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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES ACRES,

Plaintiff,

v.

BLUE LAKE RANCHERIA, and its TRIBAL COURT, through its Chief Judge LESTER MARSTON, in his individual and official capacities,

Defendants.

Case No. 3:16-cv 05391-WHO

DEFENDANT BLUE LAKE RANCHERIA'S MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION

[Civil L.R. 7-9]

Action Filed: September 20, 2016
Honorable William H. Orrick

Defendant Blue Lake Rancheria ("BLR") files this Motion for Leave to File a Motion for Reconsideration ("Motion") of the Court's December 8, 2016 Order Granting Limited Discovery Re Bad Faith Exception and Issuing Protective Order.

No hearing date has been requested for this Motion because Civil L.R. 7-9(d) provides the following: "**(d) Determination of Motion**. Unless otherwise ordered by the assigned Judge, no response need be filed and no hearing will be held concerning a motion for leave to file a motion to reconsider. If the judge decides to order the filing of additional papers or that the matter warrants a hearing, the judge will fix an appropriate schedule."

FACTUAL BACKGROUND

Plaintiff James Acres ("Acres") filed this action on September 20, 2016, seeking a declaration from this Court that the Tribal Court of the Blue Lake Rancheria ("Tribal Court") lacked jurisdiction over him because of his claims of bad faith asserted against the Tribal Judge.

On November 9, 2016, BLR filed a Motion to Dismiss this Action based on various grounds, including, among other things, sovereign immunity and failure to exhaust tribal court remedies.

On December 7, 2016, this Court held a hearing on the Motion to Dismiss wherein the Court stated that it intended to allow limited discovery on the issue of bad faith regarding the Tribal Judge. However, the Court further stated that if the Tribal Judge was to recuse himself, BLR might be able to bring a Motion for Reconsideration:

> THE COURT: Well, I suppose that you could move for reconsideration of whatever order comes out of this for changed factual circumstance if Judge Marston withdrew and somebody else was on the bench. Then I'd have to look at it.

On December 8, 2016, this Court issued an Order Granting Limited Discovery Re Bad Faith Exception and Issuing Protective Order. [DKT No. 30.] The December 8, 2016 Order delayed ruling on BLR's Motion to Dismiss to allow for limited discovery regarding Judge Marston.

On December 29, 2016, the Tribal Court Judge issued an Order recusing himself as Tribal Court Judge in the pending Tribal Court action. A true and correct copy of the Order of recusal from the Tribal Court is attached hereto as **Exhibit A** and incorporated herein.

AUTHORITY

Civil L.R. 7-9(a) provides the following in connection with Motions for Reconsideration:

> **(a) Leave of Court Requirement.** Before the entry of a judgment adjudicating all of the claims and the rights and liabilities of all the parties in a case, any party may make a motion before a Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any interlocutory order on any ground set forth in Civil L.R. 7-9(b). No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion.

Civil L.R. 7-9(b) further elaborates on the requirements of a motion for leave to file a motion for reconsideration as follows:

> **(b) Form and Content of Motion for Leave.** A motion for leave to file a motion for reconsideration must be made in accordance with the requirements of Civil L.R. 7-9.The moving party must specifically show reasonable diligence in bringing the motion and one of the following:
> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

ARGUMENT

At the December 7, 2016, hearing on BLR's Motion to Dismiss, this Court suggested that BLR might be able to bring a Motion for Reconsideration of the Court's Order allowing limited discovery before making a final ruling on BLR's Motion to Dismiss if "Judge Marston withdrew and somebody else was on the bench." As shown in Exhibit A attached hereto, Judge Marston has recused himself from the Tribal Court action and an alternative Judge will be appointed to handle the matter within 14 days of December 29, 2016.[1] The crux of the Federal Action is Acre's allegation that Judge Marston acted in bad faith by failing to recuse himself. Because Judge Marston's

[1] We do not yet know the identity of the alternative Judge but we will so inform the Court in any subsequent filing related to the Motion for Reconsideration.

involvement in the Tribal Court case is no longer an issue, this Court can and should reconsider its December 8, 2016 Order and now grant Defendant BLR's Motion to Dismiss.

A Motion for Reconsideration is proper here because it meets the requirements set forth by this Court in its local rules regarding motions for reconsideration. Namely, both a material change in facts and the emergence of new facts have occurred since the Court issued its December 8, 2016 Order. The changed facts/new facts are that Judge Marston has recused himself and is no longer the Tribal Court judge in the Tribal Court action. This change in facts/additional fact did not exist at the time of the December 8, 2016 Order and therefore BLR could not have known of or discovered this before now. Judge Marston's recusal order in the Tribal Court action calls for reconsideration of the Court's December 8, 2016 Order, and we would necessarily expound on this argument in the event leave is granted.

CONCLUSION

BLR respectfully requests that the Court grant BLR Leave to file a Motion for Reconsideration regarding the December 8, 2016 Order.

Dated: December 30, 2016

BOUTIN JONES, INC.

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

EXHIBIT A

Trisha Doyle

Subject: FW: C-15-1215LJM
Attachments: Order Recusing Judge Marston (12.29.16).doc; ATT00001.htm

From: Anita Huff <bluelakerancheriatribalcourt@gmail.com>
Date: December 29, 2016 at 7:38:05 PM PST
To: <james@kosumi.com>, <aoneill@boutinjones.com>
Subject: C-15-1215LJM

Please find attached an Order in the above named case. Original WILL NOT follow by USPS. I am working remotely and will send you a fully stamped first page dated today upon my return to the office.
Thank you,

Anita Huff
Court Clerk
Blue Lake Rancheria Tribal Court
ahuff@bluelakerancheria-nsn.gov

IN THE TRIBAL COURT FOR THE BLUE LAKE RANCHERIA

BLUE LAKE CASINO & HOTEL, a tribally owned entity of Blue Lake Rancheria, a federally recognized Indian tribe,

Plaintiff,

v.

ACRES BONUSING, INC., a Nevada Corporation, and JAMES ACRES, an individual,

Defendants.

Case No.: C-15-1215 LJM

MEMORANDUM OF DECISION AND ORDER RECUSING CHIEF JUDGE

RECUSAL OF CHIEF JUDGE

To ensure the fairness of any court proceeding, it is incumbent upon a judge to make certain that parties to the case are afforded due process. The fundamental principle embodied in the concept of due process is notice and an opportunity for a hearing appropriate to the nature of the case. *See generally* Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J 455, 475 (1986) ["The Supreme Court has often stated that the core rights of due process are notice and hearing."]. In order to comply with the requirements of due process, the hearing must be heard before an impartial adjudicator.

In establishing the Blue Lake Tribal Court, the Business Council sought to ensure the independence and fairness of its court by entering into a Judicial Services Contract with a person who: (1) was not a member of the Blue Lake Rancheria ("Tribe"); (2) was not married to a member of the

Tribe; (3) owned no land or any interest in any land on the Blue Lake Rancheria ("Reservation"); (4) did not reside on the Reservation; (5) owned no interest in any real or personal property on the Reservation; (6) had no private or commercial dealing with the Tribe; (7) possessed prior experience as both a state and tribal court judge; (8) was not financially dependent on the Judicial Service Contract with the Tribe for his support and livelihood; and (9) whose only business dealing with the Tribe was a Judicial Services Contract for the purpose of establishing and operating a court and performing judicial services for the Tribe. Under the applicable Judicial Services Contract, this Judge has an obligation to administratively process, hear, and decide cases filed in the Tribal Court.

The Tribe filed a complaint in this case against Defendants Acres Bonusing Inc. and James Acres, President of Acres Bonusing Inc., in his individual capacity (collectively, "Defendants"), alleging a breach of contract and other causes of action. *See* Docket No. 2. Because tribal courts, like federal courts, are courts of limited jurisdiction and because James Acres is a non-tribal member, the first issue that this Court must address is whether it has jurisdiction over Defendants. Rather than decide the important issue of jurisdiction, however, this Court and United States District Court for the Northern District of California ("Federal Court") in the case of *James Raymond Acres v. Blue Lake Rancheria, et al.*, Case No. 16-CV-05391-WHO ("Federal Court Case") the Honorable Willian H. Orrick have dedicated a large amount of time to determining whether the Tribal Court and, in particular, this Judge have a conflict of interest in this case and/or, in the absence of a conflict of interest, whether this Judge is biased against Defendants.

The result has been that the parties to this action and the courts have expended considerable time and money. *See James Raymond Acres v. Blue Lake Rancheria, et al.*, Case No. 16-CV-05391-WHO [Federal Court Case in which two complaints and two motions to dismiss have been filed]; *Blue Lake Casino & Hotel v. Acres Bonusing, Inc. and James Acres*, Tribal Court Case No. C-15-1215-LJM [Tribal Court Case in which the Court has heard one motion to dismiss and one motion to disqualify

the Chief Judge]. In addition, the Federal Court has now ordered that Mr. Acres is entitled to engage in limited discovery on the issue of whether this Judge possesses a conflict of interest or bias in this case. Encompassed in the limited discovery ordered by the Federal Court is the taking of this Judge's deposition and the production of the Judicial Services Contract and judicial services billing records between this Judge and the Tribe.

What is apparent from the proceedings that have taken place to date in this case and in the Federal Court is that the very purpose for which the Tribal Court was established, to resolve disputes arising on the Reservation, is being frustrated. Instead of resolving the issue of whether the Tribal Court has jurisdiction over Defendants and, if so, deciding the issues arising in this case, the time of the Tribal and Federal Courts has been dedicated to whether this Judge has a conflict or is bias.

For the reasons set forth below, this Court has determined that it does not have a conflict of interest in this case. In addition, this Judge believes that he can be fair and impartial and can decide this case based upon the evidence presented in this case and the applicable law. Given the facts of this case, after discovery is completed, even if the Federal Court should rule that the Tribal Court is not bias against the Defendants, there would, however, still exist the appearance of a conflict of interest and/or bias, particularly if the Tribal Court should end up ruling against Defendants on the issue of jurisdiction and the merits of the case. If that were to occur, Defendants and future litigants before the Court might question whether the Court's rulings in this case were based upon the evidence and law or were issued by the Court because Defendants questioned this Judge's ability to be fair and impartial.

Since an appearance of a conflict of interest and bias exists, which in the opinion of this Court cannot be resolved, and since it is in the best interests of the parties and the Court: (1) that the Tribal Court in the first instance determine its own jurisdiction, and (2) that the issue of the Court's jurisdiction be decided by a judge whose impartiality is above reproach, I am recusing myself from hearing this case and will, within fourteen (14) days of the issuance of this Memorandum of Decision

and Order, issue a separate order appointing a new associate judge to hear this case. This decision is consistent with Rule 3 of the Court's Rules of Judicial Conduct Governing the Conduct of Judges of the Tribal Court of the Blue Lake Rancheria, which requires a judge of the Court at all times to "act in a manner that promotes public confidence in the honesty and impartiality of the Tribal Court." After this case has been assigned to the new associate judge, I will have no further involvement in this case.

Finally, to provide guidance to future judges of this Court in determining whether they possess a conflict of interest in future cases coming before the Court, I will now address: (1) each of the issues raised by Defendants in the Federal Court Case, in the order in which they appear in the complaint; and (2) the issues Defendants raised in their opposition to the motion to dismiss filed with the Federal Court.

ISSUES RAISED IN THE FEDERAL COURT COMPLAINT

Facts

This Court has previously ruled that a colorable claim to tribal jurisdiction exists over the underlying action and rejected Defendants' motion for this Judge to disqualify himself. Since that time, Defendant James Acres ("Defendant") has filed a complaint for declaratory and injunctive relief ("Complaint") with the Federal Court. In his Complaint, Defendant asserts that the exhaustion of all tribal remedies before resort to the Federal Court is not required when a tribal court is conducting the underlying action in bad faith, and argues that this Judge's decision to remain as a presiding judge over a case in which the Tribe is a party is "an act of bad-faith so outrageous as to allow th[e] [United States District Court for the Northern District of California] to strip the tribal court of jurisdiction."

The substance of Defendant's argument that bad faith exists is as follows:

(1) The Tribal Court lacks independence from the Casino-Hotel because a hearing was held in a conference room in the Tribe's Hotel-Casino, rather than the Tribe's Courthouse;

(2) This Judge denied the motion to disqualify himself because he had no "financial interest in . . . a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding" and because he also was "not an active participant in the affairs of any party to the action"; however, this Judge and his alleged law partner David Rapport, working together as the Law Offices of Rapport & Marston ("Rapport & Marston"), have represented the Tribe since at least 1983, the legal relationship between Rapport & Marston and the Tribe continues to this day, and Rapport & Marston's relationship with the Tribe would disqualify this Judge from representing the Tribe as an attorney in the underlying tribal action due to an imputed conflict of interest;

(3) Judges have a fiduciary responsibility both to the public and to the litigants before them, and a judge who "conceals material information from them is guilty of fraud" (citing *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987); Rapport & Marston's representation of the Tribe in a suit for over $18,000,000 is a material fact in deciding whether or not this Judge should be disqualified from presiding over a tribal court case in which the Tribe is a litigant "because the relationship entails both involvement in [the Tribe's affairs], as well as financial considerations"; and this judge had an obligation to reveal that his alleged firm was actively representing the Tribe in federal court but "deceitfully hid" the aforementioned "fact" when he claimed he shared no interests with any party in the underlying tribal action;

(4) Rapport & Marston's involvement with the Tribe in pending litigation and its professional relationship with the Tribe over the past three decades is grounds to disqualify this Judge under Rules 7(c), 7(d), and 7(e)(3) of the Tribe's Rules of Judicial Conduct, and this Judge fraudulently claimed that nothing in the Tribe's Rules of Judicial Conduct disqualified him from presiding over the underlying tribal action.

(5) Rapport & Marston's involvement with the Tribe in pending litigation and its professional relationship with the Tribe over the past three decades is grounds to disqualify this judge under Canons 3(C)(1)(a)-(c) and (d)(iii) of the Code of Conduct for United States Judges, and this Judge fraudulently claimed that nothing in the federal Code of Conduct for United States Judges disqualified him from presiding over the underlying tribal action.

(6) This Judge has historically presided in bad-faith as a tribal court judge when his alleged law partner, Mr. Rapport, appeared as plaintiff's attorney for the Tribe; and

(7) This Judge is simultaneously associated as co-counsel with the law firm of Boutin Jones in pending litigation on behalf of the Tribe while presiding over Boutin Jones, who represents the Tribe in the underlying matter, as judge.

For reasons set forth below, none of the issues raised in the Complaint require this Judge to disqualify himself from hearing this case.

I. A Reasonable Person Would Not Perceive the Appearance of Impropriety Merely Because the Court Hearing Was Held in the Plaintiff's Conference Room.

Defendant alleges that the Court lacks independence from the Casino-Hotel because a Tribal Court hearing was held in a conference room in the Tribe's Hotel-Casino, rather than the Tribe's former court facilities. This Court will consider the allegation as an assertion that this Judge erred in refusing to recuse himself from this case pursuant to 28 U.S.C. § 455(a), which provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In *Liljeberg v. Health Servs. Acquisition Corp.*, the United States Supreme Court explained that "[t]he goal of section 455(a) is to avoid **even the appearance of partiality**. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists." 486 U.S. 847, 860 (1988) (internal quotation marks omitted) (emphasis added). The Ninth Circuit Court of Appeals has

restated § 455(a) and asks "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned" or, in other words, "whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (internal quotation marks and citation omitted); *Clemens v. U.S. Dist. Ct.*, 428 F.3d 1175, 1178 (9th Cir. 2005) (internal quotation marks and citation omitted). Yet, at the same time, a "reasonable person is not a someone who is hypersensitive or unduly suspicious" but is instead a "well-informed, thoughtful observer." *Holland*, 519 F.3d at 913 (internal quotation marks and citation omitted). Accordingly, the standard cannot become "so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." The Ninth Circuit considers disqualification under 28 U.S.C. § 455 as "necessarily fact-driven" which "may turn on subtleties in the particular case." *Id.* at 913.

"A judge is as much obligated not to recuse himself when it is not called for as he is obligated to when it is." *McClelland v. Gronwaldt*, 942 F. Supp. 297, 302 (E.D. Tex. 1996) (citing *Maez v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488, 1508 (10th Cir. 1995); *In re American Mix, Inc.*, 14 F.3d 1497, 1501 (10th Cir. 1994); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)). Therefore, "[a] judge should not recuse himself based upon unsupported, irrational, or highly tenuous speculation." *Id.* (citing *In re American Mix, Inc.*, 14 F.3d at 1501).

To the extent that Defendant's Complaint suggests that the impartiality of this Judge may be reasonably questioned merely because the Court hearing was held in a conference room belonging to the Tribe, this Court finds that it does not warrant recusal because it is based upon unsupported, irrational, and highly tenuous speculation. The conference room was utilized for the Tribal Court action because the Tribe was using the former Tribal Court facilities for other purposes. In fact, it is anticipated that the former Tribal Court facilities will no longer be used, and that the conference room

will be used for any ongoing and future Tribal Court actions—at least until the new and anticipated tribal justice facilities are available.

In short, this Court is unmoved by Defendants mere suggestion that a reasonable person would perceive that there is a significant risk that a judge would resolve a case on the basis of the location of the court hearing rather than the merits of the case.

II. This Judge Has No Financial Interest in a Party to the Proceeding Nor Is There Any Imputed Conflict of Interest.

This Judge denied Defendants' motion to disqualify because this judge had no "financial interest in . . . a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding" and because this Judge also was "not an active participant in the affairs of any party to the action." However, Defendant alleges that this Judge and his alleged law partner, Mr. Rapport, have represented the Tribe since at least 1983, that the legal relationship between Rapport & Marston and the Tribe continues to this day, and that Rapport & Marston's relationship with the Tribe would disqualify this Judge from representing Defendant as an attorney in the underlying tribal action due to an imputed conflict of interest.

Again, the court analyzes this component of Defendant's Complaint pursuant to § 455. In particular, the Court interprets Defendant's Complaint to allege the appearance of impropriety pursuant to § 455(a), and personal bias, prejudice, service as a lawyer, or financial interest pursuant to § 455(b)(1), (2), and (4). However, as an initial matter, the Court will first explore the nature of the relationship between this Judge and Mr. Rapport.

A. This Judge and Mr. Rapport Are Not Members of the Same Law Firm.

Under the relevant criteria set forth in the comment to ABA rule 1.0(c), a "'firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law . . ." The second comment on ABA rule 1.0 states:

> Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, ***two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm.*** However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, ***it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.***

(Emphasis added.)

Yet, the California Rules of Professional Conduct defines a "law firm" as, among other things, "two or more lawyers whose activities constitute the practice of law, ***and who share its profits***, expenses, and liabilities." Rules of Prof. Conduct, rule 1-100(B)(1)(a). *See Cochran Firm, P.C. v. Cochran Firm L.A. LLP*, 641 Fed. Appx. 749, 755 (9th Cir. 2016) (Callahan, dissenting) (emphasis added). Accordingly, and as expressed in the discussion on the California rule itself, a "[l]aw firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers ***who do not share profits***, expenses, and liabilities. . . ." (emphasis added.).

Looking to the facts before this Court, it is true that this Judge, in private practice, and Mr. Rapport both share an office called "The Law Offices of Rapport & Marston: An Association of Sole Practitioners". Nevertheless, Defendant is mistaken in assuming that this means that this Judge and Mr. Rapport are law partners in the same law firm. Rather, this Judge and Mr. Rapport are solo practitioners—as the name of the office expressly states—enjoying the advantages of setting their own work hours and schedules, as well as conducting every facet of their own respective businesses as they see appropriate. In response to the disadvantages of solo practice (*e.g.*, no set salary and overhead expenses that can be extremely burdensome), it is no surprise that this Judge and Mr. Rapport, as solo

practitioners, would seek the economic benefits of office sharing (*e.g.*, sharing rent, library and research materials, scanner, copier, and other office equipment).

Regarding the Tribe as a client, this Judge serves the Tribe as its Chief Tribal Judge pursuant to a specific contract and Mr. Rapport represents the Tribe as an attorney pursuant to a specific contract—completely separate from that of the contract for the Chief Tribal Judge. Although both this Judge and Mr. Rapport may work in the same office building, they maintain separate client files and do not communicate about their individual respective clients or the representations or legal services for their respective clients, including the Tribe. Whatever this Judge receives as payment for his judicial services from the Tribe is this Judge's alone. Likewise, whatever the Tribe pays Mr. Rapport for his legal services is Mr. Rapport's alone. Neither this Judge nor Mr. Rapport know how much the other receives as payment from the Tribe, nor do they help the other in the provision of services to the Tribe.

Despite this Judge and Mr. Rapport both engaging in activities that constitute the practice of law and sharing office expenses, they individually maintain full control of the profits of each of their own respective businesses derived from their own separate clients. They do not share any profits. Therefore, pursuant to the California Rules of Professional Conduct, the nature of this Judge and Mr. Rapport's relationship cannot be defined as a law firm.

B. A Reasonable Person Would Not Perceive the Appearance of Impropriety Based on Mr. Rapport's Role as Tribal Attorney.

As discussed more fully above, § 455(a) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." A reasonable and objective person, at first glance, might be inclined to think that this Judge could be biased in favor of Mr. Rapport and Rapport & Marston and/or the Tribe itself. Yet, a reasonable and objective person knowledgeable of all applicable facts would no longer be inclined to have such thoughts because neither Mr. Rapport or Rapport & Marston represent any party in the underlying action, and this Judge does not represent the Tribe in any other role than as Chief Judge.

Additionally, to the extent Defendant's Complaint alleges or can be construed to allege that there is the appearance of impropriety because this Judge receives his salary from the Tribe, and the Tribe's Hotel-Casino is a party to the underlying action, the fact that a judge's salary is paid by a governmental body neither dictates nor suggests the need for recusal under § 455(a). *See, e.g.*, *United States v. Zuger*, 602 F. Supp. 889, 892 (D. Conn. 1984) [case in which defendant was charged with two counts of willful and knowing failure to file income tax returns for certain years, "[t]he fact that the undersigned [judge]'s salary is paid by the United States neither dictates nor suggests the need for recusal under [] § 455(a)."]. This Judge has no doubt concerning his impartiality and finds no reasonable person with knowledge of the facts would arrive at any different conclusion.

As the *Zuger* Court found in regards to federal judges, disqualification on the basis that this Judge's salary is paid by the Tribe would not be restricted to any one judge, but would mean that no tribal judge could preside over the trial of a tribal offense. *See id.* Furthermore, "[i]f such a claim were not dismissed as farcical, on its face, it would further violate the time-honored Rule of Necessity, *United States v. Will*, 449 U.S. 200 [] (1980), whereby a judge is not disqualified to try a case because of personal interest if there is no other judge available to hear and decide the issue." *Id.*

C. This Judge Has No Actual Bias or Prejudice Regarding a Party in this Matter.

Under § 455(b)(1), in relevant part, a judge shall disqualify himself: "Where he has a personal bias or prejudice concerning a party . . ." Looking to guidance from the Ninth Circuit,

> [A] judge must apply the ***subjective*** standard articulated in section 455(b) to determine whether he can be truly impartial when trying the case. ***This is a test for actual bias.*** If the judge feels he cannot hear the case without bias . . . then the judge has a duty to recuse himself irrespective of how it looks to the public. Section 455(b) of Title 28 requires recusal where the judge "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1); see also 28 U.S.C. § 144 (addressing recusal upon motion by a litigant); Code of Conduct for United States Judges Canon 3 (2000) (imposing upon judges a duty to recuse themselves where they are either impartial or when their impartiality may reasonably be questioned). ***This test is highly personal in nature and requires each judge in such a situation to set aside emotion and thoughtfully examine his ability to impartially "administer justice without respect to persons."*** 28 U.S.C. § 453. If he feels there is a risk of prejudice, it is incumbent on him to recuse himself

> from the case; failure to do so would amount to an abdication of duty and be in clear derogation of the solemn promise made when he took his oath of office.

Holland, 519 F.3d at 915 (emphasis added).

To the extent Defendant may contend that this Judge might be biased in favor of Mr. Rapport, the allegation would be insufficient as a matter of law. § 455(b)(1) "has been narrowly interpreted to require that the bias or prejudice be directed at a party itself rather than its attorneys." *Gronwaldt*, 942 F. Supp. At 303; *see also Travelers Ins. Co. v. Liljeberg Enters. Inc.*, 38 F.3d 1404, 1412 (5th Cir. 1994); *Henderson v. Dept. of Public Safety and Corrections*, 901 F.2d 1288, 1296 (5th Cir. 1990). Thus, even if it could be inferred from Defendant's allegation that this Judge is biased in favor of Mr. Rapport, this allegation is insufficient under subsection (b)(1) as a matter of law. Perhaps more definitively, the allegation is also insufficient because Mr. Rapport does not represent any party in the underlying matter.

To the extent Defendant may contend that this Judge might be biased in favor of the Tribe, it is essentially an argument that this Judge is in cahoots with the tribal government. Yet, an assertion of actual bias pursuant to § 455(b)(1) "does not present valid basis for disqualification" if the Defendant does "not allege that anything the court said or did was in response to information derived from extrajudicial source...." *United States v Mosley* (2009, CA7 Ill) 2009 US App LEXIS 25781. Here, Defendant has not made any such allegations. Therefore, this Court is not persuaded d by Defendant's allegation because it fails to provide a valid basis for disqualification.

D. <u>This Judge Did Not Serve as a Lawyer or Serve with a Lawyer in the Matter in Controversy.</u>

Under § 455(b)(2) in relevant part, a judge shall disqualify himself "Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter . . ." Even if this court were to accept as true Defendant's claims that this judge and Mr. Rapport work together in a law firm that has and

continues to represent the Tribe, the simple fact of the matter is that neither this judge nor Mr. Rapport serve as lawyers ***in this matter in controversy***.

Here, the matter in controversy is a breach of contract, tortious breach of implied covenant of good faith and fair dealing, unjust enrichment, and money had and received. Defendant references to other matters that he alleges this Judge and Mr. Rapport worked together as Rapport & Marston, including *Rancheria v. Lanier*, 106 F. Supp. 3d 1134 (E.D. Cal. 2015), whereupon the Tribe has alleged that the California Employment Development violated its tribal sovereign immunity by attaching liens on tribal assets. The matter in *Lanier* is not even remotely the same as this matter in controversy.

Defendant also claims that this Judge and Mr. Rapport have represented the Tribe "since at least *Tillie Hardwick v. United States* in 1983" and that the court document he provides as an exhibit "names Marston and Rapport as attorneys in the action" and "shows they represented [the Tribe]." The matter at issue in *Hardwick* was recognition of Indian entities, and is once again a different matter than the matter currently in controversy. In addition, Indian tribes were not parties to the *Hardwick* litigation. Instead, individual Indians filed suit to unterminated and restore the federally recognized legal status of the tribe illegally terminated by the United States under the California Rancheria Act. The Tribe was not a party to that litigation. Moreover, despite the fact that both this Judge and Mr. Rapport represented individual Indians in *Hardwick*, they did so not as sole practitioners doing business under the business name of Rapport & Marston, but as attorneys with California Indian Legal Services decades ago.

Therefore, any prior representation of the Tribe by this Judge or Rapport & Marston with regard to matters unrelated to litigation before him does not automatically require recusal. This Judge has a duty to not disqualify himself unnecessarily and, here, this Judge does not find sufficient grounds for disqualification.

Defendant also raises the issue of an imputation of conflict, claiming that this Judge would not be able to represent the defendant as an attorney in the underlying matter based on Rapport & Marston's representation of the Tribe. This argument is tangential and the Court struggles with understanding its significance, but will, nevertheless, indulge it in brief analysis. Setting aside that this Judge is, in fact, the judge, and even assuming that this Judge and Mr. Rapport fall under the purview of ABA rule 1.10 regarding imputation of conflicts as a law firm, there is no danger that the same lawyer or firm will represent opposing parties in this litigation. Neither this Judge, in private practice, nor Mr. Rapport represent any party in this litigation and neither have previously represented the Tribe in any matter that could be remotely considered to be the same matter as the underlying matter.

E. This Judge Has No Interest in the Subject Matter in Controversy or in a Party to the Proceeding.

Under § 455(b)(4), in relevant part, a judge shall disqualify himself: "If knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceedings." This is an issue that has been repeatedly addressed by the Fifth Circuit, which "has consistently held that a remote, contingent, and speculative interest is not a 'financial interest' within the meaning of the section 455(b)(4)." *McClelland v. Gronwaldt*, 942 F. Supp. 297, 302 (E.D. Tex. 1996).

The Fifth Circuit has held that "recusal is not required although judge owned large investment in nonparty bank and although rulings in the present case were likely to have financial impact on all banks," and "recusal not required under either [§] 144 or [§] 455 where plaintiff merely makes nonspecific, conclusory allegations that judge may bear personal liability based upon tortious acts of his former law firm." *Id.* (citing *In re Placid Oil Co.*, 802 F.2d 783, 787 (5th Cir. 1986); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F. 2d 1157, 1167 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983)).

Here, the Court again gives Defendant the benefit of the doubt by trying to extend his argument to its fullest potential. This is difficult, to say the least. The Court assumes that Defendant may be speculating that this Judge has a financial interest based on representing the Tribe in other matters. Yet, as already discussed, this Judge does not represent the Tribe in other matters, except to provide judicial services under his contract. Other attorneys, with whom this Judge does not share in any profits whatsoever, handle the Tribe's other legal matters. Also, the fact that this Judge is paid by a governmental body neither dictates nor suggests the need for recusal under § 455(a). Extending such an analysis to § 455(b), it is important to acknowledge, once again, that it is a subjective standard instead of the objective standard under § 455(a) that is to be used. Here, this Judge can unequivocally state that his ability to impartially administer justice without respect to persons is not in any way affected by a financial interest because this judge does not have a financial interest in either party or the matter of this case.

Perhaps, Defendant alleges that this Judge has a financial interest in his position as judge, and will not vote against the Tribe in order to maintain his position. Yet, there is no indication, whatsoever, that the Tribe will remove this Judge from the bench for failure to adjudicate in favor of the Tribe. Therefore, the Court is unmoved by this potential allegation because it involves a remote, contingent, and speculative interest.

III. This Judge Did Not Conceal Material Information from the Litigants Before It.

Defendant has alleged that this Judge concealed material information from him by failing to disclose Mr. Rapport's representation of the Tribe, a party in the underlying matter, in a separate suit for over $18,000,000. A judge is a fiduciary toward "the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud." *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987). Materiality is measured by an objective standard and "does not reach every piece of information that a particular litigant might like to have about a judge. A judge

need not disclose information that would not make a reasonable person think him incapable of presiding impartially in the case." *Id.* Several case examples where disclosure was not warranted include a judge who shopped at a store that was a party in a case, and a judge who had an account at a bank that was a party in a case. *Id.* at 307–308 (internal citation omitted).

Comparatively, if a judge "is busily soliciting loans from counsel to one party, and not telling the opposing counsel (let alone the public), he is concealing material information in violation of his fiduciary obligations." *Id.* In particular, the Seventh Circuit has considered such "loans" material because "[i]t is when the other party to the transaction is doing him a favor that an inference of gratitude, or an inference that a quid pro quo can be expected, may arise and make the failure to disclose the transaction to counsel for the opposing litigant material." *Id.* at 308.

Here, Defendant argues that this Judge should be disqualified from presiding over a Tribal Court case in which the Tribe is a litigant based on the allegation that this Judge and Mr. Rapport worked together as Rapport & Marston in *Rancheria v. Lanier*, 106 F. Supp. 3d 1134 (E.D. Cal. 2015). *Lanier* is a case wherein the Tribe alleged that the California Employment Development violated its tribal sovereign immunity by attaching liens on tribal assets. Needless to say, again, the matter in *Lanier* is not, even remotely, the same as this matter in controversy. Yet, Defendant alleges that Rapport & Marston's representation of the Tribe in *Lanier* is material "because the relationship entails both involvement in [the Tribe's affairs], as well as financial considerations . . .."

However, this Judge, in private practice, does not represent the Tribe in *Lanier* nor has this Judge assisted Mr. Rapport in his representation of the Tribe in *Lanier*. As previously discussed, this Judge and Mr. Rapport are solo practitioners who share an office space but are not a law firm. This Judge and Mr. Rapport do not share clients, discuss clients, or share profits derived from representation of the separate clients. Nor is Mr. Rapport even an attorney for a party in the underlying matter. There

is nothing to indicate that any favors have been done for this Judge, let alone any favors with an inference of gratitude, or an inference of an expected *quid pro quo*.

Mr. Rapport's representation of a party, which he does not represent in the underlying matter, in a matter completely unrelated to the underling matter, is not material information that is required to be disclosed to the litigants in the underlying matter. Thus, if there is no duty to disclose such information it then follows that this Judge did not commit fraud by not disclosing the information. The information was simply not material.

IV. Rules 7(c), 7(d), and 7(e)(3) of the Tribe's Rules of Judicial Conduct Do Not Require This Judge's Disqualification.

Defendant alleges that this Judge fraudulently claimed that nothing in the Tribe's Rules of Judicial Conduct disqualified him from presiding over the underlying tribal action, and specifically cites to Rules 7(c),(d), and (e)(3). Rule 7 addresses disqualification of tribal court judges. Rule 7(c) requires disqualification if "[a]ny party to a proceeding before the Court, except the Business Council of the Tribe as part of a judicial services contract, has been a source of income to the Tribal Judge within the last twelve (12) month period." Here, this Judge has not received any source of income from any party to the proceeding within the last twelve (12) month period aside from what he has received as part of a Judicial Services Contract.

Rule 7(d), in relevant part, requires disqualification, in relevant part, if "[t]he Judge knows or has reason to know that he/she individually, . . . has a financial interest in the subject matter or outcome of the case or controversy or is a party to the proceeding, or has any other interest that could be substantially affected by the proceedings." This rule is nearly the exact same as § 455(b)(4). The same analysis applies and the conclusion is the same[1]: This Judge has no interest in the subject matter in controversy or in a party to the proceeding.

[1] Disqualification of judges is addressed by subsection 11.1.1.040(E) of the Tribe's tribal court ordinance ("Ordinance"). The Ordinance does not provide any additional direct guidance on this

Rule 7(e)(3), in relevant part, requires disqualification if "[t]he Tribal Judge . . . is known by the Judge to have an interest that could be substantially affected by the outcome of the proceeding . . .." This provision is essentially the same as Rule 7(d), and the same analysis used regarding § 455(b)(4) is also applicable here, with the same conclusion: this Judge has no interest in the subject matter in controversy or in a party to the proceeding.

Therefore, pursuant to the Tribe's Rules of Judicial Conduct, there is nothing that requires this Judge from being disqualified to preside over the underlying tribal action.

V. Canons 3(C)(1)(a)-(c) and (d)(iii) of the Code of Conduct for United States Judges Do Not Require This Judge's Disqualification.

The text of Canon 3(C)(1)(a)-(c) and (d)(iii) is substantially similar to § 455(b)(1), (2) and (4), "and both seek to promote public confidence in the judiciary" yet: "the focus of the two is different: Whereas the goal of the Code of Conduct, including Canon 3C, is to inform federal judges of their ethical obligations to the end of advising them on how judges should conduct themselves, § 455 is a procedural statute aimed at articulating disqualification standards to the end of preserving the rights of litigants to impartial justice." Judicial Disqualification: An Analysis of Federal Law, Federal Justice Center, 2, (2d ed. 2010).

The issues presented here (*i.e.*, disqualification based on personal bias or prejudice concerning a party, serving as a lawyer or with a lawyer in the matter in controversy, having a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding) have already been addressed by this

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matter. Rather, subsection 11.1.1.060(A) states, "When choosing what law applies, the Tribal Court shall apply the law of the Tribe. In the absence of applicable tribal law, the Court shall use as guidance the laws of the State of California, the laws of other federally recognized Tribes and federal law, but shall follow federal and state laws, if required by tribal or federal law." Thus, in the absence of additional tribal law regarding disqualification of judges, the Court shall look to the laws of the State of California and federal law for guidance. § 455 and applicable case law provides that guidance.

memorandum in its analysis of § 455(b)(1), (2), and (4). The conclusion is the same here. Disqualification is not required.

VI. This Judge Has Not Historically Presided in Bad-Faith as a Judge.

Defendant refers to two instances when his alleged law partner, Mr. Rapport, appeared as plaintiff's attorney for the Tribe when this Judge presided over the matter. Assuming arguendo that this Judge and Mr. Rapport are part of an implied law firm, it still was not bad faith for this judge to preside over the listed matters. One matter was an order dismissing an unlawful detainer action and the other was an order dismissing an action based on stipulation of the parties. Simply put, both matters only required a judge's signature to dismiss the action, and did not require any adjudication of the merits. It was not bad faith for this Judge to sign the orders.

VII. This Judge Is Not Associated as Co-Counsel with Boutin Jones.

Defendant alleges that this Judge is simultaneously associated as co-counsel with the law firm of Boutin Jones in pending litigation on behalf of the Tribe while also presiding over the underlying matter in which Boutin Jones represents the Tribe. This is yet another unsupported, irrational, and highly tenuous speculation. This Judge is ***not*** associated with Boutin Jones in any matter. Thus, this Court finds that a reasonable person would not perceive that there is a significant risk that a judge would resolve a case on any basis rather than the merits of the case when the judge is not associated with any counsel to any party in the underlying matter.

ISSUES RAISED IN THE DEFENDANTS' MOTION TO DISMISS FILED IN THE FEDERAL COURT CASE.

On November 1, 2016, Defendants filed an Opposition to the Plaintiff's Motion to Dismiss ("Opposition") in *James Raymond Acres v. Blue Lake Rancheria, et al.*, United States District Court for the Northern District of California, Case No. 16-cv-05391-WHO. In the Opposition, the Defendants argued that this Judge engaged in bad faith by failing to disclose that he represented the

Tribe in the case of *Blue Lake Rancheria v. Shiomoto, et al.,* Superior Court for the County of Humboldt, Case No. cv-140799 ("*Shiomoto*").

In *Shiomoto,* I brought an action in the name of the Tribe, on behalf of the Tribal Court, for the sole purpose of obtaining a judgment from the Superior Court ordering the California Department of Motor Vehicles to recognize and enforce an order that I issued changing a person's name as part of a marriage ceremony performed by the Tribal Court. While I brought the action in the name of the Tribe and signed a declaration stating that I was an attorney representing the Tribe in that action, I never considered myself an attorney for the Tribe, representing the Tribe in the action. Rather, I consider the case to be an action brought in my capacity as the Chief Judge of the Tribal Court, in furtherance of my duties as the Chief Judge, to ensure that orders of the Tribal Court are afforded comity and are recognized off the Reservation by administrative agencies of the State of California. When I appeared before the Superior Court, I advised the State Court Judge that I was the Chief Judge of the Tribal Court who had issued the order in the case and advised the State Court Judge that I was there to obtain recognition and enforcement by the State Court of my order.

The *Shiomoto* case did not involve or further the business, financial, or governmental interests of the Tribe or raise any of the issues in this case, other than to further the Tribe's governmental interest in ensuring that its Tribal Court orders are afford comity by state courts and administrative agencies.

Notwithstanding the above, the issues created by my declaration in the *Shiomoto* case coupled with the proceedings that have occurred to date in this case and in the Federal Court Case could create the appearance of possible bias and, therefore, might not promote public confidence in the honesty and impartiality of the Tribal Court in accordance with Rule 3 (a) of the Rules of Judicial Conduct Governing the Conduct of Judges of The Tribal Court of the Blue Lake Rancheria. For this reason, the Court finds that it is in the best interests of the parties and the Court for this Judge to recuse himself in

this case as set forth above. If this Judge had recalled the ambiguous language used in his declaration in the *Shiomoto* case prior to the Defendants raising it for the first time before the Federal Court in their Opposition to the Motion to Dismiss, the Court would have considered and addressed the issue at an earlier date.

CONCLUSION

For the foregoing reasons, this Judge, on his own motion, recuses himself from this case, and except to appoint an associate judge to hear the case, will have no further involvement in the above-entitled case. All prior orders and briefing schedules shall remain in effect.

IT IS SO ORDERED.

DATED: December 29, 2016

HON. LESTER J. MARSTON, Chief Judge
Tribal Court for the Blue Lake Rancheria

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2016, a copy of this **DEFENDANT BLUE LAKE RANCHERIA'S MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION** was served on all interested parties through the Court's electronic filing system.

/s/ Daniel S. Stouder
Daniel S. Stouder