NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CYNTHIA LOPEZ, Plaintiff and Appellant, v. ERIC QUAEMPTS et al., Defendants and Respondents.	C087445 (Super. Ct. No. 34-2017-00206329-CU-FR-GDS) (Filed Nov. 29, 2021)

Cynthia Lopez sued the Confederated Tribes of the Umatilla Indian Reservation, a federally recognized Indian tribe (the Tribe). She also sued Eric Quaempts, the director of the Tribe's Department of Natural Resources (the Department), and David Tovey, the Tribe's executive director. The lawsuit asserted claims arising from Lopez's recruitment, hiring and employment as program manager of the First Foods Policy Program. The trial court granted defendants'

motion to quash the service of, and to dismiss, the first amended complaint based on tribal sovereign immunity.

Lopez now contends (1) the Tribe waived its sovereign immunity and was amenable to suit because it ratified the conduct of Quaempts and Tovey that was outside the scope of their employment authority; (2) the Tribe's sovereign immunity did not protect Quaempts and Tovey from suit because they were sued in their individual capacities, and Lopez should now be allowed to further amend her complaint to focus her allegations on claims against Quaempts and Tovey individually; (3) the trial court erred in finding that Lopez's exclusive remedy is in the Federal Tort Claims Act; and (4) Lopez was not required to exhaust any claims procedure within the Tribe's Tort Claims Code or Personnel Policies Manual.

We conclude (1) tribal sovereign immunity protects the Tribe from Lopez's suit, and (2) because the first amended complaint as pleaded asserts claims against Quaempts and Tovey in their official capacities, tribal sovereign immunity also protects them. Because the first amended complaint is barred, we need not address Lopez's other claims. We will affirm the trial court's order.

BACKGROUND

While Lopez was working and living in Sacramento, employees of the Tribe informed her of job openings with the Tribe and encouraged her to apply for a

position. One of the positions was for program manager of the Tribe's First Foods Policy Program within the Department. The vacancy announcement said the goal of the Department was to protect, restore and enhance the "first foods" -- water, salmon, deer, cous, and huckleberry -- for the perpetual benefit of the Tribe.

Although the vacancy announcement described duties for the program manager position, Quaempts did not disclose that the program and position would be different from what was described in the vacancy announcement. Lopez would not have applied for the position had she known the vacancy announcement contained incorrect information, particularly about staffing and budget.

In reliance on the representations made to her, Lopez moved from Sacramento to Oregon and worked as the program manager. After completing probation, Lopez discovered that the budget for the First Foods Policy Program was not as stated in the vacancy announcement. She talked with Quaempts and Tovey about bringing the program's budget and staffing up to what was stated in the vacancy announcement, but Quaempts and Tovey did not make any changes. An attorney representing Lopez then wrote Tovey and the Tribe's attorney, describing Lopez's claims of fraud and seeking an amicable resolution between Lopez and the Tribe.

Lopez subsequently took family medical leave for unrelated injuries. About three months later, the Tribe informed Lopez that if she would not accept a proposed

separation agreement, she would need to report to work in six days with a letter from her treating physician clearing her to work. Lopez did not provide such a letter and the Tribe did not allow her to return to work.

Lopez filed her lawsuit, asserting causes of action for fraud, negligent misrepresentation, fraudulent misrepresentation, and unfair business practices. Her first amended complaint asserted the same causes of action. It alleged as follows: The vacancy announcement contained false information about the budget and staffing for the First Foods Policy Program, and Quaempts did not inform Lopez that the program manager position would be substantially different than advertised. Quaempts made false representations to Lopez about promotion opportunities and benefits. When Lopez asked to hire more staff, Quaempts said there was no budget for additional staff. He rebuffed Lopez's attempts to increase the budget for the First Foods Policy Program and retaliated against her when she complained that the staffing and budget for the program were not as represented during her recruitment. Tovey and the Tribe knew of and ratified Quaempts's conduct.

Specially appearing, defendants filed a motion to quash the service of, and to dismiss, the first amended complaint based on tribal sovereign immunity. The trial court granted the motion.

STANDARD OF REVIEW

Defendants' motion to quash and dismiss was made pursuant to Code of Civil Procedure section 418.10, subdivision (a)(1), which provides that a defendant may move to quash service of the summons based on lack of jurisdiction over the defendant. Tribal defendants may specially appear and invoke their immunity from suit by using a hybrid motion to quash or dismiss. (*Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1204 (*Brown*); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1417-1418 (*Great Western Casinos, Inc.*).) On such a motion, the trial court must engage in sufficient pretrial factual and legal determinations to "'"satisfy itself of its authority to hear the case" before trial.'" (*Brown*, at p. 1204,, italics omitted; *Great Western Casinos, Inc.*, at p. 1418.)

"'[T]he plaintiff bears the burden of proving by a preponderance of the evidence that all jurisdictional criteria are met. [Citations.] The burden must be met by competent evidence in affidavits and authenticated documents; an unverified complaint may not be considered as supplying the necessary facts.' [Citation.] 'In the absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has . . . jurisdiction over an action against an Indian tribe is a question of law subject to our de novo review.' [Citation.] But '"'[w]hen the facts giving rise to jurisdiction are conflicting, the trial court's factual determinations are reviewed for substantial evidence. [Citation.] Even then, we review independently the

trial court's conclusions as to the legal significance of the facts.'"' [Citation.] We [will] affirm a trial court's order if correct on any theory." (*Brown, supra*, 17 Cal.App.5th at p. 1203; accord *People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 242, 250 (*Miami Nation Enterprises*) [stating that typically, on a dismissal motion based on sovereign immunity, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists, including that the tribe's immunity has been abrogated or waived].)

DISCUSSION

I

Lopez contends the Tribe waived its immunity from suit because it ratified the conduct of Quaempts and Tovey that were outside the scope of their employment authority.

Indian tribes are not amenable to suit brought by the states or individuals unless there is an unequivocal abrogation of tribal sovereign immunity by Congress or a clear waiver by the tribe. (*Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788-790 [188 L.Ed.2d 1071] (*Michigan*); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe* (2001) 532 U.S. 411, 418 [149 L.Ed.2d 623] (*C & L Enterprises, Inc.*); *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58-59 [56 L.Ed.2d 106] (*Santa Clara Pueblo*); *Puyallup Tribe, Inc. v. Department of Game* (1977) 433 U.S. 165, 170-173 [53 L.Ed.2d 667].) As the United States Supreme Court has explained, "Indian tribes

are '"domestic dependent nations'" that exercise 'inherent sovereign authority.' [Citation.] As dependents, the tribes are subject to plenary control by Congress. [Citation.] And yet they remain 'separate sovereigns pre-existing the Constitution.' [Citation.] Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority. [Citation.] [¶] 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.' [Citation.] That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.' [Citations.] And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands." (*Michigan*, at pp. 788-789.)

"[T]ribal immunity is intended to promote the federal policy of tribal self-governance, which includes economic self-sufficiency, cultural autonomy, and the tribe's 'ability to govern itself according to its own laws.'" (*Miami Nation Enterprises, supra*, 2 Cal.5th at p. 245.) "'[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation. [Citation.]' [Citation.] Rather, it presents a pure jurisdictional question." (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182; see *Miami Nation Enterprises*, at pp. 243-244.) Moreover, sovereign immunity "'is a matter of federal law and is not subject to diminution by the States.'" (*Michigan, supra*, 572 U.S. at p. 789;

see *Kiowa Tribe v. Manufacturing Technologies* (1998) 523 U.S. 751, 754-755, 758 [140 L.Ed.2d 981] (*Kiowa Tribe*).)

The United States Supreme Court has applied tribal sovereign immunity to activities occurring on and off the reservation and to governmental and commercial activities. (*Michigan, supra*, 572 U.S. at pp. 797-800; *Kiowa Tribe, supra*, 523 U.S. at pp. 754-755, 758; see also *Sac & Fox Nation v. Hanson* (10th Cir. 1995) 47 F.3d 1061, 1064-1065; *In re Greene* (9th Cir. 1992) 980 F.2d 590, 591, 596-597; *Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 84-85 (*Ameriloan*).) And courts have applied tribal sovereign immunity in the employment context. (See, e.g., *Pink v. Modoc Indian Health Project* (9th Cir. 1998) 157 F.3d 1185; *Tenney v. Iowa Tribe of Kansas* (D. Kan. 2003) 243 F.Supp.2d 1196; *Barker v. Menominee Nation Casino* (E.D. Wis. 1995) 897 F.Supp. 389.)

Lopez does not point to any applicable Congressional authorization for her lawsuit. She argues instead that by ratifying Quaempts and Tovey's actions, the Tribe adopted the conduct as its own, necessarily accepted any liability that arose from that conduct, and thereby expressly waived sovereign immunity.

However, Lopez does not cite to a portion of the record supporting her assertion that the Tribe expressly ratified misconduct by Quaempts and Tovey that was outside the scope of their employment authority. We do not consider factual assertions made without citation to the record. (*Nwosu v. Uba* (2004) 122

Cal.App.4th 1229, 1246-1247; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239-1240.) Although the Tribe's attorney agreed that the Tribe ratified the acts of recruiting, hiring and interviewing Lopez, including the creation and posting of the job description, the Tribe did not stipulate that Quaempts or Tovey committed illegal or improper conduct outside the scope of their employment authority.

In any event, a waiver of tribal sovereign immunity cannot be implied but must be explicit and unequivocally expressed. (*Santa Clara Pueblo, supra*, 436 U.S. at pp. 58-59; *C & L Enterprises, Inc., supra*, 532 U.S. at p. 418,; *Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075, 1087 (*Maxwell*); *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047; *McClendon v. United States* (9th Cir. 1989) 885 F.2d 627, 629 (*McClendon*); *Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal.App.4th 1364, 1369.) Waivers are strictly construed and there is a strong presumption against them. (*Ameriloan, supra*, 169 Cal.App.4th at p. 94.) Lopez fails to show that the Tribe unequivocally and clearly waived its sovereign immunity from suit in this case.

Under the circumstances, the trial court did not err in concluding that the Tribe was immune from Lopez's suit. Because the Tribe was entitled to immunity from suit, the trial court lacked jurisdiction over the claims against the Tribe and was required to dismiss it from the action. (*Pistor v. Garcia* (9th Cir. 2015) 791 F.3d 1104, 1111 (*Pistor*); *McClendon, supra*, 885 F.2d at p. 629.)

II

Lopez further argues the Tribe's sovereign immunity did not protect Quaempts and Tovey from suit because they were sued in their individual capacities.

A

Tribal sovereign immunity protects tribal employees sued in their official capacities. (*Lewis v. Clarke* (2017) ___ U.S. ___ [197 L.Ed.2d 631] [137 S.Ct. 1285, 1294] (*Lewis*).) The analysis for determining whether a tribe's sovereign immunity protects a tribal employee is remedy-focused. (*Id.* at pp. 1290-1292.)

In *Lewis*, the plaintiffs brought a negligence action in state court against the driver of a limousine that hit their vehicle on a state interstate. (*Lewis, supra*, 137 S.Ct. at p. 1289.) The defendant was an employee of an arm of the Mohegan Tribe of Indians of Connecticut and the collision occurred while the defendant was driving patrons of the Mohegan Sun Casino. (*Id.* at pp. 1289-1290.) The plaintiffs sued the defendant personally and did not name the tribe as a defendant. (*Ibid.*) The defendant moved to dismiss the action based on tribal sovereign immunity, arguing that he was entitled to immunity because he was an employee of an arm of an Indian tribe, acting within the scope of his employment at the time of the collision. (*Id.* at p. 1290.) The United States Supreme Court explained that defendants in an official-capacity action may assert sovereign immunity, whereas defendants in an individual-capacity action may not, although personal immunity

defenses may apply. (*Id.* at pp. 1291-1292.) Because the plaintiff's lawsuit in *Lewis* was a negligence action against the tribal employee and not a suit against the employee in his official capacity, the Court concluded that a judgment in that action would not operate against the tribe nor require action by the tribe or disturb its property. (*Id.* at pp. 1290-1291.) It held that tribal sovereign immunity did not bar the plaintiff's lawsuit because the employee, and not his tribal employer, was the real party in interest. (*Id.* at pp. 1290-1293 [stating that the critical inquiry was who may be legally bound by the trial court's judgment and not who will ultimately pick up the tab].)

The Ninth Circuit Court of Appeals has likewise held that tribal sovereign immunity does not extend to a tribal employee sued in his or her individual capacity. (*Pistor, supra*, 791 F.3d at pp. 1110, 1112-1114; *Maxwell, supra*, 708 F.3d at pp. 1087-1089.) In *Pistor*, for example, gamblers sued the chief of the Tonto Apache Police Department, the general manager of the Tonto Apache Tribe's hotel and casino and the Tribal Gaming Office Inspector for damages relating to the detention of the gamblers at the tribe's casino and the seizure of their property. (*Pistor*, at pp. 1108-1109.) On appeal from an order denying the tribal defendants' motion to dismiss based on tribal sovereign immunity, the Ninth Circuit held that tribal sovereign immunity did not bar the suit because the plaintiffs sought to hold the tribal defendants liable in their individual capacities and did not seek money damages from the tribe, and the tribal defendants did not show that a judgment would

interfere with tribal administration or restrain the tribe from acting. (*Id.* at pp. 1108, 1113-1114; see *Maxwell*, at p. 1088; see also *Native American Distributing v. Seneca-Cayuga Tobacco Co.* (10th Cir. 2008) 546 F.3d 1288, 1296-1297 [acknowledging that tribal officials may be sued in their individual capacities for actions taken in their official capacities where the relief sought was from the officials personally and not from the sovereign].) The Ninth Circuit noted that the gamblers had not sued the tribe. (*Pistor*, at p. 1113.)

By contrast, the Ninth Circuit has extended tribal sovereign immunity to tribal employees where the plaintiff sought to hold the tribe or a tribal entity vicariously liable for the actions of the employees. (*Cook v. AVI Casino Enterprises* (9th Cir. 2008) 548 F.3d 718, 720, 726-727 (*Cook*); *Linneen v. Gila River Indian Community* (9th Cir. 2002) 276 F.3d 489, 492; *Hardin v. White Mountain Apache Tribe* (9th Cir. 1985) 779 F.2d 476, 479-480.)

Although the caption of the first amended complaint named Quaempts and Tovey as individuals, we may not simply rely on the caption but must determine whether the action against Quaempts and Tovey actually sought relief against the Tribe. (*Lewis, supra*, 137 S.Ct. at p. 1290.) The first amended complaint alleged that Quaempts committed wrongful acts against Lopez while he was employed as the director of the Department. And Tovey failed to act or acted improperly as to Lopez while Tovey was employed as the Tribe's executive director. Lopez's declaration in opposition to defendants' motion to quash and dismiss described acts

or omissions by Quaempts in interviewing Lopez, discussing her potential employment with the Tribe, and responding to her concerns about staffing and budget when she was the program manager. Lopez averred that her attorney unsuccessfully attempted to negotiate on her behalf with the Tribe and her only option was to obtain relief in state court. Lopez did not discuss in her declaration any attempt to obtain monetary relief from Quaempts or Tovey personally. Neither the first amended complaint nor Lopez's declaration stated that as to Quaempts and Tovey, Lopez sought a judgment against those defendants personally. (Cf. *JW Gaming Development v. James* (9th Cir. 2019) 778 Fed.Appx. 545, 545-546 [claims against individual tribal defendants were not shielded by the tribe's sovereign immunity because the claims were explicitly alleged against the tribal defendants in their individual capacities and if the plaintiff prevailed on its claims against the tribal defendants, only they personally and not the tribe would be bound by the judgment].) Lopez's opposition to defendants' motion to quash and dismiss also did not make such an assertion. Rather, unlike the circumstances in *Lewis*, the first amended complaint named the Tribe as a defendant and sought to hold the Tribe vicariously liable for the conduct of its employees Quaempts and Tovey, whose alleged acts or omissions in the course of recruiting, hiring and supervising Lopez, another tribal employee, formed the

grounds for Lopez's causes of action.[1] (See generally *Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 84 [explaining that under the doctrine of respondeat superior, the employee's negligence is imputed to her employer; thus, the employer stands in the employee's shoes and the entire liability of the two defendants is co-extensive].) In fact, the cause of action for fraudulent misrepresentation in violation of Labor Code section 970 was based on defendants' alleged status as employers.

The Tribe was the real party in interest in the first amended complaint against Quaempts and Tovey. (See *Cook, supra*, 548 F.3d at pp. 721, 726-727; *Imperial Granite Co. v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269, 1270-1272; *Romanella v. Hayward* (D. Conn. 1996) 933 F.Supp. 163, 164-165, 167-168; cf. *Lewis v. Clarke* (Conn. Super. Ct. Sept. 10, 2014) 2014 WL 5354956, at *1, 4 [2014 Conn. Super. LEXIS 2314]; *Pistor, supra*, 791 F.3d at pp. 1108, 1113; *Maxwell, supra*, 708 F.3d at pp. 1081, 1089.) We conclude the first amended complaint sued Quaempts and Tovey in their representative or official capacities and not their individual capacities.

In considering Quaempts and Tovey's assertion that the Tribe's sovereign immunity extended to them, we also consider whether Lopez showed that Quaempts and Tovey exceeded the scope of their official authority. (See *Brown, supra*, 17 Cal.App.5th at

[1] Lopez's appellate reply brief also makes clear that she seeks to hold the Tribe liable for Quaempts and Tovey's conduct under the ratification doctrine.

pp. 1206-1207; *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 390; *Great Western Casinos, Inc., supra*, 74 Cal.App.4th at p. 1421; *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 643-644 (*Trudgeon*); *Davis v. Littell* (9th Cir. 1968) 398 F.2d 83, 83-85; *Acres Bonusing, Inc. v. Marston* (N.D. Cal. Apr. 15, 2020) 2020 WL 1877711, at *4 [2020 U.S. Dist. LEXIS 66438].) The agent of a sovereign may be sued in his or her personal capacity when his or her actions exceed the authority granted by the sovereign. (*Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U.S. 682, 689-690 (*Larson*); *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157 (*Boisclair*).) Under such circumstances the agent's conduct is not the conduct of the sovereign. (*Larson*, at p. 690.) But a claim of error in the exercise of delegated power or the mere allegation that the agent acted illegally is not sufficient to establish that the acts of the agent were beyond his or her authority. (*Id.* at pp. 690-691, 693.)

The first amended complaint alleged that Quaempts and Tovey acted within the scope of their employment but outside the scope of their authority. But it did not specify which acts were beyond the scope of their authority. Lopez's declaration in opposition to defendants' motion did not aver any facts indicating that Quaempts or Tovey exceeded the scope of their authority as Department director and executive director. An agent's tortious action is not ipso facto beyond his or her delegated powers. (*Larson, supra*, 337 U.S. at p. 695; *Boisclair, supra*, 51 Cal.3d at p. 1157; *Brown,*

supra, 17 Cal.App.5th at pp. 1200, 1206-1207; *Trudgeon, supra*, 71 Cal.App.4th at p. 644.)

Lopez asserts that her claims have no relationship to tribal governance and administration, but we disagree. An action challenging the employment decisions of a tribe can affect tribal governance and administration (*EEOC v. Karuk Tribe Housing Authority* (9th Cir. 2001) 260 F.3d 1071, 1080-1082; *Penobscot Nation v. Fellencer* (1st Cir. 1999) 164 F.3d 706, 707, 710-713; see also *Dille v. Council of Energy Resource Tribes* (10th Cir. 1986) 801 F.2d 373, 374-375), and here, Lopez's claims involve the administration of the Department and the First Foods Policy Program.

On appeal, Lopez urges that Quaempts and Tovey exceeded the scope of their authority by violating the Tribe's Personnel Policies Manual when they committed false advertising. However, the first amended complaint does not contain such an allegation. Lopez also argues that the Tribe's ratification of Quaempts and Tovey's actions did not extend tribal sovereign immunity to Quaempts and Tovey. But Quaempts and Tovey's immunity claim was based on tribal sovereign immunity and not ratification. Lopez further contends that federal courts presume that officials are sued in their personal capacities even if the complaint does not explicitly mention the capacity in which they are sued. But the authority she cites for that proposition -- *Romano v. Bible* (9th Cir. 1999) 169 F.3d 1182 -- relates to a claim under 42 U.S.C. section 1983, which authorizes an action against any person who, acting under color of state law, causes another to be deprived of rights,

privileges or immunities secured by the Constitution and laws. This case does not involve a section 1983 claim.

The trial court did not err in ruling that as pleaded, the first amended complaint asserted claims against Quaempts and Tovey in their official capacities. Because the first amended complaint against Quaempts and Tovey was an official capacity suit and did not seek damages against Quaempts and Tovey personally, tribal sovereign immunity bars Lopez's first amended complaint against them.

B

Lopez next asserts that she should be allowed to further amend her pleading to focus her allegations on claims against Quaempts and Tovey individually.

A trial court may, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading. (Code Civ. Proc., § 473, subd. (a).) However, no amendment can be made after a judgment of dismissal has been entered without first vacating or setting aside the judgment. (*Watterson v. Owens River Canal Co.* (1922) 190 Cal. 88, 96; *People ex rel. Hastings v. Jackson* (1864) 24 Cal. 630, 633; *Risco v. Reuss* (1941) 45 Cal.App.2d 243, 245; *Issa v. Alzammar* (1995) 38 Cal.App.4th Supp. 1, 4.) Here, we affirm the order dismissing the complaint against the Tribe, Quaempts and Tovey, and there is no complaint to amend. Lopez fails to cite any authority that supports her request to further amend her

pleading after an order dismissing the amended complaint is affirmed. In *Turner v. Martire* (2000) 82 Cal.App.4th 1042, the case Lopez cites, the order quashing service and dismissing the action based on tribal sovereign immunity was reversed. (*Id.* at pp. 1044-1045.)

Because tribal sovereign immunity bars the suit against defendants, we need not address Lopez's other appellate claims.

DISPOSITION

The order quashing the service of, and dismissing, Lopez's first amended complaint is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, 8.278(a)(1), (2).)

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
HOCH, J.

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CYNTHIA LOPEZ, Plaintiff, v. ERIC QUAEMPTS, an individual DAVID TOVEY, an individual AND THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, Defendants.	Case No. 34-2017-00206329 ~~[PROPOSED]~~ **ORDER TO QUASH/DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** DATE: March 15, 2018 TIME: 2:00 p.m. DEPT: 53 (Filed Apr. 16, 2018)

Specially-appearing Defendants/Moving Parties, ERIC QUAEMPTS, DAVID TOVEY, and THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN

RESERVATION's Motion to Quash/Dismiss Plaintiff's Summons and Complaint came on regularly for hearing on the above date, time, and department before the Honorable David I. Brown.

The Court having considered the Moving, Opposition, and Reply papers, and having heard oral argument of counsel and good cause appearing, the Court issued the following tentative ruling (also attached as Exhibit A) which has adopted as the Order of the Court:

Specially-appearing Defendants The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"), Eric Quaempts ("Quaempts") and David Tovey's ("Tovey") (collectively, "Defendants") motion to quash is GRANTED.

Background

Previously in this action, the Court tentatively granted Defendants' motion to quash based on tribal immunity, which raised identical and substantially similar issues to those raised in the instant motion to quash. After taking the matter under submission the Court vacated the tentative ruling and denied the motion to quash, *without prejudice*, allowing Plaintiff to file an amended complaint alleging facts that could defeat sovereign immunity, and to conduct discovery on the issue of "ratification." However, the tentative ruling was vacated *only* to allow certain discovery and the filing of an amended complaint. The tentative ruling continued to express the Court's perception of the legal issues raised by the motion to quash.

Now, Plaintiff has filed an amended pleading, the First Amended Complaint ("FAC") and completed her requested discovery. Having considered the amended pleading and the arguments made in Plaintiff's Opposition to the instant motion to quash, the Court has come to the same conclusion as before: tribal immunity applies here, and the motion to quash must be granted.

Allegations in FAC

In this action, Plaintiff Cynthia Lopez ("Plaintiff") alleges that Defendants hired her "under false and deceptive pretenses" and retaliated against her for bringing finding and staffing issues to light. (FAC § 9.) The FAC alleges causes of action for: (1) Fraud, (2) Negligent Misrepresentation, (3) Fraudulent Misrepresentation - Labor Code § 970, and (4) Unfair Business Practices - Business & Professions Code § 17200.

Plaintiff alleges that "Defendant Eric Quaempts, while employed with the [CTUIR] as Director of the Natural Resources Department, committed the federal crime of false advertising and California state crime of fraudulent and deceptive advertising by using false information and misrepresentations in advertising and recruiting to fraudulently induce Plaintiff, Dr. Cynthia Lopez, to leave her employment within the State of California and to exploit Dr. Lopez' experience, labor, and reputation for the benefit of himself and the CTUIR." (FAC ¶ 1.)

Plaintiff alleges that "Defendant CTUIR, a Tribal governmental entity, failed to prevent their employees'

(Mr. Quaempts' and Mr. Tovey's) fraudulent actions, and then failed to correct the situation after Plaintiff Lopez came to work at the CTUIR, learned about the misrepresentations, and complained about them." (FAC ¶ 4.) Plaintiff alleges that Quaempts and Tovey "arc individuals employed with the CTUIR." (FAC ¶ 12.) Plaintiff alleges that each Defendant was the "agent, employee, partner and/or representative of one or more of the remaining Defendants and was acting within the course of such relationship at the time of the events described herein, although some of the acts alleged were beyond the scope of authority of said employment. Plaintiff is further informed and believes that each of the Defendants herein gave consent to, ratified and authorized the acts alleged herein to each of the remaining Defendants and those acts were beyond the scope of authority of the employment." (FAC ¶ 13.)

Plaintiff alleges that she was "induced" through false promises of "a fully funded program to manage, with a budget of $600,000 to $700,000 and a staff of 3-5 individuals" if she were hired as "the CTUIR's First Foods Policy Program ("the FFPP") Manager (FAC ¶ 5.) Plaintiff alleges that through Quaempts' actions, "the funding and staffing for the FFPP dwindled to $347,369 and 1.5 full-time equivalent staff" but Quaempts and Tovey "expected the Program to conduct the same or more work as in prior years." (FAC ¶ 6.) Plaintiff alleges that Quaempts refused to "correct the situation" after Lopez complained, and thereafter retaliated against her. (FAC ¶¶ 3-4.)

Plaintiff also alleges that "Defendant David Tovey, while employed as Executive Director with the CTUIR and directly supervising Mr. Quaempts, failed to adequately supervise Mr. Quaempts and approved the false, deceptive, and fraudulent advertisement and job description for public dissemination and distribution . . . " (FAC ¶ 3.) "Defendant Tovey also did not act to correct the situation after Plaintiff Lopez raised the issue about the false and deceptive advertisements and misrepresentations." (FAC ¶ 3.)

Plaintiff's pleading includes the legal argument that "Tribal jurisdiction does not apply as false and deceptive advertising is a crime, committed outside of the CTUIR's tribal reservations and lands and is therefore subject to the criminal and civil jurisdiction of where the crime occurred." (FAC ¶ 15.) Tribal jurisdiction also does not apply as no language in the false and deceptive vacancy announcement and position description disclosed or indicated in any way that tribal jurisdiction applied to the application process and Dr. Lopez did not waive her rights or agree to Tribal jurisdiction during the application process, when the relevant crimes were committed in Sacramento, California, Hence, any dispute resulting from the pre-employment, process is not subject to die CTUIR tribal jurisdiction; rather, it is subject to California jurisdiction." (FAC ¶ 16.)

For the second time in this case, Defendants move to quash and dismiss pursuant to Code of Civil Procedure § 418.10 and other authorities on the basis that this Court lacks jurisdiction over them given their

status as a federally-recognized Indian Tribe (as to Defendant CTUIR) and as tribal employees acting in their official capacities (as to Defendants Quaempts and Tovey).

Legal Standard

The Supreme Court has consistently "recognized Indian tribes as 'distinct, independent political communities,' [citation], qualified to exercise many of the powers and prerogatives of self-government." *(Plains Commerce Bank v. Long Family Land & Cattle* Co. (2008) 554 U.S. 316, 327.) Accordingly, the tribes may establish their own law with respect to "internal and social relations." *(Ackerman v. Edwards* (2004) 121 Cal.App.4th 946, 951.) "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. . . . '[W]ithout congressional authorization,' the 'Indian Nations are exempt from suit.'" *(Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58.)

Generally, Indian tribes enjoy sovereign immunity from suit in state or federal court. *(Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58; *see also Ameriloan v. Superior Court* (2009) 169 Cal.App.4th 81; *People v. Miami Nation Enterprises* (2014) 223 Cal.App.4th 21.) Under federal law, an Indian tribe is a sovereign authority and, as such, has tribal sovereign immunity, not only, from liability, but also from suit. *(Campo Band of Mission Indians v. Superior Court* (2006) 137. App. 4th 175, 181-182.) To be clear, Indian tribes enjoy

sovereign immunity "from suits on contracts, [whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *(Kiowa Tribe v. Manufacturing Tech.* (1998) 523 U.S. 751, 760 (Kiowa).) "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its [sovereign] immunity." [emphasis added] (Id. at p. 754.) "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *(C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe* (2001) 532 U.S. 411, 418 (C&L).) For a waiver to be effective, it "must be made by a person or entity authorized to do so." *(Tavapal-Apache Nation v. Lipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206.) The party claiming a tribe has waived its sovereign immunity bears the burden of proof on the issue. *(Id.* at p. 205.) In this context, sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending cm the equities of a given n situation but that rather, it presents a pure jurisdictional question. *(Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182.)

Tribal immunity from suit has been sustained by the courts without drawing a distinction based on where the tribal activities occurred. *(Kiowa Tribe v. Mfg. Techs.* (1998) 523 U.S. 751, 754.) Tribal immunity can apply whether the tribe's activities take place on or off of tribal property. *(See*, *e.g. Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 388-90 (reversing trial court and holding that tribal casino was immune from suit under sovereign immunity for

activities taken by the casino off tribal property; because "[a]ny change or limitation of the doctrine (e.g. to exclude off reservation tort suits) must come from Congress.").) Indeed, any authorization or waiver "cannot be implied but must be unequivocally expressed." *(Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 53 (98 S. Ct. at p. 1677]; accord, *Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1998) 60 Cal. App. 4th 1340, 1347.) And since it emanates from federal law, tribal immunity "is not subject to diminution by the States." *(Kiowa Tribe of Okla.*, supra, 523 U.S. at p. 756 [118 S. Ct. at p. 1703].)

A tribe's sovereign immunity extends to tribal officials when they act in their official capacity and within the scope of their authority. *(Trudgeon v, Fantasy Springs Casino*, (1999) 71 Cal.App.4th 632, 643; *Imperial Granite Company v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269, 1271.) When tribal officials "act 'in their official capacity and within the scope of their 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.) However, "when such officials act beyond their authority, they lose their entitlement to the immunity of the sovereign." *(Imperial Granite Company v. Pala Band of Mission Indians* (1991) 940 F.2d 1269, 1271.)

Again, as this court has repeatedly expressed in the context of these motions, it must be underscored that a waiver of tribal immunity cannot be implied. Rather, it must be expressed unequivocally. *(Warburton/*

Buttner v. Superior Court (2002) 103 Cal.App.4th 1170, 1182.) A tribe's waiver must be clear. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411, 418.

On a motion to dismiss for lack of subject matter jurisdiction, the party asserting jurisdiction has the burden, of proving the facts that give the court jurisdiction, by a preponderance of the evidence. *(Nobel Flora, Inc. v. Pasero* (2003) 106 Cal.App.4th 654, 657.) "The burden must be met by competent evidence in affidavits and authenticated documents." *(Id.* at 657-658.) Subject matter jurisdiction may be challenged at any time during the course of an action. The court may consider all admissible evidence before it in making its determination. *(Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal. App. 4th 1407, 1418.)

Discussion

It is undisputed that CTUIR is "a Tribal governmental entity;" the operative pleading itself alleges as much and Plaintiff's Opposition does not argue otherwise. (FAC ¶ 4.) Defendants have filed the declaration of Paul Rabb offering evidence supporting tribal immunity. (Declaration of Paul Rabb ("Rabb Decl.") ¶¶ 1-8 ("the CTUIR is a Federally-recognized Indian Tribe" . . . and the First Food Policy Program receives funding from the Department of the Interior, as do the Executive Director Position held by David Tovey and the Natural Resources Department Director Position held by Eric Quaempts.)

Plaintiff makes various arguments as to why tribal immunity should not apply here. The Court addresses each argument in turn below.

Plaintiff's Argument That Tribal Immunity Does Not Apply To "Pre-Employment" Injuries

First, in the "Statement of Facts" section of her Opposition, Plaintiff argues that there were many *pre-employment* contacts between Plaintiff and Defendants, and in these contacts Defendants never "express[ed] that their sovereign authority or jurisdiction extends off-reservation to California or over a person living and working in California who is reading the position description." (Opp'n at 2.)

Plaintiff does not offer any authorities for the novel proposition that tribal immunity does not apply to suits arising from an employee's "pre-employment" contacts with the Tribe. In *Kiowa*, the United States Supreme Court stated, "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." (523 U.S. at p. 760 [118 S. Ct. at p. 1705]. If negotiations leading to a contract were not immune, the exception would emasculate the immunity.

Likewise, Plaintiff does not offer any authorities for the proposition that the Tribe's immunity (and the immunity of its officials working in the scope of their employment) turns on whether the Tribe gave the Plaintiff (its future employee) notice regarding its

tribal immunity. This argument flies in the fact of the rule that waiver of tribal immunity cannot be implied. None of Plaintiff's cited authorities involve facts turning upon a plaintiff's lack of notice regarding tribal immunity. To the contrary, the governing authorities explain that tribal immunity applies given the sovereign *status of the tribe (see Trudgeon*, 71 Cal.App.4th at 636-37), and that status remains a constant that does not depend on whether someone has "notice" of it.

Plaintiff has not persuaded the Court that because she alleges wrongs occurring *prior to* her formal employment with CTUIR, tribal immunity does not apply here and/or was waived by her "pre-employment" lack of notice as to such immunity.

Plaintiff's Argument That CTUIR is Not Immune From Suit For "Off-Reservation, Criminal Conduct"

Plaintiff argues that she should be treated as a "*tort victim, or other plaintiff who has not chosen to deal with a tribe* [and now has] no alternative way to obtain relief for off-reservation commercial conduct" such that immunity should not apply. (Opp'n at 6 (citing *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2036 n.8 (emphasis added) (noting, in dicta, that U.S. Supreme Court has never made any determination as to whether tribal immunity should apply under those circumstances).)

The Court is not persuaded. This is because Plaintiff's pleading squarely alleges that she *did choose to deal with a tribe*, CTUIR, after seeing a job posting

with CTUIR. This is not a case where Plaintiff sustained personal injuries while driving her car after suffering a collision with someone who just so happened to be a tribal official. While Plaintiff alleges that the CTUIR job posting for the FFPP Manager position was false and misleading regarding the position's budget and staffing support, she does not allege that any false/misleading information meant she did not *choose to deal with a tribe* in pursuing that position.

Plaintiff also argues that CTUIR has not proven "absolute" sovereign immunity because CTUIR's cited authorities "involve instances where" the underlying events "occur[] on or near tribal lands and/or where a party or non-Indian has chosen (without the presence of intentional fraud or criminal acts) to contract or commercially interact with a tribe." (Opp'n at 5-6.)

The Court is not persuaded. Plaintiff fails to acknowledge authorities holding that tribal immunity can extend even to a tribe engaging in commercial enterprises that occur off of tribal lands. The Court need not "extend" the immunity analysis to a tribal commercial enterprise on the facts here. In this case, rather than the CTUIR's engagement in a commercial enterprise like a gambling facility, the conduct at issue is in connection with CTUIR's First Foods Program, which on the evidence before the Court, is a non-commercial tribal activity undisputedly encompassed by the tribe's immunity, although it should be noted that the hiring of the plaintiff is clearly a "commercial" transaction. Plaintiff also concedes that "CTUIR is a government entity" and not a "for-profit commercial entity that

deals in commercial activities off reservation." (Opp'n at 5 (attempting to distinguish Defendants' cited cases where a tribe's immunity was extended to the tribe's commercial enterprises, even though such extension is not necessary on the facts of this particular case where Plaintiff dealt directly with the tribe in its actions as a government entity).)

Plaintiff's position that tribal immunity does not apply simply because the underlying events did not physically occur "on or near tribal lands" is not persuasive. Further, to the extent Plaintiff suggests that intentionally false representations about the position (and its funding/staffing) were made in her dealings with CTUIR, Quaempts, and Tovey, the Complaint does not allege that Defendants ever concealed their true identities or affiliations with CTUIR. Plaintiff has not alleged that she did not know she was dealing with a tribe or did not choose to deal with a tribe. At most, she alleges that nobody ever told her that CTUIR enjoys tribal immunity that would apply during her hiring process. As described above, however, Plaintiff has not presented authorities indicating that her lack of notice regarding tribal immunity means that such immunity does not exist or that it has been waived. Once again, "implied waiver", even if such could be said to exist here, is insufficient.

Plaintiff also asserts that "this case is about off-reservation criminal conduct." (Opp'n at 5.) The Court is not persuaded. This is a civil lawsuit, not a "criminal" action. Moreover, Plaintiff has not cited any authorities involving "criminal conduct" or "illegal conduct"

alleged as against a tribe or its personnel upon facts similar to those alleged here, such that even if this Court were to *assume arguendo* that "criminal conduct" was potentially at issue, Plaintiff has not shown that this means that tribal immunity would not exist or has been waived. Plaintiff's conclusory framing of Defendants conduct as "criminal" and "illegal" thus is not determinative.

Plaintiff cites repeatedly to *Bay Mills*, but in that decision the Supreme Court recognized that ***tribal immunity applied*** to bar a State from suing a tribe to enjoin allegedly-illegal gaining allegedly occurring on non-tribal lands. *(Bay Mills*, 134 S.Ct. at 2034-36 (statutory waiver of immunity codified at 25 U.S.C. §2710(d)(7)(A)(ii) applied only to permit the State of Michigan to sue the tribe to enjoin gaming activity located on tribal lands).) The Supreme Court also noted that the State could instead resort to its criminal law to prosecute those engaging in illegal gambling on non-tribal lands. *(Bay Mills*, 134 S.Ct. at 2034-36.) The facts of *Bay Mills* are simply not analogous to this case. Moreover, the ultimate holding in *Bay Mills* was that *tribal immunity barred Michigan's* lawsuit to enjoin alleged criminal conduct on non-tribal lands, which undercuts Plaintiff's argument that allegations of allegedly "criminal" conduct can somehow take a case out of the "tribal immunity" framework.

Plaintiff's Argument That CTUIR is Not Immune Because it "Ratified The Criminal Conduct" of Its Employees

Plaintiff argues that CTUIR has "ratified the illegal conduct of their tribal employees." (Opp'n at 6, 9-10.) Plaintiff also argues that Quaempts and Tovey violate the tribe's own manual and the terms of its compacts with the federal government, such that CTUIR's "ratification invalidates its claim to sovereign immunity and gives the state jurisdiction over all Defendants." (Opp'n at 6, 9-10.) Yet Plaintiff offers no legal authorities addressing a tribe's "ratification" of alleged conduct as grounds for finding a lack of tribal immunity and/or waiver of immunity. Plaintiff cites again to *Bay Mills*, but *Bay Mills* does not address a tribe's "ratification" of criminal acts of its officials or employees as destroying or waiving tribal immunity. (Opp'n at 5-6, 9-10 (citing *Bay Mills*, 134 S.Ct. at 2034-35)) Plaintiff has not shown that evidence of "ratification' of alleged conduct by Quaempts and/or Tovey would have any bearing on application of tribal immunity.

Accordingly, Plaintiff has not persuaded the Court that CTUIR's alleged ratification of conduct by Quaempts and/or Tovey bears on any issues of tribal immunity (or waiver thereof) currently before the Court.

Plaintiff's Argument that CTUIR is Not Immune Because It "Expressly Waived" Sovereign Immunity" Given In "Over 50" Contacts With Plaintiff Wherein "CTUIR Purposely Did Nat Assert Its Sovereign Immunity Over Plaintiff' (Opp'n at 10.)

Plaintiff's sole citation to authority to support her "waiver" argument is the case of *Luckerman v Narragansett Indian Tribe* (D.R.I. 2013) 965 F.Supp.2d 224, 228-29. (Opp'n at 10) However, the facts of *Luckerman* are not analogous to the facts Plaintiff urge as supporting her "waiver" argument here. In *Luckerman*, an attorney sought to sue a tribe, a former client, for nonpayment, and the court considered whether an unsigned "proposed agreement" between the tribe and the attorney – which included an "unequivocal" written "waiver of immunity" provision – in fact effectuated an "express waiver" given that it was not actually signed by any representatives of the tribe. The court concluded that although a waiver of immunity cannot be implied, these unique facts sufficed for purposes of finding an express waiver because the tribe "treat[ed] the agreement as valid," and "continued to accept" the attorney's legal services in light of the unequivocal waiver provision, even though the tribe did not formally sign the agreement. (*Id.)* Here, unlike in *Luckerman*, there is no alleged express and unequivocal "waiver of immunity" provision in any agreement between Plaintiff and Defendants.

Thus, the Court is not persuaded. Plaintiff has not cited any authorities that would condition a tribe's immunity on the tribe's giving "notice" of that immunity

to a potential plaintiff, or cases that otherwise required CTUIR to have given "notice" to Plaintiff regarding CTUIR's tribal immunity in order for such immunity to exist.

To the extent Plaintiff intends to argue that CTUIR's failure to give Plaintiff such notice somehow caused a "waiver" of CTUIR's tribal immunity, the Court is not persuaded. A waiver of tribal immunity cannot be implied; rather, it must be expressed unequivocally. *(Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182.)

Plaintiff's Argument that "Quaempts and Tovey Are Not Immune From Suit as They Exceeded Their Scope of Authority"

Plaintiff argues that "tribal officials, Defendants Quaempts and Tovey, committed the crime of false advertising" in violation of CTUIR's tribal manual (requiring tribal employees to perform their duties in compliance with the applicable laws and regulations) and in violation of the tribal compact. (Opp'n at 6.)

Plaintiff has not persuaded the Court that the alleged conduct by Quaempts and Tovey's alleged conduct is the sort "outside the scope of authority" that might prevent extension of CTUIR's tribal immunity to them as "tribal officials."

American Indian tribes, tribal entities, and tribal officers and agents acting within the scope of their authority are immune from suit in state court absent

congressional authorization to sue or the tribe's express, clear waiver of its sovereign immunity. *(AmeriLoan v. Superior Court* (2008) 19 Cal.App.4th 81, 84, 89, 94; *Great Western Casinos v. Marengo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1421.)

Indeed, "It is settled that tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority. [Citation.] This immunity applies to officials sued in their individual capacities." *(Trudgeon*, 71 Cal.App.4th at 643-44 (internal citations and quotation marks omitted).) "[A]n agent of an immune sovereign may be held liable for an act which exceeds his or her authority. [Citation.] But the commission of a tort is not per se an act in excess of authority. [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.] Where the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies." *(Id.* (internal citations and quotation marks omitted).) The appellate court in *Trudgeon* reasoned that the trial court correctly found that tribal immunity extended to the defendant tribal officials, given that the plaintiff's pleading alleged that at all times "each of the Defendants was the agent and employee of each of the remaining Defendants and in doing the things hereinafter alleged, *was acting within the scope of such agency and employment.*" *(Id.* at 644 (emphasis in *Trudgeon).)* The appellate court further held that on the plaintiff's theory of liability, the

defendants negligently failed to provide adequate security to protect patrons in the casino – such that whether tribal officials adequately secured the casino was necessarily "directly related to their performance of their official duties." *(Id.)* The Court concluded, "any failure to provide adequate security therefore was an act within the official authority of those individuals and, as such, was subject to immunity." *(Id.)*

The analysis in *Trudgeon* is analogous. While the allegations in Plaintiff's FAC assert that Quaempts and Tovey at times exceeded their authority and/or acted outside the scope of their authority (FAC ¶ 13 (every Defendant is an "agent, employee, partner and/or representative of one or more of the remaining Defendants and was acting within the course of such relationship at the time of the events described herein, although some of the acts alleged were beyond the scope of authority of said employment")), the Court does not find that this renders *Trudgeon* inapplicable here. Indeed, Quaempts' and Tovey's allegedly criminal "false advertising" misrepresentations regarding the funding and staffing attached to the FFPP Manager position ultimately filled by Plaintiff, and any retaliation or adverse employment actions against Plaintiff carried out by Quaempts and Tovey, necessarily occurred when those individuals were ***acting in their roles as tribal officials and as Plaintiff's supervisors***. As such, as in *Trudgeon*, even if these two tribal officials engaged in false representations or other misconduct when hiring and supervising Plaintiff, the specific misconduct alleged here was all

necessarily "directly related to their performance of their official duties" as Plaintiff's supervisors and as such, was subject to immunity." *(See Trudgeon*, 71 Cal.App.4th at 644.)

The Court is not persuaded by Plaintiff's undeveloped argument based on *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1055. (Opp'n at 6.) Aside from a block quote from that case, Plaintiff did not discuss the facts of that case or meaningfully analogize to it. In any event, *Turner* does not require denial of the instant motion to quash. In *Turner*, tribal law enforcement officers were alleged to have *assaulted the plaintiffs, in* part out of political motivations, *(Turner*, 82 Cal.App.4th at 1055.) The appellate court found that the allegation "at least raises a factual issue whether defendants acted for the benefit of the tribe or merely for personal reasons." *(Id.)* Here, on the other hand, the FAC alleged that the tribe *ratified and approved* the very conduct Plaintiff contends was outside the scope of Quaempts' and Tovey's duties. There are no factual allegations in the FAC asserting that such alleged conduct (making misrepresentations in hiring and supervising Plaintiff) would have been strictly "personal" to Quaempts and Tovey, i.e., not "for the benefit of the tribe" in the course of seeking to fill a tribal position. Moreover, as Defendants note (Reply at 5), here Plaintiff has argued and alleged that CTUIR *ratified* the alleged conduct of Quaempts and Tovey, including the allegedly false advertising regarding the position. As such, having alleged tribal ratification of such conduct, Plaintiff cannot simultaneously argue

that Quaempts and Tovey were acting *outside* the scope of their official duties when making such alleged misrepresentations. Plaintiff has not shown that the FAC pleads facts that, even if true, could lead to a determination that Quaempts and Tovey acted outside the scope of their authority for purposes of the analysis here.

Plaintiff argues that tribal immunity does not apply here given the case of *Lewis, et. al v. Clarke* (2017) 137 S.Ct. 1285. (Opp'n at 8.) In that case, U.S. Supreme Court held that the sovereign immunity of an Indian tribe did not preclude a negligence action against a tribal employee for causing vehicle collision while acting within scope of employment, *because the action was brought against employee in his individual rather than official capacity and any state-court judgment against employee would not operate against the tribe. (Id.* at 1289.) Here, on the other hand, Plaintiff brings this action against Quaempts and Tovey in their official capacities, and also names the *tribe itself as a Defendant* in this case. Although the caption of the FAC names Quaempts and Tovey each as "an individual" and also names the tribe itself, in substance the factual allegations in the FAC all pertain to Quaempts' and Tovey's' conduct in recruiting, hiring, and supervising Plaintiff – acts done in their roles as tribal employees. Moreover, pursuant to *Lewis*, in determining whether tribal immunity should apply, "courts should look to whether the sovereign is the real party in interest" in the action, as opposed to the individual. *(Id.* at 1291-92.) "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 1291.) "Lawsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent," and they may also be barred by sovereign immunity." *(Id.* at 1291-92 (quotation marks omitted).) In *Lewis*, the Court concluded that while the suit was "brought against a tribal employee operating a vehicle within the scope of his employment," because the judgment will not operate against the Tribe," the action was "not a suit against Clarke in his official capacity" but was "simply a suit against Clarke to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property." *(Id.* at 1292-93 (quotation marks omitted).) The Court held that Clarke, the tribal employee, could not assert tribal immunity as a result. Here, Plaintiff has not shown that this action is analogous. In this particular action, the judgment *would* operate against the tribe *because the tribe is a named Defendant*, and also given Plaintiff's theory of liability based on the tribe's "ratification" of misconduct by Quaempts and Tovey. Plaintiff has not persuaded the Court that *Lewis* applies here.

Ultimately, Plaintiff has not met her burden of presenting authorities and evidence to persuade the Court that Defendants Quaempts and Tovey engaged in the sort of conduct "outside the scope" of their official supervisory duties such that the tribe's immunity does not extend to them as tribal officials.

Federal Tart Claims Act

Plaintiff also has not shown that the Federal Tort Claims Act ("FTCA") does not apply. (P&As at 10-11 (arguing that pursuing claims under the FTCA is Plaintiff's exclusive remedy, given that "[u]nder the 1990 amendments to the Indian Self-Determination Act, Congress extended FTCA coverage to tribes and tribal employees for claims 'resulting from the performance of functions' under an Indian Self-Determination contract, grant agreement, or cooperative agreement").) Defendants assert that Public Law 101-512 § 314 provides that any "civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor, or tribal employee covered by this section, shall be deemed an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act." The FTCA provides the exclusive remedy available to any tort claim against the United States, as well as a tribe or tribal employee acting within the scope of an Indian Self-Determination Act contract. (28 U.S.C. § 2679, 25 CFR § 900.204.)

Plaintiff argues that the FTCA does not apply to her because Plaintiff's claims involve alleged intentional misrepresentations and deceit outside the scope of the FTCA. (Opp'n at 10-11 (citing intentional torts exception codified at 28 U.S.C. § 2680(h) and arguing that "[a]ny claim arising out of misrepresentation, deceit, or interference with contact rights" is excluded from the provisions.. of the FTCA)). Plaintiff argues

that Quaempts and Tovey were not acting within the scope of their employment, such that the FTCA does not apply. (Opp'n at 10-11.)

Plaintiff has not persuaded the Court that the FTCA does not apply here. Plaintiff's pleading alleges negligence and other non-intentional torts that would all within the scope of the FTCA. Also, as discussed elsewhere herein, Plaintiff has alleged tribal ***ratification*** of the misconduct she ascribes to Quaempts and Tovey; as noted, above, Plaintiff cannot simultaneously assert that Quaempts and Tovey were acting outside the scope of their official duties when making such alleged misrepresentations. Plaintiff has not shown that the FAC pleads facts that, even if the, could lead to a determination that Quaempts and Tovey acted outside the scope of their authority for purposes of the analysis here.

Claims Exhaustion

Plaintiff argues that she was not required to exhaust her claims under the CTUIR's Tribal Personnel Policies Manual ("TPPM") or in tribal court pursuant to the tribe's "Tort Claims Code" ("TCC"). (Declaration of Daniel Hester ("Hester Decl.") ¶¶ 1-10: Exh. 2 to Hester Decl.) Plaintiff conclusorily argues, without citation to authority, that the TPPM "only applies to employees of, CTUIR," and that many of the wrongs she alleges occurred when Defendants were attempting to entice Plaintiff to fill the FFPP Manager position, such

that they occurred *before* she was a CTUIR employee. (Opp'n at 11.)

The Court is not persuaded. Plaintiff's lawsuit is also premised on *post-employment* conduct Plaintiff alleges she suffered, such as retaliation after she complained that the position was receiving neither the funding nor the staffing she alleges she had been promised *before* becoming a CTUIR employee. Plaintiff assumes that her action can be severed along pre-employment and post-employment lines – but she was undisputedly a CTUIR employee subject to the TPPM and TCC when suing her employer and her supervisors and making allegations regarding the terms of her employment and the adverse actions she suffered.

Plaintiff's FAC does not allege formal causes of action for employment-torts like "retaliation" discrimination or harassment, Plaintiff has not cited any on-point authorities or otherwise persuaded the Court that pleading around formal employment-law causes of action somehow takes her claims out of the scope of the TPPM and/or the TCC. (Opp'n at 11-12.) On the facts alleged in this particular case, Plaintiff's status as a CTUIR employee is central to her claims in connection with her FFPP Manager position, despite her arguments that she makes only "pre-employment" claims in this case.

Indeed, it is undisputed that Plaintiff was a CTUIR employee (FFPP Manager), and as a CTUIR employee seeking to sue her employer in connection with the terms of her employment and representations made

about her position (FFPP Manager), Plaintiff has not shown that the TPPM and TCC do not apply to her. Plaintiff has not compellingly argued that the TPPM's remedies – and the obligation to exhaust them – vanish simply because an employee's case is partially based on alleged pre-employment" misrepresentations. Plaintiff has not met her burden of proving claims exhaustion.

Summary

Because the Court agrees with Defendants that immunity applies and this Court lacks jurisdiction over his case, the Court need not and does not reach any remaining arguments in the moving papers not separately addressed herein.

Ultimately, Plaintiff has not shown the absence of tribal immunity or that tribal immunity has been waived on the facts, evidence and legal arguments/authorities currently before the Court. Plaintiff also has not shown that she fully exhausted her claims before filing this state court action. As a result, the Court lacks jurisdiction to adjudicate this case.

Accordingly, the Court GRANTS the instant Motion to Quash/Dismiss in its entirety. Defendants shall prepare a formal order pursuant to CRC Rule 3.1312.

COURT RULING

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

Having taken the matter under submission on 3/15/2018, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling.

IT IS SO ORDERED.

Dated: April 16, 2018

/s/ David I. Brown
HON. DAVID I. BROWN

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 3/20/2018 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: 34-2017-00206329-CU-FR-GDS
CASE INIT.DATE: 01/13/2017
CASE TITLE: Lopez vs. Quaempts
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion - Other - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion to Quash/Dismiss Plaintiff's 1st Amended Complaint) taken under submission on 3/15/2018

TENTATIVE RULING

Specially-appearing Defendants The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"), Eric Quaempts ("Quaempts") and David Tovey's ("Tovey") (collectively, "Defendants") motion to quash is GRANTED.

Background

Previously in this action, the Court tentatively granted Defendants' motion to quash based on tribal immunity, which raised identical and substantially similar issues to those raised in the instant motion to quash. After taking the matter under submission, the Court vacated the tentative ruling and denied the motion to quash, *without prejudice*, allowing Plaintiff to file an amended complaint alleging facts that could defeat sovereign immunity, and to conduct discovery on the issue of "ratification." However, the tentative ruling was vacated *only* to allow certain discovery and the filing of an amended complaint. The tentative ruling

continued to express the Court's perception of the legal issues raised by the motion to quash.

Now, Plaintiff has filed an amended pleading, the First Amended Complaint ("FAC") and completed her requested discovery. Having considered the amended pleading and the arguments made in Plaintiff's Opposition to the instant motion to quash, the Court has come to the same conclusion as before: tribal immunity applies here, and the motion to quash must be granted.

Allegations in FAC

In this action, Plaintiff Cynthia Lopez ("Plaintiff") alleges that Defendants hired her "under false and deceptive pretenses" and retaliated against her for bringing funding and staffing issues to light. (FAC ¶ 9.) The FAC alleges causes of action for (1) Fraud, (2) Negligent Misrepresentation, (3) Fraudulent Misrepresentation - Labor Code § 970, and (4) Unfair Business Practices - Business & Professions Code § 17200.

Plaintiff alleges that "Defendant Eric Quaempts, while employed with the [CTUIR] as Director of the Natural Resources Department, committed the federal crime of false advertising and California state crime of fraudulent and deceptive advertising by using false information and misrepresentations in advertising and recruiting to fraudulently induce Plaintiff, Dr. Cynthia Lopez, to leave her employment within the State of California arid to exploit Dr. Lopez' experience, labor, and reputation for the benefit of himself and the CTUIR." (FAC ¶ 1.)

Plaintiff alleges that "Defendant CTUIR, a Tribal governmental entity, failed to prevent their employees' (Mr. Quaempts' and Mr. Tovey's) fraudulent actions, and then failed to correct the situation after Plaintiff Lopez came to work at the CTUIR, learned about the misrepresentations, and complained about them." (FAC ¶ 4.) Plaintiff alleges that Quaempts and Tovey "are individuals employed with the CTUIR." (FAC ¶ 12.) Plaintiff alleges that each Defendant was the "agent, employee, partner and/or representative of one or more of the remaining Defendants and was acting within the course of such relationship at the time of the events described herein, although some of the acts alleged were beyond the scope or authority of said employment. Plaintiff is further informed and believes that each of the Defendants herein gave consent to, ratified and authorized the acts alleged herein to each of the remaining Defendants and those acts were beyond the scope of authority of the employment." (FAC ¶ 13.)

Plaintiff alleges that she was "induced" through false promises of "a fully funded program to manage, with 3 budget of $600,000 to $700,000 and a staff of 3-5 individuals' if she were hired as "the CTUIR's First Foods Policy Program ("the FFPP") Manager." (FAC ¶ 5.) Plaintiff alleges that through Quaempts' actions, "the funding and staffing for the FFPP dwindled to $347,369 and 1.5 full-time equivalent staff" but Quaempts and Tovey "expected the Program to conduct the same or more work as in prior years." (FAC ¶ 6.) Plaintiff alleges that Quaempts refused to

"correct the situation' after Lopez complained, and thereafter retaliated against her. (FAC ¶¶ 3-4.)

Plaintiff also alleges that "Defendant David Tovey, while employed as Executive Director with the CTUIR and directly supervising Mr. Quaempts, failed to adequately supervise Mr. Quaempts and approved the false, deceptive, and fraudulent advertisement and job description for public dissemination and distribution. . . ." (FAC ¶ 3.) "Defendant Tovey also did not act to correct the situation after Plaintiff Lopez raised the issue about the false and deceptive advertisements and misrepresentations." (FAC ¶ 3.)

Plaintiff's pleading includes the legal argument that "Tribal jurisdiction does not apply as false and deceptive advertising is a crime, committed outside of the CTUIR's tribal reservations and lands and is therefore subject to the criminal and civil jurisdiction of where the crime occurred." (FAC ¶ 15.) Tribal jurisdiction also does not apply as no language in the false and deceptive vacancy announcement and position description disclosed or indicated in any way that tribal jurisdiction applied to the application process and Dr. Lopez did not waive her rights or agree to Tribal jurisdiction during the application process, when the relevant crimes were committed in Sacramento, California. Hence, any dispute resulting from the pre-employment process is not subject to die CTUIR tribal jurisdiction; rather, it is subject to California jurisdiction." (FAC ¶ 16.)

For the second time in this case, Defendants move to quash and dismiss pursuant to Code of Civil Procedure § 418.10 and other authorities on the basis that this Court lacks jurisdiction over them given their status as a federally-recognized Indian Tribe (as to Defendant CTUIR) and as tribal employees acting in their official capacities (as to Defendants Quaempts and Tovey).

Legal Standard

The Supreme Court has consistently "recognized Indian tribes as 'distinct, independent political communities,' [citation], qualified to exercise many of the powers and prerogatives of self-government." (*Plains Commerce Bank v. Long Family Land &* Cattle Co. (2008) 554 U.S. 316, 327.) Accordingly, the tribes may establish their own law with respect to "internal and social relations." (*Ackerman v. Edwards* (2004) 121 Cal.App.4th 946, 951.) "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. . . . '[W]ithout congressional authorization,' the 'Indian Nations are exempt from suit.'" (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58.)

Generally, Indian tribes enjoy sovereign immunity from suit in state or federal court. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58; *see also Ameriloan v. Superior Court* (2009) 169 Cal.App.4th 81; *People v. Miami Nation Enterprises* (2014) 223 Cal.App.4th 21.) Under federal law, an Indian tribe is a sovereign authority and, as such, has tribal sovereign immunity,

not only from liability, but also from suit. (*Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal. App. 4th 175, 181-182.) To be clear Indian tribes enjoy sovereign immunity 'from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.' (*Kiowa Tribe v. Manufacturing Tech.* (1998) 523 U.S. 751, 760 Kowa).) "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its [sovereign] immunity." [emphasis added] (Id. at p. 754.) "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" (*C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe* (2001) 532 U.S. 411, 418 (C&L).) For a waiver to be effective, it "must be made by a person or entity authorized to do so." (*Yavapai-Apache Nation v. Ilpay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206.) The party claiming a tribe has waived its sovereign immunity bears the burden of proof on the issue. (*Id.* at p. 205.) In this context, sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation but that rather, it presents a pure jurisdictional question. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182.)

Tribal immunity from suit has been sustained by the courts without drawing a distinction based on where the tribal activities occurred. (*Kiowa Tribe v. Mfg. Techs.* (1998) 523 U.S. 751, 754.) Tribal immunity can apply whether the tribe's activities take place on or off of tribal property. (*See, e.g. Redding Rancheria v.*

Superior Court (2001) 88 Cal.App.4th 384, 388-90 (reversing trial court and holding that tribal casino was immune from suit under sovereign immunity for activities taken by the casino off tribal property; because "[a]ny change or limitation of the doctrine (e.g. to exclude off-reservation tort suits) must come from Congress.").) Indeed, any authorization or waiver "cannot be implied but must be unequivocally expressed." (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [98 S. Ct. at p. 1677]; accord, *Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1993) 60 Cal. App. 4th 1340, 1347.) And since it emanates from federal law, tribal immunity "is not subject to diminution by the States." (*Kiowa Tribe of Okla.*, supra, 523 U.S. at p. 756 [113 S. Ct. at p. 1703].)

A tribe's sovereign immunity extends to tribal officials when they act in their official capacity and within the scope of their authority. (*Trudgeon v. Fantasy Springs Casino*, (1999) 71 Cal.App.4th 632, 643; *Imperial Granite Company v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269, 1271.) When tribal Officials "act 'in their official capacity and within the scope of their 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.) However, "when such officials act beyond their authority, they lose their entitlement to the immunity of the sovereign." (*Imperial Granite Company v. Pale Band of Mission Indians* (1991) 940 F.2d 1269, 1271.)

Again, as this court has repeatedly expressed in the context of these motions, it must be underscored that

a waiver of tribal immunity cannot be implied. Rather, it must be expressed unequivocally. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182.) A tribes waiver must be clear. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411, 418.

On a motion to dismiss for lack of subject matter jurisdiction, the party asserting jurisdiction has the burden of proving the facts that give *the* court jurisdiction, by a preponderance of the evidence, (*Nobel Flora, Inc. v.* Pasero (2003) 106 Cal.App.4th 654, 657.) "The burden must be met by competent evidence in affidavits and authenticated documents." (*Id.* at 657-658.) Subject matter jurisdiction may be challenged at any time during the course of an action. The court may consider all admissible evidence before it in making its determination. (*Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal. App. 4th 1407, 1418.)

Discussion

It is undisputed that CTUIR is "a Tribal governmental entity;" the operative pleading itself alleges as much and Plaintiff's Opposition does not argue otherwise. (FAC ¶ 4.) Defendants have tiled the declaration of Paul Rabb offering evidence supporting tribal immunity. (Declaration of Paul Rabb ("Rabb Decl.") ¶¶ 1-8 ("the CTUIR is a Federally-recognized Indian Tribe" . . . and the First Food Policy Program receives funding from Department of Interior, as do the Executive Director Position held by David Tovey and the Natural

Resources Department Director Position held by Eric Quaempts.)

Plaintiff makes various arguments as to why tribal immunity should not apply here. The Court addresses each argument in turn below.

Plaintiff's Argument That Tribal Immunity Does Not Apply To "Pre-Employment" injuries

First, in the "Statement of Facts" section of her Opposition, Plaintiff argues that there were many *pre-employment* contacts between Plaintiff and Defendants, and in these contacts Defendants never "express[ed] that their sovereign authority or jurisdiction extends off-reservation to California, or over a person living and working in California who is reading the position description." (Opp'n at 2.) Plaintiff does not offer any authorities for the novel proposition that tribal Immunity does not apply to suits arising from an employee's "pre-employment" contacts with the Tribe. In *Kiowa*, the United States Supreme Court stated, "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." (523 U.S. at p. 760 [118 S. Ct. at p. 1705]. If negotiations leading to a contract were not immune, the exception would emasculate the immunity.

Likewise, Plaintiff does not offer any authorities for the proposition that the Tribe's immunity (and the immunity of its officials working in the scope of their

employment) turns on whether the Tribe gave the Plaintiff (its future employee) **notice** regarding its tribal immunity. This argument flies in the fact of the rule that waiver of tribal immunity cannot be implied. None of Plaintiff's cited authorities involve facts turning upon a plaintiff's lack of notice regarding tribal immunity. To the contrary, the governing authorities explain that tribal immunity applies given the sovereign *status of the tribe* (*see Trudgeon*, 71 Cal.App.4th at 636-37), and that status remains a constant that does not depend on whether someone has "notice" of it.

Plaintiff has not persuaded the Court that because she alleges wrongs occurring *prior* to her formal employment with CTUIR, tribal immunity does not apply here and/or was waived by her "pre-employment" lack of notice as to such immunity.

Plaintiff's Argument That CTUIR is Not Immune From Suit For "Off-Reservation, Criminal Conduct"

Plaintiff argues that she should be treated as *a "tort victim, or other plaintiff who has not chosen to deal with a tribe* [and now has] no alternative way to obtain relief for off-reservation commercial conduct" such that immunity should not apply, (Opp'n at 6 (citing *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2036 n.8 (emphasis added) (noting, in dicta, that U.S. Supreme Court has never made any determination as to whether tribal immunity should apply under those circumstances).)

The Court is not persuaded. This is because Plaintiff's pleading squarely alleges that she *did choose to deal with* a *tribe*, CTUIR, after seeing a job posting with CTUIR. This id not a case where Plaintiff sustained personal injuries while driving her car after suffering a collision with someone who just so happened to be a tribal official. While Plaintiff alleges that the CTUIR job posting for the FFPP Manager position was false and misleading regarding the position's budget and staffing support, she does not allege that any false/misleading information meant she did not *choose to deal with a tribe* in pursuing that position.

Plaintiff also argues that CTUIR has not proven "absolute" sovereign immunity because CTUIR's cited authorities "involve instances where" the underlying events "occur[] on or near tribal lands and/or where a party or non-Indian has chosen (without the presence of intentional fraud or criminal acts) to contract or commercially interact with a tribe." (Opp'n at 5-6.)

The Court is not persuaded. Plaintiff fails to acknowledge authorities holding that tribal immunity can extend even to a tribe engaging in commercial enterprises that occur off of tribal lands. The Court need not "extend" the immunity analysis to a tribal commercial enterprise on the facts here. In this case, rather than the CTUIR's engagement in a commercial enterprise like a gambling facility, the conduct at issue is in connection with CTUIR's First Foods Program, which on the evidence before the Court, is a non-commercial tribal activity undisputedly encompassed by the tribe's immunity, although it should be noted that the hiring

of the plaintiff is clearly a "commercial" transaction. Plaintiff also concedes that "CTUIR is a government entity" and not a "for-profit commercial entity that deals in commercial activities off reservation." (Opp'n at 5 (attempting to distinguish Defendants' cited cases where a tribe's immunity was extended to the tribe's commercial enterprises, even though such extension is not necessary on the facts of this particular case where Plaintiff dealt directly with the tribe in its actions as a government entity).)

Plaintiff's position that tribal immunity does not apply simply because the underlying events did not physically occur "on or near tribal lands" is not persuasive. Further, to the extent Plaintiff suggests that intentionally false representations about the position (and its funding/staffing) were made in her dealings with CTUIR, Quaempts, and Tovey, the Complaint does not allege that Defendants ever concealed their true identities or affiliations with CTUIR. Plaintiff has not alleged that she did not know she was dealing with a tribe or did not choose to deal with a tribe. At most, she alleges that nobody ever told her that CTUIR enjoys tribal immunity that would apply during her hiring process. As described above, however, Plaintiff has not presented authorities indicating that her lack of notice regarding tribal immunity means that such immunity does not exist or that it has been waived. Once again, "implied waiver", even if such could be said to exist here, is insufficient.

Plaintiff also asserts that "this case is about off-reservation criminal conduct." (Opp'n at 5.) The Court is not

persuaded. This is a civil lawsuit, not a "criminal" action. Moreover, Plaintiff has not cited any authorities involving "criminal conduct" or Illegal conduct" alleged as against a tribe or its personnel upon facts similar to those alleged here, such that even if this Court were to *assume arguendo* that "criminal conduct" was potentially at issue, Plaintiff has not shown that this means that tribal immunity would not exist or has been waived. Plaintiff's conclusory framing of Defendants' conduct as "criminal" and "illegal" thus is not determinative.

Plaintiff cites repeatedly to *Bay Mills*, but in that decision the Supreme Court recognized that *tribal immunity* ***applied*** to bar a State from suing a tribe to enjoin allegedly-illegal gaming allegedly occurring on non-tribal lands. (*Bay Mills*, 134 S.Ct. at 2034-36 (statutory waiver of immunity codified at 25 U.S.C. § 2710(d)(7)(A)(ii) applied only to permit the State of Michigan to sue the tribe to enjoin gaming activity located on tribal lands).) The Supreme Court also noted that the State could instead resort to its criminal law to prosecute those engaging in illegal gambling on non-tribal lands. (*Bay Mills*, 134 S.Ct. at 2034-36.) The facts of *Bay Mills are* simply not analogous to this case. Moreover, the ultimate holding in *Bay Mills* was that *tribal immunity barred* Michigan's lawsuit to enjoin alleged criminal conduct on non-tribal lands, which undercuts Plaintiff's argument that allegations of allegedly "criminal" conduct can somehow take a case out of the "tribal immunity" framework.

Plaintiff's Argument That CTUIR is Not Immune Because it "Ratified The Criminal Conduct" of Its Employees

Plaintiff argues that CTUIR has "ratified the illegal conduct of their tribal employees." (Opp'n at 6, 9-10.) Plaintiff also argues that Quaempts and Tovey violate the tribe's own manual and the terms of its compacts with the federal government, such that CTUIR's "ratification invalidates its claim to sovereign immunity and gives the state jurisdiction over all Defendants.' (Opp'n at 6, 9-10.) Yet Plaintiff offers no legal authorities addressing a tribe's "ratification" of alleged conduct as grounds for finding a lack of tribal immunity and/or waiver of immunity. Plaintiff cites again to *Bay Mills*, but *Bay Mills* does not address a tribe's "ratification" of criminal acts of its officials or employees as destroying or waiving tribal immunity. (Opp'n at 5-6, 9-10 (citing *Bay Mills*, 134 S.Ct. at 2034-35).) Plaintiff has not shown that evidence of "ratification" of alleged conduct by Quaempts and/or Tovey would have any bearing on application of tribal immunity.

Accordingly, Plaintiff has not persuaded the Court that CTUIR's alleged ratification of conduct by Quaempts and/or Tovey bears on any issues of tribal immunity (or waiver thereof) currently before the Court.

*Plaintiff's Argument that CTUIR is Not Immune Because It "Expressly Waived" Sovereign immunity" Given In "*Over 50" Contacts *With Plaintiff Wherein "CTUIR Purposely Did Not Assert Its* Sovereign. *Immunity Over Plaintiff"* (Opp'n at 10.)

Plaintiff's sole citation to authority to support her "waiver" argument is the case of *Luckerman v. Narragansett Indian Tribe* (D.R.I. 2013) 965 F.Supp.2d 224, 228-29. (Opp'n at 10.) However, the facts of *Luckerman* are not analogous to the facts Plaintiff urge as supporting her "waiver" argument here. In *Luckerman*, an attorney sought to sue a tribe, a former client, for nonpayment, and the court considered whether an unsigned "proposed agreement" between the tribe and the attorney – which included an "unequivocal" written "waiver of immunity" provision – in fact effectuated an "express waiver" given that it was not actually signed by any representatives of the tribe. The court concluded that although a waiver of immunity cannot be implied, these unique facts sufficed for purposes of finding an express waiver because the tribe "treat[ed] the agreement as valid," and "continued to accept" the attorney's legal services in light of the unequivocal waiver provision, even though the tribe did not formally sign the agreement. (*Id.*) Here, unlike in *Luckerman*, there is no alleged express and unequivocal "waiver of immunity" provision in any agreement between Plaintiff and Defendants.

Thus, the Court is not persuaded. Plaintiff has not cited any authorities that would condition a tribe's immunity on the tribe's giving "notice" of that immunity

to a potential plaintiff, or cases that otherwise required CTUIR to have given "notice" to Plaintiff regarding CTUIR's tribal immunity in order for such immunity to exist.

To the extent Plaintiff intends to argue that CTUIR's failure to give Plaintiff such notice somehow caused a "waiver" of CTUIR's tribal immunity, the Court is not persuaded. A waiver of tribal immunity cannot be implied; rather, it must be expressed unequivocally. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182.)

Plaintiff's Argument that "Quaempts and Tovey Are Not immune From Suit as They Exceeded Their Scope of Authority"

Plaintiff argues that "tribal officials, Defendants Quaempts and Tovey, committed the crime of false advertising" in violation of CTUIR's tribal manual (requiring tribal employees to perform their duties in compliance with the applicable laws and regulations) and-tin violation of the tribal compact. (Opp'n at 6.)

Plaintiff has not persuaded the Court that the alleged conduct by Quaempts and Tovey's alleged conduct is the sort "outside the scope of authority" that might prevent extension of CTUIR's tribal immunity to them as "tribal officials."

American Indian tribes, tribal entities, and tribal officers and agents acting within the scope of their authority are immune from suit in state court absent

congressional authorization to sue or the tribe's express, clear waiver of its sovereign immunity. (*Ameriloan v. Superior Court* (2008) 19 Cal.App.4th 81, 84, 89, 94; *Great Western Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1421.)

Indeed, "It is settled that tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority. !Citation.] This immunity applies to officials sued in their individual capacities." (*Trudgeon*, 71 Cal.App.4th at 643-44 (internal citations and quotation marks omitted).) "[A]n agent of an immune sovereign may be held liable for an act which exceeds his or her authority. [Citation.] But the commission of a tort is not per se an act in excess of authority. [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.] Where the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies." (*Id.* (internal citations and quotation marks omitted).) The appellate court in *Trudgeon* reasoned that the trial court correctly found that tribal immunity extended to the defendant tribal officials, given that the plaintiff's pleading alleged that at all times "each of the Defendants was the agent and employee of each of the remaining Defendants and in doing the things hereinafter alleged, *was acting within the scope of such agency and employment.*" (*Id.* at 644 (emphasis in *Trudgeon*).) The appellate court further held that on the plaintiff's theory of liability, the defendants

negligently failed to provide adequate security to protect patrons in the casino – such that whether tribal officials adequately secured the casino was necessarily "directly related to their performance of their official duties." (*Id.*) The Court concluded, "any failure to provide adequate security therefore was an act within the official authority of those individuals and, as such, was subject to immunity." (*Id.*)

The analysis in *Trudgeon* is analogous. While the allegations in Plaintiff's PAC assert that Quaempts and Tovey at times exceeded their authority and/or acted outside the scope of their authority (FAC ¶ 13 (every Defendant is an "agent, employee, partner and/or representative of one or more of the remaining Defendants and was acting within the course of such relationship at the time of the events described herein, although some of the acts alleged were beyond the scope of authority of said employment")), the Court does riot find that this renders *Trudgeon* inapplicable here. Indeed, Quaempts' and Tovey's allegedly criminal 'false advertising" misrepresentations regarding the funding and staffing attached to the FFPP Manager position ultimately filled by Plaintiff, and any retaliation or adverse employment actions against Plaintiff carried out by Quaempts and Tovey, necessarily occurred when those individuals were *acting* ***in their roles as tribal officials and as Plaintiff's supervisors***. As such, as in *Trudgeon*, even if these two tribal officials engaged in false representations or other misconduct when hiring and supervising Plaintiff, the specific misconduct alleged here was all

necessarily "directly related to their performance of their official duties" as Plaintiff's supervisors and "as such, was subject to immunity." (*See Trudgeon*, 71 Cal.App.4th at 644.)

The Court is not persuaded by Plaintiff's undeveloped argument based on *Turner v. Martina* (2000) 82 Cal.App.4th 1042, 1055. (Opp'n at 6.) Aside from a block quota from that case, Plaintiff did not discuss the fads of that case or meaningfully analogize to it. In any event, *Turner* does not require denial of the instant motion to quash. In *Turner*, tribal law enforcement officers were alleged to have *assaulted the plaintiffs*, in part out of political motivations. (*Turner*, 82 Cal.App.4th at 1055.) The appellate court found that the allegation "at least raises a factual issue whether defendants acted for the benefit of the tribe or merely for personal reasons." (*Id.*) Here, on the other hand, the FAC alleged that the tribe *ratified and approved* the very conduct Plaintiff contends was outside the scope of Quaempts' and Tovey's duties. There are no factual allegations In the FAC asserting that such alleged conduct (making misrepresentations in hiring and supervising Plaintiff) would have been strictly "personal" to Quaempts and Tovey, i.e., not "for the benefit of the tribe" in the course of seeking to fill a tribal position. Moreover, as Defendants note (Reply at 5), here Plaintiff has argued and alleged that CTUIR *ratified* the alleged conduct of Quaempts and Tovey, including the allegedly false advertising regarding the position. As such, having alleged tribal ratification of such conduct, Plaintiff cannot simultaneously argue that Quaempts

and Tovey were acting *outside* the scope of their official duties when making such alleged misrepresentations. Plaintiff has not shown that the FAC pleads facts that, even if true, could lead to a determination that Quaempts and Tovey acted outside the scope of their authority for purposes of the analysis here.

Plaintiff argues that tribal immunity does not apply here given the case of *Lewis, et. al v. Clarke* (2017) 137 S.Ct. 1285. (Opp'n at 8.) in that case, U.S. Supreme Court held that the sovereign immunity of an Indian tribe did not preclude a negligence action against a tribal employee for causing vehicle collision while acting within scope of employment, *because the action was brought against employee in his individual rather than official capacity and any state-court judgment against employee would not operate against the tribe.* (*Id.* at 1289.) Here, on the other hand, Plaintiff brings this action against Quaempts and Tovey in their official capacities, and also names the *tribe itself as a Defendant* in this case. Although the caption of the FAC names Quaempts and Tovey each as "an individual" and also names the tribe itself, in substance the factual allegations in the FAC all pertain to Quaempts' and Toveys' conduct in recruiting, hiring, and supervising Plaintiff - acts done in their roles as tribal employees. Moreover, pursuant to *Lewis*, in determining whether tribal immunity should apply, "courts should look to whether the sovereign is the real party in interest" in the action, as opposed to the individual (*Id.* at 1291-92.) "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 1291.) "Lawsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent, and they may also be barred by sovereign immunity." (*Id.* at 1291-92 (quotation marks omitted).) In *Lewis*, the Court concluded that while the suit was "brought against a tribal employee operating a vehicle within the scope of his employment," because "the judgment will not operate against the Tribe," the action was "not a suit against Clarke in his official capacity but was "simply a suit against Clarke to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property." (*Id.* at 1292-93 (quotation marks omitted).) The Court held that Clarke, the tribal employee, could not assert tribal immunity as a result. Here, Plaintiff has not shown that this action is analogous. In this particular action, the judgment *would* operate against the tribe *because the tribe is a named Defendant*, and also given Plaintiff's theory of liability based on the tribe's "ratification" of misconduct by Quaempts and Tovey. Plaintiff has not persuaded the Court that *Lewis* applies here.

Ultimately, Plaintiff has not met her burden of presenting authorities and evidence to persuade the Court that Defendants Quaempts and Tovey engaged in the sort of conduct "outside the scope" of their official supervisory duties such that the tribe's immunity does not extend to them as tribal officials.

Federal Tort Claims Act

Plaintiff also has not shown that the Federal Tort Claims Act ("FTCA") does not apply. (P&As at 10-11 (arguing that pursuing claims under the FTCA is Plaintiff's exclusive remedy, given that "[u]nder the 1990 amendments to the Indian Self-Determination Act, Congress extended FICA coverage to tribes and tribal employees for claims 'resulting from the performance of functions' under an Indian Self-Determination contract, grant agreement, or cooperative agreement").) Defendants assert that Public Law 101-512 § 314 provides that any "civil action or proceeding involving such claims brought hereafter against any tribe tribal organization, Indian contractor, or tribal employee covered by this section, shall be deemed an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act." The FTCA provides the exclusive remedy available to any tort claim against the United States, as well as a tribe or tribal employee acting within the scope of an Indian Self-Determination Act contract. (28 U.S.C. § 2679, 25 CFR § 900.204.)

Plaintiff argues that the FTCA does not apply to her because Plaintiff's claims involve alleged intentional misrepresentations and deceit outside the scope of the FTCA. (Opp'n at 10-11 (citing intentional torts exception codified at 28 U.S.C. § 2680(h) and arguing that [a]ny claim arising out of . . . misrepresentation, deceit, or interference with contract rights is excluded from the provisions of the FTCA)). Plaintiff argues that

Quaempts and Tovey were not acting within the scope of their employment, such that the FTCA does not apply. (Opp'n at 10-11.)

Plaintiff has not persuaded the Court that the FTCA does not apply here. Plaintiff's pleading alleges negligence and other non-intentional torts that would fall within the scope of the FTCA. Also, as discussed elsewhere herein, Plaintiff has alleged tribal ***ratification*** of the misconduct she ascribes to Quaempts and Tovey; as noted, above, Plaintiff cannot simultaneously assert that Quaempts and Tovey were acting outside the scope of their official duties when making such alleged misrepresentations. Plaintiff has not shown that the FAC pleads facts that, even if true, could lead to a determination that Quaempts and Tovey acted outside the scope of their authority for purposes of the analysis here.

Claims Exhaustion

Plaintiff argues that she was not required to exhaust her claims under the CTUIR's Tribal Personnel Policies Manual ("TPPM") or in tribal court pursuant to the tribe's "Tort Claims Code" ("TCC"). (Declaration of Daniel Hester' ("Hester Decl.") ¶¶ 1-10; Exh. 2 to Hester Bed.) Plaintiff conclusorily argues, without citation to authority, that the TPPM "only applies to employees of CTUIR," and that many of the wrongs she alleges occurred when Defendants were attempting to entice Plaintiff to fill the FFPP Manager position, such that

they occurred *before* she was a CTUIR employee. (Opp'n at 11.)

The Court is not persuaded. Plaintiff's lawsuit is also premised on *post-employment* conduct Plaintiff alleges she suffered, such as retaliation after she complained that the position was receiving neither the funding nor the staffing she alleges she had been promised *before* becoming a CTUIR employee. Plaintiff assumes that her action can be severed along pre-employment and post-employment lines – but she was undisputedly a CTUIR employee subject to the TPPM and TCC when suing her employer and her supervisors and making allegations regarding the terms of her employment and the adverse actions she suffered.

Plaintiff's FAC does not allege formal causes of action for employment-torts like "retaliation" discrimination or harassment. Plaintiff has not cited any on-point authorities or otherwise persuaded the Court that pleading around formal employment-law causes of action somehow takes her claims out of the scope of the TPPM and/or the TCC. (Opp'n at 11-12.) On the facts alleged in this particular case, Plaintiff's status as a CTUIR employee is central to her claims in connection with her FFPP Manager position, despite her arguments that she makes only "pre-employment" claims in this case.

Indeed, it is undisputed that Plaintiff was a CTUIR employee (FFPP Manager), and as a CTUIR employee seeking to sue her employer in connection with the terms of her employment and representations made

about her position (FFPP Manager), Plaintiff has not shown that the TPPM and TCC do not apply to her. Plaintiff has not compellingly argued that the TPPM's remedies – and the obligation to exhaust them – vanish simply because an employee's case is partially based on alleged "pre-employment" misrepresentations.

Plaintiff has not met her burden of proving claims exhaustion.

Summary

Because the Court agrees with Defendants that immunity applies and this Court lacks jurisdiction over this case, the Court need not and does not reach any remaining arguments in the moving papers not separately addressed herein.

Ultimately, Plaintiff has not shown the absence of tribal immunity or that tribal immunity has been waived on the facts, evidence and legal arguments/ authorities currently before the Court. Plaintiff also has not shown that she fully exhausted her claims before filing this state court action. As a result, the Court lacks jurisdiction to adjudicate this case.

Accordingly, the Court GRANTS the instant Motion to Quash/Dismiss in its entirety.

Defendants shall prepare a formal order pursuant to CRC Rule 3.1312.

COURT RULING

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

Having taken the matter under submission on 3/15/2018, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: March 20, 2018

E. Brown, Deputy Clerk s/ E. Brown

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[Proof Of Service Omitted]

Court of Appeal, Third Appellate District -
No. C087445

S272597

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CYNTHIA LOPEZ, Plaintiff and Appellant,

v.

ERIC QUAEMPTS et al.,
Defendants and Respondents.

(Filed Mar. 9, 2022)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice