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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

EXC, Inc., a Nevada corporation, d/b/a  
Express Charters and D.I.A. Express, Inc.;  
Conlon Garage, Inc., a Colorado corporation;  
Go Ahead Vacations, Inc., a Massachusetts  
corporation; Russell J. Conlon, and; National  
Interstate Insurance Company,  
Plaintiffs,

v.

Jamien Rae Jensen, individually, and as parent  
and next friend of D. J. J., and as Personal  
Representative of the Wrongful Death Estate  
of Corey Johnson; Chavis Johnson,  
individually, and as Personal Representative of  
the Wrongful Death Estate of Butch Corey  
Johnson; Margaret Johnson and Frank  
Johnson, individually, and as parents and next  
friends of H. J. and D. J.; Francesca Johnson,  
individually; Justin Johnson, individually;  
Raymond Jensen, Sr., individually; Louise R.  
Jensen, individually; Nicole Jensen,  
individually; Ryan Jensen, individually; Justin  
Jensen, individually; Katrina Jensen,  
individually; Raymond Jensen, Jr.,  
individually, and; Murphy Jensen,  
individually; the Navajo Nation; the Kayenta  
District Court; the Navajo Nation Supreme  
Court; and Judge Jennifer Benally, a judge of  
the Kayenta District Court,  
Defendants.

NO. CV 3:10-cv-08197-PCT-JAT

**JENSEN DEFENDANTS' REPLY  
TO PLAINTIFFS' RESPONSE TO  
MOTION TO EXTEND  
DISCOVERY CLOSURE DATE  
AND DISPOSITIVE MOTIONS  
DEADLINE**

**Oral Argument Requested**

**COME NOW**, Defendants Jamien Rae Jensen et al. (hereinafter Jensen Defendants), by and through their attorneys of record, and in reply to EXC Plaintiffs' Response to their Motion to Extend the Discovery Closure Date and the Dispositive Motions Deadline, state as follows:

In their Response, EXC Plaintiffs state that they "do not contest the Jensen Defendants' request to continue the August 31, 2011 dispositive motion deadline because the deadline likely will pass before the Court rules on their Motion to Dismiss". To correct Plaintiffs' statement, the Court's Rule 16 Scheduling Order sets forth a September 02, 2011 deadline for filing dispositive motions, not August 31, 2011.

Jensen Defendants request an extension of the discovery closure date until February 03, 2012, or later depending on when the Court schedules hearings and issues rulings on Plaintiffs' pending motions. Jensen Defendants request an extension of the deadline for filing dispositive motions until thirty (30) days following the new proposed discovery closure date – February 03, 2012 – or until March 02, 2012.

Jensen Defendants request an extension of the discovery closure date but only in the event the Court denies Jensen Defendants' Motion to Dismiss for Failure to Exhaust Tribal Court Remedies. Contrary to EXC Plaintiffs' assertion, Jensen Defendants do identify, in their Motion to Dismiss for Failure to Exhaust Tribal Court Remedies, the areas in which further discovery is necessary in order allow a full record to be developed on facts bearing on jurisdiction:

- 1) Facts related to the status of the land on which the collision in the underlying case arose—U.S. Highway 160—and establishing that it is *not* "land covered by *Montana's* main rule" but in fact is distinguished from the state highway at

issue in *Strate* with respect to a number of relevant factors, including the applicability of retained treaty rights, the federally designated purpose for construction of the highway, the shared responsibilities of tribe and state over maintenance of the highway, and the Navajo Nation's regulatory jurisdiction over commercial touring activities that take place on roadways with the Navajo Reservation's boundaries. *Montana v. United States*, 45 U.S. 544 (1981) and *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997). See pp. 15-16 of Memorandum in Support of Jensen Defendants' Motion to Dismiss Without Prejudice.

- 2) Facts tending to establish that one or both of the *Montana* exceptions to its general rule apply in this case: that EXC Litigants entered into a consensual relationship with the Navajo Nation and that the Navajo Nation's regulatory and adjudicatory authority over EXC Litigants' tortious conduct "is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). See pp. 9-10 of Memorandum in Support of Jensen Defendants' Motion to Dismiss Without Prejudice.

In their Reply To Plaintiffs' Response to Defendants' Motion to Dismiss, which will be filed soon and timely in accordance with Federal Rules of Civil Procedure and Local Rules, Jensen Defendants further identify facts that are as yet undetermined, that are yet in dispute, and that are essential to any subsequent post-exhaustion review by this Court and required for *any* sound and final jurisdictional ruling in this case.

An extension of the discovery closure date is necessitated by the late entry into

this litigation of the Navajo Court Defendants. At the time of the February 14, 2011 Rule 16 Scheduling Conference, the Navajo Court Defendants had not yet been served or joined as parties Defendant in this litigation. Accordingly, the Court indicated that it would liberally consider requests for an extension of the August 1, 2011 discovery closure date after the Navajo Court Defendants were properly joined. The Navajo Court Defendants, while expressing the belief that any further fact-finding must take place in the Navajo Nation courts, concur with Jensen Defendants' Motion to Extend the Discovery Closure Date until February 03, 2011.

Again in stating inaccurately that "the Jensen Defendants have not identified any specific discovery that they require that could not have been accomplished to date", EXC Plaintiffs imply that Jensen Defendants have somehow neglected to pursue their needed discovery in the time permitted by this Court. EXC Defendants fail to mention that they and the Jensen Defendants, in accordance with the plan set forth in the Joint Proposed Case Management Plan, sought to stipulate to facts bearing on the jurisdictional issue that they believed had been established, with the express purpose of avoiding further discovery of facts bearing on the jurisdictional question. Jensen Defendants relied too on assurances that the Navajo Court Defendants' late entry into this litigation would justify an extension of the discovery closure date.

On April 09, 2011, Jensen Defendants first transmitted to EXC Plaintiffs a proposed List of Proposed Stipulations. The parties' good faith efforts to arrive at stipulations as to facts and documents broke down on or about July 27, 2011, four days prior to the discovery closure date. The proposed stipulations discussions largely broke down because Plaintiffs did not agree that such facts had been established in the Navajo

District Court, and would not agree to entry of stipulations in the same.

Because of the unique procedural history of this case, there have been no factual determinations made by the Kayenta District Court. Because of the parties' failure to enter into stipulations to be entered in the Kayenta District Court and the instant Court, there is no factual record available for this Court to review. Without any opportunity to conduct discovery this Court, and any Appellate Court, will have a defective factual record on review.

That the parties were not able to arrive at such stipulations indicates that many of the facts required for post-exhaustion review by this Court and for *any* sound and final jurisdictional ruling in this case are not conclusively determined by the Navajo Nation courts and are yet in dispute.

**WHEREFORE**, the Jensen Defendants move this Court for an Order extending the August 01, 2011 discovery closure date until February 03, 2012, or later depending on when the Court schedules hearings and issues rulings on Plaintiffs' pending motions, and extending the September 2, 2011 deadline for filing dispositive motions until thirty (30) days following the new proposed discovery closure date – February 03, 2012 – or until March 02, 2012.

Respectfully submitted,

MICHAEL J. BARTHELEMY, ATTORNEY AT LAW, P.C.

August 26, 2011

s/ Michael J. Barthelemy

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LAW OFFICES OF GEOFFREY R. ROMERO

August 26, 2011

s/ Geoffrey R. Romero

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I hereby certify that on this 26th day of August, 2011, I electronically transmitted and mailed by first class mail, postage prepaid, a true and correct copy of the foregoing document to:

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s/ Michael J. Barthelemy  
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