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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**RINCON MUSHROOM CORPORATION OF  
AMERICA**, a California  
Corporation,

Plaintiff,

v.

**BO MAZZETTI; JOHN CURRIER; VERNON  
WRIGHT; GILBERT PARADA; STEPHANIE  
SPENCER; CHARLIE KOLB; DICK  
WATENPAUGH; DOE CO.; and DOE I  
and DOE II,**

Defendants.

) Case No. 09-CV-2330-WQH-OR

)  
) **MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT OF  
) MOTION TO RE-OPEN FEDERAL CASE  
) AFTER EXHAUSTION OF TRIBAL  
) REMEDIES**

)  
) Date: January 23, 2017  
) NO ORAL ARGUMENT UNLESS  
) REQUESTED BY THE COURT  
)  
) Judge: Hon. William Q. Hayes  
) Location: Courtroom 14B  
) Suite 1480  
) 333 West Broadway  
) San Diego, CA 92101

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1 Plaintiff RINCON MUSHROOM CORPORATION OF AMERICA, INC.,  
 2 ("RMCA") submits the following Memorandum of Points and  
 3 Authorities in Support of Motion to Re-Open Federal Case after  
 4 Exhaustion of Tribal Remedies.

## 5 I.

### 6 INTRODUCTION

7 On October 20, 2009, Plaintiff filed suit against  
 8 Defendants alleging, inter alia, Defendants engaged in conduct  
 9 that interfered with Plaintiff's business on Plaintiff's  
 10 property. Plaintiff, together with MARVIN DONIUS ("Donius"),  
 11 owns non-Indian fee land within the Rincon Band of Indians  
 12 reservation in Valley Center, California. While Plaintiff is  
 13 the named party plaintiff in the federal litigation, Donius is  
 14 mentioned as a co-owner of the subject property in the federal  
 15 complaint, and Plaintiff will seek leave of court to amend the  
 16 federal complaint to add Donius as a party plaintiff.

17 Both Plaintiff RMCA and Donius engaged in actions before  
 18 the Tribal Court, including filing a Complaint for Declaratory  
 19 relief on the issue of jurisdiction to exhaust tribal remedies.  
 20 In response, the Tribe issued Notice of Violations ("NOVs") to  
 21 both RMCA and Donius as owners of the subject property, claiming  
 22 the activities being conducted on the subject property violate  
 23 its Tribal ordinances and filed suit in Tribal court against  
 24 them both. The Tribe's suit was a Counter-Claim and asserted  
 25 that it has jurisdiction to regulate the activities being  
 26 conducted on the subject property, because the activities have  
 27 the potential of causing catastrophic consequence against the  
 28 Tribe economically and in the Tribe's health and welfare. These  
 are factors set forth in the Supreme Court case of Montana v.  
U.S. (1981) 450 U.S. 544, and are built into the Tribe's  
 environmental ordinances it relied upon to issue the NOVs and  
 file the Counter-Claim.

1 In addition, recently, the Tribe filed a motion for an  
 2 Order to Show Cause ("OSC") why both RMCA and Donius both should  
 3 not be held in contempt of court for purportedly violating a  
 4 September 2010 preliminary injunction prohibiting all activities  
 5 on the subject property, after Donius commenced construction of  
 6 a small wall on the property to be used for a small fruit stand.

7 On September 21, 2010, this Court granted Defendants'  
 8 motion to dismiss for Plaintiff's failure to exhaust Tribal  
 9 remedies.

10 On July 19, 2012, the Court of Appeals for the Ninth  
 11 Circuit upheld the District Court's order that Plaintiff exhaust  
 12 its Tribal remedies, but reversed the District Court's Order of  
 13 dismissal, stating that the District Court should have stayed  
 14 the case instead of dismissing it. With respect to its order  
 15 that Plaintiff must exhaust its Tribal remedies, the Court of  
 16 Appeals stated:

17 We emphasize that we are not now deciding whether the tribe  
 18 actually has jurisdiction under the second *Montana*  
 19 exception. We hold only that where, as here, the tribe's  
 20 assertion of jurisdiction is "colorable" or "plausible,"  
 21 the tribal courts get the first chance to decide whether  
 22 tribal jurisdiction is actually permitted. **If the tribal**  
 23 **courts sustain tribal jurisdiction and Rincon Mushroom is**  
 24 **unhappy with that determination, it may then repair to**  
 25 **federal court.** (Emphasis added).

26 (Rincon Mushroom Corporation of America v. Mazzetti, et al. (9<sup>th</sup>  
 27 Cir. July 19, 2012) D.C. No. 3:09-cv-02330-WQH-POR, page 3).

28 On May 28, 2015, this Court ordered the parties to submit a  
 status report as to exhaustion of tribal remedies. Upon receipt  
 of the status report, this Court on June 25, 2015 ordered that  
 this case be "administratively closed" without prejudice to any  
 party to move to reopen the case in federal court.

On November 2, 2016, the Tribal Court entertained the  
 Tribe's motion for contempt and stated unequivocally that the

1 previous preliminary injunction it issued in September 2010 was  
2 still in force and that it was based on the Tribal Court's  
3 conclusion that the Tribe had jurisdiction to regulate all  
4 activities being conducted on Plaintiff's property, and that it  
5 prohibited all activities being conducted on the Plaintiffs'  
6 property from that date forward, including the present conduct  
7 of Plaintiff's business. It further stated that the basis of  
8 its injunction order was that the Tribe had regulatory  
9 jurisdiction under the Supreme Court case of Montana v. U.S.,  
10 supra. The Tribal Court further stated that the Tribe had the  
11 right, based on the Tribal Court's September 2010 injunction  
12 order, to enter Plaintiff's property and remove persons and  
13 property from the property, including blocking ingress and  
14 egress from the property without any further court order. Based  
15 upon this express statement from the Tribal Court on November 2,  
16 2016, Plaintiff has exhausted its Tribal remedies.

17 In addition, since the issuance of Court of Appeals'  
18 unpublished Decision in this case on July 19, 2012, the same  
19 Court of Appeals issued a published opinion one year later  
20 holding that tribal courts plainly lack jurisdiction to regulate  
21 activities being conducted on non-Indian land with facts  
22 identical to those in this case, and that such property owners  
23 "need not exhaust tribal remedies." Evans v. Shoshone-Bannock  
24 Land Use Policy Com'n (9<sup>th</sup> Cir. 2013) 736 F.3d 1298.

25 Accordingly, Plaintiff no longer needs to exhaust tribal court  
26 remedies, because, since it is "plain" that tribal court  
27 jurisdiction is lacking under the facts in this case, exhaustion  
28 "would serve no purpose other than delay." Nevada v. Hicks  
(2001) 533 U.S. 353, 369.

In addition, the facts in this case show that the Tribe's  
assertion of tribal court jurisdiction is "motivated by a desire  
to harass or is conducted in bad faith," such that exhaustion of

tribal court remedies is not required. Nevada v. Hicks, supra. The Tribe has issued numerous "Notice of Violations," claiming without any factual basis that Plaintiff's activities are unsafe, hazardous, and have the potential of catastrophically impacting the Tribe economically and its health and welfare. The Tribe, for example, claims that Plaintiff's business activities being conducted on its property has the potential of contaminating its water, yet testing of the Tribe's water in 2016 confirms that it is in fact safe to drink and has not been contaminated by any activity being conducted on Plaintiff's property. The Tribe also asserts that the activities being conducted on the property are a potential fire hazard that will start a fire and burn down its casino across the street, but this contention is based on pure speculation.

Finally, the Tribal Court has refused three (3) times to rule on Plaintiffs' motion for summary judgment on the issue of jurisdiction, and has not required the Tribe to file any opposition to the motions.

As a result, Plaintiff has exhausted its Tribal remedies, and should be allowed to proceed with its claims in federal court.

## II.

### ARGUMENT

#### A. PLAINTIFF HAS EXHAUSTED ITS TRIBAL REMEDIES

##### 1. The November 2, 2016 Hearing Affirming the Tribal Court's 2010 Preliminary Injunction.

Recently, Plaintiff and Donius started building a small wall on their property near the side of the road for a small fruit stand. When the Tribe discovered its construction, it immediately issued them both a cease and desist letter and a NOV, claiming that the activity violated the Tribal Court's September 2010 preliminary injunction barring all activities on

1 the subject property. That injunction order required that all  
2 items and persons be removed from the property, and that all  
3 business activities cease and remain so in the future.  
4 Plaintiff and Donius objected and argued that the injunction  
5 could no longer be valid and enforceable, especially since the  
6 Tribe has never tried to enforce it and has allowed Donius and  
7 RMCA to conduct business as usual since 2010. The Tribe  
8 nevertheless filed a motion for an Order to Show Cause why  
9 Donius and RMCA should not be held in contempt for purportedly  
10 violating the September 2010 preliminary injunction by building  
11 this small wall.

12 At the November 2, 2016, OSC hearing, the Tribal Court  
13 reaffirmed and clarified that its September 2010 preliminary  
14 injunction was still in effect, and that it was and is based on  
15 the Tribal Court's determination that the Tribe has regulatory  
16 jurisdiction under Montana, supra. The September 2010  
17 preliminary injunction came about because Plaintiff and Donius  
18 had erected a sign on the subject property, and Plaintiff and  
19 Donius argued before the Tribal Court at the November 2, 2016  
20 OSC hearing that it could not apply to anything beyond that, and  
21 that the Tribe must show that the construct of the wall has  
22 catastrophic consequences under Montana, supra, so as to give  
23 the Tribe regulatory jurisdiction over the wall. The Tribal  
24 Court disagreed and stated that its 2010 preliminary injunction  
25 applied to all future activities, including the wall presently  
26 under construction. It stated:

27 THE JUDGE: When I gave that order, with all due  
28 respect...[i]t was for everything. Everything was to cease and  
desist period. I don't know how you or the Ninth Circuit or  
anyone else interpreted it. It was to stop everything. That  
was my order.

(RT, 11/2/2016, page 65, lines 10-13).



1 Plaintiff and Donius' counsel then raised concerns about  
2 the Tribal Court's statement having the effect of giving the  
3 Tribe the right and opportunity to immediately have the Tribal  
4 Police enter the subject property and remove all the trailers,  
5 trucks, and other items from the property, and in essence stop  
6 Plaintiff and Donius' business operations now—something the  
7 Tribe has not done since the September 2010 preliminary  
8 injunction was first issued. In response, the Tribal Court  
9 stated that it had jurisdiction back in 2010 to issue the  
10 preliminary injunction, it has jurisdiction today to reaffirm  
11 the current effectiveness of that order, and Plaintiff and  
12 Donius are in violation of that order with respect to all  
13 present activities on the subject property. It stated:

14 MR. CORRALES: Well, the buildings are—no, not  
15 constructing, but they have like these trailers, mobile homes  
16 that they're—that they've created offices out of. They're  
17 parking cars there. They're parking their tractor-trailers  
18 there. [Donius] is conducting his business.

19 And for this Court to make that statement today causes me  
20 great concern because they're going to get—they're going to use  
21 this and give it to the Tribal Police and say, "We have an  
22 order. You can enter the property and arrest people and remove  
23 everybody. All activities have to cease," when we're just  
24 talking about a small wall here. And now we're revisiting the  
25 preliminary injunction and this court is clarifying it.

26 \* \* \*

27 THE JUDGE: This Court has jurisdiction. That's what we're  
28 arguing, rehashing.

MR. CORRALES: Yes. That is—

THE JUDGE: I already made that. It went to the Ninth  
Circuit. The Nine Circuit says, you, counsel, your side, has

1 not exhausted its tribal remedies. So we're back in terms of  
2 additional aspects that you want to add to this.

3 MR. CORRALES: Yes, Your Honor.

4 THE JUDGE: But as we sit and talk here today, this Court  
5 has jurisdiction. That was the finding that remains.  
(RT, 11/20/2016, pages 68-70).

6 Although the Tribe stated that it would not enforce the  
7 preliminary injunction, so long as the construction of the wall  
8 stops, the fact remains: **The Tribal Court has determined the**  
9 **Tribe presently has regulatory jurisdiction over the subject**  
10 **property, and clarified that the Tribe presently has the right**  
11 **to enter the property to stop any activity it chooses.** And  
12 although the Tribal Court indicated that it will "revisit" the  
13 issue of jurisdiction at the continued OSC hearing to be heard  
14 together with the Plaintiffs' summary judgment motion, the  
15 Tribal court still made a determination that the Tribe (by  
16 reaffirming its prior September 2010 preliminary injunction  
17 order) has regulatory jurisdiction over the activities occurring  
on the subject property. It stated:

18 MR. CORRALES: Yes, Your Honor. Just so it is clear, the  
19 Court has said that the preliminary injunction—

20 THE JUDGE: Stands.

21 MR. CORRALES: --stands and that the preliminary injunction  
22 at issue in September of 2010 was based upon this Court's  
23 determination that there is regulatory jurisdiction on the  
property by the Tribe.

24 \* \* \*

25 MR. CROWELL: I just want to clarify that my understanding  
26 of the Court's order would still allow the Tribe to go in and  
27 stop any permanent construction if it begins.

28 THE JUDGE: Definitely.

MR. CROWELL: Very good.

THE JUDGE: Any objection to that, Mr. Corrales?

MR. CORRALES: Yes, Your Honor. We object to that, but that's what the Court's order [is].

THE JUDGE: No. You may object, but you will do it over the Court's ruling.

MR. CORRALES: Yes, Sir.  
(RT, 11/2/2016, pages 73-75).

**2. A ruling on Plaintiff's motion for summary judgment or trial with respect to jurisdiction is now unnecessary.**

As stated, the Tribal Court made it clear at the November 2, 2016 hearing on the Tribe's motion for an OSC re: contempt that its September 2010 preliminary injunction order barring all activities on the subject property is still in effect. It further stated that that order was based on the Tribal Court's determination that the Tribe has jurisdiction under Montana, *supra*, to regulate those activities.

Accordingly, Donius and RMCA need not exhaust their Tribal remedies any further. They need not wait for a ruling on their summary judgment motion on jurisdiction, and they need not go to trial on the issue of jurisdiction.

**B. EXHAUSTION OF ANY FURTHER TRIBAL REMEDIES WOULD BE FUTILE**

The Supreme Court has outlined four exceptions to the exhaustion of tribal remedies requirement. They are: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." Elliott v. White Mountain Apache Tribal Court (9<sup>th</sup> Cir. 2009) 566 F.3d

842, 847 (quoting Nevada v. Hicks (2001) 533 U.S. 353, 369).  
Either one of these exceptions, if shown, would relieve a party  
of the necessity of exhausting tribal remedies. Id.

**1. Lack of opportunity to challenge Tribal Court jurisdiction.**

As to the third exception, the facts now show that Donius and RMCA do not have an adequate opportunity to challenge the Tribal Court's determination of jurisdiction, because of the Tribal Court's recent clarification of its September 2010 preliminary injunction order and its biasness in favor of the Tribe. No matter what Donius and RMCA do in seeking summary judgment on their declaratory relief action with respect to regulatory jurisdiction under Montana, supra, or even going to trial on that issue, the Tribal Court has already predetermined its ruling. The Tribal Court has unequivocally stated that its preliminary injunction is still in effect, and that the Tribe has the right to enforce it now without further Court order.

According to the Tribal Court, Donius and RMCA are presently in violation of that order, and the Tribe can stop the business and activities being conducted on the subject property at its discretion and without another Court order. The Tribal Court further stated that its September 2010 preliminary injunction is based upon its determination that the Tribe has regulatory jurisdiction under Montana, supra. As a result, the "cards are stacked" against Donius and RMCA in going forward with litigation in Tribal Court on the issue of jurisdiction. Because the Tribal Court has already decided the issue of jurisdiction, it would be a waste of time, i.e., it would be futile, for Donius and RMCA to take this any further.

Moreover, the Tribe lulled Donius and RMCA into a false sense of security into believing that the September 2010 preliminary injunction order was no longer in effect. After the

1 order was issued, and after the 9<sup>th</sup> Circuit Court of Appeals  
2 Memorandum of Decision of July 19, 2012 was rendered, the Tribe  
3 took no action against Donius and RMCA with respect to the  
4 preliminary injunction, until August 2016. Up until September  
5 24, 2015, the Tribe never asserted that the 2010 preliminary  
6 injunction was still in effect. On that date, the Tribe issued  
7 and served NOVs on Donius/RMCA, asserting, in addition to  
8 Donius/RMCA being in violation of the Tribe's environmental  
9 ordinance for activities being conducted on the property, that  
10 such activities violated the September 2010 preliminary  
11 injunction. It was only when Donius began building a small wall  
12 on his property in August 2016 that the Tribe first began  
13 attempting to enforce that injunction. In short, the Tribe  
14 allowed activities to be conducted on the subject property  
15 without any objection, notwithstanding the September 2010  
16 preliminary injunction, for over five years.

17 The Tribe even went so far as to correspond with  
18 Donius/RMCA about Donius/RMCA's proposed plans to have a vehicle  
19 storage business on the subject property, and then specifically  
20 requested that Donius/RMCA obtain a storm drain permit from the  
21 U.S. Environmental Protection Agency ("EPA"), without even  
22 mentioning that such activities would purportedly violate the  
23 September 2010 preliminary injunction. These efforts are set  
24 forth in this Court's June 25, 2015 Order in response to the  
25 parties' joint status report on RMCA's efforts to exhaust its  
26 tribal remedies. (Ex. "4"). Indeed, nowhere in the joint status  
27 report or in this Court's Order is there any mention that the  
28 Tribe was contesting RMCA's proposed vehicle storage plan or any  
other activities as a violation of the Tribal Court's September  
2010 preliminary injunction.

None of the letters the Tribe sent to Donius/RMCA  
concerning their proposed plan to conduct a vehicle storage

business on the property mention the proposed business violating the September 2010 preliminary injunction. (Ex. "5 through 7"). Indeed, when Donius/RMCA failed to get Tribal approval for those plans, and filed a declaratory relief action on that issue in Tribal Court, the Tribe filed a counter-claim without any mention of the September 2010 preliminary injunction. (Ex. "8") The Tribe's counter-claim was based solely on its Notice of Violations ("NOV") it issued and served on Donius and RMCA for various activities being conducted on the subject property which the Tribe contends violate its environmental ordinances and pose a catastrophic risk to the Tribe under Montana, supra, not the September 2010 preliminary injunction.

**2. Donius/RMCA were denied the opportunity to appeal the September 2010 preliminary injunction which was based on a determination of regulatory jurisdiction.**

The Court of Appeals Memorandum dated July 19, 2012, had the effect of invalidating or superseding the Tribal Court's September 2010 preliminary injunction. It specifically held that because the Tribe's assertion of jurisdiction was "colorable" or "plausible," based on the declarations it submitted in federal court, "the tribal courts get the first chance to decide whether jurisdiction is actually permitted." (Emphasis added). (Ex. "3"). It did not say that the Tribal Court had already decided it had jurisdiction over the activities being conducted on the property based on the Tribal Court's September 2010 preliminary injunction. It stated that the Tribal Court is to decide jurisdiction—future tense. Had the Court of Appeals known about the 2010 preliminary injunction, it more than likely would not have held that RMCA was required to exhaust its tribal remedies. Accordingly, the Tribe had no basis to claim that Donius and RMCA violated the September 2010 preliminary injunction, when it recently filed its motion for an OSC re contempt. Yet,

1 notwithstanding the Court of Appeals' July 19, 2012 Memorandum,  
 2 the Tribal Court entertained the Tribe's OSC for civil contempt  
 3 motion on November 2, 2016, and "reaffirmed" its September 2010  
 4 preliminary injunction, thereby cutting off Donius/RMCA's right  
 5 to appeal that order.

6 The time to appeal the 2010 preliminary injunction expired  
 7 in October 2010. The Intertribal Court of Southern California  
 8 ("ICSC") does not provide for a time in which to appeal a  
 9 preliminary injunction order, but looks to the Federal Rules of  
 10 Civil Procedure. Under FRAP 4(a)(5), a party has 30 days from  
 11 the entry of a preliminary injunction order to file a notice of  
 12 appeal. Thus, by reaffirming its September 2010 preliminary  
 13 injunction at the November 2, 2016 hearing, the Tribal Court  
 14 effectively cut-off Donius/RMCA's right to challenge the Tribe's  
 15 assertion of regulatory jurisdiction over their property, and  
 16 allowed the Tribe to "sandbag" Donius/RMCA on that issue,  
 17 despite the Court of Appeals' specific instruction that the  
 18 Tribal Court is to "decide whether tribal jurisdiction is  
 19 actually permitted." Instead, the Tribal Court in essence  
 20 responded by stated that "it already decided that issue." (RT  
 21 11/2/2016 hearing, pages 69-70, Ex. "1").

22 The Tribe now claims that it can enforce the 2010  
 23 preliminary injunction at any time, and come onto the subject  
 24 property and stop all activities and remove all persons at any  
 25 time, and the Tribal Court backed the Tribe up on that  
 26 assertion. (RT 11/2/2016 hearing, pages 74-74, Ex. "1").  
 27 Accordingly, Donius and RMCA do not have the opportunity to  
 28 challenge Tribal Court jurisdiction over the activities being  
 conducted on the subject property.

**C. IT IS "PLAIN" THAT TRIBAL COURT JURISDICTION IS LACKING**

The fourth exception mentioned in Elliott, supra, is where  
 it is "plain" that the tribal court lacks jurisdiction, such

1 that "exhausting" tribal remedies "would serve no purpose other  
 2 than delay." 566 F.3d at 847. Recently, the case of Evans v.  
 3 Shoshone-Bannock Land Use Policy Com'n (9<sup>th</sup> Cir. 2013) 736 F.3d  
 4 1298, held under facts similar to this case that the tribal  
 5 court "plainly lacks jurisdiction" and exhaustion of tribal  
 6 remedies would therefore not be required, where the Tribe fails  
 7 to show that the construction of a single family home on non-  
 8 Indian fee land within a reservation poses catastrophic risks.  
Id. at 1306.

9 In Evans, supra, decided after the Court of Appeals  
 10 Memorandum of July 19 2012 in this case, Plaintiff property  
 11 owner was in a similar situation as is Donius/RMCA. He was a  
 12 non-Indian who owned land in fee simple within a reservation.  
 13 There, the Tribe sought to prevent Plaintiff from building a  
 14 single-family home on his property, claiming, like the Rincon  
 15 Tribe claims here, that the construction would contaminate the  
 16 Tribe's water or cause a fire. The Court held that the Tribe  
 17 failed to meet its burden under Montana, supra, that the  
 18 activity complained of posed a catastrophic risk of harming the  
 19 Tribe economically or in the Tribe's health and welfare, because  
 those assertions were speculative at best. It stated:

20 For a tribe to have authority over such nonmember conduct,  
 21 "[t]he conduct must do more than injure the tribe, it must  
 22 'imperil the subsistence' of the tribal community." (Citing  
 23 Plains Commerce Bank v. Long Family Land & Cattle (2008)  
 24 554 U.S. 316, 341). Thus, "Montana's second exception 'does  
 25 not entitle the tribe to complain or obtain relief against  
 26 every use of fee land that has some adverse effect on the  
 27 tribe.'" (Citations omitted). Rather, the challenged  
 28 conduct must be so severe as to "fairly be called  
 catastrophic for tribal self-government." (Citing Plains  
Commerce, supra).

The Tribes fail to show that Evans' construction of a  
 single-family house poses catastrophic risks. The Fort  
 Hall Reservation has long experienced groundwater  
 contamination, and the Tribes proffer no evidence showing



that Evans' construction would meaningfully exacerbate the problem. Further, the Tribes' generalized concerns about waste disposal and fire hazards are speculative, as they do not focus on Evans' specific project. To the extent the district court concluded otherwise, its findings are clearly erroneous. (Citation omitted). Accordingly, the tribal court plainly lacks jurisdiction, and Evans need not exhaust tribal remedies. (Emphasis added).

736 F.3d at 1306.

**D. THE TRIBE'S ASSERTION OF REGULATORY JURISDICTION OVER THE SUBJECT PROPERTY IS MOTIVATED BY A DESIRE TO HARASS OR IS CONDUCTED IN BAD FAITH**

The first exception to exhaustion of tribal remedies is where the Tribe's assertion of regulatory jurisdiction is based on or is motivated by harassment or is conducted in bad faith. Donius/RMCA contend that the Tribe wants to buy the subject property so it can build a parking lot for its casino, and that the Tribe's issuance of numerous NOV's and suing Donius/RMCA over those NOV's are part of the Tribe's efforts to harass Donius/RMCA and force them to give up the property. Ever since the October 2007 wildfire (caused by SDG&E) that ultimately spread to Donius/RMCA's property and destroyed it, the Tribe has told Donius/RMCA, without any evidentiary support, that the activities on the subject property will have the effect of contaminating the Tribe's drinking water and poses a threat of fire that will potentially burn down the Tribe's casino across the street. All of these claims are set out in the Tribe's September 24, 2015 NOV's and determination of risk of catastrophic risks. (Ex. "10" and "11").

None of the purported violations have caused a contamination of the Tribe's drinking water or burned down the Tribe's casino across the street. (See Ex. "12," Anderson Donan's report of May 4, 2016, concluding Tribe's water is safe to drink and that all contaminants from the 2007 fire have been

1 removed). Indeed, the Tribe has failed to provide any proof  
2 that there is a potential catastrophic risk for these events to  
3 occur. Recent testing of the Tribe's drinking water shows it is  
4 safe to drink. (See Donan Report, Ex. "12"). When Donius/RMCA  
5 asked the Tribe to provide all facts that support its assertion  
6 of regulatory jurisdiction under Montana, supra, the Tribe  
7 offered nothing but conclusions and speculation. (Ex. "14,"  
8 Rincon Tribe's Responses to Interrogatories). When Donius/RMCA  
9 moved to compel further responses, the Tribal Court denied that  
10 request, and ruled that the responses were sufficient. The  
11 attached copy of those responses show clearly that they are not.

12 A cursory review of the Tribe's written responses to Mr.  
13 Donan's April 29, 2015 proposed plan on behalf of Donius/RMCA  
14 to operate a vehicle storage facility on the subject property,  
15 shows that the Tribe is merely harassing Donius/RMCA and never  
16 intended to ever approve such operations. (Ex. "5 through 7").

17 In fact, the Tribe instructed SDG&E to cut off electricity  
18 to the subject property back in 2008, after the 2007 wildfire,  
19 and it has refused to permit SDG&E to restore service since  
20 then. It claims that because Donius/RMCA have been in violation  
21 of its Tribal environmental ordinances, SDG&E should not restore  
22 power. As a result, Donius has been forced to use generators  
23 for his power to conduct his business, and the Tribe then turns  
24 around and cites him and RMCA for that. The Tribe still will  
25 not authorize SDG&E to restore power, until Donius/RMCA agree to  
26 allow the Tribe to exercise regulatory jurisdiction over the  
27 activities being conducted on the property. (Deposition of Bo  
28 Mazzetti, page 59-60, Ex. "13"). This harassing conduct was  
highlighted in the recent deposition of Bo Mazzetti, the Rincon  
Band Tribal Chairman, who testified as follows:

Q: All right. So you were telling---you were telling  
SDG&E that before---that is the Tribe, before they could

1 reconnect the electricity on the property, that there were  
2 certain outstanding issues with Mr. Donius's property that  
3 needed to be resolved first. Is that right?

\* \* \*

4 A: Yes, that's correct.

5 Q: And one of these issues had to do with this business  
6 plan that the Tribe wanted. Correct?

\* \* \*

7 THE WITNESS: General information, yes.  
8 BY MR. CORRALES:

9 Q: Okay. And when you said "unauthorized business  
10 operations," what was it you understood Mr. Donius was doing  
11 that was unauthorized? Because that's what it says here,  
12 unauthorized business operations.

13 A: Well, one thing they were doing was storing---there  
14 was---

15 Q: Vehicle storage?

16 A: ---Vehicle storage, wrecked vehicles. And there was  
17 fuel on the---coming out of them, the oil that I personally  
18 observed.

\* \* \*

19 THE WITNESS: They moved in trailers.  
20 BY MR. CORRALES:

21 Q: Trailers. Okay.

22 A: Storage vehicles in terms of trucks.

23 Q: All right.

24 A: Abandoned trailers.

25 Q: Abandoned trailers?

26 A: Wrecked trailers, moved them in there for storage.  
27 All creating additional fire again. He did the same thing.  
28 After the fire, he did the same thing. He was doing the exact  
same thing that he did before.

1 Q: Okay. And you understand that he didn't start the  
fire. Right?

2 A: That's correct.  
3 (Deposition of Bo Mazzetti, pages 52-53, Ex. "13"). Chairman  
4 Mazzetti then added:

5 BY MR. CORRALES:

6 Q: So with respect to Exhibit No. 7, this letter, do you  
7 know if in response to this letter that SDG&E in fact never  
8 reconnected the electrical service to the property?

9 \* \* \*

10 THE WITNESS: My understanding is they did not.

11 \* \* \*

12 BY MR. CORRALES:

13 Q: So presently, is it your understanding that the Tribe  
14 has---has not authorized SDG&E to provide electrical service to  
Mr. Donius's property?

15 A: That's correct.

16 Q: All right. And it's for the same reason?

17 A: Correct.

18 (Deposition of Bo Mazzetti, pages 59-60, Ex. "13").

19 Clearly, the Tribe is attempting to hold Donius/RMCA  
20 hostage by falsely telling SDG&E that it has regulatory  
21 jurisdiction over the activities being conducted on the subject  
22 property and then using that to falsely claim Donius/RMCA are  
23 not in compliance with its environmental ordinances. Such  
24 conduct is harassing and in bad faith, thereby giving rise to an  
exception to the requirement to exhaust tribal remedies.

25 **E. THE TRIBAL COURT HAS SHOWN FAVORITISM TOWARD THE TRIBE OVER**  
26 **PLAINTIFF AND REFUSED TO RULE ON PLAINTIFFS' SUMMARY**  
**JUDGMENT MOTION**

27 Based on discovery conducted in the Tribal Court action,  
28 Plaintiff filed a motion for summary judgment on the issue of

1 jurisdiction. Under the law, the Tribe has the burden of  
2 showing the relevant exception to Montana's general rule that  
3 would allow an extension of tribal authority to regulate  
4 nonmembers on non-Indian fee land. Evans, supra at 1305-1306.  
5 However, the Tribe failed to provide any evidence in opposition  
6 to the motion, and argued instead that it needs to finish taking  
7 depositions. In truth, the Tribe was required to submit  
8 declarations from its experts or other witnesses to meet its  
9 burden under Montana, but failed and refused to do so. The  
10 Tribal Court sided with the Tribe and denied the motion without  
11 prejudice after the depositions were completed.

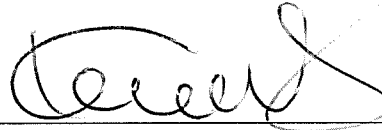
12 Plaintiff later re-filed the same motion, expecting it to  
13 be heard when the depositions were completed. The motion was  
14 set for November 2, 2016, together with the Tribe's motion for  
15 OSC re: contempt with respect to the small wall being built on  
16 Plaintiff's property. The Tribe filed no opposition to the  
17 motion for summary judgment, and reasserted its argument that  
18 the depositions were not completed. At the hearing, Plaintiff  
19 again argued that the Tribe did not need to take any depositions  
20 to meet its burden under Montana, supra, but that it was  
21 required to submit declarations from its experts. Despite this,  
22 the Tribal Court continued the summary judgment motion to  
23 December 15, 2016, which would allow the last couple of  
24 depositions to be completed and give the Tribe an opportunity to  
25 file opposition papers. (See Ex. "1," RT, pages 32-40). On  
26 December 7, 2016, when the Tribe's opposition was past due, the  
27 Tribe asked the Tribal Court to continue the December 15, 2016  
28 hearing. The Tribal Court continued the hearing to January 4,  
2017. To date the Tribe has yet to file any opposition papers,  
and it is likely the summary judgment hearing and January 9,  
2017 trial will never occur.

III.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to re-open the federal case should be granted.

Dated: December 16, 2016



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MUSHROOM CORPORATION OF AMERICA, a  
California Corporation