

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT**

JAMES ACRES,

Plaintiff-Appellant

v.

LESTER MARSTON, et al.,

Defendants-Respondents

**C089344**

**Sacramento County Superior  
Court No. 34-2018-00236829**

Appeal from Order of the Superior Court,  
State of California, County of Sacramento,

The Honorable David Brown, Judge

**RESPONDENTS' OPENING BRIEF**

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## **I. INTRODUCTION**

Defendants and Respondents Boutin Jones Inc., Michael Chase, Daniel Stouder, and Amy O’Neill (“Boutin Jones Defendants”) respectfully request that this Court affirm the Superior Court’s order granting the Boutin Jones Defendants Motion to Quash Service of Summons and Complaint for lack of jurisdiction based on tribal sovereign immunity, dismissing Plaintiff and Appellant James Acres’ (“Acres” or “Appellant”) Complaint in its entirety as to the Boutin Jones Defendants.

The Boutin Jones Defendants represented Blue Lake Casino and Hotel (“Blue Lake Casino”) in a contract dispute with Acres and Acres’ company, ABI, relating to the casino gaming business of Blue Lake Casino. Blue Lake Casino is owned and operated by the federally-recognized Indian tribe Blue Lake Rancheria (“Blue Lake” or “the Tribe”). The Boutin Jones Defendants filed suit against Acres and ABI in the tribal court on behalf of Blue Lake Casino. Respondent Judge Marston served as the Blue Lake Tribal Court’s Chief Judge and was the judge assigned to hear Blue Lake Casino’s complaint against Acres.

After the tribal court action against Acres was filed, Acres then brought two subsequent federal lawsuits against the Tribe, Judge Marston, and various other Tribe respondents seeking to enjoin the tribal court proceedings for lack of jurisdiction and bias. Boutin Jones represented Blue Lake Casino in the tribal court action and the subsequent federal actions until it substituted out of the case in February 2017, at which point it was replaced by Respondent Janssen Malloy.

After the conclusion of the underlying dispute, Acres brought an action in the Superior Court against the Boutin Jones Defendants and other Tribe and attorney Respondents alleging malicious prosecution and related

vicarious tort claims, and alleging that the Boutin Jones Defendants and others aided and abetted the breach of fiduciary duty and constructive fraud of Respondent Judge Marston in his role as the Tribal Court judge overseeing the Blue Lake Casino's action against Acres. In response, the Boutin Jones Defendants filed a motion to quash/dismiss for lack of jurisdiction pursuant to CCP § 418.10, *et seq.*, as well as an anti-SLAPP motion pursuant to CCP § 425.16. The Superior Court granted the Boutin Jones Defendants' motion to quash/dismiss Acres' Complaint, and ruled that the court's finding of no jurisdiction mooted the Boutin Jones Defendants' anti-SLAPP motion.

In granting the motion to quash/dismiss, the Superior Court correctly observed that “[t]he parties’ core dispute is whether, in committing the alleged tortious conduct, the Tribe’s attorneys were functioning as the Tribe’s officers or agents in a manner implicating the Tribe’s sovereignty, or instead the defendant attorneys acted merely as the Tribe’s employees engaged in essentially personal pursuits for their own personal benefit not involving the Tribe’s sovereignty.” (Appellant’s Appendix “AA” 272.)

The Superior Court thoroughly analyzed the law governing this issue and the facts presented by the parties and correctly held:

There is no evidence that the moving defendants acted in their individual capacities for their own private purposes and benefit, or outside the scope of their legal agency, authority and fiduciary duty to the Tribe as tribal officials. Allowing the action to proceed against the Tribe’s attorneys would undoubtedly require the Tribe to act, and would entangle this court in questions of Tribal Court practice and law that would directly impinge the Tribe’s sovereignty. Extending sovereign immunity to the [T]ribe’s attorneys for their acts in the Tribal Court action is supported by *Great W Casinos, Inc.* and *Brown*, and is not in conflict with *Lewis*. Further, extending sovereign immunity to the [T]ribe’s legal counsel would be commensurate with the scope of state sovereign immunity under analogous circumstances.

(AA 277.)

The Boutin Jones Defendants were at all relevant times acting in their official capacities as legal representatives of the Tribe, and all acts were done on behalf of the Tribe, for the purpose of progressing the Tribe's interests. Accordingly, the acts of the Boutin Jones Defendants are the acts of the Tribe and they are protected by the Tribe's sovereign immunity. The Tribe has not consented to suit and has not waived its sovereign immunity, and thus Acres' Complaint must be dismissed.

The Boutin Jones Respondents therefore respectfully ask this Court, upon *de novo* review, to affirm the Superior Court's order granting the Boutin Jones Respondents' motion to quash/dismiss Acres' verified Complaint.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### **A. BLUE LAKE CASINO IS A WHOLLY OWNED AND OPERATED COMMERCIAL ENTERPRISE OF THE BLUE LAKE RANCHERIA, WHICH IS A FEDERALLY RECOGNIZED INDIAN TRIBE**

The Blue Lake Rancheria is a federally recognized Indian Tribe in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria ("Blue Lake" or "the Tribe"). (AA 7.) Under Blue Lake's constitution, the Blue Lake Business Council is the executive political arm of the Tribe. (AA 8.) The Tribal Court of the Blue Lake Rancheria ("Blue Lake Tribal Court") was established by the Blue Lake Business Council under its inherent sovereign authority to establish and operate its own judicial system. (AA 8.) Blue Lake Casino and Hotel ("Blue Lake Casino") is an economic enterprise owned and operated by the Tribe. (AA 8.) Profits from gaming at Blue Lake Casino are deposited directly in the Tribe's general treasury, as required by a gaming ordinance enacted by the Blue Lake Business Council. (AA 8, 14.) The Blue Lake

Casino is the main business of the Tribe. (AA 14.) The verified Complaint admits that Blue Lake is a sovereign nation. (AA 37.)

**B. A CONTRACT DISPUTE AROSE BETWEEN BLUE LAKE CASINO AND APPELLANT ACRES, AND BLUE LAKE CASINO RETAINED BOUTIN JONES TO REPRESENT IT IN THAT DISPUTE**

Plaintiff and Appellant James Acres (“Acres” or “Appellant”) was at all relevant times the owner of Acres Bonusing, Inc. (“ABI”), a Nevada gaming company. (AA 7.) In 2010, Blue Lake Casino and Acres negotiated an agreement whereby Blue Lake Casino would lease an iSlot gaming system from ABI. (AA 16.) The iSlot gaming system is a server-based gaming system that would allow casino patrons to participate in casino gaming from handheld devices while at Blue Lake Casino. (AA 16.)

In 2015, a dispute arose between Blue Lake Casino and Acres and ABI regarding the return of a \$250,000 advance deposit paid to ABI by Blue Lake Casino. (AA 16.) Blue Lake Casino retained Boutin Jones as its legal counsel to represent it in this dispute. (AA 16.)

**C. BOUTIN JONES FILED SUIT AGAINST ACRES IN BLUE LAKE TRIBAL COURT IN ORDER TO PROTECT THE INTERESTS OF BLUE LAKE CASINO**

In January 2016, Boutin Jones, on behalf of Blue Lake Casino, filed a complaint against ABI for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and money had and received; and against Acres personally for fraudulent inducement in the Tribal Court of the Tribe Blue Lake Rancheria, *Blue Lake Casino and Hotel v. Acres Bonusing, Inc. et al.*, Tribal Court Case No. C-15-1215LJM (“*Blue Lake v. ABI*” or “Tribal Court action”). (AA 6, 73, 76.) Acres then filed two federal actions against the Tribe and various tribal defendants seeking to enjoin the Tribal Court action. The Tribal Court action and the

two related federal actions filed by Acres are referred to collectively as the “Underlying Litigation.”

**D. BOUTIN JONES REPRESENTED BLUE LAKE CASINO IN THE UNDERLYING LITIGATION UNTIL BOUTIN JONES SUBSTITUTED OUT OF THE CASE**

Boutin Jones, and Boutin Jones attorneys Daniel Stouder, Amy O’Neill, and Michael Chase (“Boutin Jones Defendants”) represented Blue Lake Casino in the Underlying Litigation until February 2017 when Boutin Jones substituted out of the case. (AA 12, 29.) Defendants and Respondents Janssen Malloy LLP, and Janssen Malloy attorneys Megan Yarnall and Amelia Burroughs (“Janssen Malloy Defendants”) substituted into the case to serve as Blue Lake Casino’s counsel at that time. (AA 12, 29.)

After the Boutin Jones Defendants substituted out of the case, they were no longer involved in the case against Acres in any way. (AA 197.) In July 2017, motion for summary judgment was granted in favor of Acres on the cause of action for fraudulent inducement. (AA 6-7, 52.) On August 31, 2017, *Blue Lake v. ABI* was dismissed in its entirety. (AA 7, 49.)

**E. ACRES FILED THE INSTANT LAWSUIT AGAINST THE BOUTIN JONES DEFENDANTS FOR THEIR ROLE AS ATTORNEYS REPRESENTING BLUE LAKE CASINO IN THE TRIBAL COURT ACTION AGAINST ACRES**

Acres filed the instant complaint on July 13, 2018 in Sacramento County Superior Court, *Acres v. Marston, et al.*, Case No. 2018-34-00236929 against the Boutin Jones Defendants, the Janssen Malloy Defendants, several Blue Lake Casino employees, several Tribal Court employees, and various judges of the Tribal Court including Judge Marston, who presided over *Blue Lake v. ABI* until he recused himself in January 2017. (AA 5, 7-12.)

Acres' first cause of action alleges malicious prosecution against Boutin Jones, Daniel Stouder, and Amy O'Neill for prosecuting the Tribal Court action against Acres. (AA 33.) Acres' second and third causes of action allege aiding and abetting malicious prosecution and conspiracy to commit malicious prosecution, respectively, against Michael Chase. (AA 36, 38.) Acres' fifth and seventh causes of action allege aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud, respectively, against the Boutin Jones Defendants. (AA 43, 45.) These causes of action allege that the Boutin Jones Defendants aided and abetted Judge Marston's alleged breach of fiduciary duty and constructive fraud committed against Acres in the Tribal Court action by failing to reveal Judge Marston's alleged conflict of interest. (AA 43, 45.)

**F. THE BOUTIN JONES DEFENDANTS, AND OTHERS, SUCCESSFULLY BROUGHT MOTIONS TO QUASH/DISMISS ACRES' COMPLAINT FOR LACK OF JURISDICTION BASED ON SOVEREIGN IMMUNITY AND ACRES APPEALED THE TRIAL COURT ORDER GRANTING THE BOUTIN JONES DEFENDANTS' MOTION**

The Boutin Jones Defendants successfully joined in the Janssen Malloy Defendants' motion to quash service of summons and complaint for lack of jurisdiction based on sovereign immunity, which was granted by the trial court. (AA 138, 268.) Acres then filed the instant appeal challenging the trial court ruling granting Janssen Malloy Defendants' and the Boutin Jones Defendants' motion to quash. (AA 292.) The trial court did not grant Acres leave to amend his complaint because "when the Court perceives it has no jurisdiction to proceed, then leave to amend would be inconsistent with the Court's determination, that the Tribal Court, at the end of the day, is the place where this all needs to be addressed." (RT 4:6-17.)

The Boutin Jones Defendants' also filed an anti-SLAPP motion to strike Acres' complaint because Acres' entire complaint against the Boutin Jones Defendants arises out of their representation of Blue Lake Casino in the Underlying Litigation, which is protected petitioning activity under the anti-SLAPP statute. The Boutin Jones Defendants' anti-SLAPP motion was deemed moot because the trial court first determined that it did not have jurisdiction to hear Acres' claims. (RT 3-4.) The trial court instructed at the hearing on the motion to quash, that if its ruling was reversed regarding sovereign immunity, it would then hear the Boutin Jones Defendants' anti-SLAPP motion. (RT 44.)

**G. ACRES' VERIFIED COMPLAINT ESTABLISHES THAT ALL ALLEGED WRONGFUL CONDUCT OF THE BOUTIN JONES DEFENDANTS WAS CONDUCT DONE IN THE COURSE OF THEIR REPRESENTATION OF BLUE LAKE CASINO**

The entirety of the factual allegations of wrongful conduct alleged against the Boutin Jones Defendants in the verified Complaint can be classified as:

- (1) actions taken by Boutin Jones Defendants in representing Blue Lake Casino in its pre-litigation dispute with Acres (AA 10-11, 16, 17);
- (2) actions taken by Boutin Jones Defendants in representing Blue Lake Casino in the Tribal Court action against Acres, including causing pleadings, motions, and other documents to be filed with the Tribal Court and served on Acres in that action, and appearing on behalf of Blue Lake Casino at hearings in the Tribal Court action (AA 10-11, 13, 15, 26, 29, 30);
- (3) actions taken by the Boutin Jones Defendants in representing Blue Lake Casino in the related federal court actions filed against

Blue Lake Casino by Acres, including causing pleadings, motions, and other documents to be filed with the federal court and served on Acres in those action, and appearing on behalf of Blue Lake Casino at hearings in the federal actions (AA 11, 21, 22, 29); and

(4) the Boutin Jones Defendants' representation of the Tribe and/or Blue Lake Casino on other, unrelated matters (AA 21).

**H. THERE ARE NO ALLEGATIONS IN THE VERIFIED COMPLAINT TO SUPPORT A CONCLUSION THAT BOUTIN JONES DEFENDANTS WERE EVER ACTING IN ANY OTHER CAPACITY OTHER THAN IN THEIR OFFICIAL CAPACITY AS COUNSEL FOR BLUE LAKE CASINO AND ANY SUCH ALLEGATIONS WOULD CONTRADICT THE VERIFIED COMPLAINT**

Nowhere in the verified Complaint does Acres allege facts that support the conclusion that the Boutin Jones Defendants were not acting as legal counsel for Blue Lake Casino at all relevant times. Nowhere in the verified Complaint does Acres allege facts that the support the conclusion that the Boutin Jones Defendants were not acting within the scope of their authority given to them by Blue Lake Casino at all relevant times. Nowhere in the verified Complaint does Acres allege facts that support the conclusion that the Boutin Jones Defendants were ever acting in their own self-interests.

Moreover, any allegation that the Boutin Jones Defendants were not acting as Blue Lake Casino's counsel in the Underlying Litigation would directly contradict Acres' allegations in his verified Complaint. (AA 6, 10-11.)

### **III. STANDARD OF REVIEW ON APPEAL**

Whether tribal immunity applies to bar Acres' suit is a question of law reviewed de novo by this Court. (*People ex rel. Owen v. Miami Nation Enterprises* (2016) 2 Cal.5th 111, 250.)

“Where the motion to dismiss is based on a claim of . . . sovereign immunity, which provides protection from suit and not merely a defense to liability, however, the court must engage in sufficient pretrial factual and legal determinations to “ ‘satisfy itself of its authority to hear the case’ before trial.” . . . ’ . . . [W]hen a defendant challenges [] jurisdiction, the burden shifts to the plaintiff to prove the necessary jurisdictional criteria are met by competent evidence in affidavits and authenticated documentary evidence . . . .” (*Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1204.) **The lack of jurisdiction can be shown through the plaintiff’s own pleadings.** (*Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 644 [finding that admission in complaint that individual defendants were acting as agents of the tribe could not be converted]; *Brown, supra*, at pp. 1203-1205.)

### **IV. ARGUMENT**

#### **A. THE TRIAL COURT CORRECTLY CONCLUDED THAT IT HAS NO JURISDICTION OVER THE BOUTIN JONES DEFENDANTS BECAUSE THEY MAINTAIN SOVEREIGN IMMUNITY FOR THEIR ACTIONS AS AGENTS OF THE TRIBE IN THEIR REPRESENTATION OF BLUE LAKE CASINO IN THE UNDERLYING LITIGATION**

##### **1. Blue Lake, and Its Commercial Arm Blue Lake Casino, Enjoy Sovereign Immunity from Suit as an Indian Tribe**

“Indian Tribes [are] ‘distinct, independent political communities,’ [citation], qualified to exercise many of the powers and prerogatives of self-government.” (*Plains Commerce Bank v. Long Family Land & Cattle Co.*

(2009) 554 U.S. 316, 327.) Accordingly, Indian tribes have long been recognized as possessing common law immunity from suit enjoyed by sovereign powers. (*Turner v. U.S.* (1919) 248 U.S. 354, 358.) Absent congressional authorization, “Indian nations are exempt from suit.” (*U.S. v. U.S. Fidelity and Guaranty Co.* (1940) 309 U.S. 506, 512.) Any waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (*U.S. v. Testan* (1976) 424 U.S. 392, 399.)

Judicial recognition of a tribe’s immunity from suit is not discretionary with a Court. (*See People of State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153, 1155.) Rather, absent an effective waiver, the assertion of sovereign immunity by a federally-recognized Indian tribe deprives the Court of jurisdiction to adjudicate the claim:

“Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court. . . . ‘Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.’”

(*Id.* [internal citation omitted].)

Such immunity is jurisdictional in nature and applies “irrespective of the merits of the claim asserted against the tribe.” (*Rehner v. Rice* (9th Cir. 1982) 675 F.2d 1340, 1351.) Tribal immunity applies to commercial activities of the tribe, including a casino if it is an arm of the tribe. (*Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 388-389; *Trudgeon, supra*, 71 Cal.App.4th at pp. 636-642.)

Here, it is undisputed that Blue Lake is a federally recognized Indian Tribe entitled to sovereign immunity. (AA 7.) Further, Acres’ verified

Complaint makes it clear that Blue Lake’s sovereign immunity applies to Blue Lake Casino, as the commercial arm of the Tribe whose profits are deposited directly into the Tribe’s treasury. (AA 8, 14.)

**2. The Tribe’s Sovereign Immunity Extends to the Boutin Jones Defendants Because They Were At All Relevant Times Acting in Their Official Capacity on Behalf of the Tribe and Within the Scope of Their Authority**

Sovereign immunity extends not only to the tribe itself, but also to those agents acting on the tribe’s behalf. Courts have expressly recognized that attorneys acting in their official capacity on behalf of the tribe and within the scope of their authority are protected by tribal immunity. (*Davis v. Littell* (9th Cir. 1968) 398 F.2d 83, 85; *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407.) “Further, at least in our federal circuit, an official need not be a member of the tribe in order to share in its sovereign immunity.” (*Trudgeon, supra*, 71 Cal.App.4th at p. 643; *see also U.S. v. Oregon* (9th Cir. 1981) 657 F.2d 1009, 1012; *Snow v. Quinalt Indian Nation* (9th Cir. 1983) 709 F.2d 1319, 1321.)

In *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, the Second District held that tribal sovereign immunity extended to the tribe’s outside legal counsel (characterized as “non-Indian law firm and general counsel”) in order to protect the tribal defendants’ interests and ensure adequate legal counsel for the tribe. In that case, Plaintiff Great Western Casinos filed suit against the tribe, the tribal council, individual tribal council members, the tribe’s general counsel, an attorney and her private law firm regarding the tribe’s cancellation of a contract. Great Western Casinos alleged that it entered into a gaming

contract with the tribe and the tribe, through its individual members and general counsel, conducted a fraudulent scheme to cancel the contract and cheat Great Western Casinos out of potential profits. (*Id.* at 1413.) The trial court granted the defendants’ motion to quash and dismissed the action based upon tribal sovereign immunity.

The Second District affirmed, finding in relevant part that the non-Indian law firm and general counsel were protected by tribal sovereign immunity from liability predicated upon their actions taken or opinions given in rendering related legal services to the tribe to the same extent of immunity entitled to the tribe, tribal council, and tribe members. (*Great W. Casinos, supra*, 74 Cal.App.4th at pp. 1423–1424.)

With respect to the tribe’s attorney, the court stated:

In providing legal representation—even advising, counseling and conspiring with the tribe to wrongfully terminate the management contract—counsel were similarly immune from liability for those professional services. (See *Davis v. Littell, supra*, 398 F.2d 83, 85 [attorney who advised tribal council regarding the competence and integrity of an employee is immune from liability for defamation under the executive privilege].)

(*Id.* [emphasis added].)

Citing federal case law, *Great W. Casinos* stated with approval that:

“[t]ribes need to be able to hire agents, including counsel, to assist in the process of regulating gaming. **As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney, or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised.** The purpose of Congress in requiring background checks could be thwarted if retained counsel were inhibited in discussing with the tribe what is learned during licensing investigations, for example. **Some causes of action could have a direct effect on the tribe's efforts to conduct its licensing process even where the tribe is not a party.**”

(*Id.* citing *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 550 [emphasis added].)

Applying this rationale, *Great W. Casinos* held that:

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

(*Great W. Casinos*, *supra*, 74 Cal.App.4th at pp. 1423–1424 [emphasis added].)

Here, just as in *Great W. Casinos*, the Boutin Jones Defendants, as attorneys for the Tribe, are immune from liability because the acts done by the Boutin Jones Defendants in the course of representing Blue Lake Casino in Blue Lake Casino’s contract dispute with Acres were done in the Boutin Jones Defendants’ official capacities and within their scope of authority. (*See Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1046 [When tribal officials “act ‘in their official capacity and within their scope of authority,’” they are protected by sovereign immunity because their acts are the acts of the sovereign.].) Acres’ verified Complaint is completely devoid of factual allegations that the alleged acts of the Boutin Jones Defendants were not done on Blue Lake Casino’s behalf, or within the scope of authority granted to the Boutin Jones Defendants by Blue Lake

Casino, or for the Boutin Jones Defendants' own self-interests. Further, any such allegations would directly contradict Acres' own admissions in his verified Complaint.

Moreover, the Boutin Jones Defendants' actions taken on behalf of Blue Lake Casino are entitled to protection by the Tribe's sovereign immunity regardless of Acres' characterization of those actions as "wrongful" or "tortious." (See *Great Western Casinos*, *supra*, 74 Cal.App.4th at pp. 1423-1424; *Littell*, *supra*, 398 F.2d at p. 85.) A tribal official's commission of a tort is not per se an act in excess of authority, and therefore is not necessarily unprotected by immunity. "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law." [Citation.]" (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157; see *Turner v. Martire*, *supra*, 82 Cal.App.4th at p. 1055; *Trudgeon*, *supra*, 71 Cal.App.4th at p. 644.) Even assuming the alleged actions of the Boutin Jones Defendants were tortious as Acres alleges (they were not), these acts are still within the course and scope of the Boutin Jones Defendants' authority granted to it by the Tribe, as the factual allegations of wrongful conduct consist of filing pleadings and attending and making statements at hearings in the Underlying Litigation.

**3. Acres' Argument That the Boutin Jones Defendants Are Not Entitled to Share in the Tribe's Sovereign Immunity Because there Is "No Evidence" Blue Lake Wishes to Share Its Sovereign Immunity Is Not Supported By Case Law**

Acres relies on support from *Twenty-Nine Palms Enters. Corp. v. Bardos* (2012) 210 Cap.App.4th 1435 for the proposition that the Boutin Jones Respondents can only claim sovereign immunity with Blue Lake's permission, and that there is no evidence that Blue Lake wants to share its

sovereign immunity with Respondents. (AOB 25.) *Twenty-Nine Palms* is inapplicable here, and moreover does not stand for the proposition for which it is cited.

In *Twenty-Nine Palms*, a **tribe** filed suit against a contractor for work the contractor performed on Indian lands for the tribe in state court. The contractor defendant's argument in that case was simply the California Business and Professions Code section 7031 relating to valid contractors licenses was not enforceable in a contract with a tribal entity for work done on tribal land. The Court stated, "the United States Supreme Court explained, a tribal entity selecting a state forum is 'very different' from a tribal entity being brought as a defendant to a state forum. [Citation.] The difference . . . is that the sovereign immunity defense is only available to the tribe and its entities." *Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1446. *Twenty-Nine Palms* was dealing with a tribe choosing a state court forum to sue a non-Indian, and the non-Indian asserting sovereign immunity against the tribe. This is not the case here.

Here, Acres, a non-Indian, is suing tribal officials in state court; the Tribe is not choosing to sue Acres in a state court forum. The Boutin Jones Defendants are asserting the sovereign immunity of the Tribe against Acres, not the Tribe. Thus, the principles discussed in *Twenty-Nine Palms* are wholly inapplicable to the instant case. As explained in detail above, the Boutin Jones Defendants were at all relevant times acting in their official capacities on behalf of the Tribe, and are therefore cloaked in the Tribe's sovereign immunity.

**B. THE TRIAL COURT CORRECTLY CONCLUDED THAT *LEWIS* DOES NOT PRECLUDE THE APPLICATION OF TRIBAL SOVEREIGN IMMUNITY TO THE BOUTIN JONES DEFENDANTS IN THE INSTANT CASE, AND THAT ITS HOLDING IS IN ACCORD WITH *LEWIS, GREAT W. CASINOS, AND BROWN***

Acres attempts to characterize his complaint as one against the Respondents in their individual capacities and that he is seeking relief only from them as individuals. Acres believes that by leaving the sovereign off the pleading paper, this Court must ignore the substance of his pleadings, as any examination of the pleadings makes it evident that Acres' complaint is an attack against Blue Lake Casino and the Tribe, and its agents, namely its attorneys, as a result of Blue Lake Casino's suit against Acres. Acres' assertion that a judgment against the Boutin Jones Defendants would not "bind" the Tribe does not control this Court's analysis. The Court "must not simply rely on the characterization in the complaint" but rather determine "whether the remedy sought is truly against the sovereign." (*Lewis v. Clarke* (2017) 137 S. Ct. 1285, 1290-1291.)

In *Brown v. Garcia* (2017) 17 Cal.App.5th 1198, the First District looked to Ninth Circuit authorities and observed that "sovereign immunity will nonetheless apply in appropriate circumstances even though the complaint names and seeks damages only from individual defendants." (*Id.* at 1205 citing *Pistor v. Garcia* (9th Cir. 2015) 791 R.3d 1104, 1113.) *Brown* further explained that "[i]n 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.” (*Brown, supra*, 17 Cal.App.5th at p. 1205 [citations omitted].)

Acres alleges in his verified Complaint that Judge Marston wrongfully assigned the case to himself despite various conflicts of interest; and that the Boutin Jones Defendants wrongfully prosecuted the action against him in Tribal Court, and aided and abetted various alleged wrongful acts of Judge Marston in the prosecution of the action against him in the Tribal Court. Here, as explained in *Brown* and *Great W. Casinos*, failing to extend the Tribe’s sovereign immunity to the Boutin Jones Defendants would compel the state court to determine what actions are permissible in Tribal Court; whether the Tribal Court has followed its own procedures in Tribal Court; and whether an attorney in Tribal Court has misused the Tribal Court’s judicial process. This would be an impermissible impingement on the Tribe’s sovereignty.

The Tribe counsel, in performing their functions for the Tribe, must be free to express legal opinions and give advice unimpeded by fear their relationship with the Tribe will be exposed to examination and potential liability for the advices and opinions given. (*See Great W. Casinos, supra*, 74 Cal.App.4th at pp. 1423-1424.) Refusing to recognize an extension of the Tribe’s sovereign immunity to cover the Boutin Jones Defendants’ advice to the Tribe would jeopardize the Tribe’s interests by creating the possibility that the Tribe’s rationale for pursuing its action against Acres, or any action, will be subject to scrutiny by outside authorities. (*Id.; Littell, supra*, 398 F.2d at p. 85.) Such interference in the Tribe’s sovereignty would also undoubtedly adversely influence counsel’s representation of the Tribe in the future.

Acres argues that the facts of the fairly recent United States Supreme Court case, *Lewis v. Clarke* (2017) 137 S. Ct. 1285, apply here to support the conclusion that sovereign immunity should not be extended to the Boutin Jones Defendants. The key consideration in *Lewis v. Clarke* was the distinction between individual- and official-capacity suits, stating that “[t]he identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity.” (*Id.* at 1292.) In that case, a tribal employee was sued for negligence when he allegedly caused a motor-vehicle accident on an interstate highway not on tribal lands. (*Id.* at 1291.) The employee was shuttling customers for the tribe. The tribe argued that sovereign immunity barred the suit because the driver was a tribal employee driving on tribal business and because the tribe's decision to indemnify its employees meant that a judgment would affect the tribe's finances. (*Id.*)

Acknowledging operative distinction between “personal capacity claims” and “official capacity claims” the United States Supreme Court found the case to be “a negligence action arising from a tort committed by [the employee] on an interstate highway within the State of Connecticut. The suit [was] brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment [would] not operate against the Tribe.” (*Id.* at 1291.) Based upon those specific facts, *Lewis* found that the suit was not against the employee in his official capacity. To the contrary, *Lewis* held that the case was simply a suit against the employee to recover for his personal actions, which would not require action by the sovereign or disturb the sovereign’s property.

The facts of *Lewis* are very different from the facts of the instant case. The tribe employee in *Lewis* did not claim to be an “official” of the

tribe, whereas the Boutin Jones Defendants were acting as the Tribe's fiduciary agent as the Tribe's legal representative in the Tribal Court. The tort alleged in *Lewis* involved a simple vehicle accident that occurred on a state highway, whereas the torts alleged against the Boutin Jones Defendants all occurred in the context of the Tribal Court action and the Boutin Jones Defendants' representation of the Tribe in that action and the related federal actions. Further, the action against the employee in *Lewis* would likely not require that the tribe or tribe officials be summoned as witnesses or necessary parties, whereas the action against the Boutin Jones Defendants directly interferes with the Tribe's prosecutorial efforts and could involve efforts to invade the attorney-client privilege between the Tribe and the Boutin Jones Defendants regarding the action against Acres in Tribal Court.

The employee in *Lewis* was acting within the scope of his employment, but he was not acting in an official capacity at the time of the accident. In *Lewis*, the tribe's responsibility and involvement began and ended with the indemnification of the employee. Here, the Boutin Jones Defendants were acting in their official capacity as the official legal representatives of the Tribe in the Tribal Court and with respect to other communications with Acres. Any act of the Boutin Jones Defendants in representing the Tribe would be considered an act of the Tribe; and any action against the Boutin Jones Defendants for those acts should be considered an action against the Tribe.

Based on the foregoing, the Superior Court was correct in its observation that the finding in *Great W. Casinos* that the tribe's legal counsel functioned as tribal officials does not run afoul of the "official-capacity" "personal-capacity" dichotomy identified in *Lewis*. There are

substantial factual differences between *Lewis* and the instant case, and *Lewis*, *Great W. Casinos*, and *Brown* all support the conclusion that the Tribe's sovereign immunity should extend to the Boutin Jones Defendants as officials of the Tribe acting in their official capacity in this instance. As stated above, non-member attorneys acting in their official capacity on behalf of the tribe and within the scope of their authority are protected by tribal immunity. (*Littell, supra*, 398 F.2nd at p. 85.)

**C. THE TRIAL COURT WAS CORRECT IN GRANTING THE BOUTIN JONES DEFENDANTS' MOTION TO QUASH/DISMISS WITHOUT LEAVE TO AMEND**

Acres argues at length in his Opening Brief that leave to amend his Complaint should have been granted. Acres argues that the Superior Court abused its discretion in quashing the Complaint without leave to amend because there is a reasonable possibility the Complaint could be amended to overcome Respondents' immunity defenses. Acres is wrong.

The Superior Court correctly ruled that Acres' Complaint was dismissed without leave to amend because once the Superior Court determines that it does not have jurisdiction to proceed to hear the case, leave to amend would be inconsistent with the Court's determination that the Tribal Court has jurisdiction over the dispute. (RT 4:13-17.)

Additionally, Acres has alleged in the verified Complaint that Blue Lake is a sovereign Indian Tribe; that Blue Lake Casino is Blue Lake's main business and that profits from the casino are deposited directly into the Tribe's treasury; and that the Boutin Jones Defendants were acting as legal counsel for Blue Lake Casino in the Underlying Litigation. These facts, in conjunction with applicable case law discussed above, establish that Blue Lake's sovereign immunity extends to the Boutin Jones



**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, rule 8.204(c)(1))**

The text of this brief consists of 5972 words as counted by the Microsoft Word version 2013 word processing program used to generate the brief.

Dated: January 27, 2020

\_\_\_\_\_  
/s/  
Nicole A. Deterding

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**  
**(Cal. Rules of Court, rule 8.208)**

There are no interested entities or persons to list in this certificate  
(Cal. Rules of Court, rule 8.208(e)(3)).

Dated: January 27, 2020

\_\_\_\_\_  
/s/  
Nicole A. Deterding

**PROOF OF ELECTRONIC SERVICE (CCP §1010.6)**

I am a citizen of the United States, I am over the age of eighteen years and not a party to the within cause; I am employed in the City and County of San Francisco, California and my business address is One Sansome Street, Ste. 2060, San Francisco, California 94104. My electronic service address is rvernola@lerchsturmer.com. On this date, I served the following documents:

**RESPONDENT'S OPENING BRIEF**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED on January 27, 2020 at San Francisco, California.

\_\_\_\_\_  
Rosemarie Vernola  
(type/print name)

\_\_\_\_\_  
/s/  
(signature)