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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

REPLY 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

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INTRODUCTION

Plaintiff James Acres' ("Acres") Opposition to the Motion to Dismiss ("Opposition") fails to address the sovereign immunity of Defendant Blue Lake Casino & Hotel ("BLC&H" or the "Tribe"), except to inaccurately allege that the United States District Court for the Southern District of California determined that tribal sovereign immunity did not bar this suit, which it did not. Acres similarly fails to recognize that sovereign immunity shields both the Tribe and the Blue Lake Rancheria Tribal Court ("Tribal Court") in this federal action. This jurisdictional prohibition, alone, is reason enough for the Court to dismiss Acres' Complaint.

In addition to the sovereign immunity barrier, Acres cannot show that he has exhausted his tribal court remedies, that attempting to do so is futile, or that the Tribal Court, Judge Marston, or Clerk Huff have acted in bad faith or with malicious intent.

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

Acres, in his Opposition, fails to address the Tribe's sovereign immunity from suit, which bars this current federal action against BLC&H and the Tribal Court. Regarding sovereign immunity, Acres' sole argument is based on the incorrect assumption that, because the Southern District transferred the case to the Northern District, the Southern District already decided the issue of sovereign immunity. Opposition, p. 13.

The Honorable Marilyn Huff of the Southern District expressly stated that transfer was ordered because the Southern District was an improper venue since all Defendants are located in the Northern District and the events giving rise to the lawsuit occurred in the Northern District. The Southern District did not address the Tribe's sovereign immunity and instead stated that "in light of the pending transfer, the Court denies Defendants' motion to dismiss without prejudice as to a renewed motion filed after the case is transferred." *See* Order Transferring Case to the United States District Court for the Northern District of California, [DKT No. 21], p. 4, lines 14-16. Thus,

there has been no determination regarding the defendants' assertion of sovereign immunity, and Acres makes no cogent or comprehensible arguments in this regard in opposition.

As to the individual defendants acting in their official capacities, Acres argues that "ex Parte Young colorably allows the veil of sovereign immunity to be pierced." Opposition, p. 13. Yet, this argument would require proof of the individual defendants acting in their official capacities in violation of federal law. Such an accusation cannot be supported when, as set forth in the Tribe's Motion to Dismiss ("Motion"), p. 13, Judge Marston has not made a determination regarding whether the Tribal Court may properly exercise jurisdiction over Acres and/or ABI.[1]

Judge Marston's Orders in the Tribal Court action—all of which either provide Acres with additional time to respond or instruct Acres on how to properly respond to the Tribal Court complaint—do not violate federal law. *See* Complaint, Exhibits 13, 16, & 17; Plaintiff's Request for Judicial Notice, Exhibit 7. Unless and until Judge Marston makes a final determination regarding whether the Tribal Court may exercise jurisdiction over Acres and/or ABI, any allegation that the defendants have violated federal law is, at this point, not plausible.

Furthermore, "[o]n a motion [such as the defendant's motion here] asserting sovereign immunity as a basis for dismissing an action for lack of subject matter jurisdiction, **the plaintiff** [in this case, Acres] bears the burden of proving by a preponderance of evidence that jurisdiction exists." *Campo Band of Mission Indians v. Superior Court*, 137 Cal.App.4th 175, 183 (2006) (emphasis added). *See Graves v. Clinton*, 2011 U.S. Dist. LEXIS 121817, 15 (E.D. Cal. Oct. 19, 2011), *quoting Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007) ["The party asserting a waiver of sovereign immunity bears 'the burden of establishing that its action falls

[1] ABI is a defendant in the Tribal Court action, though it is not a party to this federal action. Nevertheless, Acres makes certain arguments on behalf of both himself and ABI. For this reason, ABI is sometimes referred to in this Reply.

within an unequivocally expressed waiver of sovereign immunity….'"]. Acres has not met this burden.

In short, Acres does not contest the sovereign immunity of the Tribe or the Tribal Court, which bars this present action against them. As to Judge Marston and Clerk Huff, the Tribal Court has not yet determined its jurisdiction in the Tribal Court action. Acres' bare assertion that the individuals' actions on behalf of the Tribal Court violate federal law is, thus, untenable. Accordingly, this action should be dismissed because sovereign immunity prevents the Court from exercising jurisdiction over the Tribe, the Tribal Court, Judge Marston, and Clerk Huff.

II. THIS CASE MUST ALSO BE DISMISSED FOR THE ADDITIONAL REASON THAT ACRES HAS FAILED TO EXHAUST HIS TRIBAL COURT REMEDIES.

a. Acres Has Failed to Demonstrate That Tribal Court Jurisdiction Is Not Plausible and His Claim That the Tribe Misrepresented the Law in the Ninth Circuit Is Wrong.

Rather than respond to the Tribe's contention that Tribal Court jurisdiction is plausible due to the contractual relationship and commercial dealing between Acres, ABI, and the Tribe (Motion, pp. 22-23), Acres focuses his argument on Tribal Court jurisdiction over him personally and how he, as an individual, did not contract with the Tribe. Opposition, pp. 13-14. Acres fails to adequately address the plausibility of Tribal Court jurisdiction over his company, ABI. Instead, Acres incorrectly claims that the Tribe's only assertion in support of jurisdiction is that "Blue Lake obviously gains civil tort jurisdiction over non-Indians 'talking in diners'…." Opposition, p. 14. In doing so, Acres ignores that the underlying Tribal Court action sounds in both tort **and contract**, and that both Acres **and his company, ABI**, are named as defendants (Acres being named as a defendant with respect to the cause of action for fraud). In any event, Acres' arguments, discussed below, fail to establish that there is no colorable claim of Tribal Court jurisdiction.

Acres argues that Tribal Court jurisdiction is not plausible under the first exception outlined in *Montana v. United States*, 450 U.S. 544 (1981), because he "never

explicitly consented to tribal jurisdiction," Opposition, p. 13, and because there is no "explicit grant of consent to tribal jurisdiction over ABI's conduct." Opposition, p. 14.

The first *Montana* exception does not require explicit consent—it requires "consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* at 565. The Supreme Court could have easily crafted an "explicit consent" rule, and it has chosen not to do so on numerous occasions.[2]

Other than stating that he did not explicitly consent to Tribal Court jurisdiction, Acres offers no other real challenge to the Tribe's arguments that a consensual relationship was established between Acres, ABI, and the Tribe through the parties' contractual and commercial dealings. *See* Motion, pp. 22-23. Therefore, for all of the reasons set forth in the Tribe's Motion, Tribal Court jurisdiction under *Montana*'s first prong is colorable and must be determined by the Tribal Court in the first instance.

Even assuming, *arguendo*, that jurisdiction under *Montana*'s first exception was not plausible, in the Ninth Circuit, *Montana* "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 v. LaRance*, 642 F.3d 802, 810 (9th Cir. 2011), *citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) [recognizing a tribe's inherent authority to exclude non-Indians from tribal land, without applying *Montana*].

As a general rule, both the Supreme Court and the Ninth Circuit have recognized that, as it relates to regulatory jurisdiction over non-Indians on **Indian land,** *Montana* does not affect the fundamental principle that the authority to exclude non-Indians from

[2] Significantly, on June 23, 2016, the date of this filing, the Supreme Court affirmed the Fifth Circuit's decision in *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), recognizing, under the first *Montana* exception, the right of a tribal court to assert jurisdiction over non-Indians for torts committed on Indian land. *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496, 135 S. Ct. 2833 (Slip Opinion 579 U.S. ___ (2016)). The Fifth Circuit held that "'[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 v. A-I Contractors*, 520 U.S. 438, 445 (1997).

tribal trust land necessarily includes the lesser authority to set conditions on their entry through regulations. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) [determining that *Montana* did not apply to the question of a tribe's regulatory authority over nonmembers on reservation trust land because "*Montana* concerned lands located within the reservation but not owned by the Tribe or its members"]; *McDonald v. Means*, 309 F.3d 530, 540 n.9 (9th Cir. 2002) (as amended) [rejecting the argument that *Montana* applies to tribal land because *Montana* limited its holding to non-Indian lands and *Strate* confirmed that limitation]. Accordingly, 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*, 642 F.3d at 813.

Acres accuses the Tribe of mischaracterizing the *Water Wheel Camp* decision by adding "[or regulate]" into the following quote in the Tribe's Motion, p. 20:

> *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).

Acres then claims that *Water Wheel Camp* "has no relevance for [his] case." *Id*. Acres is wrong.

Indian tribes possess inherent sovereign powers, including the authority to exclude, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ["A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is…well established."], unless Congress has clearly and unambiguously stated otherwise. *See United States* v. *Lara*, 541 U.S. 193, 200 (2004); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 58, 60 (1978). The power to exclude nonmembers is, therefore, an inherent sovereign power.

"From a tribe's **inherent sovereign powers** flow **lesser** powers, including the power to regulate non-Indians on tribal land." *Water Wheel Camp* at 808-809 (emphasis added), *citing South Dakota* v. *Bourland*, 508 U.S. 679, 689 (1993) [recognizing that a

tribe's power to exclude includes the incidental power to regulate]. *See also Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) [acknowledging that the power to exclude necessarily includes the lesser power to set conditions on entry, on continued presence, or on reservation conduct]. Thus, the power to regulate nonmember conduct on Indian land is incidental to the power to exclude.

If a tribe has the power to exclude, it necessarily has the lesser power to regulate. If a tribe has the power to regulate, then it does not "make[] any difference whether it does so through precisely tailored regulations or through tort claims…." *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 938 (8th Cir. Iowa 2010). Accordingly, the addition of "[or regulate]" to the quoted language from *Water Wheel Camp* does not "completely alter the meaning of the passage" as Acres claims. Opposition, p. 15. And it certainly does not alter the relevance of *Water Wheel Camp* to the instant case.

In fact, the United States District Court for the Northern District of California has applied *Water Wheel Camp* to dismiss a similar action filed by a non-Indian seeking to enjoin the Blue Lake Tribal Court and Judge Marston from exercising jurisdiction over the non-Indian. *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, 2012 U.S. Dist. LEXIS 48595, 2012 WL 1144331 (N.D. Cal. Apr. 4, 2012). In the underlying Tribal Court action in that case, Mainstay Business Solutions, a division of the Blue Lake Rancheria Economic Development Corporation, sued a non-Indian defendant, Wood's Roofing Inc., in the Blue Lake Tribal Court. *Id*. at *2-3. Wood's Roofing Inc. then filed a cross claim (seeking indemnification) against Admiral Insurance Co., a non-Indian insurance company organized in Delaware and doing business in New Jersey. *Id*. Admiral insured Wood's Roofing Inc. *Id*. The jurisdictional issue in the case was whether the Blue Lake Tribal Court could exercise jurisdiction over a cross claim filed by Wood's Roofing Inc. against Admiral, which had never had any relationship with the Tribe.

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In order to resolve the jurisdictional question, "the Tribal Court ordered the parties to file cross-motions for summary judgment on the following issues: '(1) does the [Tribal] Court have personal jurisdiction over [non-Indian defendant Admiral]; (2) does the [Tribal] Court, as a matter of tribal law, have subject matter jurisdiction over [non-Indian defendant Admiral]; (3) does the [Tribal] Court, as a matter of federal law, have subject matter jurisdiction over [non-Indian defendant Admiral]…." *Id*. at *4-5. Rather than challenge the Tribal Court's jurisdiction in the Tribal Court, Admiral filed an action in district court seeking an order enjoining the Tribal Court from determining the jurisdictional issue. *Id*. at *5-6.

Admiral argued that it was entitled to "injunctive relief because the Tribal Court does not have jurisdiction over … Admiral." *Id*. at *6. The Northern District nevertheless dismissed the case because Admiral had "failed to exhaust its tribal remedies." *Id*. at *7. In so ruling, the district court analyzed whether Tribal Court jurisdiction was plausible.

> 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."

Id. at *11, *citing Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9th Cir. 2006) (*en banc*).

The district court recognized that, 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. Accordingly, the district court expressly stated that, "In the Ninth Circuit, the *Montana* exceptions do 'not apply to jurisdictional questions' over claims arising on tribal land within a reservation….'" *Id*. at *13, *citing Water Wheel Camp* at 810, 812. After considering Ninth Circuit precedent, the district court dismissed the federal case to

allow the Tribal Court to determine whether the claim arose on tribal land and, therefore, permitted the Tribal Court to determine its jurisdiction over the non-Indian defendant, Admiral. *Id.* at *18.

Acres is, therefore, wrong when he alleges that the Tribe misquoted and mischaracterized the holding in *Water Wheel Camp*. And he is wrong when he says the case is not relevant to his. The Northern District has directly applied *Water Wheel Camp*—not *Montana*—to rule that a non-Indian entity was required to exhaust its Tribal Court remedies in the Blue Lake Tribal Court prior to resorting to federal court.

With respect to the facts of the instant case, all of the claims in the underlying Tribal Court action arise on-Reservation. The Agreement between ABI and the Tribe was negotiated by Acres on land owned by the United States in trust for the Tribe. Declaration of Thomas Frank in Support of Motion to Dismiss ("Frank Decl."), ¶¶2-3. Acres entered the Reservation for the purpose of negotiating the Agreement on July 6-7, 2010. *Id.*, ¶3. Acres executed the Agreement on July 7, 2010. *Id.*, ¶3 & Ex. A. While at the Reservation negotiating the Agreement, the Tribe alleges that 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. *Id.*, ¶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. Thus, all of the causes of action in the underlying Tribal Court action arise on tribal trust land.

Because the Tribe's causes of action against Acres and ABI arise on tribal trust land, Tribal Court jurisdiction is, at the very least, plausible and the issue must be decided by the Tribal Court in the first instance.

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b. Plaintiff Has Failed to Establish That the Tribal Court's Actions Were Motivated by a Desire to Harass Plaintiff or Were Conducted in Bad Faith.

i. *The Tribal Court Actions have Not Been Prejudicial Against Acres.*

Acres has not demonstrated and cannot demonstrate that the actions of the Tribal Court have intentionally prejudiced him or his ability to obtain a fair hearing. Rather, Acres has repeatedly failed to comply with the rules and orders of the Tribal Court. Acres' failures are not limited to "failing to number [his] paragraphs," as he claims. Opposition, p 16. Acres failed to properly identify his filings. February 16, 2016 Order of the Tribal Court, p. 8, ¶ 4, [DKT No. 11-1]. Acres failed to include proof of service on the other parties. *Id*. at pp. 8-9, ¶ 8. Acres failed to notice any motion and did not attempt to set any motion for a hearing. *Id*. at p. 9, ¶ 10. Acres failed to include with his filings separately captioned affidavits, declarations under penalty of perjury, and any proposed order. *Id*. at ¶ 13. Acres failed to properly request that the Tribal Court take judicial notice of certain documents. *Id*. at p. 12, ¶ 28. All of these failures, and the numerous others not cited herein, constitute violations of the Tribal Court's Rules of Pleading, Practice, and Procedure.

Despite these failures, no default has been taken, no sanctions have issued, and no adverse actions have otherwise occurred. Instead, the Tribal Court has gone to great lengths to assist Acres and respond to his questions and concerns. Where Acres has made an inquiry with the Tribal Court, the Court has generally responded by clarifying or correcting the issue raised. This conduct is consistent with the Tribe's ordinance establishing the Tribal Court, which mandates judicial impartiality and ensures a full and fair hearing for all litigants. *See* Ordinance No. 07-02, "AN ORDINANCE OF THE BUSINESS COUNCIL OF THE BLUE LAKE RANCHERIA ESTABLISHING A TRIBAL COURT," Section 11.1.1040(E), Declaration of Yasmin Frank in Support of the Motion to Dismiss, Ex. B ["No Judge shall be qualified to hear any case where (1) she/he has any direct interest, (2) any party involved in the case includes a relative by marriage or blood in the first or second degree, (3) for any other reason the judge cannot be

impartial; or (4) the judge finds that a reasonable person would believe that he or she could not be impartial."].

Acres cannot rely on the 5-day summons issued by the Tribal Court to show bad faith. The Tribal Court first issued a corrective Order notifying Acres and ABI that the summons was issued in error and that Acres and ABI had thirty (30) days to "file an answer or other responsive pleading." *Id*. at p. 12, ¶ 4. During those 30 days, the only filing by Acres/ABI was a request for clarification of the Order, to which the Tribal Court responded. Plaintiff's Request for Judicial Notice, [DKT No. 11-1], Exs. 4, 5, & 7. Subsequently, the Tribal Court re-issued a 30-day summons for service on Acres/ABI. Plaintiff's Request for Judicial Notice, Ex. 8. Thus, the process in the Tribal Court has started anew and Acres and ABI currently have the ability to contest Tribal Court jurisdiction.

No evidence shows that the Tribal Court has acted in bad faith, or that it has any malicious intent toward Acres.

ii. *The Mere Fact That the Tribal Court Employs the Tribal Judge Is Not Inherently Prejudicial and Does Not Signify That the Tribal Court Is Unable to Afford Due Process.*

Every tribal judge, like every state and federal judge, is employed by the government. This does not divest the court of jurisdiction over an action in which that government is a party. *See, e.g.*, *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, 2012 U.S. Dist. LEXIS 48595, 2012 WL 1144331 (N.D. Cal. Apr. 4, 2012) [dismissal of federal action for failure to exhaust tribal court remedies in case bought by tribe in tribal court]. For example, the Court of Federal Claims has exclusive jurisdiction over certain actions seeking damages against the United States. Acres' claim of prejudice based on employment is, therefore, without merit.

iii. *Judge Marston's Joinder Does Not Indicate That Judge Marston Has Decided the Jurisdictional or Merit-Based Issues.*

Judge Marston and Clerk Huff's joinder in the Tribe's Motion simply joins in the grounds for relief sought by the Tribe. Judge Marston and Clerk Huff concurred that

tribal sovereign immunity bars this suit against them as officers and employees of the Tribe and that the case should be dismissed for failure to exhaust tribal court remedies. This concurrence is no basis for excusing Acres from his obligation to exhaust Tribal Court remedies.

Acres argues that the Tribal Court is acting in bad faith because "Lester Marston simultaneously serves as the presiding judge over [him] in the underlying tribal court action, and as an attorney advocating against [him] in this Court." Opposition, p. 16. Ironically, Judge Marston has only been forced to "advocate"—to the extent that joining in a motion to dismiss can be considered advocating—because Acres is suing him. Judge Marston's defense of his Court's right to hear cases and of himself against claims that he has violated federal law are not demonstrations of bad faith toward Acres.

c. Tribal Exhaustion Is Not Futile Because Acres Has the Opportunity to Challenge Jurisdiction in the Tribal Court.

As discussed above, the Tribal Court has given Acres and ABI ample opportunity to correct their Tribal Court filings and contest the jurisdiction of the Tribal Court. The Tribal Court issued an amended summons that began the case anew and allowed Acres and ABI further opportunity to challenge jurisdiction or otherwise decide how to respond to the Tribal Court Complaint. The Tribal Court's continued leniency toward Acres and ABI is more than sufficient to demonstrate that Acres and ABI have, and have had, a full and fair opportunity to challenge the Tribal Court's jurisdiction or to otherwise defend in Tribal Court.

Acres claims that Judge Marston, in his March 25, 2016 Order, "stated that he would not accept a motion to dismiss as the demanded responsive pleading," Opposition, p. 7, and that "he won't accept challenges to his jurisdiction in lieu of a responsive pleading." Opposition, p. 17. This is factually incorrect.

In Judge Marston's February 16, 2016 Order, [DKT No. 11-1], pp. 7-12, Judge Marston identified each of the defects found within Acres' Tribal Court filings. After doing so, Judge Marston ordered Acres to "correct and resubmit his Special Appearance

documents in accordance with the requirements of [the Court's] Rules of Pleading, Practice and Procedure and Rules of Evidence," *id*. at p. 12, ¶ 2, and extended Acres' time to "file an answer or other responsive pleading to the Complaint." *Id*. at ¶ 4. Rather than heed the Tribal Court's February 16, 2016 Order by correcting the filing defects identified to him, Acres filed what he entitled a "Notice of Jurisdictional Barrier to Co-Operation with Case Management Statement and Conference," which was, again, not a filing in compliance with the Tribal Court's rules. [DKT No. 11-1], pp. 23-25. Acres then filed a document entitled "Joint Request for Clarification Regarding Feb 16 Order by Judge Marsten [*sic*]," in which Acres asked the Tribal Court if his "Special Appearance" documents constituted an answer. [DKT No. 11-1], pp. 27-30. This document, again, did not properly move the Tribal Court for an order or otherwise comply with the Tribal Court Rules of Pleading, Practice and Procedure and Rules of Evidence.

Nevertheless, Judge Marston responded to Acres' "Joint Request for Clarification Regarding Feb 16 Order by Judge Marsten [*sic*]" by issuing his March 28, 2016 Order. [DKT No. 11-1], pp. 56-58. In that order, Judge Marston clarified which rules Acres needed to follow to properly notice a motion to dismiss. *Id*. at p. 58, ¶ 3. The March 28, 2016 Order also clarified that a motion to dismiss does not constitute an answer or other responsive pleading as that phrase was used in the Tribal Court's February 16, 2016 Order. *Id*. at ¶ 4.[3] The February 16, 2016 Order granted Acres 30 days to file an answer or other responsive pleading or properly notice and file a motion to dismiss in conformance with the Tribal Court's rules. Yet, Acres failed to file a proper motion. Nothing in any order of the Tribal Court states that Acres cannot file a motion to dismiss based on jurisdictional issues.

[3] As is the case under federal law, a motion to dismiss is not an answer or other responsive pleading. *See* Federal Rules of Civil Procedure, Rule 7(a) ["Pleadings. Only these pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint;(6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer."].

Rather than demonstrating bias, the Tribal Court's Orders demonstrate that it has done more than it is required to do by telling Acres how to properly seek dismissal of the action by filing a proper motion. Acres has yet to do so, and instead uses his failure to follow the Tribal Court's directives as evidence of the Court's bias. Thus, Acres has had, and continues to have, the opportunity to challenge the jurisdiction of the Tribal Court, in the Tribal Court.

III. THE COURT CAN EXAMINE THE DECLARATORY EVIDENCE SUBMITTED IN SUPPORT OF THE TRIBE'S MOTION TO DISMISS.

In Acres' "Standard of Review" argument, he asserts that, because the Tribe has introduced "evidence in the form of declarations" in support of its Motion to Dismiss, the Motion "must be transformed into a motion for summary judgment." Opposition, p. 11, p. 5. "Under a summary judgment framework," Acres posits, "there is sufficient evidence of tribal bad faith and a plain lack of tribal jurisdiction for me to plausibly argue that I should be excused from exhausting tribal remedies." Opposition, p. 5. Acres is incorrect.

> "Generally, in entertaining a motion to dismiss, the district court must accept the allegations of the complaint as true, and construe all inferences in the plaintiff's favor. Where the motion to dismiss is based on a claim of…sovereign immunity, which provides protection from suit and not merely a defense to liability, however, the court must engage in sufficient pretrial factual and legal determinations to 'satisfy itself of its authority to hear the case' before trial."

Great W. Casinos v. Morongo Band of Mission Indians, 74 Cal. App. 4th 1407, 1418 (Cal. App. 2d Dist. 1999), *citing Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027-1028 (D.C. Cir. 1997)(ellipsis in original). *See Ziller Electronics Lab GmbH v. Superior Court*, 206 Cal. App. 3d 1222, 1232-1233 (1988) [when a defendant challenges personal jurisdiction, the burden shifts to the plaintiff to prove the necessary jurisdictional criteria are met by competent evidence in affidavits and authenticated documentary evidence; allegations in an unverified complaint are inadequate].

"Since entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988).

> Thus, to address a motion to dismiss under Rule 12(b)(1) where the suit involves a…sovereign and the court's jurisdiction over the sovereign is contested, the district court must do more than just look to the pleadings to ascertain whether to grant the motion to dismiss. The district court has "considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction."

Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 449 (D.C. Cir. 1990), *citing Prakash v. American Univ.*, 727 F.2d 1174, 1179 (D.C. Cir. 1984).

Accordingly, the Court may examine the declarations filed in support of the Tribe's Motion without converting the Motion to one for summary judgment.[4]

CONCLUSION

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

Dated: June 23, 2016

BOUTIN JONES, INC.

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

[4] It is important to note that the majority of the factual allegations made by Acres in his Opposition are merely citations to his Complaint—not to declarations under penalty of perjury or to properly authenticated documentary evidence. Thus, even if the Motion were converted into a motion for summary judgment, Acres has failed to submit admissible evidence to counter the Tribe's claims. In any event, there is no real factual dispute—the Tribe, the Tribal Court, and the Tribal Court Representatives are covered by sovereign immunity; in addition, Acres has failed to exhaust his Tribal Court remedies, he is not claiming to have exhausted them, and he seeks a legal exception to the exhaustion requirement. Acres also does not contest any of the factual assertions raised with respect to the Tribe's claim that Tribal Court jurisdiction is colorable.

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2016, a copy of this **REPLY 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 23, 2016, a copy of this **REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION** was served by First Class U.S. Mail on Plaintiff as follows:

Anita Huff
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In Pro Per

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