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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ACRES BONUSING, INC., et al. Plaintiffs, v. LSTER MARSTON, et al. Defendants.	Case No.: 3:19-cv-05418-WHO **REPLY OF DEFENDANTS ARLA RAMSEY, ANITA HUFF, THOMAS FRANK, LESTER MARSTON, RAPPORT AND MARSTON, DAVID RAPPORT, DARCY VAUGHN, ASHLEY BURRELL COOPER DEMARSE, AND KOSTAN LATHOURIS TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS** DATE: April 15, 2020 TIME: 2:00 p.m. Judge Hon. William H. Orrick

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Specially-appearing Defendants ARLA RAMSEY, ANITA HUFF, THOMAS FRANK, LESTER MARSTON, RAPPORT AND MARSTON, DAVID RAPPORT, DARCY VAUGHN, ASHLEY BURRELL COOPER DEMARSE, AND KOSTAN LATHOURIS (hereinafter collectively "the Blue Lake Defendants") respectfully submit this Reply to Plaintiffs' Opposition to their Motion to Dismiss (ECF 32).

I. INTRODUCTION

Plaintiffs are disgruntled litigants who cannot sue the real object of their ire, the Blue Lake Rancheria, in state or federal court because of sovereign immunity. They have therefore brought this action against various Tribal officials and employees purportedly in their "individual" capacities, thereby seeking to avoid the bar of immunity. The Opposition to the Blue Lake Defendants' motion to dismiss makes their hostility to sovereign immunity clear. However, such immunity remains the law and the Blue Lake Defendants are entitled to its protection, as well as the protections of judicial and prosecutorial immunity.

II. SOVEREIGN IMMUNITY PROTECTS THE BLUE LAKE DEFENDANTS IN THIS ACTION:

Plaintiffs make the disingenuous argument that their claim is not barred by immunity because they are seeking to recover only against the individual defendants and no the Blue Lake Rancheria. This ignores practical reality. There is no viable claim that the Blue Lake Defendants exceeded either the Rancheria's their authority as elected tribal officials, Tribal court judges and/or staff, senior executives, or attorneys, or violated any Tribal Court Rules or Tribal law in the execution of their duties. Further, had they done so it would be for the Blue Lake Rancheria to take action. Plaintiffs are seeking to impose on the Blue Lake Rancheria and its employees their beliefs about how the Tribe's courts and government should be organized and run. Regardless of whose bank accounts are threatened, allowing this litigation to proceed will necessarily impact the ways in which Tribal employees and officials carry out their duties and their willingness to do them at all.

Further, it is clear that sovereign immunity does apply. Plaintiffs distort the holding of *Lewis v. Clarke*, 137 S.Ct. 1285 (2017) in arguing that as long as a suit names a tribal official or

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employee as an individual and does not seek money damages against the Tribe itself, tribal immunity does not bar the suit. In fact, the California Court of Appeal rejected this simplistic reading of *Lewis* in *Brown v. Garcia* (2017) 17 Cal.App.5th 1198.

Lewis v. Clarke held that an employee of a tribally owned Casino sued for damages in his individual capacity was not cloaked with tribal sovereign immunity for injuries he caused while driving a car on non-tribal roads in the course and scope of his employment. *Lewis,* 137 S.Ct. at 1291-92. The crux of the Court's holding in *Lewis v. Clarke* is that a tribal official, like a State or federal government official, is not cloaked with the sovereign's unwaived immunity unless the tribe itself is the real party in interest. *Lewis,* 137 S.Ct. at 1291.

Brown v. Garcia makes clear that *Lewis* cannot be interpreted as Plaintiffs would like. In *Brown*, the defendants were tribal officials sued for defamation for comments made in the course and scope of their positions as tribal council members. In rejecting the plaintiff's claim, the California Court of Appeal held that although the complaint sought relief only from individual defendants, the action was subject to tribal sovereign immunity because it sought to hold the defendants liable for their legislative functions as tribal officials and was thus in reality an official capacity suit. It went on to note that cases such as *Lewis v. Clark*, that followed the "remedy-focused" rule, involved "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." However, "the general rule is not dispositive if the lawsuit will encroach upon the tribe's sovereignty." (*Brown v. Garcia*, supra at 1206.)

Brown v. Garcia involved a tribe's right to define its own membership, which the court noted was "central to its existence as an independent political community." This case involves a tribe's right to set up and operate its own courts under its own rules and laws. Federal policy supports tribal self-government, including the right for tribes to operate their own courts. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). "[T]ribal courts are important mechanisms for protecting significant tribal interests." *United States v. Wheeler*, 435 U.S. 313, 332 (1987). The claims against Judge Marston and his courtroom staff are therefore veiled attempts to obtain a

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ruling from this Court regarding how the Blue Lake Rancheria's courts should be run and therefore clearly violates Blue Lake Rancheria's rights as a sovereign.

With respect to Defendants Ramsey and Frank, they too are tribal officials whose only alleged wrongdoing was performing their job duties. There is no claim that they acted for personal profit in bringing or continuing *Blue Lake v. Acres*, as was the case in, e.g., *Williams & Cochrane v. Quechan Tribe* (S.D. Calif.), 2018 WL 2734946, and *J.W. Gaming Dev. v. James* (N.D. Calif 2018) No. 3:18-cv-02669. Rather, any actions they may have taken regarding either initiating or continuing that lawsuit could only have been taken in their official tribal capacities on the Tribe's behalf in the course of the Tribe's internal deliberative processes, and had they been replaced by other tribal officers or employees, there is no reason to assume or believe that the suit would have been withdrawn. To hold them individually liable for the Tribe's decision to initiate and prosecute Blue Lake v. Acres would be equivalent to holding the head or staff of a state agency personally liable in money damages for participating in the agency's decision-making process that resulted in filing and prosecuting an unsuccessful lawsuit for breach of contract and fraudulent inducement. Although a money judgment might be enforceable only against the official, exposure to such liability would have a chilling effect on the official's ability to exercise his/her discretion and authority on the government's behalf, and under *Lewis v. Clarke*, the government, whether it be the Tribe's or the State's, would be the real party in interest to the litigation. Given that Ramsey and Frank are being sued for acts that could only have been committed in their official tribal capacities on the Tribe's behalf, they are cloaked with the Tribe's sovereign immunity under *Lewis v. Clark* and *Brown v. Garcia*.

Marston's only interactions with Acres in connection with Blue Lake v. Acres occurred in court, or through Marston's issuance of written orders, including his order recusing himself from further participation as the judge and appointing Judge Lambden in his stead. That Marston may have brought a lawsuit against the Department of Motor Vehicles to require that agency to recognize his Court's orders, or provided declarations and documents in his defense in Acres' two federal lawsuits against the Tribe and his Court, did not make him a participant or an advocate in *Blue Lake v. Acres.*

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Defendant Rapport had no role whatsoever in initiating or continuing the *Blue Lake v. Acres* Tribal Court litigation. As the Tribe's attorney, Rapport assisted in the successful defense against Acres' federal court lawsuits against the Tribe, the Tribal Court, and Judge Marston. The Tribe, not Rapport, was the real party in interest in all of those lawsuits, and as the Tribe's contracted general counsel, Rapport was properly acting in his official capacity on the Tribe's behalf, and thus is cloaked with the Tribe's sovereign immunity under Lewis v. Clarke.

Plaintiffs seek to delegitimize and distinguish various cases cited by the Blue Lake Defendants. However, those arguments are flawed. For example, he takes issue with the citation to *Davis v. Littell*, 398 F.2d 83, 83(9th Cir. 1968) because the case does not mention "sovereign immunity." However, the issue in that case was framed by the court as "whether appellee, by virtue of his position as general counsel for the Navajo Tribe, was entitled to assert absolute privilege as to defamatory statements made by him within the scope of his official duties." *Id.* at 83. In upholding the District Court decision that the general counsel was immune, the District Court noted that the Navajo Tribe was a sovereign and thus enjoyed sovereign immunity from suit. *Id.* at 84. The question was whether that immunity extended to its officials. In answering that question in the affirmative, the 9th Circuit noted that, "The need for absolute privilege is in the elimination of the 'constant dread of retaliation' or injury committed in the course of duty and the allowance of "unflinching discharge of [official] duties" free from the threat of suit and charge of malice." *Id.* Further, the Court rejected the argument that this particular defendants had not behaved with an "unselfish dedication to the public interest which should qualify them for immunity from suit as public officers", noting that the "rule of privilege is not founded on the need of the individual officer, but on the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired."

Plaintiffs next argue that both *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) and *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1270 (9th Cir. 1991) should be deemed to be overturned in light of the decision in *Lewis v. Clarke*. However, *Lewis v. Clarke* did not itself overturn those decisions and both continue to be cited by federal courts post-*Lewis* (see e.g. *Tavares v. Whitehouse*, 851 F.3d 863, 876 (9th Cir.

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2017); *LaForge v. Gets Down*, No. CV-17-48-BLG-BMM-TJC, 2018 U.S. Dist. LEXIS 21877, at *4 (D. Mont. Feb. 8, 2018) [holding that "Indian tribes, tribal entities, and persons acting on the Tribe's behalf in an official capacity enjoy sovereign immunity against suit unless Congress expressly authorizes the suit or the tribe has waived sovereign immunity" and citing *Hardin* among others]; *Coeur D'Alene Tribe v. Hawks*, 933 F.3d 1052, 1056 (9th Cir. 2019); *Mitchell v. Tulalip Tribes of Wash.*, 740 F. App'x 600, 601 (9th Cir. 2018).)

Plaintiffs' contentions to the contrary notwithstanding, tribal sovereign immunity remains a valid and viable defense, one that protects the sovereignty of Indian tribes and allows them the self-governance that is Congressional policy. Further, suits that seek to impose liability on tribal operatives for their official acts are barred as an impermissible infringement on that right of self-governance. While *Lewis v. Clarke* held that an low-level individual Tribal casino employee can be held liable for negligently causing a motor vehicle accident (just as a state or federal employee could be liable) it did not therefore disapprove the entire jurisprudence of sovereign immunity or allow third-parties such as Plaintiffs herein to force Tribal government officials to conform their actions to a third-parties' notions of what is legal or appropriate.

III. JUDICIAL IMMUNITY APPLIES

Preliminarily, Plaintiffs appear to argue that this Court's jurisdiction is not properly raised in a motion to dismiss under Rule 12(b)(1) or 12(b)(2). However, such motions are an accepted way of raising immunity defenses. (See e.g. *Cook v. AVI Casino Enters.*, 548 F.3d 718, 722 (9th Cir. 2008).) Further, it is only when the complaint is challenged for lack of subject matter jurisdiction through a Rule 12(b)(1) motion which mounts a factual attack on jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist. [Citation] In resolving a Rule 12(b)(1) factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Pels v. Keurig Dr. Pepper, Inc.*, No. 19-cv-03052-SI, 2019 U.S. Dist. LEXIS 194909, at *3-4 (N.D. Cal. Nov. 7, 2019), citing *In re Digimarc Corp. Derivative*

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Litigation, 549 F.3d 1223, 1236 (9th Cir. 2008) (citation and internal brackets omitted). It is notable that Plaintiffs' opposition cites no evidence other than the verified Complaint – many of the allegations of which are purely speculative and lack any evidentiary support.

Plaintiffs' next argument is that judicial immunity does not apply because the conduct of which they complain is not "judicial" in nature. However, this misses the essential point that all of Judge Marston's conduct (and that of his staff) with regard to these specific Plaintiffs was judicial. Instead, Plaintiffs are citing conduct that does not involve Plaintiffs at all.

Plaintiffs next attempt to arbitrarily deconstruct these defendants' respective judicial functions into "administrative" or "executive" acts. While in the appropriate contexts such distinctions may exist, in the context of this case they are irrelevant to the causes of action Plaintiffs asserts against these Defendants, all of which involve interactions between Acres and Judge Marston in open court, and between Acres and Clerk Huff in the course of her receipt of court filings, on one occasion issuing a summons, providing Acres with copies of court rules, and transmitting court orders.

In an attempt to avoid this problem, Plaintiffs prove a lengthy list of alleged activities by Judge Marston that they claim are not judicial functions. These include various administrative duties, such as processing invoices and contracting with law clerks. Preliminarily, this argument would essentially void the entire doctrine of judicial immunity. Sitting on the bench and issuing orders is only a part of what is needed for the administration of justice. Courthouse bills must be paid. Court staff must be interviewed and hired. Cases must be assigned to judges, commissioners and research attorneys. Judges speak with their legislatures. If a judge engages in illegal employment practices, he or she might be civilly liable to the individuals harmed. If a judge abuses his/her office by engaging in criminal activities, the judge can be prosecuted criminally. However, neither the case law cited nor common sense dictates that judges then lose immunity with respect to every litigant who has ever appeared before them. It would be even more disruptive to suggest that the mere act of engaging in non-judicial functions vacates immunity.

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Forrester v. White (1988) 484 U.S. 219, on which Plaintiffs rely heavily, is of no help to them. That case involved a court staff member's claim of discharge by a state court judge in violation of 42 U.S.C. § 1983. The Supreme Court held that judicial immunity against such a claim is not absolute, distinguishing a court's internal personnel decisions from judicial proceedings (the Court did not reach the question whether there might be qualified immunity). However, nothing in that decision could be read to allow a litigant before that same judge to use those allegations to bring his own claim for damages arising in a completely unrelated case.

Plaintiffs' citation to *Dennis v. Sparks*, 449 U.S. 24, 25, 101 S. Ct. 183, 185 (1980) is even less appropriate because that case held that a judge could NOT be sued for allegedly conspiring with third parties. Instead, it held that an action against the private parties accused of conspiring with the judge is not subject to dismissal. *Dennis v. Sparks*, 449 U.S. 24, 25, 101 S. Ct. 183, 185 (1980). However with respect to the judge: "The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on immunity grounds." (*Id.* at 27.) Also, the private defendants in that action had no basis upon which to claim that they were cloaked with a sovereign's immunity.

In short, this Court can properly consider evidence beyond the verified Complaint. Further, because Plaintiffs have failed to demonstrate the existence of any exceptions to these defendants' judicial immunity, the causes of action alleged against them must be dismissed.

IV. PROSECUTORIAL IMMUNITY APPLIES

The defense of prosecutorial immunity was made on behalf of Blue Lake Defendants Rapport and DeMarse. Plaintiffs' only argument in response is that Mr. Rapport's declaration denied any prosecutorial involvement by himself or Mr. DeMarse. However, this is not accurate and does not address the arguments in the underlying motion.

Mr. Rapport's declaration outlined his efforts and those of Mr. DeMarse in the successful defense of the Blue Lake Rancheria against Mr. Acres' two previous district court lawsuits (See ECF, 3206, pg. 304.) As the motion noted, prosecutorial immunity is not limited to criminal actions and is available in a civil context. Plaintiff has failed to cite any authority to the contrary,

instead simply arguing that the underlying litigation as not criminal or administrative in nature. As such, Plaintiffs have failed to substantively oppose the Motion to Dismiss as to these individuals and it should be granted.

V. FRANK IS IMMUNE

Plaintiffs argue that they not suing Mr. Frank for the actions outlined in paragraphs 14, 42, and 122 of the Complaint, but rather are suing Mr. Frank for his part in causing Blue Lake Rancheria to bring action against them and for "aiding and abetting Judge Marston in breaching his fiduciary duties", as well as for his part in "operating Blue Lake Tribal Court in a scheme to obtain money via means of false pretenses." In short it appears that they are conceding that the conduct alleged in the paragraphs cited in the motion would be privileged.

In order to avoid testimonial immunity, Plaintiffs have argued that they are suing Mr. Frank for his part in prosecuting Blue Lake Rancheria's civil action against him (a role that he denied in unrebutted evidence; see ECF 32-2, pg. 2, lines 23-27) and for his alleged role in the operations of the Blue Lake Rancheria's Tribal Court. However, these allegations bring them back squarely within the ambit of tribal sovereign immunity as argued above.

VI. CONCLUSION

The Blue Lake Defendants have submitted competent evidence in support of their motions to dismiss for lack of jurisdiction. Rather than introduce his own evidence, Plaintiffs simply argue that the Court should rely entirely on the Verified Complaint – a document that includes numerous statements made without any apparent factual basis of personal knowledge. This is contrary to well established law which allows a factual attack on jurisdiction; which requires a factual attack.

Plaintiffs are disgruntled litigants who cannot sue their real target: the Blue Lake Rancheria. Instead, they are using this motion to attack the entire idea that an Indian tribe is entitled to operate its government and its courts as it sees fit. None of the allegations of purported misconduct[1] give rise to a cause of action by these specific Plaintiffs.

[1] Which are denied.

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Dated: February 25, 2020

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Dated: February 25, 2020

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