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7 ***In Pro Per***

8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12 JAMES ACRES,

13 Plaintiff,

14 v.

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

17 Defendants.

Case No.: 3:16-cv-05391-WHO

**Opposition to Motion to Dismiss
Re: Dkt. 8**

Date: Dec 7, 2016

Time: 2pm

**SF Div., 17th Floor, Courtroom 2
Honorable William H. Orrick**

18
19 **ISSUE PRESENTED**

20 *Blue Lake argues my failure to exhaust tribal remedies requires this action*
21 *be dismissed.*

22 *Exhaustion of tribal remedies is not required when tribal courts conduct*
23 *their proceedings in bad faith.*

24 *Here, the presiding tribal court judge concealed the material fact that he is*
25 *Blue Lake's attorney in his private law practice. The fact is material*
26 *because Blue Lake is the plaintiff in the underlying tribal action.*

27 *Does a presiding tribal court judge's concealment of material facts qualify*
28 *as bad faith conduct and excuse the need to exhaust tribal remedies?*

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INTRODUCTION

1
2
3 This present action, like my prior action, arises under 28 U.S.C. § 1331 as a
4 challenge to an assertion of tribal jurisdiction over me. Typically, those challenging
5 tribal jurisdiction must first exhaust all tribal remedies. In my first federal action I argued
6 that the bad faith, colorable question, and futility exceptions to the tribal exhaustion
7 doctrine all applied. I lost on all points.
8

9
10 Having lost, I went to Blue Lake's tribal court where I answered Blue Lake's
11 underlying complaint, moved for a judgment on the pleadings that Blue Lake lacked
12 jurisdiction over me, and moved to have Defendant Marston, Blue Lake's presiding
13 judge, disqualify himself.
14

15 Marston declined to disqualify himself, reasoning that, since he had no relationship
16 with Blue Lake beyond being a Blue Lake tribal court judge, neither tribal law, nor
17 federal law, required disqualification. But Marston has been Blue Lake's attorney for
18 over thirty years, and thus has an important relationship with Blue Lake beyond being
19 Blue Lake's judge.
20

21 Marston's order declining to disqualify himself thus yields two independent acts of
22 bad faith allowing my return to federal court. The first act of bad faith is Marston's
23 concealment of the material fact that he is Blue Lake's attorney in his private practice.
24 The second act of bad faith is that, in failing to disqualify himself, Marston acted contrary
25 to his stated reasoning. A judge acting contrary to his stated reasoning acts in bad faith.
26
27
28

1 Marston's third act of bad faith is his discovery order. Marston stated he was
2 ordering discovery to develop a factual record to determine whether Blue Lake has
3 jurisdiction of the fraudulent inducement it alleges against me. For a tribe to have
4 jurisdiction over an alleged fraud, the fraud must be alleged to have occurred on the
5 reservation. Blue Lake has never specifically alleged that the fraud they claim against me
6 occurred on their reservation. Since Marston did not authorize discovery on the subject
7 of where the fraudulent inducement occurred, his discovery order cannot help to establish
8 whether Blue Lake has jurisdiction over the underlying fraud claim. A discovery order
9 that can't accomplish its goals is unreasonable. Because judges have a duty to act in
10 accordance with reason, Marston's unreasonable discovery order is a form of bad faith
11 conduct.
12

13
14
15
16 Significantly, no one contests the allegation that Marston serves simultaneously as
17 Blue Lake's judge and attorney.

18
19 Instead, Blue Lake argues in its present motion that my return to federal court is
20 untimely, and that bias and incompetence in a tribal court do not excuse the need to
21 exhaust tribal remedies.

22
23 My return to this Court is timely because it is founded on allegations of bad faith
24 that transpired after the conclusion of my prior federal lawsuit. It cannot be the case that,
25 having defended itself against charges of bad faith in the past, a tribal court is free from
26 federal review of bad faith actions going forward. Nor do my claims focus upon tribal
27 bias or incompetence. Instead, my claims focus on Marston's bad faith.
28

1 Here, Blue Lake moves for dismissal, arguing that my claims of bad faith do not
2 trigger an exception to the tribal exhaustion doctrine, and that the action is therefore not
3 ripe for federal review.

4 Since it is my claims of bad faith that provide the basis for federal jurisdiction,
5 Blue Lake’s jurisdictional attack is necessarily entwined with the merits of my claims.

6 A summary judgment standard seems appropriate, with Blue Lake as the movant.
7

8 ARGUMENT

9 10 **I: NO JURISDICTIONAL BAR PREVENTS THIS ACTION**

11 **A: Tribal sovereign immunity does not bar this action**

12
13 “Non-Indians may bring a federal common law cause of action under 28 U.S.C. §
14 1331 to challenge tribal court jurisdiction.” *Elliott v. White Mountain Apache Tribal*
15 *Court*, 566 F.3d 842, 846 (9th Cir. 2009). As a matter of comity, before bringing suit in
16 federal court, non-Indians must generally first exhaust tribal remedies. *Id.*, at 846. One
17 of the exceptions to this tribal exhaustion doctrine occurs “when an assertion of tribal
18 jurisdiction is motivated by a desire to harass or is conducted in bad faith.” *Id.*, at 847,
19 internal quotes omitted.

20 Since the present action alleges that the tribal court is conducting the underlying
21 tribal action in bad faith, this action is properly brought under 28 U.S.C. § 1331.
22

23 **B: Bad faith conduct by a tribal court presents a federal question**

24
25 Blue Lake argues in its motion papers that I ask this Court to review whether
26 Marston is biased or has a conflict of interest that precludes him from presiding over the
27

1 underlying tribal action, and that such a request does not present a federal question. *Dkt.*
2 8, Section III, from p 19.¹

3 Blue Lake misrepresents my demand for relief. I do not ask this Court to opine on
4 the propriety of any decisions made by Marston under tribal law, nor do I ask this Court
5 to opine on Marston's fitness to remain as judge in the underlying tribal action.

6 As lain out more fully below, I only ask this Court to find that Marston has
7 conducted the underlying Blue Lake Tribal Court action in bad faith, because he has
8 concealed the material fact that he is Blue Lake's tribal attorney, and because he has
9 issued orders in tribal court contrary to his explanatory reasoning. Evaluating Marston's
10 conduct for bad faith presents a federal question under 28 U.S.C. § 1331, as it is a
11 threshold issue for determining whether the exhaustion of tribal remedies is required.

12 **C: Effective relief may be lain against Marston**

13
14 Claims one, two and three of my complaint all request a finding of bad faith in
15 Marston's conduct of the underlying tribal action. *Complaint*, ¶¶ 43 – 54. All three claims
16 of relief may be lain against Marston in his role as tribal judge.

17 My fourth claim for relief requests a finding that Blue Lake lacks jurisdiction over
18 me, and an injunction against further actions against me in Blue Lake Tribal Court. This
19 relief may also be lain against Marston in his official capacities because an "injunction
20 against a public officer in his official capacity – which is what [is sought] here – remains
21 in force against the officer's successors." *Salt River Project Agricultural Improvement &*
22 *Power District v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012).

23 Marston is the presiding judge in the underlying tribal proceeding. He, and his
24 successors in that office, can certainly prevent any further actions from being taken in
25 that proceeding.

26
27
28 ¹ All page references are to ECF generated page numbers, including this brief's own exhibits.
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1 Marston is also the Chief Judge of the tribal court. Rule 5(A) of the tribe's rules of
2 procedure provide that a case is assigned to the Chief Judge upon being filed. *Exhibit 1*, p
3 3. Marston or his successors to the office of Chief Judge would have the power to
4 dismiss any enjoined case filed against me in the tribal court immediately upon that case
5 being filed. The requested injunctive relief may be effectively lain against Marston and
6 his successors in office.

7 8 **II. BAD FAITH BY A TRIBAL COURT CONDUCTING ITS PROCEEDINGS EXCUSES THE** 9 **NEED TO EXHAUST TRIBAL REMEDIES**

10 An exception to the tribal exhaustion doctrine applies when “an assertion of tribal
11 jurisdiction is motivated by a desire to harass or is conducted in bad faith.” *Elliott*, at
12 847. This single exception contains two clauses conjoined by the preposition “or.”
13 Exhaustion may be excused if the assertion of tribal jurisdiction is either, 1) “motivated
14 by a desire to harass,” or is, 2) “conducted in bad faith.” My action currently before this
15 Court focuses on the “conducted in bad faith” clause.

16 *Grand Canyon Skywalk Dev., LLC v. ‘sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1201 (9th
17 Cir. 2013), considered the bad faith exception and held that where “a tribal court has
18 asserted jurisdiction and is entertaining a suit, the tribal court must have acted in bad faith
19 for exhaustion to be excused.”²

20 The *Grand Canyon* court also defined “bad faith” for purposes of evaluating
21 exceptions to the tribal exhaustion doctrine as “[d]ishonesty of belief or purpose.” *Id.*

22 The *Grand Canyon* court continued on to make clear that in determining bad faith
23 it is necessary to look to the “*proceeding* and the court overseeing that proceeding.” *Id.*,
24 emphasis in original.

25
26
27
28 ² Blue Lake's argument that “[i]t is not relevant whether it is alleged that the tribal court itself is acting
in bad faith” is incorrect. *Dkt. 8*, p 24, line 26. Again, citation is to the ECF page number.

1 We can combine all this to produce an explicit test for determining whether or not
2 the bad faith exception to tribal exhaustion applies. “If a tribal court dishonestly
3 conducts its proceedings, then the need to exhaust tribal remedies is excused.”

4 This test fits with the comity-based rationale for *Elliott’s* tribal exhaustion doctrine
5 first enunciated in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 US 845 (1985).

6 The *National Farmers* court held that tribal exhaustion should be required because
7 it would afford tribal courts “the opportunity to rectify [their own] errors,” and
8 “encourage tribal courts to explain the precise basis for accepting jurisdiction,” as this
9 would “provide other courts with the benefit of [the tribal court’s] expertise ... in the
10 event of further judicial review.” *Id.*, at 857.

11 The bad faith exception exists because a court conducting proceedings dishonestly
12 cannot be trusted to rectify its own mistakes. Nor can a dishonest court provide a reliable
13 basis, in either fact or law, for other courts to work from in the event of judicial review.

14 As is shown below, Marston has conducted the tribal court proceeding dishonestly,
15 and so the requirement to exhaust tribal remedies is excused.

17 **III. MARSTON HAS CONDUCTED THE UNDERLYING TRIBAL ACTION IN BAD FAITH**

18 **A: Marston’s concealment of his ongoing role as Blue Lake’s attorney is** 19 **an act of bad faith.**

20
21 My first claim for relief asks for a declaration that Marston acted in bad faith while
22 presiding over the September 9th tribal court hearing, when he concealed that, in addition
23 to serving Blue Lake as its judge, he also serves Blue Lake as its attorney.

24 In his written order of September 9th, distributed just before that day’s hearing
25 (*Transcript of Sept. 9 Tribal Court Hearing*, p 3, lines 10 - 16), Marston wrote that he did
26 not have any “financial interest ... in a party to the [tribal] proceeding,” that he did not
27 have “any other interest that could be substantially affected by the outcome of the [tribal]
28

1 proceeding,” and that he was “not an active participant in the affairs of any party to [the
2 tribal] action.” *Dkt. 1-2*, p 8, lines 25 – 28. Marston also stated in oral argument that he
3 had “no interaction with the Tribe, other than as a Tribal Court Judge, presiding over
4 cases.” *Transcript of Sept. 9 Tribal Court Hearing*, p 7, lines 16 - 17.

5 All four statements are false.

6 Marston practices law at the law firm of Rapport and Marston. *Dkt. 10*, p 1, lines 1
7 – 6. As laid out in the complaint, the firm Rapport and Marston has represented Blue
8 Lake since at least as far back as 1983, and at least as recently as September of 2016.
9 *Complaint*, ¶¶ 27 – 28.

10 Since filing my complaint, I have discovered a letter from January of 2015 which
11 was sent by “Lester J. Marston, Tribal Attorney – Blue Lake Rancheria.” *Exhibit 2*, p 5.
12 This letter is related to an effort by Blue Lake to amend the California state family code
13 to allow tribal court judges to solemnize marriages. Since filing my complaint, I’ve also
14 discovered evidence that in December of 2014 Marston fought a state court action to
15 convince a Eureka superior court judge to order the California DMV to recognize tribal
16 marriages. *Exhibit 3*, p 2. Significantly, Blue Lake is located just outside of Eureka. I’ve
17 also discovered evidence that Marston travelled to Sacramento in April of 2015 to lobby
18 the California DMV to cease opposing a bill which would require the DMV to recognize
19 tribal court marriages. *Exhibit 3*, p 3. It seems probable that this April lobbying trip to
20 the DMV was made on behalf of the Blue Lake bill, which, significantly, Marston refers
21 to as “our bill.” *Id.* Tony Cohen’s comments suggest Marston lobbied as an attorney. *Id.*

22 Marston has an attorney-client relationship with Blue Lake stretching back over the
23 past three decades. It is not reasonable to believe that this work has been uncompensated,
24 and thus Marston has a financial interest in Blue Lake. Blue Lake is a party in the
25 underlying tribal action. This makes Marston’s first statement that he has “no financial
26 interest in a party to the proceeding” untrue.

27 What is reasonable to believe is that Blue Lake might terminate its three-decades
28 long relationship with attorney Marston should judge Marston rule against Blue Lake in
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1 Blue Lake’s own court. This attorney-client relationship is one “that could be
2 substantially affected by the outcome of the tribal proceeding,”³ and so Marston’s second
3 statement is also untrue.

4 Attorneys are “active participants” in the affairs of their clients. Marston’s third
5 statement is a lie.

6 As Blue Lake’s attorney, Marston has “interactions with the tribe, other than as a
7 tribal judge presiding over cases.” And so his fourth statement is also a lie.

8 Judges have a fiduciary responsibility both to the public, and to the litigants before
9 them. If a judge “deliberately conceals material information from them he is guilty of
10 fraud.” *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987). Since fraud is a form
11 of bad faith, any one of Marston’s false statements would provide an instance of the tribal
12 court conducting the underlying proceeding in bad faith, and thus excuse the need to
13 exhaust tribal remedies.

14 Neither Marston nor Blue Lake have denied that Marston is Blue Lake’s attorney.

15
16 **B: Marston’s decision to continue as presiding judge was an act of bad**
17 **faith because the decision was made contrary to his stated reasoning**

18 Prior to hearing argument on the motion to disqualify him, Marston distributed a
19 tentative decision denying the motion. (*Transcript of Sept. 9 Tribal Court Hearing*, p 3,
20 lines 10 - 16). At the close of argument, Marston adopted his tentative decision,
21 reasoning that he had “no conflict of interest” and “no bias” as to find he would need to
22 disqualify himself under either the tribal, or federal, codes of judicial conduct. *Id.*, p 13,
23 lines 18 – 27. Marston’s written order denying the motion to disqualify also explicitly
24

25
26
27 ³ The “could be affected” test is Marston’s own phrasing. Thus, for Marston’s second statement to be
28 untrue, one must only find it is objectively reasonable to believe the tribe **might** terminate its
relationship with Marston-the-attorney from its displeasure with Marston-the-judge.

1 reasons that nothing in tribal law,⁴ or federal law, required him to disqualify himself.
2 *Dkt. 1-2*, pp 4 – 8.

3 However, since Marston is Blue Lake’s attorney, both tribal and federal law would
4 require him to disqualify himself.

5 Under tribal law, as stated in Marston’s order denying the motion to disqualify,
6 “No Judge shall be qualified to hear any case where . . . the judge finds that a reasonable
7 person would believe that he or she could not be impartial.” *Id.*, p 4 line 27 – p5 line 3.
8 Rule 7 of the Blue Lake’s code of judicial conduct defines certain instances in which a
9 judge’s impartiality might be reasonably questioned. *Dkt. 1-4*, p 6. These include
10 instances where any party to a proceeding before the tribal court has been a source of
11 income to the judge within the preceding twelve months (*Id.*, Rule 7(c))⁵, and instances
12 *where the judge knows*, or has reason to know, that he has an interest that could be
13 substantially affected by the proceeding (*Id.*, Rules 7(d) and 7(e)(3)).

14 Unless Marston’s role as an attorney for the tribe is entirely devoid of any
15 compensation whatsoever, then under Rule 7(c) of the tribal code of conduct, his
16 impartiality can be reasonably questioned, and, by Marston’s own reasoning, Marston
17 should disqualify himself from the underlying tribal action.

18 Since attorneys owe their clients “the duty of undivided loyalty” (*Unified*
19 *Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981)), it is objectively
20 reasonable to believe Marston’s attorney-client relationship with Blue Lake is an interest
21 of Marston’s that could be substantially affected by his work as judge in the underling
22 tribal action. And so under Rules 7(d) and 7(e)(3) of Blue Lake’s code of judicial
23 conduct, Marston should disqualify himself from the underlying tribal action.

24
25 ⁴ Marston’s written order references only the tribal court ordinance, and does not mention the tribe’s
26 code of judicial conduct directly. However, it is clear from oral argument that Marston used the tribe’s
27 code of judicial conduct in construing the tribal court ordinance. (*Transcript of Sept. 9 Tribal Court*
Hearing, p 7 at line 18, p 9 at line 24, p 11 at line 1, and p 13 at line 22.)

28 ⁵ A Blue Lake judge’s contract with Blue Lake to provide judicial services to the tribal court is the only
exception to Rule 7(c).

1 Blue Lake argues that whether or not Marston should have disqualified himself
2 under tribal law does not present a federal question.

3 Perhaps.

4 But my claim is that Marston arrived at his decision in bad faith.

5 It is Marston himself who told us that he was remaining on the case because, under
6 Blue Lake law, his impartiality could not be reasonably questioned. But that same Blue
7 Lake law establishes that, given the attorney-client relationship between Marston and
8 Blue Lake, Marston's impartiality can be reasonably questioned.

9 This means that Marston arrived at his decision to remain as judge on the case by
10 some route other than his stated reasoning. For a judge to act contrary to his stated
11 reasoning is bad faith. And it is this bad faith conduct by the tribal court itself that
12 excuses tribal exhaustion under *National Farmers* and *Skywalk*.

13 The same line of reasoning leads us to conclude that Marston acted in bad faith
14 when he reasoned that "even if federal law were applied, Judge Marston is not
15 disqualified to hear this case." *Dkt. 1-2*, p 10, lines 20 – 21. Marston relied on 28 U.S.C.
16 § 455 in arriving at this conclusion. *Id.*, p 6, from line 21, to p 7, line 15.⁶

17 28 U.S.C. § 455(b)(1) requires disqualification when a judge has a personal bias or
18 is prejudiced in favor of a party. Since attorneys owe their clients undivided loyalty, they
19 must also be biased in their clients' favor. Blue Lake is Marston's private practice client,
20 he must be biased in Blue Lake's favor, and so, by his stated reasoning, he should have
21 disqualified himself under federal law.

22 28 U.S.C. § 455(b)(2) requires disqualification when the judge, or a lawyer with
23 whom the judge practiced law, has served as an attorney in the matter. The firm Rapport
24 and Marston and the firm Boutin Jones both represent Blue Lake in *Blue Lake v. Lanier*,

26
27 ⁶ In my complaint, I referred to several provisions of Canon 3(c) of the United States Code of Conduct
28 for District Judges, instead of 28 U.S.C. § 455. The provisions of the one are similar to the other, and
the argument is the same regardless of which source is referenced.

1 2:11-cv-01124-JAM-KJN (E.D. Cal. 2011). *Exhibit 4*, and *Complaint*, ¶ 37. Marston is
2 an attorney at Rapport and Marston (*Dkt. 10*, p 1, lines 1 – 5). Boutin Jones represents
3 Blue Lake in the underlying tribal action. By Marston’s own reasoning, Marston should
4 have disqualified himself under federal law, since Marston practices law with Boutin
5 Jones, and Boutin Jones represents Blue Lake in tribal court.

6 28 U.S.C. § 455(b)(4) and 28 U.S.C. § 455(b)(5)(iii) require disqualification when
7 the judge knows that he has an interest, financial or otherwise, that could be substantially
8 affected by the outcome of the proceeding. It is reasonable to believe that Marston’s role
9 as Blue Lake’s attorney could be affected by the outcome of the underlying tribal action,
10 and so, by his stated reasoning, Marston should have disqualified himself under federal
11 law.

12 It is also reasonable to believe that Marston’s relationship with his private practice
13 colleagues at Boutin Jones could be substantially affected by the outcome of the
14 underlying tribal proceeding, and so, by Marston’s stated reasoning, Marston’s interest in
15 his relationship with Boutin Jones should also lead to disqualification under federal law.

16 Again, it is not required for my argument that this Court find that Marston reached
17 the wrong decision under tribal law. What I show is that Marston reached his decision by
18 some route other than his stated reasoning. For a judge to act contrary to their stated
19 reasoning is an act of bad faith. Marston committed this act of bad faith while
20 conducting the underlying tribal action, and that excuses the need to exhaust tribal
21 remedies.

22 Finally, Blue Lake might argue that, since I raised none of these issues in their
23 tribal court, it is premature to raise them in this Court. This argument must fail since
24 Marston knows that he is Blue Lake’s attorney. Both the Blue Lake law, and the federal
25 law, that Marston reasoned from require that a judge disqualify himself if the judge
26 knows that he should be disqualified. Under both bodies of law Marston’s being Blue
27 Lake’s attorney is grounds for disqualification. Marston’s bad faith conduct exists
28

1 independent of my actions, and allows this Court to relieve me from exhausting tribal
2 remedies.

3
4 **C: Marston’s discovery order is an act of bad faith because his “narrow”**
5 **discovery topics cannot develop facts establishing tribal jurisdiction**
6 **over the alleged fraud claim against me, which was Marston’s stated**
7 **reason for issuing the discovery order**

8 After my first federal action was dismissed, I made a motion for judgment on the
9 pleadings in the tribal court. *Dkt. 8-2*, pp 30 – 37. The sole claim in the underlying tribal
10 action against me is for fraudulent inducement. *Dkt. 1-1*, p 7, from line 12. Tribal
11 jurisdiction is “cabined by geography” and “does not extend beyond tribal boundaries.”
12 (*Phillip Morris v. King Mountain*, 569 F.3d 932, 938 (9th Cir. 2009)). So for Blue Lake to
13 have jurisdiction over the fraud it alleges, then Blue Lake must allege that the fraud itself
14 occurred within the Blue Lake Rancheria.

15 My motion for judgment on the pleadings asked that the claim against me be
16 dismissed, because there were no allegations in Blue Lake’s tribal complaint alleging that
17 the fraudulent inducement occurred within the Blue Lake Rancheria (*Dkt. 8-2*, pp 31 - 32,
18 ¶¶ 11 - 14).

19 Marston issued a tribal court order on September 16th denying my motion for
20 judgment on the pleadings because “the jurisdictional issues presented ... have not had
21 the benefit of the development of a full factual record upon which to make a judicial
22 determination.” *Dkt. 1-4*, p 16, lines 26 – 28. Marston continued on to state that he was
23 allowing limited discovery for the purpose of developing a “robust factual record upon
24 which to make a judicial determination” about jurisdiction. *Id.*, p 17, lines 1 – 2.

25 This discovery was limited to three “narrow topics.” *Id.*, p 17, line 25. The topics
26 were, 1) Was there consent to tribal jurisdiction? 2) Were there minimum contacts with
27 Blue Lake Rancheria? And, 3) Where was the contract in the underlying tribal action
28 entered into? *Id.*, p 17 line 25 to p 18 line 1.

1 None of these “narrow topics” address where the alleged fraud took place. By
2 excluding where the fraud allegedly took place from the “narrow topics” upon which
3 discovery might be performed, Marston makes it impossible for the discovery process to
4 establish if the alleged fraud took place on the reservation.⁷ This means that, under color
5 of developing a factual record to inform a jurisdictional finding, Marston is ordering me
6 to engage in a discovery process that cannot develop the facts Marston claims he needs to
7 resolve whether or not Blue Lake has jurisdiction over the only claim Blue Lake makes
8 against me.

9 Marston has crafted his discovery order to frustrate the reasons he provided to
10 justify that order. Marston’s discovery order is another instance of him conducting the
11 tribal proceeding contrary to his stated reasoning. For a judge to conduct a proceeding
12 contrary to his stated reasoning is bad faith. Marston’s discovery order is an act of bad
13 faith that excuses the need to exhaust tribal remedies.

14

15 **D: Marston’s bad faith is incurable within the tribal court**

16

17 Marston’s bad faith actions undermine the integrity of the tribal court. Because he
18 concealed his attorney-client relationship with Blue Lake, and his association in private
19 practice with Boutin Jones, Marston has shown that his court cannot be trusted to create a
20 factual record. Because Marston arrived at his orders through some route other than his
21 stated reasoning, Marston has shown that his court cannot be trusted to provide sound
22 legal expertise for the parties, or reviewing courts, to benefit from. *See National*
23 *Farmers*, at 857. *See also, Dkt. 1-4*, p 17 lines 3 – 6.

24

25

26

27 ⁷ Blue Lake has yet to specifically allege the fraud they claim I committed. Refusing to allow discovery
28 as to the alleged fraud serves mainly to prevent me from forcing Blue Lake to commit itself to a specific
fraud theory.

1 This lack of integrity is incurable within Blue Lake Tribal Court, because, for all
2 intents and purposes, Marston is the Blue Lake Tribal Court. He is its Chief Judge, and
3 there is no tribal appellate court reviewing him. *Complaint*, ¶ 26 and *Dkt. 1-2*, p 13.

4 Blue Lake might argue that there are associate judges in the tribal court to whom
5 the case might be transferred. Indeed, there are at least two possible rosters from which
6 associate judges might be drawn, both of which purport to be “General Order #5” in the
7 tribal court. *Exhibit 5*. Three of the five named associate judges are also associate
8 attorneys at Rapport and Marston. *Id.*, pp 3 – 5. The other two are Marston’s personal
9 friends. *Id.*, pp 7 – 8. All five of the associate judges have been appointed by Marston in
10 the recent past, and are thus tainted by his bad faith.

11 Because of Marston’s bad faith, nothing the Blue Lake Tribal Court does can be
12 relied upon. The Blue Lake Tribal Court cannot be trusted to add anything reliable to the
13 question of Blue Lake’s jurisdiction over me. And so Marston’s bad faith excuses the
14 need to exhaust tribal remedies.

15
16 **IV. MARSTON’S BAD FAITH CONDUCT IN THE UNDERLYING TRIBAL ACTION IS**
17 **CONSISTENT WITH HIS CONDUCT IN OTHER BLUE LAKE TRIBAL COURT ACTIONS**

18
19 Marston has on several occasions in the past presided as judge in Blue Lake’s
20 tribal court, in actions where Blue Lake itself was plaintiff, at a time when Marston was
21 demonstrably, and simultaneously, employed as Blue Lake’s attorney.

22 Specifically, in December of 2011, *United Contractors Insurance Company v. Blue*
23 *Lake Rancheria Tribal Court*, 2:11-cv-10161-JHK-SH (C.D. Cal. 2011) was filed in the
24 United States District Court for Central California. *Exhibit 6*, pp 3, 5. Marston presided
25 over an underlying tribal action, and UCIC sought relief from tribal jurisdiction. *Id.*, p 6,
26 lines 1 – 5. The underlying tribal action involved Mainstay Business Solutions, a Blue
27 Lake Rancheria economic venture. *Id.*, p 6, lines 10 – 17. Mainstay is the tribal
28 economic venture involved in *Blue Lake v. Lanier*. *Exhibit 4*, p 2, line 9. Rapport and

1 Marston have represented Blue Lake and Mainstay in *Lanier* since June of 2011. *Id.*, pp
2 2 – 3. And so UCIC was facing Mainstay in Blue Lake Tribal Court with Marston
3 presiding, while Marston’s firm was representing Mainstay in *Blue Lake v. Lanier*.

4 *Admiral Insurance v. Blue Lake Rancheria Tribal Court*, 5:12-cv-01266-LHK
5 (N.D. Cal. 2012), is a similar action. *Exhibit 7*. Admiral faced Mainstay in Blue Lake
6 Tribal Court with Marston presiding (*Id.*, p 7, lines 19 – 25), while Marston’s firm at all
7 relevant times represented Mainstay in *Lanier*. *Exhibit 4*, pp 2 – 3.

8 In my complaint, at ¶ 36, I put forth the cases of Joe Batich and the Sloan family.
9 These were two instances in Blue Lake Tribal Court where, according to Blue Lake’s
10 own records, Marston presided as judge while his partner Rapport represented Blue Lake.
11 *See also, Dkt. 1-4*, pp 12 – 13.

12 Additionally, I know that on the morning of September 9th there was some sort of
13 business transacted in Blue Lake Tribal Court in an action unrelated to my own. Blue
14 Lake’s tribal court clerk refused to share with me the docket of that case, so I have not
15 been able to share my discoveries about Marston with any non-tribal parties in that
16 action.

17 Marston’s bad faith conduct of the underlying tribal proceedings do not appear to
18 depart from the typical conduct of proceedings in Blue Lake Tribal Court.

19
20 **V. BAD FAITH BY MARSTON IS AT LEAST PLAUSIBLE, SO BLUE LAKE’S MOTION**
21 **MUST BE DENIED**

22
23 Compelling evidence has been put forward showing that Marston is Blue Lake’s
24 attorney. Marston has not disputed the allegation that he is Blue Lake’s attorney. If
25 Marston is Blue Lake’s attorney, then he committed several acts of bad faith at the
26 September 9th tribal court hearing, and further acts of bad faith in his September 16th
27 discovery order.

1 Since Marston committed these acts of bad faith while conducting the tribal
2 proceedings, these acts of bad faith excuse the need to exhaust tribal remedies before
3 challenging tribal jurisdiction in federal court, and Blue Lake's present motion must be
4 denied.

5 Even if there is some defect in my evidence showing Marston is Blue Lake's
6 attorney, Blue Lake's motion should still be denied. That's because I've at least
7 plausibly shown that Marston is Blue Lake's attorney, and that if he is their attorney, that
8 he conducted tribal court proceedings in bad faith. That is enough for me to survive this
9 motion to dismiss under the summary judgment standard prescribed by *Safe Air for*
10 *Everyone* at 1039.

11 Additionally, if stronger evidence is needed to establish that Marston is Blue
12 Lake's attorney, then I ask that this Court allow me to engage in discovery to develop it.

13 Since filing my complaint, I have uncovered several public statements by Marston
14 establishing that he is actively involved in gaming compact negotiations between tribes
15 and California. *Exhibit 8*. Many tribal gaming compacts expire at the end of the decade,
16 and Marston states he is representing multiple tribes in renewal negotiations. *Id.*, p 2.
17 Though Marston does not reveal which specific tribes he represents, I have reason to
18 believe that Blue Lake numbers among those tribes, and that this can be established
19 through discovery. It therefore seems probable that discovery will show that Marston not
20 only represents Blue Lake as an attorney generally, but that he also represents the very
21 casino interest that is suing me in Blue Lake's tribal court. For a judge to conceal from a
22 defendant he presides over that he is an attorney for the plaintiff is outrageous bad faith.

23 ///

24 ///

25 ///

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27 ///

CONCLUSION

1
2
3 Marston is Blue Lake's attorney. He concealed that fact during his conduct of the
4 tribal court proceedings. Marston then refused to disqualify himself from presiding over
5 the underlying tribal action. This refusal was unreasonable by his own stated reasoning.
6 Marston then ordered discovery in tribal court to develop a factual record sufficient to
7 make a jurisdictional finding. But Marston framed the discovery such that no facts can
8 be developed regarding the fraudulent inducement allegations Blue Lake has leveled
9 against me. Since the only allegations against me are for fraudulent inducement, this
10 makes Marston's discovery order unreasonable as well.

11 The tribal exhaustion doctrine first enunciated by the Supreme Court in *National*
12 *Farmers* balances the right of non-Indian individuals to seek federal review of tribal
13 assertions of jurisdiction over them against a public policy goal of promoting the interests
14 of justice in Indian Country through the extension of comity to tribal courts.

15 Marston has shown through his bad faith that he cannot be trusted to create a
16 factual record, because he himself conceals material facts. And he has shown that he
17 cannot be trusted to teach the federal court about the proper application of federal Indian
18 law, because he has shown that he does not act from his stated reasons.

19 Since the tribal court cannot be relied upon to create an honest record from which
20 others might benefit, no legitimate interest is served by requiring exhaustion of tribal
21 remedies, and my right to seek federal review of Blue Lake's assertion of jurisdiction
22 must predominate.

23 I ask this Court to deny Blue Lake's motion to dismiss with prejudice, and I ask
24 this Court to order Marston to answer my complaint within fourteen days.

25 Respectfully submitted November 1st, 2016.

26 By: /s/ James Acres

27 James Acres
28 In Pro Per