

**Appeal No. C089344**

**COURT OF APPEAL, STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**JAMES ACRES**

Plaintiff and Appellant

v.

**LESTER MARSTON, et al.,**

Defendants and Respondents

Appeal from Sacramento County Superior Court

Case No. 34-2018-00236829

The Honorable David Brown, Judge

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**RESPONDENTS' BRIEF OF  
DEFENDANTS/RESPONDENTS  
JANSSEN MALLOY LLP, MEGAN YARNALL  
AND AMELIA BURROUGHS**

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<b>COURT OF APPEAL Third APPELLATE DISTRICT, DIVISION</b>		<b>COURT OF APPEAL CASE NUMBER</b> C089344
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APPELLANT/ PETITIONER: James Acres, etc. RESPONDENT/ REAL PARTY IN INTEREST: Janssen Malloy LLP, etc., et al.		
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
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1. This form is being submitted on behalf of the following party (name): Respondents Janssen Malloy LLP, etc., et al.

2. a. ☒ 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:

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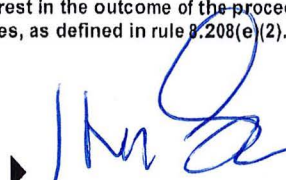
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 11, 2020

Howard Smith

(TYPE OR PRINT NAME)



(SIGNATURE OF APPELLANT OR ATTORNEY)

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**RESPONDENTS' BRIEF OF  
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**INTRODUCTION**

Defendants and Respondents JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS (collectively referred to as "Defendants," "Respondents" or "Janssen Malloy") respectfully request this Court affirm the trial court's order granting Defendants' Motion to Quash Service of Summons and Complaint for lack of jurisdiction based on tribal sovereign immunity, dismissing Plaintiff/Appellant James Acres' ("Plaintiff," "Acres" or "Appellant") Complaint in its entirety as to Janssen Malloy.

Respondents Boutin Jones Inc., Michael Chase, Daniel Stouder, and Amy O'Neill (collectively referred to as "Boutin Jones") represented Blue

Lake Rancheria ("Blue Lake" or "the Tribe"), a sovereign federally-recognized Indian Tribe in a dispute with Plaintiff and his company, Acres Bonusing, Inc. ("ABI"), relating to the casino gaming business of Blue Lake Casino and Hotel ("Blue Lake Casino"). The casino is owned/operated by the tribe.

Boutin Jones filed suit ("the tribal court action") against Plaintiff and ABI in the Tribal Court of Blue Lake ("the Tribal Court") on behalf of Blue Lake Casino. Respondent Judge Lester Marston served as the Blue Lake Tribal Court's Chief Judge and was assigned to hear the Complaint against Plaintiff.

After the tribal court action was filed, Plaintiff brought two subsequent federal lawsuits against the Tribe, Judge Marston and other Tribe Respondents seeking to enjoin the tribal court proceedings for lack of jurisdiction and bias. In January 2016, Judge Marston recused himself from the Tribal Court action. Boutin Jones represented Blue Lake Casino in the tribal court action and the subsequent federal actions until it substituted out of the tribal court action in February 2017, when it was replaced by Janssen Malloy in that action.

After the conclusion of the tribal court action, Plaintiff brought this action against Janssen Malloy and other Tribe and attorney Respondents alleging a sole Cause of Action against Janssen Malloy for Wrongful Use of Civil Proceedings (Malicious Prosecution) alleging the firm continued to improperly pursue the tribal court action. Janssen Malloy then filed a Motion to Quash/Dismiss for lack of jurisdiction under Code of Civil Procedure Section 418.10, et seq., as well as a Special ("Anti-SLAPP") Motion to Strike pursuant to Section 425.16. The trial court granted Janssen Malloy's Motion to Quash/Dismiss the Complaint based upon tribal sovereign immunity and ruled that the finding of no jurisdiction mooted Defendants' Anti-SLAPP Motion.



In granting the Motion to Quash/Dismiss, the trial court correctly observed that: "The parties' core dispute is whether, in committing the alleged tortious conduct, the Tribe's attorneys were functioning as the Tribe's officers or agents in a manner implicating the Tribe's sovereignty, or instead the defendant attorneys acted merely as the Tribe's employees engaged in essentially personal pursuits for their own personal benefit not involving the Tribe's sovereignty." (Appellant's Appendix ("AA"), at p.272.)

The trial court thoroughly analyzed the issue and correctly held:

"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 attorneys 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 the [T]ribe's attorneys for their 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 [T]ribe's legal counsel would be commensurate with the scope of state sovereign immunity under analogous circumstances."

(AA, at p.277.)

Janssen Malloy were at all relevant times acting in their official capacities as legal representatives of the Tribe before the tribal court and all acts were done on behalf of the Tribe, for the purpose of progressing the Tribe's interests. Accordingly, Janssen Malloy's acts are the acts of the Tribe and are protected by the Tribe's sovereign immunity. The Tribe has neither consented to suit nor waived its sovereign immunity and thus the trial court properly dismissed the Complaint.

Respondents Janssen Malloy respectfully ask this Court to affirm the order granting the Motion to Quash/Dismiss Plaintiff's Verified Complaint.

#### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

##### **A. Blue Lake Casino is a Wholly Owned/Operated Commercial Enterprise of Blue Lake Rancheria, a Federally Recognized Indian Tribe**

The Blue Lake Rancheria is a federally recognized Indian Tribe in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria. (AA, at p.7.) Under Blue Lake's constitution, the Blue Lake Business Council is the executive political arm of the Tribe. (AA 8.) The Tribal Court of the Blue Lake Rancheria was established by the Blue Lake Business Council under its inherent sovereign authority to establish and operate its own judicial system. (AA, at p.8.) Blue Lake Casino and Hotel is an economic enterprise owned and operated by the Tribe. (AA, at p.8.) Profits from gaming at Blue Lake Casino are deposited directly in the Tribe's general treasury, as required by a specific gaming ordinance enacted by the Blue Lake Business Council. (AA, at pp.8, 14.) The Blue Lake Casino is the main business of the Tribe. (AA, at p.14.) The Verified Complaint admits that Blue Lake is a sovereign nation. (AA, at p.37.)

**B. A Contract Dispute Arose Between Blue Lake Casino and Plaintiff, With Boutin Jones Retained to Represent the Tribe**

Plaintiff/Appellant James Acres was the owner of Acres Bonusing, Inc., a Nevada gaming company. (AA, at p.7.) In 2010, Blue Lake Casino and Plaintiff negotiated an agreement whereby Blue Lake Casino would lease an iSlot gaming system from ABI. (AA, at p.16.) The iSlot gaming system is a server-based gaming system that would allow casino patrons to participate in casino gaming from handheld devices while at the Casino. (AA, at p.16.)

In 2015, a dispute arose between Blue Lake Casino and Plaintiff and ABI regarding the return of a \$250,000 advance deposit paid to ABI by Blue Lake Casino. (AA, at p.16.) Blue Lake Casino retained Boutin Jones as its legal counsel to represent it for the dispute. (AA, at p.16.)

**C. Boutin Jones Filed Suit Against Plaintiff in the Blue Lake Tribal Court to Protect the Tribe's Legal Interests**

In January 2016, Boutin Jones, on behalf of Blue Lake Casino, filed a Complaint against Plaintiff and ABI for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Unjust Enrichment and Money Had and Received against Plaintiff personally for Fraudulent Inducement in the Tribal Court of the Tribe Blue Lake Rancheria, Blue Lake Casino and Hotel v. Acres Bonusing, Inc. et al., Tribal Court Case No. C-15-1215LJM ("the tribal court action"). (AA, at pp.6, 73, 76.) Plaintiff then filed two federal actions against the Tribe and various tribal Defendants seeking to enjoin the Tribal Court action. (AA, at pp.6, 230.)

**D. Boutin Jones Represented Blue Lake Casino in the Tribal Court Action until they Substituted out in Favor of Janssen Malloy**

In December 2016, Judge Marston recused himself from presiding over

the tribal court action. (AA, at pp.5, 7-12, 28.) Boutin Jones and Daniel Stouder, Amy O'Neill and Michael Chase represented Blue Lake Casino until February 2017 when they substituted out of the case. (AA, at pp.12, 29.)

In February 2017, Janssen Malloy LLP, and its attorneys Megan Yarnall and Amelia Burroughs substituted into the tribal court action as counsel for Blue Lake Casino. (AA, at pp.12, 29.) In July 2017, the tribal court granted a Motion for Summary Judgment in favor of Plaintiff on the claim for Fraudulent Inducement. (AA, at pp.6-7, 52.) On August 31, 2017, the tribal court entered an order of dismissal for the entire action. (AA, at pp.7, 49.)

**E. Plaintiff Filed This Action Against Janssen Malloy for Their Role as Attorneys Representing Blue Lake Casino for the Continuation of the Tribal Court Action**

Plaintiff filed this action on July 13, 2018 in Sacramento County trial court, Acres v. Marston, et al., Case No. 2018-34-00236929 against Boutin Jones, Janssen Malloy, several Blue Lake Casino employees, several Tribal Court employees, and various judges of the Tribal Court including Judge Marston. (AA, at pp.5, 7-12.)

Plaintiff's Complaint included a single Cause of Action against Janssen Malloy for Wrongful Use of Civil Proceedings (Malicious Prosecution) alleging the firm and its attorneys continued to pursue the tribal court action, after Judge Marston had recused himself in January 2017. (AA, at p.33.) Janssen Malloy are not alleged to have been part of any "conspiracy" as they never represented the Tribe before Judge Marston. (AA, at pp.36-47.)

**F. Plaintiff Has Appealed from Janssen Malloy's Successful Motion to Quash/Dismiss the Complaint for Lack of Jurisdiction Based Upon Sovereign Immunity**

Janssen Malloy moved to quash service of the summons and Complaint for lack of jurisdiction based on sovereign immunity, which was granted by the trial court -- Judge David Brown. (AA, at pp.138, 268.) Judge Brown's final minute order encompassed ten single spaced pages. (AA, at pp.268-277.)

The trial court declined to extend Plaintiff leave to amend the Complaint because "when the Court perceives it has no jurisdiction to proceed, then leave to amend would be inconsistent with the Court's determination, that the Tribal Court, at the end of the day, is the place where this all needs to be addressed." (Reporter's Transcript ("RT"), at p.4, lines 6-17.)

Plaintiff filed this appeal challenging the Court granting Defendants' Motion to Quash, without leave to amend. (AA, at p.292.)

Janssen Malloy also filed an Anti-SLAPP Motion to Strike the Complaint because Plaintiff's entire Complaint arose out of their representation of Blue Lake Casino in/before the tribal court - protected petitioning activity under Code of Civil Procedure Section 425.16. (AA, at pp.93-136.) The motion was deemed moot because the trial court first determined it did not have jurisdiction to hear Plaintiff's claims. (RT, at pp.3-4.) The trial court was clear that if the ruling granting the Motion to Quash/Dismiss was reversed regarding sovereign immunity, it would then hear Defendants' Anti-SLAPP Motion. (2 Appendix of Respondents Janssen Malloy, Megan Yarnall and Amelia Burroughs, at pp.222-223; RT, at p.44.)

**G. Plaintiff's Complaint Established Janssen Malloy's Alleged Wrongful Conduct was Performed in the Course of Their Representation of their Client Blue Lake Casino Before the Tribal Court**

The entirety of the factual allegations of wrongful conduct alleged against Janssen Malloy in Plaintiff's Verified Complaint can be classified as:

Actions taken by Janssen Malloy in representing Blue Lake Casino for the continuance of the Tribal Court action against Plaintiff, including causing pleadings, motions, and other documents to be filed with the Tribal Court and served on Plaintiff in that action, and appearing on behalf of Blue Lake Casino at hearings in the Tribal Court action (AA, at pp.10-11, 13, 15, 26, 29, 30).

**H. There are No Allegations Janssen Malloy ever acted in any Capacity other than their Official Capacity as Counsel for the Tribe**

The Verified Complaint does not allege facts showing Janssen Malloy were not acting as legal counsel for Blue Lake Casino at all relevant times. (AA, at pp.5-36.) Nowhere in the Verified Complaint does Plaintiff allege facts that support the conclusion the firm and its attorneys were not acting within the scope of their authority given to them by Blue Lake Casino at all relevant times. (AA, at pp.5-36.) Nowhere in the Verified Complaint does Plaintiff allege facts that support the conclusion that Janssen Malloy were ever acting in their own self-interests. (AA, at pp.5-36.)

Moreover, any allegation that Janssen Malloy were not acting as Blue Lake Casino's counsel before the tribal court would directly contradict Plaintiff's own allegations in his Verified Complaint. (AA, at pp.6, 10-11.)

### **STANDARD OF REVIEW ON AN MOTION TO QUASH/DISMISS**

Whether tribal immunity applies to bar Plaintiff's suit is a question of law reviewed de novo by this Court. (*People ex rel. Owen v. Miami Nation Enterprises* (2016) 2 Cal.5th 111, 250.)

"Where the motion to dismiss is based on a claim of ... sovereign immunity, which provides protection from suit and not merely a defense to liability, however, the court must engage in sufficient pretrial factual and legal determinations to 'satisfy itself of its authority to hear the case' before trial.'" (*Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1204.) "When a defendant challenges [j]urisdiction, the burden shifts to the plaintiff to prove the necessary jurisdictional criteria are met by competent evidence in affidavits and authenticated documentary evidence." (*Ibid.*) The lack of jurisdiction can be shown through the plaintiffs own pleadings. (*Trudgeon v. Fantasy Springs Casino* (1999) 71Cal.App.4th 632, 644 [Finding that admission in Complaint that individual Defendants were acting as agents of the Tribe could not be converted.]; *Brown v. Garcia, supra*, 17 Cal.App.5th, at pp. 1203-1205.)

When challenging jurisdiction based on sovereign immunity, one method is to Move to Quash service of the summons and to dismiss for lack of subject matter jurisdiction. (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1144, fn. 1; *see also Great W. Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1414.) "[T]he Plaintiff bears the burden of proving by a preponderance of the evidence that all jurisdictional criteria are met." (*Brown v. Garcia, supra*, 17 Cal.App.5th at p.1203.)

## LEGAL DISCUSSION

### I. THE TRIAL COURT CORRECTLY FOUND IT HAD NO JURISDICTION OVER JANSSEN MALLOY BECAUSE THEY MAINTAIN SOVEREIGN IMMUNITY AS AGENTS OF BLUE LAKE CASINO IN THEIR REPRESENTATION OF THE TRIBE BEFORE THE TRIBAL COURT

#### A. Blue Lake and Its Commercial Arm Blue Lake Casino, Enjoy Sovereign Immunity from Suit as an Indian Tribe

“Indian Tribes [are] ‘distinct, independent political communities,’ [citation], qualified to exercise many of the powers and prerogatives of self-government.” (*Plains Commerce Bank v. Long Family Land & Cattle Co.* (2009) 554 U.S. 316, 327.) Accordingly, Indian Tribes have long been recognized as possessing common law immunity from suit enjoyed by sovereign powers. (*Turner v. U.S.* (1919) 248 U.S. 354, 358.) Absent congressional authorization, “Indian nations are exempt from suit.” (*U.S. v. U.S. Fidelity and Guaranty Co.* (1940) 309 U.S. 506, 512.) Any waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (*U.S. v. Testan* (1976) 424 U.S. 392, 399.)

Judicial recognition of a Tribe's immunity from suit is not discretionary with a Court. (See *People of State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153, 1155.) Rather, absent an effective waiver, the assertion of sovereign immunity by a federally-recognized Indian Tribe deprives the Court of jurisdiction to adjudicate the claim:

“Sovereign immunity involves a right which courts have no choice, in the absence of a waiver,



but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court.... 'Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void ... Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.'”

(*Ibid.* [internal citation omitted].)

Such immunity is jurisdictional in nature and applies “irrespective of the merits of the claim asserted against the tribe.” (*Rehner v. Rice* (9th Cir. 1982) 675 F.2d 1340, 1351.) Tribal immunity applies to commercial activities of the Tribe, including a casino if it is an arm of the Tribe. (*Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 388-389; *Trudgeon v. Fantasy Springs Casino, supra*, 71 Cal.App.4th at pp. 636-642.)

Here, it is undisputed Blue Lake is a federally recognized Indian Tribe entitled to sovereign immunity. (AA, at p.7.) Further, Plaintiff's Verified Complaint makes it clear Blue Lake's sovereign immunity applies to Blue Lake Casino, as the commercial arm of the Tribe whose profits are deposited directly into the Tribe's treasury. (AA, at pp.8, 14.)

**B. The Tribe's Sovereign Immunity Extends to Janssen Malloy Because They Were Acting in Their Official Capacity on Behalf of the Tribe and Within the Scope of Their Authority Before the Tribal Court**

Sovereign immunity extends not only to the Tribe, but also to those agents acting on the Tribe's behalf. (*Davis v. Littell* (9th Cir. 1968) 398 F.2d

83, 85; *Great W Casinos, Inc. v. Morongo Band of Mission Indians, supra*, 74 Cal.App.4th at pp. 1423-1424.) Courts have recognized that attorneys acting in their official capacity on behalf of the Tribe and within the scope of their authority are protected by tribal immunity. (*Ibid.*) “Further, at least in our federal circuit, an official need not be a member of the tribe in order to share in its sovereign immunity.” (*Trudgeon v. Fantasy Springs Casino, supra*, 71 Cal.App.4th at p. 643; *see also U.S. v. Oregon* (9th Cir. 1981) 657 F.2d 1009, 1012; *Snow v. Quinalt Indian Nation* (9th Cir. 1983) 709 F.2d 1319, 1321.)

In *Great W. Casinos, Inc. v. Morongo Band of Mission Indians, supra*, 74 Cal.App.4th at p. 1407, the Court held tribal sovereign immunity extended to the Tribe's outside legal counsel (characterized as “non-Indian law firm and general counsel”) to protect the tribe's interests and ensure adequate legal counsel for the Tribe. (*Id.*, at pp. 1423-1424.) In the case, Plaintiff Great Western Casinos filed suit against the Tribe, the tribal council, tribal council members, the Tribe's general counsel, an attorney and her private law firm regarding the Tribe's cancellation of a contract. (*Id.*, at pp. 1410-1415.) Great Western Casinos alleged it entered into a gaming contract with the Tribe, through its individual members and general counsel, who engaged in a scheme to cancel the contract and cheat Great Western Casinos out of potential profits. (*Id.* at p. 1413.) The trial court granted the Motion to Quash and dismissed the action given sovereign immunity. (*Id.*, at pp. 1414-1415.)

The Court affirmed, finding the non-Indian law firm were protected by tribal sovereign immunity for their actions taken or opinions given in rendering related legal services to the Tribe to the same extent of immunity entitled to the Tribe, tribal council, and Tribe members. (*Great W. Casinos, Inc. v. Morongo Band of Mission Indians, supra*, 74 Cal.App.4th at pp. 1423-1424.)

With respect to the Tribe's attorney, the Court stated:

“In providing legal representation---even advising, counseling and conspiring with the tribe to wrongfully terminate the management contract---counsel were similarly immune from liability for those professional services. (See *Davis v. Littell*, *supra*, 398 F.2d 83, 85 [attorney who advised tribal council regarding the competence and integrity of an employee is immune from liability for defamation under the executive privilege].)”

(*Ibid.*)

Citing federal case law, *Great W. Casinos* stated with approval that:

“Tribes need to be able to hire agents, including counsel, to assist in the process of regulating gaming. As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney, or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised. The purpose of Congress in requiring background checks could be thwarted if retained counsel were inhibited in discussing with the tribe what is learned during licensing investigations, for example. Some

causes of action could have a direct effect on the tribe's efforts to conduct its licensing process even where the tribe is not a party."

(*Ibid.* citing *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 550.) (*Emphasis added.*)

Applying this rationale, the Court in *Great W. Casinos* held that:

"As a sovereign the Morongo Band 'enjoys sufficient independent status and control over its own laws and internal relationships to be able to accord absolute privilege to its officers within the areas of tribal control.' (*Davis v. Littell, supra*, 398 F.2d at p. 84.) Moreover, as a sovereign the Morongo Band has the 'fright' to look beyond its own membership for capable legal officers, and to contract for their services.' (*Id.*, at p. 85) In performing their function counsel must be free to express legal opinions and give advice unimpeded by fear their relationship with the tribe will be exposed to examination and potential liability for the advices and opinions give. Refusing to recognize an extension of a tribe's sovereign immunity to cover general counsel's advice to the tribe could not only jeopardize the tribe's interests but could adversely influence counsel's representation of the tribe in the future. For these reasons counsel in allegedly advising the tribe to

wrongfully terminate the contract are similarly covered by the tribe's sovereign immunity.”

(*Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, *supra*, 74 Cal.App.4th at pp. 1423-1424.) (*Emphasis added.*)

Here, just as in *Great W. Casinos*, Janssen Malloy, as attorneys for the Tribe, are immune from liability because the acts done by the law firm and its attorneys in the course of representing Blue Lake Casino before the tribal court were done in their official capacities and within their scope of authority. (See *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1046 [When tribal officials “act ‘in their official capacity and within their scope of authority,’” they are protected by sovereign immunity because their acts are the acts of the sovereign.].) Plaintiff’s Verified Complaint is completely devoid of any allegations that the acts of Janssen Malloy were not done on Blue Lake Casino’s behalf, or within the scope of authority granted to the firm by Blue Lake Casino to act before the tribal court, or for Defendants’ own self-interests. (AA, at pp. 5-38.) Further, any such allegations would directly contradict Plaintiff’s own admissions in his Complaint. (AA, at pp.6, 10-11.)

Moreover, Janssen Malloy’s actions taken on behalf of Blue Lake Casino before the tribal court are entitled to protection by the Tribe’s sovereign immunity regardless of Plaintiff’s characterization of those actions as “wrongful” or “tortious.” (See *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, *supra*, 74 Cal.App.4th at pp. 1423-1424; *Davis v. Littell*, *supra*, 398 F.2d at p. 85.) A tribal official’s commission of a tort is not per se an act in excess of authority and, therefore, is not necessarily unprotected by immunity. (*Boisclair v. Superior Court*, *supra*, 51 Cal.3d at p.1157; see *Turner v. Martire*, *supra*, 82 Cal.App.4th at p. 1055; *Trudgeon v. Fantasy*

*Springs Casino, supra*, 71 Cal.App.4<sup>th</sup> p. 644.) "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law.' [Citation.]" (*Ibid.*) Even assuming the alleged actions of Janssen Malloy were tortious (they were not), these acts are still within the course and scope of the Defendants' authority granted to it by the Tribe, as the factual allegations of wrongful conduct consist of filing pleadings and attending and making statements at hearings in/before the tribal court. (AA, at pp.11-33.)

**C. Plaintiff's Argument Janssen Malloy were Not Entitled to Share in the Tribe's Sovereign Immunity as there is "No Evidence" Blue Lake Wishes to Share its Sovereign Immunity is Unsupported**

Plaintiff relies on *Twenty-Nine Palms Enters. Corp. v. Bardos* (2012) 210 Cal.App.4<sup>th</sup> 1435 for the remarkable proposition Janssen Malloy can only claim sovereign immunity with Blue Lake's permission and there is no evidence Blue Lake wants to share its sovereign immunity with Defendants. (Appellant's Opening Brief ("AOB" at p.25.) *Twenty-Nine Palms* is inapplicable here and does not stand for the proposition for which it is cited.

In *Twenty-Nine Palms*, a Tribe filed suit in state court against a contractor for work the contractor performed for the Tribe. (*Id.*, at pp. 1437-1438.) The contractor Defendant argued that based upon Business and Professions Code Section 7031 the contract with a tribal entity for work done on tribal land was unenforceable. (*Id.*, at pp. 1440-1442, 1445.) The Court stated "the United States Supreme Court explained, a tribal entity selecting a state forum is 'very different' from a tribal entity being brought as a defendant to a state forum. [Citation.] The difference ... is that the sovereign immunity defense is only available to the tribe and its entities." (*Id.*, at pp. 1446-1447.)

*Twenty-Nine Palms* was dealing with a Tribe choosing a state court forum to sue a non-Indian, and the non-Indian asserting sovereign immunity against the Tribe. (*Twenty-Nine Palms Enters. Corp. v. Bardos*, *supra*, 210 Cap.App.4th at p. 1446.) This is not the case here.

Here, Plaintiff, a non-Indian, is attempting to sue tribal officials in state court; the Tribe is not choosing to sue him in a state court forum. (AA, at pp.5-38.) Janssen Malloy are asserting the sovereign immunity of the Tribe against him, not the Tribe. (AA, at pp.184-193, 251-255.) Thus, the “principles” discussed in *Twenty-Nine Palms* are wholly inapplicable to the instant case. As explained above, Defendants were at all relevant times acting in their official capacities on behalf of the Tribe before the tribal court and are, therefore, covered by the Tribe's sovereign immunity.

**II. THE TRIAL COURT CORRECTLY FOUND LEWIS DOES NOT PRECLUDE THE APPLICATION OF TRIBAL SOVEREIGN IMMUNITY IN THIS CASE, AND THAT IT'S RULING IS IN ACCORD WITH LEWIS, GREAT W. CASINOS AND BROWN**

Plaintiff attempts to characterize his Complaint as one against Janssen Malloy in their individual capacities and that he is seeking relief only from them as individuals. (AA, at pp.5-38.) Plaintiff believes that by leaving the sovereign off the Complaint, this Court must ignore the substance of his pleadings, as a review of the pleadings makes it evident Plaintiff's Complaint is an attack against Blue Lake Casino and the Tribe, and its agents, namely its attorneys, as a result of Blue Lake Casino's suit against Plaintiff. (AA, at pp.5-38.) The assertion that any judgment here would not “bind” the Tribe does not control the analysis, as the Court “must not simply rely on the characterization in the complaint” but rather determine “whether the remedy sought is truly

against the sovereign." (*Lewis v. Clarke* (2017) 137 S. Ct. 1285, 1290-1291.)

In *Brown v. Garcia, supra*, 17 Cal.App.5th at p. 1198, the Court looked to Ninth Circuit authorities and observed that "sovereign immunity will nonetheless apply in appropriate circumstances even though the complaint names and seeks damages only from individual defendants." (*Id.*, at p. 1205 citing *Pistor v. Garcia* (9th Cir. 2015) 79 F.3d 1104, 1113.) *Brown* further explained that: "In any suit against tribal officers, 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." (*Brown v. Garcia, supra*, 17 Cal.App.5th at p. 1205 [citations omitted].)

Plaintiff's argument is based upon allegations that Judge Marston wrongfully assigned the case to himself despite various conflicts of interest; and that Boutin Jones wrongfully prosecuted the action against him in Tribal Court, and aided and abetted various alleged wrongful acts of Judge Marston in the prosecution of the action against him in the Tribal Court. (AA, at pp.13-29.) However, these allegations do not apply to Janssen Malloy because the firm never represented the Tribe before Judge Marston. (AA, at p.29.)

Moreover, as explained in *Brown* and *Great W. Casinos*, failing to extend the Tribe's sovereign immunity to Janssen Malloy would compel the state court to determine what actions are permissible in Tribal Court; whether the Tribal Court has followed its own procedures in Tribal Court; and whether an attorney in Tribal Court has misused the Tribal Court's judicial process. This would be an impermissible impingement on the Tribe's sovereignty.

The Tribe's counsel, in performing their functions for the Tribe, such as representing the Tribe in tribal court, must be free to express legal opinions



and give advice unimpeded by fear their relationship with the Tribe will be exposed to examination and potential liability for the advices and opinions given. (See *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, *supra*, 74 Cal.App.4th at pp. 1423-1424.) Refusing to recognize an extension of the Tribe's sovereign immunity to cover Janssen Malloy's advice to the Tribe would jeopardize the Tribe's interests by creating the possibility the Tribe's rationale for pursuing its action against Plaintiff, would be subject to scrutiny by outside authorities. (*Ibid.*; *Davis v. Littell*, *supra*, 398 F.2d at p. 85.) Such interference in the Tribe's sovereignty would also undoubtedly adversely influence counsel's representation of the Tribe in the future.

Plaintiff argues that the United States Supreme Court decision in *Lewis v. Clarke*, *supra*, 137 S. Ct. at p. 1285, supports the conclusion that sovereign immunity should not be extended to Janssen Malloy. (AOB, at pp. 11, 22-24.) This argue ignores the key consideration in *Lewis v. Clarke* - the distinction between individual - and official - capacity suits, stating that: "The identity of the real party in interest dictates what immunities may be available." (*Id.* at p. 1292.) Janssen Malloy in an official-capacity action may assert sovereign immunity. (*Ibid.*) In *Lewis*, a tribal employee was sued for negligence when he allegedly caused a motor-vehicle accident on an interstate highway not on tribal lands. (*Id.* at p. 1291.) The employee was shuttling customers for the Tribe. (*Ibid.*) The tribe argued that sovereign immunity barred the suit because the driver was a tribal employee driving on tribal business and because the Tribe's decision to indemnify its employees meant that a judgment would affect the Tribe's finances. (*Lewis v. Clarke*, *supra*, 137 S. Ct. at p. 1291.)

Acknowledging the distinction between "personal capacity claims" and "official capacity claims" the United States Supreme Court found the case to

be "a negligence action arising from a tort committed by [the employee] on an interstate highway within the State of Connecticut." (*Ibid.*) "The suit [was] brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment [would] not operate against the Tribe." (*Ibid.*) Based upon those specific facts, *Lewis* found that the suit was not against the employee in his official capacity. (*Id.*, at pp. 1291-1292.) To the contrary, *Lewis* held that the case was simply a suit against the employee to recover for his personal actions, which would not require action by the sovereign or disturb the sovereign's property. (*Id.*, at pp. 1292-1293.)

The facts of *Lewis* are very different from this case. The Tribe employee in *Lewis* did not claim to be an "official" of the Tribe, whereas Janssen Malloy were acting as the Tribe's fiduciary agent as the Tribe's legal representative before the Tribal Court. (AA, at pp.11-33.) The tort alleged in *Lewis* involved a simple vehicle accident that occurred on a state highway, whereas the torts alleged against Defendants all occurred in/before the Tribal Court action and the Defendants' representation of the Tribe in that action.

Further, the action against the employee in *Lewis* would not require that the Tribe or Tribe officials be summoned as witnesses or necessary parties, whereas the action against Janssen Malloy directly interferes with the Tribe's prosecutorial efforts and could invade the attorney-client privilege between the Tribe and the law firm regarding the action before the Tribal Court.

The employee in *Lewis* was acting within the scope of his employment, but he was not acting in an official capacity at the time of the accident. (*Lewis v. Clarke, supra*, 137 S. Ct. at pp. 1291-1292.) In *Lewis*, the tribe's responsibility and involvement began and ended with the indemnification of the employee. (*Id.*, at pp. 1293-1292.) Here, Janssen Malloy were acting in

their official capacity as the official legal representatives of the Tribe in the Tribal Court. (AA, at pp.11-33.) Any act of Defendants in representing the Tribe would be considered an act of the Tribe; and any action against Defendants for those acts should be considered an action against the Tribe.

Based on the foregoing, the trial court was correct in its observation that the finding in *Great W Casinos* that the Tribe's legal counsel functioned as tribal officials does not run afoul of the "official capacity" "personal-capacity" dichotomy identified in *Lewis*. (AA, at pp. 272-274.) There are major factual differences between *Lewis* and this case, and *Lewis*, *Great W Casinos*, and *Brown* all support the conclusion the Tribe's sovereign immunity should extend to Janssen Malloy as officials of the Tribe acting in their official capacity. As stated above, non-member attorneys acting in their official capacity on behalf of the Tribe and within the scope of their authority are protected by tribal immunity. (*Davis v. Littell, supra*, 398 F.2d at p. 85.)

**III. THE TRIAL COURT CORRECTLY DECLINED TO EXTEND AMEND, WHEN GRANTING THE MOTION TO QUASH/DISMISS**

Plaintiff argues leave to amend his Complaint should have been granted. (AOB, at pp.53-62.) Specifically, Plaintiff argues the trial court abused its discretion in quashing the Complaint without leave to amend because there is a reasonable possibility the Complaint could be amended to overcome the immunity defenses. (AOB, at pp.54-56.) Plaintiff is wrong.

The trial court correctly dismissed Plaintiff's Complaint without leave to amend because once the trial court determined it did not have jurisdiction to proceed, leave to amend would be inconsistent with the determination it no longer has jurisdiction over the matter. (RT, at p.4, lines 13-17; AA, at p.268.)

Additionally, Plaintiff has alleged in that Blue Lake is a sovereign Indian Tribe; that Blue Lake Casino is Blue Lake's main business and that profits from the casino are deposited directly into the Tribe's treasury; and that Janssen Malloy were acting as legal counsel for Blue Lake Casino in/before the court. (AA, at pp.13-29.) These facts, in conjunction with applicable case law discussed above, establish Blue Lake's sovereign immunity extends to Janssen Malloy as the Tribe's attorneys. Plaintiff cannot allege additional facts to contradict these admissions in the Verified Complaint. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877-878 ["Likewise, the plaintiff may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false."].)

Accordingly, the trial court did not abuse its discretion in declining to extend Plaintiff leave to amend his Verified Complaint.

#### CONCLUSION

For the foregoing reasons, Defendant/Respondents JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS respectfully request that this Court affirm the decision of the trial court granting Defendants' Motion to Quash Service of Summons and Complaint of Plaintiff/Appellant JAMES ACRES for lack of jurisdiction based on tribal sovereign immunity, without leave to amend.

DATED: February 11, 2020

BERMAN BERMAN BERMAN  
SCHNEIDER & LOWARY, LLP

By: 

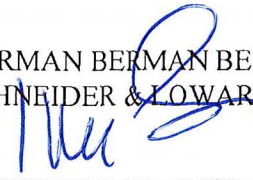
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**(California Rules of Court, Rule 8.204(c)(1))**

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### PROOF OF SERVICE

STATE OF CALIFORNIA                     )  
   ) ss.  
COUNTY OF LOS ANGELES             )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 11900 West Olympic Blvd., Suite 600, Los Angeles, California 90064-1151.

On February 13, 2020, I served the foregoing document described as **"RESPONDENTS' BRIEF OF DEFENDANTS/RESPONDENTS JANSSEN MALLOY LLP, MEGAN YARNALL AND AMELIA BURROUGHS"** on the interested parties in this action by placing a [X] true copy(ies) [ ] the original document thereof enclosed in a sealed envelope addressed as follows:

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  X   I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 13, 2020, at Los Angeles, California.

MARIA PEREZ  
Name

  
Signature

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