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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 **REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO RE-OPEN FEDERAL CASE** 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

Plaintiff RINCON MUSHROOM CORPORATION OF AMERICA ("RMCA") submits the following in reply to Defendants' opposition to Plaintiff's Motion to Re-Open Federal Case.

I.

THE TRIBAL COURT AND THE TRIBE BOTH HAVE ADMITTED THAT THE TRIBAL COURT HAS ALREADY DECIDED JURISDICTION

1. December 15, 2015 hearing.

As the Court knows, Plaintiff's prior counsel, George McGill, died in December of 2014. Thereafter, Mr. Manuel Corrales, Jr., Plaintiff's present counsel, was retained and appeared in the case. A discovery dispute arose in the Tribal Court proceedings, and the parties appeared before Judge Anthony

Brandenburg on December 15, 2015. This was the first time Plaintiff's counsel, Mr. Corrales, appeared before Judge Brandenburg in this case. Prior counsel, Mr. McGill had appeared on the case before Judge Brandenburg when Mr. Scott Crowell was representing the Tribe.

Although the matter before Judge Brandenburg involved a discovery dispute, Judge Brandenburg wondered why the parties were litigating jurisdiction, since, according to his recollection, the Tribal Court (i.e., him) already decided that issue. Mr. Crowell agreed. The transcript of the dialogue between counsel and the Court on that issue states:

MR. CORRALES: ...[W]e believe that there is absolutely no jurisdiction for them to even try and regulate activities, because of the Montana second exception says that the challenged conduct must be so severe as to fairly be called catastrophic for tribal self-government. And we don't think they can meet that burden.

So we have to have it adjudicated in Tribal Court in order to exhaust our tribal remedies before we go back to Federal Court.

JUDGE BRANDENBURG: I was under the impression, if you'll forgive me, that that had been adjudicated in Tribal Court already and we seem to be going over the same ground.

MR. CORRALES: No, Your Honor, it has not.

JUDGE BRANDENBURG: Well, Mr. Crowell?

MR. CROWELL: Yeah. I mean, I disagree with that conclusion. But ---

JUDGE BRANDENBURG: Which conclusion?

MR. CROWELL: Mr. Corrales's conclusion that the earlier litigation did not resolve the question. However, I do believe that what --- you know, pursuant to what the 9th Circuit has said, that it behooves us to go forward with the new claim,

because it is under --- the new NOVs have been issued under the new ordinance that we believe more correctly reflects the Federal --- the instructions from the Federal Courts as to what those parameters are, but one of the reasons we wanted this case consolidated, and one of the things that is correct, is **the law of that case** is that **this court found that the threshold matters of Montana second exception have been met**. That an **injunction** had been [in] place, a contempt order remains in place, and activity continues to occur on that property...

* * *

So although we believe that we have **law of the case**, we believe that litigation of the NOVs should go forward and the Montana question be looked at again so that the record can be created for the District Court to review...

(Ex. "15," 12/15/2015 Transcript of Hearing, pp. 15-18).

As can be seen, both the Tribal Court and the Tribe's attorney, Mr. Crowell, conceded that the Tribal Court had already decided that the Tribe has regulatory jurisdiction over the activities being conducted on the subject property under Montana's second exception. Mr. Crowell believes it is the "law of the case," presumably meaning that it cannot be contested or disputed anymore, and that the Tribal Court must follow that ruling in the present Tribal Court proceedings. Mr. Crowell goes even further to suggest that the proceedings in Tribal Court must "go forward," notwithstanding his belief that the issue has already been decided, because the Tribe wants the Tribal Court to "look at [that issue] again," for the sole purpose of having a record created for the District Court's review. Presumably, there was no reporter's transcript of the Tribal Court's September 2010 preliminary injunction ruling. However, that is not a reason to have the Tribal Court decide

the issue again. Mr. Crowell should have ordered a court reporter.

2. November 2, 2016 hearing.

As stated in Plaintiff's motion papers, the Tribal Court reaffirmed its September 2010 preliminary injunction barring all activities to be conducted on the subject property. It did so, despite the Court of Appeals' holding that the Tribal Court **is "to decide** whether tribal jurisdiction is actually permitted." (Ex. "3," page 3, Court of Appeals Memorandum 7/19/2012). In essence, the Tribal Court "resurrected" its 2010 preliminary injunction order rendered moot or invalid by the Court of Appeals' July 19, 2012 decision. When it did, Plaintiff was put in a position of not having any means of appealing the September 2010 preliminary injunction order, since the time to appeal that order had long passed.

The Tribal Court made it clear at the November 2, 2016 hearing that its 2010 preliminary injunction was based upon its determination that the Tribe has jurisdiction under Montana, supra, and that it still has jurisdiction over the activities being conducted on the property.

Thus, instead of deciding jurisdiction, the Tribal Court simply said it had already decided that issue back in 2010, and that that order still stands. It never said that the Tribe is "likely to prevail on the merits" for purposes of issuing a preliminary injunction. Winter v. NRDC (2008) 555 U.S. 7, 20; see also Singleton v. Kernan (U.S.D.C., S.D. Cal., 1/13/2017) 2017 WL 131831. Rather, instead it affirmatively ruled on the merits of that issue, stating unequivocally that the Tribe had jurisdiction over the activities on the property.

3. June 21, 2009 Order for Entry of Default Judgment.

In addition, the Tribal Court entered an order on June 21, 2009, granting the Tribe's motion for entry of default against

Marvin Donius and his company, Mushroom Express Corporation, when the Tribe sued them for constructing a sign on the subject property. Although the default judgment has been set aside, the fact remains that the Tribal Court made the order which was expressly based upon the Tribal Court determination that the Tribe had regulatory jurisdiction over the subject property under Montana, supra.

The Tribal Court's order stated in pertinent part as follows:

> "To prevail on its claims, the Tribe has to have jurisdiction to regulate the activities involved in this action. In its brief in support of jurisdiction, the Tribe established its jurisdiction over the activities at issue on the Donius Property based on its tribal law and established federal law recognizing that the Tribe has inherent power to regulate conduct of non-members on fee land within the Reservation where the conduct threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981). The facts submitted in the Tribe's brief in support of jurisdiction establish that the Defendants' activities on the Donius Property have a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe...**The Tribe therefore had the authority to regulate the Defendants' activities on the Donius Property**." (Emphasis added).

(Ex. "18," Order Granting Motion for Entry of Default Judgment, 6/21/2009). Donius had no opportunity to appeal this order, since he was allowed to answer the Complaint. Thus, as of the date of the Court of Appeals' July 19, 2012 Memorandum, the Tribal Court had twice determined that the Tribe had regulatory jurisdiction over the activities being conducted on the subject property based on the second exception of Montana, supra.

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II.

THE TRIBAL COURT "PLAINLY" LACKS JURISDICTION

As stated in Plaintiff's motion papers, since the issuance of Court of Appeals' unpublished Decision in this case on July 19, 2012, the same Court of Appeals issued a published opinion one year later holding that tribal courts plainly lack jurisdiction to regulate activities being conducted on non-Indian land with facts identical to those in this case, and that such property owners "need not exhaust tribal remedies." Evans v. Shoshone-Bannock Land Use Policy Com'n (9th Cir. 2013) 736 F.3d 1298. Accordingly, Plaintiff no longer needs to exhaust tribal court remedies, because, since it is "plain" that tribal court jurisdiction is lacking under the facts in this case, exhaustion "would serve no purpose other than delay." Nevada v. Hicks (2001) 533 U.S. 353, 369.

Because the subject property is "non-Indian fee land," the Tribe's efforts to regulate activity thereon are "**presumptively invalid**." Plains Commerce Bank v. Long Family Land and Cattle Co. (2008) 554 U.S. 316, 330. Therefore, the burden rests on the Tribe, not the property owners, to establish the second exception to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. Plains Commerce Bank v. Long Family Land and Cattle Co. (2008) 554 U.S. 316, 330. For a tribe to have authority over such nonmember conduct, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." Plains Commerce, supra at 341. Thus, "Montana's second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe.'" Burlington N. R.R. Co. v. Red Wolf (9th Cir. 1999) 196 F.3d 1059, 1064-65. Rather, the challenged conduct must be so severe as to "fairly be called

catastrophic for tribal self-government." Plains Commerce, supra at 341.

The Tribe's attempt to distinguish Evans, supra, is unavailing. Evans, supra, clearly reiterates the rule that the Tribe, not the non-Indian fee landowner, has the burden to establish one of the exceptions to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. Evans, supra at 1305. The Tribe's evidence in opposition to the motion to re-open is no evidence at all, and is merely speculation. Evans, supra, must now be followed. The Tribe has submitted no competent evidence in its opposition to Plaintiff's motion to re-open that would support regulatory jurisdiction under Montana's second exception. It failed in meeting its burden in responding to Plaintiff's motion for summary judgment in the Tribal Court, and it failed to meet its burden here. As a result, to continue to require Plaintiff to litigate this issue before the Tribal Court would be futile and only cause unnecessary delay. It is in the Tribe's best interest to continue to prolong the Tribal Court proceedings, because it hopes to "out finance" Plaintiff and for it to give up its property. The Tribe wants that property in order to build a parking lot for its casino across the street, and forcing Plaintiff to continue to exhaust its tribal remedies plays into the Tribe's hand in harassing Plaintiff.

The Tribe argues that Evans, supra, does not apply because it purportedly dealt solely with "general zoning law" and did not include any type of factual development that showed more than generalized statements of threats to the Shoshone-Bannock Tribes' water supply. This is inaccurate and a misreading of Evans, supra.

In truth, Evans, supra, specifically dealt with the same issues of claimed "environmental harms," including groundwater contamination and fire hazards. It stated:

> 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...Accordingly, the **tribal court plainly lacks jurisdiction**, and Evans need not exhaust tribal remedies.

736 F.3d at 1306. Accordingly, based on Evans, supra, this Court must conclude that the Tribe's claims of regulatory jurisdiction are similarly based on speculation, and that the Tribal Court plainly lacks jurisdiction.

III.

THE TRIBE'S ASSERTION OF JURISDICTION IS MOTIVATED BY "BAD FAITH" AND "HARASSMENT"

The Tribe cannot explain its conduct toward Plaintiff since the 2007 fire that destroyed the subject property, and it cannot explain why it continues to tell SDG&E to not reconnect power to the subject property. Plaintiff did not start the fire. There is no basis for such conduct other than to harass Plaintiff. Notably, the Tribe has cited Plaintiff with NOVs for using a generator on the subject property, when in fact the Tribe is the one that refuses to allow the power to be reconnected.

IV.

FAVORITISM

The record is clear that the Tribal Court Judge is extremely biased in favor of the Tribe. The transcript the Tribe submitted at the last summary judgment hearing bears this

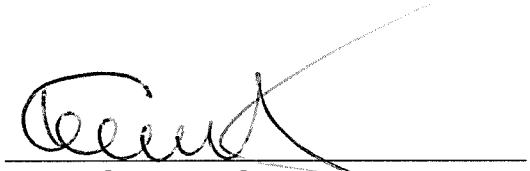
out. The Tribe refused to file and serve any opposition papers to the summary judgment motion before the hearing. Instead, it filed and served them on the morning of the hearing. Obviously, the Tribal Court Judge could not have read them. Yet he ruled on the motion and denied it, claiming there were triable issues of fact, based upon evidence he never even looked at or read.

V.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff's motion papers, the motion to re-open this case in federal court should be granted.

Dated: January 18, 2017



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