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
The Honorable William H. Orrick, Judge

Appellants' Opening Brief

Ronald H. Blumberg
141 N. Acacia
Solana Beach, CA 92075
rhb@blumberglawgroup.com
858-509-0600
Attorneys for Acres Bonusing, Inc.

James Acres
1106 2nd #123
Encinitas, CA 92024
james@kosumi.com
541-760-7503
Plaintiff/Appellant in pro per

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Statement of Jurisdiction

The district court had jurisdiction over the eighth cause of action for RICO under 18 USC 1964(c), and supplemental jurisdiction over all other causes of action under 28 USC 1367. ER 019 ¶2.

The order appealed from was a final order granting Appellees' motions to dismiss. ER 014.

The judgment in the case issued on April 15, 2020. ER 015.

The notice of appeal was filed twenty-nine days later on May 14, 2020. ER 016-017.

This appeal is timely under FRAP 4(a)(1).

Introduction

Blue Lake Casino sued Acres Bonusing, Inc. (ABI) and James Acres (Acres) in Blue Lake Tribal Court. Judge Marston presided, even though he and his law-firm, Rapport & Marston, were secretly working as attorneys for Blue Lake and its casino at the time. One case Rapport & Marston represented Blue Lake in was *Blue Lake v. Lanier,* which remains on appeal before this Court today.

Boutin Jones initially represented Blue Lake Casino in the tribal court action, even though Boutin Jones was associated as counsel with Rapport & Marston in *Lanier.* The tribal court action was pursued with menace. It began with service of a five-day summons and culminated with a hearing in a windowless casino conference room where Acres was surrounded by armed Blue Lake employees while Judge Marston lied to conceal the fact he was Blue Lake's attorney.

Acres, in federal court, exposed Judge Marston's attorney-client relationship with Blue Lake and his firm's collaboration with Boutin Jones. Judge Marston, his firm, and Boutin Jones all withdrew. A retired California judge replaced Judge Marston and, on his own motion, dismissed the cause of action against Acres as "conjured." In answer to ABI discovery requests Blue Lake dismissed the case.

ABI and Acres now sue for RICO, wrongful use of civil proceedings, breach of fiduciary duty, and constructive fraud. The district court found sovereign immunity and judicial immunity bar the action. This appeal ensues.

Issues Presented

I. Sovereign Immunity and RICO. Sovereign immunity is not available to those sued in their individual capacity. Suits over plainly unlawful conduct are individual capacity suits by definition, and RICO causes of action require pleading plainly unlawful conduct. Can sovereign immunity bar a RICO cause of action?

II. Sovereign Immunity and Individual Money Judgments. Sovereign immunity is not available where the only remedy sought is a money judgment against an individual. The only remedies sought in *ABI v. Marston* are money judgments against individuals. Can sovereign immunity bar *ABI v. Marston?*

III. Judicial Immunity. Judges can be sued for their non-judicial conduct. Here, Judge Marston and his associates secretly worked as attorneys for Blue Lake Casino in a variety of matters unrelated to *Blue Lake Casino v. ABI* while they presided over *Blue Lake Casino v. ABI*. Is secretly being the plaintiff's attorney in matters unrelated to the case being presided over judicial conduct?

IV. Tribal Petitioning Under California's anti-SLAPP Statute. California's anti-SLAPP statute protects acts of petitioning and speech guaranteed by the United States and California Constitutions. As separate, pre-existing sovereigns, Indian tribes have neither rights nor responsibilities under the United States or California Constitutions. Are petitions by tribal entities to tribal sovereigns protected by the anti-SLAPP statute?

Facts and Procedure

A. *Blue Lake Casino v. ABI* and the iSlot Agreement.

In 1999, California entered into class III gaming compacts with various tribes throughout the state, including Blue Lake. Under the compacts a finite pool of class III gaming device licenses was created, to be administered by the state and shared by the tribes. Each license required a non-refundable payment to California of $1,250.00, and licenses not deployed in commercial use within one-year were forfeit. A dispute quickly arose between the tribes and the state about how many class III gaming device licenses the pool contained, leading to a scarcity of licenses. The dispute made its way to California's Eastern District where tribes were largely victorious, and in October 2009 several tribes, including Blue Lake, rushed to purchase additional class III licenses before the district court's ruling could be unsettled on appeal. *Cachil Dehe Band of Wintun Indians v. California* 618 F.3d 1066 (9th Cir. 2010).

In July of 2010, with the anniversary of Blue Lake's class III license purchase approaching, Blue Lake Casino contracted with Acres Bonusing, Inc. ("ABI") and paid $250,000.00 for iSlot, a novel iPad-based class III gaming system, to be delivered on or before October 1, 2010. ABI made timely delivery of iSlot. Blue Lake Casino initially used iSlot to for 56 class III gaming devices, and then

increased the number of iSlot class III gaming devices to 88 in 2011. ER 027-028 ¶44.

In December 2015 Blue Lake Casino sued ABI and Acres in Blue Lake Tribal Court. *Blue Lake Casino v. ABI*[1] sought $249,250.00, punitive damages, and attorney fees, on causes of action for breach of contract, unjust enrichment and fraud, arguing, in essence, that Blue Lake Casino only received $750.00 in value from iSlot. ER 027 ¶43; ER 060-69. Judge Marston and his firm, Rapport & Marston ("RM"), provided the judicial staff on the case while the firm Boutin Jones ("BJ") represented Blue Lake Casino as attorneys of record. ER 026 ¶34, ER 027 ¶40, ER 043-044 ¶¶124-128.

B. Rapport & Marston and Boutin Jones collaborate as attorneys for Blue Lake and its casino.

Blue Lake Casino v. ABI was not the first time RM and BJ collaborated on the same case for Blue Lake. The two law-firms have been associated together as counsel for Blue Lake since 2011 in *Blue Lake v. Lanier.*[2] In *Lanier,* Blue Lake used its status as a government employer to hire out thousands of temporary employees to commercial employers at dramatically reduced worker's compensation rates. When some of those employees were injured Blue Lake used

[1] *Blue Lake Casino & Hotel v. Acres Bonusing, Inc. and James Acres,* Blue Lake Tribal Court Case No. C-15-1215JNL.

[2] *Blue Lake v. Lanier,* USCA Case No. 15-16340 (9th Cir.).

its status as a sovereign government to avoid reimbursing California for the worker's compensation claims. *See generally,* Blue Lake v. Lanier, 106 F.Supp 3d 1134 (E.D. Cal. 2015). RM and BJ continue to represent Blue Lake in *Lanier* throughout *Blue Lake Casino v. ABI,* and down through today. ER 033 ¶74.

RM has represented Blue Lake and its entities as attorneys for decades. ER 032 ¶69. As part of *Acres v. Blue Lake II*[3] Acres obtained several years of Judge Marston's billing record from RM to Blue Lake. ER 025 ¶33. In addition to his judicial duties, the billing records show Judge Marston and his associates provided Blue Lake with legal advice on everything from buying a fire-truck (ER 136), to the use of firearms by tribal employees (ER 137-138), to bringing land into trust (ER 139-140).

In *Blue Lake v. Shiomoto*[4] Judge Marston and his associates represented Blue Lake, Blue Lake Casino's CEO, Appellee Arla Ramsey ("Ramsey"), and her daughter-in-law as attorneys in state court. ER 026 ¶35. Ramsey had officiated at her son's tribal court wedding, then gifted a trans-Atlantic honeymoon cruise from the Bahamas to her son, his bride, and the bride's maids. The bride's tickets, however, were in her married name, and the California DMV would not issue a

[3] Acres brought two federal actions challenging tribal court jurisdiction. *Acres v. Blue Lake et al. I* (3:16-cv-02622-WHO, N.D. Cal., 2016) and *Acres v. Blue Lake et al. II* (3:16-cv-05391-WHO, N.D. Cal., 2017).

[4] *Blue Lake Rancheria et al., v. J Shiomoto et al.* (Super. Ct. Humboldt County, Case No. CV140799).

new driver's license on the basis of the tribal court marriage. Below, Judge Marston described in his declaration how, when he learned of all this, on his own initiative he suggested to Ramsey he sue the DMV to recognize the marriage. Judge Marston did well by his client, and obtained injunctive relief in time for the honeymoon to proceed as planned. ER 119-121 ¶20. Judge Marston and his associates continued to litigate *Shiomoto* throughout their tenure presiding over *Blue Lake Casino v. ABI.* ER 043-044 ¶¶124-128.

Other work Judge Marston and his associates performed for Blue Lake while presiding over *Blue Lake Casino v. ABI* include 1) lobbying California to streamline state-court enforcement of tribal-court money judgments (ER 029-030 ¶55); 2) advising Blue Lake Casino on a religious leave dispute with an employee (ER 035 ¶78); and, 3) negotiating with the State of California for the renewal of Blue Lake's class III gaming compact (ER 026 ¶36).

C. Rapport & Marston and Boutin Jones use the Blue Lake Tribal Court as a RICO enterprise in schemes to obtain money by means of false pretenses.

Judge Marston has a long history of presiding as judge over cases in which Blue Lake was plaintiff, while at the same time working for Blue Lake as its attorney. For instance, In 2009 and 2010 Judge Marston presided over a series of unlawful detainer cases in which Blue Lake was represented by Judge Marston's associate Appellee David Rapport ("Rapport"). ER 032 ¶69. Then, in 2015 and 2016, Judge

Marston presided over Blue Lake's lawsuit against the contractor who built its hotel. This hotel construction lawsuit ended in Blue Lake extracting over one-million dollars in settlement money. ER 044 ¶129. Judge Marston and his associates were paid for all this work, and there is no evidence in the record the defendants in these actions were informed Judge Marston was Blue Lake' attorney. ER 043-044 ¶¶124-128.

Blue Lake Casino v. ABI was a continuation of RM providing for-hire judicial staff to preside over cases in which RM's client was the plaintiff. The case began with BJ serving ABI and Acres with a five-day summons. When Acres scrambled to meet this five-day deadline by filing a *pro-se* motion to dismiss, Judge Marston threatened Acres with sanctions. ER 029-31 ¶¶54, 60, 64.

When Acres brought federal action, arguing Blue Lake Tribal Court was acting in bad-faith against him, RM ghostwrote papers filed by BJ which claimed Acres enjoyed a "full and fair opportunity" in tribal court. ER 033 ¶76; ER 115 ¶¶6-8. The District court relied on this representation when it found proceedings in the tribal court were not being conducted in bad-faith. *Acres v. Blue Lake I* at 5 (Aug. 10, 2016) [Order granting motion to dismiss].

When Acres returned to tribal court and moved for Judge Marston to disqualify himself, the hearing was held in a windowless casino conference room, and three Blue Lake employees armed with guns surrounded Acres throughout the hearing.

During the hearing, Judge Marston lied from the bench and denied having an attorney-client relationship with Blue Lake. Appellee Amy O'Neill ("O'Neill"), appearing on Blue Lake's behalf, echoed that she knew of no reason Judge Marston should be disqualified, even though BJ, her firm, was associated with RM as attorneys for Blue Lake in *Lanier,* and she had filed papers ghostwritten by RM in *Acres v. Blue Lake I*. ER 036-037 ¶¶80-82, ER 038 ¶¶89-92; ER 115 ¶¶7-8.

D. Rapport & Marston and Boutin Jones are forced to withdraw from *Blue Lake Casino v. ABI* after their scheme is exposed.

Acres returned to federal court in *Acres v. Blue Lake II,* where RM again ghostwrote filings for BJ to file in Judge Marston's defense (ER 116 ¶9), and Judge Marston swore a declaration in which he flatly denied being Blue Lake's attorney or representing Blue Lake in gaming compact negotiations (ER 039 ¶¶99-100). After Acres brought Judge Marston's filings in *Blue Lake v. Shiomoto* to the district court's attention, and unearthed evidence suggesting RM and BJ collaborated in preparing briefing against Acres, both Judge Marston and BJ withdrew from *Blue Lake Casino v. ABI.* ER 40-41 ¶¶102-111.

E. *Blue Lake Casino v. ABI* ends in exoneration for ABI and Acres.

The Honorable Justice James Lambden, a retired California Court of Appeal judge, replaced Judge Marston in *Blue Lake Casino v. ABI* and Appellee Janssen Malloy ("JM") replaced BJ as counsel for Blue Lake Casino. ER 041 ¶109-111.

On his own motion, Justice Lambden transformed Acres' motion to dismiss for lack of jurisdiction into a motion for summary judgment on the fraud cause of action against Acres. ER 019 ¶1. As part of the motion Blue Lake Casino conceded many facts as undisputed, including that 1) ABI had used all the money it received from Blue Lake Casino to develop iSlot: and 2) ABI provided a dozen iSlot updates to Blue Lake. ER 132-133 facts 131, 136.

Justice Lambden dismissed Acres from *Blue Lake Casino v. ABI* on summary judgment, finding no reasonable person could believe Acres defrauded Blue Lake Casino, and describing Blue Lake Casino's conduct as an attempt to "conjure" a cause of action against Acres. ER 097.

ABI then demanded a bill of particulars from Blue Lake Casino to substantiate Blue Lake Casino's assertion it only made $750.00 from iSlot. Rather than comply, Blue Lake Casino dismissed the entire action. ER 041 ¶113.

F. ABI and Acres seek money damages from the pockets of the individual RICO participants, specifically forswear remedies against Blue Lake or Blue Lake Casino, and allege Appellees engaged in conduct that was plainly unlawful.

ABI and Acres both bring a cause of action for RICO, alleging Appellees operated or managed Blue Lake Tribal Court as a RICO enterprise as part a scheme to obtain money via false pretenses. ABI additionally brings state-law causes of action for wrongful use of civil proceedings, breach of fiduciary duty, and constructive fraud, as well as causes of action for aiding and abetting those

three primary torts. In each of these causes of action ABI and Acres only seek monetary remedies to be paid by the individual Appellees. ER 046-058.

The Verified Complaint specifically notes that Blue Lake, Blue Lake Tribal Court, and Blue Lake Casino are not defendants. ER 020-021 ¶¶9, 11-12. No remedy is sought from Blue Lake, Blue Lake Tribal Court, or Blue Lake Casino. ER 046-058.

G. Appellees split into three factions and make significant factual concessions as part of their motions to dismiss.

Below Appellees split into three factions: 1) The Rapport & Marston/Blue Lake Faction ("RMBL");[5] 2) The Boutin Jones Faction;[6] and 3) The Janssen Malloy Faction.[7]

Each faction brought motions to dismiss under Rule 12(b)(1) arguing sovereign immunity barred the action. Each faction also brought motions to strike arguing California's anti-SLAPP statute barred ABI's state-law causes of action. ABI in turn moved to strike the anti-SLAPP motions as unwarranted in law under Rule

[5] Judge Marston, David Rapport, Darcy Vaughn, Ashley Burrell, Kostan Lathouris, and Cooper DeMarse all hail from Rapport & Marston. Arla Ramsey, Anita Huff, and Thomas Frank were all Blue Lake employees. Below, the district court combined these Appellees into a single "Blue Lake" faction. ABI and Acres maintain a distinction between the RM and BL Appellees from the belief that, on remand, their interests will diverge.

[6] Boutin Jones, Michael Chase, Daniel Stouder, and Amy O'Neill. The initials "BJ" refer specifically to the firm.

[7] Janssen Malloy, Megan Yarnall and Amelia Burroughs. The initials "JM" refer specifically to the firm.

11(b). RMBL additionally brought a motion to dismiss arguing most of its faction members were protected by judicial immunity. The Boutin Jones Faction and Janssen Malloy Faction both brought motions to dismiss under Rule 12(b)(6) arguing ABI and Acres failed to state a valid RICO cause of action. RMBL did not challenge the RICO cause of action on Rule 12(b)(6). ER 001-005.

Several Appellees brought declarations below containing significant factual concessions:

1) Judge Marston's declaration described some of his conduct as an attorney for Blue Lake and admitted this conduct disqualified him from being judge in *Blue Lake Casino v. ABI.* ER 119-123 ¶¶ 20, 25.
2) Megan Yarnall's ("Yarnall") declaration included the motion for summary judgment record in *Blue Lake Casino v. ABI,* and a set of undisputed facts in the case. ER 125-133.
3) Daniel Stouder's ("Stouder") declaration described his attorney-client communications with Blue Lake Casino and explained that his view of *Blue Lake Casino v. ABI* matched the view expressed by Yarnall and JM. ER 106-112.
4) Rapport's declaration admitted that he and Cooper DeMarse ("DeMarse") ghostwrote papers BJ filed on Blue Lake Casino's behalf in litigation against Acres. ER 115-116.

5) Chase's declaration denied coming to a "mutual understanding … to accomplish a common unlawful plan" with several co-defendants. Chase did not, however, deny coming to an understanding to accomplish an unlawful plan with Rapport, even though the Verified Complaint alleges Chase and Rapport "worked together to co-ordinate the despicable conduct of their respective firms." ER 105 ¶13; ER 033 ¶75.

H. No Blue Lake entity appeared below and there is no evidence in the record Blue Lake is concerned with the outcome of this case.

While several Appellees brought declarations below, no declaration was filed by anyone as an official representative of Blue Lake or any of its entities. Blue Lake made no appearance in the action, and there is no evidence in the record Blue Lake is concerned with the outcome of *ABI v. Marston.*

I. The district court denied discovery, found sovereign immunity and judicial immunity barred the action, then declined to reach the remaining questions.

ABI and Acres requested discovery regarding RM's relationship with Blue Lake and BJ. Appellees refused to comply with these requests and so ABI and Acres brought the discovery dispute before the district court. After the district court found Appellees were protected by sovereign immunity it vacated the discovery request (ER 003 fn.6) and denied the various motions to strike as moot (ER 002). The district court also found judicial immunity barred the causes of action against several Appellees. ER 013-014.

Standards of Review

Dismissal for sovereign immunity and judicial immunity are subject to independent review. *Maxwell v. County of San Diego,* 697 F.3d 941, 947 (9th Cir. 2012); *New Alaska Development Corp. v. Guetschow,* 869 F.2d 1298, 1300 (9th Cir. 1989). Rule 11(b) sanctions motions are reviewed for abuse of discretion. *Cooter Gell v. Hartmarx Corp.*, 496 US 384, 405 (1990).

Argument

I. Sovereign immunity cannot bar the RICO cause of action because a RICO cause of action is necessarily an individual capacity action.

A. It was error for the district court to find sovereign immunity barred the RICO cause of action because sovereign immunity can never bar a RICO cause of action.

It is well settled that sovereign immunity is not available as a defense against individual capacity suits. *Lewis v. Clarke* 137 S. Ct. 1285, 1291 (2017). It is equally well settled that an official who acts illegally is "stripped of his official or representative capacity and is subjected in his person to the consequences of his individual conduct." *Ex Parte Young* 209 U.S. 123, 160 (1958). Because of this, "suits over plainly unlawful conduct are individual capacity suits by definition" and cannot be barred by sovereign immunity, including specifically tribal sovereign immunity. *Maxwell v. County of San Diego* 697 F.3d 941, 954 (9th Cir. 2012).

A RICO cause of action is always an individual capacity cause of action because pleading RICO requires pleading plainly unlawful conduct. The elements of a RICO cause of action are: (i) the conduct of (ii) an enterprise that affects interstate commerce (iii) through a pattern (iv) of racketeering activity or collection of unlawful debt. 18 USC § 1962(c); *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). "Racketeering activity" is defined in 18 USC § 1961 and includes a long list of criminal violations. Here, the Verified Complaint

alleged mail fraud (18 USC § 1341), wire fraud (18 USC § 1343), and obstruction of justice (18 USC § 1503) as RICO predicates. ER 056-057 ¶¶202-208. Because mail fraud, wire fraud, and obstruction of justice are all plainly unlawful acts it is impossible to commit mail fraud, wire fraud or obstruction of justice in an official capacity; one can only commit mail fraud, wire fraud and obstruction of justice in one's individual capacity.

Because one can only commit mail fraud, wire fraud, and obstruction of justice in one's individual capacity it was error for the district court to find the RICO cause of action was pled against Appellees in their official capacities. Sovereign immunity cannot bar a RICO cause of action lain against individual defendants.

B. The district court did not reach the 12(b)(6) attacks on the RICO cause of action and the attacks fail under the applicable standard of review.

Both the Boutin Jones and Janssen Malloy Factions challenged the RICO cause of action on a 12(b)(6) motion for failure to state a claim on which relief can be granted. Appellees argued the RICO cause of action failed to state a claim because, absent corruption, litigation activity cannot be used to supply the RICO predicates necessary to sustain a RICO cause of action. In return, ABI and Acres argued the Verified Complaint alleged corrupt litigation activity sufficient to support RICO predicates.

The district court declined to reach the RICO cause of action because it found the entire action was barred by sovereign immunity. This was error, because, as

shown above, a RICO cause of action is by definition an individual capacity action, and therefore cannot be barred by sovereign immunity.

Had the district court reached the 12(b)(6) challenge to the RICO cause of action it would have been bound to accept all allegations in the complaint as true and draw all reasonable inferences in favor or plaintiffs. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). Given this standard, it would have been impossible for the district court to grant Appellees 12(b)(6) motion because the Verified Complaint alleges, *inter alia,* Appellees 1) Knew Judge Marston was Blue Lake's attorney (ER 018-045, *passim*), 2) Co-operated with Judge Marston and his firm to conceal that fact from Acres, ABI, and the district court (ER 018-045, *passim*), 3) Allowed Judge Marston's firm to ghostwrite filings it used against Acres in litigation (ER 032-033 ¶¶70-73), 4) Witnessed Judge Marston subject Acres to physical intimidation at a tribal court hearing (ER 036-037 ¶¶81-82), and 5) Misstated evidence while pursuing what Justice Lambden described as a "conjured" claim in *Blue Lake v. Acres.* ER 042 ¶117, ER 019 ¶1.

C. It is undisputed the RMBL Appellees engaged in plainly unlawful RICO conduct.

RMBL did not challenge the RICO cause of action via a motion under Rule 12(b)(6). Because these Appellees do not challenge the RICO cause of action, it is undisputed at this phase these Appellees operated or managed the Blue Lake Tribal Court as a RICO enterprise in a scheme to obtain money by means of false

pretenses. It was error for the district court to find the RMBL Appellees were acting in their official capacities and entitled to sovereign immunity because those Appellees did not dispute they engaged in plainly unlawful conduct.

In a nutshell, the false pretense at the heart of Appellees' scheme to defraud was that Blue Lake Tribal Court was an impartial tribunal and Judge Marston was an impartial judge. Below, Judge Marston brought a declaration describing how he worked as a zealous advocate for Blue Lake's casino CEO in a family court matter (ER 119-121 ¶20), and how he negotiated for the renewal of Blue Lake's class III gaming compact (ER 123 ¶27), all while presiding over Blue Lake Casino's action against ABI and Acres. Judge Marston's billing records show his associate attorneys aided him in this attorney work for Blue Lake (ER 043-044 ¶¶124-128), and Judge Marston describes in his declaration how he "contracted" with these associates to aid him in presiding over *Blue Lake Casino v. ABI* (ER 124 ¶35). For his part, Rapport brings a declaration describing how he and DeMarse ghostwrote papers filed by BJ in *Acres v. Blue Lake*. ER 115-116 ¶¶6-10. One of the purposes of these filings was to conceal from the district court that Judge Marston was working as an attorney for Blue Lake, its casino, and Ramsey.

It is plainly unlawful for a judge to secretly work as an attorney for a litigant in a case before him. It is plainly unlawful for a litigant to secretly employ their attorney as their judge, and to simultaneously employ their judge as their attorney.

And where one knows an attorney is presiding as judge over a case brought by his client, it is plainly unlawful to be paid to help conceal the fact. None of this plainly unlawful conduct can be undertaken in an official capacity.

It was error for the district court to find the RMBL Appellees always acted in their official capacities, because it is not only undisputed these Appellees undertook plainly unlawful conduct, it is also admitted.

D. If Acres failed to state a valid RICO cause of action then the district court lacked jurisdiction to find sovereign immunity cloaked Appellees for their conduct against Acres.

Acres is only present on the RICO cause of action. As shown above, it was error for the district court to find sovereign immunity barred the RICO cause of action because RICO causes of action are always individual capacity causes of action. Acres' cause of action could only be properly dismissed if the district court found Acres failed to state a claim on Appellees' 12(b)(6) motion. Had the district court found Acres failed to state a claim, there would have been no remaining questions brought by Acres for the district court to decide. The district court exceeded its jurisdiction when it found Acres' suit was barred by sovereign immunity because Acres did not bring any questions to the district court to which sovereign immunity was applicable.

Acres is litigating several related state law causes of action against Appellees in state court. Those causes of action are currently on appeal before California's

Third District Court of Appeal. ER 004. The district court's finding that Acres' cause of action is barred by sovereign immunity could be prejudicial to Acres in the state court proceeding. This Court should remand Acres' cause of action if for no other reason than because the district court's exceeding its jurisdiction to erroneously find Appellees are protected by sovereign immunity on Acres' RICO cause of action may prejudice Acres in the state court action.

II. Sovereign immunity cannot bar *ABI v. Marston* because the only remedies sought are money judgments to be levied against the individual defendants.

A. Unambiguous Supreme Court authority holds sovereign immunity does not bar actions for individual capacity damages against tribal employees for torts committed within the scope of their tribal employment.

In *Lewis v. Clarke* 137 S. Ct. 1285, 1288 (2017) the Supreme Court:

> [G]ranted certiorari to resolve whether an Indian tribe's sovereign immunity bars individual capacity damages actions against tribal employees for torts committed within the scope of their employment.

The Supreme Court resolved this question by holding sovereign immunity does not bar individual capacity suits against tribal employees because such actions do not implicate a tribe's sovereign immunity. In the words of Justice Sotomayor:

> We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. *Id.*, 1288.

Lewis was not decided in a vacuum. *Lewis* is a straightforward application of the sovereign immunity jurisprudence developed by the Supreme Court to

determine whether an action against a state or federal employee is barred by sovereign immunity. *Lewis* makes clear that where a state or federal employee would not be protected by sovereign immunity tribal employees are necessarily unprotected as well. This is because the protections of tribal sovereign immunity are "no broader than the protection offered by state or federal sovereign immunity." *Id.*, 1290-1292. [8]

Under *Lewis* "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit" by "determining whether the remedy sought is truly against the sovereign." *Id., 1290.* *Lewis* makes clear the test for determining whether relief is being sought from a sovereign was enunciated over seventy-years ago, and focuses on the remedy actually sought by a plaintiff. *Larson v. Domestic Foreign Corp* 337 U.S. 682, 687 (1949) as invoked by *Lewis*, 1291.

Larson was the War Assets Administrator for the United States. The Domestic Foreign Commerce Corp. (DFCC) alleged Larson's predecessor-in-office entered into a contract to sell DFCC a quantity of coal, and alleged title to the coal had passed to DFCC. Larson's predecessor determined DFCC failed to meet its

[8] Significantly, in describing the nature of sovereign immunity and its availability to individual defendants, *Lewis* relies exclusively on cases involving state or federal sovereign immunity. This is clear evidence the Supreme Court considers the cloak of tribal sovereign immunity to be cut from the same cloth as state and federal sovereign immunity.

obligations under the coal contract and decided to sell the coal to a third-party. DFCC disagreed with the Administrator's determination and sued, seeking an injunction prohibiting the War Assets Administrator, his successors, or employees from selling or delivering the coal to anyone but DFCC. After DFCC obtained an injunction, Larson appealed arguing the suit was in reality one against the United States, and thus barred by sovereign immunity. The Supreme Court took the opportunity to enunciate its "remedy-focused" test for determining whether an action is barred by sovereign immunity. *Larson*, 684-685.

The Supreme Court began by stating the presumption that government officers can be sued as individuals and held liable for their own torts:

> If [the] actions [of a government officer] are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. *Id.*, 686.

Therefore, when considering whether a suit is barred by sovereign immunity,

> In a suit against the officer to recover damages for the agent's personal actions, [the] question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. *Id.*, 687-688.

This, in a nutshell, is the remedy focused analysis adopted in *Lewis*. Sovereign immunity is not implicated where money damages are sought from government employees – whether federal, state, or tribal – because the sovereign employer will not be required to act and the sovereign's property will not be disturbed.

The analysis only becomes difficult if the "suit is not one for damages but for specific relief: *i.e.,* the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's action." Because sovereigns must act through agents, where the relief sought directs or constrains an officer's actions, there is a real possibility the officer is being sued merely as a vehicle to impermissibly restrain the sovereign. Put another way, where relief is sought directly against an individual officer in order to compensate a past wrong committed by that officer, sovereign immunity is not implicated. But where the prayed for relief is aimed at preventing or discontinuing a wrong through a suit against whomever the current office-holder happens to be, then there is a likelihood the sovereign is the target of the suit. *Id.*, 688.

Applying this analysis to the facts in *Larson* the Supreme Court found the relief DFCC sought was in actuality against the sovereign. The United States had some coal and DFCC sought a court order directing the officer responsible for that coal, who happened to be Larson, to transfer the coal to DFCC. This is why when Larson's predecessor resigned, Larson became the named party in the suit. Even though DFCC claimed it was Larson's predecessor who breached the government's contract with DFCC, DFCC did not seek a court order requiring Larson's predecessor to provide DFCC with mountains of coal or the cash equivalent. Nor did DFCC expect to obtain the coal from Larson personally.

Instead, DFCC knew Larson acted as custodian for a quantity of coal belonging to the United States, and DFCC sought an order commanding Larson, who happened to be the War Assets Administrator, to give the United States' coal to DFCC.

From the relief sought it was easy to determine DFCC sought relief from the United States, not Larson. *Id.*, 688-689. Larson was merely the most convenient name for the docket sheet, an interchangeable administrator whose pen-stroke disposed of surplus war goods for some short time between the end of World War II and the birth of the General Services Administration.

ABI v. Marston is entirely different. In *ABI v. Marston* individual remedies are sought from individual people for the individual wrongs they committed.

ABI was successful on the merits in *Blue Lake Casino v. ABI.* Based on that success, *ABI v. Marston* brings causes action for wrongful use of civil proceedings against the specific individuals involved in bringing or maintaining *Blue Lake Casino v. ABI.* The only relief sought is general money damages from those individuals. If Ms. Ramsey resigned as CEO of Blue Lake Casino ABI would not care. ABI would not amend the Verified Complaint to name Ms. Ramsey's successor as a defendant because Ms. Ramsey's personal wrongdoings would not adhere to her successor. Nor would Ms. Ramsey's departure from her post as CEO absolve her from liability for actions she took while she was CEO. From these

facts, it is plain the wrongful use causes of actions are lain against Appellees in their personal capacities.

The same analysis applies to ABI's breach of fiduciary duty causes of action. Judge Marston was disqualified[9] from presiding over *Blue Lake Casino v. ABI* because he was Blue Lake's attorney. Because he continued to work as Blue Lake Casino's attorney while presiding over *Blue Lake Casino v. ABI*, ABI alleges Judge Marston breached his fiduciary duty to ABI. ABI seeks general money damages from Judge Marston for breaching his duty, and from those who aided Judge Marston in that breach.

ABI does not seek relief from Justice Lambden, Judge Marston's successor as presiding judge in *Blue Lake Casino v. ABI,* because Justice Lambden had nothing to do with Judge Marston's breach of fiduciary duty. Nor does ABI sue the Janssen Malloy faction for aiding Judge Marston in his breach of fiduciary duty, even though JM succeeded BJ as attorneys in *Blue Lake Casino v. ABI.* This is because even though the Janssen Malloy Appellees were personally involved in wrongfully using civil proceedings against ABI, ABI has no evidence the Janssen Malloy Appellees were personally involved in Judge Marston's breach of fiduciary

[9] It bears repeating that Judge Marston himself declares he was disqualified from presiding over *Blue Lake Casino v. ABI* because he was Blue Lake's attorney. This fact is not in dispute. ER 122-123 ¶25.

duty. From these facts, it is plain the breach of fiduciary duty causes of actions are lain against Appellees in their personal capacities.

Under *Larson* and *Lewis,* things would be more difficult if ABI sought specific relief in the form of an order commanding Blue Lake's Casino CEO to deliver ABI millions of dollars, in crisp hundred-dollar bills, directly from Blue Lake Casino's vault, along with an official apology on behalf of Blue Lake Rancheria and signed by the current Chief Judge and Tribal Chair. To obtain such relief ABI would need to name Blue Lake's Casino CEO, Chief Judge, and Tribal Chair as defendants in their capacity as officials with power to dispose of the casino's property and to make statements on the tribe's behalf. If that was the relief sought in *ABI v. Marston,* then *ABI v. Marston* would be an official capacity suit.

But that is not the relief sought. ABI sues individuals for the individual wrongs they committed. ABI's Verified Complaint cannot be satisfied by stand-ins or successors. If ABI prevails, no judgment would necessarily trouble Blue Lake or its property. Indeed, Appellees could satisfy any judgment ABI might obtain without ever even informing Blue Lake or its casino.

The district court erred when it found Blue Lake was the real-party-in-interest in *ABI v. Marston* and that Appellees were therefore protected by Blue Lake's sovereign immunity. This Court must reverse that error.

B. The district court erred in its application of *Hardin* and *Cook* because *ABI v. Marston* specifically names individual defendants and seeks individual remedies whereas *Hardin* and *Cook* named official defendants and sought tribal remedies.

The district court relied on this Courts' precedents in *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476 (9th Cir. 1985) and *Cook v. AVI Casino Enterprises, Inc.,* 548 F.3d 718 (9th Cir. 2008) in finding Blue Lake's sovereign immunity bars *ABI v. Marston*. ER 009. The district court erred because, as this Court explained when correcting a similar mistake in *Maxwell v. Cnty. of San Diego,* 708 F.3d 1075 (9th Cir. 2013), both *Hardin* and *Cook* sought remedies from a tribal sovereign through the device of a suit against tribal employees. This presents a stark contrast with *ABI v. Marston* which overtly disclaims seeking a remedy from Blue Lake, Blue Lake Casino, or Blue Lake Tribal Court. ER 020-021 ¶¶9, 11-12.

In *Hardin,* the White Mountain Apache tribe banished Hardin after he hid stolen federal property on the reservation. Hardin sued the tribe and its officials on "constitutional and statutory grounds" (*Hardin,* 478), and was found to have litigated in bad faith because his "motions were replete with material omissions and misstatements," including the omission that "the basis of his expulsion was his conviction of a federal crime*"* (*Id.,* 480). This Court subsequently explained that it did not discuss the "remedy sought" principle in *Hardin* because "it did not need to do so" since "*Hardin* did not (1) identify which officials were sued in their

individual capacities or (2) the exact nature of the claims against them." *Maxwell,* 1089.

ABI v. Marston is easily distinguished from *Hardin* because its Verified Complaint (1) expressly states that each defendant is sued in their individual capacity (ER 021-024 ¶¶13-29) and (2) precisely details the nature of the verified claims against them (ER 018-058, 103).

In *Cook,* an employee birthday party hosted by Avi Casino Enterprises ("ACE") where "drinks were on the house" ended in tragedy when an overserved partygoer crashed into Cook on her way home, requiring over one-million dollars in medical expenses. Cook sued ACE directly, and vicariously through several employees, arguing negligence and dram shop liability. *Cook,* 720-721.

This Court found sovereign immunity barred suit against ACE because it was an arm of the tribe. Suit against the employees was also barred by sovereign immunity because, instead of seeking money damages from the employees, Cook sought damages from the tribal treasury, arguing ACE was vicariously liable for the conduct of its employees. Because no remedy was sought directly from the employees, this Court found Cook's complaint was "a mere pleading device," the purpose of which was to obtain money from the tribal sovereign's treasury, and therefore barred by sovereign immunity. *Id.,* 726-727.

ABI v. Marston is easily distinguished from *Cook* because it expressly seeks remedies from the individual defendants (ER 046-058), and disavows seeking any remedy against any tribal entity (ER 020-021 ¶¶9, 11-12). Unlike Cook, ABI does not name Appellees as defendants as a "pleading device" in order to wring a money judgment from Blue Lake through vicarious responsibility. Instead, ABI names Appellees as defendants because ABI seeks a money judgment which will bind Appellees as the sole parties responsible for payment. This responsibility for the judgment makes Appellees the real parties in interest.

The district court erred in applying *Hardin* and *Cook* to find sovereign immunity bars *ABI v. Marston*. The district court should have applied *Lewis,* and this Court's holding in *Maxwell,* to find Appellees could not avail themselves of Blue Lake's sovereign immunity because "[a]ny damages will come from [Appellees] own pockets, not the tribal treasury." *Maxwell,* 1089.

C. No cause of action in *ABI v. Marston* could require a court to interfere with Blue Lake's internal governance, and even if one did, Appellees lack standing to move for dismissal on that basis.

The district court erred when it found "the real party in interest [in *ABI v. Marston*] is the tribe because adjudicating this dispute would require the court to interfere with the tribe's internal governance." *ABI v. Marston* brings causes of action for RICO, wrongful use of civil proceedings, and breach of fiduciary duty.

Nothing in resolving these causes of action would require a court to interfere with Blue Lake's tribal governance.

i) The RICO Cause of Action

Nothing in a federal court finding a tribal entity was operated as a RICO enterprise would interfere with a tribe's internal governance because, as shown above, a RICO cause of action is necessarily a personal cause of action.

ii) The Wrongful Use Causes of Action

The wrongful use causes of action require ABI to prove 1) *Blue Lake Casino v. ABI* ended favorably for ABI, 2) Appellees lacked reasonable grounds to pursue at least one cause of action in *Blue Lake Casino v. ABI*, for 3) some reason other than succeeding on the merits. California Civil Jury Instruction No. 1501. Nothing in considering ABI's proof of these elements would require a court to interfere with Blue Lake's internal governance.

ABI would prove the first two elements by reference to the tribal court record. Courts are not precluded from referring to a developed tribal record when adjudicating disputes. *Findleton v. Coyote Valley Band of Pomo Ind.* 1 Cal.App.5th 1194, 1213-1214 (2016).

That *Blue Lake Casino v. ABI* ended in ABI's favor is beyond dispute because Blue Lake Casino dismissed the action rather than comply with ABI's demand for a Bill of Particulars. ER 041 ¶113. Even if Appellees were to contest this element,

ABI could satisfy its burden by providing a copy of the judgment of dismissal in the tribal court. ER 101. Nothing in providing a copy of the judgment of dismissal from the tribal court could interfere with Blue Lake's internal governance.

Prevailing on a cause of action for money had and received requires proving a defendant 1) received money from a plaintiff which it 2) failed to use for the plaintiff's benefit or 3) return to the plaintiff. California Civil Jury Instruction No. 370. On summary judgment in *Blue Lake Casino v. ABI* it was undisputed that "[s]ubstantially all of the money paid to ABI by Blue Lake [Casino] was used for iSlot development" and that ABI provided Blue Lake with twelve iSlot updates. ER 132-133, facts 129, 131-132, 136. From these facts a reasonable court could find Appellees lacked reasonable grounds to pursue the money had and received cause of action in *Blue Lake Casino v. ABI* because Blue Lake Casino admitted ABI used the money Blue Lake Casino paid ABI for Blue Lake Casino's benefit.

Significantly, Appellees themselves brought the undisputed facts from *Blue Lake Casino v. ABI* into the district court record. ER 127 ¶12. Nothing in drawing conclusions of law from undisputed facts in the tribal court record, which were provided by Appellees themselves, could interfere with Blue Lake's internal governance.

The only remaining element ABI needs prove for wrongful use of civil proceeding is that Appellees pursued at least one cause of action in *Blue Lake*

Casino v. ABI for some reason other than succeeding on the merits. It is absurd to argue a district court cannot make a factual determination about Appellees' motivations for pursuing *Blue Lake Casino v. ABI* without interfering with Blue Lake's internal governance. And indeed, were the district court to find Appellees operated Blue Lake Tribal Court as a RICO enterprise, a finding Appellees pursued *Blue Lake Casino v. ABI* for some reason other than succeeding on the merits would seem foreordained.

iii) The Breach of Fiduciary Duty Causes of Action

The breach of fiduciary duty causes of action require ABI to prove Judge Marston 1) had a fiduciary duty to ABI which he 2) breached by working as an attorney for Blue Lake Casino while he presided over *Blue Lake Casino v. ABI,* and by hiring other casino attorneys to help him preside over the case. *Knox v. Dean 205 Cal.App.4th* 417, 432 (2012). Nothing in evaluating ABI's proof of these elements could cause a court to interfere with Blue Lake's internal government.

Appellees argue they are entitled to judicial immunity for their judicial functions in *Blue Lake Casino v. ABI*. There is nothing uniquely tribal about the judicial functions or judicial immunity claimed by Appellees because judicial immunity is a common law doctrine which "originated in medieval times," has been "the settled doctrine of English courts for many centuries," and "has never been denied … in the courts of this country." *Forrester v. White,* 484 US 219, 225 (1988). By

claiming common-law judicial immunity, Appellees concede there is nothing uniquely tribal about their role as judges in *ABI v. Marston.* All that remains then is for the district court to determine whether 1) Judge Marston breached a fiduciary duty to ABI by acting as Blue Lake Casino's attorney while concealing the fact from ABI, and 2) whether being an attorney for a litigant is a judicial function. Nothing in making either determination could interfere with Blue Lake's internal governance.

Every element of every cause of action in *ABI v. Marston* can be proven without interfering with Blue Lake's internal governance.

D. There is no evidence Blue Lake wishes to share its sovereign immunity with Appellees.

Blue Lake's sovereign immunity is waivable and belongs to Blue Lake. Appellees cannot be protected by Blue Lake's sovereign immunity without Blue Lake's consent. Blue Lake is not a party to *ABI v. Marston* and has not appeared in the action. While Appellees indicated they would provide evidence Blue Lake wished to share its sovereign immunity with Appellees, they never did so. ER 003 fn.6. It was error for the district court to find Blue Lake wished to share its sovereign immunity with Appellees without any substantiating evidence.

Similarly, the record is devoid of evidence Blue Lake believes resolving *ABI v. Marston* would interfere with its internal governance. It was error for the district

court to find resolving *ABI v. Marston* interfered with Blue Lake's self-governance without evidence Blue Lake itself believed this to be the case.

Blue Lake is a sophisticated legal actor, well versed in federal litigation. It would have been well within Blue Lake's powers to assert its sovereign interests in *ABI v. Marston* if Blue Lake felt its sovereign interests were at stake. Because Blue Lake chose not to assert its sovereign interests, the district court not only erred in finding Appellees were protected by Blue Lake's sovereign immunity, the district court usurped Blue Lake's sovereign power on behalf of Appellees without Blue Lake's consent.

E. The entity Appellees are not "arms of the tribe" and therefore cannot share in Blue Lake's sovereign immunity under *White v. University of California*.

The law-firm Appellees RM, BJ, and JM are all entities. In *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014) this Court adopted a five-factor test to determine whether an entity is protected by a tribe's sovereign immunity under the "arm of the tribe" doctrine. The five factors include: 1) Method of the entity's creation; 2) purpose of the entity; 3) structure, management, ownership, and tribal control of the entity; 4) tribal intent to share immunity with the entity; and 5) the financial relationship between the tribe and the entity.

Here, none of the entities were created by Blue Lake. Instead, BJ and JM are California corporate entities (ER 23 ¶23; ER 24 ¶27), and RM is a self-professed

"association of sole-practitioners" (ER 040 ¶¶106-107; ER 114 ¶3). All three entities function as for-profit law practices. There is no evidence the entities are controlled by Blue Lake. The record is mute as to whether Blue Lake intended to share its sovereign immunity with the entities. The financial relationship between Blue Lake and the entities is presumptively that of a client paying attorneys for services.

Because the *White* factors do not argue in favor of finding the entity Appellees function as arms of the tribe, the district court erred in finding the entities were entitled to share in Blue Lake's sovereign immunity.

F. Appellees are not relieved of their duties to their federal or state sovereigns merely because they were employed by a tribal sovereign.

Appellees argue, in essence, because they are employed by a tribal sovereign, they are immune from liability to their federal and state sovereigns. This is not the law. As this Court recently explained, a "tribe's authority does not preclude the federal government from exercising its own authority" and that "[t]hese two sources of sovereignty – federal and tribal – co-exist in our system of government." *United States v. Many White Horses,* Case No. 19-30018, at 9, (9th Cir. Jul. 6, 2020 (for publication)). This Court could just as easily enumerate state-sovereignty as a third source of co-extant authority.

The principals of comity which underlie sovereign immunity forbid using one sovereign's legal process to direct the policy of another sovereign. But nothing in

comity precludes use of a sovereign's legal process to protect individuals within that sovereign's jurisdiction from tortious conduct. This is true even where a tortfeasor's torts are in service of a sovereign.

Appellees are all subject to the jurisdiction of California and the United States. If Appellees have committed civil wrongs under California or United States law then sovereign immunity does not preclude ABI and Acres from using civil process in a United States or California court to redress those wrongs.

III. Judicial immunity cannot bar this action because Appellees engaged in non-judicial conduct.

The district court erred when it found, without explanation, that all the acts alleged against Judge Marston, Lathouris, Burrell, Vaughn, DeMarse, the entity RM and Huff were judicial or quasi-judicial acts. ER 013-014.

A. The district court erred when it failed to apply the four-factor test developed by this Court in *Meek,* using a 12(b)(6) standard.

The district court did not explain what standard it used in determining Appellees' conduct as attorneys was entitled to the protections of judicial immunity. This Court should evaluate Appellees' claims to judicial immunity using the four-factor test it developed in *Meek v. County of Riverside* 83 F.3d 962, 967 (9th Cir. 1999) under a 12(b)(6) standard.

i) *Under Meek, Judicial Immunity Only Protects Specific Acts of Conduct*

Judicial immunity is a common-law doctrine protecting judicial **conduct**. Judicial immunity does **not** protect **judges**. Because it is difficult to draw the line between "truly judicial acts … and acts that simply happen to have been done by judges," the Supreme Court "has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity." Instead, the Supreme Court has focused on explaining that when judges engage in an "administrative, executive or legislative function" they are not entitled to judicial immunity. *Forrester*, 227-229.

Several lower courts have articulated multi-factor tests for analyzing whether a specific act is entitled to judicial immunity. This Court articulated a four-factor test in *Meek* at 447 to determine whether a precise act:

1) Is a normal judicial function; which
2) Occurred in the judge's chambers; and
3) Centered around a case pending before the judge; and
4) Arose directly and immediately out of a confrontation with the judge in the judge's official capacity.

ii) *Judicial Immunity is Raised on a 12(b)(6) Motion*

Below, Appellees purported to raise their judicial immunity defense on a 12(b)(1) or 12(b)(2) motion to dismiss for lack of jurisdiction. This was improper, because "the burden is on the official claiming immunity to demonstrate his entitlement." *Dennis v. Sparks* 449 US 24, 29 (1980). Because it is a defendant's

burden to show they are entitled to judicial immunity, the immunity is not properly raised through a Rule 12(b)(1) or 12(b)(2) motion where the burden is on a plaintiff to show a court's jurisdiction. Instead, the immunity should be raised on Rule 12(b)(6) because the essence of the defense is the immunity bars any relief of the plaintiff's claims. Indeed, in *Meek,* judicial immunity was evaluated as motion to dismiss for failure to state a claim. *Meek,* 965.

At the 12(b)(6) stage, when reviewing whether judicial immunity bars any of the causes of action in *ABI v. Marston*, the Court must limit itself to the Verified Complaint, read in the light most favorable to Appellants. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987).

B. The district court erred in finding Appellees' acts of advocacy on behalf of Blue Lake, Blue Lake Casino, and Ramsey were judicial acts.

Contrary to the district court's ruling below the Verified Complaint teems with clear allegations of non-judicial conduct by each Appellee. In many instances, these allegations were confirmed by declarations made by the Appellees themselves. These allegations and admissions of non-judicial conduct include, but are by no means limited to:

- **Representing** Blue Lake and Ramsey in *Blue Lake v. Shiomoto.* ER 035 ¶78; ER 119-121 ¶20.
- **Lobbying** the California Legislature on Blue Lake's behalf. ER 035 ¶78; ER 123 ¶26.
- **Advising** Blue Lake Casino on disputes with its employees. ER 035 ¶78.

- **Negotiating** with California gaming compact renewals on behalf of a consortium of tribes which included Blue Lake. ER 026 ¶36; ER 123 ¶27.

- **Contracting** with attorneys working for Blue Lake Casino to preside over *Blue Lake Casino v. ABI.* ER 043-044 ¶¶124-128; ER 124 ¶35.

- **Assigning** *Blue Lake Casino v. ABI* to a judge who was a Blue Lake Casino attorney. ER 027 ¶40.

- **Paying** for the activities described above. ER 025 ¶33.

None of this 1) Is a normal judicial function which 2) occurred in the judge's chambers, 3) centered around a case pending before the judge, or 4) arose directly and immediately out of a confrontation with the judge in the judge's official capacity. Because the alleged conduct fails to satisfy the *Meek* factors the conduct cannot be protected by judicial immunity.

C. The district court erred when it failed to recognize, among other things, Appellees claim they acted as prosecutors in *Blue Lake Casino v. ABI*.

In their motion to dismiss below Vaughn, Burrell, DeMarse and Lathouris all argued their conduct in *Blue Lake Casino v. ABI* entitled them to prosecutorial immunity. Thus, these Appellees assert they acted as adversaries to ABI and Acres in *Blue Lake Casino v. ABI.* It is axiomatic that adversarial conduct is not judicial conduct. Because Vaughn, Burrell, DeMarse, and Lathouris all assert they acted as adversaries to ABI and Acres, judicial immunity cannot bar action against them.

D. The district court erred in granting Appellees' 12(b)(6) motion prior to discovery.

Rule12(b)(6) dismissals are disfavored where the complaint asserts novel claims and there has been no opportunity for factual development. *McGary v. City of Portland,* 386 F.3d 1259, 1270 (9th Cir. 2004).

Below, ABI and Acres propounded detailed discovery requests regarding the work described in Judge Marston's billing records. Appellees refused to comply with these requests, and the district court vacated the resulting discovery dispute as moot after granting the motions to dismiss. ER 003 fn.6.

Here, it is alleged Judge Marston and his associates were secretly working as attorneys for Blue Lake Casino and its CEO the entire time they presided over *Blue Lake Casino v. ABI.* Under *McGary* the audacious novelty of Appellees' conduct precludes dismissal on Rule 12(b)(6) because ABI and Acres had no opportunity for factual development.

IV. The district court abused its discretion when it mooted the 11(b) motion to sanction Appellees' anti-SLAPP motions as frivolous.

Appellees brought anti-SLAPP motions seeking to strike the complaint which ABI in turn sought to strike as legally unwarranted under Rule 11(b). After the district court granted Appellees' motions to dismiss it mooted all of the motions to strike. ER 002. The district court abused its discretion when it mooted ABI's 11(b) motion because the anti-SLAPP motions were facially frivolous.

A. The Anti-SLAPP motions were unwarranted in law because neither the United States nor California Constitutions provide a right to petition tribal governments.

California's anti-SLAPP statute subjects causes of action arising from petitioning acts under "the United States Constitution or California Constitution" to special motions to strike. California Code of Civil Procedure 425.16(b)(1) (the "Anti-SLAPP Statute").

Special motions to strike under the Anti-SLAPP Statute are resolved using a two-prong test. In the first prong, the moving party must show the complained of activity arose from a lawful exercise of petitioning or speech rights under the United States or California constitutions.[10] *Navellier v. Sletten* 29 Cal.4th 82, 88-89 (2002).

Here, the anti-SLAPP motions are frivolous on the first-prong because the tribal court action took place in a tribal court and neither the United States nor California constitutions govern tribal court proceedings.

1. Tribes are not parties to the United States Constitution.

Tribes were not at the constitutional convention and are not parties to the United States Constitution. *Kiowa Tribe of Okla. v. Manufacturing Technologies*

[10] On the second-prong ABI must make a *prima facie* showing with admissible evidence for each element of each cause of action. ABI would succeed on the second-prong, but analyzing the second prong is unnecessary because Appellees' contentions on the first-prong are legally unwarranted.

523 U.S. 751, 756 (1998). Instead of having rights and responsibilities as parties to the United States Constitution, tribes are subject to the plenary authority of Congress. *Santa Clara Pueblo v. Martinez* 436 U.S. 49, 56 (1978).

2. Tribes are not subject to state constitutions.

It is an elementary tenant of Indian law that tribes are not subject to state constitutions. *People ex rel. Owen v. Miami Nation* 2 Cal.5th 222, 233 (2016).

3. California's anti-SLAPP statute does not protect petitioning tribal governments.

Petitioning the French government in a French court is not protected by the Anti-SLAPP Statute because neither the United States nor the California constitutions provide a right to petition foreign governments. *Guessous v. Chrome Hearts* 179 Cal.App.4th 1177, 1185 (2009).

Likewise, petitioning a tribal government in a tribal court is not protected by the Anti-SLAPP Statute because neither the United States nor the California constitutions provides a right to petition a tribal government.

B. This Court should dispose of the Anti-SLAPP motions now.

It is unclear from the district court's order dismissing the anti-SLAPP motions as moot whether the motions were dismissed with prejudice. If this Court remands this case without dealing with the anti-SLAPP motions now, a time-consuming interlocutory appeal is a possible result. Judicial economy would be best served if this Court forecloses renewal of the legally unwarranted anti-SLAPP motions.

Conclusion

Both this Court and the Supreme Court hold sovereign immunity only bars remedies sought against sovereigns. *Maxwell,* 1087; *Lewis,*1288. Here, because no remedy is sought against Blue Lake, Appellees cannot employ sovereign immunity in their defense. Indeed, if Appellees were state or federal employees, it is doubtful they would have even raised sovereign immunity as a defense. Had they done so, it is inconceivable the district court would have granted it. Because the protection afforded by sovereign immunity to tribal employees is no greater than that afforded state or federal employees, Appellees cannot be granted sovereign immunity. *Lewis,* 1291. Transplanting sovereign immunity to an exotic tribal context does not change fundamental nature of sovereign immunity.

The law on judicial immunity cited by Appellees supports this conclusion. Where federal or state judges are sued for their conduct as judges, they do not claim sovereign immunity. Instead, they rely judicial immunity, a defense that is personal to them. The same is true of officials defending themselves in 1983 actions. As a rule, police officers rely on qualified immunity as a defense, and not the sovereign immunity of their state. Even elected officials lack recourse to sovereign immunity as a defense. *See generally* *Hafer v. Melo,* 502 US 2 (1991).

Sovereign immunity is the sovereign's prerogative. Here, there is doubt as to whether Blue Lake wishes to share its sovereign immunity with Appellees. But

there is no doubt that, to whatever extent sovereign immunity is available to Appellees, Blue Lake is free to extend or withhold that immunity at its whim. If sovereign immunity were available as a defense against individual remedies it would lead to the absurd result that whether a defendant is liable for their conduct is determined by a third-party non-litigant with no clear stake in the outcome of the litigation. This would be unfair to plaintiffs, defendants, and the courts. Quite simply, sovereigns lack standing to determine what defenses are available to individuals just as much as individuals lack standing to decide whether an action intrudes upon a sovereign's interests. The available immunities must go with the remedies sought. Where a remedy is sought against a sovereign it is the sovereign's immunities that are available. And where a remedy is sought against an individual it is the individual's personal immunities that are available.

Here, Appellees improperly raised their personal judicial immunity on Rule 12(b)(1) or 12(b)(2). Appellants concede Appellees had the right to raise the immunity on Rule 12(b)(6). But the very novel audacity of Appellees' conduct precludes finding the immunity on Rule 12(b)(6). No court has ever found prosecuting a lawsuit or negotiating a gaming compact on behalf of a litigant is a judicial act. This Court's holdings in *Usher* and *McGary* precluded the district court from being the first to do so on Rule 12(b)(6), especially since Appellants were unable to conduct discovery.

Appellants ask this Court to reverse the district court and find sovereign immunity is not available to the Appellees because they are being sued in their individual capacities, and to find that judicial immunity is not available to Appellees for their conduct as attorneys.

Finally, in the name of judicial economy, ABI asks this Court to find Appellees' anti-SLAPP motions were legally unwarranted.

BLUMBERG LAW GROUP LLP

Dated: 7/27/2020

/s/ Ronald H. Blumberg
Ronald H. Blumberg
Attorneys for Acres Bonusing, Inc.

Dated: 7/27/2020

/s/James Acres
James Acres
Self-represented plaintiff

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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