, executives, contractors or  
 23 consultants fraudulently induced an investment of more than \$5 Million in a proposed tribal casino  
 24 project. Rather than using the investor's money for its intended purpose, the defendants diverted it to  
 25 their individual benefit without ever actually proceeding with the casino project. The investor sued  
 26 the various individual tribal officials and employees for money damages. This Court allowed the suit  
 27 to proceed over a motion to dismiss on sovereign immunity grounds, because the defendants had not  
 28 acted on the Tribe's behalf, but instead had "engaged in a scheme to fraudulently solicit a \$5,380,000

investment in the Pinoleville Casino Project[.]" 2018 WL 4853222, at \*1. Thus, allowing the suit to proceed against the individual defendants would not have bound the Tribe; in other words, the Tribe was not the real party in interest. (*Id.* at \*4) Indeed, the Tribe could not validly have authorized its officials to commit fraud, so their actions were *ultra vires*, a showing that Plaintiffs herein have not alleged or could make.

By contrast, all of the actions for which the Blue Lake Defendants are being sued were actions taken by tribal officials or representatives exercising core functions of tribal self-governance and tribal administration. If elected tribal officials, senior tribal executives, tribal judges and court staff, and the attorneys providing the Tribe with legal advice and representation in tribal or federal court can be sued individually for the Tribe's actions, then no elected tribal official, senior tribal executive, tribal court judge or court administrative staff, or tribal attorney could faithfully discharge his/her duties in the Tribe's interest; rather, the people without whom the tribal government could not operate necessarily would be inhibited by concerns about their personal liability to third parties that might be impacted by the Tribe's decisions and actions. In addition, as noted by the Superior Court, allowing this litigation to proceed would impact the Tribe directly by requiring production of tribal documents, testimony by tribal officials, and disclosure of internal tribal governmental deliberations. For the foregoing reasons, even under *Maxwell*, *Lewis v. Clarke* and *Pistor*, the Tribe's inherent sovereign immunity clearly cloaks all of the Blue Lake Defendants.

## **II. DEFENDANTS MARSTON, RAMSEY, HUFF, BURRELL, VAUGHN, DeMARSE AND LATHOURIS ARE CLOAKED WITH ABSOLUTE JUDICIAL OR QUASI-JUDICIAL IMMUNITY**

### **A. Tribal Court Judges Marston, Ramsey, Burrell, Vaughn and DeMarse, Tribal Court Clerk Huff, and Tribal Court Law Clerks Burrell, Vaughn, DeMarse and Lathouris Are Immune from Suit Arising Out of Their Judicial Acts**

A long line of United States Supreme Court precedents acknowledges that, with very few and limited exceptions, judges are absolutely immune from suits for money damages based on their judicial actions. *See, e.g., Mireles v. Waco*, 502 U.S. 9 (1991), citing *Forrester v. White*, 484 U.S. 219 (1988). Citing cases such as *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978), California law is consistent with federal law. *See Olney v. Sacramento County Bar Ass'n.*, 212 Cal.App.3d 807 (1989): "Judges enjoy absolute immunity from liability for damages for acts performed in their

1 judicial capacities. Immunity exists for 'judicial' actions; those relating to a function normally  
 2 performed by a judge and where the parties understood they were dealing with the judge in his  
 3 official capacity. *Stump, supra*, at p. 362." A tribal court judge is entitled to the same absolute  
 4 judicial immunity that shields state and federal court judges. *Penn v. United States*, 335 F.3d 786,  
 5 789 (8th Cir. 2003). Indeed, the Complaint, at ¶ 16, explicitly concedes Judge Marston's absolute  
 6 immunity for his judicial acts.

7 "Like other forms of official immunity, judicial immunity is an immunity from suit, not just  
 8 from ultimate assessment of damages." *Mireles v Waco*, at 11. This immunity applies, "however  
 9 erroneous the act may have been, and however injurious in its consequences it may have proved to  
 10 the plaintiff." *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985). Indeed, even "[g]rave  
 11 procedural errors or acts in excess of judicial authority" do not deprive a judge of this immunity.  
 12 *Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996).

13 As noted in *Brewster*:

14 Nor is judicial immunity lost by allegations that a judge conspired with  
 15 one party to rule against another party: 'a conspiracy between a judge  
 16 and [a party] to predetermine the outcome of a judicial proceeding,  
 while clearly improper, nevertheless does not pierce the immunity  
 extended to judges . . .

17 *Id.* at 1246.

18 In addition, "The concern for the integrity of the judicial process that underlies the absolute  
 19 immunity of judges also is reflected in the extension of absolute immunity to 'certain others who  
 20 perform functions closely associated with the judicial process.'" *Id.* at 1246. "Under this functional  
 21 approach, immunity flows from the nature of the responsibilities of the individual official." *Id.* at  
 22 1244-1245. This immunity extends to law clerks. *Id.* at 1246; *see also, Mitchell v. McBryde*, 944  
 23 F.2d 229, 230 (5th Cir.1991). Likewise, "[c]ourt clerks and administrators are also entitled to  
 24 absolute immunity from liability for damages 'when they perform tasks that are an integral part of the  
 25 judicial process.'" *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir. 1987).

26 Plaintiffs are suing Defendants Judge Marston, Clerk Huff, and Law Clerks/Associate Judges  
 27 Ramsey, Burrell, Vaughn, DeMarse, and Lathouris for judicial or quasi-judicial acts while Judge  
 28 Marston was presiding over *Blue Lake v. ABI*. Judge Marston's initial decision not to recuse himself,

1 and his subsequent rulings on motions, were quintessentially judicial acts. Serving as Judge  
 2 Marston's law clerks while Judge Marston presided over *Blue Lake v. ABI* were quintessentially  
 3 quasi-judicial acts, as were Clerk Huff's actions in issuing the summons, receiving and filing  
 4 pleadings, and transmitting the Tribal Court's orders.

5 Simply put, the Complaint alleges no facts to support abrogating the Blue Lake Defendants'  
 6 judicial or quasi-judicial immunity for their alleged actions in connection with *Blue Lake v. ABI* or  
 7 *Acres v. Blue Lake I and II*; see *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 929 (9th  
 8 Cir.2004) [Members of state licensing agency perform quasi-judicial functions and thus have  
 9 absolute immunity against personal liability for participation in investigations and licensing  
 10 decisions].

#### 11 **B. The Complaint Fails to Allege an Exception to Judicial Immunity**

12 Although the Complaint characterizes the conduct of the defendants as "despicable, and rife  
 13 with malice, oppression and fraud," *see, e.g.*, Complaint, ¶¶ 2, 75, 142, 150, 157, 166, 173, 183, 192,  
 14 the Blue Lake Defendants sued in connection with their service to the Tribal Court still are protected  
 15 by judicial immunity, because absolute judicial immunity can only be overcome in two limited sets  
 16 of circumstances. *Mireles v Waco*, 502 U.S at 11.

17 First, a judge is not immune from suit based on actions, though judicial in nature, taken in the  
 18 "complete absence of all jurisdiction." *Id.* A judicial officer acts in the clear absence of jurisdiction  
 19 only if he "knows that he lacks jurisdiction, or acts despite a clearly valid statute or case law  
 20 expressly depriving him of jurisdiction." *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985), citing  
 21 *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980). The scope of a judge's jurisdiction is  
 22 construed broadly where judicial immunity is at stake. *Penn v. United States*, *supra* at 789-790.  
 23 Therefore, courts have held that judges enjoy judicial immunity even when there are procedural  
 24 defects in their appointment, if they are "discharging the duties of that position under the color of  
 25 authority." *White by Swafford v. Gerbitz*, 892 F.2d 457 (6th Cir. 1989).

26 Based on this Court's orders dismissing *Acres v. Blue Lake Rancheria Tribal Court* (N.D.  
 27 Cal. Aug. 10, 2016) No. 16-cv-02622-WHO, 2016 U.S. Dist. LEXIS 105786, at \*9-13, and *Acres v.*  
 28 *Blue Lake Rancheria Tribal Court* (Feb. 24, 2017) No. 16-cv-05391-WHO, 2017 U.S. Dist. LEXIS

26447, at \*9, Plaintiffs cannot show that Judge Marston, Clerk Huff or Judge Marston's law clerks acted in complete absence of all jurisdiction: "[A] colorable or plausible basis for [tribal court] jurisdiction exists in this case based on the first *Montana [v. United States]*, 450 U.S. 544, 565 (1981)] exception, which 'allows a tribe to exercise jurisdiction over the activities of non-members who enter into a consensual relationship with a tribe,' that the 'tribal court does not 'plainly' lack jurisdiction," and that consideration of the case elements "weigh in favor of a finding of tribal jurisdiction." Moreover, even as Judge Lambden granted summary judgment in favor of Acres and against the Tribe, the Tribal Court found that it had jurisdiction over the action, and Acres did not appeal from that determination.<sup>15</sup>

The second circumstance in which absolute judicial immunity would not bar an action is if the complained-of act constitutes a non-judicial act – *i.e.*, an act not taken in the exercise of a judicial function. See *Mireles v. Waco*, *supra*, [If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error ... or was in excess of his authority."] *Mireles v Waco*, *supra*, at 12-13.

Whether an act taken by a judge or other court official is "judicial" is based on factors that relate to the nature of the act itself: *i.e.*, (1) whether the precise act is a normal judicial function; (2) whether the events occurred in the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the events at issue arose directly and immediately out of a confrontation with the judge in his/her official capacity. *Meek v. County of Riverside*, 183 F.3d 962, 967 (9th Cir. 1999), citing *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1302 (9th Cir. 1989) [judge's vote to terminate a court commissioner in retaliation for exercising his First Amendment right to seek election to a judgeship in competition with another commissioner deemed an administrative, rather than judicial act, because it occurred outside the scope of a specific judicial proceeding].

Courts have found conduct to be non-judicial in nature and declined to find judicial immunity

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<sup>15</sup> Blue Lake Rancheria Tribal Court Case No. C-15-1215-JRL, Order, attached to Plaintiffs' Complaint as Exhibit 2, pp. 6-11. Under *Iowa Mutual v. LaPlante*, *supra*, if Plaintiffs had disagreed with Judge Lambden's jurisdictional determination, their remedy would have been to seek tribal appellate review. They did not.

only in rare circumstances. *See, e.g., Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996) [judge stalked and sexually assaulted a litigant]; *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) [justice of the peace accused of forcibly removing a man from courtroom and physically assaulting him]; *Forrester v. White*, 484 U.S. 219 (1988) [state court judge not immune to lawsuit under 42 U.S.C. § 1983 alleging discriminatory hiring practice, because hiring decision was an administrative act unrelated to a specific judicial proceeding].

Nothing in the Complaint would support the second exception to any of the Blue Lake Defendants' absolute judicial or quasi-judicial immunity, because Judge Marston's only acts relating to Plaintiffs consisted of presiding over hearings in open court, reviewing the parties' filings, and issuing orders and rulings on motions – commonly executed judicial tasks recognized in, *inter alia*, *Mireles v. Waco*, and thus well within the scope of his judicial authority.

Plaintiffs' allegations regarding Blue Lake Defendants Burrell, Vaughn, DeMarse and Lathouris, as Law Clerks to Judge Marston, demonstrate that they too performed functions "closely associated with the judicial process" and therefore are entitled to absolute judicial immunity from suit. *Moore v. Brewster*, *supra*, at 1246. (Complaint, ¶¶ 81(b), 84, 85, 102, and 122 (Burrell); Complaint, ¶¶ 65, 123 (Vaughn); Complaint, ¶¶ 80, 124 (Lathouris))

Based on Plaintiffs' own factual allegations, the nature of the work allegedly performed by Defendants Burrell, Vaughn, DeMarse and Lathouris as it related to *Blue Lake v. ABI* or *Acres v. Blue Lake I and II* clearly was that of associate judges and/or judicial law clerks, and therefore they also are shielded by the doctrine of absolute judicial immunity.

Plaintiffs allegations against Clerk Huff (erroneous issuance of the wrong summons, Complaint, ¶ 41, and rejection of one of Acres' court filings for failing to substantially conform to Blue Lake Tribal Court Rule 12, Complaint, ¶ 62, describe functions cloaked with absolute judicial or quasi-judicial immunity. *See Moore v. Brewster*, *supra*, at 1246.

Because Plaintiffs have alleged only acts that are judicial or quasi-judicial in nature, the Blue Lake Defendants are absolutely immune to all of the claims for relief Plaintiffs assert against them.

### **III. PROSECUTORIAL IMMUNITY BARS ACRES' CLAIMS AGAINST DEFENDANTS RAPPORT, BURRELL, VAUGHN, DeMARSE, LATHOURIS AND "RAPPORT AND MARSTON"**



For substantially the same reasons that judges have absolute immunity for their judicial actions, attorneys acting on behalf of a government, whether federal, state or tribal, also possess absolute immunity from civil suit for damages. This immunity is known as "prosecutorial immunity." See *Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976).

Prosecutorial immunity also is available in a civil or administrative context. As the Supreme Court has held, government attorneys who initiate administrative proceedings are, like prosecutors, absolutely immune from liability since "[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." *Butz v. Economou*, 438 U.S. 478 (1978). This principle, in turn, has been extended to apply in some instances to government attorneys defending or prosecuting civil suits. See *Sellars v. Proconier*, 641 F.2d 1295, 1303 (9th Cir. 1981); *Mangiafico v. Blumenthal*, 471 F.3d 391, 396-97 (2d Cir. 2006) [prosecutorial immunity may apply to the functions of a government attorney "that can fairly be characterized as closely associated with the conduct of litigation or potential litigation ... including the defense of such actions"].

Blue Lake Defendants Rapport and DeMarse both are cloaked with prosecutorial immunity, because the only legal services they allegedly rendered that had anything to do with the Plaintiffs were rendered solely in their official capacities as the Tribe's attorneys providing backup to the Boutin Jones attorneys defending the Tribal Court in *Acres v. Blue Lake I and II*. See Rapport Decl., ¶¶ 7, 8. If Defendant DeMarse drafted an order for Judge Marston in *Blue Lake v. ABI*, that work was cloaked with judicial immunity.

#### **IV. DEFENDANT FRANK HAS TESTIMONIAL IMMUNITY**

The Complaint alleges only that Blue Lake Defendant Frank may have been copied with a demand letter from Defendant Stouder, and that in *Blue Lake v. ABI*, he verified Interrogatory responses and executed two declarations filed with the Tribal Court. (Complaint, ¶¶ 14, 48, 122)

Defendant Frank's execution of declarations filed in *Blue Lake v. ABI* is shielded from Plaintiffs' action by the absolute immunity accorded to witnesses in judicial proceedings. See *Briscoe v. LaHue*, 460 U.S. 325 (1983); see also, *Butz v. Economou*, *supra*.

1 **CONCLUSION**

2 For all of the foregoing reasons, Blue Lake Defendants Judge Marston, Clerk Huff, Ramsey,  
 3 Frank, Burrell, Vaughn, DeMarse, Lathouris, Rapport, and "Rapport and Marston" respectfully  
 4 request that the Court issue an order granting their motion to dismiss. Because Defendants'  
 5 respective immunities render amendment of Plaintiffs' Complaint futile, the Complaint should be  
 6 dismissed without leave to amend, and Plaintiffs' entire action should be dismissed for lack of  
 7 jurisdiction.

8 Dated: January 3, 2020

Respectfully submitted,

9 /s/ George Forman

10 George Forman

11 Attorney for Specially Appearing Defendants Judge  
 12 Lester Marston, Arla Ramsey, Thomas Frank, Anita  
 13 Huff, "Rapport and Marston," David Rapport, Cooper  
 14 DeMarse, Darcy Vaughn, Ashley Burrell and  
 15 Kostan Lathouris

16 Dated: January 3, 2020

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17 /s/ Allison Jones

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 21 Lester Marston, Ashley Burrell, Cooper DeMarse and  
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