CASE NO. C089344
IN THE THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

JAMES ACRES,

Plaintiff and Appellant,

v.

LESTER MARSTON, et al.,

Defendants and Respondents.

On Appeal from Sacramento Superior Court
Case No. 34-2018-00236829
The Honorable David Brown, Judge

Appellant's Opening Brief

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Certificate of Interested Parties

There are no interested entities or parties to list in this certificate.

November 26, 2019 /s/ James Acres
Plaintiff/Appellant

Certificate of Compliance

The main body of this brief is approximately 11,500 words long as determined by Microsoft Word. The brief, including footnotes, is composed using a 14-point Times New Roman font.

November 26, 2019

/s/ James Acres
Plaintiff/Appellant

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Issues Presented

Can Californians working from California be sued for suborning a judge in pursuit of a meritless lawsuit against another Californian?

Defendants argued they are immune from suit because a tribe paid them to suborn a tribal judge and pursue a tribe's meritless lawsuit. The Honorable Judge David Brown reluctantly agreed and granted their motions to quash without leave to amend.

This appeal presents five issues of immunity, justiciability, and procedure:

I. Tribal sovereign immunity. Under *Lewis v. Clarke* a tribal official shares a tribe's sovereign immunity only when a judgement against the official would also bind the tribe. Here, Acres brings a verified complaint against law-firms and private individuals in their personal capacities, and no tribe could be bound by judgment in Acres' favor. Are Respondents cloaked in tribal sovereign immunity?

II. Intra-tribal dispute doctrine. California courts lack subject matter jurisdiction over purely internal tribal disputes. In *Blue Lake v. Acres,* non-tribal members filed papers displaying California bar numbers invoking California law in pursuit of a fraud judgment against another non-tribal member. Any judgment in *Blue Lake v. Acres* would have been enforceable in a California court under a California statute Respondents lobbied the California legislature to enact. Was *Blue Lake v. Acres* a purely internal tribal dispute?

III. Judicial immunity. Judges can be sued for their non-judicial acts. Under *Regan v. Price* a judicial act is "a function normally performed by a judge, and to the expectation of the parties." Here, Marston secretly worked as Blue Lake's attorney while he presided over Blue Lake's tribal court case against Acres. Is being the plaintiff's attorney "a function normally performed by a judge, and to the expectation of the parties?"

IV. Prosecutorial immunity. State attorneys cannot be sued for prosecuting criminal cases. But no authority holds prosecutorial immunity protects civil litigators. Here, Blue Lake's civil litigators brought a meritless cause of action against Acres, and helped ensure the case would be heard by their fellow Blue Lake civil litigators. Does prosecutorial immunity protect the civil litigators from claims for wrongful use of civil proceedings, or for helping to corrupt a tribunal to their benefit?

V. Leave to amend. Where a plaintiff has had no opportunity to amend the complaint, leave to amend should be liberally allowed as a matter of fairness. Below, I had no opportunity to amend the complaint. Should leave to amend be granted?

Facts and Procedure

Acres v. Marston brings a verified complaint seeking damages and disgorgement for wrongful use of civil proceedings, breach of fiduciary duty, and constructive fraud against seventeen defendants. (AA 4-91.) The complaint also alleges defendants aided and abetted each other in committing the primary torts.

Defendants' tortious conduct was associated with the tribal court case *Blue Lake v. Acres* where Blue Lake's casino sued me in its tribal court for fraudulent inducement. The full factual history is recounted in the verified complaint. (AA 13-33.)

Even though reading the complaint filled the Honorable Judge Brown with "horror" (RT 4) [1] he felt constrained to grant defendants' motions to quash the summonses because he believed all their conduct was protected by tribal sovereign immunity, judicial immunity, or prosecutorial immunity (AA 267-290). The limited factual history below focuses on showing why it was error to quash the summonses.

A. *Blue Lake v. Acres* was litigated by Californians, in California, using California law.

Blue Lake v. Acres lasted from January 2016 through August 2017. (AA 6.) Judge Marston originally assigned the case to himself. (AA 13-15.) Judge Marston's fellow Blue Lake attorneys Stouder and O'Neill from Boutin Jones were Blue Lake's original attorneys in the case. (AA 11, 76.) The single cause of action against me was for fraudulent inducement, and that cause of action contained no reference to tribal law. (AA 81-82.)

[1] The Reporters Transcript begins with four unnumbered pages. Starting with the fifth page, each page bears a number in the upper right corner. RT page numbers refer to the pager numbers in the upper right of the Reporter's Transcript.

Stouder and O'Neill displayed their California bar numbers and Boutin Jones' Sacramento address in their *Blue Lake v. Acres* filings. (AA 29, 76.) It is reasonable to conclude Stouder and O'Neill litigated the case largely from their California office. O'Neill used California highways to reach the single tribal court hearing attended by Boutin Jones. (AA 30.) Declarations and proofs of service filed by Stouder and O'Neill in *Blue Lake v. Acres* were sworn under California law. (AA 29-30.)

In an attempt to escape tribal court I brought two federal lawsuits against Blue Lake and Judge Marston. (AA 230-231.) In the course of that litigation, I obtained four years of Judge Marston's billing records (AA 13), proved Judge Marston lied to conceal he was Blue Lake's attorney (AA 26-27), and uncovered evidence that Boutin Jones and Rapport & Marston co-operated behind the scenes in drafting briefs filed against me (AA 22, 161-163). As a consequence, Judge Marston, Boutin Jones, Stouder and O'Neill all withdrew and were replaced by Justice Lambden and the Janssen Malloy attorneys Yarnall and Burroughs. (AA 27-29.)

Yarnall and Burroughs displayed their California bar numbers and Janssen Malloy's Eureka address on their *Blue Lake v. Acres* filings. (AA 29, 99.) It is reasonable to conclude Yarnall and Burroughs litigated the case largely from their California office, both tribal court hearings attended by Yarnall were held in

Oakland, and Yarnall used California highways to reach these hearings. (AA 30.) Declarations and proofs of service filed by Yarnall and Burroughs were sworn under California law. (AA 29, 97, 135-136)

In opposing my motion for summary judgment in *Blue Lake v. Acres*, Yarnall and Burroughs argued the merits of Blue Lake's fraud claim against me. No tribal law was used in support of Blue Lake's fraud claim. Instead, Blue Lake's fraud claim against me relied exclusively on California law. (AA 81, 105, 108.)

B. *Blue Lake v. Acres* was decided by a retired California judge, from his California office, and according to California law.

Judge Marston was replaced by the Honorable Justice James Lambden, who is now a private neutral in his retirement from the court of appeal. Justice Lambden held two hearings in *Blue Lake v. Acres* and both these hearings occurred in Oakland. (AA 30.) Justice Lambden decided the merits of Blue Lake's fraud claim against me without reference to tribal law and relied on California law to find that no reasonable person could believe I fraudulently induced Blue Lake. (AA 66-70.) In making this finding, Justice Lambden noted Blue Lake had attempted to "conjure" a cause of action against me. (AA 70.)

C. Judge Marston worked as an attorney for Blue Lake while presiding over *Blue Lake v. Acres,* and hired other Blue Lake attorneys from Rapport & Marston to help him.

Judge Marston works as the Chief Judge of Blue Lake's tribal court under his judicial services contract. (AA 27, 145, 149-157.) The contract specifies Judge Marston's principal place of business – the Ukiah law-office he shares with Rapport – as a place of performance under the contract. (AA 150, 152.)

Judge Marston declares that he contracted with Burrell, Vaughn, and Lathouris to aid him in presiding over *Blue Lake v. Acres* (AA 31-32, 147.) But Judge Marston's judicial services contract forbids the assignment of any interest in the contract to third-parties without Blue Lake's prior written consent (AA 153-154), and there is no evidence Blue Lake gave consent for Marston to contract with Burrell, Vaughn, and Lathouris. Although Judge Marston does not mention contracting with DeMarse to aid in presiding over *Blue Lake v. Acres* (AA 147), and Rapport expressly denies DeMarse performed any work in *Blue Lake v. Acres* (AA 162), Judge Marston's billing records show DeMarse did perform work in *Blue Lake v. Acres* (AA 32, 245-246).

Judge Marston was Blue Lake's attorney in the state court action *Blue Lake v. Shiomoto* the entire time he presided over *Blue Lake v. Acres.* (AA 27, 239-242.) Judge Marston admits he should have disqualified himself as judge in *Blue Lake v.*

Acres because of *Shiomoto*, but failed to do so because he forgot he was Blue Lake's attorney. (AA 147 at ¶28.) It is impossible to believe Judge Marston forgot he was Blue Lake's attorney in *Shiomoto*, not least because Judge Marston billed for work as Blue Lake's attorney in *Shiomoto* on the same day he issued his order declining to disqualify himself from *Blue Lake v. Acres.* (AA 244.[2]) Burrell, Vaughn, Lathouris and DeMarse aided Judge Marston in representing Blue Lake in *Shiomoto.* (AA 31-32.)

While presiding over *Blue Lake v. Acres,* Judge Marston also advised Blue Lake on casino compact negotiations with the State of California (AA 14, 22, 247-249. RJN 50-309, keyword "Marston"), and he advised Blue Lake's casino on an employee dispute (AA 23-24). Judge Marston also lobbied the State of California on Blue Lake's behalf to secure legislation that would ease the enforcement in California courts of any money judgments arising from Blue Lake's tribal court. (AA 17, 147.) Burrell, Vaughn, Lathouris and DeMarse all aided Judge Marston in various aspects of this work. (AA 31-32.)

Judge Marston billed Blue Lake for all the work described above via monthly invoices from Rapport & Marston for "Legal Services" addressed to Clerk Huff.

[2] Jean Shiomoto was the DMV Director. And so Judge Marston's billing records sometimes refer to *Blue Lake v. Shiomoto* as "the DMV case."

(AA 13.) Judge Marston included the work by Burrell, Vaughn, Lathouris and DeMarse on the invoices. (AA 31-32, 232, 239-249.)

D. Rapport & Marston and Boutin Jones co-ordinated their wrongful conduct in *Blue Lake v. Acres*.

Rapport & Marston and Boutin Jones worked together as attorneys for Blue Lake in Blue Lake's litigation against me. Rapport admits that he and DeMarse ghostwrote pleadings the Boutin Jones attorneys used in federal litigation against me. (AA 161-162.) Judge Marston's billing records show Judge Marston aided in "reviewing and revising" some of these documents. (AA 20-22). While Rapport insists that neither he nor DeMarse performed any legal services for Blue Lake in *Blue Lake v. Acres* (AA 162), Judge Marston's billing records show DeMarse did provide legal services to Blue Lake in *Blue Lake v. Acres* (AA 245-246).

The complaint alleges that Rapport and Chase co-ordinated the despicable conduct of their respective firms towards me. (AA 21.) While Chase denies that he came to "a mutual understanding … to accomplish a common unlawful plan" with various other Respondents, he does not deny that he and Rapport co-ordinated their despicable conduct against me, or that their despicable conduct was unlawful. (AA 197.)

E. *Acres v. Marston* seeks damages and disgorgement on causes of action for wrongful use of civil proceedings, breach of fiduciary duty, and constructive fraud.

Acres v. Marston was filed in Sacramento Superior Court in July 2018. (AA 5.) The verified complaint (AA 48) brings causes of action for: 1) Wrongful use of civil proceedings (AA 33), 2) Aiding and abetting wrongful use of civil proceedings (AA 36), 3) Conspiracy to commit wrongful use of civil proceedings (AA 38), 4) Breach of fiduciary duty (AA 39), 5) Aiding and abetting breach of fiduciary duty (AA 42), 6) Constructive fraud (AA 44), and 7) Aiding and abetting constructive fraud (AA 45).

Every cause of action seeks monetary damages. The fourth through seventh causes of action also seek disgorgement of any money paid by Blue Lake to Respondents.

F. There is no evidence Blue Lake believes its sovereign interests are implicated by *Acres v. Marston,* or that Respondents' tortious conduct was in the course and scope of their employment.

There is no evidence Blue Lake believes the tortious conduct complained of *Acres v. Marston* was within the course and scope of Respondents' employments, or that Blue Lake desires to share its sovereign immunity with Respondents. Instead, Blue Lake explained in papers filed in *Blue Lake v. Acres* that "An agent is always liable for his or her own torts, whether the principle is liable or not, and in

spite of the fact that the agent acts in accordance with the principal's directions." (AA 107-108.)

There is no evidence Blue Lake believes there are any special questions of tribal law in *Acres v. Marston* which California courts should not answer. Instead, there is evidence that Blue Lake's law of fraudulent inducement is identical to California law. (AA 68, 105.) There is also evidence Blue Lake is diligently working to integrate its court system with California's, for instance through the recognition of tribal court marriages for the purposes of issuing driver's licenses (AA 9, 13, 146-147), streamlining enforcement of tribal court money judgments in state court (AA 17, 23, 147), and through participating in the judicial council's tribal-court state-court forum (AA 146).

Standard of Review

This appeal turns on questions of tribal sovereign immunity, the intra-tribal dispute doctrine, judicial immunity and prosecutorial immunity.

Acres v. Marston's verified complaint (AA 48) can serve as an affidavit and supply the necessary facts to support jurisdiction on a motion to quash. *Shearer v. Superior Court* (1977) 70 Cal.App.3d 424, 430.

Whether tribal sovereign immunity bars suit is a question of federal law subject to independent review. *People ex rel. Owen v. Miami Nation Enters.* (2016) 2 Cal.5th 222, 250.

Whether an intra-tribal dispute deprives a court of jurisdiction is a question of federal law subject to independent review. *In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litigation,* (8th Cir. 2003) 340 F.3d 749, 766.

Whether conduct is protected by judicial immunity or prosecutorial immunity is a question of law subject to independent review.

Because this appeal arises from an attack on the pleadings this Court must "search the facts to see if they make out a claim for relief under any theory." *Smith v. Commonwealth Land Ins. Co.* (1986) Cal.App.3d 625, 629-630. If the facts present any cause of action for which Respondents might be held liable, even if the cause is not stated in the complaint, this Court must reverse the superior court and allow *Acres v. Marston* to continue.

Argument

I. Tribal sovereign immunity is not available to Respondents because no judgment in *Acres v. Marston* would bind Blue Lake.

Tribal sovereign immunity and the intra-tribal dispute doctrine are "distinct but related bases that may defeat jurisdiction in cases involving tribes." *Miccosukee Tribe of Fla. V. Cypress,* (11th Cir. 2015) 814 F.3d 1202, 1208.

Tribal sovereign immunity shields Indian tribes from unconsented suit. The Supreme Court created the doctrine "almost by accident" in a series of cases culminating in a holding that "Indian Nations are exempt from suit without Congressional authorization." While there are "reasons to doubt the wisdom of

perpetuating the doctrine" the doctrine precludes subjecting tribes to unconsented suit. *Kiowa Tribe of Okla. v. Mfg. Tech.* (1998) 523 US 751, 756-758.

Here, *Acres v. Marston* seeks remedies only from California law-firms and individuals. Because no tribal government or entity is subjected to *Acres v. Marston,* the doctrine of tribal sovereign immunity does not apply.

A. Controlling Supreme Court precedent forbids cloaking Respondents with Blue Lake's tribal sovereign immunity because no judgment in *Acres v. Marston* would bind Blue Lake.

Controlling Supreme Court precedent holds that tribal sovereign immunity is not available as a defense for tribal employees sued in their individual capacities. *Lewis v. Clarke,* (2017) 137 S. Ct. 1285, 1288.

Prior to *Lewis,* courts sometimes analyzed whether a tribal employee was acting within the course and scope of their employment in order to determine whether the employee was protected by the tribe's sovereign immunity. For instance, in *Lewis* itself, Connecticut's supreme court found because Clarke was acting within the scope of his tribal employment, he shared in his tribal employer's sovereign immunity from suit. But Justice Sotomayor was explicit in rejecting this type of analysis: "That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Lewis v. Clarke,* (2017) 137 S. Ct. 1285, 1288.

Justice Sotomayor was also explicit in describing how to determine whether a party shares in sovereign immunity: "The critical inquiry is who may legally bound by the court's adverse judgment." *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1292-1293.

This "who-may-be-bound" test is the same test used in determining whether an individual state or federal employee may share in their state or federal employer's sovereign immunity. Applying this test to tribal sovereign immunity makes sense, because it would be unreasonable to afford a greater scope to tribal sovereign immunity than to state or federal sovereign immunity. *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1291-1292.

The "who-may-be-bound" test was commonly used pre-*Lewis* to determine whether an individual could avail themselves of tribal sovereign immunity. For instance tribal paramedics sued as individuals did not enjoy tribal sovereign immunity because "a remedy would operate against [the paramedics], not the tribe." *Maxwell v. County of San Diego (9th Cir. 2013)* 708 F.3d 1075, 1087. And when a tribal police chief was sued in his individual capacity for battery and false imprisonment the result was "pretty much foreordained." Tribal sovereign immunity was not available because recovery would run against the police chief and not the tribe. *Pistor v. Garcia (9th Cir. 2015)* 791 F.3d 1104, 1108-1109.

Justice Sotomayor made clear individual tribal employees, just like state and federal employees, may still be able to avail themselves of other personal immunity defenses. *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1291. And where resolving a cause of action against an individual defendant would require resolving an internal tribal dispute, the intra-tribal dispute doctrine can still deprive state courts of subject matter jurisdiction. *Miccosukee Tribe of Fla. V. Cypress, supra,* 814 F.3d 1202, 1208.

But those issues are separate from the question of whether Respondents can avail themselves of Blue Lake's sovereign immunity from suit. Under *Lewis,* in determining whether a Respondent shares in Blue Lake's tribal sovereign immunity from suit, we look only to whether Blue Lake would be bound by a judgement against that Respondent.

Here, *Acres v. Marston* does not sue Blue Lake or any Blue Lake entity. (AA 7-8.) The only remedies *Acres v. Marston* seeks are from the Respondents, and only the Respondents could be legally bound by any judgment. (AA 33-47, 215-216, 223-225.) Because judgment against Respondents would not require any action by Blue Lake, it was error for the superior court to ignore the Supreme Court's holding in *Lewis* and find Respondents were protected by Blue Lake's sovereign immunity. (AA 268, 280.)

B. There is no evidence Blue Lake wishes to share its sovereign immunity with Respondents.

Even if *Lewis* allowed Respondents to claim Blue Lake's sovereign immunity, "the defense of sovereign immunity is personal to the tribe and its entities" and "only the tribe or its entities may assert such a defense." *Twenty-Nine Palms Enters. Corp. v. Bardos,* (2012) 210.Cal.App.4th 1435, 1446. Respondents could only claim the immunity with Blue Lake's permission.

Here, there is no evidence Blue Lake wants to share its sovereign immunity from suit with Respondents. This lack of evidence is not surprising. Judge Marston admits he was disqualified from presiding over *Blue Lake v. Acres* because he was Blue Lake's attorney, and he admits he hired other Blue Lake attorneys to help him preside over *Blue Lake v. Acres.* (AA 147.) Some of those attorneys ghostwrote papers Boutin Jones filed in Blue Lake's litigation against me. (AA 161-162.) It is difficult to believe a sovereign would confer immunity on those who suborn its justice system by ensuring cases are secretly heard by a plaintiff's attorneys, or those who obtain secret help from a judge's chambers in litigation against their opponents.

It is Respondents' burden to show they are entitled to share Blue Lake's tribal sovereign immunity. *People ex rel. Owen v. Miami Nation Enters., supra,* 2 Cal.5th 222, 244. Because Respondents bring no evidence showing Blue Lake wants to share its sovereign immunity with Respondents, and because Respondents'

conduct suborned Blue Lake's justice system, it would be error to find Respondents share Blue Lake's sovereign immunity, even if *Lewis* allowed them to do so.

C. There is no evidence suborning Blue Lake's tribal court was within the course and scope of Respondents' employment and suborning a court is not a legitimate employment for anyone.

A tribal employee can only share in a tribe's sovereign immunity from suit when the employee acts within their authority. *Imperial Granite Co. v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269, 1271. Respondents concluded without evidence that all their conduct was within the course and scope of their employment. (AA 174-175, 191.)

But Judge Marston admits he engaged in conduct that disqualified him from being judge. (AA 147.) Vaughn, Burrell, DeMarse, and Lathouris aided Judge Marston in this conduct. (AA 31-32, 147.) The Boutin Jones Respondents knew they were co-operating in litigation against me with Judge Marston's law-office through their liaison with Rapport. (AA 21-22, 161-162.) Huff paid Judge Marston's invoices that included work as both attorney and judge. (AA 13.) Ramsey employed Judge Marston as her attorney in *Shiomoto* while he sat on a case brought by the casino she is CEO of. (AA 13-14.) These Respondents all willfully co-operated in suborning Blue Lake's tribal court, and it seems unlikely a

sovereign would condone the willful subornation of its own justice system by its own employees.

The second through seventh causes of action seek to hold Respondents responsible for suborning Blue Lake's tribal court. Because no Respondent brings evidence that willfully suborning Blue Lake's tribal court was within the course and scope of their employment, and because suborning a court is never within anyone's legitimate course and scope of employment, the superior court erred in finding Respondents' conduct was within the course and scope of their employment. (AA 267-290.)

Because suborning Blue Lake's tribal court cannot be within the course and scope of Respondents' employment, even if *Lewis* allowed them to do so, Respondents cannot share in Blue Lake's sovereign immunity on the second through seventh causes of action.

D. The law-firm Respondents cannot share in Blue Lake's sovereign immunity under the explicit test established by the California Supreme Court.

An entity may only claim tribal sovereign immunity as a defense if it qualifies as an "arm of the tribe." In determining if an entity is "an arm of the tribe," courts apply a five-factor test that considers: 1) how the entity was created; 2) whether the tribe intended the entity to share in its immunity; 3) the entity's purpose; 4) the tribe's control over the entity; 5) the financial relationship between the tribe and

the entity. *People ex. rel. Owen v. Miami Nations Enterprises, supra,* 2 Cal.5th 222, 236.

The entity claiming immunity has the burden of proving by a preponderance of the evidence it is an arm of the tribe. *People ex. rel. Owen v. Miami Nations Enterprises, supra,* 2 Cal.5th 222, 236.

The record is devoid of evidence Boutin Jones, Janssen Malloy, or Rapport & Marston are arms of Blue Lake. And it seems improbable these three California law-firms (AA 9-11) operate as Blue Lake tribal enterprises.

The entity Respondents cannot share in Blue Lake's sovereign immunity under *Miami Nations,* and the superior court erred in failing to apply the *Miami Nations* test in determining whether the law-firms could share in Blue Lake's sovereign immunity. (AA 277.)

II. The intra-tribal dispute doctrine does not apply because *Acres v. Marston* is not an internal tribal dispute and does not present a genuine and non-frivolous question of tribal law.

The intra-tribal dispute doctrine is distinct from the doctrine of tribal sovereign immunity. *Miccosukee Tribe of Indians v. Cypress* (11th Cir. 2015) 814 F.3d 1202, 1208.

The intra-tribal dispute doctrine arises from the fact that "Indian tribes are distinct and independent political communities which retain their original natural rights in local self-government." Out of respect for these rights of self-governance,

matters that are "purely internal affairs" are "reserved for resolution through purely tribal mechanisms" and are not justiciable by California courts. Examples of such issues include disputes about tribal membership, inheritance rules, domestic relations, and tribal leadership. *Miccosukee Tribe of Indians v. Cypress, supra,* 814 F.3d 1202, 1208. Speculative suggestion that tribal law may be implicated in a dispute is not enough to invoke the intra-tribal dispute doctrine. Instead, a case must present a genuine and non-frivolous question of tribal law to render an issue non-justiciable. *Id.,* 1209-1210.

Below, neither the superior court nor the defendants articulated how *Acres v. Marston* presents a genuine and non-frivolous question of tribal law. Instead:

- The superior court speculated, without argument or authority, that "the [wrongful use of civil proceedings] claim would mostly likely require action by the Tribe" and that the lawsuit "could involve efforts to invade" Blue Lake's privileged interactions with its attorneys." (AA 273, 285.)

- The Janssen Malloy and Boutin Jones Respondents speculated, without argument or authority, that evaluating the propriety of their behavior in the tribal court would require the superior court to "assert[] control of [the tribal court]." (AA 192.)

- The remaining Respondents relied entirely on the doctrine of tribal sovereign immunity and did not even speculate that *Acres v. Marston* raises any unique questions of tribal law.

Acres v. Marston does not present an intra-tribal dispute because it is not a dispute between tribal members occurring on a reservation, because California law requires state courts to answer questions arising from tribal court proceedings, and because its causes of action are based on general civil obligations all Californians owe each other, and Acres can prove each element of each cause of action without invoking tribal law.

A. Respondents cannot avail themselves of the intra-tribal dispute doctrine because Respondents bring nothing more than speculative suggestion that *Acres v. Marston* might interfere with Blue Lake's self-governance.

Invoking the intra-tribal dispute doctrine requires more than "mere suggestion" a case could interfere with tribal self-government. Invoking the intra-tribal dispute doctrine requires a case "present a genuine and non-frivolous question of tribal law." *JW Gaming Dev., LLC v. James* (ND Cal. Oct 5 2018) Case No. 3:18-cv-2669-WHO at 7, aff'd 9th Cir. Case No. 18-7008; *applying* *Miccosukee Tribe of Indians v. Cypress, supra,* 814 F.3d 1202, 1209-1210.

Below, neither Respondents nor the superior court articulated how *Acres v. Marston* could interfere with Blue Lake's self-governance. Nor did Respondents provide any evidence or argument *Acres v. Marston* presents a genuine and non-frivolous question of tribal law.

The intra-tribal dispute doctrine does not bar *Acres v. Marston* because there is no evidence *Acres v. Marston* presents a genuine and non-frivolous question of tribal-law, and there is no evidence allowing *Acres v. Marston* to continue could interfere with Blue Lake's self-governance.

B. *Acres v. Marston* is not an intra-tribal dispute because most parties are not tribal members, most defendant conduct took place outside of tribal lands, and the underlying tribal court action routinely invoked California law.

1. *Acres v. Marston* is a dispute between Californians.

The plaintiff in *Acres v. Marston* is a Californian and not a member of any Indian tribe. Of the seventeen defendants, twelve are California residents and three are California law-firms. While it is true Ramsey is a Blue Lake tribal member, she is also a Californian. Even the two non-Californian defendants are attorneys at one of the Californian law-firms. (AA 7-12.)

Acres v. Marston is not an intra-tribal dispute because there are no disputing tribal members. *Acres v. Marston* is a dispute between Californians.

2. *Acres v. Marston* took place in California.

The superior court found in passing that the wrongful use of civil proceedings cause of action occurred "entirely on tribal land." (AA 273, 284.) Even if this were true, California courts have jurisdiction over private civil litigation arising on Indian lands under Public Law 280. *Bryan v. Itasca County* (1976) 426 US 373, 385.

However, the superior court plainly-erred in finding the wrongful use conduct occurred entirely on tribal land. Of the three hearings in the underlying tribal court action, two took place in Oakland, hundreds of miles from Blue Lake's reservation. (AA 30.) None of the Respondent law-firms are located on Blue Lake's reservation (AA 9-11) and it is reasonable to conclude the Respondent attorneys worked mostly from their law firms. Judge Marston himself introduced evidence in the superior court showing he provides his judicial services to Blue Lake from his principal place of business in Ukiah. (AA 150-151.) The harm caused by Respondents was aimed at a Californian, and suffered in California. (AA 6.)

Acres v. Marston is not an intra-tribal dispute because it is a dispute between Californians, involving conduct undertaken in California, which caused harm to a Californian in California.

3. *Blue Lake v. Acres* was argued and decided under California law.

During *Blue Lake v. Acres* defendants routinely swore declarations under California perjury law. These declarations included fact declarations supporting motions, discovery responses, and proofs of service. (AA 29-30, 97, 109.) Even tribal court orders were served with proofs of service sworn under California law and delivered to California addresses. (AA 30, 71-72.)

Respondents Stouder, O'Neill, Burroughs, and Yarnall all filed papers in *Blue Lake v. Acres* displaying their California bar numbers. (AA 29, 76, 99.) Burroughs

and Yarnall relied on California law to support their arguments to the merits of the tribal court cause of action against me. (AA 105.)

Blue Lake v. Acres was decided on summary judgement by Justice Lambden, a retired California Court of Appeal judge. (AA 6.) Justice Lambden made no references to tribal law in deciding the merits of *Blue Lake v. Acres*. Instead, Justice Lambden relied on California law and Federal law. (AA 65-70.)

Acres v. Marston is not an intra-tribal dispute because it is a dispute between Californians, involving conduct that took place in California, under California law.

C. California courts can answer questions involving tribal court proceedings because the Tribal Court Civil Money Judgement Act – which was sponsored by Blue Lake – requires them to do so.

The superior court granted the motions to quash because it found allowing *Acres v. Marston* to proceed would impermissibly "entangle [the superior] court in in questions of Tribal Court practice and law." (AA 277, 288.) This was error because, far from being impermissible, considering "questions of Tribal Court practice and law" is something California courts are required to do under the Tribal Court Civil Money Judgment Act (TCMJA). (Code of Civil Procedure[3] sections 1730-1741.)

[3] Unless otherwise noted, all future references to code sections are to the California Code of Civil Procedure.

The TCMJA streamlines the recognition of money judgments from tribal courts, and specifically requires California courts to evaluate tribal court practice and law.

Those seeking enforcement of a tribal court money judgment must show the tribal court proceeding which produced the judgement followed the tribal court's rules of procedure. §1734(c)(2-3) and §1737(e). Determining whether a tribal court proceeding took place according to the tribal court's rules of procedure necessarily requires evaluating the practice of law within the tribal court.

The TCMJA also requires superior courts refuse to enforce tribal court judgments where it is shown the tribal justice system that produced the judgement "does not provide impartial tribunals or procedures compatible with the requirements of due process of law." §1737(b)(3). Determining whether a justice system can provide impartial tribunals or due process of law necessarily requires answering questions about that justice system.

Superior courts may, in their discretion, decline to enforce tribal court judgments where defendants had inadequate opportunity to defend (§1737(c)(1)(A-B)), there is substantial doubt about the integrity of the tribal court (§1737(c)(1)(F)), or the specific proceeding producing the judgment did not provide due process (§1737(c)(1)(G)). Exercising discretion in evaluating any of these issues would necessarily require the superior court answer questions about the practice of law within a specific tribal court proceeding.

The TCMJA is not an outlier in Indian law. Tribal court judgments are generally recognized through comity, just like judgments from other foreign courts. *Wilson v. Marchington* (9th Cir. 1997) 127 F.3d 805, 810. And the Supreme Court teaches that issue preclusion protects tribal court decisions because "proper deference … precludes relitigation of issues … resolved in [t]ribal [c]ourts." *Iowa Mutual Ins. Co. v. LaPlante* (1987) 480 US 9, 19.

By enacting the TCMJA, the Legislature made clear California courts are required to answer "questions about Tribal Court practice and law." Significantly, Blue Lake sponsored the TCMJA and paid Judge Marston to lobby for its reauthorization. (AA 17, 23, 147.) This is strong evidence Blue Lake does not believe its ability to govern itself is impaired when a superior court considers questions arising from Blue Lake tribal court proceedings.

Acres v. Marston cannot be barred by the intra-tribal dispute doctrine because Blue Lake lobbied the legislature to pass the TCMJA and require superior courts to answer questions arising from tribal court proceedings.

D. The superior court erred in applying *Brown v. Garcia* to *Acres v. Marston* because *Brown* dealt with an intra-tribal membership dispute.

The superior court erred when it applied *Brown v Garcia* in quashing the summonses. (AA 276-277, 287-288.) *Brown* was clearly an intra-tribal dispute because it addressed a tribe "culling … tribal members who are alleged to have committed crimes against the Tribe." *Brown v. Garcia* (2017) 17 Cal.App.5th

1198, 1201. Controlling Supreme Court authority teaches that "a tribe's right to define its own membership … [is] central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez, supra,* 436 US 49, 72 fn. 32. Because of the "vast gulf between tribal traditions and [our own]" courts cannot "intrude" on tribal membership disputes. *Id.*

Brown's specific causes of action were for defamation and false light. The plaintiffs in Brown were disenrolled members of the Elem Indian Colony. Elem's federally recognized tribal leadership published an Order of Disenrollment accusing the *Brown* plaintiffs of crimes punishable by disenrollment. The *Brown* plaintiffs sued the tribal leadership, arguing the allegations of misdeeds in the Order of Disenrollment were false and defamatory. *Brown v. Garcia, supra,* 17 Cal.App.5th 1198, 1200-1203.

The summonses in *Brown* were quashed because resolving the dispute in *Brown* would have required the superior court to adjudicate whether the Elem's federally recognized tribal leadership acted improperly in culling Elem's tribal membership. *Brown v. Garcia, supra,* 17 Cal.App.5th 1198, 1207. This result was all but required by the Supreme Court's teaching in *Santa Clara Pueblo* that tribal membership disputes must be resolved within tribal forums.

But questions of tribal membership are special. Courts are not generally precluded from considering questions involving tribal officers or tribal law. For

instance, a tribal police chief can be sued for detaining casino patrons and seizing their money. *Pistor v. Garcia, supra,* 791 F.3d 1104. Tribal leaders and attorneys can be sued when a they defraud a non-tribal business partner on a tribe's behalf. *JW Gaming Dev., LLC v. James, supra,* Case No. 3:18-cv-2669-WHO (N.D. Cal.). California courts can interpret tribal law, despite tribal objections, to determine whether a tribe waived its sovereign immunity under tribal law. *Findleton v. Coyote Valley Band* (2016) 1 Cal.App.5th 1194. And federal courts can provide a forum for a tribe to sue a former tribal leader for abusing his office to enrich himself. *Miccosukee Tribe of Indians v. Cypress, supra,* 814 F.3d 1202.

Acres v. Marston is like *Pistor, J.W. Gaming, Findleton,* and *Miccosukee* in that it is not a dispute about who belongs in a tribe, or how a tribe governs affairs between tribal members. Even though the factual history includes scenes played out against an exotic tribal backdrop, *Acres v. Marston* is a dispute about how California governs affairs between Californians. Because of this, the superior court erred in its application of *Brown* to quash the summonses. (AA 276-277, 287-288.)

E. A California court can review the tribal court record to determine if there were reasonable grounds to bring *Blue Lake v. Acres,* especially since *Blue Lake v. Acres* was argued and decided according to California law, and since there is a wealth of undisputed facts.

The first three causes of action in *Acres v. Marston* relate to the tort wrongful use of civil proceedings.[4] (AA 33-39.)

The only non-frivolous legal question the superior court must answer in deciding the wrongful use causes of action is whether there were reasonable grounds to bring the fraudulent inducement cause of action in *Blue Lake v. Acres.*

There is nothing uniquely tribal about determining whether reasonable grounds exist to bring a cause of action. And the intra-tribal dispute doctrine does not preclude a California court from applying tribal law (*Findleton v. Coyote Valley Band* (2016) 1 Cal.App.5th 1194, 1213-1214) or from "examin[ing] a developed record" to determine whether a case presents a genuine non-justiciable intra-tribal issue (*Miccosukee Tribe of Indians v. Cypress, supra,* 814 F.3d 1202, 1210).

The record in *Blue Lake v. Acres* includes Justice Lambden's order dismissing the fraudulent inducement cause of action on summary judgment. That order contains four-pages of discussion explaining why no reasonable person could

[4] Wrongful use of civil proceedings is distinct from malicious prosecution. Malicious prosecution addresses the wrongful institution of a criminal prosecution. Wrongful use of civil proceedings addresses wrongfully bringing or continuing a civil proceeding. (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486.) The torts should not be conflated as they are illuminated by different families of case law.

believe the fraud allegations in *Blue Lake v. Acres* and concludes by characterizing the fraud cause of action as "an attempt to conjure a personal warranty … to supplement other causes of action." (AA 66-70.) Because of this, the wrongful use causes of action in *Acres v. Marston* do not ask a California court to second-guess the findings of the tribal court. Instead, *Acres v. Marston* incorporates the tribal court order as part of its verified complaint to satisfy the "no reasonable grounds" and "improper purpose" elements of the wrongful use causes of action and asks the superior court to refrain from ignoring comity to "readjudicate questions . . . already resolved in tribal court." *AT&T Corp v. Coeur D'Alene Tribe* (9th Cir. 2002) 295 F.3d 899, 904.

The record in *Blue Lake v. Acres* also shows its fraudulent inducement cause of action was argued (AA 105) and decided (AA 65-69) under California law. Respondents bring no argument or authority to explain why a California court cannot answer questions about how California attorneys applied California law to a California cause of action.

Finally, the summary judgment record in *Blue Lake v. Acres* includes dozens of undisputed facts between the parties. (AA 112-134.) These undisputed facts can support the wrongful use causes of action and Respondents bring no argument or authority to explain why a California court cannot answer legal questions based on undisputed facts between parties.

It was error for the superior court to quash the summonses as to the first three causes of action because the intra-tribal dispute doctrine does not prohibit a California court from reviewing a tribal court record in order to resolve subsequent disputes.

F. The breach of fiduciary duty and constructive fraud causes of action do not require resolving an intra-tribal dispute if for no other reason than because Judge Marston's declaration below proves he breached his fiduciary duty and committed constructive fraud.

The intra-tribal dispute doctrine does not shield tribal officials from allegations they've abused their office for their own personal benefit. *Miccosukee Tribe of Indians v. Cypress, supra,* 814 F.3d 1202, 1208-1210. And the intra-tribal dispute doctrine does not shield tribal officials where there are allegations of fraud committed against non-tribal members. *JW Gaming Dev., LLC v. James, supra,* Case No. 3:18-cv-2669-WHO (N.D. Cal.) at 7-8. In order for the intra-tribal dispute doctrine to bar the breach of fiduciary duty or constructive fraud causes of action, Respondents needed to establish that these causes of action require resolving a non-frivolous issue of tribal law implicating tribal self-governance. Idem. Respondents failed to do so.

Instead, Judge Marston's own declaration below removes from dispute whether Judge Marston breached a fiduciary duty towards me.

Judges are fiduciaries to the litigants before them. Judges who conceal material information from the litigants before them commit fraud and violate their fiduciary obligations. *U.S. v. Holzer I* (7th Cir 1987) 816 F.2d 304, 307.[5]

Judge Marston declares he would have disqualified himself from presiding over *Blue Lake v. Acres* had he remembered he was Blue Lake's attorney in *Shiomoto.* (AA 147.) This is an admission that being Blue Lake's attorney disqualified Judge Marston from hearing Blue Lake's case against me. Because being Blue Lake's attorney in *Shiomoto* caused Judge Marston to be disqualified from presiding over *Blue Lake v. Acres,* the fact that Judge Marston was Blue Lake's attorney was a material fact Judge Marston had a duty to disclose. Judge Marston's failure to disclose that material fact was a breach of his fiduciary duty.

Judge Marston's explanation that he forgot he was Blue Lake's attorney makes no difference. In the first place, it is simply not credible. Judge Marston billed Blue Lake for work as its attorney in *Shiomoto* on the same day he issued the order in *Blue Lake v. Acres* declining to disqualify himself. (AA 243-244.) But even if we credit Judge Marston's claim that he forgot, he had a duty to keep track of material facts.

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[5] Vacated and remanded for reconsideration of mail fraud convictions in *McNally v. United States* (1987) 483 US 350. Holzer went to jail anyway. *U.S. v. Holzer III* (7th Cir. 1988) 848 F.2d 822. None of the subsequent history in Holzer alters the main point: Judges who conceal they are being paid by a litigant violate their fiduciary obligations. *U.S. v. Holzer I, supra,* 816 F.2d 304, 307.

That a court might ultimately find judicial immunity shields Judge Marston from liability for breaching his fiduciary duties has no bearing on the question of whether his fiduciary breach presents an intra-tribal dispute. Instead, because there is no dispute of any kind over whether Judge Marston breached his fiduciary duty to me, the fourth through seventh causes of action cannot be barred by the intra-tribal dispute doctrine.

III. Judicial immunity does not protect working as an attorney, offering employment, accepting employment, or aiding a judge in breaching his fiduciary duty to litigants.

Judicial immunity does not protect judges. Judicial immunity only protects judicial acts. *Forrester v. White* (1988) 484 US 219, 227.

In this district the Honorable Justice M. Kathleen Butz emphasized that the test for determining if an act is a judicial act is "whether it is a function normally performed by a judge, and to the expectation of the parties." *Regan v. Price* (2005) 131 Cal.App.4th 1491, 1499.

The superior court erred in finding that "[a]ll of the alleged misconduct of Judge Marston, the Tribal Court personnel, the attorneys who assisted the judge in the action, were standard judicial or quasi-judicial acts" (AA 289) because many of those acts were not functions normally performed by judges or to the expectation of the parties.

A. Respondents are not protected by judicial immunity because acting as an attorney is not a judicial act.

Blue Lake and its casino, with Ramsey as CEO, were the plaintiffs in *Blue Lake v. Acres*. (AA 8.) Judge Marston, Burrell, Vaughn, Lathouris and DeMarse all worked as attorneys for Blue Lake, its casino and Ramsey while they performed judicial services in *Blue Lake v. Acres.* (AA 31-32.)

Applying the test from *Regan*, Respondents' working as a plaintiff's attorney cannot be protected by judicial immunity, because working as a plaintiff's attorney is not a function normally performed by a judge, nor do defendants expect judges to work as attorneys for plaintiffs.

It was error for the superior court to find Respondents' actions as attorneys for Blue Lake, its casino, and Ramsey were actions protected by judicial immunity. (AA 289.)

B. Respondents are not protected by judicial immunity because employing a plaintiff's attorneys to work as judicial clerks is not a judicial act.

Supreme Court authority establishes that a judge's employment decisions are administrative acts, not judicial acts. And so a judge can be sued for wrongfully firing a probation officer. *Forrester v. White, supra,* 484 US 219, 229-230.

Here, Judge Marston declares he decided to employ Vaughn, Burrell, and Lathouris as contractors to aid him in presiding over *Blue Lake v. Acres.* (AA 146.) *Forrester* persuades that Judge Marston's decision to employ his fellow attorneys

for Blue Lake and its casino as his clerks in *Blue Lake v. Acres* was a non-judicial act. Similarly, the decisions by Vaughn, Burrell, Lathouris, and DeMarse to accept work as clerks in *Blue Lake v. Acres* were non-judicial acts. (AA 31-32.)

It was error for the superior court to find Respondents' decisions to employ the plaintiff's attorneys as judicial clerks in the plaintiff's own case were protected by judicial immunity (AA 289) because on-point authority establishes these types of employment decisions are not judicial acts.

C. Judge Marston is not protected by judicial immunity because case assignment is a non-judicial act.

In *ex Parte Virginia,* the Supreme Court held judicial immunity did not protect a county judge who excluded otherwise qualified citizens from jury lists because of their "race, color, or previous condition of servitude." *Ex Parte Virginia* (1879) 100 US 339, 340. Judicial immunity was not available because selecting jurors is "merely a ministerial act" that "might as well have been committed to a private person as to one holding the office of judge." *Id.,* 348.

ex Parte Virginia remains good law, with *Forrester* noting that *ex Parte Virginia's* teachings apply in both civil and criminal actions against judges. *Forrester v. White, supra,* 484 US 219, 228.

Judge Marston assigned *Blue Lake v. Acres* to himself even though at the time he was representing Blue Lake in *Shiomoto* and casino compact negotiations with California. (AA 13-15, 146. RJN 84-85.) Applying the logic of *ex Parte Virginia*,

assigning a case to a judge is not a judicial act because cases do not need to be assigned by a judicial officer. Cases can just as easily be assigned by a clerk, a court administrator, or even by lot.

Ex Parte Virginia is persuasive authority it was error for the superior court to find Judge Marston was protected by judicial immunity for assigning *Blue Lake v. Acres* to himself. (AA 289.)

D. Clerk Huff is not protected by judicial immunity for acting as paymaster to Blue Lake's judge-attorneys, or for her myriad other roles at Blue Lake.

Judge Marston sent Clerk Huff monthly invoices detailing his work, and the work of his associates, as judges and attorneys for Blue Lake. (AA 13.) Clerk Huff wears many hats for Blue Lake besides that of clerk. She is also the "grants and contracts manager," and in that role her duties include generating revenue for Blue Lake. Clerk Huff was supervised in her work by Ramsey, the CEO of Blue Lake's casino. (AA 9, 19.)

Applying *Regan's* test to Clerk Huff precludes her from enjoying judicial immunity. Paying the plaintiff's attorneys is not something normally done by a judge. Being supervised in their work by the CEO of a corporate plaintiff is not something normally done by a judge. Generating revenue for a plaintiff is not something normally done by a judge. Judicial immunity cannot protect any of these acts.

It was error for the superior court to find Clerk Huff was protected by judicial immunity. (AA 289.)

E. Burrell, Vaughn, Lathouris and DeMarse all claim prosecutorial immunity and therefore cannot enjoy judicial immunity.

In addition to claiming judicial immunity, Burrell, Vaughn, Lathouris and DeMarse also claim prosecutorial immunity. (AA 176, 180.) Whether a defendant who claims prosecutorial immunity is barred from claiming judicial immunity from the same set of facts may present an issue of first impression.

However, applying Justice Butz's test from *Regan,* it is clear that being a prosecutor is not a task normally associated with being a judge, and that defendants do not expect to be judged by the prosecution.

F. Judicial immunity does not protect private parties corruptly conspiring with a judge.

In *Dennis v. Sparks,* a Texas oilman bribed a Texas judge to enjoin a rival oilman from producing oil. The corruption was discovered, the injunction dissolved, and the disgraced judge sued alongside those who corrupted him. Initially, a Fifth Circuit panel held that because the judge was immune, those who aided in his corruption were also immune. But when the issue was reviewed *en banc,* prior circuit authority was overruled to hold no immunity protects those who suborn a judge. *Dennis v. Sparks* (1980) 449 US 24, 24-26. A unanimous Supreme

Court affirmed, explaining "there was no good reason in law, logic, or policy" to confer immunity on those who corrupt judges. *Id.*, 27.

In *Blue Lake v. Acres*, the Boutin Jones Respondents brought a cause of action that Justice Lambden described as "conjured." (AA 70.) Boutin Jones brought this conjured action before Judge Marston, an attorney from Rapport & Marston, a firm that has been representing Blue Lake alongside Boutin Jones since 2011. (AA 9-10, 21.) Judge Marston hired other Rapport & Marston attorneys working for Blue Lake's casino to aid him in *Blue Lake v. Acres.* (AA 31-32, 147.) Some of those attorneys ghostwrote papers that Boutin Jones filed on Blue Lake's behalf in litigation against me. (AA 21-22, 161-162.)

Ramsey, the CEO of Blue Lake's casino, was employing Judge Marston as her personal attorney in *Shiomoto* the whole time *Blue Lake v. Acres* was underway. (AA 13, 31, 147, 239-242.) And Clerk Huff processed monthly invoices from Judge Marston (AA 13) that detailed the corrupt nature of Rapport & Marston's services (AA 23, 32 at ¶128, 243-249).

Respondents aided and abetted in corrupting Judge Marston, and in Judge Marston's corrupt handling of *Blue Lake v. Acres.* But for this corruption, it is reasonable to infer the "conjured" cause of action would never have brought. The second (AA 36), third (AA 38), fifth (AA 42), and seventh (AA 45) causes of action seek to bring Respondents to account for their corruptive acts.

Dennis persuades that even if Judge Marston enjoys judicial immunity, the Respondents to the second, third, fifth and seventh causes of action do not. The superior court erred in finding judicial immunity barred these causes of action. (AA 289.)

IV. Prosecutorial immunity does not protect civil litigators who wrongfully use civil proceedings, nor does it protect civil litigators who suborn judges.

Prosecutorial immunity is an absolute, common law immunity. It protects criminal prosecutors engaged in conduct that is "intimately associated with the judicial phase of the criminal process." *Pitts v. County of Kern* (1988) 17 Cal.4th 340, 350. In a state law context, prosecutorial immunity was made statutory by Government Code 821.6, which shields public employees from liability for maliciously instituting judicial or administrative proceedings. *Id.*, 360, fn.7.

Below, neither the Janssen Malloy Respondents nor the Boutin Jones Respondents raised prosecutorial immunity as a defense. However, Judge Brown noted in passing that both sets of Respondents were protected by prosecutorial immunity because it is a "relative of sovereign immunity." (AA 268.)

Respondents Rapport, Burrell, Vaughn, DeMarse, Lathouris, and the firm Rapport & Marston all raised the defense of prosecutorial immunity. (AA 180-181.) However, Judge Brown did not find that any of these Respondents were

entitled to prosecutorial immunity. Instead, he found that Burrell, Vaughn, DeMarse, and Lathouris were entitled to judicial immunity. (AA 289.)

The superior court also noted that, under Government Code 821.6 employees of the State of California would be immune from liability for malicious prosecution. (AA 273, 285.)

The superior court erred in extending prosecutorial immunity to the Janssen Malloy and Boutin Jones Respondents. (AA 268.) It would also be error to find Respondents are immunized by Government Code 821.6. (AA 273, 285.)

A. No Respondent is protected by prosecutorial immunity because *Blue Lake v. Acres* was not a criminal proceeding.

Blue Lake v. Acres began with a "SUMMONS IN A CIVIL CASE." (AA 74.)

No Respondent can enjoy prosecutorial immunity because *Blue Lake v. Acres* was not a criminal proceeding.

B. No Respondent can be protected by prosecutorial immunity because Blue Lake does not have criminal jurisdiction over non-Indians.

Barring Congressional authorization Indian tribes lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe* (1978) 435 US 191, 212.

I am a non-Indian. Because I am a non-Indian, and there is no evidence Congress gave Blue Lake criminal jurisdiction over my conduct, Blue Lake lacked criminal jurisdiction over me.

No Respondent can be protected by prosecutorial immunity because Blue Lake had no criminal jurisdiction over me.

C. No Respondent can be protected by Government Code 821.6 because no Respondent is a public employee as defined by the Government Code.

Government Code 821.6 limits its protections to public employees. Government Code 811.4 defines a "public employee" as an employee of a "public entity." Government Code 811.2 defines "public entity," and nothing in that definition includes the Blue Lake Rancheria, its casino, or its tribal court. Nor does the definition of "public entity" include private law firms like Boutin Jones, Janssen Malloy, and Rapport & Marston.

Because no Respondent was a public employee, no Respondent can enjoy the protections of Government Code 821.6.

D. Government Code 821.6 should not be analogized to protect tribal governmental employees because tribal governmental employees are not liable under 42 USC 1983.

California public employees who violate federally protected constitutional rights under color of state law may be sued in their personal capacities under 42 USC 1983. *Pitts v. County of Kern, supra,* 17 Cal.4th 340, 348-350.

However tribal employees who violate federally protected constitutional rights under color of tribal law are not liable under 42 USC 1983. *Evans v. McKay* (9th Cir. 1989) 869 F.2d 1341, 1347.

If the protections of Government Code 821.6 are extended to tribal employees, those tribal employees will enjoy an immunity under Government Code 821.6 greater than what is afforded to state employees. That's because tribal employees violating the civil rights of others on behalf of their employer would be wholly immune from suit. Whereas when state employees violate the civil rights of others they remain personally liable under 42 USC 1983.

This court should not interpret Government Code 821.6 to grant tribal employees protections broader than the protections offered to state employees. *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1291.

E. Neither prosecutorial immunity nor Government Code 821.6 protect suborning judges or courts.

1. Prosecutorial immunity does not protect suborning judges or courts.

The Supreme Court uses a three-factor test to determine if conduct can be protected by prosecutorial immunity: 1) There must be a historical basis for protecting the conduct; 2) There must be risk that absent immunity the ability to protect the public good would be undermined; 3) There must be significant external checks to restrain abuses by officials exercising the immunity. *Mitchell v. Forsyth* (1985) 472 US 511, 521-523.

Here, it is alleged that Respondents suborned Judge Marston and the tribal court. (*generally,* AA 13-33.) There is no historical basis for allowing commercial attorneys for an Indian casino to be protected by prosecutorial immunity. There is

no danger the public good will be undermined if commercial attorneys working for casinos do not enjoy prosecutorial immunity. And where attorneys suborn a judge and its court, they are destroying the external checks meant to restrain abuse.

The second through seventh causes of action seek to hold Respondents to account for suborning Judge Marston and the tribal court. (AA 36-47.) Applying *Mitchell's* three-part test, Respondents cannot enjoy prosecutorial immunity for the second through seventh causes of action.

2. Government Code 821.6 does not protect suborning judges or courts.

Government Code 821.6 protects a public employee who "institut[es] or prosecut[es] any judicial or administrative proceeding within the scope of his employment." Respondents bring no evidence or authority to suggest suborning a judge or court is ever within the scope of anyone's legitimate employment.

The second through seventh causes of action seek to hold Respondents to account for suborning Judge Marston and the tribal court. (AA 36-47.) Government Code 821.6 cannot protect Respondents from liability for the second through seventh causes of action.

F. Neither prosecutorial immunity nor Government Code 821.6 are intended to protect those who litigate on behalf of a for-profit commercial enterprise.

Blue Lake v. Acres was brought by civil litigators from private law firms on behalf of a for-profit commercial enterprise. (AA 8-12.) Respondents provide no

authority that suggests Government Code 821.6 or prosecutorial immunity protects the actions of civil litigators from private law firms acting on behalf of a for-profit commercial enterprise.

V. Leave to amend the complaint should have been granted.

Below, Respondents brought anti-SLAPP motions (RT 3), foreclosing my ability to amend the complaint. "If the plaintiff has not had an opportunity to amend the complaint … leave to amend is liberally allowed as a matter of fairness." Leave to amend should be allowed so long as the "complaint does not on its face foreclose any reasonable possibility of amendment." *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747. The superior court abused its discretion in quashing the complaint without leave to amend (RT 4) because there is a reasonable possibility the complaint could be amended to overcome Respondents' immunity defenses.

The superior court denied the anti-SLAPP motions as moot. (RT 3-4.) This Court has already dismissed Respondents' appeals from those orders. (Court of Appeal Docket, Order of Oct. 17, 2019.) There is no procedural bar below preventing amendment of the complaint, and leave to do so should be granted as it is reasonably possible such amendment could state a valid cause of action.

A. The complaint could be amended to attack Respondents' entitlement to sovereign immunity.

Respondents' brought no evidence below to show Blue Lake intended to share its sovereign immunity with Respondents. *Acres v. Marston* alleges Respondents' suborned Blue Lake's tribal court. It seems improbable a sovereign would wish to give immunity to those who suborn its justice system.

The complaint could be amended to specifically allege Blue Lake did not intend to share its sovereign immunity with Respondents for the purpose of suborning Blue Lake's tribal court.

B. Both the United States and California Supreme Courts have signaled sovereign immunity may not preclude civil tort suits by private individuals against tribal businesses, and the complaint could be amended to name Blue Lake Casino as a defendant.

The complaint noted that depending on developments in other cases, the complaint might be amended to name Blue Lake Casino as a defendant. (AA 7.)

This observation in the complaint was inspired by the high court's comment that neither the Supreme Court nor Congress has addressed whether tribal sovereign immunity should protect tribal commercial enterprises from tort claims. *Michigan v. Bay Mills Indian Community* (2014) 134 S. Ct. 2024, 2036 fn. 8. The Alabama Supreme Court has since held tribal sovereign immunity does not bar suits by tort

victims against tribal enterprises.[6] *Wilkes v. PCI Gaming* (2017) Alabama S. Ct. Case No. 1151312, certiorari denied. And the California Supreme Court has hinted tribal sovereign immunity might not preclude tort suits brought by individuals against tribal commercial enterprises. *People ex rel. Owen v. Miami Nation Enters., supra,* 2 Cal.5th 222, 236.

Here, if Blue Lake intended to share its sovereign immunity from suit with Respondents for the purposes of suborning Blue Lake's tribal court against me, then Blue Lake willfully used its sovereign immunity to commit a vicious intentional tort.

Because neither the United States Supreme Court nor the California Supreme Court has ever held tribal sovereign immunity protects tribal commercial enterprises from suit for torts against non-Indians, there is a reasonable possibility the complaint could successfully be amended to name Blue Lake Casino as a defendant for committing intentional torts against me.

C. The complaint could be amended to add a RICO cause of action.

The complaint could be amended to add RICO causes of action, with mail fraud and obstruction of justice supplying the predicates. There is a reasonable

[6] The opinion of the Alabama Supreme Court appears to be unpublished. But I do not cite the opinion for any legal contention. Instead, the opinion is cited to show it is reasonably possible to believe a suit by me against Blue Lake Casino might be successful because a suit against an Indian casino by a tort victim in a sister state has been allowed to continue.

possibility such causes of action would be successful. *JW Gaming Dev., LLC v. James, supra,* Case No. 3:18-cv-2669-WHO (N.D. Cal.) at 6-7.

D. The complaint could be amended to show Judge Marston negotiated with the State of California on Blue Lake's behalf while he presided over *Blue Lake v. Acres* because transcripts of those negotiations entered the public record on November 4, 2019.

Below, the superior court held that all of Judge Marston's acts were judicial acts. (AA 289.) This was after Judge Marston swore in two separate declarations that he did not represent Blue Lake in compact negotiations with the state. (AA 146.)

Judge Marston lied in his declaration.

Recent documents filed by Judge Marston in federal court show Judge Marston represented Blue Lake in gaming compact negotiations with the State of California while he presided over *Blue Lake v. Acres.*

In 2015 various tribes formed the Compact Tribes Steering Committee (CTSC) to renegotiate tribal gaming compacts with California. Blue Lake was a member of the CTSC. (AA 28.) Today, Blue Lake is suing California for bad-faith compact negotiations alongside several other tribes in *Chicken Ranch et al., v. Gavin Newsom et al.,* Case No. 1:19-cv-24 in the United States District Court for Eastern California. Judge Marston is an attorney representing the tribes in that case.[7]

[7] Ostensibly, an attorney named David Dehnert, and not Judge Marston, represents Blue Lake Rancheria in the federal action.

Judge Marston explained in his *Chicken Ranch* motion for summary judgement that any statement made on behalf of the CTSC during negotiations with the state were made on behalf of all the CTSC tribes. (RJN 39, 42, 45.) To support his motion for summary judgment Judge Marston was ordered to file a "Record of Negotiations" with the district court. (RJN 47-49.)

The Record of Negotiations contains transcripts of at least twenty-one negotiation sessions between the CTSC and California during which Judge Marston negotiated on behalf of the CTSC, and therefore Blue Lake. (RJN 50-309.)

These twenty-one negotiation sessions include five sessions Judge Marston attended during 2016 while he was presiding over *Blue Lake v. Acres.* (RJN 84-141.) Subjects Judge Marston addressed during these 2016 sessions include labor relations (RJN 106), definitions of casino accounting terms (RJN 116), and tort liability (RJN 139-140). All of these subjects are applicable to Blue Lake's casino.

The negotiation transcripts make clear negotiations also took place off the record. (e.g., RJN 145.) And so the RJN only represents some of Judge Marston's work representing Blue Lake in compact negotiations.

The verified complaint could be amended to specifically reference Judge Marston's representation of Blue Lake's interests at the CTSC negotiation sessions while he was presiding over *Blue Lake v. Acres*. There is a reasonable possibility

the inclusion of these allegations will defeat Respondents' claims of judicial immunity.

E. The complaint could be amended to allege criminal causes of action.

"Civil actions lie in favor of crime victims. Violation of a criminal statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the criminal statute. [Citations omitted.] Any injured member of the public for whose benefit the statute is enacted may bring an action." *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1224.

Acres v. Marston seeks to hold Respondents responsible for bringing a "conjured" cause of action within a court Respondents suborned. And so the complaint could be amended to allege Respondents violated Section 182(a)(3) of the Penal Code by falsely maintaining *Blue Lake v. Acres* against me. The complaint could also be amended to allege Respondents violated Section 182(a)(5) of the Penal Code by obstructing or perverting justice in *Blue Lake v. Acres*.

The complaint could also be amended to allege Respondents violated 18 USC 666.

18 USC 666(a)(1)(B) makes it a crime for any agent of a tribal government to corruptly accept anything of value as a reward in connection with a series of

transactions before the tribal government involving something worth $5,000 or more.[8]

Judge Marston himself declared that all his work for Blue Lake was performed under his judicial services contract. (AA 145-146 at ¶22.) This means his work as attorney in *Blue Lake v. Shiomoto* and his work as judge in *Blue Lake v. Acres* were all part of a related series of "judicial services contract" transactions. Because *Blue Lake v. Acres* sought at least $249,250 in damages (AA 82) the series of transactions involved something with more than $5,000 of value.

Judge Marston also declared that being Blue Lake's attorney in *Blue Lake v. Shiomoto* disqualified him from being judge in *Blue Lake v. Acres.* (AA 147 at ¶28.) Because being paid to be Blue Lake's attorney disqualified Judge Marston, it is reasonable to allege those payments were corruptly accepted.

The same analysis applies to 18 USC 666(b)(2) where the focus is on those who corruptly give anything of value to reward an agent of a tribal government.

It is reasonably possible the complaint could be amended to allege criminal causes of action against Respondents. Because "suits over plainly unlawful acts are individual capacity suits by definition" Respondents would not be protected by

[8] An additional element in 18 USC 666 is that the tribal government have received $10,000 or more in federal dollars in the year surrounding the corrupt act. That element is satisfied. (AA 7.)

tribal sovereign immunity for these amended causes of action. *Maxwell v. County of San Diego (supra)* 697 F.3d 941, 955.

California courts can protect Californians harmed by Californians.

Respondents are all Californians or attorneys working in California law-offices. I am also a Californian.

Respondents worked from California law-offices to compel me to defend myself against a cause of action Respondents conjured before a court Respondents corrupted. While pursuing their conjured cause of action Respondents worked to ensure any corrupt judgment they obtained would be enforced by California courts.

Respondents believe they cannot be called to account for their conduct in California courts because the tribe that paid them cannot be called to account.

This is not the law.

The Supreme Court held in *Lewis v. Clarke* that individual wrongdoers can be haled into court even if their tribal employer cannot. *Lewis v. Clarke (supra)* 137 S. Ct. 1285, 1288. This doctrine of individual liability is necessary if states are to retain the power to govern. *Bay Mills* explains why.

In *Bay Mills,* a tribe sought to open an illegal casino on land outside of any Indian reservation. When Michigan sought to enjoin the tribe from opening its illegal casino the Supreme Court held the tribe could not be enjoined because the

tribe was immune from suit. *Michigan v. Bay Mills Indian Community (supra)* 134 S. Ct. 2024, 2028.

But that did not mean Michigan was powerless to prevent the casino form opening. Michigan retained the power to pursue civil remedies against, and impose criminal penalties upon, any individuals who might illegally operate the tribe's off-reservation casino. Because Michigan retained the power hale individual tribal employees into court, Michigan retained the power to enforce its own law on its own lands. *Michigan v. Bay Mills Indian Community (supra)* 134 S. Ct. 2024, 2035.

Just as Michigan seeks to protect its residents from illegal casinos, California seeks to protect its residents from meritless lawsuits and abusive fiduciaries. California accomplishes these goals primarily by granting private rights of action in tort. If tribal sovereign immunity protected individuals from tort liability for their wrongs, then California would lose the ability to protect its residents from tortious conduct.

California can protect its residents from tortious conduct. Especially tortious conduct undertaken by Californians, working from California.

The superior court erred in finding Respondents were immune from liability for their conduct. I ask this Court to reverse the superior court and order Respondents

to answer the complaint as to all causes of action. To whatever extent that cannot be done, I ask this Court to grant me leave to amend the complaint.

November 26, 2019 /s/ James Acres
Plaintiff/Appellant

PROOF OF ELECTRONIC SERVICE (CCP §1010.6)

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I reside in the county of San Diego, State of California. My business address is 1106 2nd #123, Encinitas, CA 92024. My electronic service address is james@kosumi.com.

On November 26, 2019, I served from Encinitas, CA the foregoing documents described as "Appellant's Opening Brief" on the interested parties in this action as follows:

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☒ **BY E-MAIL:** I caused all pages of the foregoing document(s) to be sent as an attachment to the recipient(s) noted above via electronic transfer (e-mail) from the e-mail address james@kosumi.com. To my knowledge, the transmission was completed and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 26, 2019 at Encinitas, California.

/s/ James Acres

James Acres