No. C089344

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

JAMES ACRES, et al.,
Plaintiff-Appellant,
v.
LESTER MARSTON, et al.,
Defendant-Respondent,

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO, DEPARTMENT 53
HONORABLE DAVID BROWN, JUDGE
CASE NO. 34-2018-00236829-CU-PO-GDS

BRIEF OF RESPONDENTS MARSTON, RAMSEY, HUFF, FRANK, RAPPORT, "RAPPORT AND MARSTON", BURRELL, VAUGHN, DEMARSE and LATHOURIS

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C089344
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 47822 NAME: George Forman FIRM NAME: FORMAN & ASSOCIATES STREET ADDRESS: 4340 Redwood Hwy., Ste. E352 CITY: San Rafael STATE: CA ZIP CODE: 94903 TELEPHONE NO.: 415-491-2310 FAX NO.: 415-491-2313 E-MAIL ADDRESS: george@gformanlaw.com ATTORNEY FOR (*name*): Defendants Lester Marston, et al.	SUPERIOR COURT CASE NUMBER: 34-2018-00236829-CU-PO-GDS
APPELLANT/ PETITIONER: James Acres, et al. RESPONDENT/ REAL PARTY IN INTEREST: Marston, Ramsey, Huff, Frank, Rapport, "Rapport and Marston", Burrell, Vaughn, DeMarse and Lathouris	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Lester Marston, et al.

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

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Date: January 27, 2020

George Forman
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

If ever there was a case of "wrongful use of civil proceedings," James Acres' ("Acres") Superior Court lawsuit fits that description perfectly. The Superior Court correctly analyzed Acres' action for what it was: a suit against the Blue Lake Rancheria ("Tribe") as the real party in interest, due to the impact on the Tribe's exercise of its tribal governmental and judicial powers through the subterfuge of suing these Respondents as individuals for actions they allegedly took – and only could have taken – in their respective official capacities within the scope of the authority validly delegated to them as tribal officials, tribal court judges and law clerks, and tribal attorneys. On that basis, the Superior Court granted Respondents' motion to quash service of the summons and complaint, and dismissed the action without leave to amend, the jurisdictional defect being incurable. For the reasons set forth below, the Superior Court's judgment should be affirmed in its entirety.

STATEMENT OF THE CASE

A. *Blue Lake v. Acres*[1]

Acres' claimed grievances against the Blue Lake Respondents have

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[1] The Superior Court referred to this action as *Blue Lake v. Acres*, although the actual lead defendant in that action was Acres Bonusing, Inc. ("Acres Bonusing"), of which Acres is President. To avoid confusion, this Brief will use the same case name as did the Superior Court.

their genesis in a 2010 agreement between Acres Bonusing, Inc. ("Acres Bonusing") and Blue Lake, dba Blue Lake Casino ("Casino") and Hotel. Appellant's Appendix ("AA") 84-87. Under the agreement, Acres Bonusing, of which Acres is President (*id.*), was to lease to Blue Lake a server-based gaming system (the "iSlot System") that would allow Casino patrons to gamble from hand-held devices such as tablet computers. Acres Bonusing was to provide certain maintenance and improvements to the iSlot system. *Id.* Lease payments were to be based on the lesser of (i) a percentage of the system's monthly theoretical net win, or (ii) a maximum daily feeder device operated during the month. *Id.* Under the agreement, Blue Lake paid Acres Bonusing $250,000 as an "advanced deposit against royalties" that Blue Lake was to recover through a 50% reduction in monthly lease fees until the advanced deposit was extinguished. *Id*.

The iSlot system was a dismal failure, producing only $750 in reduced lease payments before Acres Bonusing terminated the lease. AA 78. In 2016, Blue Lake sued Acres Bonusing and Acres ("*Blue Lake v. Acres*") in its Tribal Court, which the Tribe had established in 2007.[2] At all times relevant to this action, Respondent Lester Marston ("Judge Marston") was its Chief Judge, and Respondent Anita Huff was its Clerk ("Clerk

[2] Information about the Tribal Court can be found on Blue Lake's website, at https://bluelakerancheria nsn.gov/about/tribal court/.

Huff").[3]

Blue Lake's Complaint sought money damages against Acres Bonusing for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment, and money had and received, and money damages against Acres individually for having fraudulently induced Blue Lake to enter into the agreement by misrepresenting the iSlot system's potential performance and Blue Lake's likely recovery of the $250,000 "advanced deposit." AA 84-87.

After Respondent Judge Marston denied Acres' challenge to the Tribal Court's jurisdiction, Acres filed suit in the U.S. District Court for the Northern District of California ((*Acres v. Blue Lake Rancheria Tribal Court, et al.* (N.D. Cal. Aug. 10, 2016) No. 16 cv 02622 WHO, 2016 U.S. Dist. LEXIS 105786, at *9 13 ("*Acres v. Blue Lake I*")) against the Tribal Court, Judge Marston and Clerk Huff, seeking to enjoin the Tribal Court proceedings for lack of jurisdiction. Marston Declaration, RA 7.

Respondent Boutin Jones, assisted by Respondents David Rapport ("Rapport") and Cooper DeMarse ("Demarse") (not as attorneys of record),

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[3] None of the Blue Lake Respondents was either a party to *Blue Lake v. Acres* or the Tribe's attorney in that action. AA 76, 140, 162; Declaration of Arla Ramsey, Respondent's Appendix ("RA") RA 101; Declaration of Thomas Frank, RA 185; Declaration of David Rapport, RA 193.

represented the Tribal Court and Respondents Judge Marston and Clerk Huff in that federal court action, and moved to dismiss the action for failure to exhaust remedies in the Tribal Court. The district court, noting that the Tribal Court had at least colorable jurisdiction, granted the motion to dismiss. Rapport Declaration, RA 196-97.

Acres became aware that while Judge Marston was presiding over *Blue Lake v. Acres*, he also was acting as Blue Lake's attorney in a Superior Court lawsuit, *Blue Lake v. Shiomoto*, seeking to compel the California Department of Motor Vehicles to recognize the validity of a Tribal Court order approving a Blue Lake tribal citizen's name change. On that basis, Acres sought Judge Marston's recusal. AA 232. After Judge Marston determined that his role in *Blue Lake v. Shiomoto* did not affect his impartiality in *Blue Lake v. Acres*, and on that basis declined to recuse himself, RA 5, Acres filed a second U.S. District Court lawsuit ((*Acres v. Blue Lake Rancheria Tribal Court, et al.* (February 24, 2017) No. 16 cv 05391 WHO, 2017 U.S. Dist. LEXIS 26447, at *9 ("Acres v. Blue Lake II")) seeking to enjoin the Tribal Court proceedings based on the claim that because of Judge Marston's dual role as both the Tribal Court Judge and the Tribe's attorney in unrelated litigation, Acres and his company could not receive a fair trial in the Tribal Court. AA 144.

Judge Marston proceeded to recuse himself and appoint retired

California Court of Appeal Justice James Lambden to preside over *Blue Lake v. Acres*, AA 145, after which the district court dismissed the action for failure to exhaust tribal court remedies and as moot. AA 145, RA 5-6.

Judge Lambden eventually confirmed the Tribal Court's personal and subject-matter jurisdiction over both Acres Bonusing and Acres, and granted summary judgment in favor of Acres, AA 58-63, after which Blue Lake voluntarily dismissed its action as against Acres Bonusing. AA 50.

B. *Acres v. Marston, et al.*

On July 13, 2018, Acres filed his Superior Court action seeking compensatory and punitive damages against ten lawyers;[4] three law firms with which those lawyers are in some way associated;[5] Judge Marston; Clerk Huff; Blue Lake's elected Vice Chairperson/Tribal Administrator/Casino CEO Arla Ramsey ("Ramsey"); and Blue Lake's former senior Casino executive and Tribal Economic Development Director Thomas Frank ("Frank"), alleging that various combinations of Respondents wrongfully used, conspired, or aided and abetted a conspiracy

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[4] Respondents Rapport, Burrell, DeMarse, Vaughn, Lathouris, Chase, Stouder, O'Neil, Yarnell, and Burroughs.

[5] Defendants Boutin Jones (attorneys Stouder, O'Neil and Chase), Janssen Malloy (attorneys Burroughs and Yarnell), and "Rapport and Marston," an association of sole practitioners (allegedly consisting of attorneys Marston, Rapport, DeMarse, Darcy Vaughn, Ashley Burrell and Kostan Lathouris). AA 9.

to wrongfully use civil proceedings against him in the Blue Lake Tribal Court; breached and/or aided and abetted breach of a fiduciary duty allegedly owed by Judge Marston; committed and/or aided and abetted commission of constructive and extrinsic fraud by reason of Judge Marston's failure to disclose his role in *Blue Lake v. Shiomoto*, and in successfully defending against Acres' two federal district court lawsuits.

Respondents "Rapport and Marston",[6] Judge Marston, Clerk Huff, Tribal Vice Chairperson/Tribal Administrator/Casino CEO Ramsey, former Casino and Tribal executive Frank, Tribal attorneys David Rapport and Cooper DeMarse, and Tribal Court associate judges/law clerks Burrell, Vaughn and Lathouris (unless otherwise specified, these Respondents, as distinguished from the Boutin Jones and Janssen Malloy Respondents, will be referred to herein as the "Blue Lake Respondents") specially appeared and moved pursuant to Code of Civil Procedure, section 418.10 to quash the summons and complaint and to dismiss the action for lack of jurisdiction, based on their respective tribal, judicial and/or prosecutorial immunities.[7]

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[6] "Rapport and Marston" appears in quotations because, as shown by the Declarations of David Rapport, RA 195, and Lester Marston RA 6, "Rapport and Marston" as an entity had no legal relationship with the Tribe or the Casino; rather, Respondents David Rapport and Lester Marston each had a separate contractual relationship directly with the Tribe.

[7] Acres did not dispute, and the Superior Court correctly held, based on *Boisclair v. Sup. Ct.* (1990) 51 Cal.3d 1140, 1140 n.1, that a motion to

In a lengthy and thoroughly researched order, the Hon. David Brown succinctly characterized the issue before him as follows:

> The parties' core dispute on tribal sovereign immunity is whether, in committing the alleged tortious conduct, the Tribal Court Judge, the Tribal Court Clerk, the Tribal Judge's law clerks and other associate judges, the Tribe's executives, including those who gave evidence in *Blue Lake v. Acres*, and the tribe's lawyers, were functioning as the Tribe's officers or agents in an official capacity implicating the Tribe's sovereignty, or instead acted merely as the Tribe's employees engaged in essentially personal pursuits for their own personal benefit not involving the Tribe's sovereignty. AA 283.

Judge Brown prefaced his analysis of the sovereign immunity issue with the following observation:

> It is important to note that Acres only alleges that the *Blue Lake v. Acres* fraudulent inducement action was maliciously prosecuted against him, and is the sole basis of the First, Second and Third Causes of Action. (Com. 111] 132, 133, 134, 135.) Thus, at least as to the malicious prosecution claims, the moving defendants' conduct was contained to acts taken solely within *Blue Lake v. Acres* in the Tribal

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quash under C.C.P. § 418.10 is the proper means by which a Tribe or a Tribal official may assert tribal sovereign immunity as a bar to maintenance of an action in the Superior Court. See also *Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1204 ["[W]hen a defendant challenges personal jurisdiction, the burden shifts to the plaintiff to prove the necessary jurisdictional criteria are met by competent evidence in affidavits and authenticated documentary evidence; allegations in an unverified complaint are inadequate."].

> Court. The parties' core dispute on tribal sovereign immunity is whether, in committing the alleged tortious conduct, the Tribal Court Judge, the Tribal Court Clerk, the Tribal Judge's law clerks and other associate judges, the Tribe's executives, including those who gave evidence in *Blue Lake v. Acres*, and the tribe's lawyers, were functioning as the Tribe's officers or agents in an official capacity implicating the Tribe's sovereignty, or instead acted merely as the Tribe's employees engaged in essentially personal pursuits for their own personal benefit not involving the Tribe's sovereignty. AA 283.

Judge Brown analyzed the facts alleged in Acres' Complaint, the legal contentions and evidentiary submissions of the Blue Lake Respondents, in light of decisions by the U.S. Supreme Court (*Lewis v. Clarke* (2017) 137 S.Ct. 1285), U.S. Circuit Courts of Appeals (*Pistor v. Garcia* (9th Cir. 2015) 791 F.3d 1104; *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 550; *Stock West Corp. v. Taylor* (9th Cir. 1991) 964 F.2d 912 (9th Cir. 1992) (*en banc*); *Davis v. Littell* (9th Cir. 1968) 398 F.2d 83, 84-85, *cert.* denied, 393 U.S. 1018, 21 L.Ed.2d 562, 89 S. Ct. 621), California appellate court decisions (*People ex rel. Owen v. Miami Nations Enterprises* (2016) 2 Cal.5th 222; *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157; *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* (2nd Dist. 1999) 74 Cal.App.4th 1407; *Brown v. Garcia* (1st Dist. 2017) 17 Cal.App.5th 1198; *Trudgeon v. Fantasy Springs Casino* (4th Dist. 1999) 71 Cal.App.4th 632, 644), and decisions from

federal district courts and appellate courts in other states, all pertaining to whether tribal officials or employees sued as individuals may be cloaked with the tribe's sovereign immunity.

The record before Judge Brown consisted not only of the parties' legal contentions, but also declarations (together with exhibits) from Respondents Judge Marston, Clerk Huff, Ramsey and Rapport concerning Blue Lake's governmental structure, the manner in which the Casino and Tribal Court were established, the relationship between the tribal government and the Casino, and the respective roles of the Blue Lake Respondents relative to Acres and the litigation between Acres and Blue Lake. RA 103.

Based on the respective parties' written submissions and oral arguments, Judge Brown observed that none of the Blue Lake Respondents was a party to *Blue Lake v. Acres* (AA 281), noted the "obvious distinctions between the negligence case against the driver in *Lewis* and the malicious prosecution action and related torts stated here against moving defendants[,]" (AA 284), and determined that,

> To adjudicate Acres' claims against the Tribal Court Judge and personnel, and the Tribe's titular executives, would require this state court to adjudicate the propriety of the manner in which the tribal officials carried out inherently tribal functions in the Tribal Court and the tribal lawsuit. *Brown [v. Garcia]* supports an

> extension of sovereign immunity to the tribe's officials and attorneys in this action because of that unavoidable interference with the Tribe's sovereignty.
>
> In light of the foregoing, the Court finds that in the prosecution of the Tribal Court action, the moving defendants were functioning as the Tribe's officials solely within the Tribal Court's jurisdiction. The moving defendants are clearly not analogous to the negligent employee in *Lewis v. Clarke*. There is no evidence that the moving defendants acted in their individual capacities for their own private purposes and benefit, or outside the scope of their legal agency, authority and fiduciary duty to the Tribe as tribal officials. Allowing the action to proceed against the Tribe's officials would undoubtedly require the Tribe to act, and would entangle this court in questions of Tribal Court practice and law that would directly impinge the Tribe's sovereignty. Extending sovereign immunity to these moving defendants for their alleged acts in the Tribal Court action is supported by *Great W. Casinos, Inc.* and *Brown*, and is not in conflict with *Lewis*. Further, extending sovereign immunity to the tribe's official would be commensurate with the scope of state sovereign immunity under analogous circumstances. [AA 288]

Judge Brown also determined that because Acres' suit against the Blue Lake Respondents is based upon acts taken directly – and solely – in connection with Tribal Court proceedings in *Blue Lake v. Acres* and *Acres v. Blue Lake*, the Blue Lake Defendants are entitled to absolute judicial, quasi-judicial immunity or prosecutorial immunity. (AA 280).

Judge Brown having determined that Acres' action is barred by the Blue Lake Respondents' impenetrable immunities, granting Acres leave to amend would have been futile.

FACTS ESSENTIAL TO THIS APPEAL

A. The Blue Lake Respondents.

Acres concedes that the Blue Lake Rancheria is a federally recognized Indian Tribe that owns and operates the Blue Lake Casino & Hotel ("Casino"). AA 7-8. The Casino is located on the federal trust lands of the Blue Lake Rancheria[8] in Humboldt County. AA 55. The Casino is not separately organized apart from the Tribe itself; it is an enterprise fund of the Tribe, operated under the direction of the Tribe's Business Council, which under the Tribe's Constitution is the Tribe's governing body. RA 103.

Acres alleges that Respondents DeMarse, Vaughn and Burrell are attorneys associated with Respondent "Rapport & Marston" and are Tribal Court "associate judges" who participated in various aspects of the litigation between the Tribe and Acres (AA 10); that Respondent Lathouris allegedly is an attorney associated with "Rapport & Marston" who performed legal

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[8] "Blue Lake Rancheria" can mean either the tribal entity or the tribal entity's federal trust land base. Unless otherwise specifically indicated, this Memorandum uses "Blue Lake" to refer to the tribal entity, rather than the land over which the Tribe exercises jurisdiction.

research and drafted orders for Judge Marston *i.e.* acted as Judge Marston's law clerk (*id.*); that Respondent Huff is the Tribal Court's Clerk and the Tribe's "Grants and Contracts Manager" (AA 9); that Respondent Ramsey is the Casino's CEO, a Tribal Court Judge, the Tribe's Vice Chairperson and the Tribe's Administrator responsible for day-to-day functioning of the Tribe's government (AA 8); that Respondent Frank was a high-level Casino executive and then the Tribe's Director of Business Development (AA 8); that Respondent "Rapport & Marston" is an association of Respondent attorneys David Rapport and Lester Marston, exact form unknown to Acres (AA 9); that Respondent Rapport has served as the Tribe's contract general legal counsel since 1983 (AA 10); and that Respondent DeMarse is a Tribal Court associate judge and is associated with "Rapport and Marston." AA 10.

B. Acres' Complaint.

Acres' Complaint, verified on information and belief, is replete with vitriol, unanchored speculation and hyperbole, but neither the Complaint nor Acres' response to the Blue Lake Respondents' motion to quash and dismiss sufficed[9] to meet his burden of showing by a preponderance of facts

[9] Although Acres' Complaint alleged violations of federal mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343, respectively), the only acts alleged to have been committed by any of the Blue Lake Respondents that involved the use of mail or wire communication consisted of filing or

that the Blue Lake Respondents were not cloaked with the various immunities they asserted.[10]

Acres' Complaint alleges seven causes of action:

1. Respondents Ramsey, Frank, the Boutin Jones and Janssen Malloy law firms, and Respondent attorneys Stouder, O'Neill, Burroughs and Yarnell allegedly committed the tort of wrongful use of civil proceedings by filing and prosecuting *Blue Lake v. Acres* in the Tribal Court;

2. Respondents Rapport, "Rapport and Marston," Judge Marston, Clerk Huff, and Respondents DeMarse, Vaughn, Burrell,

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assisting in preparing pleadings or orders in the Tribal Court and federal court litigation between Blue Lake and Acres/Acres Bonusing. Use of the mails or wire to file documents in litigation does not violate either of those statutes. See *United States v. Pendergraft* (11th Cir 2002) 297 F.3d 1198, 1208 ["Serving a motion by mail is an ordinary litigation practice. A number of courts have considered whether serving litigation documents by mail can constitute mail fraud, and all have rejected that possibility. See *Daddona v. Gaudio* (D. Conn. 2000) 156 F.Supp.2d 153; *Auburn Med. Ctr., Inc. v. Andrus* (M.D. Ala.1998) 9 F.Supp.2d 1291, 1300; *von Bulow v. von Bulow* (S.D. N.Y.1987) 657 F.Supp. 1134; *Paul S. Mullin & Assocs., Inc. v. Bassett* (D. Del.1986) 632 F.Supp. 532, 540; *Am. Nursing Care of Toledo, Inc. v. Leisure* (N.D. Ohio 1984) 609 F.Supp. 419, 430."

[10] Although a complaint verified on information and belief may serve as an affidavit for the purpose of stating a cause of action to overcome a demurrer, such a complaint cannot satisfy a plaintiff's burden of supporting the assertion of jurisdiction over a defendant who otherwise is not subject to a court's personal jurisdiction. See *Shearer v. Superior Court* (2nd. Dist. 1977) 70 Cal App 3d 424, 430. Acres' Opening Brief.

Lathouris, and Chase allegedly aided and abetted the commission of the tort of wrongful use of civil proceedings against *Blue Lake v. Acres*;

3. Respondents "Rapport & Marston," Judge Marston, David Rapport, Clerk Huff, and Respondent attorneys Burrell, DeMarse, Vaughn, Lathouris and Chase allegedly conspired with their client and the other attorneys named as Respondents to commit the tort of wrongful use of civil proceedings in *Blue Lake v. Acres*;

4. Respondent Judge Marston allegedly breached a fiduciary duty owed to Acres by not having disclosed that his role in *Blue Lake v. Shiomoto*, and by not having immediately recused himself from presiding over *Blue Lake v. Acres*;

5. Respondents Judge Marston, Ramsey, Frank, Clerk Huff, "Rapport and Marston," Boutin Jones, Rapport, Burrell, DeMarse, Vaughn, Lathouris, Chase, Stouder, O'Neill, and Janssen Malloy allegedly aided and abetted Judge Marston's alleged breach of his fiduciary duty to Acres by (somehow) assisting and encouraging Judge Marston's alleged breach of his fiduciary duty to Acres in *Blue Lake v. Acres*;[11]

6. Respondent Judge Marston allegedly committed constructive fraud against Acres by failing to disclose that he had received compensation

[11] Acres does not explain how Judge Marston aided and abetted his own alleged acts or omissions.

from Blue Lake for legal work allegedly performed in a capacity other than as Tribal Court Judge, but unrelated to *Blue Lake v. Acres*; and

7. Respondents Ramsey, Frank, Clerk Huff, "Rapport & Marston," Rapport, Burrell, DeMarse, Vaughn, Lathouris, Chase, Stouder, O'Neill and Boutin Jones allegedly aided and abetted Judge Marston's alleged commission of constructive fraud against Acres.

STANDARD OF REVIEW

"On a motion asserting sovereign immunity as a basis for dismissing an action for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists." *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 183. If the trial court's resolution of the jurisdictional question depended on disputed issues of fact, this Court reviews the trial court's findings for substantial evidence. *Professional Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016, 1032. Absent conflicting extrinsic evidence, the question of jurisdiction over an action against an Indian tribe is purely one of law, subject to *de novo* review. *Warburton/Buttner v. Superior Court* (4th Dist. 2002) 103 Cal.App.4th 1170, 1180.

The same standard applies to challenges to personal jurisdiction. See *Serafini v. Superior Court* (1998) 68 Cal.App.4th 70, 77.

Leave to amend a complaint is entrusted to the sound discretion of

the trial court, and will not be disturbed on appeal absent a clear showing of abuse. The discretion to be exercised is that of the trial court, not that of the reviewing court. The trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record. *Bd. of Trustees v Superior Ct.*, (2007) 149 Cal.App.4th 1154, 1162-63.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE BLUE LAKE RESPONDENTS ARE CLOAKED WITH THE TRIBE'S SOVEREIGN IMMUNITY.

A. No One Disputes that the Blue Lake Rancheria Possesses Sovereign Immunity.

As the Superior Court correctly noted (AA 280), no one disputes that the Blue Lake Rancheria is a federally recognized Indian Tribe possessing sovereign immunity from suit, and cannot be sued without its express consent . AA 280; see *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 ["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* (2014) 572 U.S. 782, 788. 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. *United States v. Testan* (1976) 424 U.S. 392, 399. 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.* (1998) 523 U.S. 751. Tribal sovereign immunity "is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Warbutton/Buttner v. Sup. Ct.* (4th Dist. 2002) 103 Cal.App.4th 1170, 1182. Tribal sovereign immunity presents a pure jurisdictional question, and is a matter of federal law that state courts cannot diminish. *Id.* at 1172; *People ex rel. Owen v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 235. Because the Tribe has not waived its immunity, it retains immunity from Acres' suit on his causes of action in the Superior Court.

B. The Superior Court Correctly Held That The Blue Lake Respondents Are Cloaked With Blue Lake's Sovereign Immunity.

After a thorough review of the relevant facts, the Superior Court found that all of the Blue Lake Respondents were being sued for actions related to litigation on tribal land relative to a Tribal Court proceeding; that "the Tribe's Tribal Court Judge, Clerk, Executives and attorneys were officials of the Tribe in the Tribal Court, or officials providing legal representation to the Tribe[,]"; and that,

> the malicious prosecution claim would most likely require action by the Tribe in the lawsuit, and could involve efforts to invade the privileged interactions between the Tribe and its legal counsel regarding the decision-making

> process underlying the prosecution of Acres in the Tribal Court. Moreover, as to the moving defendants, Acres' causes of action draw into dispute the totality of the Tribal Court, its administration and validity. [AA 284-85.]

Applying the relevant U.S. Supreme Court, U.S. Circuit Court of Appeals, U.S. District Court and California appellate case law to those facts, the Superior Court held that even though Acres purports to seek money damages from the individual Blue Lake Respondents, not the Blue Lake Tribe, the nature of Respondents' actions and the impacts on Blue Lake's governance rendered Blue Lake, not the named Respondents, the real party in interest. Therefore, the Blue Lake Respondents all are cloaked with Blue Lake's sovereign immunity. Because substantial evidence supports the Superior Court's factual findings, and the law was correctly applied, this Court should affirm that conclusion.

Acres' Opening Brief contends that because an award of money damages against the Blue Lake Respondents would not come out of Blue Lake's treasury, Blue Lake cannot be the real party in interest, and thus that the Blue Lake Respondents are not cloaked with Blue Lake's sovereign immunity. In so contending, Acres misstates the holdings of the very decisions upon which he relies: principally *Lewis v. Clarke* (2017) ___ U.S. ___, 137 S.Ct. 1285; and *Maxwell v. County of San Diego* (9th Cir 2013)

708 F.3d 1075.[12]

As the Superior Court observed, quoting *Brown v. Garcia* (1st Dist. 2017) 17 Cal.App.5th 1198, 1204, a Tribe's sovereign immunity extends "to tribal officials when they act in their official capacity and within the scope of their authority." See also *Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1421 [Tribal Council members and non Indian tribal attorney held immune from suit over roles in Tribe's termination of gaming management contract]; see also *Imperial Granite Co.*

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[12] Acres cited *J.W. Gaming v. James* (ND Cal. Oct 5 2018) Case No. 3:18-cv-2669-WHO, but the Superior Court did not consider that decision because it was under appeal. AA 284. The Ninth Circuit recently affirmed the district court's ruling that under the circumstances presented in that case, the individually-named defendants, who had defrauded the plaintiff of more than $5 Million by making false representations and converting the plaintiff's money to their own personal use, were not cloaked with the Pinoleville Nation's sovereign immunity because the award of damages against those individuals would not expend itself against the tribal treasury or impact tribal self-governance; therefore, the Tribe was not the real party in interest. On remand, proceedings against the individual defendants in that case are continuing in the district court. See 2020 WL 353536 (N.D.Cal. Jan. 21, 2020). However, the facts in this case as found by the Superior Court are very different from those in *JW Gaming*. Rather than having falsified documents and otherwise fraudulently induced Acres into investing money in a tribal project, only to divert the money to their personal use, Blue Lake paid Acres $250,000 for a gaming system that did not work as he had promised it would; unlike the *JW Gaming* individual defendants, the Blue Lake Respondents had no involvement in and did not derive any personal benefit from filing and prosecuting *Blue Lake v. Acres*; and allowing Acres to sue tribal officials, executives, court personnel and legal counsel as individuals would have significant adverse impacts on the Tribal government's ability to function effectively. See AA 284-85.

v. Pala Band of Mission Indians (9th Cir. 1991) 940 F.2d 1269, 1271 [tribal official immune from suit based on participation in Tribe's decision to deny use of road across Reservation land]. Under these cases, a plaintiff generally may not avoid the operation of tribal immunity simply by naming tribal officials as individual defendants for actions taken in their official capacities on the Tribe's behalf and in the exercise of tribal authority validly conferred upon them.

The Superior Court accurately and at length explained why, even under *Lewis*, Acres' suit against the Blue Lake Respondents necessarily implicates significant tribal government interests:

> There are obvious distinctions between the negligence case against the driver in *Lewis* and the malicious prosecution action and related torts stated here against moving defendants. First, the alleged tort in *Lewis* occurred entirely on state land in pursuit of the tribe's commercial activities, while the malicious prosecution claim and related torts here occurred entirely on tribal land within the context of a Tribal Court judicial proceeding. Second, the tribe's driver in *Lewis* did not claim to be an "official" of the tribe acting as the tribe's necessary fiduciary agent, while the Tribe's Tribal Court Judge, Clerk, Executives and attorneys in this matter were officials of Tribe in the Tribal Court, or officials providing legal representation to the Tribe. Third, the negligence action against the driver in *Lewis* would not be expected to require the appearance of the Tribe (or tribal officials) as witnesses or necessary parties in the action, while the malicious prosecution claim would

> most likely require action by the Tribe in the lawsuit and could involve efforts to invade the privileged interactions between the Tribe and its legal counsel regarding the decision-making process underlying the prosecution of Acres in the Tribal Court.
>
> Moreover, as to the moving defendants, Acres' causes of action draw into dispute the totality of the Tribal Court, its administration, and validity. [AA 284-285].

The Superior Court's analysis also is consistent with the Ninth Circuit's decision in *Maxwell v. San Diego County* (9th Cir 2013) 708 F.3d 1075. In *Maxwell*, paramedics employed by the Viejas Tribe were sued individually for gross negligence while responding to an off-Reservation emergency under an agreement between the Tribe and San Diego County. Foreshadowing the Supreme Court's holding in *Lewis*, the Ninth Circuit held that the paramedics could be sued individually because imposing individual liability would not directly implicate tribal sovereign or governmental interests, even if the Tribe had agreed to indemnify the employees. *Id.* at 1087, 1090. However, the Court cautioned that, "we must be sensitive to 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 acting, or to compel it to act.' *Shermoen v. U.S.* (9th Cir. 1992) 982 F.2d 1312, 1320 (internal citations and quotation marks omitted)." *Id.* at 1088.

The record before the Superior Court contains no allegations or evidence identifying any specific act or omission on the part of Respondent Casino CEO/Tribal Vice Chair/Tribal Court Judge/Tribal Administrator Ramsey that would – or could – have been taken other than in an official tribal capacity or outside the scope of her authority as the Casino's chief executive officer, elected Vice Chair of the Tribe's governing body, or the Tribe's Administrator.[13] The Complaint's only specific allegation against Respondent Frank is that he acted in his official capacity on behalf of the Tribe as a liaison between Blue Lake and its attorneys in *Blue Lake v. Acres*, and submitted declarations and verified the Casino's discovery responses in *Blue Lake v. Acres*. AA 208, RA 187.[14] Likewise, whatever Acres might allege about the activities and/or associations of Respondents Judge Marston, Clerk Huff, Rapport, "Rapport and Marston," Burrell, Vaughn, DeMarse and Lathouris outside the Tribal Court proceedings in *Blue Lake v. Acres* and/or the federal court proceedings in *Acres v. Blue Lake I and II*, the Superior Court correctly concluded that the impacts of Acres' suit on Blue Lake's self-governance would be comparable to those

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[13] Acres' only specific allegation concerning Respondent Ramsey is that she executed the Tribe's consent to substitution of its attorneys in *Blue Lake v. Acres*. AA 207.

[14] Under *Butz v. Economou* (1978) 438 U.S. 478, 515, these actions were absolutely privileged.

found sufficient to support the sovereign immunity of the tribal officials named as individual defendants in *Brown v. Garcia*, *supra*. AA 288.

Citing *Twenty-Nine Palms Enters. Corp. v. Bardos* (4th Dist. 2012) 210 Cal.App.4th 1435, and *People ex rel. Owen v. Miami Nation Enters*, *supra* (Opening Brief, at p. 25), Acres argues that in order to invoke the Tribe's sovereign immunity, the Blue Lake Respondents must prove that the Tribe has granted them permission to do so. Neither case supports Acres' contention.

Bardos involved a suit by a tribal corporate entity against a construction contractor for a project that may – or may not – have been located on tribal trust land. It did not involve or decide whether a tribe must affirmatively delegate its sovereign immunity to tribal officials in order that such officials may invoke tribal sovereign immunity when sued as individuals. Rather, the issue in *Bardos* was whether a non-tribal contractor could assert as a defense against the tribal corporation's lawsuit that California's contractor licensing laws, being civil/regulatory rather than criminal/prohibitory, applied to the contractor on tribal land. *Bardos*, at 1446.

Miami Nation also did not involve or decide that a tribe must affirmatively delegate its sovereign immunity to its officials in order for such persons to be cloaked with the tribe's immunity when sued as

individuals. At issue in *Miami Nation* was whether an economic entity created by a non-California Indian Tribe for the purpose of making "payday" loans to Californians residing outside the Tribe's Indian country was an "arm of the Tribe" to which the Tribe's sovereign immunity attached in an action filed by the State of California to enforce the State's consumer lending laws.

The California Supreme Court articulated a five-factor test for determining whether a tribal economic entity is an "arm of the Tribe." One of those factors is whether the creating Tribe intended that the entity share the Tribe's immunity.

Here, Acres is suing the Blue Lake Respondents, not a tribally-created off-Reservation commercial sub-entity. Although Acres may have named the Blue Lake Respondents as individuals, his suit is effectively an attack on Blue Lake itself, not on a commercial entity claiming to be an "arm of the Tribe," and challenges the manner in which the Tribe has chosen to exercise its judicial powers and protect its financial resources through litigation. In short, the actions for which the Blue Lake Respondents are being sued are the actions of the Tribe itself, and the Blue Lake Respondents are cloaked with Blue Lake's immunity.

C. Contrary to Acres' Argument, the California Tribal Court Civil Money Judgment Act Has Nothing To Do With This Case, and Could Not Have Conferred Upon the Superior Court Jurisdiction to Grant the Relief Sought by Acres.

Acres argues that California's Tribal Court Civil Money Judgment Act ("TCCMJA"), California Code of Civil Procedure, section 1730, *et seq.* authorized the Superior Court to deny the motions to quash notwithstanding principles of tribal sovereign immunity. (Opening Br. pp.33-35.) Acres' argument is, to put it mildly, far off the mark. The TCCMJA provides a statutory basis for superior courts to recognize and enforce money judgments issued by tribal courts. Cal. Civ. Proc. Code, § 1731. It is true that the TCCMJA authorizes – indeed, requires – a Superior Court to inquire into the circumstances surrounding a tribal court judgment (*id.*, sec. 1737 subd.(a)) if a judgment defendant objects to enforcement on grounds of lack of jurisdiction or procedural or substantive unfairness. However, such an inquiry is warranted only if the Tribe itself *voluntarily* invokes the Superior Court's jurisdiction to enforce the judgment of its tribal court. The obvious purpose of this requirement is to protect a tribal court defendant from enforcement of a judgment issued by a court lacking jurisdiction or in a manner inconsistent with basic notions of due process. (*Id.*, sec. 1737 subd.(b).) Because Blue Lake has not sought to enforce a Tribal Court judgment against Acres, the TCCMJA simply is inapplicable to this case.

Acres would have this Court infer from the TCCMJA a general authorization for California courts to evaluate the procedures and decisions of tribal courts regardless of the surrounding circumstances. Doing so would not just ignore the specific circumstances that the California Legislature deemed necessary to trigger application of the TCCMJA (namely, the filing of a state court action seeking to enforce a tribal court judgment), but also would invite an unbounded intrusion into the affairs of tribal judicial systems. Such a radical amendment of the TCCMJA should be left to the Legislature, and thereafter to the courts to determine whether the Legislature has the authority to do so consistent with controlling federal law.

II. BLUE LAKE RESPONDENTS JUDGE MARSTON, CLERK HUFF, RAMSEY, BURRELL, VAUGHN, DeMARSE AND LATHOURIS ARE CLOAKED WITH ABSOLUTE JUDICIAL OR QUASI JUDICIAL IMMUNITY

A. The Superior Court Correctly Held that Blue Lake Respondents Judge Marston, Clerk Huff and Law Clerks Burrell, Vaughn, DeMarse, and Lathouris Are Absolutely Immune from Suit Arising Out of Their Judicial or Quasi-Judicial Acts.

As an alternative basis for granting the Blue Lake Respondents' motion to quash, the Superior Court determined, correctly, that the Tribal Court's judge(s), clerk and law clerks possess absolute judicial immunity for their judicial or quasi-judicial acts. AA 285. "It is a general principle of the

highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Mireles v. Waco* (1991) 502 U.S. 9, 10.

California law is consistent with federal law. See *Olney v. Sacramento County Bar Ass'n.* (1989) 212 Cal.App.3d 807, 811: "Judges enjoy absolute immunity from liability for damages for acts performed in their judicial capacities. (*Stump v. Sparkman* (1978) 435 U.S. 349, 356 357; *Greene v. Zank* (1984) 158 Cal.App.3d 497, 508.) Immunity exists for 'judicial' actions; those relating to a function normally performed by a judge and where the parties understood they were dealing with the judge in his official capacity. (*Stump*, *supra*, at p. 362 [55 L.Ed.2d at p. 342]; *Greene*, *supra*, at p. 507." See also *Regan v. Price* (2005) 131 Cal.App.4th 1491, 1495. Moreover, "[A] tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges." *Penn v. United States* (8th Cir. 2003) 335 F.3d 786, 789.

"Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v Waco*, *supra*, at 11. This immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger v. Saxner* (1985) 474 U.S.

193,199-200.[15] Indeed, even "[g]rave procedural errors or acts in excess of judicial authority" do not deprive a judge of this immunity. *Moore v. Brewster* (9th Cir. 1996) 96 F.3d 1240, 1243.

Judicial immunity "applies even where the judge's acts are alleged to have been done maliciously and corruptly." *Frost v. Geernaert* (1988) 200 Cal.App.3d 1104, 1107. As noted in *Brewster*, *supra*, 96 F.3d at 1246,

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

In addition, "the privilege of judicial immunity applies not only to judges, but to all persons who act in a judicial capacity." *Howard v. Drapkin* (2nd. Dist. 1990) 222 Cal.App.3d 843, 851 [Psychologist who performed evaluation in family law proceedings entitled to quasi judicial immunity]. "The concern for the integrity of the judicial process that underlines the absolute immunity of judges also is reflected in the extension

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[15] *U.S. v. Holzer* (7th Circ. 1987) 816 F.2d 304, cited by Acres (Opening Brief, p. 41), is of no help to Acres. *Holzer* involved a federal criminal prosecution of a state court judge accused of, *inter alia*, mail fraud, extortion and violating RICO by pressuring attorneys with cases before him or dependent upon him to make receivership appointments to "loan" him nearly $200,000 – loans that somehow never were repaid. Civil judicial immunity was not an issue in the case.

of absolute immunity to 'certain others who perform functions closely associated with the judicial process.'" *Brewster*, *supra*, 96 F.3d at 1246. "Under this functional approach, immunity flows from the nature of the responsibilities of the individual official." *Id.* at 1244 1245. This immunity extends to law clerks. *Id.* at 1246; see also *Mitchell v. McBryde* (5th Cir.1991) 944 F.2d 229, 230. Likewise, "[c]ourt clerks and administrators are also entitled to absolute immunity from liability for damages when they perform tasks that are an integral part of the judicial process." *Mullis v. United States Bankruptcy Court* (9th Cir. 1987) 828 F.2d 1385, 1390; see also *Howard v. Drapkin*, *supra*.

Here, Acres has sued Respondents Chief Judge Marston, Clerk Huff, and Law Clerks/Associate Judges Ramsey, Burrell, Vaughn, DeMarse, and Law Clerk Lathouris for their judicial or quasi-judicial acts taken in connection with Judge Marston's presiding over *Blue Lake v. Acres*. Unless Acres can demonstrate that the acts for which they are being sued are beyond the scope of their absolute judicial immunity, his action is barred by that immunity. As explained below, Acres cannot make that showing.

B. Acres' Complaint Fails to Allege an Exception to Judicial Immunity.

Even if, as Acres complains (but the Blue Lake Respondents certainly do not concede), the Blue Lake Respondents' conduct toward him

was "despicable, and rife with malice, oppression and fraud," the Blue Lake Respondents sued for performing their Tribal Court duties in connection with *Blue Lake v. Acres* still are protected by absolute judicial or quasi-judicial immunity, *see*, *e.g.*, *Frost v. Geernaert*, 200 Cal.App.3d, *supra,* at 1107, because there are only two limited circumstances under which absolute judicial or quasi-judicial immunity can be overcome, and Acres has not demonstrated, and cannot demonstrate, the existence of either of these circumstances. *Mireles v. Waco*, 502 U.S. at 11; *Regan v. Price* (3rd Dist. 2005), 131 Cal.App.4th 1491 at 1496.

First, judicial immunity does not apply to actions, though judicial in nature, taken in the "complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. at 12. A judicial officer acts in the clear absence of jurisdiction only if he "knows that he lacks jurisdiction, or acts despite a clearly valid statute or case law expressly depriving him of jurisdiction." *Mills v. Killebrew* (6th Cir. 1985) 765 F.2d 69, 71.

The scope of a judge's jurisdiction is construed broadly where judicial immunity is at stake. *Penn v. United States*, *supra*, at 789 790. Therefore, courts have held that judges enjoy judicial immunity even when there are procedural defects in their appointment, if they are "discharging the duties of that position under the color of authority." *White by Swafford v. Gerbitz* (6th Cir. 1989) 892 F.2d 457, 462; see also *Wagshal v. Foster*

(D.C. Cir. 1994) 28 F.3d 1249, 1254.

Any claim by Acres that the Tribal Court's judges, clerk and law clerk(s) acted in complete absence of all jurisdiction is effectively refuted by the district court orders dismissing both of Acres' federal district court lawsuits against the Tribal Court, Judge Marston and Clerk Huff. See *Acres v. Blue Lake I* and *Acres v. Blue Lake II*.[16] Moreover, even as the Tribal Court granted summary judgment in favor of Acres and against the Tribe, the Tribal Court found that it had jurisdiction over the action:

> Tribal Court jurisdiction over both [Acres Bonusing, Inc.] and Acres arises directly from the consensual relationship established through the Agreement and commercial negotiations" between James Acres, Acres Bonusing, Inc. and Blue Lake, that "facts submitted by the parties establish that all claims in the action arose on tribal trust land are thus subject to the Tribal Court's sovereign jurisdiction," and that "[t]he Tribal Court has jurisdiction over ABI and James Acres"].

AA 58-68, an order from which Acres did not appeal. Acres' allegations regarding Respondent Judge Marston's judicial bias and his duty to recuse,

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[16] Judge Orrick found that a "colorable or plausible basis for [tribal court] jurisdiction exists in this case based on the first *Montana [v. United States* (1981) 450 U.S. 544, 565] 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." AA 178

if any, also do not allege a "complete lack of jurisdiction." See *Ashelman v. Pope* (9th Cir. 1986) 793 F.2d 1072, 1075-1078 ["To determine if the judge acted with jurisdiction, courts focus on whether the judge was acting clearly beyond the scope of subject matter jurisdiction in contrast to personal jurisdiction."]. Deciding whether or not to recuse is, of course, a judicial act within a court's jurisdiction and discretion, as are presiding over hearings and ruling on motions, receiving and filing parties' submissions, reviewing pleadings, drafting, issuing and serving orders, and performing legal research in connection with pending proceedings. Those are the very functions Acres alleged the Blue Lake Defendants performed in connection with *Blue Lake v. Acres*, and thus Acres failed to allege facts sufficient to invoke the first exception to judicial immunity.

The second circumstance in which absolute judicial immunity does not apply 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*, 502 U.S. at 11; *Regan v. Price*, 131 Cal.App.4th at 1496. 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 or her official capacity. *Meek v. County of Riverside* (9th Cir. 1999) 183 F.3d 962, 967 [judge's action to retaliate against court personnel unrelated to a pending judicial proceeding was not a judicial act].

Courts have found conduct to be non judicial in nature and declined to find judicial immunity only in relatively rare circumstances, none of which are present in this case. *See, e.g.*, *Archie v. Lanier* (6th Cir. 1996) 95 F.3d 438 [judge stalked and sexually assaulted a litigant]; *Gregory v. Thompson* (9th Cir. 1974) 500 F.2d 59 [justice of the peace accused of forcibly removing a man from courtroom and physically assaulting him]; *Regan v. Price*, 131 Cal.App.4th at 1496 [discovery referee deliberately slammed door on party to litigation].

Acres' Complaint alleges no facts to support the second exception to Respondents' absolute judicial immunity. As already noted above, each of Judge Marston's acts of which Acres complains in connection with *Blue Lake v. Acres* was a commonly executed judicial task, well within the scope of his judicial authority: *i.e.*, managing the case by reviewing the parties' filings, issuing scheduling orders, holding hearings and ruling on motions. See *Jenkins v. Kerry* (D. D.C. 2013) 928 F.Supp.2d 122, 134.

Acres cites *Forrester v. White* (1988) 484 U.S. 219 to support his contention that Judge Marston's actions in *Blue Lake v. Acres* were

administrative, rather than judicial. Acres apparently contends that Respondent Judge Marston may be sued personally for having retained the services of law clerks whom Acres contends were themselves conflicted to participate in *Blue Lake v. Acres*. Acres' reliance on *Forrester* is completely misplaced.

In *Forrester*, a state court judge was sued under 42 U.S.C. section 1983 for sexual discrimination in demoting and ultimately firing a probation officer. The Supreme Court determined that the decision to terminate a staff member was an administrative act, rather than a judicial act, because it did not involve adjudication in a judicial proceeding, and thus that Judge White did not have absolute judicial immunity (the Court left open the possibility that he might have qualified immunity). *Forrester*, 484 U.S. at 230.

Acres' allegations regarding Blue Lake Respondents Burrell, Vaughn, DeMarse and Lathouris, whether as Associate Tribal Court Judges or 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*, 96 F.3d at 1246. Ms. Burrell allegedly drafted orders and a tentative ruling that Judge Marston reviewed, and took notes for Judge Marston during a hearing. *See*, *e.g.*, AA 10, 27-28. Ms. Vaughn allegedly drafted a tribal court order for Judge Marston threatening to sanction Acres should he

continue to "flout tribal court rules." *See*, *e.g.*, AA 19.

Acres alleges that Judge Marston tasked Respondent Lathouris with drafting a memorandum of decision as to whether the Tribal Court could exercise jurisdiction over Acres, and that Respondent Lathouris was supervised by Judge Marston. *See*, *e.g.*, AA 22. Based on the factual allegations in Acres' Complaint, the nature of the work allegedly performed by Blue Lake Respondents Burrell, Vaughn, DeMarse and Lathouris as it related to either *Blue Lake v. Acres* or *Acres v. Blue Lake I or II* clearly was that of Tribal Court personnel performing duties in the course of an adjudicatory proceeding, and therefore they are shielded by the doctrine of absolute judicial or quasi-judicial immunity.

Mr. Acres' Acres alleges Clerk Huff made mistakes in the issuance of a Tribal Court summons, that he was harmed by those errors, AA 15, and that Clerk Huff used her discretion to reject one of his Tribal Court filings for failing to substantially conform to Blue Lake Tribal Court Rule 12 dealing with the form, size, and duplication of papers. AA 18. Even if Clerk Huff made mistakes, her acts were quintessentially quasi-judicial acts for which she enjoys absolute judicial immunity. *Moore v. Brewster*, 96 F.3d 1240 at 1246.

Simply put, whatever else Acres may allege about the Blue Lake Respondents' activities unrelated to the litigation between the Tribe and

Acres, his Complaint fails to allege any extra judicial or non-judicial interactions between Acres and any of the Blue Lake Respondents: no stalking, no physical altercations, no contacts outside the courtroom, no bribery, etc.[17] Thus, the harm alleged by Acres could only have been the result of these Respondents' alleged judicial or quasi-judicial acts in the exercise of the Tribal Court's jurisdiction. Because Acres has alleged only acts that are judicial in nature, absolute judicial or quasi-judicial immunity bars all of Acres' causes of action against these Respondents.

III. PROSECUTORIAL IMMUNITY BARS ACRES' CLAIMS AGAINST BLUE LAKE RESPONDENTS RAPPORT, BURRELL, VAUGHN, DeMARSE, LATHOURIS AND "RAPPORT & MARSTON"

Although the Superior Court relied on tribal and judicial immunity in granting the Blue Lake Respondents' motion to quash, it also could have relied on prosecutorial immunity to quash service as against those Blue Lake Respondents sued for providing Blue Lake with legal advice concerning its litigation with Acres. 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

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[17] Indeed, Acres alleges that Judge Marston specifically avoided any *ex parte* contact with Acres. Complaint, 95, AA 180. However, after Judge Marston recused himself, Acres physically accosted and verbally abused Judge Marston at a meeting of the California Tribal Court State Court Forum held in San Francisco on February 17, 2017. AA 148.

absolute or at least qualified immunity from civil suit for damages. This immunity is known as "prosecutorial immunity."

> The common law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Imbler v. Pachtman (1976) 424 U.S. 409, 422-24.

Contrary to Acres' assertion in his opening brief (at p. 49), prosecutorial immunity is not limited to criminal proceedings; it 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 because "[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* (1978) 438 U.S. 478, 515. This principle, in turn, has been extended to apply in some instances to government attorneys defending or prosecuting civil suits. See *Bradley v. Med. Bd.* (1997) 56 Cal.App.4th 445, 454 n.7 [members of state medical licensing board]; *Sellars v. Procunier* (9th Cir. 1981) 641 F.2d 1295, 1303

[members of State Parole Board]; *Mangiafico v. Blumenthal* (2d Cir. 2006) 471 F.3d 391, 396 97 [prosecutorial immunity may apply to the functions of a government attorney (State Attorney General) "that can fairly be characterized as closely associated with the conduct of litigation or potential litigation . . . including the defense of such actions"].

Under cases such as *Great W. Casinos*, 74 Cal.App.4th 1407, 1414, Respondents Rapport, Burrell, Vaughn, DeMarse and "Rapport & Marston" all are cloaked with prosecutorial immunity for legal services that they may have rendered to the Tribe in their capacities as the Tribe's attorneys in connection with litigation between Blue Lake and Acres Bonusing/Acres. Mr. Rapport, as the long time Tribal Attorney for the Tribe, and attorney DeMarse, as an independent contractor working for Mr. Rapport, were indirectly involved in successfully defending the Tribal Court and Respondents Judge Marston and Clerk Huff against Acres' two federal district court lawsuits seeking to enjoin proceedings in *Blue Lake v. Acres*. (AA 159-162.)

IV. ACRES WAS NOT ENTITLED TO LEAVE TO AMEND

Acres contends that he should have been granted leave to amend his complaint in order to cure its jurisdictional defects, but that the filing of Anti-SLAPP motions by various Respondents foreclosed his ability to do so. Acres is wrong for two reasons.

First, and perhaps most obviously, the filing of Anti-SLAPP motions (and the Blue Lake Respondents' motion to strike the Complaint pursuant to California Code of Civil Procedure, section 1714.10) had nothing to do with whether Acres should have been granted leave to amend, because the Superior Court ruled that the various Respondents' Anti-SLAPP motions were mooted by the Court's grant of the motions to quash for lack of jurisdiction, based on Respondents' sovereign, judicial and prosecutorial immunities. (RA 219)

Second, and more fundamentally, leave to amend should not be granted if amendment would be futile. *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685. In this case, because the Superior Court correctly determined that all of the Blue Lake Respondents are cloaked with tribal, judicial, quasi-judicial and/or prosecutorial immunity, there was no way that Acres could have amended his Complaint to overcome that threshold jurisdictional bar, whether by adding a cause of action for civil damages under RICO, or under any other theory that could invoke the Court's jurisdiction. Therefore, the Superior Court did not abuse its discretion by failing to grant Acres leave to amend his Complaint.

CONCLUSION

For all of the foregoing reasons, the Superior Court's judgment should be affirmed.

Dated: January 27, 2020

Respectfully submitted,

/s/ George Forman
George Forman
Attorney for Blue Lake Respondents Lester Marston, Arla Ramsey, Thomas Frank, Anita Huff, "Rapport and Marston," David Rapport, Cooper DeMarse, Darcy Vaughn, Ashley Burrell and Kostan Lathouris

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(b), the attached reply brief is proportionately spaced, has a typeface of 13 points or more, and contains 9,258 words.

Dated: January 27, 2020 By: /s/ George Forman
George Forman