No. 21-

IN THE

Supreme Court of the United States

JAMES ACRES,

Petitioner,

v.

LESTER MARSTON *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lewis v. Clarke* 137 S.Ct. 1285 (2017) this Court explained tribal officials sued in their personal capacities could avail themselves of personal immunity defenses. But *Lewis* did not address the nature of the personal immunities available to tribal officials.

Below, a California Court of Appeal synthesized *Lewis* and California common law to hold absolute prosecutorial immunity protects the conduct of attorneys pursuing civil litigation on behalf of a tribal commercial enterprise. While the result flows naturally from California's common-law, it is anathema to this Court's absolute immunity jurisprudence.

The question presented is: What personal immunities are available to tribal officials?

PARTIES TO THE PROCEEDING BELOW

Petitioner James Acres was the plaintiff/appellant below.

Respondents "The Law Offices of Rapport & Marston," David Rapport, Lester Marston, Darcy Vaughn, Kostan Lathouris, Cooper DeMarse, Ashley Burrell, Boutin Jones, Inc., Michael Chase, Daniel Stouder, Amy O'Neill, Janssen Malloy LLP., Megan Yarnall, Amelia Burroughs, Arla Ramsey, Thomas Frank, and Anita Huff were all defendant/appellees below.

CORPORATE DISCLOSURE

Petitioner Acres is a natural person.

RELATED CASES

Acres (James) v. Marston (Lester), No. S272460, Supreme Court of California. Petition for review denied February 23, 2022.

James Acres v. Lester John Marston; et al., No. C089344, Third District Court of Appeal of the State of California. Judgment entered November 18, 2021.

James Acres v. Lester John Marston; et al., No. 34-2018-0236829, Superior Court of California for the County of Sacramento. Judgment entered on February 11, 2019.

There are no other directly related cases within the meaning of Rule 14.1(b)(iii).

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STATUTES AND OTHER AUTHORITIES:

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The California Court of Appeal's published opinion is reported at 72 Cal.App.5th 417. App.2a-52a.

The order from the California Superior Court is unreported. App.53a-81a.

STATEMENT OF JURISDICTION

The California Supreme Court denied a petition for review on February 23, 2022. App.1a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION

The Indian Commerce Clause provides, in relevant part, that:

> "The Congress shall have the power to … regulate commerce … with the Indian tribes."

U.S. Const. Article I Section 8.

STATEMENT OF THE CASE

This petition describes how, by applying state law instead of federal law, a California court of appeal found attorneys working on behalf of a tribal casino were protected by absolute prosecutorial immunity.

A. Factual Background

The Blue Lake Rancheria is a federally recognized tribe which operates the Blue Lake Casino. App.4a. Rapport & Marston is an association of attorneys that provides various legal services to Blue Lake and its casino. App.8a. When Blue Lake Casino sued petitioner and his company in Blue Lake Tribal Court, Marston presided as judge, even though he was simultaneously working as an attorney for Blue Lake Casino. App.5a. Attorneys from Rapport & Marston aided Judge Marston in presiding over the tribal court proceeding. App.8a. Attorneys from Rapport & Marston were also alleged to have performed "legal work for the Casino" in the tribal court proceeding. App.39a.

Petitioner brought two federal lawsuits to enjoin the tribal court proceedings. App.5a-6a. Attorneys from Rapport & Marston aided Blue Lake Casino in defending against these lawsuits. App.8a. While Petitioner did not succeed in enjoining tribal court jurisdiction in either case, in the second case the district court ordered Judge Marston to produce his billing records. App.6a. Ultimately, Judge Marston recused himself and was replaced in the tribal court proceeding by Justice Lambden, a retired justice from the California Court of Appeals. App.6a. Shortly thereafter, Justice Lambden granted summary judgment to petitioner, and the Blue Lake Casino dismissed the remaining causes of action against petitioner's company. App.6a.

B. Procedural History

Petitioner filed this present action in 2018, bringing causes of action for wrongful use of civil proceedings and

breach of fiduciary duty in Sacramento County Superior Court. App.7a-9a. The superior court held sovereign immunity barred petitioner's action in its entirety. App.10a. Alternatively, the superior court also held absolute judicial immunity barred suit against Judge Marston, his law clerks, and the tribal court clerk. App.10a.

Acres appealed, and the California Court of Appeal reversed as to sovereign immunity, holding that under the "remedy sought" test established by this Court in *Lewis v. Clarke,* 137 S.Ct. 1285 (2017), because no remedy sought by petitioners could bind Blue Lake's policy or property, sovereign immunity was not implicated. App.16a-29a. The Court of Appeal agreed with the superior court, however, that several respondents were entitled to judicial immunity.[1] App.30a-38a. The Court of Appeal also held, in the first instance, that several respondents[2] were "entitled" to absolute personal immunity[3] "for their alleged work on behalf of the Casino." App.39a-49a.

Acres now seeks review, arguing the Court of Appeal erred by applying state law instead of federal law in determining which personal immunities were available to respondents.[4]

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1. Respondents Judge Marston, Huff, DeMarse, Burrell, Vaughn, and Lathouris.

2. Respondents Rapport & Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris.

3. The Court of Appeal described the absolute immunity as a "prosecutorial or similar immunity." App.xxx.

4. About a year after petitioner filed his state court lawsuit, petitioner's company brought a similar lawsuit against the same

C. Preservation of Federal Question

Respondents asserted absolute prosecutorial and judicial immunity in both the superior court and on appeal. Petitioner opposed respondents in both courts, arguing from this Court's precedent. Petitioner specifically preserved the issue of whether assertions of prosecutorial or judicial immunity by tribal officials present questions of federal law in his petition for review to the California Supreme Court.

REASONS FOR GRANTING THE PETITION

I. Review is necessary to establish a framework for evaluating claims to personal immunity by individuals acting on behalf of tribal interests.

Both tribal fortunes and governments are flourishing in modern America. Tribal commerce has grown substantially over the past several decades and this has sometimes created disputes between tribal enterprises and non-members. However, because this Court extended tribal sovereign immunity to protect tribal commercial

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respondents, with an additional RICO cause of action. Petitioner joined that suit as to the RICO cause of action. That federal lawsuit had a similar procedural history, mainly differing in that, on appeal, the Ninth Circuit did not reach respondents' assertions of prosecutorial immunity. A petition for writ of certiorari from the Ninth Circuit's opinion is currently pending before this Court as Case No. 21-1255, and that petition focuses on the scope of federal judicial immunity. Significantly, while both the Ninth Circuit (*Acres Bonusing Inc. v Marston,* 17 F.4th 901, 907 fn.1) and the California Court of Appeal (App.10a-11a) recognized the concurrent litigations, neither gave any indication the concurrent litigations were improper.

conduct, non-members have frequently been unable to seek a remedy for wrongs worked by tribal commercial enterprises. *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024, 2050-2052 (2014)(Thomas, C., dissenting). The number of non-members living in Indian Country has also dramatically increased as a result of this Court's decision in *McGirt v. Oklahoma* (140 S.Ct. 2452 (2020)), and it is easy to foresee this will engender further disputes between tribal interests and non-members, and that tribal sovereign immunity will complicate or foreclose the ability of non-members to seek redress. While this Court has expressed doubt it was proper to cloak tribal commercial pursuits with sovereign immunity (*Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* 523 US 751, 758 (1998)), it has also explicitly held non-members retain the ability to seek remedies against individual tribal employees or officials *(Lewis*, 1288). This Court has also explained tribal officials, like state and federal officials, "may be able to assert personal immunity defenses." *Lewis,* 1291 [italics omitted]. But *Lewis* did not address whether the immunities available to tribal officials arise under federal, state, or tribal law.

The immunities available to individual tribal officials and employees can only arise under federal law. Congress has plenary authority over tribal governments. *Santa Clara Pueblo v. Martinez,* 436 US 49, 56 (1978). Furthermore, all aspects of tribal sovereignty are both "subject to plenary federal control and definition" and "privileged from diminution by the States." *Three Affiliated Tribes v. Wold Engineering,* 476 US 877, 891 (1986). The ability to imbue tribal employees with immunity is an aspect of tribal sovereignty. The immunities available to tribal officials must therefore, like all aspects of tribal sovereignty, be defined by federal law.

The California Court of Appeal properly relied upon federal law to determine respondents, as tribal employees and officers, could raise personal immunities. App.14a-16a. But the Court of Appeal then erred by applying California common law principles to determine the nature of those immunities. App.45a-46a. This error led to the extension of absolute prosecutorial immunity to attorneys performing "legal work on behalf of the Casino." App.39a.

Because Indian law is federal law (*Santa Clara,* 56) it is up to this Court to establish a framework for evaluating claims to personal immunity by individuals working on behalf of tribal interests.

II. This case is an ideal vehicle for establishing which immunities are available to individual tribal officers and employees, including individuals working for tribal commercial enterprises.

The California Court of Appeal held several respondents were "entitled" to absolute personal immunity "for their alleged work on behalf of the Casino." App.39a. While the Court of Appeal properly consulted this Court's holdings in *Lewis* and *Filarsky v. Delia*, 566 US 377 (2012) to determine respondents could raise personal immunity defenses (App.14a-16a, 47a), the Court of Appeal erred in applying California common law in determining the nature of the personal immunities available (App.45a-46a). The error was material, because this Court would not extend absolute immunity to protect the conduct of attorneys working to further the interests of a commercial enterprise.

A. Federal prosecutorial immunity versus California prosecutorial immunity.

This Court first articulated its modern federal prosecutorial immunity doctrine in *Imbler v. Pachtman*, 424 US 409 (1976). As a prosecutor, Pachtman obtained a conviction for murder against Imbler. After Imbler's sentence of death was affirmed, Pachtman discovered evidence which corroborated the testimony of Imbler's alibi and impeached the credibility of Pachtman's prime witness. Believing that "a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to his case or not, should be presented," Pachtman summarized the exculpatory evidence in a letter to the Governor of California, starting a process which led to Imbler's freedom, and then to Imbler's federal civil rights action against Pachtman for Pachtman's wrongful or negligent conduct in securing Imbler's conviction. *Id.,* 412-417.

This Court held absolute prosecutorial immunity barred Imbler's suit because absolute immunity was needed to allow "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." Moreover, withholding absolute immunity "would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice." *Id.,* 427-428. The extension of absolute immunity, however, was strictly limited to the activities of a prosecutor "intimately associated with the judicial phase of the criminal process." *Id.,* 430.

Later, this Court continued to underscore federal prosecutorial immunity's focus on "the judicial phase

of the criminal process" by denying absolute immunity to prosecutors performing various other duties. *Burns*, 492-496 (1991) [prosecutor giving legal advice to police unprotected]; *Buckley v. Fitzsimmons,* 509 US 259 (1993) [prosecutor's investigatory conduct unprotected]; *Kalina v. Fletcher,* 522 US 118 (1997) [prosecutor making false statements of fact in affidavit unprotected]; *Mitchell v. Forsyth,* 472 US 511 (1985) [Attorney General's national-security conduct unprotected].

The only post-*Imbler* case extending absolute prosecutorial immunity beyond "the judicial phase of the criminal process" is *Butz v. Economou* 438 US 478 (1978), which extends absolute immunity to officials responsible for bringing and prosecuting agency enforcement actions. In *Butz,* the specific agency was the Department of Agriculture, and the action was one to revoke a registration as a commodities merchant. *Id.,* 480-481. Such agency actions are, like criminal proceedings, aimed at the impartial preservation of public order. *Butz's* extension of absolute immunity to administrative contexts is limited in scope. For example, absolute immunity does not extend to prison officials pursuing disciplinary actions. *Cleavinger v Saxner,* 474 US 193 (1985). This is consistent with the limit of absolute immunity "to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz,* 507.

California's analogous immunity law differs from federal law. It is governed by statute, and focuses on the nature of the tort alleged by the plaintiff, rather than the duties performed by the defendant. *Asgari v. City of Los Angeles,* 15 Cal.4th 744, 756 (Cal. 1997). Specifically, California law immunizes any "public employee" from

all liability for "instituting or prosecuting any judicial or administrative proceeding." Cal. Gov. Code §821.6; see also *Asgari,* 756-757. This statutory immunity is the codification of California's pre-existing common-law immunity. *Id.,* 763-764 [*Asgari's* dissent, discussing common-law and statutory history].

B. The Court of Appeal erred when it applied state law to determine the availability of personal immunities in tribal and commercial contexts.

1. The Court of Appeal explained that, although respondents could not seek immunity under California's immunity statute, respondents could seek "support in the principles underlying the statute," which were established in California cases and "extend … to tribal employees." App.45a-46a. One of the cases the Court of Appeal cited as establishing the principles of California's prosecutorial immunity was *Hardy v. Vial*, 48 Cal.2d (Cal.1957). The immunity California's Supreme Court described in *Hardy* is much broader than the immunity available under federal law. A discussion of the details in *Hardy* is instructive.

Hardy was a professor at Long Beach State College. Vial, along with various individuals employed by the college or the Department of Education, filed false affidavits with the college as part of a conspiracy which caused the college to fire Hardy. The State Personnel Board ultimately found the charges against Hardy were untrue and ordered his employment be reinstated. *Hardy,* 580. Hardy could not sue the state employees for "making and filing affidavits containing false charges" because they "occupied positions which would ordinarily embrace duties relating to the investigation of charges." *Id.,* 583.

The conduct of the state employees would not be protected by absolute immunity under federal law. This Court has specifically held absolute immunity does not protect prosecutors swearing affidavits (*Kalina,* 129-131) or engaging in investigatory conduct (*Buckley,* 273-276). Thus, the state-law immunity described in *Hardy* is far broader than the analogous federal immunity.

2. The Court of Appeal also extended California's prosecutorial immunity beyond *Hardy* by holding government attorneys litigating on behalf of a commercial enterprise are entitled to prosecutorial immunity because it saw no reason "to treat a government attorney who files suit to enforce a traditional governmental contract different from a government attorney who files suit to enforce a commercial contract." App.48a. The result flows naturally from the plain language of California's immunity statute which absolves any public employee from all liability for instituting or prosecuting any judicial or administrative proceeding. *Asgari,* 756-757. But the result is not compatible with federal absolute immunity doctrine.

Under federal law, any extension of absolute immunity requires demonstrating "absolute immunity is essential for the conduct of the public business." *Butz,* 507. Even if conduct related to commerce or commercial litigation could be considered "public business" for the purposes of absolute immunity analysis, no one could show absolute immunity is necessary to protect the function of commercial litigation because, despite the fact commercial litigators are generally unprotected by absolute immunity, commerce and its attendant litigation continue to thrive.

C. The clarity of the opinion below makes this case an ideal vehicle with which to establish federal law as the basis for evaluating claims for personal immunity by tribal actors, and for establishing that absolute immunity cannot protect conduct on behalf of commercial enterprises.

The opinion below relied on California common law principles to find respondents are entitled to absolute immunity. App.46a. The question of which law to apply in determining whether the officers and employees of tribal governments may avail themselves of personal immunities is therefore starkly presented. The question can be met with a simple answer – the personal immunities available to tribal officers and employees are determined by federal law.

The opinion below also extended absolute immunity to conduct undertaken on behalf of a tribal commercial enterprise. App.39a, 48a. Given the vigorous growth of tribal commercial enterprises similar claims to personal immunity can be expected to recur. The analysis of such claims can be simplified with a clear rule – personal immunities do not protect conduct undertaken on behalf of commercial enterprises.

Because the question presented is lain bare by the opinion below, and because the answer to the question is clear, petitioner respectfully requests this Court consider summary reversal.

CONCLUSION

The petition for certiorari should be granted.

May 23, 2022

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE CALIFORNIA SUPREME COURT, DATED FEBRUARY 23, 2022

CALIFORNIA SUPREME COURT

No. S272460

ACRES

v.

MARSTON

Decided Feb 23, 2022

S272460

02-23-2022

ACRES (JAMES) v. MARSTON (LESTER)

C089344 Third Appellate District

Petition for review denied

APPENDIX B — ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, FILED DECEMBER 10, 2021

IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT
SACRAMENTO

C089344

JAMES ACRES,

Plaintiff and Appellant,

v.

LESTER MARSTON *et al.*,

Defendants and Respondents.

December 10, 2021, Opinion Filed

(Super. Ct. No. 34-2018-00236829-CU-PO-GDS)

ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

APPEAL from a judgment of the Superior Court of Sacramento County, David I. Brown, Judge.

BLEASE, Acting P. J.—Suits against Indian tribes (and other sovereign entities) are generally barred by sovereign immunity. So too are some suits against tribal

employees, though not because these employees enjoy sovereign immunity by virtue of their position. These suits are instead barred by sovereign immunity because, although nominally directed against an employee, they are really against the tribe. To determine the true defendant in these cases, courts focus on the remedy the plaintiff seeks. A suit against a tribal employee is really against the tribe if the plaintiff's requested relief must necessarily come from the tribe itself. But if, on the other hand, the plaintiff's suit would only impose personal liability on the sued employee, then the suit is, as pleaded, against the individual alone and sovereign immunity is inapplicable.

This case concerns the aftermath of an Indian tribal casino's unsuccessful suit in tribal court against appellant James Acres following a contract dispute. After dismissal of the tribal case, Acres filed his own suit in state court against two officials of the casino, the casino's attorneys, a tribal court judge, the clerk of the tribal court, and various other individuals and entities. He alleged, among other things, that the parties he sued (collectively, respondents) wrongfully conspired to file the lawsuit against him in tribal court. He then sought monetary relief from respondents as redress for this alleged conduct. The trial court, however, found Acres's claims against all respondents barred by sovereign immunity and, as to the tribal judge and several others, also barred by judicial or quasi-judicial immunity.

On appeal, we reverse in part. Because Acres's suit, if successful, would bind only the individual respondents, and not the tribe or its casino, we find these respondents

are not entitled to sovereign immunity. But, as to those respondents who have asserted personal immunity from suit (e.g., judicial immunity), we agree those respondents, with one exception, are immune from suit.

BACKGROUND

I

Tribal Casino's Suit Against Acres

Acres is the owner of Acres Bonusing Inc., a Nevada gaming company. In 2010, Acres Bonusing entered into an agreement with Blue Lake Casino & Hotel (the Casino), an arm of Blue Lake Rancheria (the Tribe), which is a federally recognized tribe. Under the agreement, Acres Bonusing agreed to lease to the Casino a gaming software that would allow Casino patrons to gamble on tablet computers and other handheld devices, and the Casino, in exchange, agreed to pay a monthly lease fee and a $250,000 advance deposit. In 2010, according to Acres, the Casino used the gaming software on 56 devices and, in 2011, the Casino expanded the use of the software to 88 devices.

But a few years later, in 2015, the Casino sought a return of the $250,000 advance deposit with interest. After Acres Bonusing declined to pay this amount, the Casino sued Acres Bonusing and Acres in tribal court, alleging, among other things, that Acres Bonusing and Acres knew their gaming "system could never satisfactorily perform" and failed to supply "new, more successful games to [the Casino] as required by the Agreement and as promised."

Appendix B

Lester Marston, a tribal judge, initially presided over the case, which was titled *Blue Lake Casino & Hotel v. Acres Bonusing, Inc.* (Blue Lake Rancheria Tribal Ct., No. C-15-1215 LJM) (*Blue Lake v. Acres Bonusing*). At the time he presided over the case, Judge Marston also represented the Casino as its attorney in several matters.[1]

In 2016, Acres moved to disqualify Judge Marston but Judge Marston denied the motion. Around the same time, Acres also filed "two federal court actions asserting that the tribal court lacked jurisdiction over him." (*Acres Bonusing, Inc. v. Marston* (N.D.Cal., Apr. 15, 2020, No. 19-cv-05418-WHO) 2020 WL 1877711, p. *2 (*Acres Bonusing*).) The federal district court dismissed the first action for lack of subject matter jurisdiction because, before challenging a tribal court's jurisdiction, a party generally must first exhaust tribal remedies, and Acres had not done so. (*Acres v. Blue Lake Rancheria Tribal Court* (N.D.Cal., Aug. 10, 2016, No. 16-cv-02622-WHO) 2016 WL 4208328, pp. *2–*4 (*Acres I*).) The court acknowledged several exceptions exist to the exhaustion requirement, including when tribal court jurisdiction is

1. To support his contention that Judge Marston served as the Casino's attorney at the time of *Blue Lake v. Acres Bonusing*, Acres asks that we take judicial notice of several documents purportedly showing that Judge Marston represented the Casino in negotiations with the State of California in 2015. We deny the request. No one in this appeal disputes that Judge Marston served as the Casino's attorney on some matters around the time of *Blue Lake v. Acres Bonusing*. The parties instead, accepting these allegations as true, dispute whether Judge Marston may nonetheless be immune from suit. Because Acres's request is irrelevant to the issue of immunity, we deny it.

asserted in bad faith, but it found Acres failed to show any of these exceptions applicable. (*Ibid.*)

The following month, Acres filed his second action in federal court and, this time, the court agreed to allow Acres "limited discovery on the issue of bad faith." (*Acres v. Blue Lake Rancheria* (N.D.Cal., Feb. 24, 2017, No. 16-cv-05391-WHO) 2017 WL 733114, p. *1 (*Acres II*).) The court did so in part based on inconsistent declarations that Judge Marston had filed in this federal action and in other litigation involving the Tribe, which the court found "concern[ing]." (*Ibid.*) In this federal action, Judge Marston filed a declaration claiming he was "'not the Tribe's Tribal Attorney,'" but in another ongoing case titled *Blue Lake Rancheria v. Shiomoto*, Judge Marston filed a declaration saying he was "'the attorney for … the Blue Lake Rancheria ("Tribe") … and Arla Ramsey.'" (*Ibid.*)

Shortly after the district court's ruling, Judge Marston recused himself from *Blue Lake v. Acres Bonusing* and appointed James Lambden, a retired California Court of Appeal justice, to preside over the case. A few months later, following Acres's filing of various motions, Judge Lambden dismissed Acres from *Blue Lake v. Acres Bonusing*. He reasoned that the Casino's one claim against Acres "essentially" concerned Acres's statement that the gaming system would be profitable, which was not "an actionable misstatement of the facts regarding the performance of the [system]." The Casino afterward dismissed its action against Acres Bonusing.

Appendix B

II

Acres's Suit

In 2018, about a year after the Casino dismissed its tribal action, Acres filed suit in state court against 17 individuals and entities involved in the tribal litigation. In particular, he sued two officials of the Casino and the Tribe (Arla Ramsey and Thomas Frank), the Casino's attorneys in *Blue Lake v. Acres Bonusing* (Boutin Jones Inc. and three associated attorneys (Michael Chase, Daniel Stouder, and Amy O'Neill)) and Janssen Malloy LLP and two associated attorneys (Megan Yarnall and Amelia Burroughs), the clerk of the tribal court (Anita Huff), Judge Marston, an "association of attorneys" called Rapport and Marston, and several attorneys associated with Rapport and Marston (David Rapport, Cooper DeMarse, Ashley Burrell, Darcy Vaughn, and Kostan Lathouris).

According to Acres's complaint, Boutin Jones, Janssen Malloy, Chase, Stouder, O'Neill, Yarnall, and Burroughs all represented the Casino, at one point or another, in *Blue Lake v. Acres Bonusing*. Boutin Jones, Chase, Stouder, and O'Neill also represented the Casino in *Acres I* and *Acres II*. Judge Marston initially presided over *Blue Lake v. Acres Bonusing* and, while doing so, also served as the Casino's attorney on various matters. Huff was the clerk of the tribal court and also a manager at the Casino during the tribal court litigation. Ramsey, among other things, was the chief executive officer of the Casino and "supervised the work of Clerk Huff" during the tribal

court litigation. Frank verified the Casino's discovery in *Blue Lake v. Acres Bonusing* and "has sworn statements describing his employment in various executive roles for [the Casino] over the past 15 years." And, rounding out the named respondents, Rapport and Marston is an "association of attorneys" that includes Judge Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris. Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris, Acres alleged, provided legal services to the Casino and the Tribe in various matters unrelated to Acres around the time of *Blue Lake v. Acres Bonusing*, and also, at least potentially, provided legal services to the Casino in *Acres I* and *Acres II*. DeMarse, Burrell, Vaughn, and Lathouris, Acres further asserted, also provided legal services to Judge Marston in his role as judge in *Blue Lake v. Acres Bonusing*.

Acres raised seven claims in his complaint. He alleged: (1) the two Casino officials, Boutin Jones and its associated attorneys (apart from Chase), and Janssen Malloy and its associated attorneys wrongfully filed the tribal lawsuit against him; (2) Judge Marston, Huff, Chase, Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris conspired to wrongfully file the tribal lawsuit; (3) the same respondents named in the second cause of action aided and abetted the wrongful filing of the tribal lawsuit; (4) Judge Martson breached the fiduciary duty he owed Acres when, among other things, he declined to disclose his work on behalf of the Casino and failed to recuse himself; (5) Judge Marston, Huff, the two Casino officials, Boutin Jones and its associated attorneys, Rapport and Marston, Rapport, DeMarse, Burrell,

Vaughn, and Lathouris aided and abetted Judge Marston's breach of fiduciary duty; (6) Judge Marston committed constructive fraud by improperly "receiving compensation from [the Tribe], Blue Lake Casino, or Ms. Ramsey" while presiding over *Blue Lake v. Acres Bonusing*; and (7) Huff, the two Casino officials, Boutin Jones and its associated attorneys, Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris aided and abetted the constructive fraud.

As relief, Acres sought, among other things, damages for the injuries he suffered to his "body" and "his nervous system and person" from respondents' conduct and damages for "[t]he work required to uncover the true nature of Judge Marston's relationship with [the Tribe], Blue Lake Casino, and Ms. Ramsey." He also sought to recover, for himself, any compensation that respondents had received for their services from the Tribe, the Casino, Ramsey, and "any related entity" since August 1, 2015.

Respondents afterward moved to quash Acres's summons and dismiss his suit. Frank, Boutin Jones and its associated attorneys, and Janssen Malloy and its associated attorneys contended Acres's suit against them was barred by sovereign immunity. Ramsey and Judge Marston contended Acres's suit against them was barred by sovereign immunity or, alternatively, by judicial or quasi-judicial immunity. Rapport and Marston and Rapport contended Acres's suit against them was barred by sovereign immunity or, alternatively, by prosecutorial immunity. And DeMarse, Burrell, Vaughn, and Lathouris contended Acres's suit against them was barred by

sovereign immunity, or, alternatively, by prosecutorial immunity and judicial or quasi-judicial immunity.

The trial court granted respondents' motions, finding all respondents were entitled to sovereign immunity. As part of its reasoning, the court noted that it found "no evidence that the moving defendants acted in their individual capacities for their own private purposes and benefit, or outside the scope of their legal agency, authority and fiduciary duty to the Tribe as tribal officials." It then concluded that "[a]llowing the action to proceed against the Tribe's attorneys would undoubtedly require the Tribe to act, and would entangle this court in questions of Tribal Court practice and law that would directly impinge the Tribe's sovereignty." The court further found several of the respondents were also entitled to judicial or quasi-judicial immunity. It reasoned that "all of the alleged acts by the moving defendants with judicial roles (all except Ramsey and Rapport) were either judicial or quasi-judicial acts" performed within the tribal court's jurisdiction and so were protected by judicial immunity.

Several months after the court's ruling, Acres filed a similar suit in federal court. But that court too, for largely the same reasons, dismissed Acres's suit. It found Acres's suit against all respondents was barred by sovereign immunity. (*Acres Bonusing, supra*, 2020 WL 1877711 at pp. *6–*8.) And it found Acres's suit against those respondents "with judicial roles" was further barred by judicial or quasi-judicial immunity. (*Id.* at p. *9.)

Acres timely appealed the trial court's ruling. Shortly after, he also appealed the federal district court's ruling in *Acres Bonusing*.

DISCUSSION

I

Background Principles

Indian tribes are sovereign nations "pre-existing the Constitution." (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 56 [56 L. Ed. 2d 106, 98 S. Ct. 1670].) Although once "separate nations within what is now the United States," they are now considered "'domestic dependent nations.'" (*Williams v. Lee* (1959) 358 U.S. 217, 218 [3 L. Ed. 2d 251, 79 S. Ct. 269]; *Oklahoma Tax Comm'n v. Potawatomi Tribe* (1991) 498 U.S. 505, 509 [112 L. Ed. 2d 1112, 111 S. Ct. 905].) As domestic dependent nations, they "'retain[] their original natural rights' in matters of local self-government" subject to Congress's "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." (*Santa Clara Pueblo*, at pp. 55–56.)

"Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" (*Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788 [188 L. Ed. 2d 1071, 134 S. Ct. 2024].) A tribe's sovereign immunity is generally implicated when a litigant sues the tribe or an arm of the

tribe directly. (See *Lewis v. Clarke* (2017) 581 U.S. ___ [197 L. Ed. 2d 631, 137 S.Ct. 1285, 1290–1291] (*Lewis*) ["an arm or instrumentality of the [sovereign] generally enjoys the same immunity as the sovereign itself"].) But it may also be implicated when a litigant sues a tribe's employees or officials. Courts, in these circumstances, consider whether the suit, although nominally against an employee or official, is really against the sovereign. "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." (*Id.* at p. ___ [137 S.Ct. at p. 1291].)

A suit against a tribal official is really against the sovereign (and considered an official-capacity suit) if the plaintiff "must look to the [tribal] entity itself" for relief. (*Kentucky v. Graham* (1985) 473 U.S. 159, 166 [87 L. Ed. 2d 114, 166, 105 S. Ct. 3099] (*Graham*) [discussing state sovereign immunity]; see also *Lewis, supra*, 581 U.S. at p. ___ [137 S.Ct. at pp. 1290–1291] [applying the same principles when discussing tribal sovereign immunity].) That was true, for example, in *Edelman v. Jordan* (1974) 415 U.S. 651, 653 [39 L. Ed. 2d 662, 94 S. Ct. 1347]. The plaintiff there sued state officials alleging that they administered a federal aid program in violation of federal law and, as relief, sought an injunction requiring the defendants to deliver the benefits wrongly withheld. (*Id.* at pp. 653–656.) In finding the suit barred by the state's sovereign immunity, the Supreme Court observed that the requested "funds w[ould] obviously not be paid out of the pocket of [defendant] Edelman" but would instead

"inevitably come from the general revenues of the State of Illinois." (*Id.* at pp. 664–665.) The court thus found the requested "award resembles far more closely [a] monetary award against the State itself" and was barred by sovereign immunity. (*Id.* at pp. 665, 678; see also *Ford Co. v. Dept. of Treasury* (1945) 323 U.S. 459, 464 [89 L.Ed. 389, 65 S. Ct. 347] ["when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants"], overruled on other grounds in *Lapides v. Board of Regents of Univ. System of Ga.* (2002) 535 U.S. 613 [152 L. Ed. 2d 806, 122 S. Ct. 1640].)

A suit against a tribal official, on the other hand, is against only the individual (and considered a personal-capacity suit) if the plaintiff's suit would only impose personal liability on the sued employee. (*Lewis, supra*, 581 U.S. at p. ___ [137 S.Ct. at p. 1292] ["'Personal-capacity suits … seek to impose *individual* liability upon a government officer for actions taken under color of state law'"].) *Lewis* is an example of a personal-capacity suit. In that case, an employee of an arm of an Indian tribe rear-ended a car while driving patrons of the tribe's casino to their homes. (*Id.* at p. ___ [137 S.Ct. at p. 1287].) The driver and passenger of the hit car afterward sued the employee in his individual capacity in Connecticut state court and, in response, the employee "moved to dismiss for lack of subject-matter jurisdiction on the basis of tribal sovereign immunity." (*Id.* at p. ___ [137 S.Ct. at p. 1290].) He "argued that because [his employer] was entitled to

sovereign immunity, he, an employee … acting within the scope of his employment at the time of the accident, was similarly entitled to sovereign immunity against suit." (*Ibid.*) Although the Connecticut Supreme Court accepted this argument, the Supreme Court reversed. "The critical inquiry," the court explained, "is who may be legally bound by the court's adverse judgment." (*Id.* at p. ___ [137 S.Ct. at pp. 1293–1294].) And because a judgment against the employee in this case would "not bind the Tribe or its instrumentalities in any way," the court declined to find that sovereign immunity applied. (*Id.* at p. ___ [137 S.Ct. at p. 1294]; see also *Philadelphia Co. v. Stimson* (1912) 223 U.S. 605, 619–620 [56 L.Ed. 570, 32 S. Ct. 340] ["The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded"].)

Although tribal officials sued in their individual capacities cannot seek protection under the tribe's sovereign immunity, they may nonetheless be immune from suit under the distinct defense of official (or personal) immunity. Courts have long recognized that, under common law rules, "government officials are entitled to some form of immunity from suits for civil damages." (*Nixon v. Fitzgerald* (1982) 457 U.S. 731, 744 [73 L. Ed. 2d 349, 102 S. Ct. 2690].) 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* (1974) 416 U.S. 232, 239 [40 L. Ed. 2d 90, 94 S. Ct. 1683] (*Scheuer*), abrogated on other grounds as stated in *Davis v. Scherer* (1984) 468 U.S. 183, 191 [82 L. Ed.

2d 139, 104 S. Ct. 3012].) In particular, the court noted, "[t]his official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, 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." (*Scheuer*, at pp. 239–240, fn. omitted.)

Courts have recognized two general forms of common law personal immunity: absolute immunity and qualified immunity. (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 807 [73 L. Ed. 2d 396, 102 S. Ct. 2727].) Government officials entitled to absolute immunity include "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." (*Ibid.*) Outside of those particular functions, government officials are generally entitled only to qualified immunity, which "shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." (*Brosseau v. Haugen* (2004) 543 U.S. 194, 198 [160 L. Ed. 2d 583, 125 S. Ct. 596]; see *Buckley v. Fitzsimmons* (1993) 509 U.S. 259, 268 [125 L. Ed. 2d 209, 113 S. Ct. 2606] ["Most public officials are entitled only to qualified immunity."].)

Apart from common law personal immunity, tribal employees also enjoy statutory immunity under certain

circumstances. (See, e.g., 25 U.S.C. § 5321(d) [treating certain tribal medical personnel as employees of the U.S. Public Health Service]; 42 U.S.C. § 233(a) [providing that the exclusive remedy for certain damages caused by employees of the U.S. Public Health Service is against the United States].) None of the respondents here, however, allege that they are immune from suit under any statute.

II

Sovereign Immunity

With that background in mind, we consider first whether respondents are, as they allege, entitled to sovereign immunity. We find they are not.

Acres seeks in his suit to recover damages from respondents in their personal capacities. He alleges that each of the respondents committed one or more torts against him and, to address these alleged wrongs, he seeks monetary relief from them directly. These claims may lack merit, and they may even be barred under personal immunity principles. But they are not barred by the Tribe's sovereign immunity. As the Supreme Court explained in *Alden v. Maine* (1999) 527 U.S. 706 [144 L. Ed. 2d 636, 119 S. Ct. 2240] (*Alden*) in discussing state sovereign immunity, "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." (*Id.* at p. 757.) And as the court recently reaffirmed in

Lewis in discussing tribal sovereign immunity, which is "no broader than the protection offered by state or federal sovereign immunity," "sovereign immunity 'does not erect a barrier against suits to impose individual and personal liability.'" (*Lewis, supra*, 581 U.S. at p. ___ [137 S.Ct. at pp. 1293, 1292].) Applying those principles to this case, we cannot conclude that sovereign immunity principles bar Acres's suit. Any judgment against these respondents, after all, would not obligate the Tribe or the Casino to pay the relief Acres seeks. It would only obligate the individual respondents to pay the requested damages out of their own pockets.

Respondents never characterize Acres's suit differently. They instead, quoting the trial court, principally contend *Lewis* is distinguishable for three reasons. But we find none of their arguments favor a different result.

First, they assert, "'the alleged tort in *Lewis* occurred entirely on state land in pursuit of the tribe's commercial activities, while the malicious prosecution claim and related torts here occurred entirely on tribal land within the context of a Tribal Court judicial proceeding.'" But that distinction is largely irrelevant. A tribe's immunity, after all, is not limited to the tribe's activities on tribal lands; it extends "even when they take place off Indian lands." (*Michigan v. Bay Mills Indian Community, supra*, 572 U.S. at p. 790.) The critical question for our purposes, thus, has little to do with the location where the tribal conduct occurred. It instead, as the Supreme Court explained in *Lewis*, focuses on "who may be legally bound

by the court's adverse judgment." (*Lewis, supra*, 581 U.S. at p. ___ [137 S.Ct. at pp. 1292–1294].) And, again, because neither the Tribe nor the Casino would be bound by any potential adverse judgment in this case, we decline to find sovereign immunity applicable.

Second, respondents contend, "'the tribe's driver in *Lewis* did not claim to be an "official" of the tribe acting as the tribe's necessary fiduciary agent, while the Tribe's Tribal Court Judge, Clerk, Executives and attorneys in this matter were officials of Tribe in the Tribal Court, or officials providing legal representation to the Tribe.'" Respondents suggest, in this argument, that a tribe's high-level officials and attorneys are entitled to sovereign immunity as of right, even if low-level employees are not.

But the Supreme Court has never equated a sovereign's high-ranking officials or attorneys with the sovereign itself. Consider, for example, *Hafer v. Melo* (1991) 502 U.S. 21 [116 L. Ed. 2d 301, 112 S. Ct. 358] (*Hafer*). In that case, after the auditor general of Pennsylvania fired certain employees following her election, several employees alleged they were fired "because of their Democratic political affiliation" and filed suit seeking, among other things, damages from the auditor general in her personal capacity. (*Id.* at p. 23.) Claiming immunity, the auditor general responded that the suit should be barred under the Eleventh Amendment because "imposing personal liability on officeholders may infringe on state sovereignty by rendering government less effective." (*Hafer*, at p. 29; see also *Alden, supra*, 527 U.S. at pp. 728–729 ["The Eleventh Amendment confirmed rather than established sovereign

immunity [for the states] as a constitutional principle"].) But the Supreme Court rejected her argument.

Although the court accepted that the auditor general took the challenged actions in her "official capacit[y]" (*Hafer, supra*, 502 U.S. at p. 24), and although it noted that "[s]uits against state officials in their official capacity … should be treated as suits against the State" (*id.* at p. 25), the court nonetheless found her argument misplaced. "[T]he phrase 'acting in their official capacities,'" the court explained, "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." (*Id.* at p. 26.) And because, in this case, the auditor general was sued in her personal capacity, even if she acted in her official capacity, she could not rely on the state's sovereign immunity as a shield. (*Id.* at p. 31 ["Insofar as respondents seek damages against [the auditor general] personally, the Eleventh Amendment does not restrict their ability to sue in federal court"].) "[I]mposing personal liability on state officers," the court added, "may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence." (*Ibid.*)

The court's earlier decision in *Spalding v. Vilas* (1896) 161 U.S. 483 [40 L.Ed. 780, 16 S. Ct. 631] (*Spalding*) is similar. The court there considered the immunity available to the United States Postmaster General in a suit for damages based on his official actions—which were neither "unauthorized by law, nor beyond the scope of his official duties"—that were allegedly motivated by

personal malice. (*Id.* at pp. 493–499.) Although a high-ranking official acting consistent with his duties, the court never considered whether the Postmaster General was entitled to sovereign immunity for his conduct. It instead considered only whether he was entitled to personal immunity—a type of immunity, notably, that would not have been available had he been able to assert sovereign immunity, as an official may only raise sovereign immunity defenses, not personal immunity defenses, in suits deemed to be effectively against the sovereign. (*Graham, supra*, 473 U.S. at p. 167 ["[i]n an official-capacity action, [personal immunity] defenses are unavailable"; "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess"].) Drawing on principles of personal immunity developed in English cases at common law, the court concluded that "[t]he interests of the people" required a grant of absolute immunity. (*Spalding*, at pp. 498–499.) It reasoned that, "[i]n exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint." (*Id.* at p. 498.)

Perhaps respondents here could raise similar arguments for their own personal immunity. But to the extent they believe their status as high-ranking officials or attorneys entitles them to sovereign immunity as of

right, they are mistaken. As the Supreme Court has repeatedly made clear, "[i]n deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling; the dispositive inquiry is 'who will pay the judgment?'" (*Stafford v. Briggs* (1980) 444 U.S. 527, 542, fn. 10 [63 L. Ed. 2d 1, 100 S. Ct. 774].) Consistent with those principles, the state auditor general in *Hafer* was not entitled to sovereign immunity even though she was a high-ranking elected official. Nor was the Postmaster General in *Spalding* even though he too was a high-ranking official. He was instead entitled only to personal immunity—a type of immunity, again, that he could not have successfully asserted had he been able to seek immunity on the separate ground of sovereign immunity. (See *Graham, supra*, 473 U.S. at pp. 166–167.)

Lastly, in attempting to distinguish *Lewis*, respondents argue that "'the negligence action against the driver in *Lewis* would not be expected to require the appearance of the Tribe (or tribal officials) as witnesses or necessary parties in the action, while the malicious prosecution claim would most likely require action by the Tribe in the lawsuit and could involve efforts to invade the privileged interactions between the Tribe and its legal counsel regarding the decision-making process underlying the prosecution of Acres in the Tribal Court.'"

We acknowledge these are legitimate concerns, though they are perhaps somewhat overstated. We fail to see, for example, why the Tribe—which presumably retains its sovereign immunity—would need to participate in Acres's action. We also question at this stage whether

Acres could, as respondents fear, "invade the privileged interactions between the Tribe and its legal counsel." The mere filing of a malicious prosecution action, after all, does not "'automatically open an attorney's files.'" (*Schlumberger Limited v. Superior Court* (1981) 115 Cal. App.3d 386, 393 [171 Cal. Rptr. 413] ["'If filing a malicious prosecution action (or, by the same logic, a malpractice action) could automatically open an attorney's files to a prior action, then an attorney, anticipating such a future suit, would hesitate to commit his or her doubts about a case to paper.'"]; see also *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262 [245 Cal. Rptr. 682] [although a party may overcome the attorney-client privilege by "mak[ing] a prima facie showing that the services of the lawyer 'were sought or obtained' to enable or to aid anyone to commit or plan to commit a crime or fraud," the "mere assertion of fraud is insufficient; there must be a showing the fraud has some foundation in fact"].)

But setting that aside, we agree *Lewis* is distinguishable for some of the reasons respondents suggest. In contrast to the suit in *Lewis*, for instance, allowing Acres's suit to go forward would likely require some tribal employees to testify in the action and could distract these employees from their official duties. But considering other immunity cases involving outside counsel, we find respondents' stated concerns "are properly addressed within the framework of [the Supreme Court's] personal immunity jurisprudence," not its sovereign immunity jurisprudence. (*Hafer, supra*, 502 U.S. at p. 31.)

Appendix B

The Supreme Court in *Filarsky v. Delia* (2012) 566 U.S. 377, 391 [182 L. Ed. 2d 662, 132 S. Ct. 1657] (*Filarsky*), for example, relied on personal immunity principles to address concerns nearly identical to respondents' own. In that case, a city hired a private employment attorney to assist in the investigation of an employee who allegedly misused his sick time, and the investigated employee later sued the attorney (and various others) for conducting an unconstitutional search during the investigation. (*Id.* at pp. 380–382.) In the course of finding the attorney was entitled to personal immunity, the court noted that allowing the suit to go forward would likely require several city employees who worked with the attorney to testify as witnesses and "embroil[]" the city's employees in the litigation. (*Id.* at p. 391.) Because of those considerations, which largely parallel respondents' own concerns, the court concluded that allowing the suit to proceed would distract these city's employees from their duties and thus "substantially undermine an important reason [personal] immunity is accorded public employees in the first place." (*Ibid.*)

The Ninth Circuit in *Davis v. Littell* (9th Cir. 1968) 398 F.2d 83 (*Davis*), found similarly on facts more like our own. The court there considered "whether appellee, by virtue of his position as [outside] counsel for the Navajo Tribe, was entitled to assert absolute privilege as to defamatory statements made by him within the scope of his official duties." (*Id.* at p. 83.) Relying on case law concerning personal immunity, not sovereign immunity, it found he was. Echoing the sentiments of the *Spalding* court, the Ninth Circuit reasoned that personal immunity was

necessary to eliminate "the 'constant dread of retaliation' for injury committed in the course of duty" and to allow "'unflinching discharge of [official] duties' free from the threat of suit and charge of malice." (*Id.* at p. 85.) The court found support for its conclusion in *Spalding*, *Barr v. Matteo* (1959) 360 U.S. 564 [3 L. Ed. 2d 1434, 79 S. Ct. 1335], and *Gregoire v. Biddle* (2d Cir. 1949) 177 F.2d 579 all cases, notably, involving personal immunity. (*Davis*, at pp. 84–85; see also *Barr*, at pp. 574–575 (plurality opinion) ["Acting Director of an important agency of government" found entitled to personal immunity against a libel claim based on a press release issued "in the line of duty"]; *Gregoire*, at pp. 579–581 ["two successive Attorneys-General of the United States, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island" found entitled to personal immunity against a claim of malicious arrest].)

Beyond attempting to distinguish *Lewis*, respondents also contend other case law favors their position. First, citing *Brown v. Garcia* (2017) 17 Cal.App.5th 1198 [225 Cal. Rptr. 3d 910], respondents claim "a Tribe's sovereign immunity extends 'to tribal officials when they act in their official capacity and within the scope of their authority.'" But to the extent the court in *Brown* endorsed that view, we disagree with it. As the Supreme Court in *Lewis* explained, a tribal employee is not entitled to sovereign immunity "solely because he was acting within the scope of his employment." (*Lewis, supra*, 581 U.S. at p. ___ [137 S.Ct. at pp. 1292–1293].) Nor, similarly, is an employee entitled to sovereign immunity merely because

she inflicted the alleged injury in her official capacity. (*Hafer, supra*, 502 U.S. at p. 26 ["the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury"]; see also *Spalding, supra*, 161 U.S. at p. 498.) Nor, finally, is an official entitled to sovereign immunity simply because he holds an important title or position. (*Spalding, supra*, 161 U.S. at p. 493.) Instead, the "dispositive inquiry" for our purposes is only this: "'who will pay the judgment?'" (*Stafford v. Briggs, supra*, 444 U.S. at p. 542, fn. 10.) And again, because any judgment in Acres's favor would operate only against respondents in their individual capacities, and not against the Tribe or the Casino, we find Acres's suit is not barred by the Tribe's sovereign immunity.

Next, respondents contend their position "is consistent with the Ninth Circuit's decision in *Maxwell v. San Diego County* (9th Cir. 2013) 708 F.3d 1075." That is so, they reason, because the court there cautioned that "we must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" (*Maxwell, supra*, 708 F.3d at p. 1088.) Focusing on the "interfere with the public administration" language, respondents argue that tribal counsel "must be free to express legal opinions and give advice unimpeded by fear their relationship with the Tribe will be exposed to examination and potential liability for the advices and opinions given."

But although a constant fear of suit may leave public officials unduly timid in performing their duties and, in this sense, indirectly interfere with public administration, this consideration does not weigh in favor of granting sovereign immunity. It weighs instead, if anything, in favor of granting personal immunity. As the Supreme Court explained in *Westfall v. Erwin* (1988) 484 U.S. 292 [98 L. Ed. 2d 619, 108 S. Ct. 580], superseded by statute on other grounds as stated in *Hernández v. Mesa* (2020) 589 U.S. ___ [206 L. Ed. 2d 29, 140 S.Ct. 735, 748], the "provision of [personal] immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits." (*Westfall*, at p. 295.) Those are precisely the types of concerns that respondents assert here. Respondents thus, once again, raise concerns better addressed within the framework of the Supreme Court's personal immunity jurisprudence, not its sovereign immunity jurisprudence.

To find otherwise, and to treat any alleged indirect interference of this sort as enough to trigger sovereign immunity, would largely eviscerate the distinction between sovereign immunity and personal immunity and render questionable a long line of Supreme Court decisions dealing with personal immunity. A judgment against the Postmaster General in *Spalding*, for instance, would have left him (and other federal officials) "under an apprehension that the motives that control [their] official conduct may, at any time, become the subject of inquiry in a civil suit for damages," "seriously crippl[ing] the

proper and effective administration of public affairs." (*Spalding, supra*, 161 U.S. at p. 498.) But that threatened "cripp[ling]" interference with public administration was not ground for finding sovereign immunity applicable; it was ground instead for finding the action barred by absolute personal immunity. (*Id.* at pp. 498–499; see also *Hafer, supra*, 502 U.S. at p. 31.)

Respondents next point to *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal. App.4th 1407 [88 Cal. Rptr. 2d 828] as supportive authority. That case, we agree, lends some support to their position. The plaintiff there, a casino company, sued an Indian tribe, its tribal council, the individual tribal council members, numerous individual tribal members, and the tribe's in-house and outside counsel, alleging that the defendants "concoct[ed] a fraudulent scheme to cancel" a contract that authorized the plaintiff to operate a gambling enterprise on the tribe's reservation. (*Id.* at pp. 1411–1414.) But, the court found, all the individual defendants (along with the tribe) were protected by sovereign immunity. (*Id.* at p. 1421.) In terms of the in-house and outside counsel, the court concluded the attorneys were immune under the reasoning of the Ninth Circuit in *Davis*. (*Id.* at p. 1424.) But *Davis*, again, found a tribe's general counsel was entitled to personal immunity, not sovereign immunity. (*Davis, supra*, 398 F.2d at p. 85.) And so, in relying on *Davis* to find the tribe's attorneys were "covered by the tribe's sovereign immunity" (*Morongo Band of Mission Indians*, at p. 1424), the *Morongo Band of Mission Indians* court, in our view, misconstrued the *Davis* decision and improperly conflated sovereign immunity with personal immunity.

Finally, the Janssen Malloy respondents assert that allowing Acres's claim to proceed would impermissibly impinge on the Tribe's sovereignty because it "would compel the state court to determine what actions are permissible in Tribal Court; whether the Tribal Court has followed its own procedures in Tribal Court; and whether an attorney in Tribal Court has misused the Tribal Court's judicial process." Aspects of his claim, we accept, have some truth. We accept, for example, that resolving whether the Casino's tribal suit against Acres "was brought without objective probable cause"—which is one of the elements for malicious prosecution of a civil lawsuit (*Lane v. Bell* (2018) 20 Cal.App.5th 61, 64 [228 Cal.Rptr.3d 605])—could require some consideration of tribal law. But we decline to find that respondents are entitled to sovereign immunity for that reason. The fundamental flaw with respondents' argument is that it has nothing to do with the identity of the defendant. A simple example illustrates the point. Suppose a person having no association with the Tribe filed a frivolous suit in tribal court. And suppose the sued party, in response, filed a suit for malicious prosecution in state court. Under respondents' logic, the filer of the tribal suit could claim that the state suit is barred by sovereign immunity because resolving the claim "would compel the state court to determine what actions are permissible in Tribal Court." We decline to accept this reasoning, which finds no support in the Supreme Court's sovereign immunity jurisprudence and which would grant sovereign immunity to persons having no relation to a sovereign entity.

In sum, although respondents may ultimately prevail on a claim of personal immunity, we decline to find that they are entitled to sovereign immunity. Our conclusion in this respect accords with the Ninth Circuit's recent decision in *Acres Bonusing, Inc v. Marston* (9th Cir., Nov. 5, 2021, No. 20-15959) 2021 WL 5144701 (*Acres Bonusing, Inc.*). Again, shortly after Acres sued respondents in state court, Acres and Acres Bonusing filed a "substantially similar" action in federal district court. (*Acres Bonusing, supra*, 2020 WL 1877711 at p. *2.) But, like the trial court in this case, the district court found Acres's claims barred by sovereign immunity. The court reasoned, in summary, "that all of the defendants were functioning as the Tribe's officials or agents when the alleged acts were committed" and so were entitled to tribal sovereign immunity. (*Id.* at p. *4.) The Ninth Circuit, however, rejected the district court's sovereign immunity analysis. It reasoned: "Acres and [Acres Bonusing] seek money damages against the defendants in their individual capacities. Any relief ordered by the district court will not require Blue Lake to do or pay anything. Because any 'judgment will not operate against the Tribe,' [citation], Blue Lake is not the real party in interest, and tribal sovereign immunity does not apply." (*Acres Bonusing, Inc., supra*, 2021 WL 5144701 at p. *7.) For the reasons discussed, we find likewise here.

Appendix B

III

Personal Immunity

A. Judicial and Quasi-judicial Immunity

Having rejected respondents' assertion of sovereign immunity, we consider next whether certain respondents are entitled to judicial or quasi-judicial immunity—a type of absolute personal immunity. Seven of the respondents—namely, one of the Casino officials (Ramsey), the tribal court clerk (Huff), the tribal court judge (Judge Marston), and four attorneys associated with Rapport and Marston (DeMarse, Burrell, Vaughn, and Lathouris)—raise this defense. Apart from Ramsey, we find these respondents are entitled to judicial or quasi-judicial immunity.

1. Judge Marston, Huff, DeMarse, Burrell, Vaughn, and Lathouris

We start with Judge Marston, Huff, DeMarse, Burrell, Vaughn, and Lathouris.

"As early as 1872, the [Supreme] Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.'" (*Stump v. Sparkman* (1978) 435 U.S. 349, 355 [55 L. Ed. 2d 331, 98 S. Ct. 1099] (*Stump*).) For that reason, the court has explained, "'judges of courts of superior or general jurisdiction are

not liable to civil actions for their judicial acts'" and "will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority." (*Id.* at pp. 356, 355.) "[R]ather," the court went on, a judge "will be subject to liability only when he has acted in the 'clear absence of all jurisdiction'" or outside "his 'judicial' capacity." (*Id.* at pp. 356–357, 360; see also *Penn v. U.S.* (8th Cir. 2003) 335 F.3d 786, 789 ["a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges"].)

Apart from protecting judges, the Supreme Court has added, this immunity also extends to "certain others who perform functions closely associated with the judicial process." (*Cleavinger v. Saxner* (1985) 474 U.S. 193, 200 [88 L. Ed. 2d 507, 106 S. Ct. 496]; see also *Antoine v. Byers & Anderson, Inc.* (1993) 508 U.S. 429, 436 [124 L. Ed. 2d 391, 113 S. Ct. 2167].) California courts have found similarly. (*Hardy v. Vial* (1957) 48 Cal.2d 577, 582 [311 P.2d 494] (*Hardy*) [California "recognize[s] the same wide immunity" for judges and certain other officials]; *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 852–853 [271 Cal. Rptr. 893] ["California courts have extended absolute judicial immunity to persons other than judges if those persons act in a judicial or quasi-judicial capacity"].)

In this case, as relevant here, Acres has sued a tribal court judge, several attorneys who effectively served as his law clerks, and a tribal court clerk in connection with their work in *Blue Lake v. Acres Bonusing*. We find all are entitled to judicial or quasi-judicial immunity.

Appendix B

Starting with Judge Marston, although we accept he had a conflict of interest, we find he still acted in his capacity as a judge, and not "'clear[ly] [in] absence of all jurisdiction,'" when he presided over *Blue Lake v. Acres Bonusing*. (See *Montana v. United States* (1981) 450 U.S. 544, 565 [67 L. Ed. 2d 493, 101 S. Ct. 1245] ["Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," including non-Indians "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"].) We find he is thus entitled to judicial immunity for his alleged conduct. (*Stump, supra*, 435 U.S. at pp. 355–356 [judges "'are not liable to civil actions for their judicial acts, even when such acts … are alleged to have been done maliciously or corruptly'"].)

Turning next to his, in effect, law clerks (DeMarse, Burrell, Vaughn, and Lathouris), we find they also are entitled to immunity for the assistance they offered Judge Marston in *Blue Lake v. Acres Bonusing*. The Supreme Court, again, has extended the immunity granted to judges to "certain others who perform functions closely associated with the judicial process," including, among others, prosecutors, grand jurors, and testifying witnesses. (*Cleavinger v. Saxner, supra*, 474 U.S. at p. 200; see also *Howard v. Drapkin, supra*, 222 Cal.App.3d at pp. 852–853 [California courts have found similarly].) Although it has yet to consider the immunity of law clerks, we have no trouble concluding that law clerks too "perform functions closely associated with the judicial process." Several federal courts of appeals, indeed,

have already found as much. As the Second Circuit has explained, "a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function." (*Oliva v. Heller* (2d Cir. 1988) 839 F.2d 37, 40.) For that reason, the court concluded, "we therefore must agree that 'for purposes of absolute judicial immunity, judges and their law clerks are as one.'" (*Ibid.*; see *Moore v. Brewster* (9th Cir. 1996) 96 F.3d 1240, 1244–1245 (*Moore*) [same], superseded by statute on other grounds as recognized in *Dettamanti v. Staffel* (9th Cir. 2020) 793 Fed. Appx. 583.) We find likewise here.

Finally, considering the clerk of the court (Huff), we find she too is entitled to immunity. Although not entirely clear, Acres's complaint appears to challenge certain discretionary acts that Huff took in the course of *Blue Lake v. Acres Bonusing*. Acres suggests, for example, that "Clerk Huff used her discretion" to apply the tribal court's rules of court too stringently against him. But discretionary acts of that sort, involving the application of court rules to the facts, are judicial in nature and protected by absolute immunity. (*Moore, supra*, 96 F.3d at pp. 1244–1245 [court clerk entitled to absolute immunity for his quasi-judicial acts]; *Scott v. Dixon* (11th Cir. 1983) 720 F.2d 1542, 1546 [court clerk entitled to absolute immunity for acts of a type "normally handled by a judge"].)

Attempting to overcome respondents' entitlement to judicial or quasi-judicial immunity, Acres offers several arguments that Judge Marston, Huff, DeMarse, Burrell,

Vaughn, and Lathouris acted outside of their judicial or quasi-judicial capacities. But we find none of his arguments persuasive.

First, Acres contends Judge Marston, Burrell, Vaughn, Lathouris, and DeMarse acted outside their judicial or quasi-judicial capacities when they advised the Casino, the Tribe, and Ramsey on certain legal matters while Judge Marston was presiding over *Blue Lake v. Acres Bonusing*. In support, he cites portions of his complaint where he alleged these respondents advised the Casino, the Tribe, and Ramsey on employment issues, domestic restraining orders, "the legality of arming tribal employees," "gaming compact litigation," and a suit involving the Department of Motor Vehicles titled *Blue Lake v. Shiomoto*. But Acres has not alleged that he was harmed simply because these respondents provided legal advice on these topics. He has not alleged, for example, that respondents' advising the Tribe on "gaming compact litigation" somehow caused him to suffer any harm. He has instead alleged that he was harmed because Judge Marston, with the help of these four attorneys, presided over *Blue Lake v. Acres Bonusing* even though he and his assistants had a conflict of interest and a corrupt intent to rule against him. But although we agree that a judge's presiding over a case while having a conflict of interest and corrupt intent is certainly objectionable, a judge has not acted outside of his or her judicial capacity in that scenario. (See *Stump, supra*, 435 U.S. at pp. 355–356 [judges "'are not liable to civil actions for their judicial acts, even when such acts … are alleged to have been done maliciously or corruptly'"]; *Moore, supra*, 96 F.3d at pp.

1242, 1244–1245 [federal judge, law clerk, and clerk of the court who allegedly conspired "to deprive [a litigant] of the proceeds of a judgment in his favor" were immune from suit].)

Second, Acres argues that Judge Marston acted outside his judicial capacity when "he decided to employ Vaughn, Burrell, and Lathouris as contractors to aid him in presiding over *Blue Lake v. Acres* [*Bonusing*]." But even if that is true, it is irrelevant for our purposes. Acres, after all, has not sued Judge Marston because he employed Vaughn, Burrell, and Lathouris.

Third, Acres claims that Judge Marston acted outside his judicial capacity when he "assigned *Blue Lake v. Acres* [*Bonusing*] to himself." In his view, this was a ministerial, not a judicial act, and ministerial acts are not entitled to judicial immunity. We acknowledge that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts. In *Ex parte Virginia*, 100 U.S. 339 [25 L.Ed. 676] (1880), for example, th[e Supreme] Court declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts." (*Forrester v. White* (1988) 484 U.S. 219, 228 [98 L. Ed. 2d 555, 108 S. Ct. 538].) The court reasoned that "[w]hether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent," and "[t]he duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge." (*Ex parte Virginia, supra*,

100 U.S. at p. 348.) But even supposing Judge Marston's assigning *Blue Lake v. Acres Bonusing* to himself was an administrative, not a judicial, act, we do not see how that helps Acres. Acres never alleged nor suggested that he suffered any harm from Judge Marston's mere assignment of the case. He alleged instead that he suffered harm because Judge Marston presided over *Blue Lake v. Acres Bonusing* even though he had a conflict of interest and a corrupt intent. But again, as to that conduct, we find Judge Marston plainly acted in his judicial capacity, even if inappropriately. (See *Dennis v. Sparks* (1980) 449 U.S. 24, 28–29 [66 L. Ed. 2d 185, 101 S. Ct. 183] (*Dennis*) [judge who was allegedly bribed to rule against a litigant was immune from damages liability]; see also *In re Castillo* (9th Cir. 2002) 297 F.3d 940, 952 ["when determining whether a function is judicial in nature, a court must focus on the 'ultimate act' rather than the constituent parts of the act"].)

Fourth, Acres asserts that Huff acted outside her quasi-judicial capacity when she processed Judge Marston's and his assistants' invoices relating to *Blue Lake v. Acres Bonusing*. He also alleges that Huff's obligations include "generating revenue for [the Casino]." But similar to above, even supposing all that is true, Acres never alleged that he suffered any harm from these activities, and so we fail to see the relevance of Acres's contentions. (See *Badie v. Bank of America* (1998) 67 Cal. App.4th 779, 784–785 [79 Cal. Rptr. 2d 273] ["When an appellant … asserts [a point] but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

Fifth, Acres argues that Burrell, Vaughn, Lathouris, and DeMarse are barred from claiming judicial or quasi-judicial immunity because they also claimed prosecutorial immunity. But Acres neither explains his logic nor cites any supportive authority for his position. We find his argument forfeited as a result. (*Badie v. Bank of America, supra*, 67 Cal.App.4th at pp. 784–785.) In any event, to the extent Acres believes these respondents have raised conflicting immunity defenses, we disagree. These respondents have raised both judicial and prosecutorial immunity, it appears, because they believe Acres has challenged their conduct in their judicial capacity (in their capacity as, in effect, law clerks to Judge Marston) and in their prosecutorial capacity (in their capacity as the Casino's counsel).

Lastly, Acres asserts that those respondents who corruptly conspired with Judge Marston are not entitled to judicial immunity, even if Judge Marston is. Acres bases his argument on the Supreme Court's decision in *Dennis*, which found that private litigants who allegedly bribed a judge could be liable for their conduct under 42 United States Code section 1983 even though the judge was immune. (*Dennis, supra*, 449 U.S. at pp. 28–29.) As the court noted, these litigants "urg[ed] dismissal for failure to allege action 'under color' of state law, a necessary component of a § 1983 cause of action." (*Id.* at p. 26.) They reasoned that, because they are private individuals rather than state officials, they could not act "under color" of state law. (*Ibid.*) But the court disagreed. It reasoned that "to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the

State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." (*Id.* at pp. 27–28.) None of this reasoning helps Acres, however. *Dennis* does not, as Acres appears to believe, supply a rationale for overcoming judicial or quasi-judicial immunity. Indeed, the one party in the case who could claim judicial immunity, the judge, remained immune from suit. We thus fail to see how the case assists Acres in his efforts to overcome the judicial or quasi-judicial immunity of Huff, DeMarse, Burrell, Vaughn, and Lathouris.

We therefore conclude that Judge Marston, Huff, DeMarse, Burrell, Vaughn, and Lathouris are all entitled to absolute personal immunity. Our decision in this regard, like our conclusion concerning sovereign immunity, accords with the Ninth Circuit's decision in *Acres Bonusing*. (See *Acres Bonusing, Inc., supra*, 2021 WL 5144701 at p. *12 [Judge Marston, Huff, Burrell, DeMarse, Vaughn, and Lathouris found entitled to absolute immunity].)

2. Ramsey

We consider next the alleged judicial immunity of Ramsey.

Respondents never clearly explain why Ramsey is entitled to judicial immunity, other than to note that she is an associate judge of the tribal court. But a person is not entitled to judicial immunity merely because she happens to be a judge. "It is only for acts performed in

h[er] 'judicial' capacity that a judge is absolutely immune." (*Stump, supra*, 435 U.S. at p. 360.) And to the extent respondents attempt to characterize Acres's claims against Ramsey as involving acts performed in her judicial capacity, we reject that contention. As Ramsey herself said in her declaration, she "did not perform any judicial duties in connection with the Tribal Court action entitled *Blue Lake Rancheria Casino and Hotel v. Acres*." Acres does not appear to allege any differently in his complaint.

In the end, Ramsey may be entitled to another form of personal immunity in this action. But respondents have not shown that she is entitled to judicial immunity. (See *Acres Bonusing, Inc., supra*, 2021 WL 5144701 at p. *13 [reaching the same conclusion after respondents conceded that Ramsey "would not be entitled to judicial or quasi-judicial immunity"].)

B. Prosecutorial and Similar Immunity for Government Attorneys

Finally, we consider whether certain respondents are entitled to prosecutorial or similar immunity for their alleged legal work on behalf of the Casino in its suit against Acres. Six of the respondents—namely, Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris—raise this defense. We agree these respondents are entitled to immunity.

Courts have long found that government attorneys may be entitled to absolute immunity for their work "closely associated with the judicial process" (*Burns v.*

Reed (1991) 500 U.S. 478, 495 [114 L.Ed.2d 547, 111 S.Ct. 1934]) an immunity that courts have at times characterized "as a form of 'quasi-judicial' immunity … derivative of the immunity of judges" (*Imbler v. Pachtman* (1976) 424 U.S. 409, 420 [47 L. Ed. 2d 128, 96 S. Ct. 984] (*Imbler*)). Courts have typically, though not always, done so when government attorneys act in a prosecutorial capacity. In *Yaselli v. Goff* (1927) 275 U.S. 503 [72 L.Ed. 395, 48 S. Ct. 155], for example, the Supreme Court summarily affirmed a lower court decision that found federal prosecutors are immune from suits for malicious prosecution. (*Id.* at p. 503; see *Yaselli v. Goff* (2d Cir. 1926) 12 F.2d 396, 404.)

Fifty years later, in *Imbler*, the court reaffirmed that holding in a case involving a suit against a California prosecutor who allegedly conspired with others to charge and convict the plaintiff. Although acknowledging "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty" (*Imbler, supra*, 424 U.S. at p. 427), the court found several considerations weighed in favor of granting absolute immunity. First, the court noted the long history of courts granting common law immunity to prosecutors. (*Id.* at pp. 421–424.) Second, the court found "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest." (*Id.* at p. 427.) Among other things, the court explained, "[i]t would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." (*Id.* at pp. 427–428.) Finally, the court found various procedural safeguards—including "the remedial powers

of the trial judge, appellate review, and state and federal post-conviction collateral remedies"—would prevent abuses of authority from going unaddressed. (*Id.* at p. 427.) These considerations in mind, the court found it better "'in the end … to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" (*Id.* at p. 428; but see *Buckley v. Fitzsimmons, supra*, 509 U.S. at p. 273 ["A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity"].)

A couple years after *Imbler* , the Supreme Court found "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* (1978) 438 U.S. 478, 515 [57 L. Ed. 2d 895, 98 S. Ct. 2894] (*Butz*).) After expressing concern that "[a]n individual targeted by an administrative proceeding will react angrily and … seek vengeance in the courts," the court explained "that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment" and found that several procedural safeguards, including potential court review, adequately protect the interests of those subject to administrative actions. (*Id.* at pp. 515–516; see also *id.* at p. 517.)

The California Supreme Court has found similarly, 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. In *Hardy, supra*, 48 Cal.2d 577, for example, 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. (*Id.* at pp. 580–584.) The court reasoned that all these officials had acted within the general scope of their duties, which included the disciplining of professors, and then found, like the court in *Imbler*, that it is better "'in the end … to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" (*Id.* at p. 583; see also *White v. Towers* (1951) 37 Cal.2d 727, 729 [235 P.2d 209] [agency investigator, who had the duty to investigate crime and to institute criminal proceedings, was immune from civil liability for malicious prosecution of a criminal action]; but see *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 756 [63 Cal. Rptr. 2d 842, 937 P.2d 273] ["California law regarding the presence or absence of governmental immunity for false arrest and malicious prosecution" is now—as to employees of California, its political subdivisions, and its public corporations—"governed by statute," namely, Gov. Code, § 821.6].)

Under this and similar authority, we find Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris are all entitled to absolute immunity for their alleged legal work on behalf of the Casino. Three general

considerations guide our decision. First, although Acres argues otherwise, we find historical support for applying immunity in this context. To quote the Second Circuit in *Barrett v. U.S.* (2d Cir. 1986) 798 F.2d 565—which found an attorney who defended the State of New York in a civil suit was entitled to absolute immunity—"[e]xten[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.* at p. 572; see also *Mangiafico v. Blumenthal* (2d Cir. 2006) 471 F.3d 391, 396 [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"]; *Davis, supra*, 398 F.2d at p. 85 [tribe's outside counsel who made "defamatory statements made by him within the scope of his official duties" found entitled to absolute immunity].)

Second, we find an alternative rule 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. (See *Butz, supra*, 438 U.S. at p. 515.) Tribal attorneys considering whether to move forward with a suit of this sort on the tribe's behalf "should not be inhibited in the faithful performance of [their] duties by the threat of harassing lawsuits against [them]." (*Barrett v. U.S., supra*, 798 F.2d at p. 572; see also *Hardy, supra*, 48 Cal.2d at pp.

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'"].)

Finally, we note that litigants have opportunity to challenge the legality of a suit against them in tribal court. Although we acknowledge Judge Marston's conflict of interest in this case, litigants typically may present their arguments to an impartial judge in tribal court. The tribal court rules here, indeed, expressly acknowledge a litigant's right to an impartial judge. (Tribe Ord., No. 07-01, tit. 11, art. 1, ch. 1, § 11.1.1.040.E.1. ["No Judge shall be qualified to hear any case where (1) she/he has any direct interest, (2) any party involved in the case includes a relative by marriage or blood in the first or second degree, (3) for any other reason the judge cannot be impartial; or (4) the judge finds that a reasonable person would believe that he or she could not be impartial"].) Should, moreover, litigants in tribal court find the court has wrongly asserted jurisdiction over them, they may challenge the tribal court's jurisdiction in federal court. (*Nevada v. Hicks* (2001) 533 U.S. 353, 368 [150 L. Ed. 2d 398, 121 S. Ct. 2304].) Acres, in fact, did just that. He obtained federal court review that allowed "limited discovery" to determine whether the tribal court asserted jurisdiction in "bad faith." (*Acres II, supra*, 2017 WL 733114 at pp. *1, *3.)

Taking all these considerations together, and considering other cases that have long found immunity

appropriate under similar circumstances (see *Davis, supra*, 398 F.2d at p. 85), we find absolute immunity appropriate here.

Although Acres offers several arguments in favor of a contrary result, we find none of his arguments persuasive. First, without any citation or explanation, he contends "[n]o Respondent can enjoy prosecutorial immunity because *Blue Lake v. Acres* [*Bonusing*] was not a criminal proceeding." Supreme Court precedent, however, forecloses the argument that government attorneys may enjoy absolute immunity only in criminal proceedings. (See *Butz, supra*, 438 U.S. at p. 515 [finding immunity in noncriminal administrative proceeding]; *Hardy, supra*, 48 Cal.2d at pp. 583–584 [same].)

Second, Acres argues that respondents are not entitled to immunity because "Indian tribes lack criminal jurisdiction over non-Indians." But although we acknowledge that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians" (*Oliphant v. Suquamish Indian Tribe* (1978) 435 U.S. 191, 212 [55 L. Ed. 2d 209, 98 S. Ct. 1011]), we fail to see the relevance of that detail. As Acres himself acknowledges, *Blue Lake v. Acres Bonusing* was not a criminal proceeding.

Third, Acres argues that respondents cannot seek immunity under Government Code section 821.6—a statute granting immunity to certain public officials for malicious prosecution. That statute, in particular, provides that a "public employee"—defined to mean an employee of the State of California, its political subdivisions, or its

public corporations—"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." (Gov. Code, § 821.6; see also *id.*, §§ 811.2, 811.4.) But although true, as Acres asserts, that respondents cannot seek immunity under this statute (and they have not), they can seek support in the principles underlying the statute. Government Code section 821.6 serves in large part to codify the common law rule, recognized in cases like *Hardy*, that immunized public employees from suits for malicious prosecution. (See *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720, 719 [117 Cal. Rptr. 241, 527 P.2d 865] [noting that, according to the Sen. Com. comment to the statute, Gov. Code, § 821.6 "'continues the existing immunity of public employees'" recognized in *Hardy* and similar cases].) 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. (See *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1049 [99 Cal. Rptr. 2d 587] ["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"]; see also *Davis, supra*, 398 F.2d at p. 85 [tribal council found entitled to absolute immunity under common law immunity principles].)

Fourth, Acres contends we should not extend immunity to "civil litigators from private law firms acting on behalf of a for-profit commercial enterprise." Acres's

contention appears to include two components: (1) only a tribe's in-house counsel can assert immunity, and (2) a tribe's counsel can only assert immunity in suits involving traditional governmental matters (as opposed to "for-profit commercial" matters). We find neither argument persuasive. To start, we reject Acres's suggestion that only a tribe's in-house counsel can assert immunity. As the Supreme Court explained in *Filarsky*, a case involving the immunity of a private attorney who a city had hired for an investigation, "[a]fforded immunity not only to public employees but also to others acting on behalf of the government" is consistent with historical practices and "serves to '"ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service."'" (*Filarsky, supra*, 566 U.S. at p. 390; see also *id.* at p. 387; *Davis, supra*, 398 F.2d at p. 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"].)

Turning next to Acres's suggestion that a tribe's counsel can only assert immunity in suits involving traditional governmental matters, we reject that contention too. In the context of sovereign immunity, the Supreme Court has not "yet drawn a distinction between governmental and commercial activities of a tribe." (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 754–755 [140 L.Ed.2d 981, 118 S.Ct. 1700].) It instead, for both types of activities, has found tribes enjoy sovereign immunity. (*Id.* at p. 760 ["[t]ribes enjoy immunity from suits on contracts, whether those contracts involve

governmental or commercial activities"].) Considering that sovereign immunity and personal immunity both "spring[] from the same root considerations" (*Scheuer, supra*, 416 U.S. at p. 239), we similarly decline to draw a distinction between governmental and commercial activities of a tribe in the context of personal immunity. We see no reason, after all, to treat a government attorney who files suit to enforce a traditional governmental contract different from a government attorney who files suit to enforce a commercial contract. Both attorneys, in our view, are entitled to immunity for the initiation and prosecution of the enforcement action on the government's behalf.

Fifth, in his reply brief, Acres contends Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris cannot, in this appeal, seek immunity for their work on the Casino's behalf, because the trial court never reached that issue and these respondents never cross-appealed the trial court's decision. We disagree. A respondent may on appeal "'assert a legal theory which may result in affirmance of the judgment,'" even if the trial court declined to consider that theory. (*Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 798 [21 Cal. Rptr. 2d 779].)

Finally, also in his reply brief, Acres contends Rapport and DeMarse cannot seek immunity for their work on the Casino's behalf, because, although DeMarse "undisputed[ly]" billed the Casino for work in *Blue Lake v. Acres Bonusing*, "Rapport specifically denies that he or DeMarse provided any legal services in *Blue Lake v. Acres* [*Bonusing*]." Acres reasons that Rapport's

statement shows that his and DeMarse's work in *Blue Lake v. Acres Bonusing* was "non-legal in nature" and so is not protected by any immunity afforded to tribal attorneys. We reject the claim. Acres's argument is premised on a misunderstanding of the record. Start with his claim that DeMarse "undisputed[ly]" billed the Casino for work in *Blue Lake v. Acres Bonusing*. Acres suggests in this claim that DeMarse represented the Casino in the tribal litigation. But as he acknowledges elsewhere in his briefing, DeMarse served Judge Marston, not the Casino, in *Blue Lake v. Acres Bonusing*. Consider next Acres's claim that "Rapport specifically denies that he or DeMarse provided any legal services in *Blue Lake v. Acres* [*Bonusing*]." To support that claim, Acres points to Rapport's declaration. But the declaration says something quite different, stating, with regard to *Blue Lake v. Acres Bonusing*, that neither he nor DeMarse "performed any legal services for the *Tribe* in the tribal court proceedings." (Italics added.) At most, then, the record shows that (1) DeMarse assisted Judge Marston in *Blue Lake v. Acres Bonusing*, and (2) DeMarse and Rapport did not represent the Tribe in *Blue Lake v. Acres Bonusing*. But it does not show, as Acres claims, that DeMarse and Rapport provided nonlegal services to the Casino in *Blue Lake v. Acres Bonusing*.

IV

Leave To Amend

Lastly, we turn to Acres's contention that the trial court wrongly granted respondents' motions to quash

without giving him leave to amend his complaint. Acres asserts that he should be granted leave to amend his complaint for five reasons. First, he argues that he should have leave to amend his complaint "to attack Respondents' entitlement to sovereign immunity." Second, he asserts that his "complaint could be amended to name Blue Lake Casino as a defendant," which, he states, might not have sovereign immunity. Third, he contends his complaint "could be amended" to add causes of action under the Racketeer Influenced and Corrupt Organizations Act (RICO; 18 U.S.C. § 1961 et seq.). In support, he cites a federal district court decision that allowed a plaintiff to pursue a RICO claim against several defendants who had unsuccessfully claimed sovereign immunity. (*JW Gaming Development, LLC v. James* (N.D.Cal., Oct. 5, 2018, No. 3:18-cv-02669-WHO) 2018 WL 4853222, pp. *3–*4, affd. (9th Cir. 2019) 778 Fed. Appx. 545.) Fourth, he asserts the "complaint could be amended to show Judge Marston negotiated with the State of California on Blue Lake's behalf while he presided over *Blue Lake v. Acres* [*Bonusing*]." He then claims that "[t]here is a reasonable possibility the inclusion of these allegations will defeat Respondents' claims of judicial immunity." And fifth, he contends the "complaint could be amended to allege criminal causes of action," which, he argues, "would not be protected by tribal sovereign immunity."

But of all these claims, we find it necessary to address only one—the fourth. Acres, again, asserts that "Respondents' claims of judicial immunity" might be defeated if his complaint were amended to note that Judge Marston represented the Tribe at the time of *Blue Lake*

v. Acres Bonusing. We disagree. As discussed above, even if Judge Marston had a conflict of interest and a corrupt intent when he presided over *Blue Lake v. Acres Bonusing*, that would still not be ground for finding him liable for damages. (See *Stump, supra*, 435 U.S. at pp. 355–356 [judges "'are not liable to civil actions for their judicial acts, even when such acts … are alleged to have been done maliciously or corruptly'"].) Because Acres's proposed amendment would thus be futile in overcoming Judge Marston's claim of judicial immunity, we decline to find that he should be granted leave to amend his complaint in this respect. (*Nelson v. Tucker Ellis, LLP* (2020) 48 Cal.App.5th 827, 848 [262 Cal.rptr.3d 250] [""'[L]eave to amend should not be granted where … amendment would be futile.'""].)

All Acres's remaining contentions—the first, second, third, and fifth—appear to be directed toward overcoming respondents' claimed entitlement to sovereign immunity. But because, for the reasons already discussed, we agree that respondents are not entitled to sovereign immunity, we find it unnecessary to address these arguments here.

DISPOSITION

We reverse the trial court's ruling in favor of Ramsey, Frank, Boutin Jones, Janssen Malloy, Chase, Stouder, O'Neill, Yarnall, and Burroughs. In all other respects, we affirm. The parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Appendix B

/s/_____
Blease, Acting P.J.

We concur:

/s/_____
Mauro, J.

/s/_____
Duarte, J.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO, DATED FEBRUARY 11, 2019

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

34-2018-00236829-CU-PO-GDS

ACRES,

v.

MARSTON.

February 11, 2019, Decided

Judge: David Brown.

MINUTE ORDER

Nature of Proceeding: Ruling on Submitted Matter (Motion to Quash Service and Dismiss Pursuant to CCP 418.10 (Marston)) taken under submission on 2/5/2019

TENTATIVE RULING

The motion of specially appearing defendants Lester Marston, Aria Ramsey, Thomas Frank, Anita Huff, Rapport & Marston, David Rapport, Cooper DeMarse, Darcy Vaughn, Ashley Burrell and Kostan Lathouris pursuant to Code of Civil Procedure Section 418.10 for

an order quashing service of and dismissing as against them the entire action of Plaintiff James Acres ("Acres") is GRANTED.

These defendants first move to dismiss on the ground that all of the specially-appearing defendants are sued solely for actions taken by them within the scope of their authority in their respective official capacities as judicial officers, elected officials, and/or senior executives of the Blue Lake Rancheria, a federally-recognized indian tribe ("Tribe") or its "arms" and thus are cloaked with the Tribe's unwaived sovereign immunity. Thus, they contend that tribal sovereign immunity precludes this Court from acquiring or exercising jurisdiction over them or the causes of action alleged against them. The Court finds that these moving defendants have established their entitlement to tribal sovereign immunity in this action.

Defendants alternatively contend that they are also entitled to absolute or quasi-judicial immunity or prosecutorial immunity because Acres has sued Tribal Court Chief Judge Marston, Tribal Court Clerk Huff, and the judge's Law Clerks/Associate Judges Burrell, Vaughn, DeMarse, and law clerk Lathouris for judicial or quasi-judicial acts taken while Judge Marston presided over the Tribal Court civil action *Blue Lake v. Acres* which is at the heart of Acres' claims. The Court finds that these moving defendants have also established immunity under the alternative concepts of absolute or quasi-judicial immunity.

The parties do not dispute that these issues are properly presented to the court by way of motion to

quash and or dismiss. (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1144; *Great W. Casinos, Inc v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1414.) There is no dispute that the Blue Lake Rancheria is a federally recognized indian tribe entitled to tribal sovereign immunity. The parties' burdens upon the motion are also not in dispute. "Where the motion to dismiss is based on a claim of … sovereign immunity, which provides protection from suit and not merely a defense to liability, however, the court must engage in sufficient pretrial factual and legal determinations to "'satisfy itself of its authority to hear the case' before trial." … ' … [W]hen a defendant challenges personal jurisdiction, the burden shifts to the plaintiff to prove the necessary jurisdictional criteria are met by competent evidence in affidavits and authenticated documentary evidence; allegations in an unverified complaint are inadequate." (*Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1204.) The lack of jurisdiction can also be shown by plaintiff's own pleadings. (*Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 644.)

This motion, as with the related motion, requires a lengthy summarization of the allegations of Acres' complaint, and the alleged roles of the moving defendants in relation to those allegations.

This tort action arises from a previous civil case filed by the Blue Lake Casino & Hotel (a tribally owned entity of Blue Lake Rancheria) against Acres Bonusing, Inc. ("ABI"), and Plaintiff James Acres ("Acres"). The prior civil case was filed in the Blue Lake Rancheria Tribal

Court - Case Number C-15-1215IJM. That Tribal Court case ("*Blue Lake v. Acres*") alleged four causes of action against ABI (breach of contract, tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment, and money had and received) and one cause of action against Acres (fraudulent inducement).

Blue Lake v. Acres arose from a contract between Blue Lake Casino & Hotel and ABI related to ABI's development, service and maintenance of online gambling software referred to as the iSlot System. Acres alleges that he was not personally a party to the iSlot Agreement at issue in *Blue Lake v. Acres*. (Complaint "Com." ¶49.)

Acres alleges in this action that The Blue Lake Rancheria ("Tribe") is a federally recognized Indian Tribe in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria. Tribe comprises approximately sixty members and approximately ninety acres of land. (Com. ¶8.) Tribe is not named in the present action.

Under Tribe's constitution, the Blue Lake Business Council is the executive political arm of the Tribe. The Blue Lake Business Council is not currently named as a Defendant to this action. (Com. ¶9.)

The Tribal Court of the Blue Lake Rancheria ("Tribal Court") was established by the Blue Lake Business Council through its enactment of Ordinance No. 07-01, and under "its inherent sovereign authority to establish and operate its own judicial system." The Tribal Court is not currently named as a Defendant to this action. (Com. ¶10.)

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The Blue Lake Casino & Hotel ("Blue Lake Casino") is an economic enterprise owned and operated by Tribe. According to a gaming ordinance enacted by the Blue Lake Business Council, profits from gaming at the casino are deposited directly in Tribe's general treasury. Blue Lake Casino was the plaintiff in the alleged wrongful civil proceeding against Mr. Acres in the Tribal Court. However, Blue Lake Casino is also not currently named as a Defendant to this action. (Com. ¶11.)

The named defendants in the present action were not parties to the *Blue Lake v. Acres* action. Instead, they are alleged to have had other involvement in the prosecution of *Blue Lake v. Acres* against Acres in the Tribal Court. The alleged involvement of the many defendants, including the moving defendants, is important to the immunity questions raised in this motion.

Lester Marston ("Judge Marston") is alleged to have served as the Chief Judge of the Blue Lake Tribal Court, and he originally presided over *Blue Lake v. Acres*. (Com. ¶15.)

Arla Ramsey ("Ramsey") is alleged to have been the CEO of Blue Lake Casino during *Blue Lake v. Acres*. Ms. Ramsey also served as Tribe's Tribal Administrator, as a judge of Blue Lake's Tribal Court, and as the vice-chair of the Blue Lake Business Council. In her role as Tribal Administrator, Ms. Ramsey was responsible for the day to day business affairs of the Tribal Government, and supervised the work of Clerk Anita Huff. (Com. ¶12.)

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Anita Huff ("Huff") is alleged to have been the Clerk of the Tribal Court during *Blue Lake v. Acres*. While acting as Clerk, Clerk Huff was also employed by Tribe in various other roles, like "Grants and Contracts Manager." (Com. ¶14.) During *Blue Lake v. Acres*, most of the orders issued by the Tribal Court were served by Clerk Huff upon the parties. (Com. ¶120.)

Thomas Frank ("Frank") is alleged to have held various executive roles for Tribe over the past 15 years, including as a Blue Lake Casino executive (until 2009) and as Director of Business Development for Tribe (from 2010 until at least 2015). (Com. ¶13.) During *Blue Lake v. Acres*, Frank verified Blue Lake Casino's discovery responses to Mr. Acres, and made several sworn declarations. (Com. ¶119.)

David Rapport ("Rapport") allegedly provided attorney services to the Tribe in partnership with Judge Marston since at least 1983. (Com. ¶17.)

Rapport & Marston is alleged to be a law firm consisting of Judge Marston and Rapport. (Com. ¶16.) This is repeatedly disputed in their motion papers.

Darcy Vaughn (Vaughn) is alleged to be an associate judge of the Blue Lake Tribal Court, and a licensed California attorney associated with Rapport and Marston. (Com. ¶20.) Vaughn performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in *Blue Lake v. Acres*. (Com. ¶123.)

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Ashley Burrell (Burrell) is alleged to be an associate judge of the Blue Lake Tribal Court, and a licensed California attorney associated with Rapport and Marston. (Com. ¶18.) Burrell performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in *Blue Lake v. Acres*. (Com. ¶122.)

Cooper DeMarse (DeMarse) is alleged to be an associate judge of the Blue Lake Tribal Court, and a licensed California attorney associated with Rapport and Marston. (Com. ¶19.) DeMarse performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in *Blue Lake v. Acres*. (Com. ¶125.)

Kostan Lathouris (Lathouris) is alleged to be an attorney licensed in Nevada and associated with Rapport and Marston. (Com. ¶21.) Lathouris performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in *Blue Lake v. Acres*. (Com. ¶ 124.)

Boutin Jones Inc. ("Boutin") is a law firm located in Sacramento, California. Boutin attorneys filed the initial complaint in *Blue Lake v. Acres* and prosecuted the case for over a year against Acres. Boutin also represented Blue Lake Casino in federal actions initiated by Mr. Acres seeking to enjoin *Blue Lake v. Acres*. (Com. ¶22.)

Michael Chase ("Chase") is alleged to be Vice-President and a shareholder attorney at Boutin. It is alleged that Chase personally appeared on behalf of Blue Lake Casino in the federal actions commenced by Acres

in his effort to enjoin *Blue Lake v. Acres*, referred to by Acres as *Acres v. Blue Lake I* and *Acres v. Blue Lake II*. (Com. ¶23.)

Daniel Stouder (Stouder) is alleged to be Vice-President and a shareholder attorney at Boutin. Stouder was an attorney of record representing Blue Lake Casino in *Blue Lake v. Acres*, and *Acres v. Blue Lake I and II*, and personally appeared in federal court on Blue Lake Casino's behalf in *Acres v. Blue Lake II*. (Com. ¶24.)

Amy O'Neill (O'Neill) is alleged to have been an attorney at Boutin, and was an attorney of record representing Blue Lake Casino in *Blue Lake v. Acres*. It is alleged that she personally appeared in Blue Lake Tribal Court on Blue Lake Casino's behalf. O'Neill was also an attorney of record for Blue Lake Casino in *Acres v. Blue Lake I and Acres v. Blue Lake II*. (Com. ¶25.)

Janssen Malloy LLP ("Janssen Malloy") is alleged to be a law firm located in Humboldt County, California. In February of 2017, it is alleged that Janssen Malloy replaced Boutin as attorneys for Blue Lake Casino in *Blue Lake v. Acres* and *Acres v. Blue Lake II*. (Com. ¶26.)

Megan Yarnall (Yarnall) is alleged to be a partner at Janssen Malloy. She was an attorney of record for Blue Lake Casino in both *Blue Lake v. Acres* and in *Acres v. Blue Lake II*, and personally appeared on behalf of Blue Lake Casino in both actions. (Com. ¶27.)

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Amelia Burroughs (Burroughs) is alleged to be an attorney (and perhaps partner) at Janssen Malloy, and attorney of record for Blue Lake Casino in *Blue Lake v. Acres*. (Com. ¶28.)

The Court need not recite at length here the detailed gravamen of Acres' complaints about Judge Marston's alleged disqualifying conflicts of interest in serving as the trial judge in *Blue Lake v. Acres* while also serving as the Tribe's lawyer in other legal matters. It will suffice to summarize Acres' position that Judge Marston had several disqualifying conflicts and connections with Tribe while he acted as judge in Tribe's lawsuit against Acres in *Blue Lake v. Acres*. Acres also alleges that Judge Marston had improper connections with the attorneys representing, or associated with the attorneys representing, Blue Lake Casino in *Blue Lake v. Acres*. And, Acres alleges that the fraud cause of action prosecuted by Blue Lake Casino against him in *Blue Lake v. Acres* was prosecuted without probable cause and with malice, and that the ultimate decision in *Blue Lake v. Acres* in his favor bears that out.

Acres also alleges that Judge Marston had a fiduciary duty to Acres in the context of *Blue Lake v. Acres* to disclose his many conflicting interests to Acres, and to recuse himself from that action long before he did so. Acres alleges that the many other defendants aided or conspired with Judge Marston to breach that fiduciary duty.

Acres alleges that the conflicting interests between Judge Marston, the Tribe, and the attorney defendants

was "part of a pattern of despicable behavior, rife with malice, oppression and fraud in which [Tribe], its entities, and agents, wrongfully each used civil proceedings in Blue Lake Tribal Court for their own individual benefit," which "was continuous from at least January 2013 until at least December 2016." (Com. ¶ 129.)

The Court's ruling upon the motion to quash/dismiss is of course not an adjudication of whether Acres has or had legitimate grievances or concerns about the Tribal Court, the tribal lawsuit, or Judge Marston's involvement in that matter as alleged in the complaint. Any grounds for disqualification or discipline of a Tribal Judge, under the Tribe's Code of Judicial Conduct or otherwise, would fall solely to the Tribe.

In light of the foregoing alleged facts, Acres' Verified Complaint asserts seven causes of action:

First Cause of Action [Wrongful Use of Civil Proceedings ("Malicious Prosecution")] Ramsey, Frank, Boutin, Janssen Malloy, and defendant attorneys Stouder, O'Neill, Burroughs and Yarnell committed the tort of malicious prosecution by filing and prosecuting the Tribal Court action *Blue Lake v. Acres* against Acres.

Second Cause of Action [Aiding and Abetting Malicious Prosecution] Judge Marston, Clerk Huff, and attorneys Rapport, Rapport & Marston, DeMarse, Vaughn, Burrell, Lathouris, and Chase aided and abetted the commission of the tort of malicious prosecution against Acres.

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Third Cause of Action [Conspiracy to Commit Malicious Prosecution] Rapport & Marston, Judge Marston, David Rapport, Clerk Huff, and defendant attorneys Burrell, Demarse, Vaughn, Lathouris and Chase conspired with Ramsey, Frank, Boutin, Janssen Malloy, Stouder, O'Neill, Burroughs and Yarnell to commit the tort of malicious prosecution by filing and prosecuting the Tribal Court action *Blue Lake v. Acres* against Acres. (Com.¶ 153.)

Fourth Cause of Action [Breach of Fiduciary Duty] Judge Marston had and breached a fiduciary duty to Acres by failing to disclose Judge Marston's performance of legal work for the Tribe in other matters while sitting as Tribal Judge, and a duty to recuse himself from presiding over *Blue Lake v. Acres* sooner than he did.

Fifth Cause of Action [Aiding and Abetting Breach of Fiduciary Duty] Judge Marston, Ramsey, Frank, Clerk Huff, Rapport & Marston, Boutin, Rapport, Burrell, DeMarse, Vaughn, Lathouris, Chase, Stouder and O'Neill, aided and abetted Judge Marston's alleged breach of his alleged fiduciary duty to Acres by assisting and encouraging Judge Marston's alleged breach of his alleged fiduciary duty to Acres.

Sixth Cause of Action [Constructive Fraud] Judge Marston committed constructive fraud against Acres by failing to disclose that Judge Marston had received compensation from the Tribe for legal work unrelated to Acres that Judge Marston performed in a capacity other than as the Tribal Court Judge.

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Seventh Cause of Action [Aiding and Abetting Constructive Fraud] Ramsey, Frank, Clerk Huff, Rapport & Marston, Rapport, Burrell, DeMarse, Vaughn, Lathouris, Boutin, Chase, Stouder, and O'Neill aided and abetted Judge Marston's alleged commission of constructive fraud against Acres.

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

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

On this key issue, the parties cite *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal. App.4th 1407; *Brown v. Garcia* (2017) 17 Cal.App.5th 1198; *Lewis v. Clarke* 137 S. Ct. 1285 (2017); and *People*

ex rel. Owen v. Miami Nations Enterprises (2016) 2 Cal. 5th 222. They also discuss two federal court opinions *J.W. Gaming Dew, LLC v. James* (N.D. Cal. Oct. 5, 2018) Case No. 3:18-cv-02669-WHO and *Williams & Cochrane v. Quechan Tribe of the Fort Yuma Indian Reservation* (S.D. Cal. Jun. 7, 2018) Case No. 3:17-cv-01436-GPC-MDD. (J.W. Gaming has been appealed to the Ninth Circuit, so this court has not considered that opinion in its analysis.)

The Court's review of the cited authorities persuades it that the moving defendants are entitled to the Tribe's sovereign immunity or an extension of that immunity, with respect to the torts alleged against them in this action.

The clear starting point is the United States Supreme Court's fairly recent opinion in *Lewis v. Clarke* 581 U.S., 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017). In that case, a tribal employee was sued for negligence when he allegedly caused a motor-vehicle accident on an interstate highway not on tribal lands. (137 S. Ct. at 1291.) The employee was shuttling customers for the tribe. The tribe argued that sovereign immunity barred the suit because the driver was a tribal employee driving on tribal business and because the tribe's decision to indemnify its employees meant that a judgment would affect the tribe's finances. (*Id.*) The United States Supreme Court disagreed holding that a tribal employee sued in his personal capacity, based on his personal actions not occurring on tribal property, could not invoke sovereign immunity - even when acting in the scope of his employment. (*Id.*) The Court found that the particular suit would "not require action by the sovereign or disturb the sovereign's property," even if the tribe chose to indemnify the employee. (*Id.*)

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Lewis addressed in part whether the sovereign immunity of an Indian tribe bars "individual-capacity damages" against tribal employees for torts committed by them within the scope of their employment.

Justice Sotomayor's short analysis of this question starts with a tangential observation that the Court's prior cases on sovereign immunity establish that courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars a suit against state and federal employees or entities. (137 S.Ct. at 1291.) *Lewis* indicated that a court should not extend sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. (*Id.* at 1293.)

The distinction between individual- and official-capacity suits thus was the paramount question in the *Lewis* analysis bounded by general rules of the scope of analogous sovereign immunity exercised by state and federal entities. "The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity." (137 S. Ct. at 1292.) "An officer in an individual-capacity action, on the other hand, may be able to assert personal immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. But sovereign immunity 'does not erect a barrier against suits to impose individual and personal liability.'" (137 S. Ct. at 1292.)

Lewis observed that "[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." (137 S. Ct. at 1292) In comparison, "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." (*Id.*)

Acknowledging the analogous "general rules" of state and federal sovereign immunity, and the operative distinction between "personal capacity claims" and "official capacity claims," *Lewis* then turned to the facts of the negligence action before it. The Court found the case to be "a negligence action arising from a tort committed by [the employee] on an interstate highway within the State of Connecticut. The suit [was] brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment [would] not operate against the Tribe." Based upon those specific facts, *Lewis* found that the suit was not against the employee in his official capacity. To the contrary, *Lewis* held that the case was simply a suit against the employee to recover for his personal actions, which would **not require action by the sovereign** or disturb the sovereign's property.

There are obvious distinctions between the negligence case against the driver in *Lewis* and the malicious prosecution action and related torts stated here against moving defendants. First, the alleged tort in *Lewis* occurred entirely on state land in pursuit of the tribe's commercial activities, while the malicious prosecution

claim and related torts here occurred entirely on tribal land within the context of a Tribal Court judicial proceeding. Second, the tribe's driver in *Lewis* did not claim to be an "official" of the tribe acting as the tribe's necessary fiduciary agent, while the Tribe's Tribal Court Judge, Clerk, Executives and attorneys in this matter were officials of Tribe in the Tribal Court, or officials providing legal representation to the Tribe. Third, the negligence action against the driver in *Lewis* would not be expected to require the appearance of the Tribe (or tribal officials) as witnesses or necessary parties in the action, while the malicious prosecution claim would most likely require action by the Tribe in the lawsuit and could involve efforts to invade the privileged interactions between the Tribe and its legal counsel regarding the decision-making process underlying the prosecution of Acres in the Tribal Court. Moreover, as to the moving defendants, Acres' causes of action draw into dispute the totality of the Tribal Court, its administration, and validity.

Lewis also looked to the general rules of state and federal governmental immunity to guide the Court's consideration of the appropriate scope of tribal sovereign immunity and to assess whether the claim was official or personal. In that respect, this court has also considered the appropriate and available scope of sovereign immunity in California relating to similar tort claims.

Specifically, Government Code section 821.6 provides a broad immunity "for injury caused by [a public employee] instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he

acts maliciously and without probable cause." The statute "is given an 'expansive interpretation' in order to best further the rationale of the immunity, that is, to allow the free exercise of the prosecutor's discretion and to protect public officers from harassment in the performance of their duties. [Citations.]" (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1292.) It extends not merely to the institution of proceedings, but to "[a]cts taken during an investigation prior to the institution of a judicial proceeding " (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 229.) If the public employee is immune, the public entity by which he or she was employed is likewise immune, unless otherwise provided by statute. (Gov. Code, § 815.2, subd. (b).) In short, the State of California enjoys sovereignty immunity from malicious prosecution claims because its officers and attorneys are statutorily entitled to such immunity.

In addition to the malicious prosecution claim, Acres also alleges that some of the moving defendants committed other torts by conspiring with or aiding Judge Marston to breach a fiduciary duty owed by him to Acres in the Tribal Court action. These claims implicate other related immunities that emanate from sovereign immunity — namely judicial immunity and quasi-judicial immunity. "It is well established judges are granted immunity from civil suit in the exercise of their judicial functions. (*Frost v. Geernaert* (1988) 200 Cal. App. 3d 1104, 1107-1108, citing *Tagliavia v. County of Los Angeles* (1980) 112 Cal. App. 3d 759, 761; *Oppenheimer v. Ashburn* (1959) 173 Cal. App. 2d 624, 629.) This rule applies even where the judge's acts are alleged to have been done maliciously and

corruptly. (*Tagliavia, supra*, at p. 761.) The rule is based on "'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself.'" (*Tagliavia, supra*, 112 Cal. App. 3d at p. 762.) Judicial immunity is a principle of common law **which is necessary for the welfare of the state and the peace and happiness of society**. (*Tagliavia, supra*, at pp. 762-763; *Singer v. Bogen* (1957) 147 Cal. App. 2d 515, 523-524.) Judicial immunity from a civil action for monetary damages is absolute. (*Howard v. Drapkin* (1990) 222 Cal. App. 3d 843, 851; *Soliz v. Williams* (1999) 74 Cal. App.4th 577, 585-586.) "'The justification for [judicial immunity] is that it is impossible to know whether [a person's claim against an official] is well founded until the case has been tried, and that 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.' …Thus, the protection must be absolute, even to the malicious or corrupt judge. The effect of judicial immunity is that the action against the judicial officer must be dismissed." (*Howard v. Drapkin* (1990) 222 Cal. App. 3d 843, 852.)

Further, under the related concept of "quasi-judicial immunity," California courts have also extended a form of judicial immunity to persons other than judges if those persons act in a judicial or quasi-judicial capacity. In determining whether a person is acting in a quasi-

judicial fashion, the courts look at "the nature of the duty performed [to determine] whether it is a judicial act — not the name or classification of the officer who performs it, and many who are properly classified as executive officers are invested with limited judicial powers." (*Pearson v. Reed* (1985) 6 Cal.App.2d 277, 286-287.) The immunity has been extended to nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process against damage claims arising from their performance of duties in connection with the judicial process. (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585-586.)

Existing California case authorities also provide guidance.

In *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, the Second District held that tribal sovereign immunity extended to the tribe's outside legal counsel (characterized as "non-Indian law firm and general counsel") in order to protect the tribal defendants' interests and ensure adequate legal counsel for the tribe. The plaintiff in that case filed suit against a tribe, the tribal council, individual tribal council members, the tribe's general counsel, an attorney and her private law firm regarding the tribe's cancellation of a contract. The plaintiff alleged that when the tribe realized the profit potential of the contract, its council, and the individual members of the tribal council and tribe, acting through their general counsel, decided to concoct a fraudulent scheme to cancel the contract and oust the plaintiff from the lucrative business. The plaintiff alleged claims for bad faith breach of contract, fraud, breach of fiduciary duty,

constructive fraud, conversion, interference with business relations, abuse of process, civil violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq. (RICO)), money had and received, imposition of a constructive trust, accounting and dissolution of partnership.

The trial court granted the defendants' motions to quash and dismissed the action based upon tribal sovereign immunity. The Second District affirmed finding in relevant part that the non-Indian law firm and general counsel were protected by tribal sovereign immunity from liability predicated upon their actions taken or opinions given in rendering related legal services to the tribe to the same extent of immunity entitled to the tribe, tribal council, and tribe members.

In this regard, *Great W. Casinos, Inc.* opined as follows: "In providing legal representation — even advising, counseling and conspiring with the tribe to wrongfully terminate the management contract-counsel were similarly immune from liability for those professional services. (See *Davis v. Littell, supra,* 398 F.2d 83, 85 [attorney who advised tribal council regarding the competence and integrity of an employee is immune from liability for defamation under the executive privilege].) Citing federal case law, *Great W. Casinos, Inc.* stated with approval that "[t]ribes need to be able to hire agents, including counsel, to assist in the process of regulating gaming. As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney,

or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised. The purpose of Congress in requiring background checks could be thwarted if retained counsel were inhibited in discussing with the tribe what is learned during licensing investigations, for example. Some causes of action could have a direct effect on the tribe's efforts to conduct its licensing process even where the tribe is not a party." (*Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, supra, 74 Cal.App.4th at 1423-1424 citing *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 550.)

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

to wrongfully terminate the management contract are similarly covered by the tribe's sovereign immunity." (*Great W. Casinos, Inc. v. Morongo Band of Mission Indians, supra*, 74 Cal.App.4th at 1423-1424.)

Great W. Casinos, Inc.'s analysis regarding the extension of tribal sovereign immunity to the tribe's legal counsel was relied upon by the United States District Court for the Southern District of New York in *Catskill Dev., LLC v. Park Place Entm't Corp.* (U.S.D.C. S.D.N.Y. 2002) 206 F.R.D. 78. In that case, the District Court addressed in part whether a tribe's non-member attorneys were protected by the tribe's sovereign immunity against subpoenas issued to the attorneys demanding information about the tribe's business and the attorneys' work on behalf of the tribe in a civil action where neither the tribe nor the attorneys were parties.

The District Court held that the attorneys were entitled to sovereign immunity against the subpoenas, reasoning as follows: "As a general proposition, a tribe's attorney, when acting as a representative of the tribe and within the scope of his authority, is cloaked in the immunity of the tribe just as a tribal official is cloaked in that immunity. See, e.g., *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996); *Stock West Corp. v. Taylor*, 942 F.2d 655, 664-65 (9th Cir. 1991), modified on rehearing, 964 F.2d 912 (9th Cir. 1992) (en banc) (tribal attorneys may qualify as a "tribal official" if their actions are "clearly tied to their roles in the internal governance of the tribe"); *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968), cert. denied, 393 U.S. 1018, 21 L. Ed.

2d 562, 89 S. Ct. 621 (1969); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1423-24, 88 Cal. Rptr. 2d 828 (Cal. Dist. Ct. App.), review denied, 1999 Cal. LEXIS 9092 (Dec. 21, 1999), cert. denied, 531 U.S. 812, 148 L. Ed. 2d 15, 121 S. Ct. 45 (2000); *Diver v. Peterson*, 524 N.W.2d 288, 292 (Minn. Ct. App. 1994), review denied (Minn Feb. 14, 1995); *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 7-8, 480 P.2d 654, 657-58 (1971)." (*Catskill Dev., LLC*, 206 F.R.D. at pp. 91-92.) The court found that "Tribal attorneys possess sovereign immunity only to the extent that a tribal official possesses sovereign immunity " (*Id.*)

"Although Indian tribes enjoy broad sovereign immunity from lawsuits, the immunity of Indian tribal officials … is more limited." (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157.) When tribal officials "act 'in their official capacity and within their scope of authority,'" they are protected by sovereign immunity because their acts are the acts of the sovereign. (*Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1046.) On the other hand, when "an officer of a sovereign acts beyond his or her delegated authority, his or her actions 'are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden,'" and therefore sovereign immunity does not apply. (*Turner*, at p. 1055; see *Trudgeon*, supra, 71 Cal.App.4th at p. 644.) An official's commission of a tort is not per se an act in excess of authority, and therefore is not necessarily unprotected by immunity. "'[I]f the actions of an officer do not conflict with the terms of his

valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law ' [Citation.]" (*Boisclair, supra*, 51 Cal.3d at p. 1157; see *Turner, supra*, 82 Cal.App.4th at p. 1055; *Trudgeon, supra*, 71 Cal.App.4th at p. 644.) Accordingly, to determine whether a tribal official is entitled to the protection of sovereign immunity for a tortious act, courts must determine whether the official (1) committed the act in his or her official capacity and (2) within the scope of his or her official authority. (*Boisclair*, at pp. 1157-1158; *Turner*, at p. 1046; *Great Western Casinos, Inc. v. Morongo Band of Mission Indians, supra*, 74 Cal.App.4th at p. 1421.) "A tribal official also may forfeit immunity where he or she acts out of personal interest rather than for the benefit of the tribe." (*Turner*, at p. 1055.)

The parties also cite *Brown v. Garcia* (2017) 17 Cal. App. 5th 1198 for consideration on the issue. *Brown* involved a defamation action by plaintiff tribe members against other defendant tribe members. Specifically, the defendant tribe members published an "Order of Disenrollment" (the Order) that accused the plaintiffs of multiple violations of tribal, state and federal laws. The Order stated, "'[i]f you are found guilty by the General Council of these offenses against the Tribe, you may be punished by: a. DISENROLLMENT - loss of membership.'" On the defendant's motion to quash the defamation action based upon sovereign immunity, the trial court ruled the lawsuit was barred by sovereign immunity finding that the alleged defamatory statements were made pursuant to the defendants' lawful authority as tribal officials. The First District affirmed.

Appendix C

The plaintiffs' in *Brown* made arguments very similar to Acres' arguments on this motion. Specifically, the *Brown* plaintiffs argued that sovereign immunity was inapplicable because they were suing defendants only in their individual capacities and sought relief only from them as individuals, not from the Tribe. The plaintiffs denied that their action would require the court to adjudicate an intra-tribal dispute or insert itself in tribal law, custom, practice or tradition. Instead, the plaintiffs represented that they were "simply asking that the Defendants, in their individual capacities, be held accountable for their defamation of fellow Californians."

Looking to Ninth Circuit authorities, and rejecting the plaintiffs' contentions, *Brown* observed that "sovereign immunity will nonetheless apply in appropriate circumstances even though the complaint names and seeks damages only from individual defendants." Citing *Pistor v. Garcia* (9th Cir. 2015) 791 F.3d 1104, *Brown* noted that: "'In any suit against tribal officers, we must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'"

In affirming that the defendants were entitled to tribal sovereign immunity against the defamation claims, *Brown* accepted that the plaintiffs' suit did not ask the court to take any actions regarding their disenrollment from the tribe, and only sought to assess liability for torts the tribal officials allegedly committed in effectuating

that disenrollment. However, *Brown* also found that "[n]otwithstanding plaintiffs' assertion that their action is 'purely about harmful publications' and 'does not require a court to interfere with any membership or governance decisions,' entertaining the suit would require the court to adjudicate the propriety of the manner in which tribal officials carried out an inherently tribal function."

Acres argues that *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* is overruled by *Lewis* to the extent it "disagrees with *Lewis*," and that *Brown v. Garcia* (2017) 17 Cal.App.5th 1198 is inapt because it only involved inter-tribal governance and membership issues. The Court disagrees with both contentions.

First, *Great W. Casinos, Inc.'s* extension of tribal sovereign immunity to the tribe's officials and legal counsel does not "disagree" with the "official-capacity" "personal-capacity" dichotomy identified in *Lewis*. The finding in *Great W. Casinos, Inc.* that the tribe's officials and legal counsel functioned as tribal officials in relation to the alleged tortious conduct does not run afoul of *Lewis*. And, nothing in the facts of *Great W. Casinos, Inc.* would have prevented a finding that the relief sought by the plaintiffs there was only nominally against the tribal officials as individuals and was instead an action against the tribe's officials acting in their tribal office, and thus was an action against the sovereign tribe itself.

Second, the nuanced holding in *Brown* is not inapt here. *Brown* was fully aware of *Lewis*. *Brown* was presented with a circumstance where the plaintiffs plead

facially "personal-capacity suits" for defamation against the defendants, but the court looked beyond the facade of the action to determine whether the claims against the tribal officials would compel the state court to adjudicate the propriety of the manner in which the tribal officials carried out inherently tribal functions. The circumstances in *Brown* are echoed in this matter as to the Tribal officials and the tribe's attorneys. To adjudicate Acres' claims against the Tribal Court Judge and personnel, and the Tribe's titular executives, would require this state court to adjudicate the propriety of the manner in which the tribal officials carried out inherently tribal functions in the Tribal Court and the tribal lawsuit. *Brown* supports an extension of sovereign immunity to the tribe's officials and attorneys in this action because of that unavoidable interference with the Tribe's sovereignty.

In light of the foregoing, the Court finds that in the prosecution of the Tribal Court action, the moving defendant were functioning as the Tribe's officials solely within the Tribal Court's jurisdiction. The moving defendants are clearly not analogous to the negligent employee in *Lewis v.* Clarke. There is no evidence that the moving defendants acted in their individual capacities for their own private purposes and benefit, or outside the scope of their legal agency, authority and fiduciary duty to the Tribe as tribal officials. Allowing the action to proceed against the Tribe's officials would undoubtedly require the Tribe to act, and would entangle this court in questions of Tribal Court practice and law that would directly impinge the Tribe's sovereignty. Extending sovereign immunity to these moving defendants for their

alleged acts in the Tribal Court action is supported by *Great W. Casinos, Inc.* and *Brown*, and is not in conflict with *Lewis*. Further, extending sovereign immunity to the tribe's official would be commensurate with the scope of state sovereign immunity under analogous circumstances.

Although the case is disposed on the finding of tribal sovereign immunity, the court also briefly addresses the moving defendants' alternative grounds of judicial immunity and quasi-judicial immunity. "[A]bsolute immunity is necessary so that judges can perform their functions without harassment or intimidation." *Van Sickle v. Holloway*, 791 F.2d 1431, 1435 (10th Cir. 1986) Judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacities. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). The doctrine of judicial immunity is applicable to administrative law judges performing judicial functions. Judicial immunity is even applicable in suits brought under 42 U.S.C.S. § 1983. The scope of judicial immunity is broad: A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority. A judge lacks immunity only when performing an act that is not judicial in nature, or when acting in the clear absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12, (1991). Courts have recognized "the long-standing federal policy supporting the development of tribal courts" for the purpose of encouraging tribal self-government and self-determination. *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 850 (8th

Cir. 2003). A tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges. See *Sandman v. Dakota*, 816 F. Supp. 448, 452 (W.D. Mich. 1992); *Penn v. United States*, 335 F. 3d 786, (2003). In the instant matter, all of the alleged acts by the moving defendants with judicial roles (all except Ramsey and Rapport) were either judicial or quasi-judicial acts. None of the alleged acts were performed outside the jurisdiction of the Tribal Court or Judge Marston, or could be characterized as the rare "non-judicial" act, as when a judicial officer assaults a litigant in the courtroom. All of the alleged misconduct of Judge Marston, the Tribal Court personnel, and the attorneys who assisted the judge in the action, were standard judicial or quasi-judicial acts. Whether the acts were malicious or fraudulent does not overcome the protection of the immunity.

This minute order is immediately effective. A formal order and further notice of this ruling are not required.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 2/5/2019, the Court now rules as follows:

SUBMITTED MATTER RULING:

The Court affirmed the tentative ruling.