

BOUTIN JONES INC.

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**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 NOTICE OF
MOTION AND MOTION FOR
RECONSIDERATION**

[Civil L.R. 7-9]

Date: February 22, 2017

Time: 2:00 p.m.

Courtroom 2, 17th Floor

Honorable William H. Orrick

Action Filed: September 20, 2016

TO: HONORABLE WILLIAM H. ORRICK and to PLAINTIFF JAMES ACRES, IN PRO PER:

PLEASE TAKE NOTICE that, on February 22, 2017 at 2:00 p.m. or a soon thereafter as the matter may be heard in the courtroom of the Honorable William H. Orrick, Judge of the United States District Court for the Northern District of California, Courtroom 2, 17th Floor, located at 450 Golden Gate Avenue, San Francisco, CA 94201. Defendant Blue Lake Rancheria (“Tribe”), a federally recognized Indian tribe, shall make a special appearance for the purpose of moving the Court to reconsider Judge Orrick’s December 8, 2016 Order Granting Limited Discovery Re Bad Faith Exception and Issuing Protective Order (“December 8 Order”) which delayed the Court’s ruling on the Tribe’s Motion to Dismiss seeking dismissal of Plaintiff’s complaint in its entirety for lack of subject matter jurisdiction, Fed. R. Civ. Proc. 12(b)(1), for lack of personal jurisdiction, Fed. R. Civ. Proc. 12(b)(2), and for failure to state a claim upon which relief can be granted, Fed. R. Civ. Proc. 12(b)(6).

This motion is made on the grounds that this Court has granted leave, based on a sufficient change in facts and circumstances, to file a Motion for Reconsideration of the December 8 Order. The December 8 Order stayed a decision on the Tribe’s Motion to Dismiss pending limited discovery of Judge Marston’s relationship with the Tribe. However, since the issuance of the December 8 Order, Judge Marston, who was the focus of the limited discovery, has recused himself and a new, independent Judge has been appointed to preside over Tribal Court Case No. C-15-1215LJM, in which the Tribe, d.b.a. the Blue Lake Casino & Hotel (“BLC&H”), has sued James Acres (“Acres”) and his company, Acres Bonusing, Inc. (“ABI”).

Acres’ concerns about Judge Marston presiding over the case are now moot in light of Judge Marston’s recusal and the appointment of an outside Judge. Likewise, Acres’ claim that the Tribal Court has lost jurisdiction because of the alleged actions of one, now-recused judge are unsupported by case law, court rules, or the practice of

1 state, federal, or tribal courts. Thus, Acres' Complaint should now be dismissed and the
2 Tribal Court should be able to determine its own jurisdiction in the first instance (which
3 it still has not yet done).

4 This motion is based on all pleadings and papers already on file herein, the
5 memorandum of points and authorities filed in support of this motion, the declaration of
6 Amy L. O'Neill filed in support of this motion, and such other pleadings, papers,
7 argument, or evidence that may be introduced prior to or at the hearing on this motion.
8

9 Dated: January 24, 2017

BOUTIN JONES, INC.

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11 By: /s/ Daniel S. Stouder
12 Daniel S. Stouder
13 Amy L. O'Neill
14 Attorneys for Blue Lake Rancheria
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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Blue Lake Rancheria (the “Tribe”) files this Motion for Reconsideration (“Motion”) of the Court’s December 8 Order regarding the Tribe’s Motion to Dismiss. The Tribe now asks that the Court vacate its December 8, 2016 Order Granting Limited Discovery Re Bad Faith Exception and Issuing Protective Order and instead grant the Tribe’s Motion to Dismiss.

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. [Dkt No. 1.]

On November 9, 2016, the Tribe filed a Motion to Dismiss this Action based on various grounds, including, among other things, sovereign immunity and failure to exhaust tribal court remedies. [Dkt. No. 8.]

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, the Tribe 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. [Dkt No. 32.]

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 the Tribe’s Motion to Dismiss to allow for limited discovery regarding Judge Marston.

1 On December 29, 2016, the Tribal Court Judge issued an Order recusing himself
 2 as Tribal Court Judge in the pending Tribal Court Action (“Recusal Order”). Decl. of
 3 Amy L. O’Neill (“O’Neill Decl.”), ¶ 2, Ex. A. The Clerk of the Tribal Court said that
 4 she was working remotely, but that she would email the parties a file stamped copy of
 5 the Recusal Order when she was back in the office. *Id.*

6 On January 10, 2017, the Clerk of the Tribal Court sent the parties a file stamped
 7 copy of Judge Marston’s Recusal Order from December 29, 2016. O’Neill Decl. ¶ 3,
 8 Ex. B.

9 On January 11, 2017, the Clerk of the Tribal Court sent the parties a copy of an
 10 Order appointing Justice James Lambden (California Court of Appeal (Ret.))
 11 (“Appointment Order”) as Tribal Court Judge. O’Neill Decl. ¶ 4, Ex. C. The
 12 Appointment Order indicated that because Mr. Acres had voiced objections regarding
 13 the Tribal Court’s current Associate Judges, the Appointment Order was for a retired
 14 California Court of Appeal judge who has, until now, not been involved in Tribal Court
 15 proceedings. *Id.*

16 ARGUMENT

17 At the December 7, 2016, hearing on the Tribe’s Motion to Dismiss, this Court
 18 suggested that the Tribe might be able to bring a Motion for Reconsideration of the
 19 Tribe’s Motion to Dismiss if “Judge Marston withdrew and somebody else was on the
 20 bench.” As discussed above, Judge Marston has recused himself from the case and a
 21 new judge, Justice James Lambden, has been appointed. The crux of the Federal Action
 22 is Acres’s allegation that Judge Marston acted in bad faith by failing to recuse himself.
 23 Because Judge Marston’s involvement in the Tribal Court case is no longer an issue,
 24 this Court can and should reconsider its December 8, 2016 Order and now grant the
 25 Tribe’s Motion to Dismiss.

26 In the Court’s January 11, 2017 Order Granting Leave to file a Motion For
 27 Reconsideration, this Court said that the criteria for filing a motion for reconsideration
 28

1 have been met, and that the Tribe should focus its Motion on why the Motion to
2 Dismiss should now be granted. This is what the Tribe will do.

3 **I. The Crux of Acres' Complaint Was His Accusations of Wrongdoing**
4 **Against Judge Marston Who Has Now Recused Himself.**

5 Acres' Complaint alleges four causes of action: 1) "Declaratory relief finding
6 bad-faith in Marston's fraudulent concealment of his relationship with Blue Lake
7 Rancheria"; 2) "Declaratory relief finding bad-faith in Marston's failure to disqualify
8 himself"; 3) "Declaratory relief finding Marston's discovery order was made in bad-
9 faith"; and 4) "Declaratory and Injunctive Relief against tribal jurisdiction." The root of
10 the Complaint is Acres' accusations of bad faith against Judge Marston which Acres
11 claims deprive the Tribal Court of jurisdiction. Acres alleges that Judge Marston's
12 actions and decisions alone support his request that this Court strip the Tribal Court of
13 Jurisdiction – effectively disregarding the sovereign immunity of the Tribe and
14 preventing the Tribal Court from determining its own jurisdiction in the first instance as
15 it is entitled to do. *See Bowen v. Doyle*, 230 F.3d 525, 529-530 (2nd Cir. 2000), *citing*
16 *National Farmers Union Insurance Co. v. Crow Tribe of Indian*, 471 U.S. 845, 856
17 (1985) ("Even when the jurisdiction of the tribal court is challenged, 'the Tribal Court
18 itself' must be permitted to determine the issue 'in the first instance.'")

19 Any concerns as to the propriety of Judge Marston serving as Tribal Court
20 Judge in the Tribal Court Action have been addressed by Judge Marston's Recusal
21 Order and appointment of an outside judge. Likewise, the Recusal Order has the effect
22 of mooted Acres' first three causes of action which seek judicial declarations about the
23 alleged bad faith conduct of Judge Marston.¹

24 ¹ Mr. Acres' Opposition to the Tribe's Motion for Leave to File a Motion for Reconsideration
25 argues that the Tribe, in effect, admits bad faith by way of Judge Marston's Recusal Order. This is not
26 so. The Tribe has not taken a position on whether Judge Marston should have recused himself and it
27 does not do so now. The decision was within the sole discretion of Judge Marston. Mr. Acres' attempt
28 to claim that the Recusal Order somehow admits bad faith by the Tribe is without factual support or
legal authority, and would provide a windfall to Mr. Acres while unjustly punishing the Tribe.
Moreover, the Recusal Order itself does not appear to comport with Mr. Acres' description of it.

Mr. Acres' last cause of action, that Judge Marston's failure to recuse himself has somehow deprived the Tribal Court of jurisdiction, is unsupported by case law, rules of court, or the practice of state, federal, or tribal courts. For example, if a judge in State or Federal Court is determined to have had a conflict and should have recused him or herself, the entire court system does **not** lose jurisdiction of the case. Rather, in such instances a new judge is appointed and the case is retried in the same jurisdiction. It has never been held by any Court so far as we are aware—and is inconsistent with the current practices of all court systems—that if one judge fails to timely recuse himself, whether proper or not, the entire system loses jurisdiction. Acres acknowledged at the December 7, 2016 hearing that there is no case law which supports his fourth cause of action. [Dkt No. 32 - Hearing Transcript, p. 2:16-22.]

Because the only bad faith alleged in the Complaint pertains to Judge Marston and his Orders, and no separate actions of bad faith have been alleged against the Tribal Court, there is no basis for depriving the entire Tribal Court of jurisdiction for the reasons described above.

Lastly, even if Acres believes that the alleged actions of Judge Marston should deprive the Tribal Court of jurisdiction, it is not for this Court to decide the matter *at this time*. Rather, Acres' jurisdictional challenge regarding Judge Marston's previous involvement in the case is an issue that can and should first be brought before Judge Lambden in the Tribal Court. As clearly established by case law, it is the Tribal Court's sole prerogative to determine in the first instance whether it has jurisdiction. *Bowen v. Doyle*, 230 F.3d 525, 529-530 (2nd Cir. 2000), *citing National Farmers Union Insurance Co. v. Crow Tribe of Indian*, 471 U.S. 845, 856 (1985).

II. There Have Been No Adverse Findings Against Acres in the Tribal Court.

Within the Tribal Court action the Tribal Court has not even determined in the first instance whether it has jurisdiction over Acres and ABI. Rather, this is an issue on

1 which Judge Marston ordered discovery and briefing. It will now be up to Judge
 2 Lambden to determine, in the first instance, whether the Tribal Court has jurisdiction
 3 over Acres and ABI – a process in which Judge Marston will have no involvement.
 4 The Tribal Court case is at the beginning, the judge with whom Mr. Acres had concerns
 5 about is gone, and a new and independent Judge has been appointed; thus there is no
 6 reason the Tribal Court should not now determine its jurisdiction in the first instance.

7 As raised at the December 7, 2016 hearing, Mr. Acre's arguments to the contrary
 8 are based on his general qualm about what he claims are inherent inabilities of tribal
 9 judges to be fair because they are being paid by the tribe. As this Court already
 10 recognized at the December 7, 2016 hearing, this general claim is insufficient to deprive
 11 a tribal court of jurisdiction and cannot do so here. If this were the rule, no tribe could
 12 ever have a tribal court in which the tribe could bring a claim. This is not and cannot be
 13 the rule.

14 **III. The Arguments in BLR's Motion to Dismiss and Reply in Support** 15 **Thereof Should Also Be Reviewed and Considered.**

16 The Tribe made extensive arguments in its Motion to Dismiss and in the Reply in
 17 Support thereof regarding why this Court should dismiss the current action. The
 18 arguments include: sovereign immunity of the Tribe, Acre's failure to exhaust
 19 administrative remedies, and the Court's lack of jurisdiction and authority to determine
 20 whether a Tribal Judge has acted in bad faith. We understand that the Court's specific
 21 concerns about Judge Marston's declaration were the only impediment to granting the
 22 Motion to Dismiss. Judge Marston's voluntary recusal has resolved these concerns; the
 23 Motion to Dismiss can and should now be granted.

24 **CONCLUSION**

25 The Tribe respectfully requests that the Court, upon reconsideration of the
 26 December 8 Order, vacate that Order and grant the Tribe's Motion to Dismiss.

1 Dated: January 24, 2017

BOUTIN JONES, INC.

2
3 By: /s/ Daniel S. Stouder
4 Daniel S. Stouder
5 Amy L. O'Neill
6 Attorneys for Blue Lake Rancheria

7 **CERTIFICATE OF SERVICE**

8 I hereby certify that on January 24, 2017, a copy of this **DEFENDANT BLUE**
9 **LAKE RANCHERIA'S NOTICE OF MOTION AND MOTION FOR**
10 **RECONSIDERATION** was served on all interested parties through the Court's
11 electronic filing system.

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/s/ Daniel S. Stouder
Daniel S. Stouder