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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| **ACRES BONUSING, INC.,** et al.,<br><br>Plaintiff,<br><br>v.<br><br>**LESTER MARSTON,** et al.,<br><br>Defendants. | Case No.: 3:19-cv-5418-WHO<br><br>**OPPOSITION TO DEFENDANT, RAPPORT & MARSTON/BLUE LAKE MTD AT DKT. 32**<br><br>Date: April 15, 2020<br>Time: 2pm<br>Judge: William H. Orrick |

**Please note: This memo begins at page one to mirror ECF numbering.**

**The body of this memo continues for 21 pages.**

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## I. Introduction

In late 2015 Blue Lake Rancheria ("Blue Lake") sued Plaintiffs, Acres Bonusing, Inc. ("ABI") and James Acres ("Acres"), individually, in Blue Lake's tribal court. The case was styled as, *Blue Lake Casino & Hotel v. Acres Bonusing, Inc.* ("*Blue Lake v. ABI"*).

Defendant, Judge Lester Marston ("Judge Marston") originally presided over *Blue Lake v. ABI* even though he was Blue Lake's attorney at the time. After Acres uncovered what Judge Marston had previously denied, that Marston was, indeed, Blue Lake's attorney, Judge Marston finally stepped down. Soon thereafter the Honorable Justice James Lambden replaced Judge Marston and granted Acres summary judgment, finding the cause of action against Acres had been "conjured." Blue Lake then, virtually immediately, voluntarily dismissed ABI.

ABI and Acres bring causes of action for RICO, Wrongful Use of Civil Proceedings, and Breach of Fiduciary Duty against three defendant factions: 1) the Rapport & Marston/Blue Lake faction; 2) the Boutin Jones faction; and 3) the Janssen Malloy faction.

This paper opposes the Rapport & Marston/Blue Lake faction's Motion to Dismiss at docket 32. The Rapport & Marston/Blue Lake faction consists of Defendants, Rapport & Marston, David Rapport, Judge Marston, Amy Burrell, Darcy Vaughn, Kostan Lathouris, Cooper DeMarse, Arla Ramsey, Anita Huff, and Thomas Frank. For the remainder of this Opposition "Defendants" shall refer to the Rapport & Marston faction as a whole.

Defendants move the Court under Rule 12(b)(1) to find Blue Lake's sovereign immunity bars suit against them. The Court should deny the motion because Defendants are sued as **individuals** and no judgment against them could bind Blue Lake.

Judge Marston, Vaughn, Burrell, Lathouris, DeMarse, Ramsey and Huff all move the Court to find judicial immunity bars suit against them. The Court should construe the motion as made under Rule 12(b)(6) and deny it because defendants all engaged in non-judicial conduct.

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Rapport & Marston, Rapport, Vaughn, Burrell, Lathouris, and DeMarse all move the Court to find prosecutorial immunity bars suit against them. The Court should construe the motion as made under Rule 12(b)(6) and deny it because *Blue Lake v. ABI* was not a criminal case, defendants were not prosecutors, and Blue Lake lacks criminal jurisdiction over non-Indians, ABI and Acres.

Defendant Frank moves the Court to find testimonial immunity bars suit against him. The Court should construe the motion as made under Rule 12(b)(6) and deny it because Frank engaged in non-testimonial conduct.

## II. Factual Background

A full factual history is available in the Verified Complaint. This factual background briefly frames the facts necessary for deciding Defendants' Motion to Dismiss at docket 32. This factual background draws on the Verified Complaint and declarations submitted by Defendants.

### A. Rapport & Marston's Formation and Operation.

Rapport & Marston is an association of attorneys in Ukiah, California. Dkt. 1, ¶17. It was formed by Rapport and Judge Marston so they might share expenses. Rapport and Judge Marston use Rapport & Marston to represent various clients. Dkt. 32-6, ¶3. Rapport and Judge Marston both represent Blue Lake as attorneys. Dkt. 1, ¶¶23, 35. Vaughn, Burrell, Lathouris and DeMarse aid Rapport and Judge Marston in representing Blue Lake as attorneys. Dkt. 1, ¶¶73, 124-128; Dkt. 32-6, ¶¶7-10.

### B. The Parties Involvement with *Blue Lake v. ABI*.

Judge Marston assigned himself as the initial Presiding Judge in *Blue Lake v. ABI.* Dkt. 1, ¶40. Judge Marston contracted with Vaughn, Burrell, Lathouris and DeMarse to aid in presiding over *Blue Lake v. ABI.* Id., ¶35. Attorneys from Boutin Jones represented Blue Lake

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in *Blue Lake v. ABI.* Rapport provided a conduit for communication to flow from Rapport & Marston to Boutin Jones while *Blue Lake v. ABI* was underway. This communication included papers ghostwritten by DeMarse and filed by Boutin Jones against Acres. Dkt. 32-6, ¶¶7-10.

After Acres proved Judge Marston was Blue Lake's attorney, Judge Marston recused himself and appointed Justice James Lambden to preside over *Blue Lake v. ABI.* Dkt. 1, ¶¶102-104, 109. Justice Lambden dismissed Acres on summary judgment, finding Blue Lake had attempted to "conjure" its cause of action against Acres. ABI then demanded a Bill of Particulars from Blue Lake to substantiate Blue Lake's remaining claims against ABI. Rather than supply the Bill of Particulars, Blue Lake dismissed the case in its entirety. Id., ¶¶53, 113.

Ramsey was CEO of Blue Lake's casino throughout *Blue Lake v. ABI.* Id., ¶13.

Frank was an executive at Blue Lake involved with Blue Lake's decision to bring or continue *Blue Lake v. ABI.* Id., ¶¶14, 48, 122.

Acres was not a party to the iSlot Agreement between ABI and Blue Lake. Id., ¶¶52-53.

**C. Judge Marston's Non-Judicial Work for Blue Lake.**

While Judge Marston presided over *Blue Lake v ABI* he also worked as an attorney for Blue Lake and Ramsey in various capacities. This work included representing Blue Lake and Ramsey as their attorney in *Blue Lake v. Shiomoto,* advising Blue Lake's casino on an employee dispute, lobbying the State of California to reauthorize legislation sponsored by Blue Lake, and representing Blue Lake in gaming compact negotiations with the State of California. Id., ¶¶65, 77-78. Vaughn, Burrell, Lathouris and DeMarse assisted Judge Marston in this work. Id., ¶¶124-128.

Clerk Huff processed invoices from Judge Marston which described his work in *Blue Lake v. ABI* and his work as an attorney for Blue Lake. These invoices also included work by

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Vaughn, Burrell, Lathouris and DeMarse assisting Judge Marston in *Blue Lake v. ABI* and in representing Blue Lake. Id., ¶33.

Blue Lake was aware it paid Defendants to simultaneously work as its attorneys, and as the judge and law-clerks, in its case against ABI and Acres. Dkt. 36, p4.[1]

## III. Defendants Do Not Enjoy Sovereign Immunity Because they are Not Sovereigns.

Defendants argue under Rule 12(b)(1) Blue Lake's sovereign immunity bars suit against them. Defendants are simply wrong. Because no judgment against Defendants could bind Blue Lake, controlling Supreme Court authority requires this Court find Defendants are not protected by Blue Lake's sovereign immunity. *See JW Gaming v. James,* 3:18-cv-02669-WHO, pp5-6 (N.D. Cal. Oct. 5, 2018).

### A. Defendants are Not Protected by Blue Lake's Sovereign Immunity Because No Judgment Against Defendants Would Bind Blue Lake.

Controlling Supreme Court authority holds sovereign immunity is not available to tribal employees who are sued in their individual capacities. *Lewis v. Clarke,* 137 S. Ct. 1285 (2017).

Prior to *Lewis,* courts sometimes analyzed whether a tribal employee was acting within the scope of their employment in order to determine whether the employee was protected by the tribe's sovereign immunity. For instance, in *Lewis* itself, Connecticut's supreme court found because Clarke was acting within the scope of his tribal employment, he shared in his tribal employer's sovereign immunity from suit. But Justice Sotomayor was explicit in rejecting this type of analysis: "That 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." *Id.*, 1288.

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[1] All page number references are to the ECF page number.

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Justice Sotomayor was also explicit in describing how to determine whether a party shares in sovereign immunity: "The critical inquiry is who may be legally bound by the court's adverse judgment." *Id.*, 1292-1293.

This "who-may-be-bound" test is the same test used in determining whether an individual state or federal employee may share in their state or federal employer's sovereign immunity. The "who-may-be-bound" test is applied in a tribal government context because the protection afforded by tribal sovereign immunity is "no broader than the protection offered by state or federal sovereign immunity." *Id.*, 1291-1292.

The "who-may-be-bound" test was developed in the Ninth Circuit even before *Lewis* to determine whether an individual could share in a tribe's sovereign immunity from suit. For instance, tribal paramedics sued as individuals were not protected by their tribal employer's sovereign immunity because "a remedy would operate against [the paramedics], not the tribe." *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013). And when a tribal police chief was sued in his individual capacity for battery and false imprisonment the result was "pretty much foreordained." Sovereign immunity was not available because recovery would run against the police chief and not the tribe. *Pistor v. Garcia*, 791 F.3d 1104, 1108-1109 (9th Cir. 2015).

Under *Lewis,* to determine whether a defendant shares Blue Lake's sovereign immunity from suit, we look only to whether Blue Lake would be bound by a judgment against that defendant.

Here, *ABI v. Marston* does not sue Blue Lake or any Blue Lake entity. The only remedies *ABI v. Marston* seeks are from the individual and law-firm defendants, and only those

individuals and law-firms could be legally bound by any judgment. Because no judgment could require action by Blue Lake, Defendants cannot share in Blue Lake's sovereign immunity.

**B. Rapport & Marston does Not Qualify as an "Arm of the Tribe" Under the Explicit Test Articulated in *White v. University of California* and Therefore Cannot Share in Blue Lake's Sovereign Immunity.**

An entity may only claim tribal sovereign immunity as a defense if it qualifies as an "arm of the tribe." In determining if an entity is "an arm of the tribe," courts apply a five-factor test that considers: 1) The method of the entity's creation; 2) The purpose of the entity; 3) The structure, management and control of the entity; 4) Whether the tribe intends to share its immunity with the entity; and 5) The financial relationship between the tribe and the entity. *White v. University of California,* 765 F.3d 1010, 1025 (9th Cir. 2014).

Rapport & Marston was created by Rapport and Judge Marston, not Blue Lake. Its purpose is to "share office expenses." It is structured as a law-office in which Rapport and Marston do business as attorneys with their various clients. The financial relationship between Rapport & Marston and the tribe is that of service provider and client. (Dkt. 1, ¶17; Dkt. 32-6, ¶3.) Even if Blue Lake intends to share its immunity with Rapport & Marston, the factors overwhelming militate against considering Rapport & Marston to be an arm of the tribe.

Because Rapport & Marston cannot be considered an arm of the tribe, it cannot share in Blue Lake's sovereign immunity from suit.

**C. *Davis, Hardin,* and *Imperial Granite* Do Not Cloak the Individual Defendants with Blue Lake's Sovereign Immunity Because the Cases Fail to Apply *Lewis's* "Who-May-Be-Bound" Test.**

Defendants cite three cases to support their argument they share in Blue Lake's sovereign immunity. The cases, however, are inapposite as they are decades old and fail to apply *Lewis'* "who-may-be-bound" test.

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**1) *Davis v. Littell* Does Not Address Sovereign Immunity and Foreshadows *Lewis.***

The oldest of the three cases, *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), does not support Defendants' argument (it does not even apply) because it does not address sovereign immunity. The question in *Davis* was whether a tribal executive officer "was entitled to assert absolute privilege as to defamatory statements made by him within the scope of his official duties." *Id.*, 83. The *Davis* court held tribal governmental officials are entitled to the same privileges and immunities as their state and federal counterparts. *Id.*, 85.

*Davis* does not support a finding Defendants share in Blue Lake's sovereign immunity from suit. The words "sovereign immunity" do not appear anywhere in *Davis.* Instead *Davis* teaches that in determining whether a tribal official is protected by an immunity or privilege we apply the same test as for a similarly situated state or federal official. This is in line with *Lewis's* holding the "who-may-be-bound" test should determine whether a tribal official enjoys sovereign immunity because it is the same test used to determine whether a state or federal official enjoys sovereign immunity.

Under *Davis,* Defendants are not entitled to share in Blue Lake's sovereign immunity from suit because similarly situated California and United States employees would not be entitled to share in California's or the United States' sovereign immunity from suit.

**2) Hardin and Imperial Apply the Wrong Test Under *Lewis.***

Hardin, a non-Indian, was an unruly and unwelcome resident on the White Mountain Apache reservation. After the tribal government lawfully ejected him from the reservation, Hardin sued the tribe and "various officials" for declaratory relief, injunctive relief, and damages. The *Hardin* court found sovereign immunity protects tribes and tribal officers from suit when they eject unwelcome non-Indians from tribal land. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478-479 (9th Cir. 1985).

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Imperial leased a quarry that was entirely surrounded by the Pala's reservation. The quarry was only accessible via a road which crossed Pala's reservation. After the passage of some time, Pala refused Imperial use of the road, and so Imperial sued Pala, its officers, and all its members. The *Imperial* court found because there was no evidence the tribal officials acted outside the scope of their authority the officials shared in Pala's sovereign immunity. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1270-1272 (9th Cir. 1991).

Neither *Hardin* nor *Imperial* applied the "who-may-be-bound" test in determining whether tribal employees shared in their tribe's immunity from suit. Instead, they analyzed whether the tribal officials acted within the scope of their employment.

Justice Sotomayor could not have been more clear, destroying any application *Great Western Casinos* may have had to this case: Tribal employees are not entitled to sovereign immunity merely because they act within the scope of their employment. *Lewis,* 1288. Instead, "[t]he critical inquiry is who may be legally bound by the court's adverse judgment." *Id.,* 1292-1293.

*Hardin* and *Imperial* would need to be decided differently post-*Lewis.* Instead of extending sovereign immunity to defendants because they acted within the scope of their employment, the court would need to evaluate whether the tribe would be bound by an adverse judgment. Where judgment against a defendant would not bind the tribe, sovereign immunity would not be available. *JW Gaming,* Dkt. 55, pp5-6.

Because *Hardin* and *Imperial* used a test expressly rejected by the Supreme Court in *Lewis,* and failed to use the "who-may-be-bound" test required by *Lewis,* neither case can be used to find today's defendants are entitled to sovereign immunity.

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**D. Recent Supreme Court Precedent Makes Doubtful Tribal Sovereign Immunity Precludes Recovery by Private Tort Victims.**

Sovereign immunity from suit for tribal commercial enterprises is a controversial doctrine. The Supreme Court has noted the doctrine "developed almost by accident" and that the "wisdom of perpetuating the doctrine may be doubted." *Kiowa Tribe of Okla. v. Manufacturing Technologies*, 523 U.S. 751, 752 (1998).

The Supreme Court recently revisited the doctrine in *Michigan v. Bay Mills Indian Cmty.* 134 S. Ct. 2024 (2014). In *Bay Mills* the State of Michigan sued Bay Mills to enjoin Bay Mills' illegal off-reservation casino. The Supreme Court held in a five-four decision sovereign immunity precluded the suit because Michigan could prevent operation of the casino by bringing action against individual tribal employees and officers. *Id.*, 2035. However four dissenting justices would have overturned *Kiowa* outright because "the inequities engendered by unwarranted tribal immunity have multiplied." *Id.*, 2045. And even the majority opinion made clear sovereign immunity might not preclude suit by tort victims who had no other way to obtain relief. *Id.*, 2036 fn. 8.

In a letter to the Court, Defendants explain Blue Lake "was fully apprised as to who was performing what work on its behalf." Dkt. 34, p6. If this is true, Blue Lake willfully committed vicious intentional torts against ABI and Acres. These intentional torts involved off-reservation conduct and caused off-reservation harm. Dkt. 1, *passim.* These torts were instigated by a Blue Lake commercial enterprise. Significantly, Acres never entered into an agreement with Blue Lake or its casino. Id., ¶¶52-53.

If Defendants are immune from suit, then Acres and ABI have no way to obtain relief for Blue Lake's intentional torts against them. This outcome is contrary to the logic of *Bay Mills.*

Read in the light of *Bay Mills, Lewis'* exposure of individual tribal employees and officers to liability in civil tort is necessary to preserve Blue Lake's sovereign immunity. Blue Lake cannot enjoy sovereign immunity from suit unless individuals who commit torts on its behalf are exposed to individual liability.

## IV. Defendants Have Not Carried Their Burden to Show Judicial Immunity Protects the Precise Acts of Which ABI and Acres Complain.

Judicial immunity is a common-law doctrine protecting judicial **conduct**. Judicial immunity does **not** protect **judges**. Because it is difficult to draw the line between "truly judicial acts … and acts that simply happen to have been done by judges," the Supreme Court "has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity." Instead, the Supreme Court has focused on explaining that when judges engage in an "administrative, executive or legislative function" they are not entitled to judicial immunity. *Forrester v. White,* 484 US 219, 227-229 (1988).

Several lower courts have articulated multi-factor tests for analyzing whether a specific act is entitled to judicial immunity. Defendants suggest in their motion (Dkt. 32-1, p21) this Court apply the four-factor test from *Meek v. County of Riverside* 83 F.3d 962, 967 (9th Cir. 1999) to determine whether the precise act:

1) Is a normal judicial function;
2) Occurred in the judge's chambers;
3) Centered around a case pending before the judge; and
4) Arose directly and immediately out of a confrontation with the judge in the judge's official capacity.

Plaintiffs agree *Meek* is an appropriate analytical framework for determining whether specific acts by Defendants are protected by judicial immunity.

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It is Defendants' burden, however, to establish that each of the specific acts of which plaintiffs complain was a judicial act because "the burden is on the official claiming immunity to demonstrate his entitlement." *Dennis v. Sparks* 449 US 24, 29 (1980).

Because it is a defendant's burden to show they are entitled to judicial immunity, the immunity is not properly raised through a Rule 12(b)(1) or 12(b)(2) motion where the burden is on a plaintiff to show a court's jurisdiction. Instead, the immunity should be raised on 12(b)(6) because the essence of the defense is the immunity bars any relief of the plaintiff's claims. Indeed *Meek,* and every other judicial immunity case cited by Defendants that explicitly discusses procedural posture, was evaluated as Motion to Dismiss for failure to state a claim.

Where a court considers matters outside the complaint on a 12(b)(6) motion the motion must be converted into one for summary judgment. Here, while Judge Marston brings a florid declaration describing his work for Blue Lake (Dkt. 32-4), Defendants confine argument on judicial immunity to the Verified Complaint itself. Therefore, in deciding judicial immunity, the Court should limit itself to the Verified Complaint, read in the light most favorable to Plaintiffs. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987).

Plaintiffs know of no authority precluding the Court from considering Judge Marston's declaration and finding it illuminates the Verified Complaint with a light favorable to Plaintiffs.

Judicial immunity does not protect those who convince a judge to exercise their jurisdiction corruptly. *Dennis v. Sparks* 449 US 24, 27 (1980.

**A. Defendants' Motion to Dismiss for Judicial Immunity Should be Denied Because Defendants' Conduct Presents a Novel Set of Facts.**

Judge Marston worked as an attorney for Blue Lake the entire time he presided over Blue Lake's case against ABI and Acres. Dkt. 1, ¶124.

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Plaintiffs have found no case law considering whether judicial immunity precludes causes of action against a judge arising from harm caused by the judge's work as an attorney for a litigant in a case before that judge.

"Rule12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *McGary v. City of Portland,* 386 F.3d 1259, 1270 (9th Cir. 2004).

The audacious novelty of Defendants' conduct is so far outside the norm that dismissal without factual development should be precluded. This is especially true since Judge Marston admits he was Blue Lake's attorney the entire time he presided over *Blue Lake v. ABI.* Dkt. 32-4, ¶¶19-20, 25-27, 33. All of this is meticulously articulated in Plaintiffs' Verified Complaint.

**B. Judge Marston's Acts of Advocacy on Behalf of His Clients Were Not Judicial Acts.**

The Verified Complaint alleges Judge Marston worked as an advocate for Blue Lake in various capacities while he presided over *Blue Lake v. ABI.* Judge Marston makes no attempt to explain how his acts of advocacy on behalf of Blue Lake were judicial acts.

**1) Judge Marston Represented Blue Lake and Ramsey as Their Attorney.**

Judge Marston describes in his declaration how, when he learned Ramsey's new daughter-in-law might not be able to take her honeymoon cruise to Europe with her bridesmaids, he leapt to action, sued the DMV to recognize the marriage, and obtained injunctive relief in time for the honeymoon cruise to proceed on schedule. (Dkt. 32-4, ¶20.) Judge Marston continued to represent Blue Lake and Ramsey as their attorney the whole time he presided over *Blue Lake v. ABI.* (Dkt 1, ¶¶35, 36, and *passim.*)

Applying *Meek,* filing and pursuing a lawsuit is not a normal judicial function. Nor does filing a lawsuit relate to a case pending before a judge or arise out of a confrontation with the

judge in his official capacity. Instead, Judge Marston was acting in collaboration with Blue Lake and Ramsey when he caused a new case to be placed in the chambers of another judge.

Acting as an attorney for Blue Lake and Ramsey was the opposite of a judicial act.

**2) Judge Marston Lobbied the California Legislature on Blue Lake's Behalf.**

Judge Marston lobbied the California legislature on Blue Lake's behalf to reauthorize legislation streamlining the enforcement of tribal court money judgments in state courts while he presided over *Blue Lake v. ABI.* (Dkt. 1, ¶¶55, 65, 78.) Judge Marston contends this is no different than the Chief Justice of California's Supreme Court advocating for the interests of California courts before the California legislature. (Dkt. 32-4, ¶33.)

But Judge Marston provides no argument or authority to explain how lobbying a state legislature is a judicial act. Applying *Meek,* lobbying a legislature is not a normal judicial function, it does not occur in a judge's chambers, and it does not involve a confrontation with a judge in an official capacity.

Lobbying is a non-judicial act. An otherwise non-judicial act does not become a judicial act simply because a judge performs the act for the benefit of a party in a case before him.

**3) Judge Marston Negotiated on Blue Lake's Behalf for a New Gaming Compact.**

Judge Marston negotiated for gaming compact renewals with the State of California on behalf of the Compact Tribes Steering Committee. Blue Lake was part of the Compact Tribes Steering Committee. (Dkt. 1, ¶¶36, 108; Dkt. 32-4, ¶27.)

Judge Marston provides no argument or authority to support the proposition negotiating a gaming compact is a judicial act. Applying *Meek,* representing a government in gaming compact negotiations is not a normal judicial function, and gaming compact negotiations do not take place in a judge's chambers or involve a confrontation with a judge in their official capacity.

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Representing a government in gaming compact negotiations is a non-judicial act. An otherwise non-judicial act does not become a judicial act simply because a judge performs the act for the benefit of a party in a case before him.

**C. Contracting with Attorneys to Serve as Law-Clerks is Not a Judicial Act.**

Judge Marston contracted with Burrell, Vaughn, Lathouris and DeMarse to aid him in managing *Blue Lake v. ABI* even though he knew they were attorneys working for Blue Lake. Dkt. 1, ¶¶124-128; Dkt. 32-4, ¶33.

Judge Marston provides no argument or authority to support the proposition contracting with attorneys to serve as law-clerks is a judicial act.

The Supreme Court's holding *Forrester* is clear: a judge's employment decisions are administrative acts, not judicial acts. *Forrester*, 229. Judge Marston's contracting with Burrell, Vaughn, Lathouris and DeMarse is not protected by judicial immunity because judicial immunity does not protect administrative acts.

Applying the test from *Meek* produces the same result. While employment decisions might occur in a judge's chambers, the employment decisions are not judicial functions, are not centered around any particular case pending before a judge, nor can they be said to arise from a confrontation with a judge.

Employment decisions are non-judicial acts. An otherwise non-judicial act does not become a judicial act simply because it is alleged the act was tortious.

Judge Marston is not protected by judicial immunity for hiring Blue Lake attorneys Burrell, Vaughn, Lathouris, or DeMarse. Nor are Burrell, Vaughn, Lathouris and DeMarse protected by judicial immunity for accepting employment as law-clerks in a case where their client was the plaintiff.

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**D. Advising an Employer on a Dispute with Their Employees is Not a Judicial Act.**

The Verified Complaint alleges Judge Marston advised Blue Lake on a dispute with a casino employee while he presided over *Blue Lake v. ABI.* (Dkt. 1, ¶¶78-79.)

Judge Marston provides no argument or authority to support the proposition advising an employer on a dispute they are having with an employee is a judicial act.

Under *Forrester* a judge's employment decisions about his own employees are not judicial acts. If a judge's employment decisions about his own employees are not judicial acts, his actions in advising someone else on their employment decisions cannot be judicial acts either.

Applying *Meek* produces the same result. Advising an employer on a dispute with their employees is not a normal judicial function occurring in a judge's chambers. And, one does not seek out a judge's advice by "confronting" the judge in their official capacity centering around a case pending before the judge.

Advising an employer on an employment dispute is a non-judicial act. An otherwise non-judicial act does not become a judicial act simply because it is alleged the act was tortious.

**E. Initial Case Assignment is Not a Judicial Act.**

The Verified Complaint alleges Judge Marston assigned *Blue Lake v. ABI* to himself. (Dkt. 1, ¶40.)

Judge Marston brings neither argument nor authority to explain why initial case assignment is a judicial act.

Initial case assignment is an administrative function. For instance, this Court uses an automated system to randomly assign cases. (See General Order 44.) By definition, initial case assignment cannot center around a case pending before a judge, or occur within a judge's chambers, because the act happens prior to the case being brought before the judge. Nor can

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case assignment involve a confrontation with the judge in their official capacity, because no one knows the judge has an official capacity until the case is assigned.

Where a case is already underway the appointment of judicial officers to a case can be a judicial act. For instance, assigning a receiver during a pending case is a judicial act. *New Alaska Development Corp. v. Guetschow* 869 F.2d 1298 (9th Cir. 1989).

But, applying *Meek,* initial case assignment is easily distinguishable from the assignment of a receiver mid-litigation. A receiver is appointed by a judge only after the judge has been convinced specific legal criteria have been met. A judge appointing a receiver does so in his official capacity as a presiding judge, usually via a formal written order. And those upon whom a receiver is imposed generally have notice and opportunity to confront the judge and to argue no receiver is necessary.

None of those factors are present in initial case assignment.

If an employee of this Court were to non-randomly influence case assignment to benefit a party in a case, the employee's act would not be a judicial act protected by judicial immunity. An otherwise non-judicial act does not become a judicial act merely because it "happen[s] to have been done by [a] judge[]." *Forrester,* 227.

Judge Marston's assignment of *Blue Lake v. ABI* to himself was not protected by judicial immunity because it was not a judicial act.

**F. Processing an Invoice is Not a Judicial Act.**

The Verified Complaint alleges Clerk Huff processed invoices from Rapport & Marston to Blue Lake for the conduct described under subheadings B through E above. (Dkt. 1, ¶33.)

Applying *Meek*, processing an invoice is not a normal judicial function, performed in a judge's chambers, centering around a case pending before the judge, and arising out of a confrontation with the judge in their official capacity.

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Processing an invoice is a non-judicial act. An otherwise non-judicial act does not become a judicial act simply because it is alleged the act was tortious.

**G. Working as a Prosecutor is Not a Judicial Act.**

Burrell, Vaughn, DeMarse, and Lathouris each raise prosecutorial immunity and judicial immunity as defenses from liability for the same set of facts. Curiously, and quite telling, none offer any argument or authority explaining how one can enjoy **both** immunities for the same conduct.

Prosecutorial immunity and judicial immunity only protect specific conduct. It is axiomatic prosecutorial conduct and judicial conduct are entirely different forms of conduct. Anyone who simultaneously raises the defenses of prosecutorial immunity and judicial immunity from the same set of facts should be denied both immunities.

**H. Ramsey Disavows any Judicial Acts.**

Ramsey brings a declaration in which she disavows any judicial role in *Blue Lake v. ABI.* (Dkt. 32-5, ¶6.) Because Ramsey disavows having any judicial role in *Blue Lake v. ABI,* Ramsey cannot be protected by judicial immunity.

## V. Defendants Have Not Carried Their Burden to Show Prosecutorial Immunity Protects Secret Civil Litigators Serving a Sovereign Who Lacks Criminal Jurisdiction.

Absolute prosecutorial immunity protects prosecutors from liability for their conduct in initiating a prosecution and presenting a state's case, insofar as that conduct is "intimately associated with the judicial phase of the criminal process." *Burns v. Reed,* 500 US 475, 486 (1991).

Because it is a defendant's burden to show they are entitled to prosecutorial immunity, the immunity is not properly raised through a Rule 12(b)(1) or 12(b)(2) motion where the burden

is on a plaintiff to show a court's jurisdiction. Instead, the immunity should be raised on 12(b)(6) because the essence of the defense is that the immunity bars any relief of the plaintiff's claims.

Where a court considers matters outside the complaint on a 12(b)(6) motion the motion must be converted into one for summary judgment. Here, while Rapport brings a declaration describing the work by DeMarse and him for Blue Lake, the effect of the declaration is to deny any prosecutorial involvement by Rapport or DeMarse in *Blue Lake v. ABI*. (Dkt. 32-6, ¶¶6-10.) Therefore, in deciding prosecutorial immunity, the Court should limit itself to the Verified Complaint, read in the light most favorable to plaintiffs. *Usher*, 561. Dismissal is "especially disfavored" where the complaint presents novel facts or theories. *McGary*, 1270.

Plaintiffs know of no authority precluding the Court from considering Rapport's declaration and finding it illuminates the Verified Complaint with a light favorable to plaintiffs.

**A. *Blue Lake v. ABI* was a Civil Case, Not a Criminal Case or Administrative Proceeding.**

The summons and complaint from *Blue Lake v. ABI* are incorporated in *ABI v. Marston's* Verified Complaint. The summons clearly states *Blue Lake v. ABI* is a civil case. (Dkt. 1-1, pp2-3.)

*Blue Lake v. ABI* included causes of action for breach of contract, tortious breach of implied covenants, unjust enrichment, money had and received, and fraudulent inducement. (Id., pp7-10.) These are civil causes of action, not criminal or administrative causes of action.

No one can claim prosecutorial immunity for their involvement in *Blue Lake v. ABI* because *Blue Lake v. ABI* did not entail any criminal or administrative process whatsoever.

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**B. Blue Lake Lacked Criminal Jurisdiction Over Non-Indians ABI and Acres.**

ABI and Acres are both non-Indians. Barring Congressional authorization, Indian tribes lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe* 435 US 191, 212 (1978). Because there is no evidence Congress granted Blue Lake criminal jurisdiction over ABI or Acres, no one can enjoy prosecutorial immunity for conduct in *Blue Lake v. ABI.*

**C. Defendants Cannot Claim Entitlement to Prosecutorial Immunity While Denying Any Involvement in *Blue Lake v. ABI.***

Rapport submits a declaration claiming he did not participate in *Blue Lake v. ABI.* (Dkt. 32-6, ¶6.) Rapport also claims DeMarse did not have "any financial interest in the initiation or prosecution of [*Blue Lake v. ABI*]." (Id., ¶10.)

Even if *Blue Lake v. ABI* were the type of proceeding which could give rise to prosecutorial immunity, only those who partook in the prosecution of Blue Lake's case against ABI or Acres could claim prosecutorial immunity. Because Rapport brings evidence claiming to disavow participation by Rapport or DeMarse in *Blue Lake v. ABI,* neither Rapport nor DeMarse can derive prosecutorial immunity from *Blue Lake v. ABI*.

**D. Defendants Cannot Claim Entitlement to Judicial Immunity and Prosecutorial Immunity from the Same Set of Facts.**

Burrell, Vaughn, DeMarse, and Lathouris each raise prosecutorial immunity and judicial immunity as defenses from liability for the same set of facts. None offer any argument or authority explaining how one can enjoy both immunities for the same conduct.

Prosecutorial immunity and judicial immunity only protect specific conduct. It is axiomatic prosecutorial conduct and judicial conduct are entirely different forms of conduct. Anyone who simultaneously raises the defenses of prosecutorial immunity and judicial immunity from the same set of facts should be denied both immunities.

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## VI. Testimonial Immunity Does Not Protect Frank from Liability for His Role in Causing Blue Lake to Bring or Maintain *Blue Lake v. ABI.*

Frank argues he enjoys testimonial immunity for signing papers in *Blue Lake v. ABI,* bringing the argument under Rule 12(b)(1) or 12(b)(2).

Testimonial immunity is an absolute immunity protecting those who testify in judicial proceedings from liability arising from their testimony. For instance, in *Briscoe v. LaHue* 460 U.S. 325 (1983) testimonial immunity precluded a suit for liability against a police officer for offering perjured testimony.

It is unclear why Frank's assertion of testimonial immunity should deprive this Court of personal or subject matter jurisdiction. Frank offers no explanation.

Testimonial immunity, like judicial immunity and prosecutorial immunity, prevents a plaintiff from stating a claim upon which relief may be granted. Frank's claim of testimonial immunity should be evaluated under Rule 12(b)(6), with the burden resting on Frank to show he is entitled to the immunity. In deciding testimonial immunity, the Court should limit itself to the Verified Complaint, read in the light most favorable to plaintiffs. *Usher,* 561. Dismissal is "especially disfavored" where the complaint presents novel facts or theories. *McGary*, 1270.

### A. Frank Cannot Avail Himself of Testimonial Immunity Because Plaintiffs Do Not Sue Frank for His False Testimony.

Plaintiffs do not sue Frank for signing papers in *Blue Lake v. ABI.* Plaintiffs sue Frank for 1) Frank's part in causing Blue Lake to bring or continue *Blue Lake v. ABI* (Dkt. 1, ¶135); 2) Frank's part in aiding and abetting Judge Marston in breaching his fiduciary duties (Id., ¶172); and 3) Frank's part in operating Blue Lake Tribal Court in a scheme to obtain money via means of false pretenses (Id., ¶199).

One can reasonably infer from the Verified Complaint Frank was a senior Blue Lake executive responsible for causing *Blue Lake v. ABI* to be brought or continued. This is especially

so because Justice Lambden's order granting Acres summary judgment was incorporated in the Verified Complaint, and Justice Lambden's analysis on summary judgment focuses on what Frank could have reasonably believed as a Blue Lake executive. (Dkt. 1-2, pp16-19.)

Frank and Ramsey bring declarations that buttress this reading of the Verified Complaint. (Dkts. 32-2, 32-5.) Both declarations describe Frank as a Blue Lake executive who was involved in Blue Lake's decision-making process to bring and/or maintain *Blue Lake v. ABI.*

Testimonial immunity bars suit for mistaken, libelous, or even perjurious **statements** made in a declaration. But it is absurd to argue testimonial liability bars suit for **conduct** described in a declaration or related to conduct described in a declaration. If that were the case, a tortfeasor would need only file a declaration describing his involvement in a tort to immunize himself from liability.

Frank is not immune from liability for his part in convincing Blue Lake to bring or maintain *Blue Lake v. ABI* simply because he made declarations describing some of his conduct that might have convinced Blue Lake to bring or maintain *Blue Lake v. ABI.*

### B. The Complaint Can be Amended to State the Claims Against Frank More Explicitly.

Indeed, it may be necessary to draw inferences from the allegations to understand what Plaintiffs claim Frank did. If the Court deems these inferences prevent Frank from understanding the claims against him, Plaintiffs request leave to amend the Verified Complaint to make their claims against Frank more explicit.

## VII. Conclusion

The Verified Complaint alleges Defendants partook in a sprawling and sordid scheme to obtain money by means of false pretenses from ABI and Acres. Defendants move to dismiss arguing they cannot be called to account for their misconduct because a tribe paid them for their

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part in the scheme, and because they are protected by the absolute immunities protecting those involved in adjudicative proceedings.

*Lewis v. Clarke* established that where no remedy is sought against a tribal sovereign, tribal employees and agents are not protected by sovereign immunity. Under *Lewis,* sovereign immunity is unavailable to Defendants in *ABI v. Marston,* just as sovereign immunity is unavailable to federal officers in *Bivens* actions, or state employees in 42 USC 1983 actions.

Defendants' absolute immunity defenses are properly evaluated under Rule 12(b)(6). Defendants argue there are no allegations of Defendant conduct besides conduct established by precedent as being protected by an absolute immunity. But the plausible, detailed, and Verified Complaint alleges corrupt litigation conduct far outside the bounds of existing precedent. The audacity of the scheme to defraud alleged in *Blue Lake v. ABI* precludes dismissal on a 12(b)(6) motion under *McGary.*

Employment by a tribal sovereign does not relieve us of our duties to our state or federal sovereigns – or to each other. ABI and Acres ask this Court to deny Defendants' motion, and order Defendants to answer the Verified Complaint within fourteen days.

To whatever extent Defendants' motion cannot be denied, Plaintiffs' request leave to amend.

**BLUMBERG LAW GROUP LLP**

Dated: 2/18/2020

*/s/ Ronald H. Blumberg*
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Dated: 2/18/2020

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