

**BOUTIN JONES INC.**

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION**

BLUE LAKE RANCHERIA, et al.,	)	<b>Case No.: 2:11-cv-01124 JAM-JFM</b>
	)	
Plaintiffs,	)	<b>Judge: Hon. John A. Mendez</b>
vs.	)	<b>Courtroom: 6</b>
	)	<b>Date: June 4, 2014</b>
MARTY MORGENSTERN, et al.,	)	<b>Time: 9:30 a.m.</b>
	)	
Defendants.	)	<b>Date of Filing: April 26, 2011</b>
	)	<b>Date of Trial: Not set</b>

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF  
PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

1 Plaintiffs Blue Lake Rancheria (“the Tribe”), Blue Lake Rancheria Economic  
 2 Development Corporation (“EDCo”), and Mainstay Business Solutions (“Mainstay”) (collectively,  
 3 “plaintiffs”) respectfully submit this reply memorandum of points and authorities in further  
 4 support of their Motion for Leave to File a First Amended Complaint (“Motion”).

5 Defendant’s only argument in opposition to the Motion is that new proposed claim for  
 6 injunctive relief pursuant to 42 U.S.C. § 1983 (“section 1983”), denominated the “Third Claim for  
 7 Relief” in the [Proposed] First Amended Complaint, is futile. Futility is a difficult legal standard  
 8 to meet, as this court has explained in the past:

9 “The test for futility is identical to the one used when considering the sufficiency  
 10 of a pleading challenged under Rule 12(b)(6). Accordingly, a proposed  
 11 amendment is futile only if no set of facts can be proved under the amendment to  
 12 the pleading that would constitute a valid and sufficient claim or defense.”

13 *Kuschner v. Nationwide Credit, Inc.*, 256 F.R.D. 684, 687 (E.D. Cal. 2009) (granting motion to  
 14 amend pleading and reasoning, *inter alia*, “[resolution] requires the types of credibility  
 15 determinations and weighing of evidence quintessentially performed by a fact-finder”); *see also*  
 16 *Miller v. Rykoff-Sexton*, 845 F.2d 209, 214 (9<sup>th</sup> Cir. 1988) (“Questions of fact must be resolved to  
 determine whether a settlement occurred.”).

17 Plaintiffs’ section 1983 claim is not futile because they have stated sufficient facts to  
 18 constitute a valid claim. Because the claim is based on enforcement of their due process rights,  
 19 and not on their assertion of sovereign immunity, it is permitted by federal law. Moreover, the  
 20 evidence submitted by defendants in their Opposition does nothing to resolve the factual issue of  
 21 whether defendants were afforded their due process rights with respect to the deprivation of  
 22 property at issue in the new proposed Third Claim for Relief.

23 **A. Plaintiffs’ proposed section 1983 claim is not barred because it does not arise from**  
 24 **the defendants’ sovereign status.**

25 Defendants argue that plaintiffs’ section 1983 claim is precluded by *Inyo County*,  
 26 *California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* (“Inyo”),  
 27 538 U.S. 701, 708-712 (2003) and *Skokomish Indian Tribe v. U.S.* (“Skokomish”), 410 F.3d 506,

1 514 (9<sup>th</sup> Cir. 2005). Their quotations and summaries of those two cases, however, confirm the  
 2 governing rule: a tribe is barred from pursuing a section 1983 claim only if the claim is based  
 3 solely on the tribe's sovereign immunity. *See* Defendants' Opposition to Plaintiffs' Motion for  
 4 Leave to File First Amended Complaint ("Opposition"), p. 5, lines 14-18 ("a tribe is not a person  
 5 capable of bringing a claim under section 1983 *for violation of a sovereign prerogative*") (quoting  
 6 *Skokomish*, 410 F.3d at 514, emphasis added) and lines 25-28 ("It is *only* by virtue of the Tribe's  
 7 asserted 'sovereign' status that it claims immunity from the County's processes ....") (quoting  
 8 *Inyo*, 538 U.S. at 711-712, emphasis added). Accordingly, because the government action in *Inyo*  
 9 and *Skokomish* was allegedly wrongful *only* by virtue of the tribes' sovereign immunity, the  
 10 section 1983 claims were barred.

11 Plaintiffs here do not allege in the proposed Third Claim for Relief that defendants' acts of  
 12 serving Notices of Levy and recording notices of state tax liens violated section 1983 due to  
 13 sovereign immunity. Rather, the proposed section 1983 claim alleges that the conduct was  
 14 wrongful because it deprived the Tribe and EDCo of property without due process. Any private  
 15 person levied on behalf of another taxpayer (as the Tribe and EDCo were here) could assert this  
 16 claim, regardless of whether he, she, or it has sovereign immunity. *See Capitol Industries-EMI,*  
 17 *Inc. v. Bennett*, 681 F.2d 1107, 1119 ("A nontaxpayer that has stated a claim with respect to an  
 18 assessment or collection is entitled to a judicial remedy in which they can participate."). The Tribe  
 19 and EDCo are, therefore, "persons" for the purpose of pursuing their new section 1983 claim in  
 20 this case.

21 Defendants have confused matters by submitting numerous facts regarding defendants'  
 22 sovereign status and past occasions on which they have asserted sovereign immunity. *See*  
 23 *Opposition*, pp. 4-7 (e.g., "[b]ut for the Tribe asserting its sovereign rights, Mainstay would not  
 24 have been eligible to participate in the State's Unemployment Insurance Reimbursable Program.").  
 25 These facts are irrelevant. Regardless of whether plaintiffs have previously asserted sovereign  
 26 immunity for other purposes, including for other causes of action in this case, that is not the basis  
 27 of their section 1983 claim in this case.

1 The section 1983 claim is not futile because Plaintiffs are entitled to enforce their due  
2 process rights, regardless of the incidental fact that they have sovereign immunity.

3 **B. Defendants' evidence does not defeat plaintiffs' new proposed section 1983 claim**  
4 **as a matter of law.**

5 Defendants have also submitted selective evidence to show that plaintiffs' section 1983  
6 claim is futile as a factual matter. Defendants are presumably attempting to prove that defendants  
7 were not, in fact, deprived of due process. However, the submitted facts relate to previous tax  
8 assessments against Mainstay in 2003, not the assessment underlying the wrongful liens created  
9 against defendant's property in April 2011. As show below, that dispute was resolved, and is  
10 irrelevant to whether defendants were afforded due process before plaintiff served the Notices of  
11 Levy and recorded the notice of state tax liens against their property.

12 Specifically, defendants point to the fact that the Tribe and Mainstay filed a petition for  
13 review of several 2003 assessments by the EDD. Opposition, p. 4, lines 24-27. They omit the fact  
14 that the petition was eventually granted. Declaration of Martin Swindell in Opposition to  
15 Plaintiffs' Motion for Preliminary Injunction ("Swindell Decl."), ¶ 7 and Exhibit 6, p. 7. They also  
16 omit the fact that a subsequent 2006 assessment was later paid in full and the slate was wiped  
17 clean. *Id.* at ¶¶ 9, 10. The proceedings related to the 2003 assessments, therefore, have no bearing  
18 whatsoever on whether the Tribe and EDCo were afforded due process in 2011 in connection with  
19 defendants' later tax claim against Mainstay.

20 Defendants' evidence fails to establish that there is no set of facts through which plaintiffs'  
21 can prove their section 1983 claim. *See Kushner*, 256 F.R.D. at 687. They have failed to show  
22 that plaintiffs' section 1983 claim is "futile." Thus, no grounds exist to deny plaintiffs' leave to  
23 file an amended complaint, and this Motion should be granted.

**CONCLUSION**

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Leave to File First Amended Complaint.

Dated: May 28, 2014.

BOUTIN JONES INC.

By: /s/ Robert R. Rubin  
Robert R. Rubin

Attorneys for Plaintiffs Blue Lake Rancheria, Blue  
Lake Rancheria Economic Development Corp. and  
Mainstay Business Solutions