Exhibit 2

Justice Lambden's Order

IN THE TRIBAL COURT FOR THE TRIBE 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-JRL ORDER REGARDING PARTIES' FRCP § 12 (b) MOTIONS RE JURISDICTION AND JAMES ACRES MOTIONS TO STRIKE AND FOR DISMISSAL, DISQUALIFICATION AND VOIDANCE OF ORDERS ORDER RE SUMMARY JUDGMENT Justice James Lambden (California Court of Appeal, Ret.)

PROCEDURAL HISTORY

Justice James Lambden (hereinafter the "Presiding Judge") was appointed *pro tempore* as an Associate Judge of the Tribal Court for the Tribe Blue Lake Rancheria (the "Tribal Court") on January 10, 2017 following the recusal of Hon. Lester Marston, Chief Judge of the Tribal Court.

One year previously, Plaintiff Blue Lake Casino & Hotel ("BLCH") served its complaint and the summons issued by the Tribal Court on Acres Bonusing, Inc. ("ABI") and on James Acres individually. The complaint alleged four causes of action against ABI: breach of contract, tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment and money had-and-received. The fifth cause of action for fraudulent inducement was the only count alleged against James Acres, who has appeared *pro se* throughout these proceedings. James Acres ("Acres") has styled all of his numerous motions and pleadings as "special appearances".

Pursuant to Judge Marston's order of February 16, 2016, both defendants filed answers to the complaint. James Acres also filed a motion for judgment on the pleadings alleging that the complaint was defective on its face and that the Tribal Court does not have jurisdiction. Judge Marston denied the Acres motion for judgment on the pleadings and ordered the parties to submit cross-motions on the question of jurisdiction. Discovery on the question of jurisdiction was permitted in support of the cross-motions.

Judge Marston characterized these cross-motions as Federal Rule of Civil Procedure ("FRCP") Rule 12 (b) "Unenumerated" motions. T The somewhat abbreviated rules of procedure employed by the Tribal Court incorporate the FRCP in many respects; and the parties have cited the FRCP and federal authorities to support their motions. ABI elected to title its jurisdiction motion as an "Un-Enumerated 12 (b) Motion to Dismiss"; BLCH styled its motion as "…Regarding The Propriety of Jurisdiction of the Tribal Court"; and Acres described his pleadings as "Motions to Dismiss and to Strike". Acres also filed several other motions discussed below. [1]

Presiding Judge Lambden's March 13, 2017 "Order Scheduling Briefing And Hearing Of Counter Motions Regarding Jurisdiction" allowed time for the parties to conclude limited discovery regarding jurisdiction and forum issues. The parties submitted briefing; and oral argument was heard on June 2, 2017. Megan Yarnall, Esq. appeared on behalf of BLCH. Defendant James Acres appeared *in propria persona;* and Ron Blumberg, Esq. appeared for defendant ABI.

EVIDENCE SUBMITTED IN SUPPORT OF THE MOTION[S]

The affidavits and other evidence submitted by the parties establish the following generally undisputed facts:

- The Tribe is a federally recognized tribe that operates a casino and hotel in Blue Lake, California.
- The parties entered into a contract (the "Agreement") between ABI and BLCH related to the provision of certain components of the "iSlot" gaming system designed to operate on hand held devices such as iPads (Acres" declaration in support of motion to dismiss "Acres ABI declaration"). A copy of the Agreement was attached and incorporated by reference as part of BLCH's complaint.

---

[1] In March of 2016, Acres filed a complaint for "preemptive and declaratory relief from improper assertion of tribal jurisdiction" in the U.S. District Court for the Southern District of California. That complaint was transferred to the U.S. District Court for the Northern District of California and dismissed. In September of 2016 Acres filed another action in the Northern District of California contesting tribal jurisdiction and alleging due-process violations arising from conflicts of interest in Judge Marston's relations with the Blue Lake Tribe; and that case was dismissed after Judge Marston recused himself and Justice Lambden was appointed to serve *pro tempore.* Acres has filed motions in this proceeding to "recognize the disqualification" of Presiding Judge Lambden on the grounds that he was appointed by Judge Marston.

- Defendant James Acres began communicating with BLCH concerning the gaming system in the spring of 2010; and negotiations ensued between Acres on behalf of ABI and representatives of BLCH relating to the gaming system that resulted in execution of the Agreement on or about July 7, 2010 (Acres ABI declaration paragraph 13).
- Acres was personally present on the Blue Lake Rancheria July 7, 2010 to discuss the proposed business relationship between ABI and BLCH. (Acres contends that no meeting took place on July 6, 2010 but does not deny that he arrived at the hotel the day before the meeting on July 7, 2010).
- Acres met with tribal personnel and discussed the final terms of the Agreement in BLCH's restaurant.
- Acres offered his personal speculation (based on his visits to other casinos) that the BLCH restaurant might be located on land held in "fee simple" status.
- BLCH has offered uncontroverted evidence that the BLCH hotel and casino, including the restaurant, is located on land held in trust.
- James Acres signed the agreement on behalf of ABI; and a representative of the tribe signed the agreement on behalf of BLCH. The signature lines for both parties were dated July 7, 2010.
- Acres submitted evidence that his signature on the agreement occurred off reservation property; and BLCH has not shown that Acres signed the Agreement on BLCH property.
- On July 7, 2010 BLCH wired $250,000.00 to ABI as provided in the Agreement.
- Although performance of the contract terms remains at the heart of the dispute, there is no evidence that ABI failed to provide BLCH with the specified "server capable of serving 56 gaming devices" in September of 2010, prior to the Agreement's deadline of October 1, 2010.
- It is also undisputed that on approximately 12 different occasions between December 2010 and September of 2012 ABI shipped materials to BLCH at the Rancheria address. The evidence also shows that those materials supported the iSlot system supplied by ABI. Acres and other ABI personnel were provided accommodations at the casino hotel under the terms of the Agreement and came to the casino on numerous occasions to facilitate implementation of the iSlot system.

The Agreement between ABI and BLCH provides in pertinent part follows:

"In order to cover localization costs of the iSlot system, BLC&H shall pay ABI an advanced deposit against royalties of $250,000." (Agreement, page 7).

"Once the iSlot System is installed one-half of each month's lease fee shall be applied against the advance deposit until it is extinguished." (Agreement, page 7).

"The deposit shall be refunded if, and only if, ABI does not make an iSlot System available to BLC&H for installation by October 1, 2010 which:(i) has received GLI certification; (ii) has approved by at least one tribal gaming authority in California; (iii) allows BLC&H to credit points to player-club accounts for coin-in played on the iSlot System (though BLC&H understands this may be a manual process performed daily by their staff)." (Agreement, page 7).

"In the event that ABI provides the iSlot system in at [sic] timely fashion and BLC&H elects not to involve the system or elects to use the iSlot system to serve fewer than 20 simultaneous gaming devices, then any remaining advance fee shall be forfeit [sic]." (Agreement, page 4)."

"In the unlikely and unfortunate event that ABI cannot deliver the iSlot System, then some Acres Family controlled entity shall make strenuous efforts to refund the deposit or make some other restitution to the satisfaction of BLC&H." (Agreement, page 7).

The Agreement also provided that BLCH would purchase and maintain certain third party components, including terminals and kiosks. The "Monthly Lease-Fee" was described as follows: "BLC&H shall pay a monthly lease-fee equal to the lesser of 15% of Theoretical Net Win of all play on the iSlot System for the month or the Maximum Monthly Fee [calculated according to the described formula including a Maximum Daily Fee of $60 adjusted for inflation]. (Agreement, page 6).

BLCH's affidavits and evidence establish that the tribe is a federally recognized Indian tribe, and that the tribe conducts gaming operations at its wholly owned and operated "Blue Lake

Casino and Hotel". BLCH also showed that its facilities are located entirely on the Blue Lake Rancheria, including the restaurant in which negotiations took place, and that the Rancheria is owned by the United States in trust for the tribe. (Declarations of Thomas Frank and Megan Yarnell). The Agreement provided that the iSlot software to be used by the tribe was developed by the TALO Inc., a Nevada corporation[2]. Evidence submitted by Acres showed that iSlot components were shipped from Nevada.

Acres came to the Rancheria on multiple occasions to oversee installation, maintenance and repair of the iSlot System. Other members of the ABI team, including Mark Daily, Dwayne Lamb and Stephen O'Brien came to the Rancheria on multiple occasions to assist with the implementation of the system. (Declaration of Robert Pollard). The agreement provided that BLCH was to provide hotel rooms and other accommodations for ABI personnel visiting the casino on business matters related to the Agreement (Frank declaration). Both Acres and the ABI team stayed at the hotel and were provided accommodations by BLCH on multiple occasions (Pollard Declaration). Acres coordinated and attended these meetings and generally worked with other ABI personnel and BLCH to implement the system (Pollard Declaration).ARGUMENTS

ABI and Acres repeatedly assert that the tribe cannot establish jurisdiction over ABI and Acres because "tribal jurisdiction is cabined by geography" (*Philip Morris USA v. King Mountain Tobacco,* 569 F. 3d 932, 938 (9th Cir. 2009)); and they argue that BLCH's jurisdictional allegations cannot survive a facial challenge because they are "flatly pled legal conclusions" that are "implausible." ABI contends that paragraph 4 of the complaint is patently insufficient to establish jurisdiction because it only alleges as follows: "[The Blue Lake Tribal Court] has jurisdiction over this action because the contract upon which the dispute was founded was signed on Blue Lake Rancheria tribal property; was to be performed on Blue Lake Rancheria tribal property; and at least one party to the contract is an entity owned by Blue Lake Rancheria a federally recognized Indian tribe." (ABI Reply to BLCH Opposition, p. 4).

---

[2] Public records disclose that James Acres is the only listed officer of Acres Bonusing Inc., a Nevada corporation with an office in Carson City. TALO Inc. is also a Nevada corporation with an office in Las Vegas; and its officers are John and Joann Acres. No alter-ego cause of action has been pleaded.

ABI also concedes that this Court "may look beyond the pleadings in an Un-Enumerated [FRCP] 12(b) motion" (ABI Reply to BLCH Opposition, n. 3, page 4). Indeed, no party disputes that the purpose of the instant countermotions is to examine the factual and legal underpinnings of the complaint, as well as the jurisdiction of the Tribal Court. The motions before the Court have at various junctures been styled as: motions to dismiss, motions to strike, motions for judgment on the pleadings, motions for summary judgment and Un-Enumerated 12(b) motions.

DISCUSSION

The facts before the Court fatally undermine defendants' efforts to bring this dispute within the jurisdictional limitations imposed by *Big Horn County Electric Coop. v. Adams,* (9th Cir. 2000) 219 F. 3d 944. The *Big Horn* case involved the Crow tribe's attempt to tax Big Horn's property consisting of easements granted by the federal government for utility transmission lines. The Court of Appeals analyzed whether Big Horn's property was the "equivalent of non-Indian fee land' where the tribe's jurisdiction over "non-member conduct on non-Indian fee land would be "extremely limited". Defendant's argument that BLCH's land must be evaluated as fee land because BLCH is "open to the public" and because BLCH "shares regulatory authority over the Casino" is not supported by *Big Horn.* ABI is correct, however, when it points out that the Tribal Court's jurisdiction over non-tribal members is strongest on trust land. The evidence here establishes significant conduct on tribal trust land.

Defendants' reliance on *Montana v. United States* ((1981) 450 U.S. 544) is also unavailing because the Ninth Circuit has held that applying *Montana* to cases arising on reservation trust land "would impermissibly broaden *Montana's* scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self government." *Knighton v. Cedarville Rancheria of N, Paiute Indians* (E.D. Cal 2017) 2017 U.S. Dist. LEXIS 21604*17 quoting *Water Wheel Camp Recreational Area Inc. v. Larance,* (9th Circ. 2011) 642 F.3d 802, 809. The activities alleged in this complaint (including negotiation of the Agreement, installation, maintenance and use of the iSlot System) did not occur on non-Indian fee land. The evidence shows that the conduct occurred on the Blue Lake Rancheria, which is land owned by the United States in trust for the Tribe. It follows that jurisdiction is presumed under the holding of *Water Wheel,* (Id. at 812).

BLCH's counter argument is founded on the inherent sovereignty of Indian Country. "Tribes maintain considerable authority over the conduct of both tribal members and non-members on Indian land, or land held in trust for a tribe by the United States." *McDonald v. Means* (9th Cir. 2002) 309 F.3d 530, 536. The law provides that in order to exercise this inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction and personal jurisdiction. *Water Wheel Camp Recreational Area Inc. v. Larance,*, supra at 809.

BLCH asserts Tribal Court jurisdiction under Article V, Section 5 of the Tribe's Constitution, which authorizes the Tribe's Business Council to enact laws for the welfare, health and safety of the members of the Blue Lake Rancheria. Pursuant to this authority the Business Council created the Tribal Court and described the ambit of its jurisdiction in Ordinance 07-01 entitled "Ordinance of the Blue Lake Rancheria Establishing a Tribal Court."

Section 11.1.1.030 (a)(3) of the Tribal Court Ordnance grants the Tribal Court jurisdiction in civil actions over: "(d) persons or legal entities who have entered contracts with the Tribe or its wholly owned entities; (e) persons or entities doing business within the territorial jurisdiction of the Tribal Court; and (k) all other individuals whose conduct threatens or have direct effect on the political integrity, the economic security or the health and welfare of the tribe." BLCH thus argues that the Tribal Court has personal jurisdiction over ABI because there is no dispute that both ABI and BLCH are parties to the agreement; and the Tribal Court Ordinance provides for tribal "jurisdiction over persons or legal entities who have entered into contracts with the tribe or its wholly owned entities." ABI is also subject to personal jurisdiction under the Tribal Court ordinance because it is an entity "doing business" within a territorial jurisdiction of the Tribal Court.

BLCH argues there is personal jurisdiction over James Acres pursuant to the Tribal Court Ordinance because Acres did business within the territorial jurisdiction of the Tribal Court and because his conduct threatened and had a direct effect on the economic security of the tribe. BLCH also argues that federal law allows courts to exercise personal jurisdiction over employees or corporate officers based on: (1) where the corporation is the agent or alter ego of the individual defendant; or (2) by virtue of the individual's control of and direct participation in the alleged activities. For this proposition BLCH cites *Trans Go, Inc. v. AJAC Transmission Parts*

Corp., (9th Cir. 1985) 768 F.2d 1001, 1021 which states: A corporate officer is in general personally liable for all torts which he authorizes or directs or in which he participates notwithstanding that he acted as an agent of the corporation and not on his own behalf."

BLCH also cites *Davis v. Metro Products Inc*. (9th Cir. 1989) 885 F.2d 515, 524 fn. 10 which states: "Cases which have found personal liability on the part of corporate officers have typically involved incidences where the defendant was the 'guiding spirit' behind the wrongful conduct." Although DLS BLCH points to several statements in their supporting declarations which indicate that James Acres negotiated the agreement and was the primary communicator with BLCH, the only alleged claim against James Acres is that he "fraudulently induced BLCH to enter the agreement via negotiations that took place on the Rancheria." BLCH has not pleaded any other cause of against Acres and there are no allegations asserting alter ego liability.

BLCH argues there is jurisdiction over the defendants not only because of the Tribal Court Ordnance which provides for jurisdiction over contracting parties, but also because of the evidence that Acres and other representatives of ABI traveled to the Rancheria to negotiate the contract and install, troubleshoot and otherwise implement the iSlot System under the terms of the Agreement. Accordingly, the causes of action against both ABI and James Acres regard the enforcement and interpretation of the Agreement, which arose and was to be implemented on the Rancheria. There is no significant dispute over the fact that the United States owns the land in trust for the Tribe. The limitations on jurisdiction imposed by *Montana v. United States*, ((1981) 450 U.S. 544) do not apply; and it is long settled that "Tribal authority over activities of non-Indians on reservation land is an important part of tribal sovereignty." (*Iowa Mutual Insurance Co. v. LaPlante*, (1987) 480 U.S. 9, 18). The inherent powers and attributes of sovereignty that are not divested by the federal government remain in place where Congress has been silent. (*Merrion v. Jicarilla Apache Tribe*, (1982) 455 U.S. 130, 149). Accordingly, where there is no evidence of Congressional intent to limit jurisdiction and no conflict with federal interests in promoting tribal self-government, the jurisdiction of the Tribal Court is presumed. (*Water Wheel*, supra at 812-814).

ABI argues that jurisdiction cannot attach because the wire transfer of the deposit was a precondition of the completion of the Agreement and the transfer was received in Nevada. Acres

argues that he has evidence (a receipt form a sandwich shop in Petaluma) showing that he had left the Rancheria before signing the Agreement on July 7, 2010. Neither ABI nor Acres cited authority that would bar the Tribal court's exercise of jurisdiction based on those facts; and in any event, the analysis of jurisdiction requires consideration of more than simply where the contract was signed.

Here the evidence shows that the relevant conduct by the parties, including the negotiation of the agreement, the alleged misrepresentations by James Acres, the installment and troubleshooting of the gaming system, as well as the use of the gaming system by BLCH's patrons, all occurred on the Rancheria. The Rancheria, including the BLCH restaurant has been shown by the evidence to be on land owned by the United States in trust for the Tribe. Accordingly, Tribal Coast jurisdiction is presumed under *Water Wheel* (642 F.3d at 812). The jurisdiction of the Tribal Court also extends to include civil authority over non-members under these circumstances. "A tribe may regulate through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." (*Montana v. United States*, supra at 565-566).

Even if the jurisdictional limitations imposed by *Montana* applied (and they do not) the result would be the same. "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." (*Montana*, supra at 566). Accordingly, even if the conduct occurred on fee land, the first Montana exception recognizes that as a sovereign nation, the Tribe has the power to enter into contractual relationships with non-member individuals and entities for work on reservation property whether Indian-owned or not; and the Tribe may place conditions on those contracts. (*Soaring Eagle Casino and Resort v. NLRB* (6th Cir. 2015) 791 F.3d 648, 668). Moreover, the *Montana* exception applies to "private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangement that they (or their employers) entered into." (*Montana*, supra, citing *Nevada v. Hicks*, (2001) 533 U.S. 353 372). The law thus recognizes that when a non-member voluntarily enters into a commercial relationship with a tribe, the general principles of jurisdiction apply to the tribe as a sovereign, unless otherwise expressly limited. Moreover,

the Tribe may itself choose to impose conditions–such as jurisdiction in the Tribal Court–on its contractual relationships with those entities.

James Acres speculates "based on his experience in other casinos" that the restaurant where negotiations took place might not have been located on trust land. Acres he did not sign the Agreement until after he left the Rancheria; but this assertion has only limited significance among the facts to be considered. The evidence showed that the Agreement between ABI and BLCH was negotiated by Acres on land owned by the United States in trust; and, most significantly, performance of the Agreement called for the maintenance and installation of the gaming system to take place on trust land. ABI personnel visited the BLCH Casino on numerous occasions to work on the iSlot System and the Agreement expressly provided for their accommodations while they worked there. Indeed, under the terms of the Agreement, the system was intended for use only in the casino and could be played by users only while at the casino. The iSlot System was not something ordered online and simply delivered by UPS; it was a system installed entirely within the jurisdiction of the Tribal Court under an Agreement that was negotiated, and to be performed, on tribal land.

Blue Lake Rancheria Tribal Court Ordinance 07-01, Section 11.1.1.060 provides that where there is no tribal law on point, the Court will look to California and federal law as well as the laws of other tribal jurisdictions. Here there is no statutory or precedential law indicating whether the filing of an answer in the Blue Lake Tribal Court constitutes a general appearance and thereby waives personal jurisdiction. Under California law an appearance and assertion of affirmative defenses constitutes a waiver of the ability to challenge personal jurisdiction (California Code of Civil Procedure Section 1014. See also *Roy v. Superior Court of County of San Bernardino* (2005) 127 Cal. App. 4th 337, 344-345). Federal law is in accord: "a motion to dismiss is normally considered to constitute an appearance". (*Sun Bank of Ocala,* (5th Cir. 1989) 874 F 2d 274, 277). Acres points out that federal law may require a different outcome under Federal Rule of Civil Procedure 12(b): "A defendant may raise objections to personal jurisdiction along with any other defenses without being deemed to have waived the jurisdictional objection. A defendant may also choose to proceed by motion before answering or simply state the lack of personal jurisdiction in his responsive pleading as a defense." (*Roy*, supra at 342). However, despite his care in labeling all of his numerous submissions to the Court as

"special appearances" Acres has gone beyond the ambit of a limited appearance by arguing the merits in his motions to strike and dismiss the action. Ordinarily arguments on the merits, including arguments supporting motions to dismiss or to strike (such as the numerous and variously labeled motions on the merits submitted by Acres) are treated as a general appearance. This provides additional grounds for finding jurisdiction over Acres as an individual.

Tribal Court jurisdiction over both ABI and Acres arises directly from the consensual relationship established through the Agreement and commercial negotiations between James Acres, ABI and BLCH and is not limited by the authorities cited by the Defendants. The facts submitted by the parties establish that all claims in the action arose on tribal trust land and are thus subject to the Tribal Court's sovereign jurisdiction. The Tribal Court has jurisdiction over ABI and James Acres. James Acres has waived his objections by argueing on the merits.

MOTION FOR SUMMARY JUDGMENT

During the case management conference that took place on May 11, 2017 the Presiding Judge instructed both parties to answer two questions in their briefs before the jurisdictional hearing set for June 2, 2017: First, whether James Acres had waived his objections to general jurisdiction and generally appeared by arguing the merits of the case. And second, whether Acres might be entitled to summary judgment based on any of the arguments he raised on the merits. At the conclusion of the hearing on June 2, 2017, the Presiding Judge reserved ruling on the jurisdiction issues and indicated that the Court would deem the aggregate of the motions to dismiss and strike, etc., filed by James Acres as a motion for summary adjudication of the cause of action alleging fraudulent inducement, which is the only count alleged against Acres individually. The parties were directed to supplement their briefs to comply with the Tribal Court and FRCP rules applicable to summary judgment. A briefing schedule was set; and hearing of arguments was scheduled for June 30, 2017. The Presiding Judge indicated that the summary judgment motion would be based on all the pleadings, affidavits and other evidence filed in the case, including the extensive briefs and declarations previously served, as well as the supplementary materials served in preparation for the June 30 hearing.

The Tribal Court rules provide for unusually wide discretion in the granting of motions for dismissal and summary judgment. Rule 30 (b) provides in part: "After the plaintiff has completed the presentation of ... evidence, defendant, without waiving it's right to offer evidence in the event the motions are not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff, or may decline to render any judgment until the close of all evidence". Rule 35(b) provides: "A party against whom a claim or counterclaim is asserted or a declaratory judgment is sought *may, at any time, move with or without supporting affidavits for a summary judgment in his/her favor as to all or any part thereof.* (Emphasis added) Rule 35 goes on to state in subparagraph (c): "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law." FRCP. 56(c). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the nonmoving party's case. See *Celotex Corp. v. Catrett*, (1986) 477 U.S. 317, 326. Upon such showing, the court may grant summary judgment "on all or part of the claim." FRCP 56(a)-(b).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusionary statements. FRCP 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. (*Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, (9th Cir.1983) 701 F.2d 95, 97). The non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of material fact for trial. (See *Celotex Corp.*, 477 U.S. at 324). The materiality of a fact is determined by whether it might influence the outcome of the case based on the contours of the underlying substantive law. (*Anderson v. Liberty Lobby, Inc.*, (1986) 477 U.S. 242, 248). Disputes over such facts amount to genuine issues only if they are pertinent and a reasonable jury could resolve them in favor of the nonmoving party. Id.

Federal Rule of Civil Procedure (FRCP) Number 56 has traditionally been more liberal in the granting of summary judgments than California State Court. Indeed it permits the court to consider a summary judgment motion on its own motion. The California Supreme Court has recently clarified that the purpose of the most recent amendments to the California Code of Civil Procedure Section 437 (c) (the summary judgment statute in California) was to "liberalize the granting of summary judgment motions". In California summary judgment is no longer called a "disfavored" remedy. In line with federal law, summary judgment is now seen in California as a particularly suitable means to test the sufficiency of the plaintiff's case. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, at page 542)

The stack of variously titled motions filed by Mr. Acres is unruly almost to the point of incoherence. In response to the presiding Judge's request for briefing on the issue of summary judgment Acres repeated his jeremiad regarding the recusal of the chief judge of the Tribal Court, Lester Marston. Acres repeats his arguments that all prior orders in the action are void and that the Court Clerk and the Presiding Judge are "disqualified". He also repeats (in the context of the summary judgment motion) all of his arguments regarding jurisdiction. Even though Acres has been unsuccessful in disputing jurisdiction, he has pointed to facts and raised arguments sufficient to suggest that BLCH does not have sufficient evidence of an essential element of its fraud claim to carry its burden of persuasion at trial. (See *Nissan fire & Marine Ins. Co. v. Fritz Cos. Inc.,* (9th Cir. 2000) 210 F3d. 1099, 1202).

Acres' effort to dispute even irrelevant facts initially suggests that there must be factual disputes that would prevent summary judgment. Acres disputes when, where, and how negotiations took place; and Acres essentially denies that he made any assurances or representations regarding the iSlot system. He even disputes the fundamental purpose of the purpose of the agreement, at least as it is asserted by BLCH. More on point, Acres denies that there was any "royalty repayment scheme" as alleged by BLCH. Accordingly, it might appear that there must be disputable issues of fact to prevent summary adjudication or summary judgment. Indeed BLCH argues, "[n]early every fact material to the cause of action against Acres is disputed". (BLCH Opposition, p. 6).

However, most of Acres' disputation pertains to tangential and irrelevant matters. Neither party disputes the operative terms of the written agreement including the fact that the "royalty repayment scheme" at the center of BLCH's fraud claim is actually an express provision of the Agreement. The Agreement provides for monthly lease payments following the initial advance deposit. It also provides that a portion of the monthly lease payments will be credited towards "extinguishment" of the initial deposit. In other words, the parties do not dispute that monthly "lease" payments by BLCH to ABI would be reduced in this fashion. In practice this meant that BLCH would pay a reduced amount of the base "lease" payment provided by the agreement. [3]

Despite Acres' efforts to dispute every single fact, his elaborate, disjointed and confusing motions have revealed an issue with the potential for summary adjudication: the question of whether there Mr. Frank could have reasonably relied upon misrepresentation allegedly made by Acres. This issue must be examined in view of the terms of the contract, the mathematical certainties involved in the repayment schedule, and the sophistication, experience of the person asserting reasonable reliance. Based on the assumption that all disputed facts are interpreted in BLCH's favor, the question is whether it was reasonable for Mr. Frank to rely on the representation alleged in paragraph 4 of his declaration that "…the royalty repayment scheme would repay the entire $250,000 advance deposit…". This representation followed Frank's expression of uncertainty that the "iSlot System would be profitable". (Frank Declaration, paragraph 3).

Mr. Frank's declaration offers his own opinion that it was "not unreasonable to believe" that the system would be profitable enough to cover the deposit "during the initial two-year term of the Agreement". Frank bases that opinion on his more than 12 years of experience in casino management. No other declaration of a witness has been provided beyond Mr. Frank's

[3] The parties variously call these payments "lease payments" and "royalty payments"; and BLCH alleges that this provision of the Agreement is the fraudulent "royalty repayment scheme". As a matter of legal interpretation the Agreement more closely resembles a licensing agreement than either a lease or an agreement for payment of royalties.

declaration although Mr. Sallati was apparently involved in the negotiations and signed that Agreement. Between them, Sallati and Frank have decades of experience in casino management. Especially as to Mr. Frank, the expertise he touts in his declaration that his reliance was "reasonable"cuts both ways. His career in casino management necessarily involves substantial knowledge and experience regarding the calculation of payouts and probabilities. The management of casinos also involves evaluation of the popularity with the public of different devices and games. The question is whether a man of Frank's experience and expertise could have reasonably relied upon the representation that the gaming system would be "profitable" enough to "pay back" the advance deposit during the initial two-year term.

Several points make this a questionable proposition:

- First, the terms of the agreement do not describe a "scheme". The express terms of the agreement describe a reduction of monthly payments under a formula best characterized as a discount of the initial $250,000.
- Second, BLCH's ability to calculate the efficacy of that discount by simple mathematical calculations is beyond dispute. The parties apparently agree that the total aggregate sum of $3.333 million in "theoretical net win" calculations would be required to "extinguish" the advance payment. It is also undisputed that BLCH would be required to pay monthly lease payments in an amount at least equal to the discount.
- Thirdly, the essence of the misrepresentation alleged by BLCH was that " the iSlot System would repay the entire advance deposit and that the iSlot System would be profitable" (Frank Declaration, Paragraph 6). The Complaint and the Agreement do not describe any time frame for the recoupment of the deposit; Frank's declaration implies that he was assured by Acres that sufficient profits would be recovered within two years, which was the initial term of the agreement. However, it has been not been alleged or shown that the two-year time frame was a part of the Acres representation; and the express term of the Agreement regarding the "repayment" discount is open-ended. Thus, the alleged misrepresentation did not indicate a time frame. The alleged misrepresentation at the heart of the fraud claim was not that the system would work, or that the iSlot System would be popular or that the

maintenance of gaming licenses would be assured. According to Frank the misrepresentation was not only that "the iSlot System would be profitable", but also by implication that it would be profitable enough to repay the entire advance payment of the license fee and implicitly within two years. (Frank Declaration, paragraphs 6 and 10).

- Frank and Salatti have between them accrued decades of experience in casino management. As such, their ability to reasonable rely on representation by others pertaining to the areas of the their own expertise is circumscribed. If the conduct of plaintiff BLCH's managers and advisors (examined in the light of their own intelligence and information) was manifestly unreasonable, recovery may be denied. (*Gray v. Don Miller & Associates, Inc.,* (1984) 35 Cal.3d 498, at p. 503 ["the issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience"].)
- The essence of the alleged fraud was Acres' assurance that the System would be quickly profitable. Frank states that he was uncertain that the system would be profitable and that he relied on Acres' assurance that it would be profitable. This is akin to asserting there was a warranty that the system would work and that it would be popular enough to be profitable. (See *American Jurisprudence Proof of Facts 3d* AMJUR POF 3d 329). However, the Agreement contains no warranties either expressed or implied with reference to the operation of the system.
- Indeed the Agreement affirmatively states that the advance deposit against payments shall be "refunded if, and only if," ABI did not deliver the system by October 1, 2010.
- Acres' alleged assurance that the gaming public would use the system enthusiastically enough to generate 3.333 millions of dollars in profits with in a short time can only be viewed as an opinion. This is because it is predictive of third party behavior. Such statements cannot support an action for fraud because the general rule is that an action for fraud must be based on statements of fact, not opinion, and that statements as to future actions by third parties are deemed non-actionable opinions. (*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn.* (1988) 205 Cal.App.3d 1415, 1423; *San Francisco Design Center Associates v. Portman Companies* (1995) 41 Cal.App.4th 29, 43–44,; 5 Witkin, Summary of Cal. Law, *supra,* Torts, § 774, p. 1137

Accordingly, the terms of the Agreement are in inconsistent with reasonable reliance by BLCH. Both the complaint and Mr. Frank's limited declaration regarding the alleged representation are conclusionary. Without any apparent conscious irony Frank opines based on his own extensive casino experience that his reliance was reasonable. However, there was no royalty repayment "scheme" as alleged by the complaint. The Agreement does not provide any promise to repay the deposit; it expressly promises only a discount of the initial payment stream. The Agreement also contains an express and strict limitation on the circumstances under which the deposit can be recovered other than by the discount of monthly payments. The open-ended Agreement does not indicate any time frame within which the deposit would eventually be recouped by the discounted payments.

While it is true that fraud in the context of contracts usually presents triable issues of fact, this case presents circumstance where the evidence presented by the plaintiff is not sufficient to establish the element of justifiable reliance. Counsel for BLCH is correct that circumstantial evidence is usually a matter of factual dispute because fraudulent inducement turns upon the state of mind of the inducer. However, this is a case where the exception proves the rule. Assuming the facts in the light most favorable to BLCH and also assuming that the narrowly framed "assurance" by Acres was delivered precisely as described by Frank, reasonable minds can come to only one conclusion: A person with the knowledge, experience and education possessed by Thomas Frank[4] could not have reasonably relied on what was essentially an opinion offered by Acres regarding the future gaming behavior of third party customers. He could not reasonably have believed there was a "scheme" that was inconsistent with the *express* language of the Agreement. He needed only to invoke his own knowledge and experience, read the Agreement and do the math, to discern that Acres' assurance of profitability was a chimera. Viewed in the context of the contradictory terms of the Agreement, an early motion for judgment on the pleadings or a demurrer might well have been successful if not for the cloud of persistent procedural confusion generated by a hyperbolic defendant appearing *pro se*.

BLCH has not shown sufficient evidence to establish reasonable reliance by a highly experienced casino manager such as Mr. Frank. There is no evidence to show that there was any "royalty repayment scheme" outside the four-corners of the Agreement itself; and the Agreement

[4] And by extension, BLCH; no other witness offered evidence for BLCH regarding reliance.

contains no express warranties or breaches of contract enforceable against James Acres. The alleged false representation was essentially a salesman's opinion that the iSlot System would be "profitable" based on a prediction of future customer behavior.

There was no circumstantial evidence sufficient to show the required element of scienter on the part of Acres. BLCH attempts to find direct evidence to show Acres' state of mind on page 15 of his Unenumerated Motion to Dismiss: "it is now clear that Acres did not believe deposit could be repaid as he disputes the ability to collect $3.3 million [within the time frame expected by BLCH]". This misstates the evidence not least because the contract contains an open-ended provision for automatic extensions of the initial two-year term. No time period was specified for the repayment of the deposit and straightforward mathematical calculation could have shown that it was unlikely that the system would generate that amount of cash within a short time period.

Assuming the assurance was precisely as described by Thomas Frank, it could only have been Acres' opinion that BLCH would profit from the conduct of customers rather than an actionable misstatement of the facts regarding the performance of the iSlot System. BLCH has attempted to conjure a personal warranty by Acres to supplement its other causes of action against ABI based on the "complete failure of the system" asserted by Thomas Frank. BLCH cannot prove the required element of reasonable reliance with reference to the fraud cause of action. THEREFORE,

Summary judgment is GRANTED in favor of James Acres individually. Mr. Acres is dismissed from the action and is no longer a party. To the extent his other motions have not already been denied by previous orders those motions are moot.

Dated: July 18, 2017

James R. Lambden

Hon. James Lambden (Ret.)

PROOF OF SERVICE

State of California
County of San Francisco

I certify that I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 100 First Street, 27th Floor, San Francisco, California 94105.

On July 18, 2017, I served the foregoing document described as the **ORDER REGARDING PARTIES' FRCP § 12 (b) MOTIONS RE JURISDICTION AND JAMES ACRES MOTIONS TO STRIKE AND FOR DISMISSAL, DISQUALIFICATION AND VOIDANCE OF ORDERS; ORDER RE SUMMARY JUDGMENT; and PROOF OF SERVICE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address tyler@adrservices.org to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **BY U.S. MAIL:** I caused such envelope with postage thereon to be placed in the United States mail at San Francisco, California.

☐ **BY FACSIMILE:** I caused such to be faxed to the attorneys on July 18, 2017

☐ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the attorneys on July 18, 2017.

☒ **STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 18, 2017 at San Francisco, California

Tyler Smith

Tyler Smith

ADR SERVICES

SERVICE LIST

RE: BLUE LAKE CASINO & HOTEL v. ACRES BONUSING, INC., ET AL.
ADRS Case No. 17-0767-JL
Court Case No. C-15-1215-JRL

Amelia F. Burroughs, Esq. Megan A. Yarnall, Esq. JANSSEN MALLOY LLP 730 Fifth Street P.O. Drawer 1288 Eureka, California 95501 aburroughs@janssenlaw.com myarnall@janssenlaw.com	Attorneys for Blue Lake Casino & Hotel,
James Acres 1106 2nd Street, #123 Encinitas, California 92024 james@acresbonusing.com	IN PROPRIA PERSONA
Ronald H. Blumberg, Esq. BLUMBER LAW GROUP LLP 137 North Acacia Avenue Solano Beach, California 92075 rhb@blumberglawgroup.com	Attorneys for Acres Bonusing, Inc.,