

George Forman (SBN 047822)  
 Jay B. Shapiro (SBN 224100)  
 Margaret C. Rosenfeld (SBN 127309)  
 FORMAN & ASSOCIATES  
 4340 Redwood Highway, Suite E352  
 San Rafael, CA 94903  
 Telephone: (415) 491-2310  
 Facsimile: (415) 491-2313  
 E-mail: george@gformanlaw.com

Attorneys for Defendants Lester Marston, Arla Ramsey,  
 Anita Huff, Thomas Frank, Rapport and Marston,  
 David Rapport, Darcy Vaughn, Ashley Burrell  
 Cooper DeMarse and Kostan Lathouris

Allison Lenore Jones (SBN 162976)  
 GORDON & REES, LLP  
 101 W Broadway, Suite 2000  
 San Diego, CA 92101  
 Telephone: (619) 696-6700  
 Facsimile: (619) 696-7124  
 E-Mail: ajones@grsm.com

Attorneys for Defendants Lester Marston,  
 Ashley Burrell, Cooper DeMarse and Darcy Vaughn

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

ACRES BONUSING, INC., a Nevada  
 Corporation, and JAMES ACRES, an  
 individual,

Plaintiffs,

vs.

Lester Marston, *et al.*,

Defendants.

Case No.: 3:19-cv-05418-WHO

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MOTION STRIKE PLAINTIFF ABI'S  
 PENDENT STATE LAW CLAIMS  
 PURSUANT TO C.C.P. § 425.16 (Anti-  
 SLAPP)**

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## INTRODUCTION

By this motion, the Blue Lake Defendants<sup>1</sup> move to strike Plaintiff Acres Bonusing, Inc.'s ("ABI") Claims One through Seven (pendent state-law claims) on the grounds that all of the allegedly wrongful conduct on which ABI's state-law claims are based allegedly occurred exclusively in connection with *Blue Lake v. Acres*<sup>2</sup> in the Blue Lake Rancheria's ("Tribe") Tribal Court, and *Acres v. Blue Lake I*<sup>3</sup> and *Acres v. Blue Lake II*<sup>4</sup> in this Court. Therefore, Defendants are being sued for conduct protected by California's Anti-SLAPP statute. See Cal. Civ. Proc. Code § 425.16.

As will be shown below, not only are the Blue Lake Defendants entitled to seek relief under California's Anti-SLAPP statute, but also, under the facts as alleged in the Complaint and as set forth in the Declarations of Defendants Marston, Rapport, Ramsey and Huff lodged in support of the Blue Lake Defendants' pending Motion to Dismiss, ABI cannot show that it has a reasonable basis for prevailing on its claims, and thus the Blue Lake Defendants' Anti-SLAPP motion to strike should be granted, and the Blue Lake Defendants are entitled to a mandatory award of reasonable attorneys' fees and costs incurred in connection with making this motion.

## RELEVANT FACTS AND PLAINTIFF ABI'S ALLEGATIONS

Having presided over *Acres v. Blue Lake I* and *II*, this Court is familiar with the background of this action. Nonetheless, given the number of claims and defendants in this action, a summary of that history and the parties is set forth below.

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<sup>1</sup> Arla Ramsey ("Ramsey"), Lester Marston ("Marston"), Anita Huff ("Huff"), Thomas Frank ("Frank"), David Rapport ("Rapport"), "Rapport and Marston", Ashley Burrell ("Burrell"), Darcy Vaughn ("Vaughn"), Cooper DeMarse ("DeMarse") and Kostan Lathouris ("Lathouris"). Unless otherwise specified, these Defendants collectively are referred to herein as the "Blue Lake Defendants."

<sup>2</sup> *Blue Lake Casino and Hotel v. Acres Bonusing, Inc., et al.*, Tribal Court for the Blue Lake Rancheria, Case No.: C-15-1215 LJM. For consistency of nomenclature, this Memorandum will refer to this action as *Blue Lake v. Acres*.

<sup>3</sup> *Acres v. Blue Lake Rancheria Tribal Court*, No. 16-cv-02622-WHO, 2016 U.S.Dist.LEXIS 105786, at \*2 (N.D.Cal. Aug. 10, 2016).

<sup>4</sup> *Acres v. Blue Lake Rancheria, et al.*, No. 16-cv-05391-WHO, 2017 U.S.Dist.LEXIS 26447, at \*8 (N.D.Cal. Feb. 24, 2017).

**A. The Blue Lake Defendants**

It is undisputed that the Blue Lake Rancheria is federally-recognized Indian Tribe, operating the Blue Lake Casino and hotel on its federal trust lands in Humboldt County. (Complaint, ¶¶ 8, 11, 12.) Defendant Ramsey is the elected Vice Chair of the Tribe's governing body, and also serves as the Tribe's Administrator and CEO of the Tribe's Casino and Hotel. (Complaint, ¶ 13). Defendant Frank, who no longer works for the Tribe, formerly served as the Tribe's Director of Economic Development, and before that as a senior executive in the Tribe's Casino. (Complaint, ¶ 14).

In the exercise of its inherent sovereignty, the Tribe established and operates the Blue Lake Rancheria Tribal Court ("Tribal Court"). (Complaint, ¶ 11). At all times relevant to *Blue Lake v. Acres* and *Acres v. Blue Lake I* and *II*, Defendant Marston was the Chief Judge of the Tribal Court, and in that capacity – and only in that capacity – presided over *Blue Lake v. Acres* until he voluntarily recused himself and appointed retired California Court of Appeal Justice James Lambden to preside over the case; in addition, Judge Marston was named as a defendant in *Acres v. Blue Lake I* and *II*. (Complaint, ¶¶ 16, 17).

Defendant Huff is the Clerk of the Tribal Court, and in that capacity – and only in that capacity – issued the Tribal Court's process, received the parties' filings and transmitted the Tribal Court's orders in *Blue Lake v. Acres*; in addition, Clerk Huff was named as a defendant in *Acres v. Blue Lake I* and *II*. (Complaint, ¶ 15).

Defendants Burrell, Darcy Vaughn, and Lathouris are attorneys who, under contract to Judge Marston, acted as his research attorneys while he presided over *Blue Lake v. Acres*.<sup>5</sup> Defendant Rapport is the Tribe's General Legal Counsel, who contracted with Defendant DeMarse to assist him in providing assistance to the Tribe's counsel of record in defending the Tribal Court, Judge Marston and Clerk Huff against Acres' attacks in *Acres v. Blue Lake I* and *II*.<sup>6</sup> (Complaint, ¶¶ 18, 72, 73).

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<sup>5</sup> The Complaint describes them as Associate Judges of the Tribal Court.

<sup>6</sup> Defendant DeMarse allegedly assisted Judge Marston in matters other than *Blue Lake v. Acres*, including assisting Judge Marston in drafting a declaration filed in *Acres v. Blue Lake II*. (Complaint, ¶¶ 73, 79).



**B. *Blue Lake v. Acres, Acres v. Blue Lake I and Acres v. Blue Lake II***

In January, 2016, the Tribe filed *Blue Lake v. Acres* against Acres and ABI in the Tribal Court, alleging causes of action against ABI for breach of contract, tortious breach of the covenant of good faith and fair dealing, money had and received and unjust enrichment, and against Acres for fraudulent inducement. (Complaint, ¶ 52-53.) Defendant Marston assigned the case to himself.

Acres objected to the Tribal Court's jurisdiction from the outset (Complaint, ¶ 60), and proceeded to file *Acres v. Blue Lake I* against the Tribal Court, Judge Marston, and Clerk Huff to enjoin further Tribal Court proceedings. Acres' claims were asserted against Judge Marston and Clerk Huff in their official capacities only. On August 10, 2016, the District Court granted the defendants' motion to dismiss, finding that, "tribal court jurisdiction is at least colorable, not futile, and neither motivated by a desire to harass nor conducted in bad faith[.]" and that Acres was therefore required to exhaust his tribal remedies before bringing a federal lawsuit.

After the District Court declined to enjoin the pending Tribal Court case, the parties continued to litigate their dispute. *See, Acres v. Blue Lake II*. Each side filed various motions, including a motion by Acres to disqualify Judge Marston. Judge Marston presided over a hearing on the motions, and issued various procedural orders, including an order denying Acres' motions for judgment on the pleadings and to disqualify Judge Marston. (Marston Declaration, ¶¶ 5-9; Complaint, ¶¶ 80, 89, 95).

On or about September 28, 2016, Acres filed *Acres v. Blue Lake II*, again seeking to enjoin *Blue Lake v. Acres*. While that action was pending, Judge Marston *sua sponte* issued an order recusing himself as the judge presiding over *Blue Lake v. Acres*, and appointed appointing retired California Court of Appeal Justice James Lambden to preside over *Blue Lake v. Acres*. *See Acres v. Blue Lake II*.

On February 24, 2017, this Court dismissed *Acres v. Blue Lake II* on the grounds that Acres had failed to exhaust his Tribal Court remedies and that the issue of Judge Marston's disqualification had been rendered moot by Marston's recusal and subsequent appointment of Judge Lambden. *Id.* Acres appealed to the Ninth Circuit, which affirmed the dismissal. *See Acres v. Blue Lake Rancheria, et al.*, 692 Fed.Appx. 894 (Mem) (9th Cir., 2017).

1 The parties returned to the Tribal Court, where Judge Lambden heard the parties' respective  
 2 motions for summary judgment, and granted summary judgment in favor of Acres. Thereafter, the  
 3 Tribe dismissed its action against ABI. (Complaint, ¶ 113). No party appealed from the Tribal  
 4 Court's final judgment.

### 5 **C. Plaintiff's Allegations Against the Blue Lake Defendants**

6 Plaintiff's 42-page Complaint contains a multitude of factual and legal allegations, many of  
 7 which appear to be entirely irrelevant<sup>7</sup> or plainly based on nothing more than Acres' suspicions and  
 8 speculations. According to the Complaint, defendants DeMarse, Vaughn and Burrell are attorneys  
 9 associated with "Rapport & Marston" and are Tribal Court "associate judges" who participated in  
 10 various aspects of the litigation between the Tribe and Acres, whether in Tribal or federal court  
 11 (Complaint, ¶¶ 19-21, 64, 73, 79, 81, 128). Defendant Lathouris allegedly is an attorney associated  
 12 with "Rapport & Marston" who performed legal research and drafted orders for Judge Marston – *i.e.*  
 13 acted as Judge Marston's law clerk (Complaint, ¶ 22, 77). Defendant Huff is the Tribal Court's  
 14 Clerk and also the Tribe's "Grants and Contracts Manager" (Complaint, ¶ 15). Defendant Ramsey is  
 15 the Casino's CEO, a Tribal Court Associate Judge, the Tribe's Vice Chairperson, and the Tribe's  
 16 Administrator responsible for day-to-day functioning of the Tribe's government (Complaint, ¶ 13).  
 17 Defendant Frank was a high-level executive in the Tribe's Casino, and the Tribe's Director of  
 18 Business Development (Complaint, ¶ 14). Defendant "Rapport & Marston" is alleged to be an  
 19 association of defendant attorneys David Rapport and Lester Marston, exact form unknown  
 20 (Complaint, ¶ 17). Defendant Rapport has served as the Tribe's legal counsel since 1983  
 21 (Complaint, ¶ 18).

22 As against Defendants Ramsey and Frank, the First Cause of Action alleges, without any  
 23 details, "Wrongful use of Civil Proceedings" in the filing and prosecution of *Blue Lake v. Acres*. As  
 24 against Defendants Judge Marston and his Tribal Court staff, including Clerk Huff and associate  
 25 judges/research attorneys Burrell, Vaughn, and Lathouris, as well as Defendants Rapport, DeMarse  
 26

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27 <sup>7</sup> By way of example, the Complaint takes exception to an admitted error in the issuance of  
 28 the original summons (Complaint, ¶ 41-42), which the District Court in *Acres v. Blue Lake I* found  
 was not evidence of bad faith.

1 and "Rapport and Marston", the Complaint alleges pendent state-law claims for (1) Aiding and  
 2 Abetting Wrongful Use of Civil Proceedings, (2) Conspiracy to Commit Wrongful Use of Civil  
 3 Proceedings, (3) Breach of Fiduciary Duty (against Judge Marston only), (4) Aiding and Abetting  
 4 Breach of Fiduciary Duty (against all Blue Lake Defendants other than Judge Marston), (5)  
 5 Constructive Fraud (against Judge Marston only), and (6) Aiding and Abetting Constructive Fraud  
 6 (against all Blue Lake Defendants other than Judge Marston).

7 The essence of all of these claims is that ABI believes that Judge Marston somehow was  
 8 aware that *Blue Lake v. Acres* was "wrongful" from the outset; that Judge Marston wrongfully  
 9 served as the judge in *Blue Lake v. Acres* despite having a purported conflict of interest arising out  
 10 of his performance of what Plaintiff characterizes as other legal work for the Tribe and Ramsey; that  
 11 Judge Marston should have recused himself from presiding over *Blue Lake v. Acres* earlier in that  
 12 case; and that the other Blue Lake Defendants all had the same knowledge that *Blue Lake v. Acres*  
 13 was wrongful; that they cooperated with the Tribe's officers and its attorneys in bringing or  
 14 maintaining *Blue Lake v. Acres* against Plaintiffs, or in helping Judge Marston to conceal the fact  
 15 that he was Blue Lake's, Blue Lake Casino's and/or Ms. Ramsey's attorney in other matters unrelated  
 16 to *Blue Lake v. Acres* while presiding over *Blue Lake v. Acres*. (Complaint, ¶¶ 148-150).

17 Most significantly for the purposes of this Motion, none of the Blue Lake Defendants was a  
 18 party or appeared as counsel of record for a party in *Blue Lake v. Acres*. Defendants Marston and  
 19 Huff were defendants in *Acres v. Blue Lake I* and *Acres v. Blue Lake II*, and Defendant Marston  
 20 represented both the Tribal Court and himself in *Acres v. Blue Lake II*. Moreover, all of the alleged  
 21 acts for which ABI is suing the Blue Lake Defendants were taken on behalf and in the interest solely  
 22 of the Tribe, and not on behalf or in the interest of any individual (including themselves), and none  
 23 of the Blue Lake Defendants stood to derive any personal benefit from a judgment against Acres or  
 24 ABI in any of those actions.

## 25 ARGUMENT

### 26 A. California's Anti-Slapp Statute Precludes Plaintiffs' First Seven Causes Of 27 Action

28 To decide an anti-SLAPP motion, the Court must engage in a two-step process. First, the

1 Court must decide whether a defendant has made a threshold showing that the challenged cause of  
 2 action is one arising from protected activity (sometimes referred to as "Prong One"). If the Court  
 3 finds such a showing has been made, it then must determine whether the plaintiff has demonstrated a  
 4 probability of prevailing on the claim (sometimes referred to as "Prong Two"). *Navellier v. Sletten*,  
 5 29 Cal.4th 82, 89 (2002). Thus, once a defendant makes a *prima facie* showing that plaintiff's claims  
 6 arise from protected activity, the burden shifts to plaintiff to show by competent, admissible  
 7 evidence, the probability of prevailing on all elements of its claims. See *Dixon v. Superior Court*, 30  
 8 Cal.App.4th 733, 745 (1994); Cal. Civ. Proc. Code § 425.16(b).

9 A plaintiff bears a heavy burden to establish by way of competent, admissible evidence  
 10 within the personal knowledge of the declarant, a probability that s/he will prevail. *Church of*  
 11 *Scientology v. Wollersheim*, 42 Cal.App.4th 628, 658 (1996), disapproved on other grounds in  
 12 *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53 (2002). If a plaintiff fails to meet its  
 13 burden, the court must strike the cause of action. *Church of Scientology, supra*, 42 Cal. App. 4th at  
 14 654-55; *Evans v. Unkow*, 38 Cal.App.4th 1490, 1499 (1995).

#### 15 **B. Prong One: The Blue Lake Defendants' Conduct is Protected Litigation Activity**

16 California law defines a strategic lawsuit against public participation (a "SLAPP") suit as  
 17 including any "cause of action against a person arising from . . . any written or oral statement or  
 18 writing made in connection with an issue under consideration or review by a legislative, executive,  
 19 or judicial body, or any other official proceeding authorized by law." (Code Civ. Proc.  
 20 §§425.16(b)(1) and (e); see also *Sipple v. Foundation for National Progress*, 71 Cal.App.4th 226,  
 21 237 (1999) ("[Under] § 425.16, the moving party need only establish that the communication in  
 22 question was made in connection with an issue under review by a judicial body."); *Dove Audio, Inc.*  
 23 *v. Rosenfeld, Meyer & Susman*, 47 Cal.App.4th 777, 784 (1996) (holding that the statute affords  
 24 protection to any statement that is "rationally connected" to litigation).<sup>8</sup> "[S]tatements, writings, and  
 25 pleadings in connection with civil litigation are covered by the anti-SLAPP statute." *Rohde v. Wolf*,

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26  
 27 <sup>8</sup> The statute does not distinguish among State, federal or tribal legislative, executive or  
 28 judicial bodies. California has created procedures for recognizing tribal court judgments. See  
 California Code of Civil Procedure §§ 1730-1741. Federal law protects the free speech and  
 petitioning rights of persons subject to tribal jurisdiction. See 25 U.S.C. § 1302.

1 154 Cal.App.4th 28, 35 (2007).

2 The anti-SLAPP protection for speech and petitioning activities applies not only to the filing  
3 of lawsuits, but also extends to conduct that relates to such litigation, including statements made in  
4 connection with or preparation of litigation. *Kashian v. Harriman*, 98 Cal.App.4th 892, 908 (2002).  
5 Indeed, courts have adopted "a fairly expansive view of what constitutes litigation-related activities  
6 within the scope of § 425.16." (*Id.*). Thus, the statute governs even statements to the news media  
7 regarding pending litigation and allegations that a defendant testified falsely or conspired with others  
8 to offer false testimony in a civil action. *Haight Ashbury Free Clinics, Inc. v. Happening House*  
9 *Ventures*, 184 Cal.App.4th 1539, 1548-1549 (2010). Further, "where a cause of action alleges both  
10 protected and unprotected activity, the cause of action will be subject to § 425.16 unless the  
11 protected conduct is 'merely incidental' to the unprotected conduct. *Peregrine Funding, Inc. v.*  
12 *Sheppard Mullin Richter & Hampton LLP*, 133 Cal.App.4th 658, 672 (2005).

13 Here, the Blue Lake Defendants have satisfied Prong One, because each of ABI's seven  
14 pendent state-law claims is based entirely on the Blue Lake Defendants' alleged actions and  
15 statements in connection with litigation, in Tribal Court and/or federal court, and thus those actions  
16 and statements are protected under § 425.16.

17 Recognizing the likelihood of having to face an anti-SLAPP motion directed at its pendent  
18 state-law claims,<sup>9</sup> ABI has attempted to frame its allegations so as to come within an exception to the  
19 anti-SLAPP law articulated in *Flatley v. Mauro*, 39 Cal.4th 299 (2006), but to no avail. In *Flatley*,  
20 the California Supreme Court held that where, "either the defendant concedes, or the evidence  
21 conclusively establishes, that the assertedly protected speech or petition activity was illegal as a  
22 matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's  
23 action." *Id.* at 320. However, "[a] long line of cases have concluded in the wake of *Flatley* that its  
24 exception for illegal conduct is a 'very narrow' one, one that applies only 'where either the defendant  
25 concedes the illegality of its conduct or the illegality is conclusively shown by the evidence.'"

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26  
27 <sup>9</sup> "This cause of action does not arise from an act in furtherance of any person's right of  
28 petition or free speech under the United States Constitution or the California Constitution in  
connection with a public issue. This cause of action encompasses conduct that was illegal as a matter  
of law under 18 U.S.C. 666." (Complaint, ¶¶ 145, 153, 160, 170, 177, 187, 196).

1 *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP*, 18 Cal.App.5th 95, 115, fn. 7,  
 2 citations omitted (2017). Further, "the *Flatley* rule applies only to criminal conduct, not to conduct  
 3 that is illegal because in violation of statute or common law." *Bergstein v. Stroock & Stroock &*  
 4 *Lavan LLP*, 236 Cal.App.4th 793, 806 (2015).

5 *Flatley's* narrow exception to the anti-SLAPP statute clearly does not apply here. The Blue  
 6 Lake Defendants certainly do not concede that their conduct was illegal, and there is no evidence –  
 7 much less conclusive evidence – of any illegality whatsoever. Moreover, none of ABI's allegations,  
 8 even if true, would reach the level of criminal conduct required to trigger *Flatley's* illegality  
 9 exception in the first place. Therefore, the *Flatley* "illegality" exception to the anti-SLAPP statute  
 10 does not apply to Plaintiff's seven state-law causes of action.

11 **C. Prong Two: ABI Cannot Meet Its Burden Of Showing A Probability Of**  
 12 **Prevailing On The Merits Of Its Claims**

13 The Blue Lake Defendants having made a *prima facie* showing that ABI's claims are based  
 14 on their protected activity, ABI bears the burden of establishing "by competent, admissible  
 15 evidence" that it is likely to prevail on its claims. *See* Cal. Civ. Proc. Code § 425.16(b)(1)-(3).  
 16 However, ABI cannot satisfy its burden under Prong Two, because none of ABI's pendent state-law  
 17 claims is viable as a matter of law. Specifically, judicial immunity, prosecutorial immunity and/or  
 18 the Tribe's unwaived sovereign immunity bars each of ABI's claims; there is no evidence that any of  
 19 the Blue Lake Defendants acted tortiously in participating in deliberations leading to the filing of  
 20 *Blue Lake v. Acres*, providing testimony, presiding over or serving as a research attorney in  
 21 connection with *Blue Lake v. Acres*, or assisting in the defense of *Acres v. Blue Lake I* or *Acres v.*  
 22 *Blue Lake II*. Moreover, ABI cannot provide any authority for finding an enforceable fiduciary duty  
 23 between the Tribal Court's judge and a private litigant. Thus, none of ABI's pendent state law claims  
 24 is viable, and striking each of those claims is appropriate.

25 **1. ABI's Pendent Claims Against Defendants Marston, Huff, Burrell,**  
 26 **Vaughn, and Lathouris Are Barred by the Doctrine of Judicial Immunity**

27 "The concept of judicial immunity is long-standing and absolute, with its roots in English  
 28 common law. It bars civil actions against judges for acts performed in the exercise of their judicial



functions and it applies to all judicial determinations, including those rendered in excess of the judge's jurisdiction, no matter how erroneous or even malicious or corrupt they may be." (*Howard v. Drapkin*, 222 Cal.App.3d 843, 851 (1990); see also *Tagliavia v. County of Los Angeles*, 112 Cal.App.3d 759, 761 (1980)) ["the decisions of this state uniformly and consistently grant immunity from civil suit to judges in the exercise of their judicial functions. [Citation] That is true even if the acts are in excess of the jurisdiction of the judge and are alleged to have been done maliciously and corruptly"]. Under California law, "a judge is not to be held answerable in damages for acts performed in his judicial capacity." (*Fisher v. Pickens*, 225 Cal.App.3d 708, 716-717 (1990), citations omitted.)

"The rationale behind the doctrine is twofold. First, it "protect[s] the finality of judgments [and] discourag[es] inappropriate collateral attacks." [Citation] Second, it "protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants. [Citation.]" (*Howard v. Drapkin*, 222 Cal.App.3d 843, 851-852 (1990).)

Finally, the doctrine of judicial or quasi-judicial immunity extends not only to the judicial officer but extends to courtroom staff. "Under the concept of 'quasi-judicial immunity,' California courts have extended absolute judicial immunity to persons other than judges if those persons act in a judicial or quasi-judicial capacity." (*Howard v. Drapkin*, 222 Cal.App.3d 843, 852-853 (1990). For example, judicial immunity has been extended to court investigators (*Fisher v. Pickens*, 225 Cal.App.3d 708, 715 (1990)). It would be a nonsensical result if a judge were immune for his decisions but that immunity did not extend to the clerk following his directions or to the research attorneys who assisted in his evaluation.

Federal courts reach a similar conclusion. "Judges are absolutely immune from civil liability for damages for their judicial acts." (*Church of Scientology Int'l v. Kolts*, 846 F.Supp. 873, 885 (C.D.Cal. 1994).) Further, while the issue does not appear to have been raised in California's courts, it is clear from federal authority that the doctrine of judicial immunity applies to tribal court judges just as it would to federal court judges. "[A] tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges." (*Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003); see also *Sandman v. Dakota*, 816 F.Supp. 448, 452 (W.D.Mich. 1992) [Finding

1 that a civil rights claim against a Keweenaw Bay Tribal Court judge was barred by judicial and  
2 sovereign immunity.).

3 Whatever ABI may contend about Judge Marston's activities outside his courtroom while  
4 presiding over *Blue Lake v. Acres*, his defense of himself in *Acres v. Blue Lake I* or *Acres v. Blue*  
5 *Lake II* and the assistance provided to Judge Marston by Clerk Huff and law clerks Burrell, Vaughn,  
6 and Lathouris in those actions, all of those activities were quintessentially judicial or quasi-judicial  
7 acts, and thus are protected by judicial immunity.

## 8 **2. ABI's Pendent Claims Against Defendants Rapport and DeMarse are** 9 **Barred by Prosecutorial Immunity**

10 Attorneys acting on behalf of a government, whether federal, state or tribal, and whether in a  
11 criminal, civil or administrative context, possess absolute immunity, known as "prosecutorial  
12 immunity," from civil suit for damages. This immunity is based upon the same considerations that  
13 underlie the common-law immunities of judges and grand jurors performing their official duties –  
14 *i.e.*, concern that harassment by unfounded litigation would cause a deflection of the prosecutor's  
15 energies from his/her public duties, and the possibility that s/he would shade decisions out of self  
16 interest, instead of exercising the independence of judgment required by a public trust. See *Imbler v.*  
17 *Pachtman*, 424 U.S. 409, 422-24 (1976); see also *Butz v. Economou*, 438 U.S. 478, 515 (1978);  
18 *Bradley v. Med. Bd.*, 56 Cal.App.4th 445, 454 n.7 (1997).

19 In this case, to the extent that defendants Rapport, Burrell, Vaughn, DeMarse and "Rapport  
20 & Marston" provided legal services as the Tribe's attorneys, including in *Acres v. Blue Lake I* and  
21 *Acres v. Blue Lake II*, they all are cloaked with prosecutorial immunity.

## 22 **3. ABI's Pendent Claims Against the Blue Lake Defendants Are Barred by** 23 **the Tribe's Sovereign Immunity**

24 It is well-settled that "[s]uits against Indian tribes are . . . barred by sovereign immunity  
25 absent a clear waiver by the tribe or congressional abrogation." (*Oklahoma Tax Commission v.*  
26 *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991).) Indian tribes are  
27 sovereign nations predating the United States Constitution, and, "[a]s a matter of federal law . . .  
28 [are] subject to suit only where Congress has authorized the suit or the tribe has waived its



immunity." (*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); see also *Great Western Casinos Inc. v. Morongo Band of Mission Indians*, 74 Cal.App.4th 1407 at 1419-20 (1999); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); see *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989) [Indian tribes are separate from the federal government and the several states]). Immunity for Indian tribes extends to activities both on and off the tribe's reservation, and no distinction is drawn between the tribe's governmental and commercial activities. (*Kiowa Tribe of Oklahoma*, *supra*, 523 U.S. at 754; "[A]n 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*, 137 Cal.App.4th 175, 181-82 (2006).) Further, a tribe's sovereign immunity may extend to tribal agencies. (*Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998).)

Sovereign immunity is "not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation," but instead acts as an absolute bar to suit. (*Chemehuevi Indian Tribe v. California State Bd. Of Equalization*, 757 F.2d 1047, 1052, n.6 (9th Cir. 1985), reversed in part on other grounds at 474 U.S. 9; see *California v. Quechan Tribe*, 595 F.2d 1153, 1155 (9th Cir. 1979) ["Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy. . . the application of which is within the discretion of the court."]). The application of sovereign immunity to bar claims by individuals claiming they sustained bodily injury on tribal property or in connection with a tribe's business operations is well established. (See, e.g., *Lawrence v. Barona Valley Ranch Resort & Casino*, 153 Cal.App.4th 1364 (2007); *Campo Band of Mission Indians*, *supra*, 137 Cal.App.4th 1364.)

#### 4. Immunity Extends to Tribal Court Judges and Staff

Agents of an immune sovereign acting within the scope of their agency are protected by sovereign immunity, even where the acts are alleged to be tortious. See *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002). Hence, for example, an attorney representing an Indian tribe is immune from suit for actions taken or opinions given in rendering legal services to the tribe. This immunity applies even in a case alleging that the attorney counseled and conspired with the tribe to wrongfully terminate a contract. (*Great Western Casinos*, *supra*, 74 Cal.App.4th at

1 1423). Similarly, federal courts have found that "Indian tribes 'exercise inherent sovereign authority  
 2 over their members and territories.' [Citation] Federal district court do not have jurisdiction to  
 3 review the judicial actions of tribal courts,. . . " (*Sandman v. Dakota*, 816 F.Supp. 448, 451  
 4 (W.D.Mich. 1992).)

5 In this case Judge Marston was retained to act as the Blue Lake Tribal Court Chief Judge. It  
 6 is difficult to imagine a more fundamental violation of the Tribe's rights to self-governance than to  
 7 allow a state court to pass judgment on and punish its judicial officers for their conduct in  
 8 performing their jobs.

9 **D. ABI Cannot Establish Entitlement to Relief on Its Pendent Claims**

10 Aside from the legal defenses to ABI's claims, ABI has a much greater factual problem.  
 11 First, it should be apparent that a judge cannot simply dismiss a lawsuit *ab initio* because he  
 12 allegedly "knows" that it is meritless. The Judge must give the parties the opportunity to brief the  
 13 matter and be heard. As the Ninth Circuit noted in *Acres v. Blue Lake I*, "tribal court jurisdiction  
 14 [was] at least colorable" as of the summer of 2016. (*Acres v. Blue Lake Rancheria Tribal Court*  
 15 (N.D.Cal. Aug. 10, 2016, No. 16-cv-02622-WHO) 2016 U.S.Dist.LEXIS 105786, at \*2.).

16 Judge Marston did exactly that. ABI's seven pendent state law claims fail to allege any  
 17 improprieties in Judge Marston's procedural rulings, and of course he recused himself without  
 18 making any rulings on the merits of *Blue Lake v. Acres*.

19 As the District Court noted in *Acres v. Blue Lake II*:

20 Acres's allegations revolve around Judge Marston's conduct and relationship  
 21 to the Tribe. He alleges that Judge Marston is the Tribe's attorney, is biased  
 22 against Acres, and is consequently asserting jurisdiction over Acres in bad  
 23 faith. It is worth noting that the latter two allegations are unproven and, as to  
 24 the first, it appears that Judge Marston's representation of the Tribe in the past  
 25 was (at most) relatively limited. But regardless of the merits of those  
 allegations, Judge Marston's voluntary recusal and the appointment of a  
 neutral judge undercuts those allegations. Indeed, these developments  
 evidence an attempt to provide Acres a fair and neutral proceeding in Tribal  
 Court. Judge Marston cannot exercise jurisdiction over Acres in bad faith if he  
 has recused himself.

26 (*Acres v. Blue Lake Rancheria* (N.D.Cal. Feb. 24, 2017, No. 16-cv-05391-WHO) 2017  
 27 U.S.Dist.LEXIS 26447, at \*8.)

28 ABI's claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty,

constructive fraud, and aiding and abetting in constructive fraud all depend on the existence of a fiduciary duty between a judge and a litigant. There is no authority for the imposition of such a duty. "The creation of a fiduciary obligation or duty must, at a minimum, arise from facts demonstrating the formation of a confidential relationship. None are present here. 'A fiduciary relationship is created where a person reposes trust and confidence in another and the person in whom such confidence is reposed obtains control over the other person's affairs.'" (*Richard B. LeVine, Inc. v. Higashi*, 131 Cal.App.4th 566, 586 (2005).) Far from a confidential relationship, the relationship between a litigant and a judge is necessarily one of measured distance and neutrality. Moreover, in this case, neither ABI nor Acres reposed any trust or confidence in Judge Marston or the Tribal Court, twice having sued in this Court to enjoin the Tribal Court's proceedings for either lack of jurisdiction or bias.

With respect to Defendants Ramsey, Frank, Rapport, "Rapport and Marston" and DeMarse, none of whom were parties or counsel in *Blue Lake v. Acres* or *Acres v. Blue Lake I* or *II*, ABI equally cannot establish the elements of its claims against any of them.

**E. ABI's Claims Against Defendants Marston, Rapport, "Rapport And Marston", Burrell, Vaughn, Demarse And Lathouris Are Time-Barred Under C.C.P. § 340.6(a).<sup>10</sup>**

All of ABI's pendent state-law claims against Defendants Marston, Rapport, "Rapport and Marston", Burrell, Vaughn, Demarse and Lathouris arise out of acts they allegedly committed as attorneys. Thus, those claims are subject to the statute of limitations imposed by California Code of Civil Procedure, section 340.6.

The California Court of Appeal has clearly held that § 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in underlying litigation. *Connelly v. Bomstein*, 33 Cal.App.5th 783,799 (2019). Further, California case law clearly establishes that the statute of limitations applicable to ABI's aiding and abetting and conspiracy

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<sup>10</sup> "(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. ..."

claims is the same as the underlying tort that a defendant allegedly have aided and abetted or conspired to commit: *i.e.*, § 340.6(a)'s one-year statute of limitations applicable to claims for malicious prosecution brought against attorneys, because the claim necessarily arises from the attorney's performance of professional services. *Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal.App.4th 1451, 1478-1479 (2014) ("The statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort."); *Maheu v. CBS, Inc.*, 201 Cal.App.3d 662, 673 (1988) (holding the applicable statute of limitations for conspiracy is determined by the nature of the action in which the conspiracy is alleged).

ABI's verified Complaint alleges that,

"[from January 2016 through July 2017, Blue Lake Rancheria ("Blue Lake") and its confederates sued Acres Bonusing, Inc. ... within Blue Lake's tribal court. Blue Lake and its confederates sought ruinous judgments, within a court they controlled, before a judge they suborned, on conjured claims of fraud and breach of contract." (Complaint, ¶ 1.)<sup>11</sup>

ABI also alleges that it received Judge Marston's billing records in January 2017 (Complaint, ¶¶ 124-128, 132); that Judge Marston recused himself from presiding over *Blue Lake v. Acres* on January 10, 2017 (Complaint, ¶ 109); that Acres and ABI presented evidence in early February 2017 that allegedly showed that a single author had created documents filed by Judge Marston and his attorneys in *Acres v. Blue Lake I* and *Acres v. Blue Lake II* (Complaint, ¶ 110); and that *Blue Lake v. Acres* was dismissed in its entirety on August 31, 2017. (Complaint, ¶ 113.) Thus, ABI discovered or reasonably should have discovered all alleged wrongful conduct that comprises its pendent state law claims against the Blue Lake attorney Defendants as early as January 2016, but no later than August 31, 2017.

To beat the one-year deadline imposed by C.C.P. § 340.6(a), ABI would have had to file its instant Complaint by August 31, 2018. ABI filed its Complaint on August 28, 2019. Therefore, ABI's pendent state law claims against the Blue Lake attorney Defendants are therefore barred by the

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<sup>11</sup> The Complaint does not and cannot in good faith allege that any of the Blue Lake attorney Defendants ever represented ABI.

1 one-year statute of limitations.<sup>12</sup>

2 **F. The Litigation Privilege Bars ABI's Pendent Claims**

3 ABI also cannot show a probability of prevailing on its claims for aiding and abetting breach  
4 of fiduciary duty and aiding and abetting constructive fraud against any of the Blue Lake Defendants  
5 because these claims are barred by the litigation privilege found in California Civil Code § 47(b).

6 The litigation privilege applies to any communication "(1) made in judicial or quasi-judicial  
7 proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the  
8 litigation; and (4) that ha[s] some connection or logical relation to the action." *Mansell v. Otto*, 108  
9 Cal.App.4th 265, 271 (2003). This privilege also extends to statements made outside of judicial  
10 proceedings; and to "statements made to (and information concealed from)" the plaintiff and the  
11 court related to the action. *Graham-Sult v. Clainos*, 756 F.3d 724, at 742 (9th Cir. 2014).

12 Defendants are immunized "from virtually any tort liability (including claims for fraud), with the  
13 sole exception of causes of action for malicious prosecution." *Olsell v. Harbisoll*, 191 Cal.App.4th  
14 325, 333 (2010). "Any doubt about whether the privilege applies is resolved in favor of applying it."  
15 *Contreras v. Dowling*, 5 Cal.App.5th 394, 415 (2016).

16 ABI does not allege any conduct by any of the Blue Lake Defendants that was not a  
17 communication made in connection with a judicial proceeding. The broad scope of the litigation  
18 privilege protects these Defendants from liability based on (1) preparing or assisting in preparing,  
19 filing, and serving pleadings, orders, and other documents in *Blue Lake v. Acres* or *Acres v. Blue*  
20 *Lake I* and/or *II*; (2) and making statements (such as sworn declarations) in judicial proceedings in  
21 *Blue Lake v. Acres*, *Acres v. Blue Lake I* and/or *Acres v. Blue Lake II*.

22 The litigation privilege also protects these Defendants from liability based on allegedly  
23 concealing information from ABI related to *Blue Lake v. Acres*. See *Graham-Sult*, *supra*, 756 F.3d  
24 at 742. Accordingly, ABI's claims for aiding and abetting breach of fiduciary duty and aiding and

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25  
26 <sup>12</sup> ABI has not alleged, and cannot in good faith allege any facts that would toll the statute of  
27 limitations in the instant case. As alleged in ABI's verified Complaint, it suffered actual injury when  
28 *Blue Lake v. ABI* was first instituted against it in January 2016, specifically alleging that  
"[t]hroughout the pendency of *Blue Lake v. ABI*, ABI's business was harmed because of the stress  
placed on Mr. Acres by defendants' tortious conduct." (Complaint, ¶ 58.)

abetting constructive fraud are barred by the litigation privilege as a matter of law.

**THE BLUE LAKE DEFENDANTS ARE ENTITLED TO A MANDATORY  
AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS**

Under California Code of Civil Procedure section 425.16(c), a defendant who prevails on a special motion to strike is entitled to a mandatory award of its attorneys' fees and costs. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131 (2001) ["... any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees."]; see also *Paiva v. Nichols*, 168 Cal.App.4th 1007, 1038 (2008) [to same effect]. The fee award should ordinarily include compensation for all the hours reasonably spent, including those relating solely to the fee motion. *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Ass'n*, 163 Cal.App.4th 550, 559 (2008). Thus, if the Court grants the Blue Lake Defendants' motion to strike ABI's pendent state-law claims, the Blue Lake Defendants are entitled to a mandatory award of their attorneys' fees and costs incurred both in making the anti-SLAPP motion itself, and preparation of the request for attorneys' fees.

**CONCLUSION**

For all of the reasons set forth above, the Court should grant the Blue Lake Defendants' motion to strike each of ABI's seven pendent state-law claims pursuant to California Code of Civil Procedure section 425.16. If the Court grants that motion, it should grant the Blue Lake Defendants leave to submit a request for a mandatory award of their attorneys' fees and costs pursuant to § 425.16(c)(1).

Dated: March 6, 2020

Respectfully submitted,

/s/ George Forman

George Forman

Attorney for Defendants Lester Marston, Arla Ramsey,  
Thomas Frank, Anita Huff, "Rapport and Marston,"  
David Rapport, Cooper DeMarse, Darcy Vaughn,  
Ashley Burrell and Kostan Lathouris

1 Dated: March 6, 2020

GORDON REES SCULLY MANSUKHANI, LLP

2  
3 /s/ Allison Jones

4 Allison L. Jones

5 Kevin W. Alexander

6 Attorneys for Defendants Lester Marston, Ashley  
7 Burrell, Cooper DeMarse and Darcy Vaughn  
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