IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FOURTH APPELLATE DISTRICT, DIVISION TWO

CALIFORNIA CAPITALISM ASSOCIATES, LLC AND RAVI BENDAPUDI, Plaintiffs, Appellants, and Cross-Respondents, v. LESTER J. MARSTON, DAVID J. RAPPORT, KOSTAN R. LATHOURIS, AND RAPPORT & MARSTON Defendants, Respondents, and Cross-Appellants.	Case No. E078759

COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF

San Bernardino Superior Court Case No. CIV-SB 2121814

Hon. Judge Donald Alvarez

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CERTIFICATE OF INTERESTED PARTIES

Specially-appearing defendants, respondents, and cross appellants hereby certify that they know of no interested parties within the meaning of California Rule of Court 8.208.

Dated: December 5, 2022 LAW OFFICE OF FRANK LAWRENCE

By: /s/ Frank Lawrence
Frank Lawrence, Esq.
Attorney for Specially-Appearing Defendants, Respondents, and Cross-Appellants

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I. INTRODUCTION

A. Introduction

This case arises out of plaintiffs' numerous material breaches of a Joint Venture Agreement ("JVA") they executed with the Chemehuevi Indian Tribe ("Tribe"), a federally-recognized Indian tribe.[1] The JVA was intended to create a framework for the development and operation of a cannabis facility on the Tribe's federal Indian Reservation. *See* Declaration of Tribal Chairman Charles Wood in Support of Specially-Appearing Defendants' Motion to Quash and Dismiss at ¶¶ 4-9, 12-16 (Volume 1 of Appellants' Appendix at pp. 173-175);[2] Marston Dec. ISO Venue ¶¶ 8-9 & Ex. B (1 AA 71).

After plaintiffs repeatedly breached the JVA, the Tribe directed its official Tribal Attorney, specially-appearing defendant Lester Marston, to prepare and serve a Notice of Violation on plaintiffs, identifying with specificity plaintiffs' 28 breaches along with the steps required to cure. *See* Wood Dec. ISO Dismissal ¶ 18 (1 AA 176); Declaration of Tribal Secretary-Treasurer Amanda Sansoucie ISO Dismissal ¶¶ 14-15 & Ex. J (2 AA 199, 374-98); Marston Dec. ISO Venue ¶ 8 (1 AA 71).

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[1] *See* 87 Federal Register 4636, 4637 (Jan. 28, 2022) (list of federally recognized tribes).

[2] Hereinafter citations to declarations and Appellants' Appendix are in the form "Wood Dec. ISO Dismissal ¶¶ 12-16 (1 AA 175)."

After the time to cure expired, the Tribe determined that plaintiffs had failed to cure the majority of the 28 material breaches identified in the Notice of Violation, and directed Tribal Attorney Marston to prepare and serve plaintiffs with a Notice of Termination of the JVA. *See* Wood Dec. ISO Dismissal ¶ 18 (1 AA 176); Sansoucie Dec. ISO Dismissal ¶¶ 15-16 & Ex. L (2 AA 199, 400); Marston Dec. ISO Venue ¶ 9 & Ex. C (1 AA 71, 103, 105, 107-111, 113-114, 116, 122). In carrying out the Tribe's directions and instructions, Tribal Attorney Marston wrote to plaintiffs' then-counsel that, among other things, the JVA was no longer in effect and the Tribe's limited waiver of Tribal sovereign immunity previously contained in that agreement no longer applied "since the JVA [had been] lawfully terminated" by the Tribe. Marston Reply Dec. ISO Dismissal ¶ 4 & Ex. A (4 AA 1016, 1022).

Plaintiffs were unhappy with the Tribe's termination of the JVA. Rather than availing themselves of the remedies available to them under Tribal law, plaintiffs instead filed this lawsuit, resorting to the bizarre allegation that the Tribal Attorney who had represented only the Tribe in negotiating the JVA with plaintiffs, and who was -- and remains -- a Tribal official, was actually representing *plaintiffs* in those negotiations.

The Tribal Attorney is the Tribe's highest ranking law enforcement official, established and regulated under both Tribal law and a legal

services agreement with Mr. Marston.[3] The Tribal Attorney represented the Tribe, and only the Tribe, at all times relevant hereto. Plaintiffs' fabricated complaint against the Tribal Attorney is a transparent, attempted end run around the Tribe's sovereign immunity. Plaintiffs cannot sue the Tribe for terminating the JVA, so instead they filed suit against the Tribal official with whom their attorney negotiated the JVA. And although the lawsuit does not name the Tribe as a defendant, the Tribe has a number of significant legal interests at stake here, including its contractual relationship with plaintiffs under the JVA, its sovereign right to regulate the use of its federal Reservation lands, its governmental and contractual relationship with its Tribal Attorney, its Tribal treasury, and its sovereign immunity.

B. Mr. Bendapudi Proposes the JVA

The JVA was intended to govern plaintiffs' development and operation of an industrial cannabis facility on the Tribe's 30,000-acre Reservation ("Reservation"), owned in trust by the United States for the Tribe's benefit, in San Bernardino County, bordering Lake Havasu and along the Colorado River. *See* Complaint ¶ 10 (1 AA 33); Marston Dec. ISO Venue ¶ 7 & Ex. A (1 AA 71, 76-97).

[3] The Tribe's Contract for Legal Services with Mr. Marston is Exhibit G to the Sansoucie Dec. ISO Dismissal (2 AA 313-325). Plaintiffs never proffered any legal services agreement between them and defendants because none ever existed. The cornerstone of plaintiffs' complaint is either an intentional or delusional fabrication.

Mr. Bendapudi approached the Tribe, representing himself as the attorney for plaintiff/appellant California Capitalism Associates ("CCA"), and proposed the project. *See* Complaint ¶ 10 (1 AA 33). Mr. Bendapudi told the Tribe that he was an attorney with experience in Federal Indian law, real estate law, and the emerging field of cannabis law, and claimed to have recently developed a cannabis facility for another Tribe elsewhere in California. *See* Complaint ¶ 10 (1 AA 33); Wood Dec. ISO Dismissal, ¶ 6 (1 AA 2-3).

The Tribe's governing body, the Tribal Council, decided to pursue negotiations for a JVA with plaintiffs, conditioned upon plaintiffs reimbursing the Tribe for its attorney's fees related to drafting the JVA. *See* Wood Dec. ISO Dismissal ¶ 4 (1 AA 173). Specifically, plaintiffs and the Tribe entered into a preliminary agreement – one *not* negotiated by the Tribe's legal counsel – giving plaintiffs the exclusive right to negotiate a JVA with the Tribe. The preliminary agreement, signed by Tribal Chairman Charles Wood and Mr. Bendapudi, expressly provided that there would be "[n]o out of pocket expenses for the Tribe." Wood Dec. ISO Dismissal Ex. A (1 AA 179).

The Tribe then directed Tribal Attorney Marston to negotiate and draft the JVA on the Tribe's behalf. *See* Wood Dec. ISO Dismissal ¶ 5 (1 AA 173); *see also* Sansoucie Dec. ISO Dismissal ¶ 11 (2 AA 198); Marston Dec. ISO Dismissal ¶ 7 (1 AA 189). As the parties had agreed, plaintiffs

reimbursed the Tribe for its legal fees for Marston's work negotiating and drafting the JVA. *See* Wood Dec. ISO Dismissal ¶ 4 (1 AA 173); Sansoucie Dec. ISO Dismissal ¶ 17 (2 AA 200).

Subsequently, plaintiffs violated the JVA in numerous, material ways. *See* Wood Dec. ISO Dismissal ¶ 12 (1 AA p.175); Sansoucie Dec. ¶ 14 & Ex. J (2 AA 199, 374-376). The Tribal Council directed its Tribal Attorney to give plaintiffs written notice of the violations, which Mr. Marston did. *Id*. ¶ 18 (1 AA 176); Marston Dec. ISO Dismissal ¶¶ 15-16 (1 AA 191); Sansoucie Dec. ISO Dismissal ¶¶ 14-15 (2 AA 199). Despite clear written notice of plaintiffs' JVA violations and the corrections needed, plaintiffs failed to timely cure the violations. *See* Wood Dec. ISO Dismissal ¶ 18 (1 AA p.176); Sansoucie Dec. ISO Dismissal ¶ 16 (2 AA 199); Marston Dec. ISO Venue ¶ 9 & Ex. C (1 AA 71, 102). Following plaintiffs' failure to cure their numerous material breaches, the Tribe terminated the JVA in compliance with its terms. *See* Wood Dec. ISO Dismissal ¶ 18 (1 AA p.176); Sansoucie Dec. ISO Dismissal ¶ 16 (2 AA 199); Marston Dec. ISO Dismissal ¶ 15-16 (1 AA 191); Marston Dec. ISO Venue ¶ 9 & Ex. C (1 AA 71, 102). Plaintiffs had, but opted to forgo, the right to pursue Tribal remedies under Tribal law. *See* Sansoucie Dec. ISO

Dismissal ¶¶ 4-7 & Exs. C, E & F (2 AA 197-98, 283-90, 297-312); Lawrence Dec. ISO Fees ¶ 7Ex. C (5 AA 1162).[4]

C. The Complaint

The Complaint's cornerstones are its unsupported claims that Tribal Attorney Marston was actually plaintiffs' lawyer and that he committed legal malpractice in drafting the Tribe's limited waiver of sovereign immunity that was included in the JVA. Importantly, the Complaint depends entirely on plaintiffs being able to prove their allegations that Tribal Attorney Marston actually represented plaintiffs – not the Tribe – in negotiating and drafting the JVA, and that the Tribal immunity waiver included "in the JVA contract is invalid" and unenforceable against the Tribe. *See, e.g.,* Complaint ¶ 37 (1 AA 50).

An Indian tribe's sovereign immunity from suit is foundational to its governmental authority. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (discussing tribal sovereign immunity, emphasizing "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area").[5] Any adjudication affirming or denying the

[4] As noted below, while plaintiffs are pursuing *arbitration* under the JVA simultaneous with this lawsuit, they failed entirely to pursue their *Tribal* remedies.

[5] *See also Sharp Image Gaming. Inc. v. Shingle Springs Band of Miwok Indians*, l5 Cal App.5th 391, 401 (2017); *Lawrence v. Barona Valley Ranch Resort & Casino*, 153 Cal.App.4th 1364, 1368 (2007) ("an Indian tribe is a sovereign authority and, as such, has tribal sovereign immunity, not only from liability, but also from suit"); *Hydrothermal Energy Corp. v. Fort*

existence of tribal sovereign immunity thus affects fundamental Tribal interests.

D. The Chemehuevi Indian Tribe Has Significant Interests Here

Here, plaintiffs' Complaint would require the Court to adjudicate the sufficiency, validity, and enforceability of a provision in the JVA – the limited waiver of Tribal sovereign immunity – that directly affects the Tribe, its sovereign immunity, and its governmental interests. Further, because the Complaint asserts harm from plaintiffs' alleged loss of "land use rights" on the Tribe's Reservation, Complaint ¶ 76 (1 AA 50), adjudicating the Complaint would require the court to make determinations affecting Tribal lands. Because the Tribe is a party to the JVA, because the validity of the Tribe's immunity waiver therein is at issue here, and because the Tribe's right to control the use of its federal Indian Reservation lands is at stake, this legal action implicates paramount Tribal interests that go to the heart of tribal sovereignty. *See United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and *their territory*" (emphasis added)). *See also Williams v. Lee*, 358 U.S. 217, 223 (1959) (Indian tribes

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Bidwell Indian Cmty. Council, 170 Cal.App.3d 489, 494 (1985); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985); *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983); *Long v. Chemehuevi Indian Reservation*, 115 Cal.App.3d 853, 857-58 (1981).

may of course exercise sovereign power over non-Indians who enter tribal land); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140-41, 144 (9th Cir. 1982) ("Indian tribes … are unique aggregations possessing attributes of sovereignty over both their members and their territory") (internal quotations omitted); *Babbitt Ford, Inc. v. Navajo Indian Tribe* 710 F.2d 587, 591-922 (9th Cir.1983) ("Indian tribes have long been recognized as sovereign entities, 'possessing attributes of sovereignty over both their members and their territory....'") (*quoting United States v. Wheeler,* 435 U.S. 313, 323 (1978)). In addition, as discussed below, the case also involves other important Tribal interest, including its laws, its relationship with its Tribal Attorney, and its treasury.

E. The Trial Court Correctly Dismissed the Complaint

Given the core Tribal governmental interests at stake in this case, including Tribal sovereignty, the use of Tribal Reservation lands, the Tribe's relationship with its Office of the Tribal Attorney, Tribal contracts, and the Tribe's treasury, the case cannot be adjudicated in the Tribe's absence. However, the Tribe has not been, and cannot be, joined as a party because, as a federally-recognized tribal government, it is immune from suit. Thus, the Tribe is a necessary and indispensable party in this case, and the Superior Court correctly dismissed the Complaint on these grounds.

The case is also subject to dismissal on several independent, alternative grounds. First, plaintiffs failed to exhaust the Tribal remedies

available to them, which is a distinct jurisdictional bar to this case. Second, the defendant Tribal Attorneys, who at all times relevant hereto acted in their official capacities, are entitled to Tribal sovereign immunity. Finally, defendants are also entitled to individual official immunity. These provide independent grounds for affirming the Superior Court's order dismissing this case.

The Trial Court dismissed the Complaint on grounds that it lacked "personal and subject matter jurisdiction over these Defendants." Ruling page 9, lines 18-19 (5 AA 1186). The Court found that:

> "the Complaint depends entirely on the immunity waiver being invalid and unenforceable, requiring this Court to interpret the sufficiency and enforceability of a provision of the JVA. Because the Tribe is a party to the JVA and its immunity waiver is at issue here, clearly the terms, meaning and merits implicate paramount Tribal interests. Without the Tribe's presence, the immunity waiver cannot be adjudicated, and the Tribe cannot be joined as a party because of its sovereign immunity."

Id. lines 3-9. The Court held that "the JVA concerns the Tribe's reservation and its sovereign immunity and any potential waiver thereof. Plaintiffs have failed to establish any waiver of immunity by the Defendants and the Tribe, and the Court does not believe they can establish jurisdiction." *Id.* lines 10-13. It held that the "Defendants establish to this Court's satisfaction that they function as an arm of a federally recognized Indian Tribe, that the JVA drafted by Defendants was formed for the benefit of the tribal members, is closely related to the tribe, and federal

policies further immunity." *Id.* lines 19-23. Finally, the Court held that "Plaintiffs do not establish any waiver on the part of Defendants" for purposes of this legal action and, absent such a waiver of immunity, dismissed the Complaint. *Id.* lines 23-24.

II. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs filed their complaint on August 17, 2021. Between August 29, 2021, and September 30, 2021, the various defendants were served with summons and complaint. On September 22, 2021, the defendants obtained their insurer's approval to retain the undersigned legal counsel to represent them in this case. *See* Lawrence Dec. ISO Fees ¶ 10 (5 AA 1150). That same day, Wednesday, September 22, 2021, defendants' counsel requested in writing that plaintiffs grant defendants a two-week extension of time to file a response to the complaint since defense counsel had just been retained that day, and the first of the plaintiffs' responses to the complaint was due on Tuesday, September 29, 2021. *See id.* ¶ 10. That same day, September 22, 2021, plaintiff, and plaintiffs' counsel, Mr. Bendapudi denied defendants' request for an extension of time. *See Id.* and Exhibit B (5 AA 1150, 1156-57).

On September 26, 2021, defendants' counsel requested that the plaintiffs' counsel stipulate to an order transferring the case from San Bernardino County to Mendocino County where three of the four named defendants reside. In that request, defendants' counsel advised Mr.

Bendapudi that defendants could seek attorneys' fees pursuant to Code of Civil Procedure ("CCP") § 396b(b) if he declined to stipulate to a change of venue and the Court granted defendants' intended motion to transfer. *See* Lawrence Dec. ISO Fees ¶ 10 & Ex. C (5 AA 1150, 1161-1163). On September 27, 2021, Bendapudi denied the request. *Id.* ¶ 10 & Ex. D (5 AA 1150, 1165-1169).

Defendants appeared specially and made three motions in the Superior Court in this case, each of which was granted. These were motions: (1) to change venue; (2) to quash and dismiss; and (3) for attorney's fees for the venue motion under CCP § 396b(b). Each motion's procedural history is discussed in turn.

A. Motion to Change Venue

On September 28, 2021, after plaintiffs rejected the requested stipulation, specially-appearing defendants moved to change venue. *See* 1 AA 56-147. Plaintiffs opposed the venue motion on October 21, 2021, *see* 2 AA 403, and defendants replied on October 27, 2021. *See* 2 AA 454. On November 3, 2021, the Court heard argument on the venue motion and took it under submission. On January 5, 2022, the Court issued a "Ruling on Defendants Motion for Change of Venue," granting the motion. 5 AA

1058. No party appealed the Ruling granting defendants' venue motion. *See* 1 AA 24.[6]

B. Motion to Quash and Dismiss

On September 28, 2021, defendants also submitted their motion to quash and dismiss the complaint, together with supporting pleadings. This motion was submitted to the Superior Court on the same day and at the same time as defendants' motion to change venue. *See* Respondent's Appendix at pp. 4-5 (specially-appearing defendants' status report, filed Nov. 17, 2021). However, apparently due to the Clerk's Office's backlog, as related by the Clerk's Office to defendants' counsel, the Clerk's Office did not file the motion to quash and dismiss until October 15, 2021. *See id*.; *see also* 1 AA 143. On November 17, 2021, plaintiffs opposed the motion to quash and dismiss, *see* 4 AA 912, and defendants replied on November 30, 2021. *See* 4 AA 999. On December 2, 2021, the Court heard argument on the motion to quash and dismiss and took the motion under submission. On February 7, 2022, the Court issued a "Ruling on Motion to Quash Services of Summons and Motion to Dismiss for Lack of Subject Matter Jurisdiction," and dismissed the Complaint with prejudice.

[6] The Alphabetical Index to Appellants Appendix shows only three notices of appeal, one from the motion to quash and dismiss, one from the attorneys' fee motion, and defendants' cross-appeal of the fee award, but none from the Ruling grating the motion to change venue.

5 AA 1178. Plaintiffs appealed the Ruling granting specially-appearing defendants' motion to quash and dismiss on March 25, 2022. *See* 5 AA 1222.

C. Motion for Attorneys' Fees

Defendants moved for attorney's fees under CCP § 396b(b) on February 4, 2022. *See* 5 AA 1083-1177. Plaintiffs opposed the fee motion on March 24, 2022, *see* 5 AA 1189-1221, and defendants replied on April 2, 2022. *See* 5 AA 1244-1550. The Superior Court granted defendants' fee motion on May 9, 2022. *See* 7 AA 1561-69. Plaintiffs appealed the fee award on July 8, 2022, *see* 7 AA 1572, and defendants cross-appealed on July 28, 2022. *See* 7 AA 1611.

III. STANDARDS OF REVIEW

A. Motion to Quash and Dismiss

Specially-appearing defendants' motion to quash and dismiss was made pursuant to CCP section 418.10(a)(1), which provides that a defendant may move to quash service of the summons based on lack of jurisdiction over the defendant. Tribal defendants may specially appear and invoke their immunity from suit by using a hybrid motion to quash or dismiss. *See Boisclair v. Superior Ct.*, 51 Cal.3d 1140, 1144 fn. 1 (1990) ("we have recognized the hybrid motion to quash/dismiss as a proper means of challenging the court's authority without making a general

appearance").[7] "This is consistent with the general rule that subject matter jurisdiction can be challenged at any time during the course of an action." *Id.* at 1144 fn. 1.

On such a motion, the trial court must engage in sufficient pretrial factual and legal determinations to "'satisfy itself of its authority to hear the case' before trial." *Brown,* 17 Cal.App.5th at 204 (*quoting Great Western Casinos, Inc.,* 74 Cal.App.4th at 1418) (italics omitted).

"On a motion to quash service of summons, *the plaintiff bears the burden* of proving by a preponderance of the evidence that all jurisdictional criteria are met. The burden must be met by competent evidence in affidavits and authenticated documents …." *Brown,* 17 Cal.App.5th at 1203 (internal *quotation omitted)* (emphasis added); *see also Farina v. SAVWCL III, LLC*, 50 Cal.App.5th 286, 293 (2020) ("When a defendant moves to quash service for lack of jurisdiction, the plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence").

"'In the absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has ... jurisdiction over an action against an Indian tribe is a question of law subject to our de novo review.'" *Id.* (*quoting Lawrence v. Barona Valley Ranch Resort and Casino,* 153

[7] *See also Goodwine v. Superior Court,* 63 Cal.2d 481, 484–485 (1965); *Brown v. Garcia,* 17 Cal.App.5th 1198, 1204 (2017); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal.App.4th 1407, 1417-1418 (1999).

Cal.App.4th 1364, 1369 (2007)). But "[w]hen the facts giving rise to jurisdiction are conflicting, the trial court's factual determinations are reviewed for substantial evidence. Even then, we review independently the trial court's conclusions as to the legal significance of the facts. We [will] affirm a trial court's order if correct on any theory." *Brown,* 17 Cal.App.5th at 1203 (internal quotations and citations omitted). "We affirm a trial court's order if correct on any theory." *Id.* (*citing J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.,* 59 Cal.App.4th 6, 15–16 (1997)).

"We defer to the trial court's factual findings that are supported by substantial evidence." *Farina v. SAVWCL III, LLC*, 50 Cal.App.5th 286, 293 (2020). "We independently review [*de novo*] the trial court's application of law to facts." *Id.* at 294 (*citing Vons Inc. v. Seabest Foods*, 14 Cal.4th 434, 449 (1996).

B. Necessary and Indispensable Party

Whether an absent entity is a necessary and indispensable party under CCP section 389 is reviewed "for an abuse of discretion." *County of Imperial v. Superior Ct.*, 152 Cal.App.4th 13, 25 (2007), *as modified on denial of reh'g* (July 13, 2007) (*citing Deltakeeper v. Oakdale Irrigation Dist.,* 94 Cal.App.4th 1092, 1106 (2001)).

C. Attorney's Fees

"An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the

determination of whether the *criteria* for an award of attorney fees and costs have been met is a question of law. An issue of law concerning entitlement to attorney fees is reviewed de novo." *Leiper v. Gallegos*, 69 Cal.App.5th 284, 291 (2021) (internal quotations and citations omitted) (emphasis added).

"Fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award." *Golba v. Dick's Sporting Goods, Inc.*, 238 Cal.App.4th 1251, 1270 (2015) (quoting *Consumer Privacy Cases,* 175 Cal.App.4th 545, 556 (2009)). "However, *de novo* review of such a trial court order is warranted where the determination of whether the *criteria* for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." *Conservatorship of Whitley,* 50 Cal.4th 1206, 1213 (2010) (internal quotations omitted) (emphasis added).

Here, plaintiffs' appeal of the Superior Court's fee award is reviewed under the abuse of discretion standard. Specially-appearing defendants' cross-appeal, challenging the *criteria* applied by the court below, is reviewed de novo.

IV. DISCUSSION

Plaintiffs argue that the trial court erred by: (1) ruling on specially-appearing defendants' motion to quash and dismiss after it granted their

venue motion but before the case was transferred from San Bernardino County to Mendocino County; (2) granting the motion to quash and dismiss because the individual defendants purportedly lacked tribal sovereign immunity; (3) finding that the Tribe is a necessary and indispensable party; and (4) granting specially-appearing defendants' fee motion. Plaintiffs' arguments fail on all counts.

The trial court properly dismissed the Complaint, and this Court should affirm for several independent reasons. First, the specially-appearing defendants are Tribal governmental officials who acted in their official capacity and authority at all relevant times, and thus are immune from suit under longstanding federal and California law. The Court lacked jurisdiction to adjudicate the complaint against them. Second, the Tribe is a necessary and indispensable party that cannot be joined. The Tribe has fundamental legal interests that would be affected by this lawsuit if it is allowed to proceed, but the Tribe cannot be joined because it is immune from suit. Third, plaintiffs were required to, but did not, exhaust their Tribal remedies. The lower court was required to defer to Tribal law, and it was required to dismiss a complaint when the plaintiff fails to exhaust available Tribal remedies. Each of these reasons constitutes independent grounds for affirmance of the Superior Court's dismissal.

Finally, plaintiff Bendapudi, who is an attorney, failed to meet the statutory standard for good faith when he filed this action in San

Bernardino Superior Court, and again when he insisted on trying to keep the case in San Bernardino despite knowing that specially-appearing defendants live and work in Mendocino County and having been told that San Bernardino was not a proper venue and that he could be ordered to pay defendants' attorney's fees under Code of Civil Procedure section 396b(b).

In addition, specially-appearing defendants have cross-appealed from the Superior Court's Order granting their motion for attorney's fees under Code of Civil Procedure section 396b. The Superior Court applied the wrong legal standard in setting counsel's hourly rate and improperly denied fees for work done by defendant Lester Marston and law clerk Nicholas Marston.

A. The Superior Court Retained Jurisdiction To Dismiss: This Case Was Never Transferred To Mendocino County

Plaintiffs first argue that the Superior Court's grant of the motion to change venue – as to which they did not seek appellate review – deprived it of jurisdiction to rule subsequently on the motion to quash. Plaintiffs are wrong.

First, the case was never transferred from San Bernardino County Superior Court to Mendocino County, and thus the lower court never lost jurisdiction. Second, courts always have jurisdiction to determine their own jurisdiction. The very cases plaintiffs cite expressly provide that under the circumstances here – that is, the case was never actually transferred to

the new court – the original court retains jurisdiction. Third, the statute that was at issue in the cases plaintiffs cite has been amended, and the language they rely on was removed from the venue statute by the Legislature.

1. The Case Was Never Transferred to Mendocino County

Until a case file is actually transferred to the new court following the granting of a motion to change venue, the original court retains jurisdiction over the case. For example, *Moore v. Powell*, 70 Cal.App.3d 583, 587 (1977), explained that a "court may, upon proper motion, vacate its previous order granting the change of venue." Even statutes prohibiting parties from making successive motions for reconsideration "do not limit a court's ability to reconsider its previous interim orders …." *Le Francois v. Goel*, 35 Cal.4th 1094, 1096–97 (2005), *as modified* (June 10, 2005).

Plaintiffs cite two cases in their attempt to claim that the trial court lost jurisdiction when it granted the venue motion: *London v. Morrison,* 99 Cal.App.2d 876, 879 (1950), and *Moore v. Powell*, 70 Cal.App.3d 583 (1977). Opening Brief at 20. *London* undermines, rather than supports, plaintiffs' argument. *London* notes that certain conditions must be met before jurisdiction over a case moves from the transferring court to the receiving court: The receiving court, here Mendocino County, "does ***not*** acquire jurisdiction until the transfer fee has been paid ***and the papers filed in that court***." *Id*. at 879 (emphasis added). *See, e.g., Thompson v. Thames*, 57 Cal.App.4th 1296, 1309 (1997) (following San Diego court's

transfer of venue, "the Los Angeles County court acquired jurisdiction on June 26, 1992, the date on which Anita *filed her second version of the petition*, referencing the San Diego proceedings" (emphasis added)).

Here, no "papers" had been "filed in that [transferee] court" when the trial Court ruled on both the motion to quash and dismiss and on the fee motion, and thus the trial Court still retained jurisdiction over the case. *Id*.

The second case plaintiffs cite, *Moore,* is unhelpful to them and does not prove their point. Both *Moore* and *London* dealt with a factual situation that is readily distinguishable from the one at issue here. In both cases the transferring court granted a motion to transfer, but fees were not paid until the time limit for doing so had expired. Both cases focused on the question whether and when the receiving court *acquired* jurisdiction in such circumstances. Neither case focused on the matter at issue here, namely, the point at which the transferring court *loses* jurisdiction to decide its own jurisdiction and to award statutory attorney's fees for the venue motion. The cases are thus inapposite, and the portions plaintiffs' Opening Brief cites on pages 20-21 are out of context.

Moore acknowledged that "[w]hen a motion for change of venue has been granted by the transferor court, but the transferee court has not yet assumed jurisdiction," the transferor court retains "limited powers." *Moore v. Powell*, 70 Cal.App.3d 583, 587 (1977). *Moore* opined that the transferor court may "… vacate its previous order granting the change of

venue. Also, the court *may dismiss the action* if the transfer fees are not paid within the time provided." *Id.* (citations omitted) (emphasis added).

Here, plaintiffs do not allege, nor can they prove, that the San Bernardino Superior Court's Clerk actually transferred the case file to the Clerk of the Mendocino County Superior Court. Plaintiffs certainly have not shown that the transferring court ruled on the motion to quash and dismiss after such a transfer of the case files, for no such transfer ever occurred. Absent a transfer by the clerk of the case files, the transferring court retained jurisdiction. Thus, the trial Court had jurisdiction to decide the motion to quash and dismiss, and the motion for statutory fees.[8]

2. Plaintiffs' Cases Turn on Language in an Old Statute That Was Removed When the Statute Was Amended in 1974

Finally, the main case plaintiffs rely on in support of their misguided claim that the lower court lost jurisdiction the moment it granted defendants' venue motion is more than 70 years old and focused on a statutory provision that has since been amended. *See* Opening Brief, p. 20 (*citing London v. Morrison*, 99 Cal.App.2d 876 (1950)). Plaintiffs also cite

[8] This conclusion is consistent with the well-settled rule that "[a] court has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance." *Barry v. State Bar of California*, 2 Cal.5th 318, 326 (2017). *See also Walker v. Superior Ct.*, 53 Cal.3d 257, 267 (1991) ("courts have inherent authority to … inquire into their own jurisdiction"); *Scott v. Industrial Acc. Com.*, 46 Cal.2d 76, 83 (1956).

Moore v. Powell, which itself cites *London*. However, again, these cases undermine, rather than support, plaintiffs' argument.

London interpreted a provision that is no longer in effect, and its holding – which specifically tracked the now defunct provision it was analyzing – is thus not relevant. *London* involved former CCP §581b,[9] which provided:

> "No action heretofore or hereafter commenced, where the same was not originally commenced in the proper court, and which has been ordered transferred to the proper court, shall be further prosecuted, and no further proceedings shall be had therein, until the fees and costs of the transfer thereof and of filing the papers in the court to which transferred have been paid, as provided in Section 399 of this code…."

London, 99 Cal.App.2d 876, 878 fn. 3 (1950).

Based on the mandatory language in former section 581b providing that "no further proceedings shall be had …" – which is absent from today's §396b – *London* concluded that the section limited the transferring court's jurisdiction over an action after that court had granted a motion to transfer. But section 581b no longer exists.

Today, CCP § 396b does not contain any language automatically divesting a transferring court's authority. Thus, plaintiffs' argument is not supported by the statute's plain language. *See Poole v. Orange Cnty. Fire Auth.*, 61 Cal.4th 1378, 1384 (2015) ("[w]e begin with the plain language

[9] CCP § 581b was repealed in 1974 by Stats.1974, c. 1369, p. 2967, § 5.

of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent") (internal quotations omitted).

To the contrary, today, the original court's authority does not cease automatically, and continues until the clerk of that court actually transfers pleadings and papers to the transferee court. Under CCP section 396b the transferring court *retains* jurisdiction over a case, even after it grants a motion to transfer, until the fees are paid and the file actually transfers to the transferee court, and the original court may still award reasonable expenses and fees, a matter which naturally is adjudicated only after the motion to transfer is adjudicated and the total attorneys' fees are calculated.

Similarly, CCP §399 instructs the clerk of the transferring court to transfer the pleadings and papers of the action to the clerk of the receiving court *after* all relevant time frames have expired and fees have been paid. *See* CCP § 399. Section 399 thus means that jurisdiction does not transfer automatically. The clerk needs to take affirmative action to transfer the file to the receiving court in order to divest the transferring court of its jurisdiction. Unless and until the clerk transfers pleadings and papers, the transferring court retains jurisdiction. *See also Tanzman v. Midwest Exp. Airlines, Inc.*, 916 F. Supp. 1013, 1016 (S.D. Cal.1996) (interpreting CCP § 400, which gives parties 20 days to petition for a writ of mandate to

challenge a ruling on a venue motion, "a case subject to transfer shall not in fact be transferred for at least 20 days from the date of service of the order granting the motion to change venue absent stipulation of opposing counsel").

Practical, policy, and equitable reasons also support the original court retaining jurisdiction until the file is actually transferred to the receiving court. Unless the transferring court retains jurisdiction, granting a motion for transfer would create a jurisdictional void, with *no* court having authority over pending litigation. For example, if plaintiffs' argument were correct, parties would have no court in which to seek a temporary restraining order, for example, potentially endangering parties and subjecting them to irreparable harm. Because transferring the pleadings and papers in a case can take weeks and even months (as demonstrated by this case), the transferor court must, in the interest of justice, retain the power to make rulings, particularly with respect to the court's fundamental "duty" to determine its jurisdiction over the action, *Rowland*, 220 Cal.App.3d at 334, as well as over related matters.

The general reasoning in *LeFrancois v. Goel,* 35 Cal.4th 1094 (2005), is instructive. A transferring court should have the power to vacate or reconsider its own previous order granting a change of venue in order to rule on a motion that it had previously heard and taken under submission. Nothing in the statute implies, much less mandates, otherwise.

Plaintiffs' argument that the Superior Court lost jurisdiction the moment it ruled on defendants' venue motion fails. The case file was never transferred from San Bernardino County Superior Court, and thus the lower court never lost jurisdiction. The very cases plaintiffs cite expressly provide that under the circumstances here the trial court retained jurisdiction. Finally, the statute at issue in plaintiffs' cases has been amended, and the language they rely on was removed from the venue statute by the Legislature.

B. Specially-Appearing Defendants Were Tribal Officials Acting In Their Official Capacity And Within The Scope Of Their Authority And Thus Are Immune From Suit

1. Specially-Appearing Defendants Are Tribal Officials

The office of the Tribal Attorney was created in Chapter 3.02 of the Chemehuevi Indian Tribal Code, and is the Tribe's top law enforcement official. *See* Sansoucie Dec. ISO Dismissal ¶ 8 & Ex. B (2 AA 198, 259-61). The Tribal governmental official acting as Tribal Attorney is responsible for rendering legal opinions to the Tribe, drafting Tribal laws, representing the Tribe in negotiations, including contract negotiations, and representing the Tribe in all administrative and court proceedings as authorized by the Tribal Council. *See id.* Defendant Lester Marston has

held the office of Tribal Attorney since 1978.[10] *Id.* ¶ 9 (2 AA 198); Marston Dec. ISO Dismissal ¶¶ 2, 4 (1 AA 188-89).

The Tribe entered into a Contract for Legal Services with Mr. Marston, which expressly authorizes him to subcontract his duties as Tribal Attorney to defendants Kostan Lathouris[11] and David Rapport. *See* Sansoucie Dec. ISO Dismissal ¶ 9 (2 AA 198). All specially-appearing defendants acted in their official capacities as Tribal Attorney, pursuant to Tribal law and the Contract for Legal Services, in their interactions with plaintiffs. *See* Wood Dec. ISO Dismissal ¶¶ 4-5, 7-9, 13, 15-16, 18-20 (1 AA 173-176); Sansoucie Dec. ISO Dismissal ¶¶ 11, 14, 15-17 (2 AA 198-200); Marston Dec. ISO Dismissal ¶¶ 7, 8, 11-18, 23 (1 AA 189-92).

Mr. Marston is, and at all times relevant to this case was, a Tribal government official, acting in his capacity as Tribal Attorney. He was designated as Tribal Attorney under Tribal law and has served in that capacity for more than 40 years. *See* Sansoucie Dec. ISO Dismissal ¶¶ 8, 9 (2 AA 198). [12] Tribal governments are free to designate their governmental

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[10] Defendant Marston's wife and three of his children are enrolled members of the Chemehuevi Indian Tribe. *See* Marston Dec. ISO Dismissal ¶ 2 (1 AA 189).

[11] Defendant Lathouris is an enrolled member of the Chemehuevi Indian Tribe and a sitting member of the Tribal Council, the Tribe's governing body. *See* Sansoucie Dec. ISO Dismissal ¶ 3 (2 AA 197).

[12] Plaintiffs claim that "it is unclear how CCA could have hired and paid the Office of the Tribal Attorney in the first place, since most government departments do not accept money from outside third parties to perform legal work for them." Opening Brief, p. 23. Though plaintiffs *allege* that

officials in any way they desire. *See Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968).

The sovereign immunity of a Tribal government official applies regardless of how that individual is paid or employed. *See id.* at 85 ("That a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege otherwise available to it"). Here, as in *Davis*, the Tribal attorney was employed "under contract …." *Id.* But that fact does not matter. "The need for absolute privilege is in the elimination of the 'constant dread of retaliation' for injury committed in the course of duty and the allowance of 'unflinching discharge of (official)

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they hired the Chemehuevi Tribe's Tribal Attorney to represent them, they do not prove that this ever happened. Other than a self-serving assertion by attorney/plaintiff Mr. Bendapudi, plaintiffs have not provided any agreement or other document indicating that Marston ever represented them. To the contrary, the record is clear that Marston was the Tribal Attorney and only ever represented the Tribe in negotiating the JVA. *See, e.g.,* Wood Dec. ISO Dismissal ¶¶ 4-5, 7-9, 13, 15-16, 18-20 (1 AA 173-176); Sansoucie Dec. ISO Dismissal ¶ 17 (2 AA 199-200); Marston Dec. ISO Dismissal ¶ 23 (1 AA 192). Plaintiffs agreed to pay the Tribe's legal fees incurred in negotiating and drafting the JVA with plaintiffs, but this did not create an attorney-client relationship between plaintiffs and defendants. As an attorney who claims to be experienced in working with Indian tribes, Mr. Bendapudi should know that it is common for a party pitching a business idea to an Indian tribe to pay the tribe's legal fees as an incentive to enter negotiations. Indeed, the pre-JVA agreement giving plaintiffs the exclusive right to negotiate a JVA with the Tribe, and which was signed by Tribal Chairman Wood and plaintiff Mr. Bendapudi, expressly provided that there would be "[n]o out of pocket expenses for the Tribe." Wood Dec. ISO Dismissal Ex. A (1 AA 179).

duties' free from the threat of suit …." *Id.* (*quoting Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). "The question, then, is not how the position is filled or the security of its tenure but whether it encompasses ***public duties, official in character***." *Id.* (emphasis added). As *Davis* noted, "the rule of privilege is not founded on the need of the individual officer, but on the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired." *Id.*

Specially-appearing defendants Marston and Lathouris served the Tribe as its Tribal Attorney in all matters related to this case.[13]

2. The Chemehuevi Indian Tribe Has Sovereign Immunity

As a federally-recognized Indian tribe, the Chemehuevi Indian Tribe has tribal sovereign immunity and is immune from unconsented lawsuits. *See* 87 Fed. Reg. 4636, 4637 (Jan. 28, 2022) (annual publication of list of federally recognized Tribes). In *Santa Clara Pueblo v. Martinez,* 436 U.S.

[13] Defendant David Rapport "has never met, spoken to or had any communications with the plaintiffs." Rapport Dec. ISO Venue ¶ 6 (1 AA 140). Mr. Rapport was "never involved in the negotiation, drafting or preparation of the joint venture agreement ('JVA') between the plaintiffs and the Chemehuevi Indian Tribe ('Tribe') nor was I involved in the drafting, preparation, or service of the Notice of Violation of the JVA, the Notice of Termination of the JVA or the termination of the JVA" at issue in this case. *Id.* ¶ 7. The defendant named as "Rapport & Marston" is an association of lawyers who are sole practitioners. *See* Legal Service Contract between the Tribe and Marston, 2 AA 314.

49, 58 (1978), the U.S. Supreme Court held that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *See also People v. Miami Nation Enterprises*, 2 Cal.5th 222, 234 (2016) ("The rule that Indian tribes are immune from suit is now firmly established as a matter of federal law and is not subject to diminution by the States"); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1050-1053 (9th Cir. 1985), *rev'd on other grounds* 474 U.S. 9 (1985). Although tribal sovereign immunity can be waived by the tribe or abrogated by Congress, any such waiver must be unequivocally expressed and is to be narrowly construed. *See Santa Clara Pueblo*, 436 U.S. at 58.

Judicial recognition of a tribe's immunity from suit is not discretionary with a court, and absent an effective waiver, the assertion of sovereign immunity by a federally recognized Indian tribe deprives the court of jurisdiction to adjudicate the claim:

> "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, . . . the application of which is within the discretion of the court. . . . 'Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.'"

California ex rel. California Dep't of Fish & Game v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979) (*quoting United States v.*

United States Fidelity and Guarantee Co., 309 U.S. 506, 514 (1940)). Tribal "sovereign immunity is jurisdictional in nature," and applies "irrespective of the merits" of the claim asserted against a tribe. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983). California courts also recognize the mandatory, jurisdictional nature of the doctrine of tribal sovereign immunity. *See, e.g., Sharp Image Gaming, Inc. v. Shingle Springs Band of Miwok Indians*, 15 Cal.App.5th 391, 401 (2017); *Hydrothermal Energy Corp,* 170 Cal.App.3d at 494; *Long*, 115 Cal.App.3d at 857-58.

Furthermore, any assertion of jurisdiction by a court over an Indian tribe in the absence of an express, valid waiver of immunity or congressional abrogation, would amount to an unlawful interference with tribal self-government. As the court found in *Middletown Rancheria v. Workers' Comp. Appeals Bd*., 60 Cal.App.4th 1340 (1998):

> Here, [the] Tribe's sovereign status is an independent barrier for holding California's workers' compensation laws inapplicable because their enforcement by the Appeals Board unlawfully infringes on the right of [the] Tribe to govern its own employment affairs…. While Congress can authorize suits against Indian nations, we are required, as a matter of law, to recognize [the] Tribe's sovereign immunity status in the absence of an explicit congressional waiver.

Id. at 1347-48. Likewise, in *Santa Clara Pueblo*, 436 U.S. at 58, the Supreme Court held that any abrogation or waiver of tribal sovereign

immunity "cannot be implied but must be unequivocally expressed." *See also Great Western Casinos,* 74 Cal.App.4th at 1419.

Here, the Tribe has not consented to a waiver of its sovereign immunity for purposes of this action brought by plaintiffs. *See* Sansoucie Dec. ISO Dismissal ¶ 13 (2 AA 199).

3. As Tribal Officials Acting In their Official Capacity and Within the Scope of Their Authority, Specially-Appearing Defendants Are Immune from Suit Absent the Tribe's Consent.

Tribal sovereign immunity "extends to Tribal officials acting within their representative capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1012, fn. 8. (9th Cir. 1981). *See also Hardin v. White Mountain Apache Tribe* 779 F.2d 476, 479 (9th Cir. 1985); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983). As noted above, Tribal officials' sovereign immunity helps eliminate "the constant dread of retaliation for injury committed in the course of duty and the allowance of unflinching discharge of [official] duties free from the threat of suit …." *Davis*, 398 F.2d at 85 (internal quotations omitted).

At all times relevant to this case, the specially-appearing defendants acted as Tribal officials pursuant to express Tribal authority. *See* Wood Dec. ISO Dismissal ¶¶ 4-5, 7-9, 13, 15-16, 18-20 (1 AA 173-176); Sansoucie Dec. ISO Dismissal ¶ 17 (2 AA 199-200); Marston Dec. ISO

Dismissal ¶ 23 (1 AA 192). Indeed, plaintiffs admit that they knew that specially-appearing defendants represented the Tribe with respect to the JVA. *See* Complaint ¶ 12 (1 AA 34). The Complaint admits that "[p]laintiffs knew that the Tribe had already been working with Lester Marston and his Firm, … [and that] the [Tribal] Council insisted on using Marston" as the Tribal Attorney with respect to the JVA because Mr. Marston was "an Indian law expert" who "was familiar with the Tribe's laws and regulations." *Id.*

The Tribal Council authorized specially-appearing defendants' actions with respect to the Complaint's subject matter, in accordance with a Tribal governmental Legal Services Contract and Tribal law, and thus these actions were within the course and scope of the official capacity and authority of the office of Tribal Attorney. *See* Wood Dec. ISO Dismissal ¶¶ 4-5, 7-9, 13, 15-16, 18-20 (1 AA 173-176); Sansoucie Dec. ISO Dismissal ¶ 17 (2 AA 199-200); Marston Dec. ISO Dismissal ¶ 23 (1 AA 192). Accordingly, the well-established doctrine of tribal official sovereign immunity applies to the Tribe Attorney defendants here. *See Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985); *State of California v. Harvier*, 700 F.2d 1217 (9th Cir. 1983); *California ex rel. California Dep't of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). This provides independent

grounds for affirming the Superior Court's grant of the specially-appearing defendants' motion to quash and dismiss.

4. *Lewis v. Clarke* Holds that Tribal Officials are Protected by Sovereign Immunity Under the Circumstances Present Here

Plaintiffs do not dispute that specially-appearing defendants constituted the office of Tribal Attorney. Instead, they argue that "[w]hether Marston and his law firm were officers or employees of the Tribe, or whether they 'functioned as an arm of the Tribe' or not, is not relevant in this instance, because the *Lewis* court ruled that only the *sovereign* (e.g., the Tribe itself or a qualifying Tribal corporation) is protected by *sovereign* immunity, and that individual defendants being sued in their personal capacity cannot invoke an immunity that belongs to the sovereign." Opening Brief at p. 23 (emphasis in original).

Plaintiffs have once again misunderstood, oversimplified, and/or misrepresented the case law. *Lewis v. Clarke,* 581 U.S. __, 137 S.Ct. 1285 (2017), did *not* hold that tribal sovereign immunity does not extend to tribal officials acting in their official capacities. Indeed, Lewis was not a suit against a tribal *official* at all, but rather one against a tribal casino employee, namely, a limousine driver. *See id.* at 1289 ("Petitioners Brian and Michelle Lewis were driving down Interstate 95 in Norwalk, Connecticut, when a limousine driven by respondent William Clarke hit

their vehicle from behind. Clarke, a Gaming Authority employee, was transporting patrons of the Mohegan Sun Casino to their homes").

Nor did *Lewis* hold, as plaintiffs allege, that "individual defendants cannot invoke sovereign immunity." Opening Brief, p. 24. Rather, the Supreme Court's analysis in *Lewis* was far more nuanced. *Lewis* delineated the conditions under which a lawsuit against an individual low-level tribal employee – not a high-ranking government official – *is* barred by Tribal sovereign immunity.

Lewis explained that in a lawsuit that purports to be an individual capacity suit against such an employee, "[i]f ... an action *is in essence against a [sovereign] even if the [sovereign] is not a named party*, then the [sovereign] is the real party in interest and is entitled to invoke [sovereign immunity]." *Id.* at 1290 (emphasis added). Thus "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Id.* at 1291.

Here, the Tribal Attorney defendants were high-ranking Tribal officials. Indeed, as noted above, the Tribal Attorney is the Tribe's top law enforcement official. *See* Sansoucie Dec. ISO Dismissal ¶ 8 & Ex. B (2 AA 198, 259-61); *see also* Wood Dec. ISO Dismissal ¶¶ 7, 19 (1 AA 174, 176); Marston Dec. ISO Dismissal ¶¶ 7-18 (1 AA 189-91). Under these circumstances, the fact that the Complaint seeks damages only from individual defendants, and not from the Tribe itself, is not dispositive of the

sovereign immunity issue. Plaintiffs' Complaint would require the trial court to adjudicate *the Tribe's* immunity waiver, interpret *the Tribe's* contracts, determine matters that affect *the Tribe's* sovereign use of its Indian Tribal reservation lands, and give "full force and effect" to *the Tribe's* laws. 28 U.S.C. § 1360(c). Here, the Tribe's sovereign immunity protects the Tribal official defendants because plaintiffs' case arises wholly out of the JVA with the Tribe, interferes with the Tribe's relationship with its top-ranking law enforcement official, asserts "land use rights" on the Tribe's Reservation, and seeks disgorgement of the Tribe's money (paid by the Tribe), all of which render the Tribe a "real party in interest" within the meaning of *Lewis*. Plaintiffs' essential grievance arises from the Tribe's termination of the JVA. Had plaintiffs performed their obligations under the JVA, the Tribe would not have terminated the JVA, and the project would have proceeded as the parties intended. Absent plaintiffs' failure to perform or cure and the Tribe's resulting termination of the JVA, plaintiffs would have no cause to file this lawsuit.

Plaintiffs' complaint is "in essence" against the Tribe, even though it does not name the Tribe as a defendant. *Lewis*, 137 S.Ct. at 1290. The Complaint directly implicates matters that are fundamental to the Chemehuevi Indian Tribe's self-governance and would directly impact the Tribe by forcing it to act (or refrain from acting) in certain ways. For example, the Complaint alleges that "Plaintiffs paid Defendants to draft an

enforceable JVA contract … with a *valid* waiver of [the Chemehuevi Indian Tribe's] sovereign immunity…." Complaint ¶ 37 (1 AA 40) (emphasis added). It then alleges malpractice in light of the alleged fact that "the [JVA's] ostensible waiver of sovereign immunity ... *is invalid*." *Id.* (*emphasis added*).

In order to determine whether Mr. Marston's contract drafting was "incompetent," Complaint ¶ 37 (1 AA 40), the Court would need to determine whether the Chemehuevi Indian Tribe's waiver of sovereign immunity was or was not valid. This adjudication would, in turn directly impact whether the Tribe can or cannot be sued. Accordingly, the adjudication, which is a necessary and unavoidable predicate to plaintiffs' malpractice claim, would directly impact the Tribe and its government.

Such adjudication could also potentially restrain the Tribe from successfully asserting federally-recognized sovereign immunity under the JVA, and could force it to litigate matters (such as plaintiffs' breaches of the JVA, their failure to cure, and the Tribe's subsequent termination of that agreement) that it may not otherwise intend to litigate.

In addition, as noted above, plaintiffs also seek an adjudication of their claimed "loss of land use rights" on the Tribe's federal Indian Reservation. Complaint, ¶ 76 (1 AA 50). Whether non-Tribal third parties may or may not use Tribal Reservation lands is a matter that directly and unquestionably impacts the Tribe.

For nearly two centuries, federal courts have held that core tribal sovereign authority includes regulation of federal Indian reservation lands. *See, e.g., Merrion*, 455 U.S. at 137 (discussing "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction"); *id.* at 142 ("We do not question that there is a significant territorial component to tribal power"); *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 152 (1980) ("Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest"); *Mazurie*, 419 U.S. at 557 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"); *Worcester v. Georgia*, 31 U.S. 515 (1832) (persons were allowed to enter Cherokee land only "with the assent of the Cherokees themselves"); *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1149 (9th Cir. 2020) ("the federal government confers tribal jurisdiction over lands it acquires in trust for the benefit of tribes"); F. Cohen, *Federal Indian Law*, at p. 210, § 4.01[1][b] (West 2005) ("Tribes have plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law").[14]

[14] *Cohen* is undisputedly the leading treatise on the subject of federal Indian law, and is routinely cited by the United States Supreme Court in that regard. *See, e.g., Babbitt v. Youpee*, 117 S.Ct. 727, 730 (1997); *Hagen v. Utah*, 510 U.S. 399 (1994); *Oklahoma Tax Com'n v. Sac and Fox Nation*,

"A tribe needs no grant of authority from the federal government to exercise the inherent power of exclusion from tribal territory, either as a government or as a landowner." Cohen, *Federal Indian Law*, at pp. 219-20 (West 2005). Because a tribe's power to exclude non-members from federal Indian lands "is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty." *Id.* at p. 220, § 4.01[2][e].

This, too, demonstrates that the Chemehuevi Indian Tribe, which is not a party here, "may be legally bound by the court's adverse judgment" in this case, and thus that the present action "is in essence against [the Tribe] even if the [Tribe] is not a named party…" *Lewis*, 137 S.Ct. at 1290, 1293-

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508 U.S. 114, 123 (1993); *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 793 (1991); *Duro v. Reina*, 495 U.S. 676, 689 (1990); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 n. 16 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 435 (1989); *South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 520 (1986); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 885 (1986); *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *Arizona v. California*, 460 U.S. 605, 651 (1983); *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Merrion*, 455 U.S. at 139; *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 165 n. 1.

94. Under *Lewis,* this action is in essence against the Tribe, and as such is barred by sovereign immunity.

Attempting to avoid the inevitable conclusion that sovereign immunity applies to the Tribal Attorney defendants under *Lewis*, plaintiffs argue that theirs is "an individual capacity suit" because it names only individual defendants rather than the Tribe and because it does not expressly seek remedies against the Tribe. *See* Opening Brief, p. 25. As explained above, however, who a plaintiff names as the defendant in a lawsuit is not the determining factor for purposes of sovereign immunity. What matters is whether "an action *is in essence against a [sovereign] even if the [sovereign] is not a named party ...." Lewis*, 1297 S. Ct. at 1290 (emphasis added). If that is the case, as it surely is here, "then the [sovereign] is the real party in interest and is entitled to invoke [sovereign immunity]." *Id.* at 1290.

Plaintiffs' complaint would require the trial court to adjudicate, among other things, the validity of *the Tribe's waiver of sovereign immunity,* and issue a ruling granting plaintiffs land rights on *the Tribe's federal Indian Reservation,* and interpret *the Tribe's* contracts (both the JVA and the Contract for Legal Services). The fact that plaintiffs failed to name the Tribe as a defendant does not transform their lawsuit into a personal capacity suit. This is a lawsuit against the Tribe, and the Court should reject plaintiffs' attempted "end run around tribal sovereign immunity …."

Dawavendewa v. Salt River Project Agr. Imp. & Power Dist., 276 F.3d 1150, 1160 (9th Cir. 2002).

Here, as in *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005), "[t]he plaintiffs of course did not sue the tribe directly, but filed this action against … [the Tribe's attorneys]. They did so because they recognized that tribal immunity would create, at the least, a serious obstacle. For the very reasons we have already outlined that compel tribal immunity with respect to the plaintiffs' claims, their efforts to do an end run around tribal immunity must also fail." *Norton*, 424 F.3d at 963.

Clearly, this action is essentially against the Tribe, though the Tribe is not a named party. Under *Lewis*, when a tribe "may be legally bound by the court's adverse judgment," it is effectively a real party in interest, such that Tribal officials named as defendants in a lawsuit share Tribal sovereign immunity. *Lewis*, at 1292-93. Accordingly, the Chemehuevi Indian Tribe is a real party in interest here, and therefore its officials have sovereign immunity. This immunity applies even when, as here, a plaintiff attempts an "end run" around Tribal immunity by naming individual defendants. *Dawavendewa*, 276 F.3d at 1160.

5. Defendant Tribal Attorneys Also Are Protected by Individual Official Immunity

Specially-appearing defendants are also protected by the individual immunity that insulates individual governmental officials from personal

liability for their actions undertaken in their official capacities. While related to the sovereign immunity discussed above, this individual, official immunity provides independent grounds for affirming the Superior Court's dismissal.

Courts have long recognized that, under common law rules, "government officials are entitled to … immunity from suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982)). This "immunity of government officers from personal liability," the Supreme Court has explained, "springs from the same root considerations that generated the doctrine of sovereign immunity." *Scheuer v. Rhodes,* 416 U.S. 232, 239 (1974), *abrogated on other grounds as stated in Davis v. Scherer,* 468 U.S. 183, 191 (1984).

Official immunity rests on two notions: (1) the injustice of "subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 240 (footnote omitted).

Courts recognize two general forms of common law official immunity: absolute immunity and qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982). Absolute official immunity applies to "legislators, in their legislative functions," "judges, in their judicial functions,"

"prosecutors and similar officials," "executive officers engaged in adjudicative functions," and "the President of the United States." *Id.*

"The California Supreme Court has applied these principles, finding that public officers who initiate and pursue administrative and judicial proceedings within the scope of their duties, even if maliciously, are entitled to absolute immunity." *Acres v. Marston*, 72 Cal.App.5th 417, 447 (2021), *as modified on denial of reh'g* (Dec. 10, 2021).

For example, in *Hardy v. Vial,* 48 Cal.2d 577 (1957), "the court found several college and state officials, who allegedly conspired to improperly initiate an administrative proceeding against a college professor, were immune from civil liability in a suit for malicious prosecution." *Acres*, 72 Cal.App.5th at 477 (*citing Hardy*, 48 Cal.2d at 580-584). "The court reasoned that all these officials had acted within the general scope of their duties, which included the disciplining of professors …." *Id.*

Acres was a suit against Indian tribal officials, including the tribal casino's attorneys, the tribal court judge and clerk, and various other individuals and entities, and arose out of a prior lawsuit in tribal court. The plaintiff in *Acres* alleged that the tribal court lawsuit was improperly filed, and alleged claims for breach of fiduciary duty, constructive fraud, conspiracy, and aid and abetting. *See Acres*, 72 Cal.App.5th at 447.

The Court of Appeal found that tribal attorneys for the Blue Lake Rancheria were "all entitled to ***absolute immunity***" for their legal work on behalf of the tribe. *Id.* (emphasis added).

Acres found historical support for applying absolute official immunity. "Exten[ding] ... absolute immunity to ... government litigators [outside the traditional prosecutorial context] finds common law and historical support in the broader principle that the immunity which is extended to the judges is in like manner extended to the attorneys in the presentation of a client's case to the court or the jury." *Id.* (brackets in original) (*quoting Barrett v. United States*, 798 F.2d 565, 572 (2d Cir. 1986); *citing Mangiafico v. Blumenthal,* 471 F.3d 391, 396 (2d Cir. 2006) (government attorneys are entitled to absolute immunity for their conduct "that can fairly be characterized as closely associated with the conduct of litigation or *potential litigation'* in civil suits") (emphasis added); *Davis,* 398 F.2d at 85 (tribe's outside counsel who made "defamatory statements made by him within the scope of his official duties" found entitled to absolute immunity)) (internal quotations omitted).

Acres noted that "courts have long found that government attorneys may be entitled to absolute immunity for their work 'closely associated with the judicial process'" *Id.* at 445 (*quoting Burns v. Reed,* 500 U.S. 478, 495 (1991)). *Acres* explained that individual official immunity has "at times [been] characterized 'as a form of 'quasi-judicial' immunity ... derivative of

the immunity of judges.'" *Id.* (*quoting Imbler v. Pachtman,* 424 U.S. 409, 420 (1976)).

Following *Imbler*, the U.S. Supreme Court held that "agency officials performing certain functions analogous to those of a prosecutor"— for example, officials who "initiate administrative proceedings against an individual or corporation"— should similarly "be able to claim absolute immunity with respect to such acts." *Butz v. Economou,* 438 U.S. 478, 515 (1978). Concerned that "[a]n individual targeted by an administrative proceeding will react angrily and ... seek vengeance in the courts," the Supreme Court explained "that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment." *Id.* at 515-516; *see also id.* at 517; *Acres*, 72 Cal.App.5th at 447.

To deny individual official immunity to tribal attorneys acting in their official capacities, *Acres* held, would "leave tribal attorneys unduly timid in the performance of their duties and disserve the public interest. Contractual disputes, like the one before us, often arouse intense feelings in the litigants and may lead to retaliatory suits by angry litigants." *Id.* (*citing Butz,* 438 U.S. at 515).

Acres held that tribal attorneys considering whether to proceed with such matters "on the tribe's behalf 'should not be inhibited in the faithful performance of [their] duties by the threat of harassing lawsuits against

[them].'" *Id.* (*quoting Barrett*, 798 F.2d at 572; *citing Hardy*, 48 Cal.2d at 582-583 ("to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties") (internal quotations omitted). "Taking all these considerations together, and considering other cases that have long found immunity appropriate under similar circumstances, we find absolute immunity appropriate here." *Id.* at 448 (*citing Davis,* 398 F.2d at 85).

Here, plaintiffs' grievances with defendants arose out of the Tribe's Notice of Violation, Notice of Termination, and the Tribal Council's decision following the dispute resolution process spelled out in the JVA. *See generally* Complaint ¶¶ 10-35 (1 AA 33-40). The defendant Chemehuevi Tribal Attorneys acted at the Tribe's express direction, pursuant to their Contract for Legal Services, in all respects related to the subject matter of this case. *See*, *e.g.,* Wood Dec. ISO Dismissal ¶¶ 4-5, 7-9, 12-13, 15-16, 18-20 (1 AA 173-176); Sansoucie Dec. ISO Dismissal ¶¶ 11, 14-17 & Exs. J-L (2 AA 198-200, 374-400); Marston Dec. ISO Venue ¶¶ 8-9 & Ex. C (1 AA 71, 103-125); Marston Dec. ISO Dismissal ¶¶ 7-8, 11-18, 23 (1 AA 189-192).

In undertaking these actions, specially-appearing defendants were Tribal "officers who initiate[d] and pursue[d] administrative … proceedings

within the scope of their duties," and thus "are entitled to absolute immunity." *Acres*, 72 Cal.App.5th at 447. *See Nixon*, 457 U.S. at 744. To hold otherwise would be an "injustice" by "subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion …." *Scheuer,* 416 U.S. at 240. The "threat of such liability would deter" Tribal Attorneys " willingness to execute [their] office with the decisiveness and the judgment required by the public good." *Id.* As in *Hardy*, defendants here "acted within the general scope of their duties" as directed by the Tribe. *Acres*, 72 Cal.App.5th at 447 (*citing Hardy*, 48 Cal.2d at 580-584). The defendant Tribal Attorneys here were, at all times relevant to this case, "public officers who initiate[d] and pursue[d] administrative and judicial proceedings within the scope of their duties" with respect to the JVA and thus "are entitled to absolute immunity." *Acres*, 72 Cal.App.5th at 447. They are, like the General Counsel of Navajo Tribe was in *Davis*, employed under terminable contract as the Tribe's top legal officer, who enjoyed absolute executive immunity from liability for alleged torts allegedly occurring in the performance of his official duties. *See Davis*, 398 F.2d at 85.

6. The Tribe Never Waived the Tribal Attorney's Immunity

Just as California has codified the common law of individual official immunity,[15] so too has the Tribe. The Tribe's Limited Liability Ordinance provides that a Tribal official's immunity from suit may only be waived by a formal resolution of the Tribal Council expressly waiving the immunity of officials carrying out official functions authorized by the Tribal Council. *See* Sansoucie Dec. ISO Dismissal ¶ 13 & Ex. D (2 AA 199, 292-295). That Ordinance provides that "no person … or entity can sue the Tribe or its officers or employees without the Tribe's consent, which can only be given through the adoption of a Tribal Council resolution." *Id.* ¶ 13 & Ex. D (2 AA 199, 293).

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[15] *See* Cal. Gov't § 821.6 ("A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause"). California "Government Code section 821.6 serves in large part to codify the common law rule, recognized in cases like *Hardy*, that immunized public employees …. Although the statute speaks only of employees of the State of California and related entities, the broader common law principles underlying the statute are not so limited and extend also to tribal employees." *Acres*, 72 Cal.App.5th at 449 (*citing Sullivan v. County of Los Angeles*, 12 Cal.3d 710, 719 (1974) (Cal. Gov't Code § 821.6 "continues the existing immunity of public employees" recognized under common law); *Turner v. Martire,* 82 Cal.App.4th 1042, 1049 (2000) ("common law immunity [extends] to tribal officials" because of "the need to protect such officials from the detrimental effect that the prospect of liability would have on their performance of their official duties"); *Davis,* 398 F.2d at p. 85 (contracted tribal attorney found entitled to absolute immunity under common law immunity principles).

The Limited Liability Ordinance notes that the Tribe can only act through its officials, finds that "the Tribe is small with limited financial resources," and that it cannot pay to defend lawsuits brought against its official when they are "carrying out duties within the officials' authority or the employees' scope of work." *Id.* 2 AA 292. It further finds that the "Tribe would be unable to attract qualified people to serve in official positions" unless it limits Tribal officials' liability "from suits brought against them in their individual capacities" such as this case. *Id.* 2 AA 292-293.

The Ordinance therefore provides that "[i]n lieu of indemnifying officials … the Tribe is enacting this Ordinance, making it clear that [Tribal] ***officials … carrying out their official duties or acting within the course and scope of their employment enjoy sovereign immunity from suit absent an express and explicit waiver by the Tribe of such immunity***." *Id.* 2 AA 293 (emphasis added).

Federal law mandates that this Court give "full force and effect" to that Tribal Law. 28 U.S.C. § 1360(c) ("Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section"); *In re Marriage of Jacobsen*, 121 Cal.App.4th 1187, 1190 (2004) ("Pursuant to 28

U.S.C. § 1360(c) all State courts shall give full force and effect to this Tribal law in determining civil causes of action involving this Tribal law and policy") (internal quotations omitted).

The Tribe's codification of the common law rule of immunity for government officials mirrors that of California's in Government Code section 821.6. This Court should not allow "one jurisdiction to cherish the rule for itself while denying its benefits to a[nother] sovereign …." *Davis*, 398 F.2d at 85.The defendant Tribal Attorneys are protected by individual official immunity, and the trial Court correctly concluded that it lacked jurisdiction over them.

C. The Tribe Is A Necessary And Indispensable Party

1. Necessary and Indispensable Parties

Dismissal was also warranted under CCP § 389(b) because the Chemehuevi Indian Tribe is a necessary party that cannot be joined due to its sovereign immunity. Section 389(a), provides that an absent party "shall" be joined if the named parties: (1) cannot be accorded complete relief; or (2) if the absent party has a legal interest relating to the subject of the action and (i) its disposition will impair or impede the absentee's ability to protect that interest or (ii) the party's absence will leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

When an absent party's interests stand to be impaired or impeded but that absent party cannot be joined due to sovereign immunity, CCP § 389(b) sets forth four factors for the Court to consider in determining whether to proceed without the absent party or dismiss the action:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

The Court of Appeal presumes that, when a necessary party cannot be joined, the trial court considered the relevant statutory factors in determining whether the action should be dismissed without prejudice. *See Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of America*, 234 Cal.App.4th 1168 (2015). Because CCP § 389 tracks the language of its federal counterpart, Fed. R. Civ. P. 19, California courts rely on federal precedents applying the federal rule as a guide to applying § 389. *See Van Zant v. Apple Inc.,* 229 Cal.App.4th 965, 974 (2014).

"Indian tribes are necessary parties to actions affecting their legal interests." *Confederated Tribes of the Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1499 (9th Cir.1991). "The 'interest' referenced in Rule 19(a)(2) is broadly construed to cover any 'significantly protectable'

or 'legally protectable' interest in the subject of the litigation." *Taylor v. Bureau of Indian Affs.*, 325 F. Supp. 2d 1117, 1120 (S.D. Cal.2004).

It is well-established that an Indian tribal government is a necessary party in cases involving the tribe's contractual rights. *See*, *e.g.*, *Dawavendewa,* 276 F.3d at 1157 ("[T]oday we reaffirm the fundamental principle [that] a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract").

In *Dawavendewa*, the plaintiff sought to enjoin enforcement of a tribal hiring preference required by a contract between a defendant and the Navajo Nation. *See id.* at 1157. The Ninth Circuit held that a lawsuit potentially interfering with the defendant's contractual obligation made the Tribe a necessary party to the action. "Undermining the Nation's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively and efficiently." *Id*. *See also McClendon v. United States,* 885 F.2d 627, 633 (9th Cir.1989) (tribe is necessary party to action seeking to enforce a lease agreement signed by the tribe); *Enterprise Mgt. Consultants, Inc. v. United States,* 883 F.2d 890, 893 (10th Cir.1989) (Indian tribe is a necessary party to an action seeking to validate a contract with the tribe).

Similarly, a Tribe is a necessary party in a dispute, such as this case, in which the right to use federal Indian trust lands is at issue. Here, the Tribe has a legal interest given plaintiffs' claim to have lost "land use rights" on

the Tribe's Reservation by virtue of their alleged inability to obtain the benefits of the JVA. Complaint ¶ 76 (1 AA 50). *See Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (Navajo and Hopi tribes were necessary and indispensable parties to action involving coal mining on their reservations); *Pit River Home and Agric. Coop. Ass'n v. United States,* 30 F.3d 1088, 1099, 1101 (9th Cir. 1994) (Tribe as the beneficial owner of real property at issue, "clearly has a legal interest in the litigation, which would be impaired by the disposition of this action without its presence"); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994) ("the Quinault Indian Nation clearly has a claim to the escheated property within its reservation. Moreover, the Quinault Indian Nation undoubtedly has a legal interest in any adjudication of its governing authority over the reservation") (internal quotation omitted); *Shermoen v. U.S.,* 982 F.2d 1312, 1317 (9th Cir. 1992) ("finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest") (emphasis in original); *Confederated Tribes of Chehalis Indian Rsrv. v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (tribe had a legal interest, and could not be joined, in litigation seeking to adjudicate plaintiffs "rights in the Reservation"); *Wichita and Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765, 774 (D.C. Cir. 1986) (Indian tribe's beneficiary interest in a trust makes it a necessary party to an action seeking to affect that trust).

Moreover, as the Reservation's legal owner and as trustee for the Tribe, the United States is also a necessary and indispensable party here. "Because Indian trusts lands are at stake, the United States is also a necessary and indispensable party." *Turley v. Eddy*, 70 F. App'x 934, 936 (9th Cir. 2003) (both the tribe and the United States were necessary and indispensable parties in action against tribal officers to challenge plaintiffs' eviction from lands the tribe claimed as part of its reservation).[16]

"The United States is an indispensable party to any suit brought to establish an interest in Indian trust land." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991). *See also Carlson v. Tulalip Tribes of Washington,* 510 F.2d 1337, 1339 (9th Cir.1975) (United States is a necessary and indispensable party in a case involving federal Indian lands); *Barber v. Simpson*, 286 F. App'x 969, 970–71 (9th Cir. 2008). Here, plaintiffs' complaint claims the "loss of land use rights" and seeks declaratory relief. Complaint ¶ 76 & Prayer for Relief ¶ 8 (1 AA 50, 53).

For these reasons, the Tribe is a necessary party under CCP section 389(a).

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[16] The California Supreme Court has held that "[c]iting unpublished *federal* opinions does not violate our rules. (Cal. Rules of Court, rule 8.1115.) We find the court's reasoning persuasive." *Farm Raised Salmon Cases*, 42 Cal.4th 1077, 1096 (2008).

2. The Tribe Has Significant Interests in this Lawsuit Under CCP § 389(a)

Plaintiffs argue that the Tribe is not a necessary party, first, because "CCA is not suing the Tribe here, nor is it suing the Office of the Tribal Attorney. Furthermore, CCA is not seeking any remedies from or against the Tribe in this action." Opening Brief, p. 28. Plaintiffs' argument completely misses the point of CCP § 389 (a) and (b). Section 389(b) applies precisely when, as here, a plaintiff's lawsuit implicates the interests of a third party but does not name that party. The section protects unnamed parties, like the Tribe, that are not present in court to protect their interests. Accordingly, notwithstanding plaintiffs' lengthy but misguided objection to the contrary, §389(b) applies here.

Plaintiffs also argue that the Tribe is not necessary or indispensable because, "[s]imply put, the Tribe has absolutely no interest in the outcome of this lawsuit." Opening Brief at 28. This assertion ignores the core of plaintiffs' own lawsuit and, as discussed above, the Tribe's substantial legal interests in this case. Plaintiffs' Complaint would require the Superior Court to issue determinations that would directly impact several important Tribal interests, including the Tribe's contracts, internal Tribal governance, Tribal sovereignty, the Tribe's relationship with its Tribal Attorney, its governmental authority over its federal Indian reservation lands, and its treasury.

The Tribe's interests in this case are significant, and more than satisfy § 389(a)'s requirement that the Tribe "***claim***[] an interest in the subject of action and [be] so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest ...." CCP § 389(a) (emphasis added). *See Shermoen,* 982 F.2d at 1317 ("finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest") (emphasis in original).

a. Tribal Contracts

Plaintiffs maintain that if they prevailed on their Complaint, i.e., if they were to demonstrate that Mr. Marston owed them a duty and breached that duty by defectively drafting the JVA's limited waiver of the Tribe's sovereign immunity, the Tribal Attorney – a Tribal government official operating under Tribal law, at the direction of the Tribal Council and Chairman, and under contract with the Tribe – "would be disqualified from representing the Tribe in an action by CCA to enforce the JVA." Opening Brief, p. 29.

Plaintiffs thus expressly concede that this lawsuit would impact the Tribe's internal contractual and governmental interests. The Tribal Attorney defendants provide services to the Tribe pursuant to an attorney services contract with the Tribe. *See* Sansoucie Dec. ISO Dismissal ¶ 8 & Ex. G (2 AA 198, 313-325). Plaintiffs assert that this litigation would, if successful, preclude defendants from representing the Tribe in a pending

arbitration concerning the same transaction, JVA, and events as this case. *See* Opening Brief, p. 29.[17] In other words, plaintiffs acknowledge, and apparently hope and intend,[18] that *this* litigation – which they claim does not affect the Tribe – will enable them to prevent *the Tribe* from using its Tribal Attorney of more than 40 years in the parallel pending arbitration proceeding, thereby interfering with, and depriving the Tribe of the benefit, of its Contract for Legal Services with defendants.

As explained above, interfering with an Indian tribe's contractual rights makes that tribe a necessary party. *Dawavendewa,* 276 F.3d at 1157. As in *Dawavendewa*, plaintiffs here seek to disrupt defendants' contract with the Tribe, and, like *Dawavendewa*, the Tribe cannot be compelled to join the litigation absent its consent. *See Dawavendewa*, 276 F.3d at 1161. *See also McClendon,* 885 F.2d at 633 (tribe is necessary party to action seeking

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[17] Plaintiffs have initiated a separate arbitration action with JAMS regarding the alleged breach of the JVA. *See* Marston Dec. ISO Dismissal ¶ 22 (1 AA 191-92).

[18] That plaintiffs are at the very least aware that this lawsuit could interfere with the Tribe's attorney services contract, and that they have been aware of this fact from the beginning, is evident from their actions. In addition to the statement cited above in their Opening Brief here, in an email from plaintiffs, dated September 21, 2021, to Mr. Marston, Mr. Bendapudi stated: "You're just . . . going to try and con the Indians into paying for your lawsuit defense. . . . I have a separate arbitration against them (which you are also not involved in because you're conflicted out)." Marston Reply Dec. ISO Dismissal ¶ 22 (4 AA 902-903). In a separate letter, dated June 2, 2021, relating to the concurrent arbitration, Mr. Bendapudi stated that if defendants seek to represent the Tribe in the arbitration, "CCA will move to disqualify counsel ...." *Id*. (4 AA 903).

to enforce a lease agreement signed by the tribe); *Enterprise Mgt. Consultants, Inc.,* 883 F.2d at 893 (Indian tribe is a necessary party to an action seeking to validate a contract with the tribe).

Finally, the case also impacts the Tribe's interests in the JVA, as discussed further below.

b. Internal Tribal Government

As explained above, the Tribal Attorney is a tribal governmental official established under Tribal law. *See* Sansoucie Dec. Dismissal ¶¶ 8-9; 2 AA 198. Plaintiffs explicitly assert that this lawsuit could (and should) affect whether and how the Chemehuevi Tribe's government can utilize its own governmental Tribal Attorney in the related arbitration proceeding. *See* Opening Brief, p. 29. In addition, the complaint also implicates several internal Tribal laws, including its Tribal Administrative Code, *see* Sansoucie Dec. ISO Dismissal at ¶ 4 & Ex. B (2 AA 197, 218-281), its Tribal Tort Claims Ordinance, *see id.* & Ex. C (2 AA 197, 282-290), and its Tribal Limited Liability Ordinance. *See id.* & Ex. D (2 AA 197, 291-295).

The lawsuit thus would impact internal matters of Tribal governance and operations, in which the Tribe has a significant interest, rendering it a necessary party.

c. Tribal Sovereignty and Sovereign Immunity

The Complaint seeks a determination that the Tribal Attorney: (1) owed plaintiffs a duty;[19] and (2) breached that duty by failing to draft a valid, enforceable immunity waiver in the JVA. The Complaint expressly alleges "Incompetent Contract Drafting" and states that "the ostensible waiver of [the Tribe's] sovereign immunity … is invalid," which allegations would require the Court to adjudicate the waiver's validity.[20] Complaint ¶ 37; 1 AA 40. Similarly, plaintiffs' allegation that Mr. Marston disclaimed the waiver's enforceability – in the Tribe's Notice of Termination of the JVA due to plaintiffs' dozens of material breaches and failure to cure – creates the impression that Mr. Marston took the position that the waiver, as drafted, had *never* been enforceable.[21] S*ee* Complaint ¶

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[19] As noted above, plaintiffs' claim that defendants owed plaintiffs a duty is contradicted by all of the evidence beyond Mr. Bendapudi's self-serving statements. *See, e.g.,* Wood Dec. ISO Dismissal ¶¶ 4-5, 7-9, 13, 15-20 (1 AA 173-176); Sansoucie Dec. ISO Dismissal ¶ 17 (2 AA 199-200); Marston Dec. ISO Dismissal ¶ 23 (1 AA 192). Moreover, even if plaintiffs could establish such a duty, the issue of breach, and of whether defendants are guilty of "Incompetent Contract Drafting" as alleged in the Complaint at ¶ 37 (1 AA 40), would still turn on whether the Tribe's immunity waiver in the JVA was properly drafted such that it was valid and enforceable according to its terms, or whether it was incompetently drafted (as alleged) such that it was not valid according to its terms.

[20] Complaint, ¶ 37 (1 AA 40).

[21] In this regard, it is important to note that Marston's Notice of Termination to plaintiffs' then-legal counsel dated June 9, 2021, did not state that the immunity waiver was improperly drafted or that it was not enforceable as written. Rather, that Notice of Termination provided that the JVA's immunity waiver was *no longer* enforceable because, by then, the Tribe had terminated the JVA due to plaintiffs' multiple material breaches

51; 1 AA 44-45; Opening Brief p. 29. This misleading allegation, and others like it, could result in a court or a jury deciding whether the alleged disclaimer was correct and whether the immunity waiver was, or ever had been, valid and enforceable. In order to adjudicate these allegations in the Complaint, the Court would be required to adjudicate the validity of *the Tribe's* contractual immunity waiver. And this, in turn, would implicate fundamental Tribal interests, as explained above.

d. Tribal Lands

In addition to having significant contractual, internal governmental, and sovereignty-related interests that are implicated by the Complaint, the Tribe also has additional important legal interest in its Reservation lands at stake here. Plaintiffs claim a "loss of land use rights" and assert that such loss constitutes a component of the alleged damage they suffered by virtue of defendants' alleged malpractice. Complaint, ¶ 76 (1 AA 50). Plaintiffs concede they must prove that they suffered damage in order to prevail on their malpractice claim. Complaint, ¶ 48 (1 AA 44). Thus, if the Superior Court adjudicated the Complaint, it would have to determine whether the Tribe or the plaintiffs have land use rights on the Tribe's reservation. The Tribe has significant legal interests with respect to *its* land use rights and *its*

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and failure to cure, so that the immunity waiver contained within it was no longer valid. *See* Marston Reply Dec. ISO Dismissal ¶ 4, Ex. A (4 AA 1016, 1022).

sovereign governmental rights to regulate the use of its lands by others. Plaintiffs alleged "land use rights" on the Tribe's Reservation arise exclusively from, and depend entirely on, the JVA. Complaint ¶¶ 10, 76 (1 AA 33-34, 50); Marston Dec. ISO Venue ¶ 7 and Ex. A (1 AA 71, 76, 79) (Recital ¶¶ 4, 6; Definitions ¶ 1.13); Sansoucie Dec. ISO Dismissal ¶ 12 (2 AA 199 ("The purpose of the JVA was for the construction and operation of a business on tribal land owned by the United States in trust for the Tribe as beneficial owner, as specified in the JVA").

Tribes have power "over both their members and their territory." *Mazurie*, 419 U.S. at 557. "From a tribe's inherent sovereign powers flow lesser powers, including the power to regulate non-Indians on tribal land." *Water Wheel Camp v. LaRance*, 642 F.3d 802, 808–09 (9th Cir. 2011). "[S]tates have no power to regulate the use or governance of Native American Indian country in the absence of an effective waiver or consent by Congress or the tribe." *Middletown Rancheria*, 60 Cal.App.4th at 1347. *See Hydrothermal Energy Corp.*, 170 Cal.App.3d at 494–495; *Long,*115 Cal.App.3d at 857–858, 860, fn. 7.

"Where a dispute involves trust or restricted property, the state may not adjudicate the dispute, nor may its laws apply." *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal.1977), *aff'd sub nom. United States v. Humboldt Fir, Inc.*, 625 F.2d 330 (9th Cir. 1980). Furthermore, as the California Supreme Court has recognized, 28 U.S.C. § 1360(b) "precludes

states from asserting jurisdiction over *disputes* concerning Indian land, including—as here—disputes in which one party claims the disputed property is non-Indian." *Boisclair v. Superior Court*, 51 Cal.3d 1140, 1152 (1990). "[S]tate court jurisdiction is ***barred*** whenever one litigant claims the disputed property is Indian trust land." *Id.* at 1153 (emphasis added).

e. Tribal Treasury

Finally, this lawsuit also could impact the Tribe's treasury. The complaint alleges that plaintiffs paid a "Franchise Fee … to the Tribe," Complaint ¶ 68 (1 AA 48), that "plaintiffs paid [Mr. Marston] to draft documents in connection with the JVA," *id.* ¶¶ 5 (1 AA 32), and that plaintiffs paid retainers of $2,500 and $3,250. *Id.* ¶¶ 19, 23 (1 AA 35, 37). The Complaint expressly concedes that the $2,500 retainer was paid to defendants' client trust account: "Marston requested a $2,500 retainer, which Mr. Bendapudi paid in early 25 October 2018, writing on the check that it was for Rapport & Marston's ***client trust account***." *Id.* ¶ 19 (1 AA 35) (emphasis added).

Mr. Marston explained below that in his "first call with Mr. Bendapudi, [he] wanted to work out the details of how the plaintiffs were going to pay for the Tribe's negotiation costs." Marston Dec. ISO Dismissal ¶ 8 (1 AA 189). Mr. Marston rejected Mr. Bendapudi's proposal to pay Mr. Marston directly. Mr. Marston explained that:

> "the Tribe was my client and that the Tribe, not the plaintiffs, would pay me. I told him that I wanted him to make checks payable to the 'Rapport and Marston Trust Account' 'in the name of the Tribe'.' I told him that I would deposit the plaintiffs' check(s) into my client trust account to the credit of the Tribe, and that I would bill the Tribe monthly for the work and that upon Tribal Council approval of the bill, I would pay myself from the 'Tribe's trust funds'. Mr. Bendapudi agreed."

Id. ¶ 8 (1 AA 192-193).

Consistent with that understanding, Mr. Marston subsequently declared in detail how he was paid for his work on the JVA:

> "I have never sent a bill or invoice to the plaintiffs for any 1egal services that I have ever performed. Pursuant to the agreement negotiated between the Tribal Council and the plaintiffs, plaintiffs agreed to pay for all the legal costs that the Tribe incurred in having me, on behalf of the Tribe, negotiate and conclude the JVA. Under that agreement between the Tribe and plaintiffs, I had plaintiffs issue checks payable to Rapport and Marston for deposit in my client trust account to the credit of the Tribe. I then billed the Tribe for my services and the Tribe, not the plaintiffs approved those bills. The Tribe, not the plaintiffs, then paid me for my services that I performed relevant to the negotiation and preparation of the JVA out of the funds deposited into my trust account to the credit of the Tribe. After the JVA was prepared, plaintiffs requested an accounting of the services I performed for the Tribe in preparing the JVA. In response to plaintiffs' request, I then sent the plaintiffs copies of the Invoices that I sent to the Tribe which the Tribe approved and which the Tribe paid, as evidence of the time l spent negotiating, preparing, and concluding the JVA."

Marston Reply Dec. ISO Fees ¶ 24 (3 AA 480-481).

Thus, the Complaint and defendants' evidence are in accord: plaintiffs paid legal fees into the Tribe's trust account, from which the Tribe paid Mr. Marston for his work on the JVA. In addition, plaintiffs

paid a "very significant, but confidential, Franchise Fee … to the Tribe." Complaint ¶ 68 (1 AA 48).

The Complaint seeks relief including "disgorgement of all … fees earned by Defendants …." Complaint ¶ 69 (1 AA 49). *See also id.* ¶ 71, 77, 80 & Prayer for Relief ¶ 6 (1 AA 49-51, 53) (disgorgement). Moreover, plaintiffs effectively *admit* that the Tribe paid defendants' attorney's fees, for they demand disgorgement of all defendants' legal fees "***regardless of who was the original payor of said fees***." *Id.* ¶ 69 (1 AA 49) (emphasis added). In addition, the Complaint also seeks "restitution". *Id.* Sixth Cause of Action, ¶¶ 78-80 & Prayer for Relief ¶ 4 (1 AA 51, 53).

Given that the Complaint expressly admits that plaintiffs paid a "franchise fee" to the Tribe (and their false allegation that defendants received a commission out of said fee, *see* Complaint ¶ 36 (1 AA 40)), their claims for disgorgement and restitution effectively constitute place a direct claim on the Tribe's treasury. The same is true for plaintiffs' claim for restitution of the attorney's fees incurred by defendants, paid by the Tribe, and reimbursed by plaintiffs, "regardless of who was the original payor of said fees." *Id.* ¶ 69 (1 AA 49) (emphasis added). Even if a judgment only ordered disgorgement and/or restitution as to the defendant Tribal Attorneys, it would still implicate the Tribe's treasury because of their contractual right to payment for legal services under the Contract for

Legal Services between Mr. Marston and the Tribe. *See* Sansoucie Dec. ISO Dismissal ¶ 9 and Ex. G (2 AA 198, 314-325).

In addition, the Tribe's treasury is further implicated here because the Contract for Legal Services obligates the Tribe to indemnify defendant Tribal Attorneys. Specifically, that contract between the Tribe and defendants provides in relevant part that "[t]he Tribe shall indemnify and hold harmless Attorneys from and against any claim, loss, or damage, including the legal and other costs of defending against any claim of damages or loss by third parties, which arises out of Attorneys representation of the Tribe under this Contract." Sansoucie Dec. ISO Dismissal Ex. G, ¶ 22 (2 AA 324). The record is clear that defendant Tribal Attorneys represented the Tribe pursuant to the Contract for Legal Services. *See* Sansoucie Dec. ISO Dismissal ¶¶ 9, 14-17 (2 AA 198-200); Wood Dec. ISO Dismissal ¶¶ 3-5, 7-9, 13, 15-16, 18-20 (1 AA 173-176); Marston Dec. ISO Dismissal ¶ 23 (1 AA 192). Thus, if defendants were ordered to pay money to plaintiffs, the Tribe would be contractually obligated to indemnify defendants.

For all of the reasons stated above, the requirements of CCP § 389(a) have been met. The Tribe is a necessary party to this litigation because many of its most fundamental, paramount interests stand to be affected by plaintiffs' claims.

3. The Section 389(b) Factors Weigh in Favor of Dismissal

Given that the Tribe is a necessary party here, CCP § 389(b) requires that the court determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed…." The provision details four factors the court should consider in making this determination.

As explained in detail above, the first factor of section 389(b) is present because a judgment rendered in the Tribe's absence would be highly prejudicial to the Tribe. Such a judgment would impact some of the Tribe's most fundamental interests.

The second factor in §389(b) is "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." Given the Tribal interests at stake in this litigation, the prejudice the Tribe may suffer as a result of adjudication cannot be lessened or avoided by the shaping of relief or other measures. There is no feasible way to limit the impact of a judgment that could:

(1) order "restitution" of the funds plaintiffs paid to reimburse the Tribe for its legal fees, Complaint, Prayer for Relief, ¶ 4 (1 AA 53);

(2) order "disgorgement" of said fees and/or the "Franchise Fee that Plaintiffs paid to the Tribe" under the JVA, *id*. ¶ 68 & Prayer for Relief ¶ ¶ 5 (1 AA 48, 53);

(3) issue declaratory relief that the specially-appearing defendants owed plaintiffs a duty while simultaneously serving as the Office of the Tribal Attorney, *see id.* ¶ 8;

(4) interpret the Tribe's limited waiver of its sovereign immunity in the JVA;

(5) determine who may or may not serve as the Tribe's highest ranking legal official;

(6) prevent the Tribe from reaping the benefits of its legal services contract;

(7) adjudicate plaintiffs' claim to "land use rights" on the Tribe's federal Indian Reservation lands; and/or

(8) intrude on the Tribe's right to use and/or regulate its Reservation lands.

Although §389(b) lists two additional factors for the Court to consider, federal courts have held that because an Indian tribe is a government with sovereign immunity, the other factors carry little or no weight when a Tribe's fundamental interests are at risk of harm in a lawsuit in which the Tribe is not a named party. Many federal courts have noted the "strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity." *Klamath Tribe Claims Comm. v. United State*, 106 Fed. Cl. 87, 95 (2012) (*quoting Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999); *see also Enterprise Management*

Consultants, Inc. v. United States, 883 F.2d 890, 894 (10th Cir. 1989) ("When, as here, a necessary party . . . is immune from suit, 'there is very little room for balancing of other factors' . . . because immunity may be viewed as one of those interests compelling by themselves") (*internal quotations omitted*); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968); *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 fn. 13 (D.C. Cir. 1986). In light of the above, this Court should end the inquiry here and determine that dismissal was warranted. If, however, the Court believes that the third and fourth factors are relevant, those factors are present here as well.

The third factor a Court considers under §389(b) is "whether a judgment rendered in the person's absence will be adequate." Here, the Court will be unable to render an adequate judgment for several reasons. First, the Trial court (and the plaintiffs and defendants) will not have access to the documents and testimony required to adjudicate plaintiffs' claims. While plaintiffs may be able to produce evidence relating to their agreements with *the Tribe*, they cannot produce, or compel the Tribe to produce, any evidence of the Tribe's agreements with the defendants. Tribal sovereign immunity precludes unconsented compelled testimony or production of documents. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (tribal sovereign immunity bars court process); *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549

(9th Cir. 2002), *vacated and remanded on other grounds*, *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (sovereign immunity barred district attorney's search warrant for tribal records); *In re Elko County Grand Jury*, 109 F.3d 554, 556 (9th Cir. 1997) (sovereign immunity prevents the enforcement of subpoenas against federal officers barring a waiver of that immunity); *United States v. James*, 980 F.2d 1314, 1319-20 (9th Cir. 1992) (affirming order quashing subpoena served by a criminal defendant against the tribe, which was not a party to the action); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (if defendant is entitled to dismissal on immunity grounds, dismissal is appropriate before the commencement of discovery); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (discovery should not be allowed until threshold immunity questions are resolved).

Defendants, who at all relevant times acted in their official Tribal governmental capacity as Tribal Attorney, also cannot produce or disclose such information because it is *the Tribe's* confidential protected information, not their own. This would undermine the Court's ability to adjudicate plaintiffs' claims about what the Tribe paid defendants, which funds were used for such payments, and related matters.

That plaintiffs' claims require access to information that is *Tribal* information and that, accordingly, will not be available, is plainly evident on the face of the Complaint. For example, Complaint ¶ 51 alleges that

defendant Marston "insert[ed] himself into the middle of Plaintiffs' conflict with the Tribe." Because Mr. Marston was, at all relevant times, the Tribe's attorney, he cannot explain his actions without referencing instructions he received from the Tribe and internal conversations he had with the Tribe. However, this information is *the Tribe's* confidential, privileged information. Accordingly, the only way to obtain that information is to compel the Tribe to provide it. But the Court cannot compel the Tribe to provide such information. Similarly, the complaint alleges that the Tribe paid defendants legal fees to which the defendants were not entitled, out of funds that the Tribe should have kept for itself but instead elected to use to pay defendants, and seeks disgorgement of such fees "regardless of who was the original payor of said fees." Complaint ¶¶ 36, 68 and 69 (1 AA 40, 48-49). Adjudicating these claims would require *the Tribe's* cooperation in disclosing its fee agreement with the defendants, and the *source* of the fees it paid to defendants. This cooperation cannot be compelled. And defendants either do not have access to this information or are not free to disclose the information without the Tribe's consent. Further, the complaint alleges that the defendants "took" undisclosed commissions from the Tribe and that the defendants "collected" from the Tribe "other moneys and fees." Complaint ¶ 71 (1 AA 49). The Complaint includes numerous other claims of similar character, none of which can be adequately adjudicated without the Tribe's presence as a party to this legal

action. In short, the trial court could not render an adequate judgment in this case because the documents, privileged communications, financial records, and other information necessary to do so is unavailable due to tribal sovereign immunity and attorney-client privilege.

The Tribe is not a party to this lawsuit, nor can it be joined, nor can it be compelled to produce the evidence necessary to defend the lawsuit.[22] Without the Tribe as a party to this legal action, judgment cannot adequately be rendered.

An adequate judgment also cannot be rendered in this case because the absent Tribe is a party to the legal services agreement that this legal action seeks to undermine. The Complaint asserts that one of the consequences of the current legal action – and apparently one of its intended consequences – is that defendants will no longer be able to function as the official Tribal Attorney in the Tribe's ongoing arbitration

[22] Although the Tribe agreed to permit a number of Tribal officials to provide declarations for purposes of the Tribe's Motions, and permitted its Tribal Attorney to disclose some of the details of the Tribe's agreement and interactions with the plaintiffs, it was not *required,* and cannot be compelled, to do so. In all likelihood, the Tribe agreed to such disclosures in an attempt to ensure that its paramount interests, at stake in this litigation, are protected by the action's dismissal. If the action is permitted to proceed, however, the Tribe could not be compelled to produce witnesses or documents, or disclose any of its internal governmental communications. Defendants could be deprived of exculpatory evidence, plaintiffs could be deprived of any discovery as to the Tribe or its officials, and thus the trial court could be deprived of a foundation on which to render an adequate judgment.

with plaintiffs. For example, plaintiffs assert that defendant Tribal Attorneys should not "continu[e] to represent the Tribe in [the Tribe's ongoing arbitration with defendants] that arises from the same exact contract [i.e., the JVA]…" and that they should "withdraw from representing the Tribe" in that conflict and "recuse himself." Complaint ¶¶ 33, 43, 65 (1 AA 39, 42-43, 48), respectively. *See also* Plaintiffs' Opposition to Dismissal at p.17, line 6 (4 AA 928) ("Defendants have to recuse themselves from the arbitration …"). Plaintiffs explicitly seek "injunctive relief available that the Court may see fit to enjoin Defendants" from taking actions – including continuing to function as Tribal Attorney under Tribal law – that plaintiffs view as harmful to their interests. Complaint ¶ 77 (1 AA 50). In other words, plaintiffs want the trial court to interfere with the Tribe's law, and its legal services agreement, pursuant to which the defendants are the Tribal Attorney and are required to act as such in the Tribe's ongoing arbitration with the plaintiffs.

There is no way for a trial court to grant a remedy in *this* case that would resolve *that* matter. The Tribe is not a party here, and a remedy in this case cannot bind the Tribe's handling of its own internal legal affairs.

Finally, §389(b) instructs the court to consider whether plaintiffs will have an adequate remedy if the action is dismissed for nonjoinder. Here, plaintiffs *had* an adequate remedy and an available forum under Tribal law, but they elected to forgo the opportunity to pursue that remedy.

Plaintiffs could have filed a claim against defendants under the Tribe's Claims Ordinance, as explained further below, but they chose not to do so. *See* Sansoucie Dec. Dismissal ¶¶ 4, 7 & Ex. C (2 AA 197-98, 282-90). Having unilaterally squandered the opportunity to pursue their claims in an authorized forum, plaintiffs cannot now complain that they have no adequate remedy.

Further, a State trial court cannot fashion a remedy that would, as a practical matter, invalidate the Tribe's agreement or its internal legal designation of defendants as Tribal Attorney, because the court has no jurisdiction over the Tribe or its actions. Thus, any disposition in the Tribe's absence "threatens to leave [the parties] subject to a substantial risk of incurring multiple or inconsistent obligations" and further litigation regarding this issue will arise. *Dawavendewa,* 276 F.3d at 1157. As in *Dawavendewa,* any type of injunctive relief would result in prejudice to the defendants and the Tribe. *Id.* at 1162. And it would leave plaintiffs with an incomplete, deficient remedy. Accordingly, there is no remedy available in this case that would actually grant plaintiffs the relief they seek.

Finally, and perhaps most importantly, whether plaintiffs have an alternative remedy is immaterial when the absent party is an Indian tribe. The strong policy supporting Tribal sovereign immunity favors dismissal when a court cannot join a tribe because of sovereign immunity. *See Dawavendewa,* 276 F.3d at 1162. The Ninth Circuit noted "that in

Lomayaktewa, *Confederated Tribe, Shermoen, Pit River Home, Quileute Indian Tribe, Kescoli,* and *Clinton*, we determined that the plaintiff would be without an alternative forum to air his grievances. Nevertheless, in each case, we determined that the absent Indian Tribe was indispensable and dismissed the case." *Id*. Here too, upholding sovereign immunity justifies dismissal.

Accordingly, this Court should affirm the trial court's dismissal of this action for failure to join the Tribe as a necessary and indispensable party.

4. The Tribe Cannot Be Joined as a Party, and The Complaint was Rightly Dismissed

In sum, the Tribe is a necessary and indispensable party here that cannot be joined because of its sovereign immunity.[23] Thus, the case must

[23] A waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 192 (1996). *See also Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Middletown Rancheria*, 60 Cal.App.4th at 1347 ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed"); *Hydrothermal Energy Corp.*, 170 Cal.App.3d at 494. Thus, a court may only exercise jurisdiction over a tribe pursuant to a clear statement from the tribal government "waiving [its] sovereign immunity together with a claim ***falling within the terms of the waiver***." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (emphasis added). "[L]imitations and conditions upon which the Government consents to be sued must be ***strictly observed and exceptions thereto are not to be implied***." *Soriano v. United States*, 352 U.S. 270, 276 (1957) (emphasis added). *See Great W. Casinos*, 74 Cal.App.4th at 1420 ("tribe agreed to waive its sovereign immunity …but only in a narrowly defined situation"). Finally, tribal immunity applies to commercial as well as governmental activities: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or

be dismissed with prejudice.

D. Plaintiffs' Failure To Exhaust Their Tribal Remedies Independently Supports Affirmance; Exhaustion Of Tribal Remedies Is A Jurisdictional Prerequisite To Filing Suit In State Court

Plaintiffs were required to exhaust their Tribal remedies under the Tribe's Claims Ordinance before filing this suit. Their failure to do so deprived the Superior Court of jurisdiction. As noted above, federal law requires this Court to give full force and effect to the Claims Ordinance. *See* 28 U.S.C. § 1360(c).

1. Exhaustion of Tribal Remedies is Required.

California and federal case law requires plaintiffs to exhaust tribal remedies before seeking relief in a non-tribal court. *See Redding Rancheria v. Sup. Ct.*, 88 Cal.App.4th 384, 386, 391 (2001). *See also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1985); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989).[24]

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off a reservation." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

[24] Exhaustion of Tribal remedies is analogous to the exhaustion of administrative remedies, which California law also requires. *See Campbell v. Regents of University of California*, 35 Cal.4th 311, 321 (2005); *Los*

Exhaustion of tribal remedies is mandatory. *See Iowa Mutual*, 480 U.S. at 16 (petitioners "must exhaust available tribal remedies"); *Nat'l Farmers*, 471 U.S. at 857 ("exhaustion is required before ... a claim may be entertained by a [non-tribal] court."); *Burlington Northern*, 940 F.2d at 1245 ("The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory."). The tribal exhaustion requirement "functions as a prerequisite to a [non-tribal] court's exercise of its jurisdiction," *Burlington Northern*, 940 F.2d at 1245 (*citing Nat'l Farmers*, 471 U.S. at 857), and it is proper to dismiss a lawsuit solely based on the failure to exhaust tribal remedies. *See Stock West*, 873 F.2d at 1228; *Burlington Northern*, 940 F.2d at 1244-45.

The tribal exhaustion requirement applies in state court as well as federal court. *See United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992); *Redding Rancheria*, 88 Cal.App.4th at 390-91. The doctrine applies even if no claim is currently pending in a tribal court or agency, *see Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000), *Burlington Northern*, 940 F.2d at 1246, and

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Globos Corp. v. City of Los Angeles, 17 Cal.App.5th 627, 632-635 (2017). Exhaustion "is not a matter of judicial discretion but is a fundamental rule of procedure ... binding upon all courts," and is "a jurisdictional prerequisite to resort to the courts." *Abelleira v. Dist. Ct. App.*, 17 Cal.2d 280, 293 (1941); *see Johnson v. Loma Linda*, 24 Cal.4th 61, 70 (2000); *Lopez v. Civil Service Comm.*, 232 Cal.App.3d 307, 311 (1991) (exhaustion is jurisdictional).

"even though the contested claims are to be defined substantively by state or federal law." *Ninigret*, 207 F.3d at 31.

Requiring exhaustion of Tribal remedies supports the federal Indian "policy of supporting tribal self-government and self-determination …." *Nat'l Farmers*, 471 U.S. at 856. Exhaustion of tribal remedies also promotes the Tribe's "authority over reservation affairs" and prevents infringement upon tribal law-making authority. *Iowa Mutual*, 480 U.S. at 16.

2. The Tribe Has Enacted an Ordinance Establishing a Mandatory Claims Procedure That Covers Plaintiffs' Claims

The Tribe has enacted an Ordinance establishing a mandatory Tribal claims procedure, as well as one creating a Tribal Court. *See* Sansoucie Dec. ISO Dismissal ¶¶ 4-9 & Exs. C and E (2 AA 197-98, 282-90, 296-308). The Tribe's Claims Ordinance requires that:

> "***All legal and equitable claims*** against the Tribe, ***its officers, … or employees***, … sounding in tort, contract, or some other theory, ***shall*** be presented to the Tribal Council,[25] …, for review and adjudication, as a

[25] In *Santa Clara Pueblo*, the U.S. Supreme Court required exhaustion of tribal remedies provided by the Tribal Council. *See* 436 U.S. at 66 n.22. *See also Burlington Northern*, 940 F.2d at 1246 (exhaustion of remedies before tribal regulatory commission required in addition to exhaustion of remedies in tribal court). *Santa Clara Pueblo* held that "[n]onjudicial tribal institutions [such as the Tribal Council] have also been recognized as competent law-applying bodies." *Santa Clara Pueblo*, 436 U.S. at 66 (1978) (*citing Mazurie*, 419 U.S. 544). *See Norton*, 424 F.3d at 962; *Redding Rancheria*, 88 Cal.App.4th at 390 (hearing before a tribal council "which has the power to render a binding decision, presumably without the onerous and lengthy jury trial procedures and appeals available in

> prerequisite to suit thereon as further provided in this Chapter. No claims are exempt."

Sansoucie Dec. ISO Dismissal Ex. C (Chemehuevi Tribal Code §1.16.010) (emphasis added) (2 AA 286).[26]

Defendant Tribal Attorneys are covered by the Tribe's Claims Ordinance. The complaint acknowledges that Mr. Marston was "representing the Tribe" in the preparation, negotiation, and enforcement of the JVA. Complaint, ¶ 74 (1 AA 50); *see id.* ¶ 12 (1 AA 34) ("the Tribal Council insisted on using Marston" to draft the JVA). Mr. Marston was also representing the Tribe when he provided plaintiffs with the Notice of Violation, and when the Tribe terminated the JVA. *See* Wood Dec. ISO Dismissal ¶¶ 18-20 (1 AA 176); Sansoucie Dec. ISO Dismissal ¶¶ 14-16 & Exs. J (2 AA 199, 374-398). Defendants were working at all times under the Tribe's Contract for Legal Services. *See* Sansoucie Dec. ISO Dismissal ¶ 9 & Ex. G (2 AA 198, 313-325).

Thus, Mr. Marston acted in his capacity as Tribal Attorney throughout the negotiation, preparation, and subsequent enforcement and termination of the JVA. During these times he acted in his official capacity at the

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[California] civil court[]" is not "fundamentally unfair" simply because it "differ[s] … from the [Anglo] common law system").

[26] The Claims Ordinance also provides for appeals to the Tribal Court. *See* Sansoucie Dec. ISO Dismissal Ex. C (Chemehuevi Tribal Code §§ 1.16.10 & 1.16.130) (2 AA 286).

Tribe's direction and on its behalf. *See* Wood Dec. ISO Dismissal ¶¶ 18-20 (1 AA 176); Sansoucie Dec. ISO Dismissal ¶¶ 8-9, 11, 14-16 (2 AA 198-199); Marston Dec. ISO Venue ¶¶ 8-9, 11, 13-14 (1 AA 71-73); Marston Dec. ISO Dismissal ¶¶ 7, 11-21, 23 (1 AA 189-192). The position of Tribal Attorney is a formal governmental official, established under Tribal law. *See* Sansoucie Dec. ISO Dismissal ¶ 8 & Ex. B, § 3.02 (2 AA 198, 259-61).

As such, at all times relevant to the complaint's allegations, Mr. Marston acted as a Tribal official. *See* Wood Dec. ISO Dismissal ¶¶ 5, 20 (1 AA 173, 176); Marston Dec. ISO Venue ¶¶ 8-9, 11, 13-14 (1 AA 71-73); Marston Dec. ISO Dismissal ¶ 4-5, 7-8, 11-18, 23 (1 AA 189-192); Sansoucie Dec. ISO Dismissal ¶¶ 8-9, 11, 15-17 & Ex. B (Chemehuevi Tribal Code establishing Office of Tribal Attorney at Chapter 3.02) (2 AA 198-200, 259-260). There is no question that specially-appearing defendant Tribal Attorneys fall within the scope of the Tribe's Claims Ordinance.

The Tribe's Claims Ordinance applies to plaintiffs. The U.S. Supreme Court has held that a tribe has civil jurisdiction over "nonmembers ***who enter consensual relationships with the tribe*** or its members, through commercial dealing, ***contracts***, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (emphasis added) (citing *Williams*, 358 U.S. at 223; *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947, 950 (8th Cir.1905); and *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 152–154.

See also Merrion, 455 U.S. at 137 (tribe may regulate those who "avail themselves of the substantial privilege of carrying on business on the reservation").[27]

Thus, the Tribe has enacted a mandatory claims procedure that covers plaintiffs' claims.

3. The Court Must Give Full Force and Effect to the Tribe's Claims Ordinance.

As noted above, Congress has directed California State Courts to give full force and effect to Tribal laws such as the Claims Ordinance, unless such laws are inconsistent with California law: "Any tribal ordinance … adopted by an Indian tribe, … shall, if not inconsistent with any applicable civil law of the State, be given *full force and effect* in the determination of civil causes of action …." 28 U.S.C. § 1360(c) (emphasis added).

Here, the Claims Ordinance is not inconsistent with applicable State law. As noted above, California law generally requires exhaustion of administrative remedies, and specifically requires exhaustion of tribal

[27] Indeed, tribal jurisdiction is presumed when, as here, the subject underlying the lawsuit arise on tribally-owned land. *See Nevada v. Hicks*, 196 F.3d 1020, 1027 (9th Cir. 1999) (*citing Williams*, 358 U.S. at 222); *Burlington Northern*, 940 F.2d at 1244 (*citing Iowa Mutual*, 480 U.S. at 18; *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992)). The question of whether a dispute "arise[s] on the reservation" and thus implicates "reservation affairs" itself "presents a colorable question that must first be decided by the [t]ribal [forum]." *Landmark Golf v. Las Vegas Paiute Tribe*, 49 F.Supp.2d 1169, 1175-76 (D. Nev. 1999).

remedies. With respect to claims against governmental entities and officials, the Chemehuevi Tribe's law analogous to the requirements for presenting claims against public entities in California contained in Government Code §§ 900–935.6.

4. Plaintiffs Failed to Exhaust Their Tribal Remedies

Under the Claims Ordinance, any claim sounding in "tort, contract or some other theory" against a Tribal officer must be filed within 180 days from the date that the cause of action accrued, or the claim is forever barred. Sansoucie Dec. ISO Dismissal Ex. B (Chemehuevi Tribal Code §1.16.090) (2 AA 288). Plaintiffs could have submitted their claim for review within the 180-day time period commencing on September 9, 2020 (the date on which plaintiffs claim their claim accrued). *See* Complaint ¶ 35 (1 AA 40). They failed to do so. *See* Sansoucie Dec. ISO Dismissal ¶ 7 (2 AA 197-198).

Plaintiffs do not even allege, much less prove, compliance with the Tribe's Claims Ordinance, nor do they plead grounds for any exception to the exhaustion rule. *See Shuer v. County of San Diego,* 117 Cal.App.4th 476, 482 (2004) (holding court may dismiss action "based on the failure to adequately plead an exhaustion of administrative remedies"). Thus, plaintiffs failed to exhaust the Tribal remedy available to them, and the statutory time period for filing a claim with the Tribe has run. *See id.* & Ex. C (Chemehuevi Tribal Code §1.16.

Because the plaintiffs failed to pursue – much less exhaust – the remedies available under the Tribe's Claims Ordinance, the tribal exhaustion doctrine precludes California Courts from exercising jurisdiction over their claims. *See Redding Rancheria*, 88 Cal.App.4th at 386, 391; *Iowa Mutual*, 480 U.S. at 16 (1987); *Nat'l Farmers*, 471 U.S. at 857; *Burlington Northern*, 940 F.2d at 1244; *Stock West*, 873 F.2d at 1228.

The Court should affirm the Superior Court's dismissal on the independent grounds that the Tribe's Claims Ordinance is a binding prerequisite to suit, and plaintiffs failed to exhaust their Tribal administrative remedies, depriving this Court of jurisdiction.

E. The Superior Court Properly Granted Defendants' Motion For Attorneys' Fees

Plaintiffs appealed the Superior Court's grant of defendants' motion for statutory attorney's fees based on their motion to change venue, under CCP section 396(b). Mr. Bendapudi claims he acted in good faith within the meaning of the statute, based largely on the JVA's connection to the Tribe's Reservation in San Bernardino County. Mr. Bendapudi is wrong.

1. Code of Civil Procedure § 396b(b) Authorized the Fee Award

While ordinarily each party pays its own attorney fees, fees may be shifted pursuant to statute or contract. *See* CCP § 1021. Here, CCP section 396b(b) gives the trial court discretion to:

> "order the payment to the prevailing party of reasonable … attorney's fees incurred in making … the motion to transfer

> [venue]…. In determining whether that order for … fees shall be made, the court shall take into consideration (1) whether an offer to stipulate to change of venue was reasonably made and rejected, and (2) whether the … selection of venue was made in good faith given the facts and law the party making the motion or selecting the venue knew or should have known. As between the party and his or her attorney, those expenses and fees shall be the personal liability of the attorney not chargeable to the party."

The Superior Court was well within its discretion in finding that both statutory factors were satisfied.

2. Plaintiffs Refused to Stipulate to Change Venue

Mr. Bendapudi unreasonably rejected defendants' offer to stipulate to a transfer of venue. *See* Lawrence Dec. ISO Fees ¶ 10 and Exs. C & D (5 AA 1150, 1161-1169). Defendants' counsel explained to Mr. Bendapudi that "defendants have a right to be sued in the venue of their residence, which for defendant Marston, Rapport, and Rapport and Marston, is Mendocino County. Defendant Lathouris, who also does not reside in San Bernardino County, has consented to this venue change." *Id*. Ex. D (5 AA 1167-68). Counsel also explained that "should you decline to consent to this venue change, and the Court finds it proper, you may be liable for defendants' costs and attorney's fees in bringing a motion to change venue. *See* Cal. Code Civ. Proc. § 396b(b)." *Id.* 5 AA 1168.

Thus, Mr. Bendapudi was given both notice and an opportunity to stipulate to the venue transfer before defendants filed the motion to change venue. Stipulating would have spared defendants the time and expense of

preparing the motion to change venue and reply brief in support and preparing for and appearing at the hearing thereon, and would also have spared the Superior Court the time and trouble of preparing for the hearing thereon and adjudicating the motion. *See* Lawrence Dec. ISO Fees ¶ 10 & Exs. C & D (5 AA 1150, 1161-1169); Marston Reply Dec. Fees ¶ 11 (6 AA 1260).

Instead, plaintiffs' counsel unreasonably refused the stipulation, called defendants' intended motion to change venue "frivolous," and then offered baseless arguments in opposition to the motion to change venue. Lawrence Dec. ISO Fees Ex. D (5 AA 1165); *see also* Plaintiffs' Opposition to Fee Motion, *passim* (5 AA 1189-97). Thus, the first statutory factor – "whether an offer to stipulate to change of venue was reasonably made and rejected" -- weighs heavily in favor of affirming the lower court's award of attorneys' fees. CCP § 396b(b).

3. Plaintiffs' Counsel Knew or Should Have Known that Venue Was Improper in San Bernardino County

Turning to the second statutory factor, plaintiffs' counsel "knew or should have known" that venue was not proper in San Bernardino County. CCP § 396b(b). The "statute requires the court to assess whether the attorney acted in good faith ***after having first skillfully evaluated the facts and reviewed applicable statutes and case law***." *Metzger v. Silverman*, 62 Cal.App.3d Supp. 30, 38 (1976) (emphasis added). "[A] lawyer is expected

to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may be readily found by standard research techniques." *Id.* at 39. Defendants note that "the rules respecting venue are well settled. An attorney who ***fails to review the applicable case law, and relevant statutes***, before filing an action . . . runs a ***substantial risk*** that attorney fees will be assessed against him." *Id*. at 39-40 (emphasis added).

Plaintiff, a California attorney with 13 years of experience, knew that three of the four defendants – Mr. Marston, Mr. Rapport, and Rapport & Marston – resided in Mendocino County and that defendant Lathouris resided in Clark County Nevada. *See* Marston Reply Dec. Fees ¶ 11 (6 AA 1260). Moreover, plaintiff Mr. Bendapudi represented plaintiff CCA in the negotiations of the JVA, which occurred in Mr. Marston's law office in Mendocino County and over the telephone with Mr. Marston participating from that same office. *See* Marston Reply Dec. Fees ¶ 6 (6 AA 1258); Lawrence Dec. ISO Fees ¶ 10 & Exs. C & D (5 AA 1150, 1161-1169).

Before plaintiffs' counsel filed the complaint, and again when defendants' counsel requested a stipulated venue change, plaintiffs' counsel had a duty "to carefully investigate the facts with a view of determining which court is proper for the trial of the action." *Metzger*, 62 Cal.App.3d. Supp. at 39. Mr. Bendapudi also knew or should have known that opposing

the change of venue "runs a substantial risk that attorney fees will be assessed against him." *Id*. at 39-40. *See* Lawrence Dec. ISO Fees ¶ 10 & Ex. C (5 AA 1150, 1162).

As an experienced, licensed California attorney, Mr. Bendapudi was "expected to possess knowledge of those plain and elementary principles of law" pertaining to proper venue and "discover those additional rules of law ... readily found by standard research techniques." *Metzger*, 62 Cal.App.at 39. Mr. Bendapudi could have evaluated whether "the law on [this] particular subject is doubtful or debatable," or whether "the rules respecting venue are well settled." *Id*. at 39-40.

Instead, Mr. Bendapudi refused to stipulate to the venue change. In opposing the venue motion, Mr. Bendapudi argued for an exception to CCP § 395(a)'s general rule that venue is proper where defendants reside or where the alleged conduct occurred, but he failed to produce any evidence or legal authority in support of his argument. *See* Specially-Appearing Defendants' Reply In Support of Motion to Change Venue ("Reply Fees") at pp. 4-5, 5 AA 1247-48.

Mr. Bendapudi also opposed changing venue, claiming again without any support whatsoever that defendants were somehow California State public officers pursuant to CCP § 393(b). *See* Reply Fees, pp. 6-7, 5 AA 1249-50. Mr. Bendapudi provided no case law in support of that argument, which itself was inconsistent with his complaint. *See* Reply

Fees, p. 6, 5 AA 1249. Reasonably diligent research would have revealed that the definition of a California State public officer *cannot* include a Tribal official due, among other things, to limits on State civil jurisdiction over Indian Tribes. *See* Reply Fees, pp. 7-8, 5 AA 1250-51. No reasonable attorney could conclude that a Tribal official is, by virtue of that status alone, a California State public officer within the meaning of CCP § 393(b). *See Metzger*, 62 Cal.App.at 38.[28]

Mr. Bendapudi also argued below that venue was proper in San Bernardino County because the underlying JVA involved his alleged rights to operate a cannabis business on real property on the Chemehuevi Indian Reservation in San Bernardino County. *See, e.g.,* Plaintiffs' Opp'n to Motion to Change Venue at p. 2 (2 AA 405) (opposing specially-appearing defendants' motion to change venue in part because "Plaintiffs' [cannabis] project … would have taken place in San Bernardino County [on the Tribe's Reservation]"); *id*. at p. 3 (2 AA 406) (again referencing plaintiffs' cannabis project "in the County of San Bernardino, where the entire land development and leasing/subleasing project was based"); *id.* at p. 4 (2 AA 407) ("The site of Plaintiffs' subleasing business for this project worked up by Marston is located in San Bernardino County"); *id.* at p. 6 (2 AA 409)

[28] Of course, it is possible that a tribal official could also independently be a State official. For example, James Ramos, the first Indian elected to the California Legislature, previously served as Chairman of the San Manuel Band of Mission Indians. *See* https://a40.asmdc.org/biography.

(arguing for venue based on the alleged "injury to Plaintiffs' business and land rights that are located in San Bernardino County" and that "Plaintiffs do not have any land or commercial interests in Mendocino County").

Plaintiffs also opposed the venue motion below, in reliance on the so-called "main relief" rule:

> "Applying the main relief rule to the present case, it is clear that Plaintiffs' lawsuit pertains to a ***real properly right***, because plaintiffs are suing Defendants for contractual breaches and legal malpractice that resulted in ***Plaintiffs' land rights under the JVA*** to be extinguished, destroyed, or at least severely compromised in San Bernardino County. (*See*, Bendapudi Dec. at ¶ & ¶ 13). Plaintiffs hired Marston and his co-defendants to draft an enforceable joint venture agreement that was supposed to have guaranteed Plaintiffs the right to ***develop and sublease up to 2,000 acres of land in San Bernardino County*** for a term of 40 years."

Id. at p. 7 (2 AA 410) (emphasis added).

Reasonably diligent research would have revealed the well-settled law that State courts lack jurisdiction over federal Indian trust lands. *See* Specially-Appearing Defendants' Reply ISO Venue, pp. 9-10 (2 AA 470-71). *See also* 28 U.S.C. § 1360(b).[29] No reasonable attorney, having researched the matter, would proffer this argument in opposing change of venue. *See Metzger*, 62 Cal.App.at 38.

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[29] 28 U.S.C. § 1360 (b) provides in relevant part that:
"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real … property, … belonging to … any Indian tribe … that is held in trust by the United States …; or shall confer jurisdiction upon the State to adjudicate … the … right to possession of such property or any interest therein."

Nothing in Mr. Bendapudi's opposition to the fee motion below, or in his opening brief here, demonstrates that he acted in "good faith ***after having first skillfully evaluated the facts and reviewed applicable statutes and case law***." *Metzger*, 62 Cal.App.3d Supp. at 38 (emphasis added). To the contrary, Mr. Bendapudi's arguments demonstrate that he "***fail[ed] to review the applicable case law, and relevant statutes***, before filing an action" and again after defendants' counsel apprised him of his error in filing in San Bernardino. *Id*. at 39-40 (emphasis added).

On appeal, Mr. Bendapudi continues to argue that San Bernardino was the proper venue for this case because the JVA was signed by the Tribe and plaintiffs on the Tribe's Reservation in San Bernardino. *See* Opening Brief at 36. Plaintiffs claim that they had a "legal services agreement with Marston" and that it "was a contract that was to be performed in San Bernardino County." *Id.* However, as noted above, the only legal services contract in the record is the Tribe's contract with Mr. Marston. *See* Sansoucie Dec. ISO Dismissal ¶ 9 & Ex. G (2 AA 198, 313-325). Defendants' legal work on the JVA was conducted in Mendocino County. *See* Marston Dec. ISO Venue *passim* (1 AA 70-73).

The fact that the cannabis enterprise contemplated by the JVA was to be performed on the Tribe's Reservation in San Bernardino is irrelevant to the question of venue with respect to the negotiation and drafting of that agreement. Plaintiffs' attempts to link the JVA's drafting and performance

to the Reservation simply serve to highlight the Tribe's interests in the case, and the Superior Court's decision to dismiss based on the Tribe being a necessary and indispensable party.

For these reasons, the Superior Court did not abuse its discretion in granting specially-appearing defendants' fee motion.

V. CONCLUSION

With respect to plaintiffs' appeal, specially-appearing defendants respectfully request that the Court affirm the Superior Court's grant of their motion to quash and dismiss, pursuant to CCP section 418.10(a)(1). Defendants also request that the court affirm the Superior Court's Order granting the award of attorney's fees under Code of Civil Procedure section 396b(b), subject to defendants' cross-appeal, which follows below.

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VI. SPECIALLY-APPEARING DEFENDANTS' OPENING BRIEF ON CROSS-APPEAL FROM AWARD OF ATTORNEYS' FEES

A. Statement Of Facts On Cross Appeal

The undersigned defendants' counsel was retained in this case on Wednesday, September 22, 2021. *See* Lawrence Dec. ISO Motion for Attorney's Fees ("Fees") ¶ 10 (5 AA 1150). That same day, defendants' counsel asked plaintiffs' counsel Mr. Bendapudi via email to extend the courtesy of a short two-week extension of time to file the defendants' response to the Complaint, given that defendants' counsel was retained on that same date and that the first defendant's response to the complaint was due the following Tuesday, September 28, 2021. A true and correct copy of that September 22, 2021, email to Mr. Bendapudi requesting a two-week extension of time to respond is Exhibit A to the Lawrence Dec. ISO Fees. *See id.* Ex. A (5 AA at 1154).

Mr. Bendapudi responded with an unprofessional, rambling, and slanderous email that evening, refusing the requested extension of time. *See* Lawrence Dec. ISO Fees Exhibit B (5 AA at 1156-57).[30]

[30] Mr. Bendapudi wrote "I don't care if the judge is going to view my refusal to grant an extension negatively, when he reviews the facts of this case and realizes what a scumbag Lester is, he will understand why I am refusing to give y'all an extension." 5 AA 1157. Mr. Bendapudi offered this advice: "I also suggest that you seriously reconsider representing these defendants. They are terrible, evil people, and they will screw you, just like how they've screwed everyone else who's ever had the misfortune of entering their orbit."

On Sunday, September 26, 2021, defendants' counsel sent Mr. Bendapudi a second email asking him to stipulate on plaintiffs' behalf to a change of venue to Mendocino County, outlining the reasons why venue was not proper in San Bernardino County, and why it was proper in Mendocino County. That email expressly advised Mr. Bendapudi that "should you decline to consent to this venue change, and the Court finds it proper, you may be liable for defendants' costs and attorney's fees in bringing a motion to change venue. *See* Cal. Code Civ. Proc.§ 396b(b)." *See* Lawrence Dec. ISO Fees Exhibit C (5 AA 1162). Mr. Bendapudi responded the next day with another rambling, argumentative email refusing to stipulate to the requested change of venue. *See* Lawrence Dec. ISO Fees Exhibit D (5 AA 1165-67).

Because Mr. Bendapudi refused to extend defendants' counsel the courtesy of a brief extension of time to respond, and because Mr. Bendapudi also refused to stipulate to the clearly warranted change of venue, defendants' counsel prepared the motion to change venue, and the motion to quash and dismiss simultaneously, over the weekend of September 25-26, and Monday September 27th, and submitted both motions for filing with the Superior Court on September 28, 2021.

Bizarrely, Mr. Bendapudi emailed defendants' counsel at 3:44 a.m. on September 28, 2021, the same day defendants' responsive pleadings were due, inexplicably purporting to change his mind about the two-week

extension of time requested the previous Wednesday. A true and correct copy of Mr. Bendapudi's 3:44 a.m. email on 9/28/2021 is Exhibit E to the Lawrence Dec. ISO Fees. *See* 5 AA 1171-72. By that time, specially-appearing defendants' motion to change venue, along with the motion to quash and dismiss, together with all supporting pleadings, declarations, and exhibits, had already been researched, drafted, edited, and compiled, and thus defendants proceeded that day with submitting those pleadings to the Superior Court for filing. *See* Lawrence Dec. ISO Fees ¶ 11 (5 AA 1150-51; 7 AA 1083-1177) (fee motion and supporting pleadings).

B. Procedural History Of Defendants' Fee Motion

The procedural history of defendants' motion for attorney's fees is set forth above at section II(C), at page 25 of this brief.

C. Standards Of Review

The standards of review applicable to the fee motion are set forth above at section III(C), at page 27 of this brief.

D. Discussion

1. The Superior Court Erred As A Matter Of Law By Applying The Wrong Standard For Determining A Reasonable Hourly Rate.

It is well settled that the "reasonable hourly rate is ***that prevailing in the community*** for similar work." *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.,* 226 Cal.App.4th 26, 71 (2014) (*quoting PLCM Group,*

Inc. v. Drexler, 22 Cal.4th 1084, 1095 (2000)) (emphasis added). The relevant "community" is where the court is located. *Altavion*, 226 Cal.App.4th at 71. While the court below recited this correct standard, it did not apply it. *See* Fee Order at 7 (7 AA 1567).

Based upon this legal standard, the hourly rates defendants sought were reasonable because, as explained *inter alia* by David Dehnert, Esq.'s declaration, they were well within the accepted market rates charged by attorneys with comparable experience in Southern California. *See* Declaration of David Dehnert In Support of Motion for Attorney's Fees ¶¶ 4-9 (5 AA 1099-1100). *See also City of Oakland v. Oakland Raiders,* 203 Cal.App.3d 78, 82 (1988) (affirming attorney's fee award based on rates charged by the top law firms in the Bay area).

Importantly, plaintiffs' counsel failed to submit *any* counter-declarations or any other evidence putting the facts supporting defendants' motion in dispute. Based upon Mr. Lawrence and Mr. Marston's qualifications and years of experience practicing law – over 30 and 40 years respectively there is no doubt that their regular hourly rate of $550.00 per hour was more than reasonable and well within the rates charged by lawyers with similar experience in southern California. For example, the record below is undisputed that Mr. Lawrence's hourly rate in 2013 as a partner in the Indian Law Practice Group at the firm of Holland & Knight

LLP in Los Angeles was $595. *See* Lawrence Dec. ISO Fees at ¶ 9 (5 AA 1149).

The cases are in accord. Nearly nine years ago, the U.S. District Court for the Central District of California "conclude[d] that reasonable rates to attract competent civil rights counsel to do similar work in this case are more in line with the following: $600-$700 for senior partners or solo practitioners with 30+ years of experience, with $700 reserved for those who have invested substantial energy and time in the case . . . *See, e.g., R.S. v. City of Long Beach*, No. SACV 11-536-AG(RNBX), 2013 U.S. Dist. LEXIS 199979 (C.D. Cal. Jan. 31, 2014) (awarding $550 per hour to attorney with 33 years of extensive civil rights litigation experience) *aff'd* 637 Fed. Appx. 1008 (9th Cir. 2016) …" *Antuna v. City of L.A.*, No. CV 14-5600-MWF (PLAx), 2016 WL 11743321, 2016 U.S. Dist. LEXIS 189152, at * 10 (C.D. Cal. Mar. 8, 2016).

Here, the Superior Court erred as a matter of law by using the *wrong standard* to determine a reasonable hourly rate. Rather than using the reasonable hourly rate in the community as a benchmark, the Superior Court instead focused on its guess as to the *actual cost* to defendants. The Court wrote that "the rate attorney Lawrence ***charged*** Defendants would be his reasonable hourly rate." Fee Order at 7:16-17 (7 AA 1567) (emphasis added).

The lower court expressed a "concern" that because the rate actually charged was redacted from the timesheets submitted in support of the motion, the requested regular rate might not be reasonable. *See id. No evidence or law* supported the lower court's decision on this issue. In so doing, the lower court functionally adopted a "cost-plus approach" to setting an hourly rate, relying on *Trope v. Katz*, 11 Cal.4th 274 (1995). *See* Order at 7 (7 AA 1567).

The California Supreme Court has rejected that approach.

In *PLCM Group v. Drexler*, 22 Cal.4th 1084 (2000), the Court held that setting a reasonable hourly rate in a fee award based on what "a litigant '***actually pays*** or becomes liable to pay in exchange for legal representation'" is "***inapposite***". *Id.* at 1097 (emphasis added). The Court noted that "[t]he question of how to measure attorney fees was not raised in *Trope,* which expressly involved only the 'narrow issue' whether [pro se] attorney litigants could recover attorney fees." *Id.* The Court explained that *Trope's* reference to fees as "the sum a litigant 'actually pays or becomes liable to pay' for legal representation ***was not intended*** to imply that fees can be recovered only when, and to the extent that, a litigant incurs fees on a fee-for-service basis, a question not raised therein." *Id.* at fn. 5 (emphasis added).

Instead, the Court held that "the ***prevailing market rate*** for comparable legal services in San Francisco, where counsel is located" was

the "***proper standard*** in calculating fees" under a statutory fee provision. *Id.* at 1096 (emphasis added).

Below, specially-appearing defendants offered substantial evidence supporting the reasonableness in the community of counsel's regular hourly rate of $550. *See* Denhert Dec. ISO Fees ¶ 6 (5 AA 1100); Marston Dec. ISO Fees ¶ 12 (5 AA 1107-08); Lawrence Dec. ISO Fees ¶ 9 (5 AA 1149). Plaintiffs offered *no countervailing evidence*. The amount of attorney's fees in defendants' moving papers was calculated according to the "lodestar" method and that figure is ***presumptively reasonable***. *See Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010) (holding that the lodestar "presumption is a 'strong' one.").

The Superior Court failed to identify any basis in law or fact, and no evidence in the record, for its reduction in the hourly rate from $550 to $350. Thus, the Superior Court's Order that counsel's regular hourly rate of $550 "is not overly unreasonable" should have resulted in an award of fees at that rate. Fee Order at 7 (7 AA 1567).

For these reasons, the Superior Court erred as a matter of law in not awarding defendants' counsel the admittedly reasonable hourly rate of $550 an hour. In addition, the lower court's order was an abuse of discretion on this issue, as it was wholly unsupported by any evidence in the record, case law, or any other apposite reasoning.

2. The Court Erred By Denying Fees to Mr. Lester Marston and Mr. Nicholas Marston

The Superior Court refused to award any fees at all to Lester Marston and Nicholas Marston, based on case law holding that *parties* who are also lawyers, and who *represent themselves in pro per,* are not entitled to fees. *See* Fee Order at 7 (7 AA 1567) (*citing Trope*, 11 Cal.4th at 280, 292; *Leiper*, 69 Cal.App.5th at 282). The lower court quoted *Leiper*: "[A]n ***attorney who represents only himself*** and does not pay or become liable to pay consideration in exchange for legal representation may not recover attorney fees under the equitable common fund doctrine …." *Id.* (emphasis added).

Here, Nicholas Marston is not a defendant in the case. *See* Nicholas Marston Dec. ISO Fees at ¶¶ 1-3 (5 AA 1174-75). Because he is neither a licensed attorney (yet) nor a defendant, none of the case law cited in the Fee Order applies to Nicholas Marston's work on the venue motion as a law clerk, and fees should have been awarded to him on this basis alone for his work.

Further, neither Lester Marston nor Nicholas Marston represented themselves or any of the defendants in this case. *Trope* and *Leiper* are thus inapposite. In fact, the defendants – Lester Marston, David Rapport, Kostan Lathouris, and Rapport & Marston – along with their insurance carrier, retained the undersigned legal counsel to represent them in this

case. Neither Messrs. Marston "represent[ed] only himself" in this case; indeed, neither of them represented any defendant herein at all. *Leiper*, 69 Cal.App.5th at 282.

As noted above, the undersigned counsel was retained less than one week before defendants' response to the complaint was due. *See* Lawrence Dec. ISO Fees at ¶ 10 and Exs. A & B (5 AA 1150, 1154, 1156-57). Plaintiffs' counsel refused to grant a first, modest two-week extension of time to respond. *See id.* at ¶ 10, Ex. B (5 AA 1156). The undersigned is a sole practitioner, with a single of-counsel who was not available at the time the motion to change venue was prepared. *See* www.franklawrence.com. Thus, it was essential under the circumstances that the undersigned receive assistance in preparing the motion to change venue.

The undersigned sought assistance from Messrs. Marston because their work is reliable, and they had knowledge of the case. Without their assistance, the undersigned would have had to engage other contract counsel to assist in preparing the motion to change venue and motion to quash and dismiss, if any could be retained, within the very short time frame available. Messrs. Marston provided the necessary assistance at the request of the undersigned counsel, which work both reduced the defendants' legal expenses and precluded Messrs. Marston from doing other paying work. Had plaintiffs granted the requested brief extension of time, as nearly all reasonable lawyers generally do, the undersigned counsel

would have had sufficient time to perform all the legal work necessary on his own, and billed defendants for it.

Neither *Trope* nor *Leiper* address the availability of fees under these circumstances. The lower court's Order is void of any law or reasoning supporting its denial of fees for the necessary and reasonable work done by Messrs. Marston. Awarding fees for their work would further the purposes of Code of Civil Procedure section 396b(b) of encouraging lawyers to exercise reasonable diligence prior to filing lawsuits in the wrong venue. Had plaintiffs' counsel done so here, it would have saved the Superior Court's limited resources, as well as those of defendants.

For these reasons, specially-appearing defendants respectfully request that the Court: (1) reverse that potion of the lower court's fee order arbitrarily reducing the undersigned counsel's reasonable hourly rate; (2) order fees awarded at the requested rate; and (3) reverse the lower's court's arbitrary denial of any fees whatsoever for work done by Messrs. Nicholas and Lester Marston.

E. Conclusion

For all these reasons, specially-appearing defendants respectfully request that the Court affirm the Superior Court's award of fees, but modify that order to correct counsel's hourly rate, and award fees for the work performed by Messrs. Marston.

Specifically, specially-appearing defendants respectfully request that the Court:

1. Reverse the Superior Court's Order reducing specially-appearing defendants' counsel's regular hourly rate of $550 to $350, and award defendants' counsel fees at the correct rate for the number of hours found reasonable by the Superior Court's Order, 25.77 hours (*see* 7 AA 1568), for a fee award for defendants' counsel of $14,173.50.
2. Reverse the Superior Court's Order denying any fees whatsoever for the legal work performed in support of specially-appearing defendants' motion to change venue by Lester Marston and Nicholas Marston. Lester Marston's regular hourly rate is also $550, and the undisputed evidence submitted showed he worked 59.16 hours on the venue motion, for a fee award of an additional $32,538. Nicolas Marston's regular hourly rate is $150, and the undisputed evidence submitted showed he worked 3.06 hours on the venue motion, for a fee award of an additional $459.

Dated: December 5, 2022 LAW OFFICE OF FRANK LAWRENCE

By: /s/ Frank Lawrence
Frank Lawrence, Esq.
Attorney for Specially-Appearing Defendants, Respondents, and Cross-Appellants

CERTIFICATION OF WORD COUNT

I certify that the text of this brief, as counted by Microsoft Word, consists of 24,378 words, including footnotes, but excluding the table of contents, table of authorities, this certificate, the certificate of interested parties, signature blocks, and the attached proof of service.

Dated: December 5, 2022 LAW OFFICE OF FRANK LAWRENCE

By: /s/ Frank Lawrence
Frank Lawrence, Esq.
Attorney for Specially-Appearing Defendants, Respondents, and Cross-Appellants

PROOF OF ELECTRONIC SERVICE (Court of Appeal)	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
Case Name: California Capitalism Associates, LLC et al. v. Marston, et al. Court of Appeal Case Number: E078759 Superior Court Case Number: CIV SB 2121814	

1. At the time of service I was at least 18 years of age.
2. a. My ☐ residence ☒ business address is *(specify)*:
   Law Office of Frank Lawrence, 578 Sutton Way, No. 246, Grass Valley, CA 95945
   b. My electronic service address is *(specify)*: frank@franklawrence.com
3. I electronically served the following documents *(exact titles)*:
   COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF
4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: Ravi Bendapudi
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   California Capitalism Associates, LLC, and Ravi Bendapudi
   b. Electronic service address of person served: Ravi@GanjaLaw420.com
   c. On *(date)*: December 5, 2022
   ☐ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

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

Date: December 5, 2022

Frank Lawrence
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF NEVADA)

I am a resident of the State of California, over the age of 18 and not a party to the within action. My business address is 578 Sutton Way, No. 246, Grass Valley, CA 95945.

On December 6, 2022, I caused the foregoing document described as COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF to be served on the interested parties in this action, listed below, by the follow method:

[] FACSIMILIE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications cover Page(s) on this date before 5:00 p.m.

[] ELECTRONIC MAIL - by transmitting via e-mail the document(s) listed above to the e-mail addres(es) set forth below.

[x] MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Grass Valley, California addressed as set forth below.

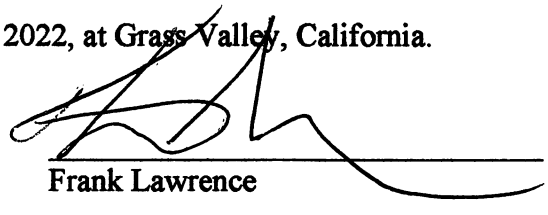
[] PERSONAL SERVICE - by causing personal delivery the document(s) listed above to the person(s) at the address(es) set forth below via One Legal.

[] OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day deliver to the person(s) at the address(es) set forth below via UPS.

[] (FEDERAL) I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

Hon. Donald Alvarez
Superior Court of California
County of San Bernardino
San Bernardino District – Civil Division
247 West Third Street
San Bernardino, CA 92415-0210

Executed on December 6, 2022, at Grass Valley, California.



Frank Lawrence