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7
 8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**

10 JAMES ACRES,
 11 Plaintiff,
 12 v.
 13 BLUE LAKE RANCHERIA, and its
 14 TRIBAL COURT, through its Chief Judge
 LESTER MARSTON, in his individual
 15 and official capacities,
 16 Defendants.

Case No. 3:16-cv 05391-WHO

**REPLY IN SUPPORT OF
 DEFENDANT'S MOTION TO
 DISMISS**

**[Fed. R. Civ. Proc. 12(b)(1), 12(b)(2),
 12(b)(6)]**

Date: December 7, 2016
 Time: 2:00 p.m.
 SF Div., 17th Floor, Courtroom 2
 Honorable William H. Orrick

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INTRODUCTION

1 The Opposition to Motion to Dismiss (“Opposition”) filed by Plaintiff James
2 Acres (“Acres”) provides no basis for the Court to deny the Blue Lake Rancheria’s
3 (“Tribe”) Motion to Dismiss (“Motion”) the Complaint.
4

5 As an initial matter, Acres’ Opposition wholly fails to address the Tribe’s
6 sovereign immunity arguments as they relate to the Tribe, its Court, and its officers.
7 The alleged evidence submitted by Acres is inadmissible, and in any event, was
8 disproven and/or addressed in Judge Marston’s Declaration previously filed with this
9 Court. [DKT No. 22.] Acre’s argument that this case fits within an exception to the
10 exhaustion rule is incorrect. The rule limits its application to where “**an assertion of**
11 **tribal court jurisdiction** is motivated by a desire to harass or is conducted in bad
12 faith.” *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir.
13 2009) (emphasis added). Here, there has not yet been an assertion of tribal jurisdiction,
14 much less an assertion of jurisdiction that is motivated by a desire to harass or is
15 conducted in bad faith. This exception is therefore inapplicable.

16 Acres’ continued attempt to move forward with a Complaint in the Federal Court
17 to subvert tribal court authority is without justification, and must be dismissed by this
18 Court just as Acres’ previous Complaint was dismissed.

ARGUMENT

I. **ACRES’ OPPOSITION FAILS TO DISPUTE THAT SOVEREIGN IMMUNITY BARS THIS ACTION AGAINST ALL OF THE DEFENDANTS.**

22 Despite having the burden to show that tribal sovereign immunity does not bar
23 this action, Acres fails to address the Tribe’s arguments regarding sovereign immunity.
24 With regard to the Tribe itself, Acres does not challenge the Tribe’s assertion that, as a
25 federally recognized Indian tribe, it is entitled to sovereign immunity from unconsented
26 suit absent congressional authorization or waiver. *Santa Clara Pueblo v. Martinez*, 436
27 U.S. 49, 58 (1978); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*,
28 757 F.2d 1047, 1050 (9th Cir. 1985), *rev’d on other grounds*, 474 U.S. 9 (1985). *See*

1 also, Motion, pp. 9-12. Neither does Acres contest that the Tribal Court, as a
2 governmental subdivision of the Tribe established pursuant to the Tribe's Constitution,
3 Art. V, Sec. 6 (n), is cloaked in tribal sovereign immunity and similarly cannot be sued
4 absent consent or waiver. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751
5 (1998). *See also* Motion, p. 9-12. Sovereign immunity, therefore, bars this suit against
6 the Tribe and the Tribal Court.

7 Acres' Opposition also does not address the Tribe's argument that Judge Marston,
8 as a tribal officer acting in his official capacity, is cloaked in the Tribe's sovereign
9 immunity and cannot be sued absent consent or waiver. *Linneen v. Gila River Indian*
10 *Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Native Am. Distrib. v. Seneca-Cayuga*
11 *Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). *See also*, Motion, pp. 10-11. Nor is
12 there any opposition to the Tribe's claims that sovereign immunity prevents Judge
13 Marston from being sued in his personal capacity because the relief sought is against the
14 Tribe, not Judge Marston, and because tribal court judges are entitled to the same
15 absolute judicial immunity that shields state and federal court judges from suit. *Murgia*
16 *v. Reed*, 338 Fed. Appx. 614, 616 (9th Cir. 2009); *Maxwell v. County of San Diego*, 708
17 F.3d 1075, 1087 (9th Cir. 2013); *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015);
18 *Fox v. Lower Sioux Tribal Court*, 2014 U.S. Dist. LEXIS 148842, *7-8, *citing Edlund v.*
19 *Montgomery*, 355 F. Supp. 2d 987, 990 (D. Minn. 2005). *See also*, Motion, pp. 12-15.
20 Acres' own arguments make clear that the relief sought is not against Judge Marston in
21 his personal capacity, but rather against the Tribal Court and the Tribe. *See* Opposition,
22 p. 8 ["Marston is the presiding judge in the underlying tribal proceeding. He, **and his**
23 **successors in that office**, can certainly prevent any further actions from being taken in
24 that proceeding." (emphasis added)]. Accordingly, tribal sovereign immunity (and
25 absolute judicial immunity) prevents this suit from going forward against Judge
26 Marston.

27 The only reference to sovereign immunity made by Acres fails to demonstrate a
28 congressional authorization of this suit or a tribal waiver of immunity. Opposition, p. 7.

1 Instead, Acres simply states that “[t]ribal sovereign immunity does not bar this action,”
2 *id.*, and then cites the rule in *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d
3 842, 846 (9th Cir. 2009) that “[n]on-Indians may bring a federal common law cause of
4 action under 28 U.S.C. §1331 to challenge tribal court jurisdiction.” *Id.* Doing so does
5 not address the Tribe’s assertions that its immunity prevents a suit against the Tribe, its
6 Tribal Court, and its Chief Judge. Additionally, such suits under §1331 “encompass[]
7 the federal question whether a tribal court **has exceeded** the lawful limits of its
8 jurisdiction.” *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004)(emphasis added),
9 *citing National Farmers Union Insurance Co. v. Crow Tribe of Indian*, 471 U.S. 845,
10 857 (1985). Here, the Tribal Court cannot have exceeded the lawful limits of its
11 jurisdiction, because it has not yet determined whether it has jurisdiction.

12 Furthermore, the only other way in which this suit could avoid the sovereign
13 immunity barrier and go forward against Judge Marston would be through an *Ex Parte*
14 *Young* action seeking “prospective relief against tribal officers allegedly acting in
15 violation of federal law.” *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901
16 (9th Cir. 1991), *overruled on other grounds by Big Horn County Elec. Coop., Inc. v.*
17 *Adams*, 219 F.3d 944, 953 (9th Cir. 2000). However, there can be no allegation that
18 Judge Marston is acting in violation of federal law because Judge Marston has not yet
19 made a determination regarding whether the Tribal Court has jurisdiction over Acres
20 and/or ABI. Nor do any of the orders issued by the Tribal Court otherwise violate any
21 federal laws that apply to the Tribe. With regard to Judge Marston’s decision on Acres’
22 motion to disqualify Judge Marston, there is no federal law that applies to the Tribe
23 regarding when and under what circumstances a tribal court judge has a conflict of
24 interest. Thus, any Tribal Court decisions on the subject cannot violate federal law,
25 because there is no applicable federal law to violate.

26 For these reasons and those stated in the Tribe’s Motion, pp. 9-15, tribal
27 sovereign immunity bars this Court from exercising jurisdiction over all of the
28

1 defendants and the subject of this suit and the Court must dismiss the Complaint in its
2 entirety.

3 **II. ACRES SUBMITTED NO ADMISSIBLE EVIDENCE IN SUPPORT OF**
4 **HIS OPPOSITION AND, THEREFORE, NOTHING IN THE RECORD**
5 **CAN SUPPORT A FINDING THAT BAD FAITH EXCUSES**
6 **EXHAUSTION OF TRIBAL COURT REMEDIES.**

7 Pursuant to the requirements of United States District Court for the Northern
8 District of California Civil Local Rules, Rule 7-3(c), the Tribe objects to all of the
9 evidence, *see* Exhibits 1-9, filed in support of the Opposition on the grounds that
10 Exhibits 1-9 are not authenticated and are not, therefore, admissible. Acres has,
11 therefore, submitted no admissible evidence in support of his Opposition. As a result,
12 the Tribe's Motion should be granted and the Court's prior decision ordering Acres to
13 exhaust his Tribal Court remedies must remain in effect.

14 Local Rule 7-5(a) is clear—an affidavit or declaration is required to present
15 evidence and facts to the Court:

16 Factual contentions made in support of or in opposition to any motion must
17 be supported by an affidavit or declaration and by appropriate references to
18 the record. Extracts from depositions, interrogatory answers, requests for
19 admission and other evidentiary matters must be appropriately
20 authenticated by an affidavit or declaration.

21 Furthermore, “[t]o satisfy the requirement of authenticating or identifying an item
22 of evidence, the proponent must produce evidence sufficient to support a finding that
23 the item is what the proponent claims it is.” Fed. R. Evid. 901(a).

24 The Exhibits submitted with the Opposition, and the factual allegations in
25 connection therewith made in the Opposition, are not supported by an affidavit or
26 declaration—they are simply attached to Acres' brief. More fundamentally, Acres has
27 not attempted to authenticate or request judicial notice of any of the materials contained
28 in Exhibits 1-9.¹ There is nothing in the record to support a finding that any of the
evidence submitted is what Acres claims it is. As a result, the Court must sustain the

¹ In Exhibit 9, Acres attempts to lay a foundation for authenticating a transcript Acres created from a recording of the Tribal Court hearing on his motion to disqualify Judge Marston; however, Exhibit 9 is not submitted under penalty of perjury. 28 U.S. Code § 1746.

1 Tribe's objection to this evidence and strike Exhibits 1-9 from the record. Accordingly,
2 Acres cannot establish that his case fits within any of the exceptions to the rule that
3 Tribal Court remedies must be exhausted prior to resort to federal court.

4 Anticipating (perhaps knowing) that his evidence was inadmissible, Acres states
5 in his Opposition that "[e]ven if there is some defect in my evidence showing that
6 Marston is Blue Lake's attorney, Blue Lake's motion should still be denied. That's
7 because I've at least plausibly shown that Marston is Blue Lake's attorney, and that if
8 he is their attorney, that he conducted tribal court proceedings in bad faith."
9 Opposition, p. 20. Yet, there is no rule of evidence allowing for a litigant to "plausibly"
10 set forth a factual contention without the submission of properly authenticated and
11 otherwise admissible evidence. In the absence of sufficient, admissible evidence
12 establishing that any of the exceptions to the exhaustion requirement are present in this
13 case, there are no grounds for the Court to entertain Acres' suit at this time. Acre's
14 Complaint should again be dismissed.

15 **III. ACRES IS PRECLUDED FROM RAISING NEW ARGUMENTS**
16 **REGARDING BAD FAITH THAT HE COULD HAVE, BUT DID NOT,**
17 **RAISE BEFORE THIS COURT IN THE PREVIOUS ACTION.**

18 In the last action filed by Acres against the Tribe, Acres argued that the Tribal
19 Court had acted in bad faith against Acres such that Acres was excused from exhausting
20 his Tribal Court remedies, citing a variety of Tribal Court actions that Acres perceived
21 as hostile toward him. In rejecting this argument, this Court ruled that Acres'
22 "arguments [were] not well taken" and that none of Acres' claims "supporte[d] a finding
23 of bad faith...." See Request for Judicial Notice ("RJN") [DKT No. 8-4], Request No. 3
24 (Order Granting Motion to Dismiss, issued by this Court on August 10, 2016, in *Acres*
25 *v. Blue Lake Rancheria Tribal Court, et al.*, Case No. 16-cv-02622-WHO, pp. 3-4).
26 Thus, this Court has ruled that the Tribal Court had not acted in bad faith toward Acres
27 and that Acres was not excused from exhausting his Tribal Court remedies.

28 Each of Acres' factual allegations against the Tribal Court regarding perceived
bad faith could have, and must have, been raised by Acres the last time he sought this

1 Court's review of the issue. Acres has, for all intents and purposes, re-filed an identical
2 lawsuit and simply come up with alternative allegations of bad faith that Acres had the
3 opportunity to present to this Court the last time he filed suit. Each of the allegations
4 that Acres believes creates a conflict of interest for Judge Marston, also allegedly
5 existed at the time Acres last asked this Court to address the issue, but he failed to raise
6 them.

7 In effect, Acres has, by re-filing a complaint that seeks identical relief to his
8 previous action, moved this Court to reconsider its prior order dismissing Acres' suit.
9 Acres' new theories regarding this Court's ability to adjudicate his claims and excuse
10 Acres' duty to exhaust do not approach the threshold necessary to meet the standard
11 required for reconsideration of a prior order. Under United States District Court for the
12 Northern District of California Civil Local Rules, Rule 7-9(c), a party seeking
13 reconsideration of an order is not permitted to "repeat any oral or written argument
14 made by the [] party in support of or in opposition to the interlocutory order which the
15 party now seeks to have reconsidered."

16 Here, Acres has repeated an identical argument—the Tribal Court is acting in bad
17 faith towards him. That Acres has developed a new allegation (i.e., the Chief Judge has
18 a conflict of interest) in support of his claim does not change the result, because these
19 allegations could have—and ought to have—been made the last time Acres sought
20 federal court review. Accordingly, Acres is now precluded from re-litigating this issue
21 because his present allegations could have, but were not, raised in his previous suit. For
22 this additional reason, the present case must be dismissed.

23 **IV. ACRES CANNOT MANUFACTURE FEDERAL COURT JURISDICTION**
24 **BY CLAIMING THAT HIS ARGUMENTS ARE LIMITED TO A**
25 **DEMONSTRATION OF BAD FAITH.**

26 In his Opposition, Acres attempts to contort the requests for relief in the
27 Complaint by claiming that this Court may review bad faith in a tribal court as part of
28 the analysis as to whether tribal court exhaustion is excused. In an effort to avoid the
inevitable fact that this Court would be required to examine and interpret tribal conflict

1 of interest laws—over which the Court has no jurisdiction—Acres claims that his
2 arguments are limited to demonstrating that Judge Marston’s “decision was made
3 contrary to his stated reasoning.” Opposition, p. 12.

4 Yet, no amount of legal positioning can avoid the fact that there is no way to
5 accept Acres’ bad faith argument without first determining that Judge Marston has a
6 conflict of interest in the underlying Tribal Court action. For example, if Judge Marston
7 does not have a conflict of interest, then there can be no showing that the Tribal Court
8 has acted in bad faith. In order to determine whether Judge Marston’s actions and
9 relationships create a conflict of interest where the Tribe is a party to the suit, this Court
10 would be required to apply the Tribe’s laws to make the determination. This the Court
11 cannot do. *In re Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d
12 749, 763 (8th Cir. Iowa 2003)[“Jurisdiction to...interpret tribal constitutions and
13 laws...lies with Indian tribes and not in the district courts.”]; *Kaw Nation ex rel.*
14 *McCauley v. Lujan*, 378 F.3d 1139 (10th Okla. 2004).

15 In addition, no federal law controls under what circumstances a tribal judge is
16 disqualified based on a conflict of interest. It is exclusively a question of tribal law.
17 Thus, Acres’ arguments regarding Judge Marston’s alleged conflict of interest do not
18 provide a basis for federal question jurisdiction under 28 U.S.C. §1331. *See Kaw Nation*
19 *ex rel. McCauley v. Lujan*, 378 at 1143, *citing Motah v. United States*, 402 F.2d 1, 2
20 (10th Cir. 1968) and *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d
21 364, 366 (10th Cir. 1966)[“A dispute over the meaning of tribal law does not ‘arise
22 under the Constitution, laws, or treaties of the United States,’ as required by 28 U.S.C.
23 §§ 1331 and 1362.”]. Neither is there any independent basis for federal court
24 jurisdiction over a claim that a tribal court judge has acted in bad faith or has a conflict
25 of interest.

26 Indeed, Acres’ own Opposition demonstrates that this Court would be required to
27 apply tribal law to decide the issues raised in Acres’ Complaint. *See* Opposition, p. 13.
28 Acres argues extensively that, under tribal law, Judge Marston has a conflict of interest

1 that should disqualify him from presiding over the case. *See id.* Additionally, Acres
2 argues that disqualification of Judge Marston is required under federal law, including 28
3 U.S.C. §455(b)(1) and 28 U.S.C. §455(b)(2), Opposition, p. 14, but neither of those
4 laws applies to or governs tribal court judges. Thus, the issue of whether Judge Marston
5 has a conflict of interest, which is dispositive on the issue of whether bad faith exists, is
6 exclusively a matter of tribal law and does not pose a federal question over which this
7 Court may exercise jurisdiction.

8 It is important to also note that the bad faith exception to the tribal court
9 exhaustion requirement applies where “**an assertion of tribal court jurisdiction** is
10 motivated by a desire to harass or is conducted in bad faith.” *Elliott v. White Mountain*
11 *Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009)(emphasis added). Acres’ bad
12 faith argument—that Judge Marston should have but failed to disqualify himself
13 because of a conflict of interest—does not relate to the assertion of Tribal Court
14 jurisdiction. In other words, Acres has not argued that Judge Marston has asserted
15 jurisdiction in bad faith—and could not do so because no “assertion of tribal
16 jurisdiction” has even been made at this point. Thus, Acres’ claims, even if taken as
17 true, do not satisfy the requirements of the bad faith exception.

18 Thus, Acres’ Complaint does not pose a federal question and this Court,
19 therefore, must dismiss for lack of subject matter jurisdiction.

20 **v. THE DISCOVERY ORDER SEEKS TO DEVELOP THE FACTS**
21 **NECESSARY TO DETERMINE WHETHER TRIBAL COURT**
22 **JURISDICTION EXISTS.**

23 Acres argues that Judge Marston, by ordering the parties to engage in discovery
24 on the issue of Tribal Court jurisdiction, acted in “bad faith because [Judge Marston’s]
25 ‘narrow’ discovery topics cannot develop facts establishing tribal jurisdiction over the
26 alleged fraud claim against me, which was Marston’s stated reason for issuing the
27 discovery order.” Opposition, p. 16. Acres further claims that Judge Marston’s
28 Discovery Order fails to “address where the alleged fraud took place.” *Id.* at p. 17. “By
excluding where the fraud allegedly took place from the ‘narrow topics’ upon which

1 discovery might be performed, Marston makes it impossible for the discovery process to
2 establish if the alleged fraud took place on the reservation.” *Id.* Tied to this argument is
3 Acres’ belief that “for a tribe to have jurisdiction over an alleged fraud, the fraud must
4 be alleged to have occurred on the reservation,” and that “Blue Lake has never
5 specifically alleged that the fraud they claim against me occurred on their reservation.”
6 *Id.* at p. 5. These arguments are meritless.

7 First and foremost, the Tribe has alleged that Acres’ fraud occurred on the Tribe’s
8 Reservation. The Tribe asserted that the contract was signed on the Reservation, Tribal
9 Court Complaint, Exhibit 1 to the Complaint, p. 1, and that Acres’ committed the fraud
10 at the time the contract was entered into. *Id.* at p. 6. Thus, there is no question that the
11 Tribe has alleged that the fraud occurred on the Reservation. Additionally, even if the
12 Tribe had not so alleged, Acres has cited no legal authority to support the claim that the
13 actions in connection with the fraud cause of action must occur on the Reservation for
14 the Tribal Court to potentially have jurisdiction over the fraud claim. The fraud claim
15 may arise on the Reservation without Acres’ physical presence on the Reservation at the
16 time of the fraud. Furthermore, Tribal Court jurisdiction over the fraud claim may result
17 from consent to the Tribal Court’s jurisdiction through some other related relationship,
18 like contractual dealings.

19 Finally, the scope of Judge Marston’s Discovery Order covers the discovery
20 necessary to determine whether the Tribal Court may exercise jurisdiction over ABI and
21 Acres, including the fraud claim against Acres. Judge Marston’s Order, *see* Complaint,
22 Exhibit 6, pp. 3-4, stated:

23 The Parties shall engage in limited discovery related to the following
24 narrow topics: (1) Did James Acres and his company, Acres Bonusing, Inc.
25 consent to the jurisdiction of the Blue Lake Rancheria? (2) Did James
26 Acres and his company, Acres Bonusing, Inc., have minimum contacts
27 with the Blue Lake Rancheria, its enterprises or its reservation? (3) Where
28 did the parties enter into the contracts that are the subject of this
proceeding?

All three of these discovery topics permit the parties to uncover the facts
necessary to determine whether the Tribal Court may properly exercise jurisdiction over

1 the fraudulent inducement cause of action against Acres. If Acres has consented to
2 Tribal Court jurisdiction by entering into a consensual relationship with the Tribe
3 through commercial dealing, contracts, leases, or other arrangements, *Montana v.*
4 *United States*, 450 U.S. 544, 565 (1981), and the fraud cause of action has a nexus to the
5 consensual relationship, then the Tribal Court may exercise jurisdiction over the claim.
6 To determine whether the Tribal Court may potentially exercise jurisdiction over Acres
7 personally also requires that the Tribal Court determine whether Acres has minimum
8 contacts with the Blue Lake Rancheria, its enterprises, or its reservation. Finally, since
9 the Tribe has alleged that the fraud occurred at the time the contract was signed, the
10 Tribal Court asked that the parties engage in discovery as to where the parties entered
11 into the contracts that are the subject of the Tribal Court action. Thus, all of the topics of
12 discovery will assist the Tribal Court in determining whether it may exercise
13 jurisdiction over the claims against ABI and Acres personally.

14 For these reasons, Acres' argument that Judge Marston's Discovery Order was
15 issued in bad faith fail. Rather, the Discovery Order appears consistent with the express
16 federal objective to encourage tribal courts to explain to the parties the precise basis for
17 accepting jurisdiction and to provide other courts with the benefit of their expertise in
18 such matters in the event of further judicial review. *National Farmers Union Insurance*
19 *Co. v. Crow Tribe of Indian*, 471 U.S. 845, 857 (1985).

20 CONCLUSION

21 Acres perceives every action that the Tribal Court takes in the underlying Tribal
22 Court action to be the result of a bad faith conspiracy between the Tribe and the Tribal
23 Court against him. That is simply untrue. For the reasons set forth herein, the Tribe
24 respectfully requests that this case be dismissed with prejudice. As this Court has found
25 before, the Tribal Court can and should make the first determination regarding whether
26 it may properly exercise jurisdiction over Acres and ABI—no such determination has
27 yet been made.

1 Dated: November 9, 2016

BOUTIN JONES, INC.

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3 By: /s/ Daniel S. Stouder
4 Daniel S. Stouder
5 Amy L. O'Neill
6 Attorneys for Blue Lake Rancheria
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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 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

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