No. C087445

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CYNTHIA LOPEZ
Plaintiff-Appellant,

v.

ERIC QUAEMPTS, et al.
Defendants-Respondents.

Appealing an Order of the Superior Court of the State of California,
County of Sacramento, Case No. 34-2017-00206329-CU-FR-GDS
The Honorable David I. Brown

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Rule 8.208.

Dated: August 15, 2019 ERIKA HEATH, ATTORNEY AT LAW

By: */s/ Erika Heath*
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STATEMENT OF THE CASE

Plaintiff and Appellant Dr. Cynthia Lopez was fraudulently induced to enter into an employment relationship with the Confederated Tribe of the Umatilla Indian Reservation (the "CTUIR"). This inducement caused her to leave her employment in Sacramento, California, and move to a remote region of eastern Oregon to work for the CTUIR. The individuals responsible for the fraud were Respondents/Defendants Eric Quaempts ("Quaempts") and David Tovey ("Tovey"). Dr. Lopez filed the instant lawsuit against these two individuals and the CTUIR, asserting claims of fraud, negligent misrepresentation, misrepresentation under Labor Code § 970, and violations of the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* ("UCL"). Rather than allowing these claims to proceed on the merits, the court below quashed and dismissed Dr. Lopez's First Amended Complaint ("FAC"). As grounds for barring Dr. Lopez from seeking any relief, the court below erroneously mis-applied the doctrines of tribal sovereign immunity and claims exhaustion of remedies.

As recent authority from the U.S. Supreme Court has clarified, the individual defendants in this lawsuit may not use the CTUIR's tribal sovereignty to immunize themselves from suit in their personal capacities. (*See Lewis v. Clarke* (2017) 137 S. Ct. 1285.) The court below recognized *Lewis* should apply here, but then so narrowly construed *Lewis* such that the court effectively declined to apply it. Instead, the court below mis-construed the FAC, which expressly names the defendants as individuals and requests money damages against them personally, as only stating claims against these individual defendants in their *official* capacities. The lower court also erroneously interpreted the FAC's allegations of fraud,

false advertising[1] and illegal conduct as acts falling within the scope of the CTUIR's employment authority for Quaempts and Tovey. The court below then erroneously reasoned the individual defendants could avail themselves of the CTUIR's sovereign immunity defense.

Not only is the lower court's distinction between individual and official capacities mistaken, it is a "red herring" and irrelevant post-*Lewis.* Even if relevant, the allegations in the FAC are clear that Quaempts and Tovey committed intentional tortious and illegal acts that do not fall within the CTUIR's scope of employment authority for employees and "officials." Appellant seeks to resolve this issue and continue her lawsuit against individual defendants who cannot avail themselves of a sovereign immunity defense.

The court below also misapplied the import of the CTUIR's express and voluntary ratification of Quaempts and Tovey's misdeeds during the course of litigation. The CTUIR's ratification cannot serve as a basis for Quaempts and Tovey to gain access to a sovereign immunity defense which they could not otherwise raise, especially post-*Lewis*. Instead, CTUIR's express ratification not only failed to immunize the individual employees from suit, but it also waived the CTUIR's sovereign's immunity. This outcome is consistent with the general rule that when a principal (here a tribe) ratifies the alleged illegal acts of its agent (here tribal employees), the principal accepts liability for the agent's alleged illegalities. Hence, the CTUIR's express and voluntary ratification explicitly waived its tribal immunity on the tort claims asserted against its agents. Appellant seeks to resolve this issue and continue her lawsuit against defendant CTUIR which expressly waived its sovereign immunity defense.

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[1] A crime pursuant to federal and California state law. (4 CT 1035-36, at ¶1, 1190, 1194-96.)

Further, contrary to the decision below, there are no procedural bars to pursuing this action. This lawsuit does not require Dr. Lopez to exhaust her claims through tribal remedies. Dr. Lopez's claims involve intentional torts recognized under California statute or common law which are not recognized by the CTUIR's tribal courts, Tort Claims Code ("TCC") or personnel manual ("TPPM"). Dr. Lopez's claims asserted here do not even meet the CTUIR's definition of tort.

In addition, the TCC and TPPM apply to claims against the CTUIR itself and not to claims against individual defendants, particularly individuals acting outside their scope of employment authority. Last, the involvement of the federal government was too minimal here to invoke the Federal Tort Claims Act ("FTCA"). This case does not involve federal employees or the federal government and the FTCA does not apply to intentional torts. Dr. Lopez plead sufficient facts to demonstrate the CTUIR had no administrative or judicial mechanisms for resolving harms caused by intentional torts.

Finally, should any of the above issues need clarification in the pleadings, this Court should, at a minimum, reverse and remand to permit Dr. Lopez to amend her complaint to clarify the claims and allegations against the individual defendants.

Because the court below erroneously applied the doctrines of sovereign immunity and exhaustion of remedies as well as procedural bars to prevent Dr. Lopez's complaint from moving forward, she seeks reversal of the judgment.

STATEMENT OF FACTS

I. Defendants deceptively induce Dr. Lopez to quit her job with a Sacramento law firm and move to rural Oregon to work for them.

In May 2012, Dr. Lopez resided in Sacramento, California and was employed full-time as a multi-lingual environmental attorney with a Sacramento law firm. (4 CT 1038 at ¶10; 5 CT 1207 at ¶ 2, 1295.) Dr. Lopez has never been a member of the CTUIR. (4 CT 1038, 1040; 5 CT 1208-10.)

On May 24 and 25, 2012, Dr. Lopez received email solicitations from Ms. Longenecker and Ms. Ferman, representing the CTUIR Department of Natural Resources ("DNR"), headed by Quaempts. (5 CT 1207-10, 1224-49.) Dr. Lopez knew Ms. Longenecker and Ms. Ferman through Dr. Lopez' prior position with the U.S. Fish and Wildlife Service. (5 CT 1207, ¶4.) Ms. Ferman is Quaempts's "right hand" staff person often serving as acting DNR director on behalf of Quaempts. (1 CT 166, at ¶ 7.) Their email solicitations forwarded official CTUIR documents highlighting job opportunities with the CTUIR, including an official vacancy announcement and position description for the position of First Foods Policy Program (the "FFPP") Manager. (5 CT 1207-10, 1224-49.) Quaempts authored the position description. (1 CT 166, at ¶7.)

In his position description and oral representations, Quaempts particularly represented to Dr. Lopez the promises of the managerial position that included adequate funding, staff, and promotional opportunities:

- supervising 3–5 staff in policy research, review, development and maintenance, (4 CT 1040, ¶¶23-25, ¶36; 1042; 5 CT 1207; 1235-40;)

- various grant and funds of approximately $600,000.00 to $700,000.00 annually as adequate funding for the FFPP described as central to the CTUIR culture and mission, (*Id.*;)

- equal or greater benefits then her previous employer, including, but not limited to, insurance, retirement plans or funds, vacation time, and sick leave, (*Id.*;) and,

- promotional opportunities or professional growth, (*Id.*)

Dr. Lopez later found these pre-employment representations to be false. (4 CT 1040, at ¶¶ 26-27, 31, 37; 4 CT 1041–42.)

The CTUIR's campaign to secure Dr. Lopez's employment continued well beyond these emails. Between June 2012 and February 2013, Dr. Lopez received several phone calls and text messages from Ms. Longenecker encouraging her to apply for the FFPP Manager position. Ms. Longenecker insisted the CTUIR was a good place to work, and that the FFPP Manager would have substantial funds and staff to be effective in the region. (5 CT 1209, at ¶9.) As Dr. Lopez was satisfied with her employment in Sacramento, initially she was not swayed by these recruitment efforts. (5 CT 1209.) Dr. Lopez also had concerns about moving to rural Oregon, far from friends and family, to work for an entity that hired based primarily on tribal preferences. (4 CT 1040.)

On March 14, 2013, on behalf of Ms. Ferman and Quaempts, Ms. Longenecker again emailed Dr. Lopez, encouraging her to apply for the FFPP Manager position. Ms. Longnecker also followed up with a telephone recruitment call. (5 CT 1209-10.) Ms. Longenecker repeated that CTUIR was a good place to work, and that the FFPP Manager would have substantial funds, staff and authority to be effective in the region. (*Id.*) In April 2013, Dr. Lopez also communicated with the CTUIR Human Resources department. (5 CT 1210, at ¶12.) Finally persuaded by these persistent contacts and representations, Dr. Lopez submitted a job

application on April 19, 2013. (5 CT 1210-11.) Had Dr. Lopez known that many of these representations, including the staffing and budget representations, were false at the time she never would have submitted the application. (*Id.*)

None of these communications from the defendants indicated Dr. Lopez would be subjecting herself to tribal jurisdiction, even though she was not a tribal member, was not employed by CTUIR at that time, and lived outside CTUIR lands in Sacramento, California where CTUIR staff contacted her. (5 CT 1209-1218.)

On July 22, 2013, following several months of back-and-forth phone calls and emails regarding details and logistics with defendants, Dr. Lopez traveled to Oregon to interview at the CTUIR offices near Pendleton. (5 CT 1212-13.) The interview was a structured process supervised by Quaempts that allowed Dr. Lopez little time to ask questions. (5 CT 1213.) During the interview led by Quaempts, the interviewers provided a description of the position that was quite promising; they gave Dr. Lopez the impression that her budget might be closer to a million dollars, and that she would be able to hire more staff after completing a mandatory probation period. (5 CT 1213-14.) Dr. Lopez was excited about these prospects and she immediately called her partner and select family and friends to discuss her interview and what she could do with such a budget and staff. (5 CT 1213-14, at ¶ 22.) At no point during the interview or afterwards did Quaempts inform Dr. Lopez that the budget and staffing was actually much less than what was advertised and that he had no intention of re-funding or re-staffing the FFPP. (*Id.*)

During July and August 2013, Quaempts continued recruiting Dr. Lopez with numerous telephone calls and emails. (5 CT 1214-17, 1297.) During these communications, Dr. Lopez was also promised she would receive equal or greater benefits than her previous employer, including but

not limited to: insurance, retirement plans or funds, vacation time, and sick leave. (5 CT 1214-16; 4 CT 1040, 1042.) Defendants also promised that the FFPP Manager position offered promotional opportunities and professional growth for her specifically, notwithstanding tribal preferences. (5 CT 1214-16; 4 CT 1040, 1042.) At no point during any of these communications did Quaempts inform Dr. Lopez that he was actively working to de-fund and de-staff the FFPP. (5 CT 1214-17, 1297.) Rather, Quaempts hid the information from Dr. Lopez and informed her that "the budgets and workplans" would be "done" before her arrival and beginning employment with the CTUIR. (*Id*.)

Defendants provided Dr. Lopez with a formal job offer on August 7, 2013. (5 CT 1216-17, 1287-88.) Dr. Lopez continued to discuss the position with defendants, by telephone and email, throughout August, September and before October 16, 2013. (5 CT 1217-18.) At no point during this time period did Quaempts inform Dr. Lopez that he was actively de-funding and de-staffing the FFPP, although he had several opportunities to inform her. (*Id.*) Dr. Lopez accepted the job offer with the understanding that she would have sufficient resources "to effect change that benefits the environment" and enhance her career. (5 CT 1404.)

II. While working for Defendants, Dr. Lopez discovers the false and misleading nature of the position description and job offer.

From August through October 2013, Dr. Lopez had many conversations with Defendants regarding logistics of the new position, and even received her first assignments from Quaempts. (5 CT 1217-18.) On October 16, 2013, Dr. Lopez began working for the CTUIR. (5 CT 1218, at ¶ 36.)

The FFPP had not had a manager for several years, so Dr. Lopez was required to do some "catch-up" work after starting employment with

CTUIR. (5 CT 1219, at ¶ 38.) Her primary tasks were to create a First Foods Policy, and to provide legislative analyses of proposed laws that could affect Defendants. (*Id*.) She was expected to attend numerous meetings with other staff, departments, and federal agencies. (*Id*.) She was also the lead on various legal projects, including motions to intervene, a water rights program, and coordinating with the CTUIR legal department. (*Id.*) Tellingly, Quaempts did not task Dr. Lopez with reviewing the FFPP budget as he had already completed the task before her arrival. (5 CT 1214-20, 1297.)

After the successful completion of her probationary period, Dr. Lopez had a review meeting with Quaempts in late January and/or February of 2014. (5 CT 1219.) At no point did Quaempts inform Dr. Lopez about FFPP budget deficiencies or that he had no intention of moving cost centers (monies) back into the FFPP. (5 CT 1214-20, 1297.)

By May 2014, while conducting performance evaluations, Dr. Lopez began noticing anomalies in the CTUIR's coding of employee salaries against specific cost centers. (5 CT 1220, 1410.) Thus, between May 1, 2014, and June 11, 2014, Dr. Lopez began to research the current and historic FFPP budgets. (5 CT 1220, 1408-10.) She learned that, contrary to their advertising, Quaempts and Tovey had been systematically de-populating the FFPP of staff and de-funding the cost centers for years; in actuality, the FFPP was left with only one full-time staff member and another who effectively worked for another DNR program (Fisheries), although this staff member was paid 100% from the FFPP cost centers. (5 CT 1220-21, 1406-10.) The FFFP effectively had only 1-1.5 staff rather than the 3-5 staff advertised in the position description. (4 CT 1040-41; 5 CT 1217-20.)

During her research, Dr. Lopez also discovered the FFPP budget to be only $347,380.00 (about half of what was advertised). (5 CT 1220-21,

1404-12; 4 CT 1040-41.) The reduced staffing and budget meant there were not nearly enough resources to effectively operate the FFPP, including without increasing Dr. Lopez's own workload. (*Id.*)

Prior to her hiring, Dr. Lopez reasonably assumed she would be able to fill any "vacancies" in the FFPP staff. (5 CT 1404.) Quaempts did not inform her until May of 2014 that her ability to increase staffing (to the advertised levels) was "unlikely" without "grant solicitation, proposal development and successful award." (5 CT 1407-08.) Soliciting grants, developing proposals and fundraising were not among Dr. Lopez's job duties per representations in the advertised position description. (5 CT 1207, 1235-40, 1406-07.) When Dr. Lopez raised these concerns with Quaempts by email in May, June and July of 2014, he informed her that there were neither staff nor budget available to bring the FFPP's resources up to the advertised levels, but encouraged her to work towards increasing the FFPP's funding in future years to attain the level indicated in the job posting. (5 CT 1220-21,1404-12; 4 CT 1041.) As Dr. Lopez explained, she did not apply to a job where she "would be managing a program that was half the size that was advertised or that [she] would have to fundraise to bring the program back to historic levels." (5 CT 1407.) She raised additional concerns to Quaempts at the time, including that she had never been provided with the benefits she had been promised, and that CTUIR's hiring preferences prevented her from advancing. (5 CT 1406-07.)

Between July and December 2014, Dr. Lopez attempted to work with the defendants to rectify the situation. (5 CT 1220-21, at ¶ 42.) Dr. Lopez attempted to negotiate with Quaempts' and his supervisor, Tovey, to obtain the promised funding and staffing, however, they were unwilling to do so. (*Id.*) Dr. Lopez then attempted to negotiate with the CTUIR legal department, again to no avail. Of note is that the CTUIR did admit the FFPP had a budget of only $347,380. (5 CT 1221, 1422.)

III. Dr. Lopez resorts to litigation.

Dr. Lopez initiated the instant lawsuit on January 13, 2017, naming three defendants: Quaempts as "an individual" and Tovey as "an individual," as well as the CTUIR. (1 CT 1.) Quaempts and Tovey were also employees of the CTUIR. (1 CT 1-2, at ¶¶ 1, 4, 12; 4 CT 1035–36, 1038.) As described above, Dr. Lopez was not a member of the CTUIR.

Defendants responded by moving to quash service of the summons and dismiss the complaint on grounds of tribal immunity. (1 CT 14.)[2] On April 26, 2017, the court below denied Defendants' motion, and allowed Dr. Lopez to amend her complaint and proceed with limited discovery regarding Defendants' ratification of the alleged wrongful acts. (2 CT 430.)

On October 2, 2017, Dr. Lopez filed the operative complaint, the First Amended Complaint ("FAC"). (4 CT 1035-46.) The FAC asserted four causes of action related to the same Defendants' false and deceptive advertising about the job position, including fraud, negligent misrepresentation, and violations of Labor Code section 970 and the Unfair Competition Law codified at Business & Professions Code section 17200 *et seq*. ("UCL").

As in the original complaint, the FAC identified both Quaempts and Tovey as individuals who were, although employed by the CTUIR, specifically acting beyond the scope of their authority. (4 CT 1035, at ¶12; 1038.) Dr. Lopez made supportable allegations of false and deceptive representations by Quaempts and Tovey to induce employment as *personal*

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[2] Because sovereign immunity is a jurisdictional issue, California courts have authorized Indian tribes and their officials to specially appear and invoke their immunity from suit by using a "hybrid motion to quash/dismiss." (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1144 fn. 1; *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1418.)

liability claims to her which occurred *prior to any contractual relationship* with the CTUIR. (1 CT 5-8, at ¶¶ 23, 27, 31, 36–38; 4 CT 1040-42, 1045.)

Although the allegations asserted included those of tribal employees acting outside the scope of their authority and sued as individuals, the CTUIR *ratified their employees' acts* after this litigation ensued and while sovereign immunity was at issue. (4 CT 1041, at ¶34; RT 32-57.) Quaempts, through his attorney, admitted to the following facts before the court below:

- "[T]here was an advertisement," (RT 52:23-24;)
- "It was disseminated," (RT 52:26-27;)
- "We recruited… Ms. Lopez," (RT 53:12-13;)
- That "preemployment, that's what we mean by recruitment," (RT 44:23-24;)
- "[The Confederated Tribes] ratif[ied] the recruitment of her…," (RT 44:26-27;) and
- That the Confederated Tribes "has ratified—the acts alleged…," (RT 51:7-8.)

The alleged ratified acts of false misrepresentations were contained in the actual advertisement, but also as oral representations. (4 CT 1035–36 at ¶¶ 1-3, 1040 at ¶ 25, 1041 at ¶ 31, 1042–43, ¶ 40.) Although all defendants admitted to the above acts and that these acts were ratified by the CTUIR, the defendants did not admit or agree to characterizing these acts as fraudulent, deceptive or tortious. (RT 51:9-10.)

IV. The trial court dismissed Dr. Lopez's complaint on grounds of tribal sovereign immunity and failure to exhaust tribal remedies.

On November 1, 2017, Defendants moved again to quash and dismiss the FAC under California's Code of Civil Procedure § 418.10 and other authorities. (4 CT 1050-51, 1056-75.) Asserting tribal sovereign

immunity and a failure to exhaust tribal remedies, Defendants argued the court did not have subject matter jurisdiction. (4 CT 1056-1075.) Plaintiff filed her opposition arguing the individual defendants were not immune from suit for their intentional conduct, the CTUIR was not immune due to ratification of this conduct, and the inapplicability of the FTCA, TCC and TPPM. (4 CT 1186-1200; 5 CT 1201-1204.)

In its decision on the motion, the court below suggested that the allegedly illegal pre-employment conduct of Quaempts and Tovey was within the sphere of a "contract," thus allowing for tribal immunity for employees or members to avoid individual liability. (6 CT 1506-1587.) Citing *Kiowa Tribe v. Mfg. Techs.* (1998) 523 U.S. 751, the court stated that "'Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.'" (*Id.* at 760; 6 CT 1514-1515.) The court then opined that "if negotiations leading to a contract were not immune, the exception would emasculate the immunity." (6 CT 1514-1515.)

The court thus concluded that Dr. Lopez did not meet her burden "of presenting authorities and evidence to persuade the court that Quaempts and Tovey engaged in the sort of conduct 'outside the scope' of their official duties or supervisory duties such that the tribe's immunity would not extend to them." (6 CT 1519-22.) Using similar logic, the trial court also found that the FTCA applied to claims against tribes and "tribal employee[s] acting within the scope of an Indian Self-Determination Act contract," thus barring this lawsuit. (6 CT 1522-23.)

The court also dismissed Dr. Lopez's arguments regarding the effects of the CTUIR's ratification of Quaemptss and Tovey's wrongful acts. (6 CT 1517-22.) The court concluded this ratification would have no

bearing on the application of tribal immunity as to the CTUIR, but would immunize the individual defendants. (*Id.*)

Finally, after mis-construing all of Dr. Lopez's allegations as regarding post-employment conduct only, the court below concluded Dr. Lopez failed to exhaust her tribal remedies. (6 CT 1523-24.) In the court's view, as a CTUIR employee, Dr. Lopez would be subject to the CTUIR's Tribal Personnel Policies Manual ("TPPM") and Tort Claims Code ("TCC"). (*Id.*) The court found that Dr. Lopez could not separate pre-employment allegations from her position as an employee of the CTUIR and, thus, was subject to the TPPM and/or the TCC. (*Id.*)

For those reasons, the court below granted the CTUIR's motion to quash in its entirety. (6 CT 1506-1587.)

Dr. Lopez's timely appeal followed.

STATEMENT OF APPEALABILITY

This appeal is from the order and final judgment of the Superior Court of California, County of Sacramento, authorized by Code of Civil Procedure section 904.1, subdivision (a)(3).

STANDARD OF REVIEW

"Generally, in entertaining a motion to dismiss, the [trial] court must accept the allegations of the complaint as true, and construe all inferences in the plaintiff's favor." (*Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1418 (*Morongo Band*) [internal quotations omitted].) However, "[w]here the motion to dismiss is based on a claim of ... sovereign immunity… the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial." (*Id*. [quotations omitted].) The plaintiff facing a jurisdictional challenge bears the burden of proving the

existence of jurisdiction by competent evidence. (*Id*., citing *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232-33; see also *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 7, fn. 8.)

Here, because there is an "absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has subject matter jurisdiction over an action against an Indian tribe is a question of law subject to [] de novo review." (*Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1203*, quoting Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364.)

ARGUMENT

Although the principle that tribes have the power "to make their own substantive law in internal matters ... and to enforce that law in their own forums" is relatively clear and accepted, (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55–56,) their tribal sovereign immunity becomes murkier when tribes interact with those who are not members of the tribes. (See *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 332 ["[a] tribe's power to prescribe the conduct of tribal members has never been doubted"].)

In this case, the trial court went too far in preventing Dr. Lopez – a non-member residing outside of tribal lands – from pursuing her claims on the merits. At a minimum, the U.S. Supreme Court has made clear that Dr. Lopez can proceed against Quaempts and Tovey in their individual capacities, regardless of any sovereign immunity the tribe may be able to assert. The CTUIR's ratification of these employees' misdeeds does not undo her individual claims against them, and if anything, such express ratification illustrates an alternative way that the tribe has waived its own claims of sovereign immunity.

No other procedural bars prevent Dr. Lopez from seeking relief. The involvement of the federal government is too minimal here to invoke the FTCA. Additionally, the doctrine of claims exhaustion is not relevant here because there was no procedure to exhaust: the CTUIR's tribal courts lack jurisdiction over California claims and intentional torts. The CTUIR's TPPM and TCC also do not address California claims and intentional torts.

I. Neither Quaempts nor Tovey can assert sovereign immunity because they were sued in their individual capacities.

Dr. Lopez named Quaempts and Tovey individually as defendants and sought money judgments against them personally. As these defendants were sued in their individual capacity, they cannot hide behind the cloak of sovereign immunity.

A. Consistent with *Lewis v. Clarke*, Dr. Lopez sued Quaempts and Tovey in their individual capacities.

The main question here is not even a close one, as the U.S. Supreme Court has already squarely decided that individuals sued personally cannot invoke tribal sovereign immunity. (See *Lewis*, 137 S. Ct. 1285.) Although defendants sued in their official capacity may assert sovereign immunity, it "'does not erect a barrier against suits to impose individual and personal liability.'" (*Id.*, quoting *Hafer v. Melo* (1991) 502 U.S. 21, 30–31.) Hence,

> [t]he distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official. Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a

> government officer for actions taken under color of state law. Officers sued in their personal capacity come to court as individuals, and the real party in interest is the individual, not the sovereign.

(*Id*. at 1292 [emphasis in original].) In other words, the distinguishing characteristic of an individual capacity suit is individual liability. (See *id.* at 1291 ["The identity of the real party in interest dictates what immunities are available."]; see also *Ky. v. Graham* (1985) 473 U.S. 159, 165 ["Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law."]; *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation* (Utah 2017) 416 P.3d 401, 414; *JW Gaming Dev., LLC v. James* (N.D. Cal. Oct. 5, 2018) No. 3:18-cv-02669-WHO, 2018 U.S. Dist. LEXIS 172773, at *9 [sovereign immunity unavailable when Plaintiff was "suing the tribal employees in their individual capacities for their own fraudulent conduct."].) Thus, the tortfeasor in *Lewis*, against whom a personal money judgment was sought, could not invoke sovereign immunity. (*Id*. at 1292-93.)

Lewis bars Quaempts and Tovey, who were both sued in their individual capacities, from asserting sovereign immunity.[3] Dr. Lopez expressly sought personal money judgments against Quaempts and Tovey. (4 CT 1045.) The fact that defendants have assets at stake, and are thus "com[ing] to court as individuals" shows they are sued in their individual capacities. (*Cf*. *Edelman v. Jordan* (1974) 415 U.S. 651, 665 ["the funds to satisfy the award in this case inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the

[3] That does not mean Quaempts and Tovey are without defenses. As the Supreme Court observed, "[a]n officer in an individual-capacity action…may be able to assert *personal* immunity defenses …." (*Lewis,* 137 S.Ct. at 1291 (original emphasis).)

monetary award against the State itself'.]; see also *Pistor v. Garcia* (9th Cir. 2015) 791 F.3d 1104, 1113 ["So long as any remedy will operate against the officers individually, and not against the sovereign, there is 'no reason to give tribal officers broader sovereign immunity protections than state or federal officers"]; *Brown*, 17 Cal.App.5th at 1205.) Here, the caption of the complaint drives the point home even further by naming them as individuals. (4 CT 1035.)

Were there still any ambiguity about whether these defendants were sued in their individual capacities, it should be resolved in allowing Dr. Lopez's complaint to move forward, as California's notice pleading rules dictate that complaints be liberally construed. (Code Civ. Proc., § 452 ["In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."].)[4]

The court below was skeptical about the applicability of *Lewis*, seemingly trying to distinguish it based on its facts. For example, the court declined to characterize Dr. Lopez as a tort victim because she "chose to deal with a tribe." (5 CT 1480.) As the court below explained, "[t]his is not a case where Plaintiff sustained personal injuries while driving her car after suffering a collision with someone who just so happened to be a tribal official."[5] (*Id*.)

However, the crux of the complaint here consisted of acts occurring off-reservation and before Dr. Lopez began any employment relationship

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[4] Even federal courts, with their more demanding pleading standards, will "presume[ ] that officials necessarily are sued in their personal capacities where those officials are named in a complaint, even if the complaint does not explicitly mention the capacity in which they are sued." (*Romano v. Bible* (9th Cir. 1999) 169 F.3d 1182, 1186.)

[5] The court below appears to be referencing the underlying facts of *Lewis.*

with the CTUIR. This includes the pre-employment conduct of deception and fraud in California to induce Dr. Lopez into an employment relationship through the off-reservation dissemination of false advertisements, false position description and other pre-employment misrepresentations, all occurring outside Quaempts and Tovey's scope of employment. (4 CT 1037, 1039, 1041.) As the allegations assert, but for their false and deceptive representations to induce Dr. Lopez as an employee, she would not have accepted the offer of a position at the CTUIR and would not have moved from Sacramento to Pendleton, Oregon. (4 CT 1042, 1043.) In as much as Dr. Lopez may have "voluntarily" engaged in exploring CTUIR employment with Quaempts, and later accepting employment, the acceptance was induced by Quaempts and Tovey's pre-employment off-reservation published false representations. (See *James*, *supra*, 2018 U.S. Dist. LEXIS 172773, at *9.) While Dr. Lopez may have "voluntarily" sought the position as they represented, she did not know of their deceit. Much like the plaintiff in Lewis, she was a non-member residing off-reservation when these pre-employment, deceitful acts in the "recruitment" process occurred. Thus, as in Lewis, these tortious acts indicate individual liability.

B. The trial court erred in interpreting the claims against Quaempts and Tovey as official-capacity claims.

The court below foreclosed the possibility of Dr. Lopez's complaint stating individual capacity claims for two faulty reasons.

First and most directly, it erroneously determined that Dr. Lopez sued Quaempts and Tovey solely in their official capacity. (5 CT 1486.) In the court's view, "[a]lthough the caption…names Quaempts and Tovey each as 'an individual' …in substance the factual allegations in the [first-amended complaint] all pertain to Quaempts' and Tovey's' conduct in

recruiting, hiring, and supervising Plaintiff…." (*Id.*) The court also concluded that Quaempts and Tovey had not "engaged in the sort of conduct 'outside the scope' of their official supervisory duties," therefore the trial court concluded that the tribe's immunity extended to these individuals. (5 CT 1487.)

This line of reasoning was apparently derived from *Trudgeon v. Fantasy Springs Casino,* (See 5 CT 1484-85, citing *Trudgeon* (1999) 71 Cal.App.4th 632, abrogated by *People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222.) According to the standard applied by *Trudgeon*, "an agent of an immune sovereign may be held liable for an act *which exceeds his or her authority."* (*Id.* at 644 [emphasis added].) The *Trudgeon* Court explained that while "the commission of a tort is not per se an act in excess of authority…if 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 ….' " (*Id.*) In other words, under the *Trudgeon* analysis, "[w]here the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies." (*Id.*, citing *Imperial Granite Co. v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269, 1271.)

The court's analysis overlooked the crucial distinction between official capacity and individual capacity suits. Dr. Lopez clearly seeks personal liability against Quaempts and Tovey. The mere fact their tortious acts may have been within the course and scope of their employment with the CTUIR does not change the analysis. The defendant in *Lewis* was sued for tortious acts committed within the course and scope of his employment, but was unable to assert sovereign immunity because he was nonetheless brought to court as an individual. (*Lewis*, 137 S.Ct. at 1293-94.) Perhaps more on point, the defendants in *James* were brought to court as individuals for their own fraudulent acts while working for the

tribe – much like the defendants here. (See *James*, *supra*, 2018 U.S. Dist. LEXIS 172773, at *9.)

There is simply no evidence on the record that a money judgment against these two individuals would be enforceable against the tribe itself. On the contrary, the only support the court below adopted for concluding that a judgment against Quaempts and Tovey would run against the CTUIR was that they were all named as defendants. (5 CT 1487 ["the judgment would operate against the tribe because the tribe is a named Defendant, and also given Plaintiff's theory of liability based on the tribe's ratification' of misconduct by Quaempts and Tovey"].) The asserted liability against the CTUIR, however, does not in any way diminish the exposure faced by the two individual defendants. The ability to bring defendants Quaempts and Tovey into court as individuals is consistent with the general principal that:

> An agent or employee is always liable for his own torts, whether his employer is liable or not. In other words, when the agent commits a tort, such as fraud, then the agent is subject to liability in a civil suit for such wrongful conduct. If a tortious act has been committed by an agent acting under authority of his principal, the fact that the principal thus becomes liable does not, of course, exonerate the agent from liability. The fact that the tortious act arises during the performance of a duty created by contract does not negate the agent's liability.

(*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 68-69.) Here, Quaempts and Tovey are liable for their own torts, as defendants always have been, entirely regardless of whether their employer, the CTUIR, can shield itself from liability.

Moreover, it is doubtful the delineation drawn by *Trudgeon*, and applied by the trial court, fully survives *Lewis*. Post-*Lewis*, the question is not whether the agent was acting outside the scope of its authority/employment, as described by the *Trudgeon* Court, but whether the agent is held individually liable. As a result, even officials acting within the scope of their employment may not be able to invoke sovereign immunity. (*Lewis*, 137 S.Ct. at 1293-94.) Because decisions of the U.S. Supreme Court are binding on matters of federal law, (*Karuk Tribe of N. Cal. V. Cal. Reg'l Water Quality Control Bd., N. Coast Region* (2010) 183 Cal.App.4th 330, 352,), and "tribal immunity is a matter of federal law," (*Kiowa Tribe*, 523 U.S. at 759,) the line articulated by *Trudgeon* appears to be redrawn by the U.S. Supreme Court. As described above, Dr. Lopez's complaint meets the test under *Lewis*.

Even assuming *arguendo* the *Trudgeon* distinction is still relevant, Dr. Lopez meets that standard too, as she alleges conduct by Quaempts and Tovey exceeding the scope of their authority. A fair reading of the FAC shows Dr. Lopez alleged a viable claim that these individual tribal employees acted outside their scope of employment authority. Specifically, Quaempts and Tovey violated the CTUIR's own TPPM by engaging in unlawful conduct – here false advertising - in the performance of their job duties and "may be held personally and legally liable for such loss or damages." (5 CT 1346, at § 2.16A and B.)

Further, at this stage of the proceedings, the only question is whether the employee or official is sued in his or her individual capacity. *Trudgeon* does not apply to the circumstances of this case. The court does not have the authority to convert the allegations by the master of the complaint from "individual" to "official."

Second, the court below refused to interpret the complaint as asserting individual claims against Quaempt and Tovey because of a

perceived inconsistency in Dr. Lopez's arguments regarding ratification. As described below, any ratification in this case cannot exonerate the individual defendants in their misdeeds. (See *infra*, at 29-31.)

C. Justice requires tribal sovereign immunity to be applied cautiously and narrowly.

Finally, allowing Dr. Lopez to pursue her remedies against Quaempts and Tovey promotes justice while doing little harm to the goals of sovereign immunity.

Tribal sovereign immunity is a judicially created doctrine that "developed almost by accident." (*Kiowa Tribe*, 523 U.S. at 756.) Once developed, the doctrine took on the same aim of other forms of immunity – to prevent "unanticipated intervention in the processes of government." (*Great N. Life Ins. Co. v. Read* (1944) 322 U.S. 47, 53.) But that protection can come at a price that is often "unjust" for plaintiffs who need to be made whole. (*Kiowa Tribe*, 523 U.S. at 764-66 [Stevens, J., dissenting].) "This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity." (*Id.*) Thus, while courts are reluctant to interfere with governance, they are equally or perhaps even more reluctant to expand the doctrine of sovereign immunity beyond its original purpose. (See e.g., *Ford Motor Co. v. Dep't of Treasury* (1945) 323 U.S. 459, 462 [sovereign immunity "does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally"]; *Elliott v. Superior Court of Solano Cty.* (1960) 180 Cal.App.2d 894, 897 ["[a]t least… in the absence of fraud," courts do not interfere with officials in their discretionary acts].) More recently, a growing number of justices on the Supreme Court have openly called for the doctrine to be scaled back significantly, or even abolished altogether. (See *Michigan v. Bay Mills Indian Cmty*. (2014) 572 U.S. 782, 814-17 (Thomas, J., dissenting, joined by Scalia, J., Ginsburg, J., Alito, J.).)

Courts should therefore apply sovereign immunity narrowly and cautiously. The trial court's broad application of sovereign immunity in this context takes the doctrine well beyond its original purpose, depriving Dr. Lopez her day in court, and awarding a windfall to Quaempts and Tovey for their fraudulent acts.

In summary, Dr. Lopez sought to, and did, sue Quaempts and Tovey in their individual capacities under the notice pleading principles of law argued above. Under *Lewis*, they therefore cannot hide behind sovereign immunity.

II. The CTUIR's ratification of the tortious acts does not extend sovereign tribal immunity to the individuals; if anything, it destroys the tribe's own immunity.

After the commencement of Dr. Lopez's lawsuit, and in an apparent attempt to immunize Quaempts and Tovey, the CTUIR expressly and *voluntarily* ratified its employees' actions in an effort to cover them under the umbrella of tribal sovereign immunity. (4 CT 1041 at ¶ 34; RT 51:5-10.) The court below erred in two ways in deciding the legal ramifications of the CTUIR's express ratification. First, the court found that the ratification immunized the individual defendants. Second, the court found that the ratification did not waive the CTUIR's immunity. Both findings are erroneous and compel reversal.

A. The CTUIR's ratification of the individual defendants' acts does not immunize all defendants from liability

The court below took particular issue with the CTUIR's ratification of the employees' acts:

> Plaintiff has argued and alleged that [the Confederated Tribes] *ratified* the alleged conduct of Quaempts and Tovey, including the allegedly false advertising regarding the

> position. As such, having alleged tribal ratification of such conduct, Plaintiff cannot simultaneously argue that Quaempts and Tovey were acting *outside* the scope of their official duties when making such alleged representations.

(5 CT 1486.) This reasoning is erroneous, as a plaintiff is allowed to plead alternative, or even inconsistent theories. (See *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29.) Thus, the mere fact that Dr. Lopez asserted a different theory of liability against a different defendant cannot be used as a basis for rejecting her theory of liability against the two individual defendants.

First, if the acts alleged are those *outside* the scope of their tribal authority, the CTUIR's ratification of these employees' acts does not change Dr. Lopez's characterization of the allegations. Dr. Lopez is the master of her complaint. (*Petersen v. Bank of Am. Corp.* (2014) 232 Cal.App.4th 238, 259 ["plaintiffs in any civil litigation… are deemed to be the masters of their complaint"], citing *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1202.)

Second, a tribe's giving of formal consent (which defines ratification[6]) to the alleged illegal "acts," does little because the acts themselves remain illegal. For instance, if a tribal employee acts in a manner that results in stealing from a person or taking the life of another,

[6] "Ratification ... may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another, who at the time assumed to act as his agent in doing the act or making the contract without authority to do so." (*Apache Tribe of Oklahoma v. Graves* (Okla. Civ. App. Div. 2, 2012) 280 P.3d 978, 981, citations omitted.)

giving formal consent to the employee's actions does not change the nature of the acts as the acts are still illegal and tortious.

In *Lewis,* the tribe lost in arguing that its indemnification policies over a tribal officer or employee were sufficient to extend tribal sovereignty immunity as a defense against an employee sued in his individual capacity. (*Lewis,* 137 S.Ct. at 1289, 1292.) The Supreme Court resolved the legal question by identifying the "critical inquiry [as] who may be legally bound by the court's judgment, not who will ultimately pick up the tab." (*Id.*) In other words, "[a tribe's] indemnification provision does not somehow convert the suit against [the employee] into a suit against the sovereign." (*Id.* at 1293.)

And, as the tribe in *Lewis* had *voluntarily* instituted indemnification policies, exercising the sovereign's ability to make its own decisions about "the allocation of scarce resources," the CTUIR's express and *voluntary* ratification of the alleged pre-employment acts of Quaempts and Tovey does not implicate sovereign immunity as a defense in an individual capacity tort action. (*Id.* at 1293.) It cannot alter "the real-party-in-interest analysis for purposes of sovereign immunity." (*Id.*)

B. By expressly ratifying the conduct of the individual defendants, the CTUIR waived its sovereign immunity and accepted the individual employees' exposure to liability.

Even beyond the U.S. Supreme Court's decision in *Lewis,* when the CTUIR voluntarily and expressly ratified the alleged illegal misconduct of these individual tribal employees acting outside the scope of their employment authority, the CTUIR also expressly waived its sovereign immunity defense.

"Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the

act as if originally authorized by him. (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 72-73.) In *Rakestaw,* an agent's forgery on a promissory note and a deed of trust to obtain funds for a business venture, ratified by a principal, relieved the wrongdoer agent of liability to the principal. As the Court explained:

> A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' ….It is essential, however, that the act of adoption be truly voluntary in character."

(*Id.*, citations omitted.) Despite contrary language in the CTUIR's employment manual that "the Tribe does not authorize any Tribal employee to engage in unlawful conduct in the performance of their job duties…[and] is negligent or engages in unlawful acts…the employees may be held personally and legally liable for such loss or damages," the tribe here has *accepted* the individual liability of the asserted allegations and damages of acts *outside the scope of their employment.* (5 CT 1346, at § 2.16A and B.) "The ratification of an act …by one held out to be a principal creates an agency relationship between such person and the purported agent and relieves the agent of civil liability to the principal which otherwise would result from the fact that he acted independently and without authority. (*Rakestraw*, 8 Cal.3d at 73.)

Moreover, it is well-established that "ratification of part of an indivisible transaction is a ratification of the whole." (Civ. Code, § 2311; accord, *Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698, 704 ["a principal is not allowed to ratify the unauthorized acts of an agent to the extent that they are beneficial, and disavow them to the extent that they are

damaging"]; *Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1656 [purchaser could not ratify unauthorized purchase agreement without ratifying agreement to pay broker 10 percent commission].) And, the principal is liable for the wrongful conduct of the agent if the principal ratifies its agent's conduct "after the fact by ... voluntar[ily] elect[ing] to adopt the [agent's] conduct ... as its own." (*Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 969, quoting *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 810; *Rakestraw,* 8 Cal.3d at 73.)

It is undisputed that *after* Dr. Lopez commenced her lawsuit and while sovereign immunity was at issue, the CTUIR voluntarily elected, by express ratification, to adopt the alleged fraudulent and illegal pre-employment actions of Quaempts and Tovey, who acted outside the scope of their employment authority and were sued in their individual capacity. Thus, under the principles of agency and ratification, the CTUIR accepted the unauthorized conduct as its own and thereby necessarily accepted the accompanying liability attached to Quaempts and Tovey.

In summary, under the circumstances of this case, the CTUIR expressly waived its tribal immunity, and stands in for Quaempts and Tovey as sued in their individual capacity, and would be liable for all damages as alleged against Quaempts and Tovey.

III. There are no federal employees here to implicate the Federal Tort Claims Act.

This case does not involve any federal employees or the federal government. The court below thus clearly erred by finding the Federal Tort Claims Act ("FCTA") to be Dr. Lopez's "exclusive remedy." (5 CT 1487.)

The FCTA governs tribal employees who engage in activities in furtherance of federal contracts, and are thus deemed federal employees and

covered by the Act. (25 U.S.C. § 450f(c).) Hence, it would be those actions that may only be brought against the United States; for individuals with tort claims against a tribal contractor. (*Robinson v. U.S.* (E.D. Cal. Jan. 27, 2011) 2:04 CV 0073 4RRB0DAD, 2011 WL 302784, at *4 ["[U]nless the United States actually supervised and controlled the day-to-day operations of the construction project, the Tribe was an independent contractor, not an employee. Thus, the actions of the Tribe cannot be attributed to the United States for the purpose of imposing liability under the FTCA."]; see also *Sears v. Gila River Indian Community* (D. Ariz. Sept. 25, 2013) CV-12-02203-PHX-ROS, 2013 WL 5352990.)

None of the allegations asserted in the FAC suggest a *federal* contractual relationship or oversight of the United States government over the actions of Quaempts or Tovey. Therefore, there is no implication of jurisdictional limitations on the court below due to the FTCA.

IV. Tribal law provides no other procedural bar to Dr. Lopez's action.

The lower court's order addressed claims exhaustion under the Tribe's Personnel Manual (TPPM) and the Tribe's Tort Claims Code (TCC). The court stated the "Plaintiff has not shown that the TPPM and the TCC do not apply to her....Plaintiff has not met her burden of proving claims exhaustion." To the contrary, in this case there is no requirement of claim exhaustion because the claims here involve intentional torts recognized under California statute or common law which are not recognized by the tribal courts. The TPPM and the TCC do not incorporate California state law; they only apply tribal law. And, tribal courts are not courts of general jurisdiction like state courts. As the U.S. Supreme Court has stated:

> [The] contention that tribal courts are courts of "general jurisdiction" is also quite wrong. A state court's jurisdiction is general, in that it

> "lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.

(*Nevada v. Hicks* (2001) 533 U.S. 353, 367.) Thus, the lower court's decision would send Dr. Lopez to tribal court to pursue state intentional tort claims under California statutory and case law, where the tribal court has no authority under the TPPM or TCC to apply California statutory and common law regarding intentional torts.

Although the CTUIR tribal court has authority to adjudicate claims which fall specifically under the TPPM and TCC, the CTUIR does not have authority to adjudicate Dr. Lopez's tort claims under California statutes and common law. As stated in its own code:

> The Confederated Tribes may be sued in the Umatilla Tribal Court only when authorized by either (1) applicable federal law, or (2) statute, ordinance or resolution approved by the Board of Trustees.

(4 CT 1142, at § 1.03.A [Statutes of the Conf. Tribes].) There is nothing in the tribal statutes to suggest state law has been incorporated by the Board of Trustees to provide tribal court jurisdiction to hear Dr. Lopez's claims.

Further, even under that limited set of laws applying in CTUIR tribal court, relief there is only available for acts committed by "officers, employees and agents acting within the scope of their employment." (4 CT 1143, at § 1.07.A.) The tribal statutes also notably limit the types of torts that can be prosecuted in tribal court to an error or omission of a legal duty. (*Id.* [defining "tort" as "an error or omission constituting a breach of a legal duty that is imposed by law, other than a duty arising from contract"].)

Because Dr. Lopez's claims are also intentional torts, the claims asserted do not even meet the tribal statutory definition of "tort."

Further and at a minimum, claims exhaustion under the TPPM and TCC does not apply to the individual defendants sued individually. Specifically, these individual defendants are being sued for their personal actions prior to Dr. Lopez's employment and for those actions outside of the scope of their employment authority. As the TPPM and TCC do not even apply to Dr. Lopez prior to her employment with the CTUIR, the defense of claims exhaustion cannot apply to claims against the individual defendants for this additional reason.

V. Alternatively, Dr. Lopez should be allowed to amend her complaint.

Alternatively, the Court should show leniency and grant Dr. Lopez the ability to amend her complaint to conform to the U.S. Supreme Court's post-complaint 2017 decision in *Lewis v. Clarke.* (See e.g., *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1055 ["plaintiffs could amend the complaint to assert that theory [of a tribal official's scope of authority] in any event"]; see also Code Civ. Proc. § 472c(a) [on demurrer without leave to amend, leave to amend is always open on appeal].)

In *Lewis*, the U.S. Supreme Court stated that tribal employees could be sued in their individual capacity without tribal sovereign immunity applying:

> We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. 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*, 137 S.Ct. at 1288.) After remand, Dr. Lopez in her new complaint would focus the allegations of the complaint exclusively on the two defendants being sued individually—falling comfortably within the parameters of *Lewis v. Clarke.* In this way, the Court provides appropriate latitude to Dr. Lopez who benefits from the jurisdictional decision of the U.S. Supreme Court in *Lewis v. Clarke* which was decided while her case was pending.

CONCLUSION

The lower court's decision granting Quaempts's and Tovey's motion to quash-dismiss is in error. It retains jurisdiction to hear the tort claims asserted against Quaempts and Tovey, sued in their individual-capacities. Moreover, the express and voluntary ratification by the CTUIR does not offer either Quaempts, Tovey, or the tribe itself immunity. Here, the CTUIR's ratification of the alleged illegal acts of Quaempts and Tovey expressly waives tribal sovereign immunity as a defense and, is thus, liable for the individual acts of Quaempts and Tovey. No other procedural bar to suit exists.

Dr. Lopez respectfully requests that this Appellate Court reverse the decision of the Court below and allow for further proceedings consistent with the disposition of the issues now before this Appellate Court.

Dated: August 15, 2019 Respectfully submitted,

ERIKA HEATH, ATTORNEY AT LAW

By: */s/ Erika Heath*
Erika A. Heath
Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, Plaintiff-Appellant hereby certifies that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more, and the word count for the portions subject to the restrictions of Rule 8.204(c)(3) is 8,984.

Dated: August 15, 2019 ERIKA HEATH, ATTORNEY AT LAW

By: */s/ Erika Heath*
Erika A. Heath
Attorney for Plaintiff-Appellant

PROOF OF SERVICE

CASE NAME: *Lopez v. Quaempts, et al.*

COURT INFORMATION: Cal. Court of Appeal, 3rd Dist.
Case No. C087445

I, the undersigned, hereby certify that I am a citizen of the United States, over the age of eighteen years, and am not a party to the within action. I am employed in the City and County of San Francisco, California, and my business address is 369 Pine Street, Suite 410, California, 94104. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. On the date listed below, following ordinary business practice, I served the following document(s):

- **APPELLANT'S OPENING BRIEF**

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/s/ Erika Heath
Erika A. Heath

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Date

/s/Erika Heath

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