No. 20-15959

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRES BONUSING, INC., et al.,
Plaintiffs and Appellants,
v.
LESTER MARSTON, et al.,
Defendants and Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-05481-WHO
Hon. William H. Orrick, Judge

DEFENDANTS'-APPELLEES' LESTER MARSTON, ARLA RAMSEY, THOMAS FRANK, ANITA HUFF, "RAPPORT AND MARSTON," DAVID RAPPORT, COOPER DEMARSE, DARCY VAUGHN, ASHLEY BURRELL AND KOSTAN LATHOURIS ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellees Lester J. Marston, Arla Ramsey, Anita Huff, Thomas Frank, David Rapport, "Rapport and Marston," Ashley Burrell, Darcy Vaughn, Cooper DeMarse and Kostan Lathouris having been sued as individuals, hereby state that no Corporate Disclosure Statement is required by FRAP 26.1.

DATED: September 28, 2020

FORMAN & ASSOCIATES

By: /s/ George Forman
George Forman
Attorneys for Defendants/Appellees Lester Marston, Arla Ramsey, Thomas Frank, Anita Huff, "Rapport and Marston," David Rapport, Cooper DeMarse, Darcy Vaughn, Ashley Burrell and Kostan Lathouris

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INTRODUCTION

Appellants are disgruntled litigants who, despite having prevailed in the Blue Lake Tribal Court, continued their offensive against their real target, the federally recognized Blue Lake Rancheria ("Blue Lake" or "Tribe"), by suing the Blue Lake Appellees, the Boutin Jones Appellees and the Janssen Malloy Appellees in the District Court.

In response to the various defendants' FRCP 12(b)(1) motions, the District Court dismissed the complaint, correctly concluding that even though the defendants were named as individuals, the defendants all were cloaked with the Tribe's unwaived sovereign immunity from unconsented suit because the Tribe is the real party in interest. As to the Blue Lake Appellees serving as Tribal Court personnel (*e.g.*, as judges, the court clerk, or research attorneys), the District Court held that they were being sued for performing judicial or quasi-judicial acts, and thus also were protected from suit under the doctrine of absolute judicial or quasi-judicial immunity.

For the reasons set forth below, this Court should affirm the District Court's judgment in its entirety.

JURISDICTIONAL STATEMENT

Appellants unsuccessfully attempted to invoke the District Court's original

jurisdiction over their Eighth Claim for Relief pursuant to 18 U.S.C. § 1964(c) ("RICO"), and over ABI's Claims One through Seven pursuant to 28 U.S.C. § 1367 (Supplemental Jurisdiction over claims arising under California law).

ISSUES PRESENTED

1. Did the District Court correctly dismiss the action for lack of jurisdiction based on its determination that even though Appellants named the Blue Lake Appellees as individuals, the Blue Lake Rancheria is the Real Party In Interest, and thus the Blue Lake Appellees are cloaked with the Blue Lake Rancheria's inherent tribal sovereign immunity from suit?

2. Did the District Court correctly determine that Blue Lake Appellees Marston, Huff, Vaughn, Burrell and Lathouris had judicial or quasi-judicial roles in connection with *Blue Lake v. ABI*, and thus are cloaked with judicial or quasi-judicial immunity?

3. Did the District Court abuse its discretion by denying as moot the appellees' respective anti-SLAPP motions and appellants' motion to strike the anti-SLAPP motions?

STATEMENT OF THE CASE[1]

[1] Due to the complexity of the factual context in which this suit arose, this Statement of the Case is merely a summary. To provide the Court with an in-depth summary of the factual context in which this suit arose, as well as the

In 2016, the Blue Lake Rancheria ("Blue Lake"), a federally recognized Indian Tribe doing business as its wholly owned Blue Lake Casino and Hotel ("Casino"), sued Appellants ABI and Acres in the Blue Lake Tribal Court in a dispute over a lease of gaming equipment. Complaint, ¶ 1, ER 019. Blue Lake initially was represented by the Boutin Jones law firm; the Janssen Malloy law firm substituted in for Boutin Jones in 2017. Complaint, ¶ 27, ER 024; Declaration of Daniel Stouder, ¶¶ 9-10, Blue Lake Supplemental Excerpts of Record ("BLSER"), BLSER 159-160.

Tribal Court Chief Judge Lester Marston initially presided over the trial court proceedings, but later recused himself due to concerns raised by Appellant Acres about a potential conflict of interest. Declaration of Lester Marston, ¶ 21, BLSER 008. Retired California Court of Appeal Justice James Lambden replaced Judge Marston and ultimately granted summary judgment in favor of Acres, after which Blue Lake voluntarily dismissed its action against ABI. Complaint, ¶ 1, ER 019.

In the District Court action giving rise to this appeal, Appellants sued ten

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facts on which the District Court relied in making its determination that it lacked subject matter jurisdiction, a detailed recitation of the relevant facts is set forth in the following section of this Brief.

lawyers;[2] those lawyers' law firms;[3] the Blue Lake Rancheria Tribal Court's Chief Judge, Lester Marston ("Judge Marston"); the Blue Lake Rancheria Tribal Court's Clerk, Anita Huff ("Clerk Huff"); Judge Marston's law clerks/research attorneys Vaughn, Burrell and Lathouris; the Blue Lake Rancheria's elected Vice Chair/Tribal Administrator/Tribal Court Associate Judge/Blue Lake Casino & Hotel ("Casino") CEO, Arla Ramsey ("Ramsey"); the Blue Lake Rancheria's former Tribal Casino executive/Tribal government Economic Development Director, Thomas Frank ("Frank"); and Blue Lake's general legal counsel, David Rapport, and attorney Cooper DeMarse, who assisted Rapport, for allegedly

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[2] David Rapport, Ashley Burrell, Cooper DeMarse, Darcy Vaughn, Kostan Lathouris, Michael Chase (BLSER 145-150), Daniel Stouder, Amy O'Neill (BLSER 151-156), Megan Yarnell, and Amelia Burroughs. In this Brief, Appellees Chase, Stouder, O'Neill, Yarnell, Burroughs, Janssen Malloy and Boutin Jones will be referred to as "Attorney Appellees" to distinguish them from the Blue Lake Appellees, some of whom (Rapport, Burrell, DeMarse, Vaughn, Lathouris, and Marston) are attorneys, and three of whom (Ramsey, Huff and Frank) are not attorneys.

[3] Boutin Jones, Inc., Janssen Malloy, LLP, and "Rapport and Marston, an association of attorneys." In this Brief, "Rapport and Marston" appears in quotation marks because, as shown by the Declarations of David Rapport (¶¶ 3, 5, Exhibit DR 1, BLSER 115-116, 118-130) and Lester Marston (¶ 24, Exhibit LM 12, BLSER 008-009, 098-104) lodged herewith, "Rapport and Marston" is an association of sole practitioners and as such had no legal relationship with either the Blue Lake Rancheria or the Casino; rather, Blue Lake Appellees David Rapport and Lester Marston each had separate contractual relationships directly with the Blue Lake Rancheria. Rapport Declaration, ¶ 2, BLSER 115; Marston Declaration, ¶ 25, 34, BLSER 009, 011-012.

conspiring or aiding and abetting a conspiracy to obtain a Tribal Court money judgment against them, that then could be enforced against Appellants in a California or U.S. District Court.[4]

Appellants sought to impose joint and several liability on all of the Appellees, as individuals, for compensatory damages of $4,000,000, punitive damages, treble damages to be proven at trial, and disgorgement of compensation received by Appellees in connection with Blue Lake's Tribal Court lawsuit and Acres' two federal court lawsuits aimed at stopping the Tribal Court proceedings. Prayer for Relief, ¶ ¶ 1-2, ER 058.

Appellant Acres filed suit against the Tribal Court, Judge Marston and Clerk Huff in the U.S. District Court in San Diego, California, seeking an injunction against the Tribal Court proceedings for lack of jurisdiction. *Acres v. Blue Lake Rancheria Tribal Court, et al.*, No. 16-CV-02622-WHO, 2016 WL 4208328, at *4 (N.D. Cal. Aug. 10, 2016) ("*Acres v. Blue Lake I*"). That lawsuit was transferred to the Northern District of California and assigned to Judge Orrick. The Boutin Jones Appellees, assisted by Blue Lake Appellees Rapport and DeMarse, moved to dismiss the action for failure to exhaust tribal judicial

[4] The Complaint failed to mention that if Blue Lake were to seek enforcement of such a judgment, Appellants would have been entitled to challenge its enforcement pursuant to Calif. Code of Civil Procedure § 1730 *et seq.*

remedies. Judge Orrick found that the Tribal Court's jurisdiction was at least colorable, and on that basis granted the motion to dismiss for failure to exhaust Tribal Court remedies. *Id.*

After further proceedings before Appellee Judge Marston, Appellant Acres filed another lawsuit in the U.S. District Court for the Northern District of California, again seeking to enjoin the Tribal Court proceedings, this time alleging that Judge Marston was biased against Appellants. *Acres v. Blue Lake Rancheria Tribal Court, et al.*, No. 16-CV-05391-WHO, 2017 WL 733114, at *1 (N.D. Cal. Feb. 24, 2017) ("*Acres v. Blue Lake II*"). Once again, the Boutin Jones Appellees defended the Tribal Court, Judge Marston and Clerk Huff, again assisted by Blue Lake Appellees Rapport and DeMarse. While *Acres v. Blue Lake II* was pending, Judge Marston recused himself and appointed retired California Court of Appeal Justice James Lambden to preside over *Blue Lake v. ABI*. Judge Orrick then dismissed *Acres v. Blue Lake II* for failure to exhaust Tribal Court remedies.

After Judge Marston recused himself, the Tribe substituted the Janssen Malloy Appellees for the Boutin Jones Appellees as the Tribe's attorneys of record in *Blue Lake v. ABI*. Complaint, ¶ 27, ER 024. Justice Lambden determined that the Tribal Court had jurisdiction over all parties in *Blue Lake v. ABI*, and ultimately granted summary judgment in favor of Acres, after which the Tribe

voluntarily dismissed its action against ABI on August 31, 2017. Complaint, ¶ 1, ER 019. Neither Acres nor ABI appealed from the Tribal Court judgment.

On July 13, 2018, Acres filed suit in the Superior Court for the State of California in Sacramento, California, (*Acres v. Marston, et al.*, Case No. 34-2018-00236829), naming as individual defendants all of the same persons and entities as Appellants later sued in this action. In the Superior Court, Appellant Acres asserted claims substantially identical to the first seven claims asserted by Appellant ABI in this action (ABI was not a party to Acres' Superior Court lawsuit). Acres did not assert a cause of action under RICO in his Superior Court action.

The Superior Court held that even though Acres had named the defendants as individuals, they were, in fact, being sued for actions taken in their official capacities as officers or agents of the Tribe validly acting on the Tribe's behalf; that all of the named defendants were being sued for the Tribe's actions rather than their individual actions; that the Tribe would be adversely impacted by Acres' action and therefore was the real party in interest; and thus that all of the named defendants were cloaked with the Tribe's sovereign immunity, requiring dismissal of the action. BLSER 260.

The Superior Court also determined that the acts for which Tribal Court

personnel were being sued were judicial or quasi-judicial acts for which those defendants had absolute judicial or quasi-judicial immunity, and that tribal attorneys Rapport, DeMarse and Rapport and Marston had prosecutorial immunity for their roles, if any, in assisting the Boutin Jones firm in defending against Acres' two federal district court actions and otherwise providing legal services to the Tribe. BLSER 273.

On August 28, 2019 (more than one year after entry of the Tribal Court's judgment in *Blue Lake v. ABI*[5]), Appellants filed this action, making substantially the same factual allegations as Acres made in his Superior Court action, but adding an eighth claim for damages under RICO in which both Appellants joined. Appellants' Claims for Relief are summarized as follows:

1. Blue Lake Appellees Ramsey and Frank, the Boutin Jones Appellees and the Janssen Malloy Appellees committed the tort of "wrongful use of civil proceedings" (*i.e.*, malicious prosecution) in the Tribe's filing and prosecution of *Blue Lake v. ABI* in the Tribal Court, and/or defending the Tribal Court, Judge Marston and Clerk Huff in the two federal lawsuits Acres filed in unsuccessful efforts to enjoin the Tribal Court proceedings;

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[5] Thus beyond the one-year statute of limitations set by Calif. Code of Civ. Proc. § 340.6(a) for actions against attorneys for malicious prosecution.

2. Blue Lake Appellees Rapport and DeMarse, "Rapport and Marston," the Tribal Court Appellees, and Boutin Jones Appellee Chase aided and abetted the Tribe's "wrongful use of civil proceedings" in connection with *Blue Lake v. ABI* and Acres' two federal lawsuits;

3. Blue Lake Appellees Rapport, DeMarse and "Rapport and Marston," the Tribal Court Appellees, and Boutin Jones Appellee Chase conspired with the Tribe[6] and the Tribe's other attorneys to commit the tort of wrongful use of civil proceedings in *Blue Lake v. ABI*;

4. Blue Lake Appellee Judge Marston breached his fiduciary duty to Appellants by failing to disclose that he also was serving as the attorney for the Tribe and a Blue Lake tribal member in *Blue Lake v. Shiomoto*, a Superior Court action against the California Department of Motor Vehicles unrelated to *Blue Lake v. ABI*, and by failing to recuse himself from *Blue Lake v. ABI* at the outset;

5. The Blue Lake Appellees (including Judge Marston), the Boutin Jones Appellees, and the Janssen Malloy Appellees, aided and abetted Judge Marston's alleged breach of his fiduciary duty to ABI;

6. Blue Lake Appellee Judge Marston's alleged non-disclosure of the

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[6] The Casino has no legal identity separate from the Blue Lake Rancheria itself. Ramsey Declaration, ¶ 5, BLSER 139.

full scope of his activities on behalf of the Tribe constituted constructive fraud, on which ABI relied to its detriment;

7. Blue Lake Appellees Ramsey, Frank, Clerk Huff, "Rapport and Marston," Rapport, Burrell, DeMarse, Vaughn and Lathouris, and the Boutin Jones and Janssen Malloy Appellees all aided and abetted Judge Marston's constructive fraud;

8. Based on the same facts alleged in ABI's first seven claims, all Appellees operated or managed the Tribal Court as a racketeering enterprise, entitling Appellants to treble money damages and other relief under RICO, 18 U.S.C. § 1964(c).

DETAILED STATEMENT OF MATERIAL FACTS

Appellants' Opening Brief recites numerous purported factual allegations, some of which were included in their Complaint, some of which were not, but most of which have no bearing on this appeal. Because the District Court dismissed Appellant's suit for lack of jurisdiction, only the following facts were relevant:

1. The Blue Lake Rancheria is a federally recognized Indian Tribe. Complaint, ¶ 9; ER 020;

2. The federal government holds in trust for the Blue Lake Rancheria

the land on which the Blue Lake Rancheria owns and operates the Blue Lake Casino & Hotel ("Casino") Complaint, ¶¶ 9, 10, 12, ER 020-021 pursuant to a Class III gaming compact with the State of California ER 005;

3. The Casino is an enterprise fund of the Blue Lake Rancheria itself, operated under the direction of the Blue Lake Rancheria's governing body, the Business Council, of which Blue Lake Appellee Ramsey is the elected Vice Chair. Complaint, ¶¶ 9, 12, 13, ER 020-021; Declaration of Arla Ramsey, at ¶ 5 ("Ramsey Declaration"), BLSER 139-140;

4. The Blue Lake Rancheria's Court was created by the Blue Lake Rancheria's governing body in the exercise of the Blue Lake Rancheria's inherent sovereign power to establish and administer a judicial system. Complaint, ¶ 11, ER 020;

5. Blue Lake Appellee Judge Marston was, at all times relevant to this action, under contract to the Blue Lake Rancheria to serve as the Chief Judge of the Tribal Court Complaint, ¶ 16, ER 021; Declaration of Lester Marston, at ¶ 1 ("Marston Declaration"), BLSER 002. With one exception, the Complaint failed to allege any interactions between Judge Marston and either Appellant except those that occurred in open court as Marston presided over *Blue Lake v. ABI* as the Tribal Court's Chief Judge. (Marston Declaration, ¶¶ 4, 14, 37, BLSER 003, 005,

012-013);

6. Blue Lake Appellee Clerk Huff's only interactions with Appellants occurred in her official capacity as Court Clerk. Huff conversed with and provided information and documents to Appellant Acres in connection with *Blue Lake v. ABI*, received filings from and provided copies of orders and rulings to the parties in *Blue Lake v. ABI*, and required the assistance of tribal security officers to remove Acres from the tribal court office after he created a disturbance by entering and then refusing to leave a portion of the court offices not open to the public Complaint, ¶¶ 41, 42, 61, 62, 63, 81, 85, 88, 104, 123, ER 027, 030-031, 036- 037, 040, 043; Huff Declaration, ¶¶ 2, 4, 5, BLSER 143-144;

7. Blue Lake Appellees Burrell, DeMarse, and Vaughn are attorneys who independently and separately contract from time to time with Blue Lake Appellees Marston or Rapport, and also are identified as Associate Judges of the Tribal Court. Complaint, ¶¶ 19, 20, 21, ER 022-023, in which capacities these Blue Lake Appellees allegedly either rendered assistance to Blue Lake Appellee Judge Marston as he presided over *Blue Lake v. ABI*, or performed legal research and/or drafted memoranda for Blue Lake Appellee Rapport, who, as the Tribe's contracted General Counsel, assisted in the defense of the *Acres v. Blue Lake I and II* federal lawsuits. Complaint, *e.g.*, ¶¶ 73, 77, 78, 79, 81, 84, ER 033-037;

8. Blue Lake Appellee Lathouris is an attorney who independently contracted with Judge Marston from time to time to perform legal research and draft orders in, *inter alia*, *Blue Lake v. ABI*. Complaint, ¶ 22, ER 023;

9. Blue Lake Appellee Frank was a high-level Casino executive and the Tribe's Director of Business Development who received a copy of a demand letter sent to ABI, executed two declarations under penalty of perjury and verified answers to Interrogatories filed in *Blue Lake v. ABI*. Complaint, ¶¶ 14, 48, 122, ER 021, 028, 043;

10. Blue Lake Appellee "Rapport and Marston," is an association of sole practitioners, "exact form unknown" Complaint, ¶ 17, ER 022, with whom Blue Lake Appellees Marston, Rapport, Vaughn, Burrell, DeMarse and Lathouris are associated in some manner, but which the Complaint does not allege had any role in initiating or representing the Tribe in prosecuting *Blue Lake v. ABI*;

11. Blue Lake Appellee Rapport has served as the Tribe's legal counsel since 1983, Complaint, ¶ 18, a role equivalent to the Tribe's Attorney General, but had no role in initiating or prosecuting *Blue Lake v. ABI*. Rapport allegedly "ghost wrote" — *i.e.* assisted Boutin Jones Appellees in drafting — pleadings and memoranda in the successful defense of *Acres v. Blue Lake I and II*, Complaint, ¶ 208, ER 057; Rapport Declaration, ¶ 3, BLSER 115;

12. In 2010, Acres' company, ABI, and the Tribe, dba the Casino, entered into a contract under which the Tribe was to advance ABI $250,000 to develop and implement a server and tablet based "iSlot" gaming system for the Casino. Complaint, ¶ 48, ER 028. A dispute arose about the system's performance, and in January 2016, the Tribe, dba the Casino and represented by the Boutin Jones Appellees, filed suit against Acres and ABI in the Tribe's Tribal Court, alleging causes of action for breach of contract, tortious breach of the covenant of good faith and fair dealing, money had and received, unjust enrichment, and specifically against Acres, fraudulent inducement. Complaint, ¶¶ 53, 54, 67, ER 029, 032.

13. Acres, on behalf of himself and ABI, moved to dismiss the action for lack of jurisdiction and for judgment on the pleadings. The Tribe moved to strike ABI's answer for lack of legal counsel. Blue Lake Appellee Judge Marston denied Appellants' challenge to the Tribal Court's jurisdiction and their motion for judgment on the pleadings. Judge Marston also granted the Tribe's motion to strike ABI's answer because ABI was not represented by legal counsel, but gave ABI 45 days in which to obtain legal counsel and file a responsive pleading. Complaint, ¶¶ 95, 96, ER 038; Marston Declaration, ¶¶ 15, 16, BLSER 005;

14. Acres then filed suit against the Tribal Court, Judge Marston and Clerk Huff in the U.S. District Court for the Southern District of California

("*Acres v. Blue Lake I*"), challenging the Tribal Court's jurisdiction. Complaint, ¶¶ 20, 67, ER 022-023, 032; that case was transferred to the Northern District of California, where it was assigned to Judge Orrick, who granted the Blue Lake Appellees' motion to dismiss, holding that:

> Because tribal court jurisdiction is at least colorable, not futile, and neither motivated by a desire to harass nor conducted in bad faith, Acres is required to exhaust his tribal remedies before bringing his lawsuit in federal court, and Blue Lake Appellees' motion [to dismiss for failure to exhaust tribal remedies] is GRANTED.

15. While the Tribal Court action in *Blue Lake v. ABI* was still pending, Acres filed a second lawsuit in the Northern District ("*Acres v. Blue Lake II*"), this time contending that the Court should enjoin the Tribal Court proceedings because the Court was biased against Acres, and that Blue Lake Judge Marston had failed to recuse himself despite an alleged conflict of interest. Complaint, ¶ 76, ER 033-034;

16. Judge Orrick allowed Acres to conduct limited discovery relative to the "good faith exception" to the general rule that federal courts must require exhaustion of tribal court remedies. Acres obtained four years of billing records from Blue Lake Appellee Marston, subject to a protective order that limited Acres' use of those records solely to that lawsuit and solely on the issue of the application

of the aforementioned "good faith exception."

17. Judge Marston recused himself without having made any rulings on the merits of *Blue Lake v. ABI,* and appointed retired California Court of Appeal Justice James Lambden to preside over further proceedings in *Blue Lake v. ABI*, after which Judge Orrick dismissed *Acres v. Blue Lake II*. Complaint, ¶ 111, ER 041. Acres appealed this dismissal to the Ninth Circuit, which affirmed the District Court's judgment. *Acres v. Blue Lake Rancheria*, 692 F.App'x 894 (9th Cir. 2017);

18. Justice Lambden ultimately entered summary judgment in favor of Acres, after which Blue Lake voluntarily dismissed its claim against ABI. Complaint, ¶ 113, ER 041;

19. Only the Boutin Jones and Janssen Malloy Appellees represented Blue Lake at various stages of the *Blue Lake v. ABI* Tribal Court litigation. Complaint, ¶¶ 48, 81, 90, 91, ER 028, 036, 038;

20. The Boutin Jones Appellees represented Blue Lake, Judge Marston, and Clerk Huff in the *Acres v. Blue Lake* federal court litigation. Complaint, ¶¶ 48, 81, 90, 91, ER 028, 036, 038);

21 Blue Lake Appellee Rapport, in his capacity as the Tribe's contract general counsel, assisted the Boutin Jones Appellees in successfully defending against the *Acres v. Blue Lake I and II* federal court litigation, but had no role in

the *Blue Lake v. ABI* Tribal Court litigation, or other dealings with either Appellant. Rapport Declaration, ¶¶ 6, 10, BLSER 116-117;

22 "Rapport and Marston" did not appear as counsel of record in either *Blue Lake v. Acres*, *Acres v. Blue Lake I*, or *Acres v. Blue Lake II*.

23. Blue Lake Appellee DeMarse assisted Blue Lake Appellee Rapport in defending against the *Acres v. Blue Lake I and II* federal litigation, but had no other dealings with either Appellant. Complaint, ¶ 128, ER 044; Rapport Declaration, ¶¶ 7, 10, BLSER 116-117;

24. Blue Lake Appellees Vaughn, Burrell and Lathouris served as law clerks to Blue Lake Appellee Judge Marston while he presided over *Blue Lake v. ABI*, performing legal research, drafting orders, and in one instance taking notes during a court hearing, but had no other dealings with either Appellant. Complaint, ¶¶ 64, 77, 79, 126, 127, 129, ER 031, 034, 036, 043-045.

PROCEEDINGS BELOW

In response to the Complaint, each of the three groups of Appellees filed motions to dismiss pursuant to F.R.Civ.P. 12(b)(1), asserting that Appellants' action, despite purportedly seeking relief against Appellees for their acts as individuals, actually sought relief against Appellees for acts taken in their official capacities as officers, executives, agents or attorneys of the Tribe in the valid

exercise of the Tribe's authority, thus making the Tribe the real party in interest and depriving the Court of jurisdiction based on the Tribe's unwaived sovereign immunity. All of the Appellees also filed Anti-SLAPP motions. The Boutin Jones and Janssen Malloy Appellees also filed motions to dismiss pursuant to F.R.Civ.P. 12(b)(6).

Judge Orrick granted the motions, concluding that "the real party in interest here is the tribe because adjudicating this dispute would require the court to interfere with the tribe's internal governance." ER 009. The fact that the various defendants were sued in their individual capacities was immaterial:

> It was the tribe, not any of the individual Blue Lake Defendants, who sued plaintiffs in the underlying tribal court case. The tribe appointed Judge Marston and Clerk Huff and both were exercising tribe judicial powers in operation of court. Acting in his capacity, Judge Marston retained services of Burrrell, Vaughn, and Lathouris to assist in exercising governmental powers in the underlying tribal court case. The tribe then retained Rapport and DeMarse as its general counsel to provide the tribe with legal advice in defending Acres' subsequent federal suits. Allowing this litigation to proceed will necessarily impact the ways in which tribal employees and officials carry out their official duties and question a tribe's right to set up and operate its own courts under its own rules and laws.

ER 013.

As to the Blue Lake Appellees sued as Tribal Court personnel, Judge Orrick

also found that,

> [A]ll of the alleged acts by the Blue Lake Defendants with judicial roles (all except Ramsey and Rapport) were either judicial or quasi-judicial acts. None of the alleged acts could be characterized "non-judicial" and whether the acts were malicious or fraudulent does not overcome the protection of this immunity. Accordingly, I also dismiss the Blue Lake Defendants on the alternate grounds of judicial immunity and quasi-judicial immunity.

ER 014.

Having dismissed the action for lack of jurisdiction, Judge Orrick also denied both the Anti-SLAPP motions and Appellants' motion to strike the Anti-SLAPP motions as moot.

SUMMARY OF THE ARGUMENT

The Blue Lake Rancheria is a federally recognized Indian Tribe, and as such possesses inherent sovereign immunity from unconsented suit. The Tribe established its Tribal Court in the exercise of its inherent sovereign right to self-governance. The Tribe's inherent sovereign immunity bars suit against its officials, senior executives, court personnel, and attorneys if the action or a judgment in the action would impact the Tribe, whether financially or in the administration of its government (whether constraining or compelling action), thus making the Tribe the real party in interest.

The District Court found that all of the actions of the Blue Lake Appellees about which Appellants complained were taken in their official capacities on the Tribe's behalf and within the scope of the authority the Tribe validly conferred upon them, and that the Tribe's governance would be adversely impacted were the action permitted to proceed, making the Tribe the real party in interest and depriving the Court of jurisdiction.

The District Court also found as an alternative ground for dismissal that all of the acts by the Blue Lake Appellees serving as Tribal Court personnel were taken directly and only in connection with proceedings in *Blue Lake v. ABI*, and thus constituted judicial or quasi-judicial acts for which those Appellees possess absolute judicial or quasi-judicial immunity.

Blue Lake v. ABI was a judicial proceeding authorized by law, and thus the Blue Lake Appellees were entitled to file a motion under California's Anti-SLAPP statute in response to Appellant ABI's State-law claims. Because the District Court dismissed Appellants' action for lack of jurisdiction, the District Court did not abuse its discretion by denying as moot the parties' respective Anti-SLAPP motions and Appellants' motion to strike those motions; had the District Court addressed those motions, it would have granted the Blue Lake Appellees' motion.

Accordingly, the District Court's judgment should be affirmed in its entirety.

STANDARD OF REVIEW

The Court of Appeals reviews the existence of the district court's jurisdiction *de novo*, *Rodriguez v County of Los Angeles*, 891 F3d 776, 790 (9th Cir 2018). In this case, the District Court made factual determinations about the roles in which Appellees acted and the impacts the action would have on the Tribe's governance are to be reviewed for clear error. Those factual findings, which went to the existence of the court's jurisdiction, are reviewed for clear error. *Id.*

With respect to Appellants' claims that the District Court erred in denying the pending anti-SLAPP motions as moot in light of the dismissal of the Complaint, that decision is to be reviewed for abuse of discretion. *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001).

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ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE ACTION FOR LACK OF JURISDICTION BASED ON ITS DETERMINATION THAT EVEN THOUGH APPELLANTS NAMED THE BLUE LAKE APPELLEES AS INDIVIDUALS, THE BLUE LAKE RANCHERIA IS THE REAL PARTY IN INTEREST, AND THUS THAT THE BLUE LAKE APPELLEES ARE CLOAKED WITH THE BLUE LAKE RANCHERIA'S INHERENT TRIBAL SOVEREIGN IMMUNITY FROM SUIT

A. The Tribe Possesses Sovereign Immunity

The Blue Lake Rancheria is a federally recognized Indian Tribe. Complaint, ¶ 9, ER 020. As such, the Blue Lake Rancheria possesses sovereign immunity from suit, and cannot be sued unless it has expressly consented to be sued. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ["Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."]; *see also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014).

Tribal sovereign immunity is not a discretionary doctrine that may or may not be applied as a remedy depending on the equities of a given situation; rather, it presents a threshold jurisdictional question to be determined as a matter of federal law. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998); *see also Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d

1047, 1052 n.6 (9th Cir.), *rev'd on other grounds* 474 U.S. 9 (1985).

A Tribe's sovereign immunity extends to the Tribe's governmental and commercial activities, whether they occur on or off of a reservation. See *Kiowa Tribe*, 523 U.S at 760. If a defendant asserts sovereign immunity, the burden of sustaining the Court's jurisdiction shifts to the plaintiff. *See, e.g., Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015).

Tribal sovereign immunity also extends to an entity that is an "arm of the Tribe." *White v. Univ. of Calif.*, 765 F.3d 1010, 1025 (9th Cir. 2014). In determining whether an entity is entitled to sovereign immunity as an "arm of the Tribe," courts examine the following factors: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the Tribe has over the entities; (4) the Tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the Tribe and the entities." *Id.* (internal quotations and citations omitted).

In this case, both the Tribal Court and the Casino qualify as arms of the Tribe under the *White* test. The Tribal Court, which is an integral part of the Tribe's government, rather than an "economic entity" such as a proprietary business, was established by tribal law in order to exercise the Tribe's inherent

sovereign judicial power. Complaint, ¶ 10, ER 020; Ramsey Declaration, ¶ 6, BLSER 139; *cf. Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.").

Likewise, the Tribe's Casino easily satisfies *White's* five factors: *i.e.*, (1) it was created by the Tribe to generate revenues for the Tribe's governmental purposes under IGRA, Ramsey Declaration, ¶ 5, BLSER 139-140; (2) it is wholly owned and operated by the Tribe itself on the Tribe's Indian trust lands, *id.*, ¶ 5, BLSER 139-140; (3) it is not separately organized from the Tribe itself (*id.*, ¶ 5, BLSER 139-140; (4) under IGRA, 25 U.S.C. § 2710(b)(2)(A), the Tribe's federally approved gaming ordinance, and § 6.2 of the Tribe's class III gaming compact with the State of California, only the Tribe can own its Casino; and (5) profits from gaming at the Casino are deposited directly in Blue Lake's general treasury, and under IGRA, must be used primarily for governmental purposes under a plan approved by the Department of the Interior. Complaint, ¶¶ 11, 37, ER 020-021, 026; Ramsey Decl., ¶ 5, BLSER 139-140; 25 U.S.C. § 2710(b)(2)(a); *see also Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (fact that tribe created, owned and operated casino to raise governmental revenues sufficed to qualify casino as "arm of the Tribe").

B. The Blue Lake Rancheria's Sovereign Immunity Also Cloaks the Blue Lake Appellees

Although Acres named the Blue Lake Appellees as individuals, the District Court held that the Tribe was the real party in interest, thus cloaking the Blue Lake Appellees with the Tribe's sovereign immunity.

As is true of any government, an Indian Tribe cannot act except through its elected officials, officers and duly authorized agents, including legal counsel. Thus, a Tribe's sovereign immunity extends not only to its arms, but also to tribal officials and agents, including legal counsel, when they act in their respective official capacities and within the scope of the authority the Tribe lawfully may confer upon them.

For example, in *Hardin v White Mountain Apache Tribe*, 779 F2d 476 (9th Cir 1985), the plaintiff sued the Tribe and elected tribal officials seeking declaratory and injunctive relief and damages for excluding him from the Reservation despite his claim of the right to access trust land his parents had leased from the Tribe. *Id.* at 478. The Ninth Circuit determined that because the tribal officials were sued for acts taken in their "representative capacity and within the scope of their authority" that the Tribe validly had delegated to them, they were actually being sued in their official capacities, and thus were cloaked with

the Tribe's sovereign immunity, requiring dismissal of the action for lack of jurisdiction. *Id.* at 479-80; *see also Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013) (explaining the holding in *Hardin*: "[T]he plaintiff had sued high ranking tribal council members for voting to eject him. Holding the defendants liable for their legislative functions would therefore have attacked the very core of tribal sovereignty.") (Citations omitted).

In *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), a non-Indian attorney serving as a Tribe's attorney general under a contract with the Tribe was sued for defamation based on a critical review he provided to the tribal governing body about another attorney's qualifications. The Ninth Circuit upheld the tribal attorney's claim of absolute privilege: "In our judgment it can hardly be disputed that the Navajo Tribe enjoys sufficient independent status and control over its own laws and internal relationships to be able to accord absolute privilege to its officers within the areas of tribal control." *Davis v Littell*, 398 F.2d at 83-84.

Similarly, in *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991), tribal officials were sued for carrying out the Tribe's order to block a road across the Reservation that the plaintiff had used to access a marble quarry. The plaintiff argued that the officials had exceeded the scope of their authority, and thus were not entitled to share in the Tribe's immunity. The

District Court rejected that argument, and the Ninth Circuit affirmed, holding:

> Even if the complaint is liberally construed to allege that the tribal officials themselves 'blocked' the road, Imperial's claim that they exceeded their authority fails. There is no allegation that closing the road to Imperial exceeded the officials' authority granted by the Band; quite the contrary, the Band clearly authorized the closure. [*Id.* at 1271.]

Since *Hardin* and the other above-cited cases were decided, the Ninth Circuit and the Supreme Court have adopted a "remedy focused" or "real party in interest" approach to analyzing whether tribal officials or employees can be sued as individuals for money damages for actions taken within the course and scope of their employment or authority. For example, in *Maxwell, supra,* the Ninth Circuit held that a tribally employed paramedic could be sued for money damages for injuries caused by his gross negligence in the course of responding to an off-Reservation call under an agreement between his tribal employer and a local fire protection district. This Court reasoned that an award of money damages against the "low ranking" employee would not impact the Tribe itself, even if the Tribe were to indemnify the employee, but with an important caveat:

> While individual capacity suits against low ranking officers typically will not operate against the sovereign, we cannot say this will always be the case. In any suit against tribal officers, we must be sensitive to whether the judgment sought would expend itself on the public

> treasury or domain, *or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.*

Maxwell, 708 F.3d at 1088 (alteration in original) (emphasis added) (internal quotations omitted).

In *Lewis v. Clarke*, 137 S.Ct. 1285 (2017), the Supreme Court took essentially the same approach as this Court had in *Maxwell*. *Lewis* arose from a collision on an interstate highway within Connecticut caused by Clarke, an employee of the Mohegan Tribal Gaming Authority who was driving patrons of the Mohegan Sun Casino to their homes off the Tribe's lands. Plaintiffs sued Clarke in his individual capacity; the Connecticut Supreme Court held that tribal sovereign immunity barred the damage suit against Clarke.

The U.S. Supreme Court reversed, holding that whether a defendant can invoke tribal sovereign immunity is not determined simply by the complaint's characterization of the parties, but rather by whether the remedy sought is truly against the sovereign, *i.e.*, whether the Tribe is the real party in interest. *Lewis*, 137 S.Ct. at 1290. The Supreme Court characterized the suit against Clarke as one "to recover for his personal actions," which "will not require action by the sovereign or disturb the sovereign's property." *Id.* at 1291. Therefore, "immunity

is simply not in play. Clarke, not the Gaming Authority, is the real party in interest." *Id.*

In *Pistor v. Garcia*, this Court held that a tribal police chief and tribal casino employees could be sued for damages individually for wrongfully detaining and stealing money from their tribal employer's customers (who had not violated any laws), because imposing liability for money damages would not "expend itself on the [tribal] treasury or domain, or interfere with [tribal] administration, . . . [or] restrain the [Tribe] from acting." 791 F.3d 1104, 1114 (9th Cir. 2015).[7]

Notably, post-*Lewis v. Clarke*, the Ninth Circuit and lower courts within the Ninth Circuit have continued to cite cases such as *Hardin* and *Imperial Granite* to uphold the immunity of tribal officials sued for acts committed in their official capacities and within the scope of the Tribe's authority validly conferred upon them. For example, in *LaForge v. Gets Down*, No. CV-17-48-BLG-BMM-TJC, 2018 WL 826380, at *2 (D. Mont. Feb. 9, 2018), tribal court judges were held to be entitled to sovereign immunity to the extent sued in their official capacities, and absolute judicial immunity to the extent sued as individuals: "Indian tribes, tribal entities, and persons acting on the Tribe's behalf in an official capacity enjoy

[7] Under the Indian Civil Rights Act, 25 U.S.C. § 1302, the Tribe could not validly have conferred upon the defendants the authority to violate the plaintiffs' rights and steal their money.

sovereign immunity against suit unless Congress expressly authorizes the suit or the tribe has waived sovereign immunity." (Citing *Hardin* among other cases).

The case at bar falls well within the *Hardin*, *Imperial Granite*, and *Littell* line of cases, rather than *Lewis v. Clarke*, *Maxwell*, and *Pistor*. Although Appellants purport to seek money damages against the Blue Lake Appellees solely as individuals, the District Court recognized that the Tribe is the real party in interest, because the Tribe, not any of the Blue Lake Appellees, created the Blue Lake Tribal Court, filed *Blue Lake v. ABI* in the Tribal Court, and would have been directly affected by an action challenging the manner in which the tribal government structured its judiciary and the Tribal Court conducted its proceedings. The Tribe, not any of the Blue Lake Appellees, appointed Blue Lake Appellees Judge Marston and Clerk Huff, and both were exercising the Tribe's judicial powers — not their own — through the operation of the Tribal Court. In the exercise of his authority as the Blue Lake Rancheria Tribal Court's Chief Judge, Judge Marston retained the services of Blue Lake Appellees Burrell, Vaughn and Lathouris as law clerks to assist him in exercising the Tribe's judicial powers in adjudicating *Blue Lake v. ABI*. The Tribe long ago had retained Blue Lake Appellee Rapport as its General Counsel, and through him Blue Lake Appellee DeMarse, to assist the Boutin Jones Appellees in defending against

Acres v. Blue Lake I and II.

Unlike an action merely seeking money damages from a low-level tribal employee who commits a garden-variety tort such as negligently operating a tribally owned vehicle on a state highway (*Lewis v. Clarke*), or who is grossly negligent at the scene of an off-Reservation emergency (*Maxwell*), or who allegedly illegally detained and stole money from casino customers who had broken no laws (*Pistor*), Appellants' suit, if allowed to proceed, necessarily would have interfered with the Tribe's public administration or had the effect of restraining the Tribe from acting, or compelling it to act, by intruding deeply into the inner workings of the executive and judicial branches of the Tribe's government in discovery and otherwise, inhibiting the Tribe's attorneys from giving and the Tribe's government officials from receiving candid legal advice and zealous representation, and otherwise hobbling the core operation of the executive and judicial branches of the Tribe's government.

The District Court necessarily would have probed into and adjudged the tribal judicial branch's ability to preside over litigation, potentially imposing external standards and preventing the tribal judiciary from exercising its independence. Exposing the Tribe's general counsel to personal liability for providing his Indian law expertise to the Tribe's attorneys of record in successfully

defending against Acres' two federal district court challenges to the exercise of the Tribe's judicial powers would have a severely inhibiting impact on the future ability of the Tribe's legal counsel to advise the Tribe or defend the Tribe's governmental powers. *See, e.g., Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal.App.4th 1407 (1999).[8]

As the District Court recognized, its order dismissing Appellants' action on sovereign immunity grounds is not inconsistent with this Court's memorandum decision in *JW Gaming Develop., LLC v. James*, 778 Fed.Appx. 545 (9th Cir. 2019) (Memorandum).[9] The plaintiff in *JW Gaming* alleged that individuals who happened to be tribal officials, executives, contractors or consultants fraudulently induced the plaintiff to invest more than $5 Million into the Pinoleville Pomo

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[8] Appellants' inability to sue the Blue Lake Appellees for damages as individuals would not leave them without remedies against a wrongfully obtained Tribal Court judgment. Had Appellants lost *Blue Lake v. ABI*, they could have appealed to the Tribal Court of Appeal, sought relief in the District Court by alleging that the proceedings deprived them of due process, or defended against an effort to enforce a money judgment against them in California Superior Court pursuant to CCP § 1730, *et seq.* If they believed that the Blue Lake Rancheria's counsel in *Blue Lake v. ABI* had filed a frivolous lawsuit in bad faith, they could have sought sanctions in the Tribal Court, and nothing prevented them from complaining to the Blue Lake Rancheria's Tribal Council about what they alleged to be misconduct by Judge Marston.

[9] Having presided over *JW Gaming* since its inception, Judge Orrick was perfectly situated to distinguish between the circumstances presented by that case and Appellants' allegations in this action.

Nation's proposed casino project. Rather than using the investor's money for its intended purpose, the defendants allegedly diverted it to their individual benefit without ever actually proceeding with the casino project.

The swindled investor sued the various individual tribal officials, consultants and employees for money damages under a variety of theories, including fraud and RICO. See *JW Gaming Develop., LLC v. James*, No. 3:18 cv 02669 WHO, 2018 WL 4853222 (Oct. 5, 2018). The individual defendants moved to dismiss, asserting that their positions with the Tribe gave them sovereign immunity. Judge Orrick denied the motion, finding that the plaintiff plausibly had alleged that the defendants had not acted on the Tribe's behalf, but instead had "engaged in a scheme to fraudulently solicit a $5,380,000 investment in the Pinoleville Casino Project[.]" *Id.* at *1. Thus, allowing the suit to proceed against the individual defendants would not have bound or otherwise impacted the Tribe, and therefore the Tribe was not the real party in interest. *Id.* at *4.

By contrast, Appellants did not allege that any of the Blue Lake Appellees had induced Appellants to give them — or the Tribe — any money or anything else of value. Given that Appellant Acres repeatedly attempted to enjoin the Tribal Court proceedings in *Blue Lake v. ABI*, first by challenging its jurisdiction in *Acres v. Blue Lake I*, and then accusing the Tribal Court and Judge Marston of

being biased against Appellants in *Acres v. Blue Lake II*, Appellants did not, and reasonably could not, allege that they had relied on any representations or omissions by any of the Blue Lake Appellees. Neither did Appellants allege or demonstrate the source of any duties, fiduciary or otherwise, that the Blue Lake Appellees purportedly owed to them, and that the Blue Lake Appellees purportedly violated.

In short, all of the actions for which Appellants sued the Blue Lake Appellees could only have been taken in their official capacities in the Tribe's exercise of core functions of self-governance and tribal administration. As Judge Orrick noted:

> The Blue Lake Defendants are named as individual defendants but the tribe is the real party in interest. It was the tribe, not any of the individual Blue Lake Defendants, who sued plaintiffs in the underlying tribal court case. The tribe appointed Judge Marston and Clerk Huff and both were exercising tribe judicial powers in operation of court. Acting in his capacity, Judge Marston retained services of Burrrell, Vaughn, and Lathouris to assist in exercising governmental powers in the underlying tribal court case. The tribe then retained Rapport and DeMarse as its general counsel to provide the tribe with legal advice in defending Acres' subsequent federal suits.

ER 013.

The Blue Lake Appellees with judicial or quasi-judicial duties (Judge

Marston, Clerk Huff, law clerks Burrell, Vaughn, and Lathouris, and possibly Associate Judge/Tribal Vice Chairperson/Tribal Administrator/Casino CEO Ramsey[10]) performed only those judicial or quasi-judicial duties in connection with *Blue Lake v. ABI*; whatever other functions they may have performed for the Tribe or its citizens, they had no role in initiating or prosecuting that litigation.

Blue Lake Appellees Rapport and DeMarse, acting under the general counsel contract between the Blue Lake Rancheria and Rapport,[11] are not alleged by Appellants to have had any role in initiating or prosecuting *Blue Lake v. ABI*; their only connection to litigation involving Appellant Acres was to assist the Boutin Jones Appellees in representing the Tribal Court, Judge Marston and Clerk Huff in successfully defending against *Acres v. Blue Lake I* and *Acres v. Blue Lake II*. Rapport Decl.,¶ ¶ 7, 8, BLSER 116.

Given these circumstances, Judge Orrick correctly held that, ". . . entertaining this suit would require me to question the judicial function of the Blue Lake Rancheria Tribal Court. The real party in interest here is the Tribe itself."

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[10] In which of her various capacities Appellee Ramsey was sued cannot be ascertained from the Complaint.

[11] There was no contract between the Blue Lake Rancheria and "Rapport and Marston," only separate contracts between the Blue Lake Rancheria and Rapport for services as General Counsel, and between the Blue Lake Rancheria and Marston for judicial services. Rapport Declaration, ¶ ¶ 3, 5; BLSER 115-116.

ER 011.

For the foregoing reasons, this Court should affirm Judge Orrick's ruling that all of the Blue Lake Appellees were cloaked with the Blue Lake Rancheria's inherent sovereign immunity, thus compelling dismissal of Appellants' lawsuit for lack of jurisdiction.

C. Merely Alleging a Claim for Civil Damages Under RICO Did Not Strip the Blue Lake Appellees of the Cloak of the Tribe's Sovereign Immunity

The only federal claim asserted by Appellants was their Eighth Claim, seeking civil damages under RICO, 18 U.S.C. § 1964(c). According to Appellants, a claim under RICO necessarily implicates only a defendant's individual capacity, and thus, all they needed to allege in order to overcome the Blue Lake Appellees' assertion of tribal sovereign immunity, official immunity or even judicial immunity was that the Blue Lake Tribal Court is an "enterprise" under RICO, 18 U.S.C. § 1961(4), and that based on exactly the same facts as alleged in support of ABI's first seven claims,[12] the Blue Lake Appellees engaged in "racketeering activity" as defined in § 1961(1). , Complaint, ¶ 197, ER 056. Appellants' Opening Brief, p. 21. Simply put, Appellants are wrong about both

[12] Appellants do not explain why declaring the Tribe's Court to be an "enterprise" under RICO would not directly impact the Tribe, reinforcing the Tribe's status as the real party in interest.

the law and the facts relevant to this suit.

To establish a RICO claim under § 1964(c), Appellants must have alleged facts showing (1) a violation of 18 U.S.C. § 1962 [engaging in or benefitting from a pattern of racketeering activity]; (2) an injury to business or property; and (3) that the injury was caused by the violation of § 1962. To establish that any of the Blue Lake Appellees violated § 1962, Appellants had to present evidence that the Blue Lake Appellees participated in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity that (5) proximately harmed the victim. *Eclectic Properties E., LLC v. Marrns & Millichap Co.*, 751 F.3d 990, 997 (9th Circ. 2014).

What Appellants ignore is that the Blue Lake Appellees asserted fact- and evidence-based objections to the District Court's exercise of jurisdiction, thus shifting to Appellants the burden of presenting affidavits or other evidence necessary to support the exercise of the District Court's subject matter jurisdiction. See *St. Clair v. City of Chico, et al.*, 880 F.2d 199, 201 (9th Cir. 1989).

Thus, Appellants had the burden of presenting *evidence*, not mere conclusory allegations in their Complaint, that the Blue Lake Appellees had committed any of the crimes enumerated in 18 U.S.C. § 1961(c) as predicate acts sufficient to constitute "racketeering activity" as defined in RICO. See *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Appellants utterly failed to meet that burden, and thus could not overcome the Blue Lake Appellants' assertion of tribal sovereign immunity.

To support Appellants' claims that the actions of the Blue Lake Appellees were illegal, and thus that their sovereign immunity did not bar Appellants from suing them as individuals, Appellants asserted that the Blue Lake Appellees violated four federal statutes as constituting the two predicate acts needed to assert a claim under RICO: 18 U.S.C. § 666; 18 U.S.C. § 1341; 18 U.S.C. § 1343; and 18 U.S.C. § 1503. Complaint, ¶ 122, ER 043; Opening Brief, p. 22. However, not only did Appellants fail to offer any evidence that any of the Blue Lake Appellees violated any of those statutes, they cannot show that any of those statutes actually applied to the facts alleged in Appellants' Complaint.

18 U.S.C. § 666 prohibits and provides for punishment of anyone who,

> ... corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence

> or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

However, § 666(c) expressly excludes from its reach, "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." Appellants did not allege or offer any evidence that any of the Blue Lake Appellees paid anything of value to influence the decision of the tribal government or any tribal agent or official, or that any of the Blue Lake Appellees received anything of value from the tribal government or any other person or entity other than the ordinary compensation that the Blue Lake Rancheria paid as salaries or fees for professional services rendered by the Blue Lake Appellees in the ordinary course of the Tribe's business, whether as attorneys contractually engaged to advise and/or represent the Tribe and its governmental and/or business entities in connection with transactions or litigation; as Blue Lake Rancheria elected officials or senior executives participating in the Tribe's decision-making process; or as Tribal court judicial or quasi-judicial personnel presiding over or assisting in presiding over litigation pending in the Tribal Court. Thus, even if, as Appellants alleged, the Tribe had received federal grants or contracts exceeding $10,000, § 666 would have no application to Appellants'

claims against the Blue Lake Appellees.

18 U.S.C. § 1503 prohibits and penalizes obstruction of justice in federal criminal proceedings. Appellants have neither alleged nor shown that any criminal proceedings were involved in any of the interactions between Appellants and any of the Blue Lake Appellees. It is undisputed that the only federal proceedings that involved Appellant Acres and any of the Blue Lake Appellees were Acres' own two unsuccessful civil district court lawsuits (and Acres' unsuccessful appeal from one of those adverse judgments) aimed at enjoining the Tribal Court proceedings in *Blue Lake v. ABI*. Blue Lake Appellees Rapport and DeMarse did nothing more in those actions than to assist the Boutin Jones Appellees representing the Blue Lake Rancheria, its Tribal Court, and Judge Marston in successfully defending against those actions, Rapport Declaration, ¶ 7, BLSER 116. Blue Lake Appellees Judge Marston and Clerk Huff did nothing more in those actions than to prepare and sign declarations for use by the Tribe's lawyers in presenting their defense. Marston Declaration,¶ 9, BLSER 004.

Appellants provided no evidence to support their contention that any of the Blue Lake Appellees violated 18 U.S.C. § 1503 merely by having been named as defendants in a federal civil action, providing drafting assistance ("ghost writing") to an attorney of record for a defendant in a federal civil action, providing

declarations to defense counsel in a federal civil action, or providing declarations in *Blue Lake v. ABI*. Indeed, nothing in that statute even remotely suggests that the foregoing activities can constitute obstruction of justice under 18 U.S.C. § 1503.

Therefore, Appellants' bare allegation that any of the Blue Lake Appellees violated 18 U.S.C. § 1503 cannot constitute evidence that any of the Blue Lake Appellees committed obstruction of justice as one of the two predicate acts needed to establish civil liability under RICO, and cannot suffice to strip the Blue Lake Appellees of their tribal sovereign immunity.

Neither 18 U.S.C. § 1341 nor § 1343 is implicated by any of the Blue Lake Appellees' participation in the proceedings in *Blue Lake v. ABI*, *Acres v. Blue Lake I*, and/or *Acres v. Blue Lake II*, because the only use of the mails or wires that Appellants alleged in connection with any of the Blue Lake Appellees, Complaint, ¶¶ 202-207, ER 056-057, consisted of nothing more than filing and serving documents and court orders in the respective courts pursuant to the respective courts' rules, all actions taken in their official capacities in the Tribe's lawful exercise and/or defense of its governmental powers.

Appellants cite no authority and provide no evidence to support their contention that using the mails or electronic communication to file, serve or

receive pleadings, documents and court orders in litigation, whether in *Blue Lake v. ABI*, *Acres v. Blue Lake I*, or *Acres v. Blue Lake II*, could constitute mail or wire fraud as predicate acts under RICO that automatically would strip the Blue Lake Appellees of their sovereign immunity. The Ninth Circuit has not yet expressly ruled on the question of whether filing pleadings, declarations and other documents in litigation can constitute mail or wire fraud, but the other federal Circuits that have done so have held that such activity, without much more, cannot constitute either mail or wire fraud.

For example, in *Kim v. Kimm*, 884 F. 3d 98, 104 (2d Cir. 2018), the Second Circuit rejected the proposition that — at least absent evidence of corruption — "allegations of frivolous, fraudulent, or baseless litigation activities, without more, cannot constitute a RICO predicate act."

In so holding, the Second Circuit reviewed and agreed with decisions from the First, Fifth, Tenth and Eleventh Circuits that reached the same conclusion. As just two examples of such decisions, in *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087-88 (11th Cir. 2004), the Court held that an "alleged conspiracy to extort money through the filing of malicious lawsuits" did not constitute predicate acts of extortion or mail fraud under RICO. In *Deck v. Engineered Laminates*, 349 F.3d. 1253, 1258, (10th Cir. 2003), the Court held that meritless litigation is not a

predicate act of extortion under RICO.

In this case, Appellants would have had the District Court hold, without any actual evidence, that the Blue Lake Rancheria's Tribal Court is an enterprise that the Blue Lake Appellees operated or controlled through a pattern of racketeering activity that directly injured Appellants' business or property, and thus that the Blue Lake Appellees can be sued individually for money damages under RICO. The District Court was absolutely correct to implicitly reject that assertion, and this Court should do the same.

II. BLUE LAKE APPELLEES MARSTON, RAMSEY, HUFF, BURRELL, VAUGHN, DeMARSE AND LATHOURIS ARE CLOAKED WITH ABSOLUTE JUDICIAL OR QUASI JUDICIAL IMMUNITY

A. Tribal Court Judges Marston and Ramsey, Tribal Court Clerk Huff, and Tribal Court Law Clerks Burrell, Vaughn, and Lathouris Are Immune from Suit Arising Out of Their Judicial or Quasi-Judicial Acts

A long line of United States Supreme Court precedents acknowledges that, with very few and limited exceptions, judges are absolutely immune from suits for money damages based on their judicial actions. *See, e.g., Mireles v. Waco*, 502 U.S. 9 (1991) (citing *Forrester v. White*, 484 U.S. 219 (1988)). "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 LaForge v. Gets Down, No. CV-17-48-BLG-BMM-TJC, 2018 WL 826380, at *2 (D. Mont. Feb. 9, 2018).

Judges enjoy absolute immunity from liability for damages for acts performed in their judicial capacities. Immunity exists for "judicial" actions: *i.e.*, those relating to a function normally performed by a judge and where the parties understood they were dealing with the judge in his official capacity. *Stump v. Sparkman*, 435 U.S. 349, at 356-57 & 362 (1978).

"Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v Waco*, 502 U.S. at 11. This immunity applies, "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger v. Saxner*, 474 U.S. 193, 199, 200 (1985). Indeed, even "[g]rave procedural errors or acts in excess of judicial authority" do not deprive a judge of this immunity. *Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996) (Judge, judge's law clerk and Court Clerk absolutely immune from suit contending that judge and others conspired to deprive litigant of bond proceeds to which Court of Appeals had held he was entitled). As noted in *Brewster*:

> Nor is judicial immunity lost by allegations that a judge conspired with one party to rule against another party: 'a conspiracy between a judge and [a party] to predetermine

> the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges . . . .

Id. at 1246.

In addition, "[t]he concern for the integrity of the judicial process that underlies the absolute immunity of judges also is reflected in the extension of absolute immunity to 'certain others who perform functions closely associated with the judicial process.'" *Brewster*, 96 F.3d at 1246. "Under this functional approach, immunity flows from the nature of the responsibilities of the individual official." *Id.* at 1244-45. This immunity extends to law clerks. *Id.* at 1246; *see also Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir.1991); *cf. Ashelman v. Pope*, 793 F.2d 1072, 107 (9th Cir. 1986) (*en banc*):

> We therefore hold that a conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors. As long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies. Prosecutors are absolutely immune for quasi-judicial activities taken within the scope of their authority.

Likewise, "[c]ourt clerks and administrators are also entitled to absolute immunity from liability for damages 'when they perform tasks that are an integral part of the judicial process.'" *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir. 1987).

All of the acts of Blue Lake Appellees Judge Marston, Clerk Huff, and Law Clerks and/or Associate Judges Ramsey, Burrell, Vaughn, DeMarse, and Lathouris of which Appellants complained occurred in the course of Judge Marston's presiding over *Blue Lake v. ABI*, a case within the Tribal Court's jurisdiction. *Acres v. Blue Lake I, supra,* 2016 WL 4208328. Judge Marston's initial decision to not recuse himself, his subsequent rulings on the parties' procedural motions, and his eventual decision to recuse himself to avoid even the appearance of a conflict of interest, all were quintessentially judicial acts, in that they related directly to a function normally performed by a judge in pending litigation, and where the parties understood they were dealing with the judge in his official capacity. See *Stump v. Sparkman*, 439 U.S. at 362.

Had any of the Blue Lake Appellees served as an Associate Judge in connection with *Blue Lake v. ABI*, that service would have been a judicial act for which those Appellees would be absolutely immune from suit. Serving as Judge Marston's law clerks while he presided over *Blue Lake v. ABI* were at least quasi-judicial acts, as were Clerk Huff's actions in issuing the summons, receiving and filing pleadings, and transmitting the Tribal Court's orders in *Blue Lake v. ABI*. Thus absolute judicial or quasi-judicial immunity also would attach to those actions. See *Moore v. Brewster*, 96 F.3d at 1244-45.

Appellants offered no evidence, or even allegations, to support abrogating the judicial or quasi-judicial immunity of the Blue Lake Appellees with judicial or quasi-judicial responsibilities for their alleged actions in connection with *Blue Lake v. ABI* or *Acres v. Blue Lake I and II*. As shown below, neither did Appellants demonstrate the existence of one of the few exceptions to the doctrine of absolute judicial or quasi-judicial immunity.

B. Appellants Have Not Established That An Exception to Judicial or Quasi-Judicial Immunity Applies to Any of the Blue Lake Appellees

The doctrine of absolute judicial or quasi-judicial immunity recognizes two exceptions, neither of which applies to the facts as alleged by Appellants in their Complaint.

First, a judge "will be subject to liability . . . when he has acted in the 'clear absence of all jurisdiction.'" *Moore v. Brewster*, 96 F.3d at 1244 (internal citations omitted). The scope of a judge's jurisdiction is construed broadly when judicial immunity is at stake. *Penn v. United States*, 335 F.3d at 789-790.

Appellants cannot seriously contend that Judge Marston acted in the clear absence of jurisdiction; indeed, Judge Marston, as the Blue Lake Tribal Court's Chief Judge, clearly possessed and properly exercised both subject-matter jurisdiction over *Blue Lake v. ABI* and personal jurisdiction over Appellants. In the

exercise of its inherent sovereign authority, Blue Lake duly enacted an Ordinance creating the Tribal Court and vesting it with jurisdiction over transactions involving the Tribe and persons and entities involved in such transactions. Ramsey Declaration, ¶ 1, BLSER 139.

All of Judge Marston's actions relative to Appellants were taken directly and only while presiding over *Blue Lake v. Acres*. Marston Declaration, ¶ 3, 4, BLSER 002-003. Judge Lambden's order granting summary judgment in favor of Acres confirmed the Tribal Court's jurisdiction, and neither Acres nor ABI appealed from that determination.[13] ER 080.

Under the U.S. Supreme Court's *Montana* line of cases (see *Montana v. United States*, 450 U.S. 544, 565 (1981)), tribal courts may execise jurisdiction over matters involving consensual relationships between non-Indians and Tribes. That would include the contract dispute between Appellants and Blue Lake. Indeed, the District Court expressly recognized this in its order dismissing *Acres v. Blue Lake I*, as did this Court in affirming that dismissal. See *Acres v. Blue Lake I*, 692 Fed.Appx. 894 (9th Cir. 2017) (Memorandum).

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[13] Blue Lake Rancheria Tribal Court Case No. C 15 1215 JRL, Order, attached to Appellants' Complaint as Exhibit 2, pp. 6, 11, ER 085, 090. Under I*owa Mutual v. LaPlante, supra*, had Appellants disagreed with Judge Lambden's jurisdictional determination, their remedy would have been to seek tribal appellate review. They did not.

Thus, the first exception to absolute judicial or quasi-judicial immunity does not apply under the facts alleged or established in this case.

The second exception to absolute judicial immunity is when a suit against a judge is predicated on the judge having committed a non-judicial act, *i.e.*, an act not taken in the exercise of a judicial function. See *Mireles v. Waco*, 502 U.S. at 12-13 (If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.").

Whether an act taken by a judge or other court official (such as a court clerk) is "judicial" is based on factors that relate to the nature of the act itself: *i.e.*, (1) whether the precise act is a normal judicial function; (2) whether the event(s) occurred in the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the event(s) at issue arose directly and immediately out of a confrontation with the judge in his/her official capacity. *Meek v. County of Riverside*, 183 F.3d 962, 967 (9th Cir. 1999), citing *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1302 (9th Cir. 1989) (judge's vote to terminate a court commissioner in retaliation for exercising his First Amendment right to seek election to a judgeship in competition with another commissioner deemed an administrative, rather than judicial act, because

it occurred outside the scope of a specific judicial proceeding).

Courts have found conduct to be non-judicial in nature and declined to find judicial immunity only in relatively rare circumstances, none of which are alleged to be present in this case. *See, e.g., Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996) (judge stalked and sexually assaulted a litigant); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (justice of the peace accused of forcibly removing a man from courtroom and physically assaulting him); *Forrester v. White*, 484 U.S. 219 (1988) (state court judge not immune to lawsuit under 42 U.S.C. § 1983 alleging discriminatory hiring practice, because hiring decision was an administrative act unrelated to a specific judicial proceeding).

Appellants have not alleged or offered evidence of any conduct by any of the Blue Lake Appellees that would support applying the second exception to absolute judicial or quasi-judicial immunity to any of the Blue Lake Appellees. Judge Marston's only acts relating to Appellants consisted of presiding over hearings in open court, reviewing the parties' filings, and issuing orders and rulings on motions or other commonly executed judicial tasks recognized in, *inter alia*, *Mireles v. Waco*, and thus were well within the scope of his judicial

authority.[14] Marston Declaration, 3, 4, BLSER 002-003.

Appellants' allegations regarding Blue Lake Appellees Burrell, Vaughn, DeMarse and Lathouris in serving as law clerks/research attorneys for Judge Marston in *Blue Lake v. ABI*, demonstrate that they, too, only performed functions "closely associated with the judicial process" and therefore are entitled to absolute judicial or at least quasi-judicial immunity from suit. *Moore v. Brewster*, 96 F.3d at 1246. Complaint, ¶¶ 81(b), 84, 85, 102, 122, ER 036, 037, 040, 043 (Burrell); Complaint, ¶¶ 65, 123, ER 031,043 (Vaughn); Complaint, ¶ 80, 124, ER 036, 043 (Lathouris).

Appellants' only allegations against Blue Lake Appellee Clerk Huff are that she initially erroneously issued an incorrect summons in *Blue Lake v. ABI*, (Complaint, ¶ 41, ER 027), and later rejected one of Acres' Tribal Court filings for failing to substantially conform to Blue Lake Tribal Court Rule 12 (Complaint, ¶ 62, ER 031). These allegations describe nothing more than common functions

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[14] Judge Marston's only interaction with Appellant Acres in or near the Blue Lake Tribal Court but outside an actual proceeding allegedly occurred when Acres offered to shake Judge Marston's hand, but Judge Marston declined to participate in what he characterized as an *ex parte* communication. Complaint, ¶ 97, ER 038-039. However, on another occasion that Appellants failed to mention, Acres physically and verbally accosted Judge Marston at a meeting of the California Judicial Council's Tribal Court-State Court Forum in San Francisco. Marston Declaration, ¶ 37, BLSER 012-013.

routinely performed by court clerks, and thus do not constitute an exception to absolute judicial or quasi-judicial immunity. See *Moore v. Brewster*, 96 F.3d at 1246.

Appellants' entire argument that the judicial or quasi-judicial immunity of at least some of the Blue Lake Appellees should be abrogated rests on Appellants' allegations and/or assumptions about activities on behalf of Blue Lake in matters completely unrelated to *Blue Lake v. ABI*. In particular, Appellants focus upon Judge Marston's activities in a California Superior Court action entitled *Blue Lake v. Shiomoto*, in which Judge Marston filed suit on behalf of a Blue Lake citizen against the California Department of Motor Vehicles to compel that agency to recognize the validity of his own Court's order granting a name change. Complaint, ¶ 35, ER 026.

Judge Marston contends that this action in defense of his own Court's jurisdiction was within the scope of his judicial services contract with the Blue Lake Rancheria, and there is no evidence that Blue Lake objected to this activity. Marston Declaration, ¶ 20, BLSER 008. Judge Marston's activities in *Blue Lake v. Shiomoto* or the other activities unrelated to *Blue Lake v. Acres* that Appellants alleged he undertook on Blue Lake's behalf in matters unrelated to *Blue Lake v. Acres* may have raised questions about Judge Marston's ability to impartially

preside over *Blue Lake v. Acres*, but those activities did not render Judge Marston's actions in *Blue Lake v. ABI* anything other than purely judicial acts for which Judge Marston is absolutely immune.

Similarly, even if Blue Lake Appellees Rapport, Burrell, Vaughn, DeMarse and Lathouris rendered services to the Blue Lake Rancheria in matters unrelated to *Blue Lake v. ABI*, whether during the pendency of *Blue Lake v. ABI* or at other times and in other matters, their only involvement in any proceedings involving Appellants either was to assist Judge Marston in presiding over those proceedings, or to assist the Boutin Jones Appellees in defending against Acres' attacks on the Tribal Court's jurisdiction. Thus, they, too, retain their judicial or quasi-judicial immunity.

Finally, even though Clerk Huff may have held additional positions with Blue Lake's government, her only interactions with Appellants were as the Tribal Court Clerk in connection with administering *Blue Lake v. Acres* and executing declarations in aid of her own defense in *Acres v. Blue Lake I* and *Acres v. Blue Lake II*. Thus, she, too, retains her quasi-judicial immunity, even if she initially may have issued the wrong summons in *Blue Lake v. Acres*, and rejected one of Acres' filings in that case as having been defective.

Because Appellants only alleged acts by the Blue Lake Appellees serving as

Tribal Court personnel that are judicial or quasi-judicial in nature, the District Court correctly held as an alternative ground for dismissing Appellants' action as against those Appellees that the Blue Lake Appellees with judicial or quasi-judicial roles were absolutely immune to all of the claims for relief Appellants assert against them.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING AS MOOT THE APPELLEES' RESPECTIVE ANTI-SLAPP MOTIONS AND ABI'S MOTION TO STRIKE THE ANTI-SLAPP MOTIONS

Appellant ABI complains that the District Court abused its discretion in denying as moot the Blue Lake Appellees' anti-SLAPP motion and Appellants' motion to strike those motions as frivolous under F.R.Civ.P. 11(b). Further, citing concerns over an interlocutory appeal, ABI asks that this Court rule on the anti-SLAPP motions on the record before it. Opening Brief, p. 46.

Blue Lake Appellees agree that the record before this Court is as complete as it ever will be, and that those motions can either be considered now or remanded to the District Court for decision. In either event, Appellants' arguments on the merits of the motions are incorrect as a matter of law.

A. California's Anti-SLAPP Statute Applies to Tribal Courts

ABI contends that California's anti-SLAPP statute does not apply to this

case, making a variety of contradictory assertions that are unsupported by law. The California Legislature specifically has instructed that the anti-SLAPP statute "shall be construed broadly." Cal. Code Civ. Proc., § 425.16, subd. (a). ABI's proposed narrow interpretation of the anti-SLAPP statute runs contrary to its plain language and the case law.

Appellants argue that the anti-SLAPP statute does not apply because Blue Lake is not a party to the United States Constitution. While historically indisputable, that fact also is completely irrelevant.[15] Appellants do not cite a single case that holds, or even suggests, that tribal court proceedings are not "proceedings authorized by law" or that constitutional rights do not exist in those courts.

In fact, the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1304, imposes many of the protections of the U.S. Constitution on Indian

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[15] *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1988) states simply that because tribes were not parties to the Constitution they are also not "parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible." Similarly, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1675-76 (1978) noted that as "separate sovereigns pre-existing the Constitution, tribes have historically been [regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" while also noting that the Indian Civil Rights Act imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Id.* at 57-58.

tribes. Those protections specifically include the right "to petition for redress of grievances." 25 U.S.C. §1302, subd. (a)(1). As noted in the dissenting opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978): "The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U. S. C. §§ 1301-1341, is 'to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72-73 (1978), citing S. Rep. No. 841, 90th Cong., 1st Sess., 6 (1967). ABI's bare statement that there is no constitutional right of petition in tribal courts is therefore extremely dubious at best.

This argument also ignores California's anti-SLAPP statute's own definitions. The statute defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include: (1) "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" and (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Cal. Code Civ. Proc., § 425.16, subd. (e).

Vargas v. City of Salinas, 46 Cal.4th 1 (2009) makes clear that the

anti-SLAPP definitions of "protected activity" apply whether or not the participation is constitutionally, because the decision acknowledges that while a government is not a person protected by the First Amendment, it nevertheless is entitled to file an anti-SLAPP motion if it engages in "protected activity" as defined in § 425.16(e). *Id.* at 17.

Further, the anti-SLAPP statute includes proceedings authorized by law outside of the traditional context of courts. For example, a hospital peer review committee has been deemed to be "an official proceeding authorized by law" under section 425.16, subdivision (e)(2) because that procedure is required under Business and Professions Code § 805 *et seq*. *Kibler v. Northern Inyo County Local Hospital Dist.*, 39 Cal.4th 192, 199 (2006).

Tribal courts are both judicial proceedings and proceedings authorized by United States law. Numerous federal laws authorize tribal courts to exercise authority over both tribal citizens and non-Indians. For example, the Indian Civil Rights Act authorizes tribal courts to impose a fine of up to $500 and incarceration for up to six months. The 2013 reauthorization of the Violence against Women Act (42 U.S.C. § 1301, *et seq.*; Violence against Women Reauthorization Act of 2013, 113 P.L. 4, 127 Stat. 54, 121) allowed tribes to prosecute non-Indians in tribal courts for committing acts of violence against Indians with whom they are in

a relationship. Further, State courts must give full faith and credit to tribal court custody orders involving Indian children (25 U.S.C. § 1911(d)), protection orders (18 U.S.C. § 2265); child support orders (28 U.S.C. § 1738 B); and child custody orders (Family Code § 3404).

Finally, there is a "long-standing federal policy supporting the development of tribal courts" for the purpose of encouraging tribal self-government and self-determination." *Penn v. United States*, 335 F.3d at 789 (8th Cir. 2003). This policy is the basis for according tribal court judges "the same absolute judicial immunity that shields state and federal court judges." *Id.* This policy is also best served by according litigants in tribal courts the same protection of the anti-SLAPP statute that is afforded to litigants in state courts.

B. Blue Lake's Court is Not the Equivalent of a Foreign Nation's Courts

ABI contends that the Blue Lake Tribal Court is the equivalent of the court of a foreign nation, relying on *Guessous v. Chrome Hearts, LLC*, 179 Cal.App.4th 1177 (2009). ABI's reliance on that decision is misplaced. *Guessous* held that "petitioning activity undertaken in a foreign county is not protected by the anti-SLAPP statute." *Id.* at 186. This was based on the lack of any Constitutional right to petition in the courts of France, where the underlying litigation took place.

A Native American tribe is not equivalent to a foreign government. This has been well established law in the United States since the 1830s, beginning with *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). "For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities,' [Citation] . . . We have frequently noted, however, that the 'sovereignty that the Indian tribes retain is of a unique and limited character.'" (*Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008).) "Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. . . . As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states. . ." (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-209 (1978).) "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' [Citation]." (*Ibid*, citations omitted.)

As discussed at length above, tribal courts are not treated as courts of a foreign nation for purposes of multiple federal and even some California statutes.

Further, any decision of the Blue Lake Tribal Court regarding jurisdiction would have been reviewable by the District Court after tribal court remedies were exhausted, a limitation that would certainly not apply to the courts of a foreign nation. There is simply no basis for treating tribal courts, whose authority ultimately is subordinate to the federal government, as equivalent to courts in independent foreign countries.

Therefore, had the District Court ruled on the Blue Lake Appellees' Anti-SLAPP motion, it would have been appropriate to grant the motion based on the ample grounds offered in support thereof.

CONCLUSION

For all of the reasons set forth above, the District Court's judgment should be affirmed.

DATED: September 28, 2020

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FOR THE NINTH CIRCUIT

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I hereby certify that on September 28, 2020, I electronically filed the foregoing DEFENDANTS'-APPELLEES' LESTER MARSTON, ARLA RAMSEY, THOMAS FRANK, ANITA HUFF, "RAPPORT AND MARSTON," DAVID RAPPORT, COOPER DEMARSE, DARCY VAUGHN, ASHLEY BURRELL AND KOSTAN LATHOURIS ANSWERING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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s/ Ann Allen
Ann Allen, Declarant