BOUTIN JONES INC.
Daniel S. Stouder, SBN 226753
dstouder@boutinjones.com
Amy L. O'Neill, SBN 294458
aoneill@boutinjones.com
555 Capitol Mall, Suite 1500
Sacramento, CA 95814-4603
Telephone: (916) 321-4444
Facsimile: (916) 441-7597
Attorneys for Blue Lake Casino & Hotel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES ACRES,

Plaintiff,

v.

BLUE LAKE RANCHERIA TRIBAL COURT, *et al.*,

Defendants.

Case No. 3:16-cv-02622-WHO

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

[Fed. R. Civ. Proc. 12(b)(1)-12(b)(2)]

Date: July 20, 2016
Time: 2:00 p.m.
Courtroom: 2
Judge: William H. Orrick

TO PLAINTIFF JAMES ACRES, IN PRO PER:

PLEASE TAKE NOTICE that, on July 20, 2016 at 2:00 p.m., or as soon thereafter as the matter may be heard in the courtroom of the Honorable William H. Orrick, Judge of the United States District Court for the Northern District of California, Courtroom 2, floor 17, located at 450 Golden Gate Avenue, San Francisco, CA 94201. Defendant Blue Lake Casino & Hotel ("BLC&H"), which is wholly owned and operated by the Blue Lake Rancheria ("Tribe"), a federally recognized Indian tribe, shall make a special appearance for the purpose of moving the Court, pursuant to Fed. R. Civ. Proc. 12(b)(1), for an order dismissing Plaintiff's complaint in its entirety for lack of subject matter jurisdiction and pursuant to Fed. R. Civ. Proc. 12(b)(2) for an order dismissing Plaintiff's complaint in its entirety for lack of personal jurisdiction

The motion is made on the following grounds: (1) BLC&H is wholly owned and operated by the Tribe and, therefore, it enjoys sovereign immunity from unconsented suit absent congressional abrogation or waiver of that immunity; (2) no such abrogation or waiver has occurred with regard to this case; (3) the Tribal Court is a governmental subdivision of the Tribe and is similarly cloaked in the same immunity enjoyed by the Tribe and BLC&H; (4) the Tribe's sovereign immunity extends to Lester J. Marston, as Chief Judge of the Tribal Court, and Anita Huff, as Clerk of the Tribal Court, who, at all times relevant to this action, have acted in their official capacities and within the scope of their authority; and (5) Acres has failed to exhaust his Tribal Court remedies and an exception to the exhaustion rule does not apply.

This motion is based on all pleadings and papers already on file herein, the memorandum of points and authorities filed in support of this motion, the declarations of Thomas Frank, Robert Pollard, Anita Huff, and Yasmin Frank filed in support of this motion, and such other pleadings, papers, argument, or evidence that may be introduced prior to or at the hearing on this motion.

Dated: June 2, 2016

BOUTIN JONES, INC.

By: */s/ Daniel S. Stouder*
Daniel S. Stouder
Amy L. O'Neill
Attorneys for Blue Lake Casino & Hotel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(2) the Blue Lake Casino & Hotel ("BLC&H"), which is wholly owned and operated by the Blue Lake Rancheria ("Tribe"), a federally recognized Indian tribe, by and through undersigned counsel, moves to dismiss the complaint filed herein by Plaintiff James Acres ("Acres") for lack of personal jurisdiction, lack of subject matter jurisdiction, and for failure to exhaust tribal court remedies.

This action involves a lawsuit filed by the Tribe, by and through BLC&H, against Acres in the Tribal Court for the Blue Lake Rancheria ("Tribal Court Action"). The Tribal Court Action stems from a written agreement ("Agreement") between the BLC&H and Acres's company, Acres Bonusing Inc. ("ABI"), wherein ABI agreed to develop gaming software for the Tribe's use at BLC&H.[1] In the Tribal Court Action, Acres and ABI, who are litigating *pro se*, have routinely neglected to conform their pleadings to the Tribal Court's Rules of Pleading, Practice and Procedure. Notwithstanding Acres' and ABI's disregard of the Tribal Court Rules, the Tribal Court has accommodated Acres and ABI by extending the time for them to file responsive pleadings. Significantly, as of the date of this motion, the Tribal Court has not made a determination as to whether the Tribal Court's exercise of jurisdiction over Acres or ABI in the Tribal Court Action is proper.

In this brief, the Tribe demonstrates that: (1) BLC&H is wholly owned and operated by the Tribe and, therefore, enjoys sovereign immunity from unconsented suit absent congressional abrogation or waiver of that immunity; (2) no such abrogation or waiver has occurred with regard to this case; (3) the Tribal Court is a governmental

[1] The Tribal Court complaint names both Acres and ABI as defendants, though Acres is only named as a defendant in the Fraudulent Inducement cause of action. The federal court complaint was filed solely by Acres as an individual, though he directs the allegations on behalf of both himself and ABI. BLC&H therefore address both as well.

subdivision of the Tribe and is similarly cloaked in the same immunity enjoyed by the Tribe and BLC&H; (4) the Tribe's sovereign immunity extends to Lester J. Marston, as Chief Judge of the Tribal Court, and Anita Huff, as Clerk of the Tribal Court, who, at all times relevant to this action, acted in their official capacities and within the scope of their authority; and (5) Acres has failed to exhaust his Tribal Court remedies and no exception to the exhaustion rule applies.

STATEMENT OF FACTS

The relevant facts of this case are set forth in the declarations of Thomas Frank, Robert Pollard, Anita Huff, and Yasmin Frank filed in support of the Tribe's motion to dismiss for lack of jurisdiction. For the Court's convenience, the Tribe will not repeat the facts here, but rather, incorporates them by this reference as if set forth here in full.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY BARS THIS ACTION IN ITS ENTIRETY.

As a federally recognized Indian tribe, the Tribe is entitled to sovereign immunity from unconsented suit absent congressional authorization or waiver. The Tribe's sovereign immunity from suit extends to BLC&H, the Tribal Court, Judge Marston, and Clerk Huff. None of the defendants has waived sovereign immunity from suit and Congress has not abrogated the Tribe's immunity. Consequently, the Court lacks jurisdiction and the case must be dismissed. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The sovereign immunity of an Indian tribe is coextensive with that of the United States itself, *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1050 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985), and thus extends to

governmental and commercial activities whether they occur on or off of a reservation. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred.... Nor have we yet drawn a distinction between governmental and commercial activities of a tribe.... Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Id. at 754-55.

The doctrine of tribal sovereign immunity includes an action against a tribal court and its tribal court judge when serving in his official capacity. *See United States v. Yakima Tribal Court of the Yakima Indian Nation and David Ward, Tribal Judge*, 806 F.2d 853, 861, *citing Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th Cir. 1985) [recognizing that, while tribal sovereign immunity would bar an action against a tribal court and its tribal court judge acting in his official capacity, it does not bar such an action by the United States].

Inclusion of an Indian tribe on the Federal Register list of federally recognized tribes is generally sufficient to establish a tribe's entitlement to sovereign immunity. *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F.Supp.2d 952, 955 (N.D. Cal. 2011); *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 957 (E.D. Cal. 2009); *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997).

Moreover, it must be recognized that "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Chemehuevi*, 757 F.2d at 1047, fn. 6 (internal citations omitted); *Rehner v. Rice*, 678 F.2d 1340, 1351, *rev'd on other grounds*, 463 U.S. 713 (1983) [tribal sovereign immunity applies "irrespective of the merits" of the claim asserted against the tribe]. Rather, it presents a pure jurisdictional question. *Chemehuevi* at 1051.

Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. *See Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Snow v. Quinalt Indian Nation*, 709 F.2d 1391, 1321 (9th Cir. 1983); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Hardin*, 779 F.2d at 479-480; *Davis v. Littel*, 398 F.2d 83, 84 (9th Cir. 1968). Thus, "a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials[.]" *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). "'[T]he interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself.'" *Id., citing Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462 (10th Cir. 1989). Accordingly, "a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d at 1296.

"Tribal officials" are not limited to political officials, but include all employees of a tribe if acting within the scope of their employment. *See Cook v. AVI Casino. Enters., Inc.*, 548 F.3d 718, 727 (9th Cir.2008). Although the doctrine of sovereign immunity as applied to officials is not absolute and is subject to certain exceptions, including the *Ex Parte Young* doctrine, an *Ex Parte Young* action requires an allegation of an ongoing violation of federal law. *BNSF Ry. Co. v. Ray*, 297 Fed. Appx. 675, 676 (9th Cir. 2008) (unpublished).

While tribal sovereign immunity may be waived by an Indian tribe or abrogated by Congress, any such abrogation must be unequivocally expressed and is to be narrowly construed. *Santa Clara Pueblo*, 436 U.S. at 58 [a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."]. *Accord, C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ["To abrogate tribal immunity, Congress must 'unequivocally' express that

purpose."]; *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) ["[T]ribal sovereign immunity remains intact unless surrendered in express and unequivocal terms."].

The requirement that the waiver be "unequivocally expressed" is not a "requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). "In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.*

Moreover, the Ninth Circuit has held that "[t]here is a strong presumption against waiver of tribal sovereign immunity[.]" *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). It is "the plaintiff"—not the defendant—who "bears the burden of showing a waiver of tribal sovereign immunity." *Hall v. Mooretown Rancheria*, 2013 U.S. Dist. Lexis 81446, *citing Ingrassia*, 676 F.Supp.2d at 956-57.

Like tribal waivers of sovereign immunity, congressional abrogation cannot be implied. *See Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) [holding that an abrogation of tribal sovereign immunity by Congress cannot be determined by implication and must be expressly stated]; *C&L Enterprises., Inc.*, 532 U.S. at 418 ["To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."].

Here, the Tribe is included on the list of federally recognized tribes promulgated by the Bureau of Indian Affairs, Department of the Interior, 81 Fed. Reg. 5020 (Jan. 29, 2016). Request for Judicial Notice ("RJN"), Request No. 1. As such, it enjoys tribal sovereign immunity from unconsented suit and cannot be sued without its consent. The Tribe conducts gaming on its tribal trust lands pursuant to the "Tribal-State Compact

Between the State of California and the Blue Lake Rancheria" and pursuant to the requirements of the IGRA. *See* RJN, Request No. 2, 65 Fed. Reg. 31189 (May 16, 2000) (Notice of Approved Tribal State Compacts); *see also* Declaration of Thomas Frank in Support of Motion to Dismiss ("Frank Decl."), ¶2. The Tribe operates its casino and hotel under the name "Blue Lake Casino & Hotel". Frank Decl., ¶¶1 & 2. In short, BLC&H is the Tribe. Thus, because BLC&H is the Tribe, it is also immune from suit. *Ingrassia*, 676 F.Supp.2d at 957.

Similarly, the Tribal Court, as a governmental subdivision of the Tribe established pursuant to the Tribe's Constitution, Art. V, Sec. 6 (n), is cloaked in tribal sovereign immunity. Declaration of Yasmin Frank in Support of Motion to Dismiss, ("Yasmin Frank Decl."), ¶4, Ex. A. Finally, both Judge Marston and Clerk Huff, as tribal officers acting in their official capacities, are cloaked in the Tribe's sovereign immunity and cannot be sued absent consent or waiver.

Acres has provided no allegations nor can he provide evidence that a waiver of tribal sovereign immunity exists. Nor has Acres shown that Congress has waived tribal sovereign immunity for the purpose of this action. This is so because there has been no waiver or congressional abrogation of the Tribe's immunity from suit.

As demonstrated by the above, the Tribe and the Tribal Court enjoy sovereign immunity from suit. Judge Marston and Clerk Huff are cloaked in that immunity as officers and employees of the Tribe. There has been no waiver of sovereign immunity and Congress has not abrogated tribal sovereign immunity for purposes of this action. As a consequence, the Court lacks jurisdiction over all of the defendants and must dismiss the Complaint in its entirety.

II. EX PARTE YOUNG DOES NOT SAVE ACRES' CLAIMS AGAINST JUDGE MARSTON AND CLERK HUFF.

This suit cannot proceed against Judge Marston and Clerk Huff under an *Ex Parte Young* theory. Avoiding the barrier of tribal sovereign immunity through *Ex Parte*

Young requires that an action seek "prospective relief against tribal officers allegedly acting in violation of federal law." *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds by Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

Here, there can be no allegation that Judge Marston and/or Clerk Huff are acting in violation of federal law because Judge Marston has not yet made a determination regarding whether the Tribal Court has jurisdiction over Acres and/or ABI and none of the orders issued by the Tribal Court otherwise violates federal law. *See* Complaint, Exhibits 13, 16, & 17. It is, moreover, indisputable that the Tribal Court may take the actions required to gather the information needed to make the legal determination as to whether the Tribal Court may properly exercise jurisdiction over Acres and/or ABI: "It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction...." *United States v. United Mine Workers*, 330 U.S. 258, 292 (1947), *citing Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). "'Jurisdiction to determine jurisdiction' refers to the power of a court to determine whether it has jurisdiction over the parties to and the subject matter of a suit. If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993), *citing* 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3536 at 535 (2d ed. 1984).

As is the case with federal jurisdiction—where "the federal court may either have to determine the facts, as in contested citizenship, or the law, as whether the case alleged arises under a law of the United States," *United Mine Workers*, 330 U.S. at 292—the Tribal Court has jurisdiction to determine its own jurisdiction by extricating and examining the relevant facts and law. The Tribal Court's engagement in the requisite fact-finding and legal determinations necessary to determine its own

jurisdiction does not, therefore, violate federal law. Thus, an *Ex Parte Young* theory is inapplicable to this case.

The only conceivable claim that *Ex Parte Young* allows for a circumvention of tribal sovereign immunity in this case would require an unequivocal demonstration that Tribal Court jurisdiction is not colorable. As discussed in Section III (b), below, Acres has not come close to establishing that there is no such colorable claim of Tribal Court jurisdiction. Accordingly, the *Ex Parte Young* doctrine does not apply to this case and tribal sovereign immunity, therefore, bars this suit against all the defendants.

III. THIS CASE MUST BE DISMISSED BECAUSE ACRES HAS FAILED TO EXHAUST HIS TRIBAL COURT REMEDIES.

A. *Acres Has Not Even Allowed The Tribal Court To Determine Its Own Jurisdiction*

Under applicable federal law, Acres is required to exhaust his Tribal Court remedies before this Court can address whether the Tribal Court may properly exercise jurisdiction over Acres. *National Farmers Union Insurance Co. v. Crow Tribe of Indian,* 471 U.S. 845, 856 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991). Acres' Complaint flies in the face of this principle.

"As a matter of comity…federal courts generally decline to entertain challenges to a tribal court's jurisdiction until the tribal court has had a full opportunity to rule on its own jurisdiction." *Elliott v. White Mountain Apache Tribal Ct.,* 566 F.3d 842, 844 (9th Cir. 2009). *See Iowa Mut. Ins. Co.,* 480 U.S. at 16-17. "The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction: 'Exhaustion *is required* before such a claim may be entertained by a federal court.'" *Burlington Northern R. Co.*, 940 F.2d at 1245, *citing National Farmers Union*, 471 U.S. at 857 (emphasis in original). The Supreme Court has said that "federal

policy…*directs* a federal court to stay its hand," and "proper respect… *requires*" tribal remedy exhaustion. *Iowa Mutual Ins. Co.*, 480 U.S. at 16 (emphasis added).

> Therefore, non-Indian petitioners "*must* exhaust available tribal remedies." The *LaPlante* Court emphasized that "*National Farmers Union requires* that the issue of jurisdiction be resolved by the Tribal courts in the first instance."…[A]s the Supreme Court recognized, "Congress is committed to a policy of supporting tribal self-government and self-determination." *Id.* at 856. "That policy," the Supreme Court said, "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."

Burlington N. R. Co., 940 F.2d at 1245 (emphasis added).

As a result, "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Id.* "If deference is called for, the district court may not relieve the parties from exhausting tribal remedies." *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991). Thus, "[t]he tribal exhaustion rule formulated by the Supreme Court in *LaPlante*…and *National Farmers*…bars federal courts from exercising jurisdiction over matters pending in tribal courts." *Bowen v. Doyle*, 230 F.3d 525, 529 (2nd Cir. 2000). "Even when the jurisdiction of the tribal court is challenged, 'the Tribal Court itself' must be permitted to determine the issue 'in the first instance.'" *Id.* at 529-530, *citing National Famers*, 471 U.S. at 856.

It is also the "practical imperative of judicial efficiency" that "compels exhaustion of tribal remedies." *Burlington N. R. Co.*, 940 F.2d at 1245. "[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers Union*, 471 U.S. at 856. "Exhaustion thus encourages more efficient procedures." *Burlington N. R. Co.*, 940 F.2d at 1246. Finally, the Supreme Court has recognized that "exhaustion of tribal court remedies… will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such

matters in the event of further judicial review." *National Farmers Union*, 471 U.S. at 857.

B. *This Case Does Not Fit Within An Exception To The Exhaustion Rule*

The Supreme Court has outlined four limited exceptions to the exhaustion rule: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) where a tribal court action is "patently violative of express jurisdictional prohibitions"; (3) where "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." *Elliott*, 566 F.3d at 847, *quoting Nevada v. Hicks,* 533 U.S. 353, 369; *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013).

As to the fourth exception, if tribal court jurisdiction is "'colorable' or 'plausible,' then…exhaustion of tribal court remedies is required." *Id.* at 848, *citing Atwood v. Fort Peck Tribal Ct. Assiniboine,* 513 F.3d 943, 948 (9th Cir. 2008). Thus, the tribal court exhaustion rule applies in any action over which a tribal court might plausibly exercise subject matter jurisdiction. *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 82 (2nd Cir. 2001), *citing United States v. Tsosie*, 92 F.3d 1037, 1042 (10th Cir. 1996). *See Crawford v. Genuine Parts Co.*, 947 F.2d at 1407; *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000). In determining whether the exhaustion rule applies, the Court "need not make a definitive determination of whether tribal court jurisdiction exists; [it] must decide only whether jurisdiction is plausible." *Elliott*, 566 F.3d at 849.

1. Acres cannot establish that the assertion of Tribal Court jurisdiction is motivated by a desire to harass or is conducted in bad faith.

Here, there are insufficient allegations, and there will be no evidence to demonstrate that the assertion of tribal court jurisdiction is motivated by a desire to

harass or is conducted in bad faith. The five-day time period to answer, upon which Acres places much emphasis, was caused by an unintentional error (accidental reference to an unlawful detainer summons) of the Court that was corrected by the Tribal Court in its February 16, 2016 Order. Declaration of Anita Huff in Support of Motion to Dismiss ("Huff Decl."), ¶¶8-9. The February 16, 2016 Order, moreover, granted Acres and ABI 30 days to file a responsive pleading. *See* Exhibit 16 to the Complaint, p. 6. Additionally, the February 16, 2016 Order provided Acres and ABI with a detailed analysis regarding the fundamental defects in his attempted filings and described, with specificity, the steps Acres and ABI needed to take to file a pleading that conformed to the Tribal Court's Rules of Pleading, Practice and Procedure. *See id.*, pp. 1-6.

In addition to providing by Order an additional 30-days for Acres and ABI to respond to the Complaint, the Court then went a step further and issued an amended summons for service on Acres and ABI which specified a 30-day response time. Huff Decl., ¶ 10, Ex. B. Thus, despite Acres' complaints about the accidental 5-day summons, the Tribal Court has gone above and beyond to give him repeated extensions to file a responsive pleading to the Complaint.

2. Tribal Court jurisdiction is not violative of express jurisdiction prohibitions.

There are likewise no allegations, nor will there be any evidence, that Tribal Court jurisdiction is patently violative of express jurisdictional prohibitions. For example, Section 11.1.1.030(A)(2) of the Tribal Court Ordinance provides that the Tribal Court shall have subject matter jurisdiction over causes of action that arise on the Tribe's Reservation. Yasmin Frank Decl., ¶5, Ex. B. Section 11.1.2.030 of the Tribe's Contracts Code, moreover, grants to the Tribal Court "jurisdiction over civil causes of action regarding the validity, interpretation, and enforcement of contracts to which the Tribe or Tribal Entities are parties, if the contract is entered on the Reservation, is to be performed on the Reservation or if the Tribal Entity is domiciled on the Reservation."

Yasmin Frank Decl., ¶6, Ex. C; *also available at http://www.bluelakerancheria-nsn.gov/govLawTribalCourt.html*. Based on the information currently before this Court (and, for that matter, before the Tribal Court) regarding the contractual dealings between the Tribe, ABI, and Acres, Tribal Court jurisdiction does not patently violate any express jurisdictional prohibitions.

3. Acres has an adequate opportunity to challenge the Tribal Court's jurisdiction in the proceedings pending in the Tribal Court.

With regard to the third exhaustion exception, whether exhaustion would be futile because of the lack of an adequate opportunity to challenge the Tribal Court's jurisdiction, it is clear that Acres and ABI have the opportunity to challenge jurisdiction in the Tribal Court. Section 11.1.1.030(A)(1)(b) of the Tribal Court Ordinance expressly states that the Tribal Court may decline to exercise jurisdiction if it finds that "one or more of the parties is not a person over which the Tribal Court can exercise its authority." Yasmin Frank Decl., ¶5, Ex. B. Rule 18 of the Tribal Court Rules of Pleading, Practice and Procedure permits the filing of a motion to dismiss for lack of personal and subject matter jurisdiction. Huff Decl., ¶4, Ex. A. The Tribal Court can dismiss actions against non-Indians if the Tribal Court determines that it lacks jurisdiction over the non-Indian party. Yasmin Frank Decl., ¶5, Ex. B (Section 11.1.1.030). Furthermore, all of the Tribal Court's rules are readily available on the internet for use by Tribal Court litigants. *See http://www.bluelakerancheria-nsn.gov/govLawTribalCourt.html*. Thus, Acres and ABI have a full and fair opportunity to challenge the Tribal Court's jurisdiction before the Tribal Court, itself.

4. Tribal Court jurisdiction is both colorable and plausible.

Finally, with regard to the fourth exhaustion exception, the exception is not met here because Tribal Court jurisdiction over Acres and ABI is both colorable and plausible. In order to establish that Tribal Court jurisdiction over Acres and ABI is

plausible, an analysis of the extent of Tribal Court jurisdiction over non-Indians is required.

Montana v. United States, 450 U.S. 544 (1981), is the "pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A-I Contractors,* 520 U.S. 438, 445 (1997). In that case, the Supreme Court held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation." *Montana,* 450 U.S. at 564. "In Montana, the Supreme Court recognized that generally, 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 172 (5th Cir. 2014), *cert. granted sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496, 135 S. Ct. 2833 (U.S. June 15, 2015), *citing Montana* at 565.

> The narrow question the Court considered in light of this test concerned the tribe's exercise of regulatory jurisdiction over non-Indians on *non-Indian* land within the reservation. *Id.* at 557. ("Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one…the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.").

Water Wheel Camp v. LaRance, 642 F.3d 802, 809 (9th Cir. 2011), *citing Montana* at 557 (emphasis in original).

The *Montana* Court announced two exceptions to the general rule. First, the Court stated:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate through taxation, licensing or other means, the activities of *nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.*

Id. at 565 (emphasis added).

Second, the Court held that a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

These two exceptions are now commonly referred to as the *Montana* exceptions. *Montana,* therefore, "limited the tribe's ability to exercise its power to exclude [or regulate] only as applied to the regulation of non-Indians on *non-Indian land, not on tribal land*." *Water Wheel Camp* at 810 (emphasis added), *citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982) [recognizing a tribe's inherent authority to exclude non-Indians from tribal land, without applying *Montana*]. Despite the limitations recognized in *Montana* and subsequent cases, the Supreme Court has consistently acknowledged that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co.*, 480 U.S. at 18.

Post-*Montana*, the Supreme Court has held that "*Montana*'s consensual relationship exception requires that the…regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Thus, under the first *Montana* exception, a "tribe may only regulate activity having a logical nexus to some consensual relationship between a business and the tribe or its members." *Dolgencorp*, 746 F.3d at 175. *See Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941 (9th Cir. 2009)["The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts."].

"'[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" *Dolgencorp*, 746 F.3d at 173, *citing Strate*, 520 U.S. at 453. *See Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 938 (8th Cir. 2010)["If the Tribe retains the power under *Montana* to regulate…conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims…."]; *Philip Morris*, 569 F.3d at 939 ["The *Montana* framework is applicable to tribal adjudicative jurisdiction, which extends no further than the *Montana* exceptions."].

Thus, "[t]he first *Montana* exception recognizes that, as a sovereign, the Tribe has the power to enter into contractual relationships with nonmember individuals and entities for work on reservation property, whether Indian owned or not, and to place conditions on those contracts." *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 668 (6th Cir. 2015). Furthermore, as the Supreme Court "recognized in *Hicks*, the exception applies 'to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into.'" *Id.*, *citing Hicks*, 533 U.S. at 372. "[T]he first *Montana* exception for civil jurisdiction recognizes that, when a nonmember voluntarily enters into a commercial relationship with the Tribe, the Tribe as a sovereign itself may choose to place conditions on its contractual relationships with those nonmembers…." *Id.*

In the Ninth Circuit, "*Montana* does not apply to jurisdictional questions" when the land upon which the tribe seeks to regulate non-members is on-reservation tribal trust land. *Water Wheel Camp*, at 813.

> The Ninth Circuit looks to two facts "when considering a tribal court's civil jurisdiction over a case in which a nonmember is a party": (1) "the party status of the nonmember"—"that is, whether the nonmember party is a plaintiff or a defendant" in the tribal action; and (2) where the events "giving rise to the cause of action occurred."

Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court, 2012 U.S. Dist. LEXIS 48595, 2012 WL 1144331, *11 (N.D. Cal. Apr. 4, 2012), *citing Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9th Cir. 2006)(*en banc*). Thus, while a "tribe generally does not have jurisdiction over a nonmember defendant on non-Indian land within its reservation" subject to the two *Montana* exceptions, "[b]y contrast, a tribe has inherent sovereign power to regulate non-Indians on tribal land." *Id.* at *12-13, *citing Water Wheel Camp* at 808-809.

Here, ABI voluntarily entered into the Agreement with the Tribe. *See* Frank Decl., ¶3. The Agreement between ABI and the Tribe was negotiated by Acres on land owned by the United States in trust for the Tribe. *Id.*, ¶¶2-3. The Agreement was signed by James Acres and dated July 7, 2010. *Id.*, ¶3 & Ex. A. James Acres was at the Rancheria negotiating the Agreement on July 6-7, 2010. *Id.*, ¶3. While at the Rancheria negotiating the Agreement, James Acres stated to representatives of the Tribe that the royalty payment scheme would repay the advance deposit. *Id.*, ¶5.

The Agreement called for the development, maintenance, and upgrading of the ISlot System. Frank Decl., ¶4. The ISlot System was designed for use in the Tribe's on-Reservation casino and could only be played by users while at the casino. *Id.*, ¶4 & Ex. A. The Agreement specifically provided for "hotel rooms and reasonable meals for ABI" when "visiting BLC&H on business matters" related to the Agreement. *Id.*, ¶4 & Ex. A. James Acres personally visited the Tribe and stayed on the reservation on more than 10 occasions in connection with the Agreement. Declaration of Robert Pollard in Support of Motion to Dismiss ("Pollard Decl."), ¶2, Ex. 1. Members of Acres' team also visited the Tribe on various occasions to assist with ISlot System operations. *Id.*, ¶3.

This course of dealing is of the exact kind contemplated by the first *Montana* exception, that is, a consensual relationship with the Tribe, created through commercial dealing, contracts, leases, and other arrangements. *Montana* at 565. In addition, the tortious conduct of James Acres (fraudulently inducing BLC&H to enter into the

Agreement with ABI) occurred, at least in part, on tribal property. Furthermore, the consensual relationship with the Tribe, the gaming software Agreement and inducement thereof, has a direct, logical nexus to the activity the Tribe seeks to regulate through its adjudicative authority. In other words, the underlying Tribal Court suit arises directly from the consensual relationship established through agreements and commercial dealings, between Acres, ABI, and the Tribe. *See* Frank Decl., ¶ 6. Additionally, all of the claims in the underlying Tribal Court action arise on-reservation on tribal trust land.

As a result, Tribal Court jurisdiction over Acres and ABI is not only plausible—it is probable. Nevertheless, the Court does not, at this point, need to "make a definitive determination of whether tribal court jurisdiction exists; [it] must decide only whether jurisdiction is plausible." *Elliott*, 566 F.3d at 849. Thus, Acres and ABI cannot, as a matter of law, demonstrate that exhaustion of Tribal Court remedies should be excused prior to their untimely resort to this Court.

Ultimately, these jurisdictional considerations can—and should—be addressed by the Tribal Court in the first instance. The Tribal Court has not had the opportunity to fully assess all of the relevant information required to make a definitive jurisdictional determination at this point. Because an exception to the general exhaustion rule does not apply in this case, "it is in this Court's discretion whether 'to dismiss a case or stay the action' while a tribal court determines its own jurisdiction." *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, 2012 U.S. Dist. LEXIS 48595 at *9, *citing Atwood v.Fort Peck Tribal Ct. Assiniboine,* 513 F.3d at 948. Because the record demonstrates that Tribal Court jurisdiction is not plainly lacking, the Tribe, which wholly owns and operates BLC&H, respectfully requests that the Court dismiss this case to allow the Tribal Court to determine its own jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Tribe respectfully requests that the Court dismiss the Complaint in its entirety.

Dated: June 2, 2016

BOUTIN JONES, INC.

By: */s/ Daniel S. Stouder*
Daniel S. Stouder
Amy L. O'Neill
Attorneys for Blue Lake Casino & Hotel

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, a copy of this **NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION** was served on all interested parties through the Court's electronic filing system.

/s/ Amy L. O'Neill
Amy L. O'Neill

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, a copy of this **NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION** was served by First Class U.S. Mail on Plaintiff as follows:

James Acres 344 Sylvia Encinitas, CA 92024 james@kosumi.com In Pro Per	Acres Bonusing, Inc. 1106 2nd #123 Encinitas, CA 92024 james@acresbonusing.com
Lester J. Marston Rapport & Marston 405 West Perkins Street Ukiah, CA 95482 T: (707) 462-6846/F: (707) 462-4235 marston1@pacbell.net In Pro Per and on behalf of the Tribal Court of the Blue Lake Rancheria	Anita Huff 428 Chartin Road Blue Lake, CA 95525 T: (707) 668-5101 X1032 AHuff@bluelakerancheria-nsn.gov In Pro Per

/s/ Amy L. O'Neill
Amy L. O'Neill