CASE NO. C089344
IN THE THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

JAMES ACRES,

Plaintiff and Appellant,

v.

LESTER MARSTON, et al.,

Defendants and Respondents.

On Appeal from Sacramento Superior Court
Case No. 34-2018-00236829
The Honorable David Brown, Judge

Appellant's Reply Brief

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Certificate of Compliance

The main body of this brief is approximately 9,500 words long as determined by Microsoft Word. The brief, including footnotes, is composed using a 14-point Times New Roman font.

May 13, 2020

/s/ James Acres
Plaintiff/Appellant

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Tribal Sovereign Immunity is Not Broader than State Sovereign Immunity.

On Reply, this appeal boils down to two fundamental questions: 1) Are any of the Respondents protected by Blue Lake's sovereign immunity? 2) For those Respondents who are not protected by sovereign immunity, are any protected by a personal immunity? These are two independent questions which need to be evaluated individually for each Respondent.

Lewis v. Clarke controls the determination of whether Respondents are protected by sovereign immunity. *Lewis* requires courts evaluate claims of sovereign immunity by tribal employees using the same framework that would be used to determine whether state employees are entitled to sovereign immunity. In deploying the framework, courts must be mindful that . . .

> "The protection offered by tribal sovereign immunity … is no broader than the protection offered by state or federal sovereign immunity." *Lewis v. Clarke* (2017) 137 S. Ct. 1285, 1292.

And so, consider each Respondent independently. If the Respondent were a state employee, would this Court find the Respondent was protected by state sovereign immunity? Where the answer would be no for a state employee, it must also be no for a tribal employee.

The same is true in evaluating whether personal immunities are available to Respondents. Several Respondents claim they are protected by the common law judicial and prosecutorial immunities. These immunities exist to protect specific

functions, and adhere to conduct, not specific employees or officers. *Forrester v. White* (1988) 484 U.S. 219, 225-227. Because the immunities adhere to conduct, it makes no difference whether the immunity is raised by tribal, state, or federal judges or prosecutors. The focus of the inquiry is on the common law understanding of what types of judicial and prosecutorial conduct must be protected in order for courts to function. And so, again, imagine each Respondent individually as a state judge or state attorney. Would this Court find the Respondent is protected by judicial or prosecutorial immunity? Where the answer would be no for a state employee, it must also be no for a tribal employee.

The Verified Complaint is Supported by Respondents' Declarations.

Acres v. Marston's verified complaint lays out the full factual history of this action. Many of the salient facts are supported by Respondent declarations below.

To recap, Blue Lake Casino brought a cause of action for fraudulent inducement against me in *Blue Lake v. Acres.* (AA[1] p76 [Ver. Compl.]; ARA[2] p11 at ¶¶8-9 [Stouder Decl.].) Judge Marston initially presided over the case with help from his associates at Rapport & Marston, even though they were all attorneys for Blue Lake at the time. (AA pp13-14 at ¶¶34-36, p31 at ¶¶121-125 [Ver. Compl.]; AA p147 at ¶31[Marston Decl.].) Being Blue Lake's attorney disqualified Judge

[1] AA = Appellant's Appendix filed with the opening brief.
[2] ARA = Appellant's Reply Appendix filed concurrent with this reply brief.

Marston from presiding over Blue Lake Casino's case against me, and Judge Marston failed to reveal his attorney client relationship with Blue Lake to me. (AA p147 at ¶28 [Marston Decl.].)

The Boutin Jones Respondents initially represented Blue Lake Casino in *Blue Lake v. Acres.* (AA p13 at ¶33, p76 [Ver. Compl]; ARA p11 at ¶¶8-9 [Stouder Decl.].) Boutin Jones and Rapport & Marston have co-operated in representing Blue Lake since 2011. (AA p21 at ¶74.) While Judge Marston presided over *Blue Lake v. Acres,* attorneys from Rapport & Marston and Boutin Jones worked together as Blue Lake's attorneys in litigation against me. (AA p21-22 at ¶¶75-78 [Ver. Compl]; AA p161-162 at ¶¶7-9 [Rapport Decl.]).

After significant federal litigation Justice Lambden became the presiding judge in *Blue Lake v. Acres,* and the Janssen Malloy Respondents replaced Boutin Jones as Blue Lake Casino's attorneys. (AA p29 at ¶¶107-109 [Ver. Compl.]; p95, ¶¶8-9 [Yarnall Decl.]) Justice Lambden granted me summary judgment on the merits, finding that as a matter of law, it was unreasonable to believe I fraudulently induced Blue Lake Casino into entering a contract. (AA p67-70. [Justice Lambden's Order].) Blue Lake Casino's motion papers on summary judgment in *Blue Lake v. Acres*, as well as the statement of undisputed facts, was placed in the *Acres v. Marston* record by the Janssen Malloy Respondents. (AA p99-108, 112-134 [Yarnall Decl.]). Respondents Stouder and O'Neill, from Boutin Jones,

brought declarations below stating that their understanding of the pertinent facts in *Blue Lake v. Acres* matched those put forward by Janssen Malloy on summary judgment. (ARA pp12-13 at ¶¶12 [Stouder Decl.]; ARA 6 at ¶7 [O'Neill Decl.]). The Stouder declaration also describes in some detail Boutin Jones' conversations with Blue Lake regarding the factual basis behind *Blue Lake v. Acres.* (ARA pp12-14 at ¶¶11-13 [Stouder Decl.]).

The Complaint is Verified on Personal Knowledge and Not Information and Belief as Respondents Suggest

Respondents attempt to mischaracterize the complaint as being "verified on information and belief." (RMBL[3] p21 at fn.10.) This is inaccurate. The verified complaint is verified on personal knowledge, under penalty of perjury. (AA p48.) Those few allegations made on information and belief clearly identify themselves as being made on information and belief. (i.e. AA p30 at ¶¶115-117 [allegations regarding residence and use of California highways by Respondents made on information and belief].)

Some of the more salient fact allegations originally made on information and belief have since been clarified. For instance, paragraph 106 of the verified complaint ends by alleging on information and belief that "[Respondent] Rapport

[3] RMBL = The Rapport & Marston/Blue Lake Respondents' brief. The RMBL Respondents did not paginate the cover page of their brief. I cite to the page numbers printed at the bottom margins of the RMBL brief.

represented Blue Lake at [compact negotiation] meetings." (AA p28-29 at ¶106.) Based on filings in other litigation, it is now clear that Judge Marston represented Blue Lake in compact negotiations. (AOB[4] p56-58; See also RJN[5] Exh. 7, 9.) As another example, the verified complaint alleged on information and belief attorneys from Boutin Jones and Rapport & Marston co-operated in drafting briefs for Blue Lake Casino to use against me in litigation. (AA p21-22 at ¶¶71-78.) Rapport admits this happened in his declaration. (AA p161-162 at ¶¶8-10 [Rapport Decl.].)

This Court can rely on the facts alleged in the verified complaint. The vast majority of the allegations are made from personal knowledge. Those few made from informed belief clearly announce themselves as being so made, and are, in any event, only made where a reasonable consideration of facts known from personal knowledge supports informed belief.

Standard of Review

Acres v. Marston's verified complaint (AA p48) can serve as an affidavit and supply the necessary facts to support jurisdiction on a motion to quash. *Shearer v. Superior Court* (1977) 70 Cal.App.3d 424, 430.

[4] AOB = appellant's opening brief.
[5] RJN = The request for judicial notice filed concurrent with the opening brief.

Whether tribal sovereign immunity bars suit is a question of federal law subject to independent review. *People ex rel. Owen v. Miami Nation Enters.* (2016) 2 Cal.5th 222, 250.

Regan v. Price (2005) Cal.App.4th 1491 is the leading case in this District on judicial immunity. Although not explicitly stated, it is clear the *Regan* court treated the application of judicial immunity as a question of law subject to independent review.

Because this appeal arises from an attack on the pleadings this Court must "search the facts to see if they make out a claim for relief under any theory." *Smith v. Commonwealth Land Ins. Co.* (1986) Cal.App.3d 625, 629-630. If the facts present any cause of action for which Respondents might be held liable, even if the cause is not stated in the complaint, this Court must reverse the superior court and allow *Acres v. Marston* to continue.

Arguments in Rebuttal

I. Binding Supreme Court authority bars this Court from finding Respondents are protected by Blue Lake's sovereign immunity.

Respondents argue throughout their briefs they are protected by Blue Lake's sovereign immunity from suit because all of their conduct was within the scope of their tribal employment. The argument is without merit because it has been repeatedly rejected by the Supreme Court.

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

> "…granted 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 tribal 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:

> "That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Lewis v. Clarke* (2017) 137 S. Ct. 1285, 1288.

Whether sovereign immunity is available to tribal employees as a defense is a federal question. *People ex rel. Owen v. Miami Nation Enters.* (*supra*) 2 Cal.5th 222, 250. Because the Supreme Court granted certiorari in *Lewis v. Clarke* to "resolve whether an Indian tribe's sovereign immunity bars individual capacity damages actions against tribal employees," *Lewis* is directly on-point and controlling.

Respondents assert throughout their briefs on appeal they escape *Lewis'* holding "that an employee was acting within the scope of his employment … is not … sufficient to bar a suit" because Respondents were officers instead of mere employees, or because imposing personal liability on Respondents for their conduct might infringe on Blue Lake's sovereignty.

A faithful reading of *Lewis* and its antecedents prohibit this Court from being persuaded by Respondents' assertions. *Lewis* was not decided in a vacuum. *Lewis*

is a straightforward application of the sovereign immunity jurisprudence developed by the Supreme Court to evaluate whether state and federal employees are entitled to sovereign immunity. *Lewis* makes plain 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." *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1290-1292. [6]

Because the Supreme Court has rejected the arguments made by Respondents in the context of state and federal employees seeking the protection of sovereign immunity, this Court is bound by *Lewis* to reject the arguments brought by the tribal employee Respondents today.

A. Respondents' argument "tribal officers acting in their official capacity" are to be distinguished from mere "tribal employees" has no basis in *Lewis* and has been rejected by the Supreme Court as part of its broader sovereign immunity jurisprudence.

In *Lewis v. Clarke,* the Supreme Court found Clarke was not protected by his tribal employer's sovereign immunity for an accident he caused while working as a tribal limousine driver. Respondents observe there are differences between a

[6] 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.

limousine driver and attorneys or government officials, and argue the difference is so great that it becomes doubtful *Lewis'* holding applies to Respondents, who worked as attorneys and other highly skilled professionals. (BJ[7] pp23-24; JM[8] pp26; RMBL p28.) But nothing in *Lewis* even hints that the availability of sovereign immunity to an employee depends on whether the employee is a "worker doing work" as opposed to being an "officer doing official business." Instead, the cases relied upon by *Lewis* to explain sovereign immunity explicitly reject making such a distinction.

In *Hafer v. Melo* (1991) 502 U.S. 21, Hafer was elected Auditor General of Pennsylvania. After winning election, Hafer, in her official role as Auditor General, fired twenty of her employees. The employees brought a §1983 action seeking monetary damages, claiming they were fired because of their support for Hafer's electoral foe. *Id.*, 23. Hafer argued that "state officials may not be held liable in their personal capacity for actions they take in their official capacity." The Supreme Court found her argument both "unpersuasive" and "foreclosed by its prior decisions." *Id.*, 27. This is because . . .

> "…the principle that an agent is liable for his own torts is an ancient one and applies even to certain acts of public officers or public instrumentalities." *Larson v. Domestic Foreign Corp.* (1949) 337 U.S.

[7] BJ = The Boutin Jones Respondents' brief. The BJ Respondents did not paginate the cover page of their brief. I cite to the page numbers printed at the bottom margins of the BJ brief.

[8] JM = The Janssen Malloy Respondents' brief.

682, 687 [internal quotes omitted].

Furthermore, sovereign immunity is a form of absolute immunity, and the Supreme Court has . . .

> "… refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions … [and] … State executive officials are not entitled to absolute immunity for their official actions." *Hafer v. Melo, supra,* 502 U.S. 21, 28-29.

If sovereign immunity protected state officials whenever they acted in their official capacity, then state officials would enjoy precisely what the Supreme Court forbids - absolute immunity for all their official acts.

From these cases it is clear that it is not only possible to sue state officials in their personal capacity without offending the Supreme Court's sovereign immunity doctrine, it is necessary that it be possible to sue state officials in their personal capacity in order to avoid offending the Supreme Court's absolute immunity doctrine.

The sovereign immunity protections available to tribal officers and employees are no broader than the protections available to a state officers and employees. *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1292. Because sovereign immunity does not protect state officials from personal liability for actions taken in their official capacities, this Court must find sovereign immunity cannot protect Respondent tribal officials from personal liability for actions taken in their official capacities.

B. Actions seeking personal money damages are unambiguously personal capacity suits and difficulties in determining whether a sovereign is implicated only arise where specific or prospective relief is sought.

Respondents bring a flurry of argument and allusion to convince this Court that, however styled, *Acres v. Marston* in reality seeks relief from non-party Blue Lake. But *Lewis* makes clear the test for determining whether relief is being sought from a sovereign was enunciated over seventy-years ago. *Larson v. Domestic Foreign Corp.* (1949) 337 U.S. 682 as invoked by *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 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 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 v. Domestic Foreign Corp., supra,* 337 U.S. 682, 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." *Larson v. Domestic Foreign Corp, supra,* 337 U.S. 682, 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." *Larson v. Domestic Foreign Corp, supra,* 337 U.S. 682, 687-688.

This, in a nutshell, is the remedy focused analysis adopted in *Lewis.* Sovereign immunity is not implicated where general 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. *Larson v. Domestic Foreign Corp., supra,* 337 U.S. 682, 688.

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 whoever 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 in its possession a certain quantity of coal and DFCC sought a court order directing the officer responsible for that coal 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 in the possession of 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. *Larson v. Domestic Foreign Corp.* (*supra*) 337 U.S. 682, 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.

Acres v. Marston is entirely different. In *Acres v. Marston* I sue individual people for the individual wrongs I allege they committed against me.

I was victorious on the merits in *Blue Lake v. Acres.* I obtained a judgment from the tribal court that it was unreasonable to believe I fraudulently induced Blue Lake Casino into entering a contract. (AA p70.) Based on that judgment, *Acres v. Marston* brings causes action for wrongful use of civil proceedings against the specific individuals involved in bringing or maintaining *Blue Lake v. Acres.* The only relief sought is general money damages from those individuals. (AA pp33-39.) If I were to learn Ms. Ramsey resigned as CEO of Blue Lake Casino, I would not care. I would not amend my complaint to name Ms. Ramsey's successor as a defendant in *Acres v. Marston* 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 Respondents in their personal capacities.

The same analysis applies to my breach of fiduciary duty causes of action. (AA pp39-47.) Judge Marston failed to inform me he was disqualified[9] from presiding over *Blue Lake v. Acres* because he was Blue Lake's attorney. By failing to inform me of this material fact, I allege Judge Marston breached his fiduciary duty to me. I seek general money damages from Judge Marston for breaching his duty to me, and from those who aided Judge Marston in that breach.

I do not seek relief from Justice Lambden, Judge Marston's successor as presiding judge in *Blue Lake v. Acres,* because Justice Lambden had nothing to do with Judge Marston's breach of fiduciary duty. Nor do I sue the Janssen Malloy Respondents for aiding Judge Marston in his breach of fiduciary duty, even though the Janssen Malloy Respondents succeeded the Boutin Jones Respondents as attorneys in *Blue Lake v. Acres.* This is because even though the Janssen Malloy Respondents were personally involved in wrongfully using civil proceedings against me, I have no evidence the Janssen Malloy Respondents were personally involved in Judge Marston's breach of fiduciary duty. From these facts, it is plain

[9] It bears repeating that Judge Marston himself declares he was disqualified from presiding over *Blue Lake v. Acres* because he was Blue Lake's attorney. (AA p147 ¶28.) This fact is not in dispute.

the breach of fiduciary duty causes of actions are lain against Respondents in their personal capacities.

Under *Larson,* things would be more difficult if I sought specific relief in the form of an order commanding Blue Lake's Casino CEO to deliver me $4,000,000, in crisp $100 bills, directly from Blue Lake Casino's vault, combined with an official apology on behalf of Blue Lake Rancheria and signed by the current Chief Judge and Tribal Chair. To obtain such relief I 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 *Acres v. Marston,* then *Acres v. Marston* would be an official capacity suit.

But that is not the relief sought. I sue individuals for the individual wrongs they committed against me. My complaints cannot be satisfied by stand-ins or successors. If I prevail, no judgement would necessarily trouble Blue Lake or its property. Indeed, Respondents could satisfy any judgment I might obtain without ever even informing Blue Lake or its casino. The superior court erred when it found Blue Lake was the real-party-in-interest in *Acres v. Marston* and that Respondents were therefore protected by Blue Lake's sovereign immunity. This Court must reverse that error.

C. Respondents' argument that imposing personal-liability on tribal employees intrudes on sovereignty because it would inhibit employee effectiveness and impose consequences on the sovereign was rejected by the Supreme Court in *Lewis* and in its broader sovereign immunity jurisprudence.

Respondents suggest that if they are not protected by Blue Lake's sovereign immunity Blue Lake's ability to receive candid advice from its employees will be compromised. (BJ p16; JM p19.) Because *Acres v. Marston* only seeks money damages, Respondents are in essence arguing the threat of financial liability might dampen their zeal to further Blue Lake's interests. The argument is without merit, because if Blue Lake is concerned about this dampened zeal, Blue Lake can indemnify Respondents for any financial liability they might incur in Blue Lake's service.

Lewis held a tribe does not become the real-party-in-interest when it indemnifies employees. This is because the critical inquiry is . . .

> ". . .who may be bound by the court's adverse judgment, not who will ultimately pick up the tab." *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1292-1293.

Here there is nothing in the record to establish whether Blue Lake is indemnifying Respondents. Indeed, there is nothing in the record aside from Respondents' self-interested speculation to suggest Blue Lake is concerned with the outcome of this case at all. Either way, the fact *Acres v. Marston's* outcome might have some negative consequence for Blue Lake is of no moment. If Blue

Lake is indemnifying Respondents, then *Lewis'* holding is directly on point, and sovereign immunity does not flow from indemnification. If Blue Lake is not indemnifying Respondents, then any dampened zeal on Respondents' part is simply a risk Blue Lake has willingly accepted. *Duckworth v. Franzen* (7th Cir. 1985) 780 F.2d 645, 651 [noting increased salary costs resulting from the choice not to indemnify state employees does not implicate sovereign immunity]. Indeed, if we presume Blue Lake desires its employees refrain from tortious conduct, a sensible policy would be to rely on the heightened sense of self-preservation exposing employees to personal to liability would promote. But regardless of Blue Lake's position on indemnification and tortious conduct by its employees, *Lewis* forbids this Court from finding Respondents are cloaked in Blue Lake's sovereign immunity simply because Blue Lake might "ultimately pick up [some portion of] the tab." *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1293.

Lewis is not an outlier in this holding. In *Hafer,* Pennsylvania's Auditor General explicitly argued she must be protected by sovereign immunity because "imposing personal liability on officeholders may infringe on state sovereignty by rendering government less effective." *Hafer v. Melo, supra,* 502 U.S. 21, 29. The Supreme Court rejected the argument, even as it recognized . . .

> "…imposing personal liability on state officers may hamper their performance of public duties" because "such concerns are properly addressed within the framework of our personal immunity jurisprudence." *Hafer v. Melo, supra,* 502 U.S. 21, 31.

Lewis and the rest of the Supreme Court's sovereign immunity jurisprudence forbid this Court from finding Respondents are protected by Blue Lake's sovereign immunity unless Blue Lake itself is bound in judgment. Because Blue Lake would not be bound by any judgement in *Acres v. Marston,* this Court must find Respondents cannot be protected by sovereign immunity.

D. There is no reason allowing *Acres v. Marston* to continue will require action by Blue Lake or efforts to intrude upon its affairs because the record developed to date can sustain all the causes of action.

I argued in my opening brief the record from the tribal court is sufficient to sustain my wrongful use causes of action. (AOB pp38-40.) Instead of addressing these arguments head-on Respondents rely on unsupported speculation. The RMBL Respondents suggest *Acres v. Marston* will "likely require action by the Tribe … and could involve efforts to invade the privileged interactions between the tribe and its legal counsel." (RMBL pp25-26.) And the Janssen Malloy and Boutin Jones Respondents assert "the possibility the Tribe's rationale for pursuing its action against Acres . . . will be subject to scrutiny by outside authorities" requires Respondents be cloaked by sovereign immunity. (JM p25; BJ p21.)

Respondents' assertions and speculations are unfounded because of the wealth of evidence placed in the record by Respondents, and irrelevant because Blue Lake's reasons for pursuing *Blue Lake v. Acres* do not bear on any element of any cause of action in *Acres v. Marston*.

The only elements of the wrongful use causes of action of *Acres v. Marston* that are in dispute are 1) Whether Respondents had reasonable grounds to pursue the fraudulent inducement cause of action against me in *Blue Lake v. Acres*, and 2) Whether Respondents pursued that cause of action for some reason other than prevailing on the merits.

Respondent Yarnall voluntarily placed into the record of *Acres v. Marston* the undisputed facts, argument, and summary judgment for the fraudulent inducement cause of action in the tribal court. (AA pp99-136 [Yarnall Decl.]). And, in his superior court declaration, Respondent Stouder voluntarily described his attorney-client discussions with Blue Lake employees regarding the fraudulent inducement cause of action. (ARA pp12-14 at ¶¶11-13). Because Respondents themselves voluntarily provided this wealth of evidence to the superior court, it seems improbable any further discovery will be required from Blue Lake to prove the "no reasonable grounds" or "improper purpose" elements on the wrongful use causes of action.

The same holds true for the breach of fiduciary duty and constructive fraud causes of action. Judge Marston himself declared to the superior court that he was disqualified from presiding over *Blue Lake v. Acres* because he was Blue Lake's attorney, and that he failed to inform me he was Blue Lake's attorney. (AA p147 at ¶28). The only questions that remain are whether Judge Marston had fiduciary

duty to me as a judge, and whether he breached that duty by engaging in non-judicial conduct. Because Judge Marston relies exclusively on state and federal common law in arguing he is entitled to judicial immunity (RMBL pp34-44), it seems likely these questions can be answered without troubling Blue Lake.

Finally, Blue Lake Casino's reasons for pursuing *Blue Lake v. Acres* against me with its attorney Judge Marston presiding are irrelevant to any of the causes of action in *Acres v. Marston.* Because Blue Lake is not a defendant in *Acres v. Marston* there is no need to explore Blue Lake's motivations for any of its actions.

But let us assume that, for the sake of the argument, as litigation progresses, I need to obtain some discovery or compel some act from Blue Lake in order to prevail. At that time, Blue Lake will be free to refuse its co-operation based on its sovereign immunity. But until such events come pass there is no reason to presume Blue Lake's co-operation will be both necessary and unavailable.[10]

This Court cannot allow Respondents' motion to quash to stand on the dubious speculations that Blue Lake might someday prove an unwilling and indispensable party.

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[10] Tribal government priorities, like state government priorities, change with elections. Even if the Court were to believe Respondents represent the opinion of Blue Lake's government today, there is no reason to assume Blue Lake's policy goals will remain the same at some misty date in the future should joining Blue Lake to the action prove necessary.

E. *Brown v. Garcia* is easily distinguishable and does not control.

Respondents rely heavily on *Brown v. Garcia* (2017) 17 Cal.App.5th 1198 throughout their briefs. But nothing in Respondents briefing is responsive to my argument that *Brown* is easily distinguished as being decided as an intra-tribal dispute case as opposed to a sovereign immunity case. (AOB pp35-38.) I stand by my argument that *Brown* is best understood as an intra-tribal dispute case. And it is worth noting *Brown,* a first district opinion, does not control this Court.

But even read as a sovereign immunity case, *Brown* is easily distinguishable from *Acres v. Marston*. In *Brown,* plaintiffs' cause of action required a California court provide specific relief in the form of finding a tribal council erred in determining plaintiffs had committed crimes meriting tribal disenrollment. *Brown v. Garcia (supra)* 17 Cal.App.5th 1198, 1206-1207. This moves *Brown* closer to *Larson*, only instead of directing a government official to dispose of surplus coal according to a court order, the *Brown* plaintiffs sought a court order countermanding a determination by government officials that plaintiffs committed crimes worthy of disenrollment. In both cases the nub of the problem is that the court is asked to direct the sovereign's policy through direction of the sovereign's officers.

Acres v. Marston is easily distinguishable because I do not seek to overturn any tribal governmental decision. I seek to use the tribal court's judgment that the

fraudulent inducement cause of action against me was unreasonable as an element in my wrongful use causes of action. I am not asking a California court to second-guess the tribal court's judgment. I am asking a California court to accept the tribal court's judgment at face-value and apply it to my causes of action.

The same analysis applies to my breach of fiduciary duty and constructive fraud causes of action. Nothing in the record suggests a Blue Lake official has determined it is permissible for a judge to preside over his client's case while concealing the fact from opposing litigants. Instead, we have a declaration from Judge Marston, who was Chief Judge of Blue Lake's tribal court, stating that he was disqualified from presiding over *Blue Lake v. Acres* because he was Blue Lake's attorney. (AA p147 at ¶28.) I am not asking a California court to countermand a finding made by a Blue Lake official. I am asking a California court to evaluate a cause of action in refence to the facts as declared by a defendant to that cause of action.

This Court should not be persuaded by *Brown* to find Respondents are protected by sovereign immunity because, unlike the relief sought in *Brown,* the relief sought in *Acres v. Marston* does not require a California court direct the action or countermand the findings of any Blue Lake governmental officer.

F. *Great Western Casinos* is easily distinguishable, does not control, and would need to be decided differently post-*Lewis*.

Respondents rely heavily on *Great Western Casinos v. Morongo Band* (1999) Cal.App.4th 1407.[11] *Great Western* was decided in the second district and therefore does not control this Court today.

In *Great Western* a group of tribal officials and attorneys were sued for their role in terminating Great Western's casino management contract. The *Great Western* court found the tribal officials were protected by Morongo's sovereign immunity because they acted within the scope of their employment. *Great Western v. Morongo, supra,* Cal.App.4th 1407, 1421-1423. This holding does not survive *Lewis* because *Lewis'* second paragraph plainly holds . . .

> ". . . that an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1288.

Great Western would need to be decided differently today with respect to the tribal employees because *Great Western's* "scope of employment" test is directly overruled by *Lewis*.

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[11] In conjunction with *Great Western,* Respondents also rely on *Davis v. Littell* (9th Cir. 1968) 398 F.2d 83 and *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536. For simplicity, I address the line of cases as a whole through citations to *Great Western.*

The *Great Western* court also found the tribe's attorneys were protected by sovereign immunity for their part in counseling Morongo to terminate Great Western's management contract. The *Great Western* court reasoned that "counsel must be free to express legal opinions and give advice unimpeded by fear . . . [of] potential liability for the advice and opinions given." *Great Western v. Morongo, supra,* Cal.App.4th 1407, 1423-1424. As discussed above, this line of reasoning is overruled by *Lewis* because it inconsistent with *Larson* and *Hafer.* The fact that negative consequences might flow to a tribal employer if tribal employees are exposed to personal tort liability is not sufficient to extend sovereign immunity to the tribal employees because . . .

> ". . . the critical inquiry is who may be bound by the court's adverse judgment, not who will ultimately pick up the tab." *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1292-1293.

Great Western would need to be decided differently today with respect to the tribal attorneys because that portion *Great Western* is directly overruled by *Lewis.*

Finally, *Great Western* is very different from *Acres v. Marston.* The *Great Western* attorneys were sued for expressing legal opinions and giving advice directly to a tribe's governing council with regards to the termination of a management contract. This is distinguishable from *Acres v. Marston* where the Respondent attorneys are sued for their conduct in wrongfully pursuing civil proceedings in *Blue Lake v. Acres* on behalf of a commercial enterprise, and for

their conduct in suborning Judge Marston. Even if *Great Western* weren't overruled by *Lewis* it would be error for this Court to be guided by *Great Western* today, because in *Great Western* the attorneys were sued for giving legal advice to a tribal government, and not for their own independently tortious conduct in pursuing a lawsuit on behalf of a paying client.

G. The entity Respondents cannot be protected by sovereign immunity under *Owen.*

The Entity Respondents – Rapport & Marston, Boutin Jones, and Janssen Malloy – ignore entirely the argument they are not entitled to sovereign immunity under the test developed by the California Supreme Court in *People ex. rel. Owen v. Miami Nations Enterprises* (*supra*) 2 Cal.5th 222, 236. (AOB pp27-28.) This Court is bound by *Owen.* Under *Owen,* the Entity Respondents have the burden to show they are entitled to sovereign immunity using *Owen's* five-factor test. Because the Entity Respondents have not even attempted to meet this burden, *Owen* precludes this Court from finding the Entity Respondents are protected by Blue Lake's sovereign immunity.

H. The record does not support a conclusion that casino lawyer Respondents Stouder, O'Neill, Yarnall, and Burroughs were functioning as Blue Lake governmental officers in *Blue Lake v. Acres.*

As shown above, whether Respondents were acting as "employees" or "government officials" is not relevant to the sovereign immunity analysis under *Lewis* or the Supreme Court's broader sovereign immunity jurisprudence. But

even if it were the case government officials have more claim to sovereign immunity than do employees, the record does not support a conclusion that every Respondent functioned as an official in Blue Lake's tribal government. Instead, the record, as seen from Respondent declarations, shows Respondents Stouder, O'Neill, Yarnall, and Burroughs were employed as attorneys for a commercial casino enterprise.

In his declaration below, Respondent Stouder tells us he was retained by "Blue Lake Casino & Hotel," and he confirms *Blue Lake v. Acres* was filed on behalf of the casino, and not the tribe. (ARA p10 at ¶4, p11 at ¶¶8-9.) In her declaration below, Respondent O'Neill also confirms she was retained by "Blue Lake Casino & Hotel." (ARA p5, ¶4.) Respondent Yarnall declares that she and Respondent Burroughs were also retained by "Blue Lake Casino & Hotel." (AA p95 at ¶9.)

Respondents Stouder, O'Neill, Yarnall and Burroughs all describe themselves as for-hire attorneys representing a commercial enterprise. This presents a stark contrast with Respondent Judge Marston, whose declaration describes his employment as being that of "Chief Judge of the Tribal Court" (AA p142, ¶1), and with Respondent Rapport, whose declaration describes his employment as being that of "Tribal Attorney for the Tribe" (AA p160, ¶3).

If Respondents Stouder, O'Neill, Yarnall, and Burroughs really were tribal officers, then they should have described themselves as such in their declarations.

Because Respondents Stouder, O'Neill, Yarnall, and Burroughs all describe themselves as contract attorneys working from general services law-firms for a commercial customer, a finding that these Respondents were instead "tribal officers" is unsupportable.

I. The record does not support a conclusion that Respondents DeMarse, Vaughn, Burrell, and Lathouris were functioning as Blue Lake governmental officers because Respondents Rapport and Judge Marston hired them as contractors.

Respondent Judge Marston declares that he "contracted" with Respondents Vaughn, Burrell, and Lathouris to "do legal research and prepar[e] drafts of Tribal Court memorandum of decisions and orders." (AA p147, ¶31 [Marston Decl.].) Respondents make no attempt to explain how this "contracting" work conferred any official status on Vaughn, Burrell, or Lathouris. Furthermore, Judge Marston's judicial services contract explicitly forbids him from assigning any interest in the judicial services contract to third-parties without the prior written consent of Blue Lake's Tribal Council. (AA pp153-154, ¶9 [Marston Decl.].) There is nothing in the record to show Judge Marston obtained Blue Lake's prior written consent before "contracting" with Vaughn, Burrell, and Lathouris.

Respondent Rapport declares that Respondent DeMarse did not provide legal services to Blue Lake in *Blue Lake v. Acres.* (AA 162, ¶10.) But Judge Marston's billing records show DeMarse did bill for work Judge Marston in *Blue Lake v. Acres.* (AA p246 ["CMD" is the billing code for "Cooper DeMarse"].) There is

nothing in the record to suggest DeMarse performed this work as an officer of Blue Lake Rancheria.

Because there is nothing in the record to suggest Respondents DeMarse, Vaughn, Burrell, and Lathouris were tribal officials, but instead there is evidence in the record forbidding Judge Marston from contracting with Respondents DeMarse, Vaughn, Burrell, and Lathouris, a finding that these Respondents were "tribal officers" is unsupportable.

J. Judge Marston's advocacy work on behalf of Blue Lake exceeded the scope of his employment under his judicial services contract.

Judge Marston asserts his actions were all within the scope of his employment, and therefore protected by sovereign immunity. (RMBL 27-30.) As shown above, under *Lewis* and the Supreme Court's broader sovereign immunity jurisprudence, whether Respondents were acting within the scope of their employment is not relevant to the sovereign immunity analysis. But even if it were relevant, Judge Marston's own declaration shows his legal advocacy work exceeded the scope of his judicial services contract.

As part of his judicial services contract, Judge Marston "covenant[ed] that he ha[d] no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of his services" as a tribal court judge. (AA pp150-151 at ¶2 [describing services]; AA pp153-154 at ¶9 [covenant].) By Judge Marston's own admission, his advocacy work disqualified

him from being the judge in *Blue Lake v. Acres.* (AA p147 at ¶28; see also RJN Exh. 7, 9.) Because Judge Marston admits he performed work expressly forbidden by his judicial services contract, a finding all his work was within the scope of his employment under his judicial services contract is unsupportable.

K. If this Court looks past *Lewis,* the California Supreme Court held sovereign immunity is not available to tribal defendants committing off-reservation torts.

This Court should not look past *Lewis* and its controlling "who-may-be-bound" test in determining whether Respondents are protected by Blue Lake's sovereign immunity. But if this Court does look past *Lewis*, on-point California Supreme Court precedent holds tribal defendants committing off-reservation torts are not protected by sovereign immunity. *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157-1159.

In *Boisclair* a tribe wished to exclude outsiders from using a portion of a road traversing Indian land. To accomplish this goal members of the tribe collaborated with a group non-Indians to erect a barricade across a portion of the road outside the reservation. The outsiders sued, seeking injunctive and declaratory relief to guarantee their right to use the road to traverse tribal land. The outsiders also sought compensatory and punitive damages for the harm caused by the barricade erected on and preventing access to non-Indian land. *Boisclair v. Superior Court, supra,* 51 Cal.3d 1140, 1145-1147.

The California Supreme Court held the outsiders' application for injunctive and declaratory relief for access to the portion of the road traversing the reservation was barred by sovereign immunity. However, the cause of action for compensatory and punitive damages for conduct outside the tribe's reservation was not barred by sovereign immunity. This is because . . .

> ". . . the authority of a tribal government to act beyond the confines of its own territory is severely circumscribed" and, therefore "The sovereign power of Indian tribes to act on land that is neither tribal land nor within the confines of a reservation is a fortiori minimal." *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157-1159.

Here, almost all of Respondents' conduct presumptively took place at their offices, which are outside of tribal land. The Rapport & Marston Respondents are located in Mendocino county, Nevada, and Arizona. (AA pp9-10 at ¶¶16-21.) The Boutin Jones Respondents are located in Sacramento. (AA pp10-11 at ¶¶22-25.) The Janssen Malloy Respondents are located in Eureka. (AA pp11-12 at ¶¶26-29; AA 99 [Eureka address in upper-left corner of filing].) Two of the three tribal court hearings took place in Oakland. (AA p30 at ¶115.) Even when Respondents undertook conduct on tribal land, they needed to traverse hundreds of miles of California highways to get there. (AA p30 at¶¶116-117.) And finally, nearly all of the harm caused by Respondents was suffered in California. (AA p7 at ¶6.) In short, because Respondents caused harm to a Californian from off-reservation

locations in California sovereign immunity is not available to Respondents under *Boisclair*.

This result is in line with other recent federal Supreme Court precedent besides *Lewis*. For instance, the opening brief discussed how, in *Michigan v. Bay Mills Indian Community* (2014) 134 S. Ct. 2024, the Supreme Court recommends civil actions against tribal employees and executives to ensure tribal compliance with state law for off-reservation conduct. (AOB 60-61.) In one of *Bay Mills'* footnotes, the Supreme Court explicitly rejected the argument that pursuing remedies against tribal officers offends sovereign immunity. *Bay Mills* (supra) 134 S. Ct. 2024, 2035 fn.7.

This Court must follow *Lewis* and find Respondents cannot be protected by sovereign immunity because no judgment against Respondents would be legally binding on Blue Lake. But even if *Lewis* does not control, the California Supreme Court holdings in *Boisclair* and *Owen* also preclude extending sovereign immunity to Respondents.

II. Respondents make no serious attempt to argue the intra-tribal dispute doctrine precludes a California court from hearing *Acres v. Marston.*

The opening brief on appeal argued the intra-tribal dispute doctrine does not bar *Acres v. Marston* because *Acres v. Marston* is in essence a dispute between Californians. (AOB 28-42.) The only attempt Respondents make in opposing

these arguments is to assert that California courts are only authorized to recognize judgments issuing from tribal courts at the request of a tribal sovereign. (RMBL pp33-34.) Respondents fail to cite any authority to support their assertion that deciding whether a California court can recognize a judgment issuing from a foreign court requires an inquiry into who the judgment favors.

Tribal court judgments, like all foreign judgments, are presumptively enforceable under the principles of comity. *Wilson v. Marchington* (9th Cir. 1997) 127 F.3d 805. These principles are based on the respect one nation grants the "legislative, executive, or judicial acts of another nation." Under this framework, courts should only refuse to recognize foreign judgments when recognizing a judgment "would be contrary or prejudicial to the interest of the nation called upon to give [the judgment] effect." *Id.*, 809-810.

Here, *Acres v. Marston* ended in a judgment that was favorable to a Californian. California courts should recognize tribal court judgments so long as they are not contrary or prejudicial to the interests of California. Because it is neither contrary nor prejudicial to the interests of California to recognize a foreign judgment favoring a Californian, this Court should recognize the judgment in *Acres v. Marston* and allow causes of action based upon that judgment to proceed.

Indeed, recognizing the tribal court judgment in *Blue Lake v. Acres* would strengthen tribal courts as institutions capable of resolving disputes between

parties. This is because the courts of a sovereign cannot be considered as strong or just if the court's judgments are only valid when they please the sovereign.

III. Respondents have not attempted to show the acts identified in the Opening Brief are judicial acts under the test this Court established in *Regan v. Price*.

This Court established a test for determining whether an act is protected by judicial immunity in *Regan v. Price.* Specifically, whether "it is a function normally performed by a judge and to the expectation of the parties." *Regan v. Price* (2005) Cal.App.4th 1491, 1499.

The opening brief on appeal argued there are six broad categories of conduct Respondents engaged in that are not entitled to judicial immunity under *Regan,* or under Supreme Court authority:

1) Acting as an attorney for a litigant. (AOB 43.)
2) Hiring a litigant's attorneys to work as law-clerks. (AOB 43-44.)
3) Assigning a case to be judged by a litigant's attorney. (AOB 45-45.)
4) Paying a litigant's attorneys. (AOB 45.)
5) Working as a prosecutor on behalf of a litigant. (AOB 46.)
6) Corrupting a judge in favor of a litigant. (AOB 46-48.)

Respondents do not explain in their briefs how any of these categories of conduct are "functions[s] normally performed by a judge and to the expectation of the parties." Nor do Respondents deny they undertook the conduct described above. Instead, Respondent Judge Marston's own declaration admits undertaking significant portions of the conduct. (AA p147 at ¶¶28-29, 31.)

Judicial immunity is an absolute immunity. Officials claiming an absolute immunity have the burden of showing they are entitled to the immunity. *Forrester v. White* (1988) 484 U.S. 219, 224. Because Respondents have not attempted to explain how being an attorney for a litigant is "a function normally performed by a judge and to the expectation of the parties" this Court cannot find Respondents have met their burden to show they are entitled to judicial immunity.

IV. Respondents' assertion of prosecutorial immunity is a red-herring.

Respondents do not attempt to refute any of the specific arguments in the opening brief regarding prosecutorial immunity. (AOB 48-52.) Those arguments all provide firm ground for the Court to find Respondents are not entitled to prosecutorial immunity. In addition to the arguments raised in the opening brief, Respondents can be denied prosecutorial immunity because their arguments and declarations show none of the Respondents are entitled to prosecutorial immunity for the causes of action alleged in *Acres v. Marston.*

A. The only Respondents granted prosecutorial immunity below fail to argue they are entitled to prosecutorial immunity on appeal.

The opening brief pointed out that the superior court granted the Janssen Malloy and Boutin Jones Respondents prosecutorial immunity as an alternative source of immunity even though those Respondents never argued they were entitled to the immunity. (AOB 48-49.) These Respondents did not address prosecutorial immunity in their briefs on appeal. Because these Respondents have never

articulated why they are entitled to prosecutorial immunity, or even asserted that they are entitled to prosecutorial immunity, this Court may decline to grant them prosecutorial immunity out of hand.

B. The only Respondents who argue for prosecutorial immunity on appeal failed to secure prosecutorial immunity below, or to cross-appeal.

The opening brief pointed out that the superior court declined to extend prosecutorial immunity to Respondents Rapport, Burrell, Vaughn, DeMarse, Lathouris and the entity Rapport & Marston. (AOB pp48-49.) These Respondents all now argue on appeal they are entitled to prosecutorial immunity, even though they failed to cross-appeal from the judgment below. (RMBL pp44-46.) Because these Respondents are attempting to expand their rights under the judgment below without first cross-appealing this Court may decline to grant them prosecutorial immunity out of hand.

C. Prosecutorial immunity cannot protect Respondents Rapport, DeMarse, Vaughn, Burrell, Lathouris or the entity Rapport & Marston for conduct in the civil-tort suit *Blue Lake v. Acres* from the facts in the record.

Several Rapport & Marston Respondents argue on appeal they are protected by prosecutorial immunity because prosecutorial immunity can apply in "civil or administrative contexts." (RMBL pp45-46.) But Respondents fail explain how they can be entitled to prosecutorial immunity on the facts put forward in declarations by Respondents Rapport and Judge Marston.

Rapport specifically denies that he or DeMarse provided any legal services in *Blue Lake v. Acres.* (AA pp162 at ¶10.) Significantly, it is undisputed DeMarse billed Blue Lake for work in *Blue Lake v. Acres.* (AA p32 at ¶125; p246.) Because Rapport states any involvement by Rapport or DeMarse had in *Blue Lake v. Acres* was non-legal in nature, their involvement in *Blue Lake v. Acres* cannot be protected by prosecutorial immunity.

Judge Marston declares Respondents Vaughn, Burrell, and Lathouris all performed legal research and drafted judicial orders and opinions in *Blue Lake v. Acres.* (AA p147 at ¶31.) This Court cannot find Respondents are protected by prosecutorial immunity for their work performing legal research and drafting orders and opinions for a judge.[12]

V. Leave to amend should be granted because the complaint can be amended to allege Blue Lake does not wish to share its sovereign immunity with Respondents, and to allege criminal causes of action.

Even if this Court finds immunities bar action against Respondents under the operative complaint, the opening brief brought several arguments as to why leave

[12] This section should not be read to argue specific Rapport & Marston Respondents limited themselves to specific types of roles. For instance, DeMarse worked under Rapport as an attorney, and Judge Marston billed out work from DeMarse in managing *Blue Lake v. Acres.* (AA p161 at ¶7; p246). I argue Rapport & Marson functioned as a busy boutique law-practice, where work was shared and billed freely between associates.

to amend should be granted. (AOB pp53-60.) Respondents fail to address these arguments head-on, and instead rely on bald assertions the complaint cannot be amended to further attack the basis for their immunities.

Leave to amend should be granted for all the reasons articulated in the opening brief. (AOB pp53-60.)

Respondents main line of defense is that they are protected by Blue Lake's sovereign immunity. Key to Respondents' defense is their assertion Blue Lake intends to share its sovereign immunity with Respondents. This assertion is unsubstantiated in the record and Respondents make no attempt to explain this lack of substantiation. The complaint could be amended to allege Blue Lake does not intend to share its sovereign immunity with Respondents, thereby compelling Respondents admit the allegation, or refute it with competent evidence.

Furthermore, Respondents do not address the argument that their conduct was plainly unlawful and therefore unprotected by sovereign immunity. (AOB pp58-60.)

Tribal employment does not confer immunity from personal liability for intentionally tortious conduct.

Respondents are, for the most part, Californians who undertook conduct in California. They used California bar numbers. They worked from computers in offices regulated by California building codes, using electricity regulated by the California Public Utilities Commission. When their work required them to travel,

Respondents used roads maintained by California. When their work required Respondents to rely on legal authority, Respondents swore declarations under California law, and Respondents cited cases decided by California courts. And all of Respondents' conduct was aimed at a California resident.

Despite all of this, Respondents argue they are immune from personal liability under California law because they were employed by a tribe. If this view prevails, then California is powerless to protect its residents against the predatory instincts, or casual indifference, of foreign sovereigns. But California is not powerless to protect its residents.

Even if Blue Lake wishes to share its sovereign immunity with Respondents, a proposition for which we have no evidence, Respondents' argument cannot survive the ancient maxim that agents are liable for their own torts. *Larson v. Domestic Foreign Corp, supra,* 337 U.S. 682, 687. This maxim is a pillar of the Supreme Court's sovereign immunity jurisprudence, and applies equally to federal, state and tribal employees. *Lewis v. Clarke, supra,* 137 S. Ct. 1285, 1290-1292.

States are not helpless when an immune sovereign pursues an illegal policy on state land. The Supreme Court recommends states impose personal liability on the immune sovereign's employees as a method to ensure state law is upheld on state land. *Michigan v. Bay Mills* (supra) 134 S. Ct. 2024, 2035 fn.7.

There is nothing unusual or untoward about Respondents being liable under California law for conduct that took place in California and was aimed at a Californian. To find otherwise would mean whenever tribal policy collided with state law on state land, states would need to give way to the tribal interest. This is not the law.

Nor is there anything uniquely tribal about the personal immunities raised by Respondents. Judicial immunity and prosecutorial immunity are common-law immunities, rooted in Anglo-American jurisprudence. To the extent Respondents rely on these immunities, they rely on non-tribal law.

I do not dispute that Respondents were employed by Blue Lake. Instead, I allege each Respondent, all three law-firms and all fourteen individuals, performed their work for Blue Lake in a tortious fashion. It seems probable Respondents only behaved as they did because they believed they were protected by absolute sovereign immunity. This is precisely why the Supreme Court deems absolute immunity to be . . .

> ". . . strong medicine, justified only when the danger of officials being deflected from the effective performance of their duties is very great." *Forrester v. White, supra,* 484 U.S. 219, 230 [brackets omitted].

No court has ever held the strong medicine of absolute immunity is necessary to protect lawyers pursuing civil-tort suits on behalf of a casino. And no court has

ever found the strong medicine of absolute immunity needs to protect judges who work as paid legal advocates for parties to cases they preside over.

I ask this Court to reverse the superior court's error granting the motions to quash, and to allow this case to proceed to the merits. To whatever extent this cannot be done, I request leave to amend.

May 13, 2020

/s/ James Acres
Plaintiff/Appellant

Certificate of Word Count

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I reside in the county of San Diego, State of California. My business address is 1106 2nd #123, Encinitas, CA 92024. My electronic service address is james@kosumi.com.

On May 13, 2020, I filed from Encinitas, CA the *Appellant's Reply Brief* in the appeal Third District Court of Appeal case *Acres v. Marston et. al,* civil case number C089344.

The main body of the *Appellant's Reply Brief* was 9,503 words long.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 14, 2020 at Encinitas, California.

James Acres

Supplemental Service Certificate

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I reside in the county of San Diego, State of California. My business address is 1106 2nd #123, Encinitas, CA 92024. My electronic service address is james@kosumi.com.

On May 14, 2020, I served from Encinitas, CA the *Appellant's Reply Brief* and *Appellant's Reply Appendix* in the appeal Third District Court of Appeal case *Acres v. Marston et. al,* civil appeal number C089344 on the Superior Court of Sacramento via postal mail to 720 9th Street, Sacramento, CA 95814.

This service supplements the service I made on May 13, 2020 on the Court of Appeal and on the Respondents to the case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 14, 2020 at Encinitas, California.

James Acres