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**STATEMENT OF POSITION ON DISCIPLINARY BOARD COMPLAINT
FILED BY H. GARY BROWN**

AUGUST 17, 2022

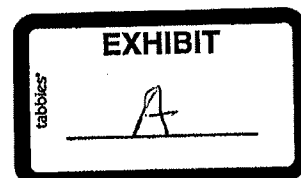
COMES NOW CARL BRYANT ROGERS, and for his Statement of Position in response to the Disciplinary Board Complaint filed against him by H. Gary Brown, states as follows:

1. The undersigned is counsel of record for all Defendants in a suit in which the Complainant H. Gary Brown is a Plaintiff. Howard Gary Brown and Brandon Sibley v. Choctaw Resort Development Enterprise, Et al., Civil Action No. 3:22-cv-00256-DPJ-FKB now pending in the United States District Court for the Southern District of Mississippi (Northern Division). As summarized at Doc. 4, ¶ 6, pp. 2-3 and Doc. 6, ¶ 6, p.3 filed by Defendants in that suit:

Plaintiffs have sued all Defendants (hereinafter the "Tribal Defendants") based on the [Mississippi Band of Choctaw Indian's] enactment of and the individual Tribal Defendants' action to implement and enforce (at the Tribe's Golden Moon Casino & Hotel (Compl., ¶s 25, 26, 27-71)) a tribal mask mandate issued as a public health emergency measure authorized by Choctaw Tribal Ordinance 50-A, cited in the Chief's Executive Order No. 2020-06-B "Reinstatement of Face Covering Requirement." That Executive Order is referenced in the Complaint at ¶s 23, 24, 82 and appended thereto as Exhibit A. A true and correct copy of Choctaw Tribal Ordinance 50-A is attached hereto as Exhibit 6.

Plaintiffs claim that they had a religious based exemption that gave them the right as a matter of federal law to enter the Tribe's hotel and casino and remain there per their hotel reservation without wearing a mask.

2. Defendants have filed two Motions to Dismiss the Complaint per F.R.Civ.P. 12(b)(6). (Docs 4 and 6 with supporting Memoranda at Docs. 5 and 7).



3. One of those Motions seeks dismissal for Plaintiffs' failure to exhaust tribal remedies before seeking relief on their claims (except for their 42 U.S.C. § 1983 claim) in the U.S. District Court, which Defendants contend is required by *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (Doc. 6).

4. A predicate for one line of Defendants' argument in support of the Doc. 6 Motion contending that Plaintiffs are required to exhaust their tribal remedies before seeking relief in Federal Court in this suit is that there must be a colorable basis for the exercise of Choctaw Tribal Court jurisdiction over Plaintiffs' non-§1983 claims. Plaintiffs' 42 U.S.C. §1983 claim is addressed in a separate Motion to Dismiss (Doc. 4).

5. Defendants identified two independent grounds per which the Federal Court could find that a colorable basis for Choctaw Tribal Court jurisdiction exist as to Plaintiffs' non-§1983 claims.

6. First, Defendants' argued that since this dispute arose on Choctaw Reservation land at a tribal hotel and casino and involves non-Indian plaintiffs suing the Mississippi Band of Choctaw Indians and various officers and employees thereof for causes of action Plaintiffs' claim arose from Defendants' actions at that on-reservation facility, that tribal court jurisdiction over Plaintiffs' non-§1983 claims exists under *Williams v. Lee*, 358 U.S. 217 (1959) since the federal court plaintiffs would be tribal court plaintiffs if their suit were refiled in the Choctaw Court. (Doc. 7, pp. 4-5, 16-17).

7. Second, Defendants' argued that a colorable basis exist for the exercise of tribal court jurisdiction under the "consensual relationship" exception established by *Montana v. U.S.*, 450 U.S. 544 (1981) if that test were applicable. The anchor for that *Montana* argument was set out in Defendants' "Memorandum in Support of Motion to Dismiss for Failure to Exhaust Tribal Remedies as to all but Plaintiffs' 42 U.S.C. § 1983 Claims" (Doc. 7). Core excerpts regarding that argument appear in Doc. 7 at pp. 4 and 18, as follows:

Defendants' reservation booking for rooms at the Golden Moon Casino Hotel constitutes a private, voluntary commercial consensual relationship which triggers *Montana* jurisdiction in the Choctaw Tribal Courts even in the absence of any separate written contracts between the parties. *Cardin v. DeLa Cruz*, 671 F.2d 363 (9th Cir. 1982) (non-Indian purchases of goods at a

tribally-operated grocery store on Indian reservation constituted a "consensual relationship" under *Montana v. U.S.*, 450 U.S. 544 (1981)). Moreover, the Court in *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd* by an evenly divided court *sub nom Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016), found that a verbal agreement of a non-Indian corporation's employee to have the local Dollar General store participate in a tribal work experience training program constituted a consensual relationship which anchored tribal court jurisdiction over tort claims against the corporation arising from that relationship. Here, Plaintiffs' held a confirmed hotel reservation (Compl., ¶s 25 and 26). *Id.* at p. 4.

Independent of the *Williams v. Lee* argument set out in Part B, *supra*, the parties' Golden Moon reservation transaction constitutes a private voluntary consensual relationship which would otherwise anchor tribal court jurisdiction over disputes arising on the reservation from that relationship under the *Montana* test, even in the absence of any binding written contract, and even if the Plaintiffs were defendants in that suit. *Montana v. U.S.*, *supra* at 565; *Strate v. A-1 Contractors*, *supra* at 445-447; *Atkinson Trading Co. v. Shirley*, *supra* at 655-666. *Cardin v. Dela Cruz*, *supra*; *Dolgencorp*, *supra*.

There is an obvious logical nexus between that consensual relationship and the claims here pled, as required by *Atkinson Trading Company, Inc. v. Shirley*, *supra* at 123 S.Ct. at 1833 (requiring that the cause of action pled must have some logical connection ("nexus") to the underlying consensual relationships to anchor *Montana* jurisdiction); *MacArthur v. San Juan County*, 309 F.3d 1216, 1223 (10th Cir. 2002) (the *Montana* nexus requirement is not met where there is no logical connection between the plaintiff's cause of action and the underlying consensual relationships). This *Montana* nexus requirement is satisfied here because Plaintiffs' claim the Defendants wrongfully deprived them of their opportunity to "enjoy the local food, culture and shops while staying two nights at the Golden Moon Hotel and Casino" pursuant to their hotel reservation for that stay. (Compl., ¶s 25, 26, 27-80)

In these circumstances, the Choctaw Tribal Courts clearly have colorable subject matter jurisdiction to adjudicate Plaintiffs' claims both under *Williams v. Lee* (because the non-Indian

parties here involved are the Plaintiffs) and *Montana* (because even if the non-Indian party involved were defendants), the *Montana* test is satisfied.

8. Plaintiffs' responded to Defendants' argument that their hotel reservation was a contract or consensual relationship under the *Montana* test at ¶ 28 of their Doc. 9 submission and Defendants replied to that argument at Doc. 12, p. 10. Both Plaintiffs' response and Defendants' Reply on this point are set out below:

... [Plaintiffs'] argue (at ¶ 28 of their Doc. 9 submission) that they "did not speak to or interact with, in any way, with any (then) current employees of the Choctaw Resort Development Enterprise nor any members of the Tribe to obtain a reservation for the Golden Moon Hotel and Casino," and at ¶ 33 that "Choctaw Resort Development Enterprise has contractual relationships with marketing firms, a YouTube channel, television and radio commercials, billboards, and does sponsor televised ball parks inviting all to come to their facility and is factually involved in advertisement and marketing to bring visitors to the casino," and that this somehow excuses their duty to exhaust their tribal remedies.

Reply: Plaintiffs' Complaint alleges (¶s 25, 26, 27-80) that they had a reservation to stay at the Golden Moon Hotel and Casino and their argument above repeats that admission. The fact that they did not communicate with Defendants when obtaining that reservation does not alter the fact that they had the reservation and that by their acceptance of that reservation they entered into a private, voluntary consensual relationship with the Tribe within the meaning of the *Montana* test. See, *Montana v. U.S.*, 450 U.S. 544 (1981). ...

9. Mr. Brown reiterates Plaintiffs' argument that their hotel reservation cannot be a contract between them and the Tribe at ¶s 9 and 10 of his Bar Complaint:

9. Had Rogers read the complaint before writing his memorandum, he would have found that the very first fact in the Plaintiffs' complaint (page 6 line 14) states, "Plaintiff Howard Brown on the 16th day of October, 2021, had secured a hotel reservation through David Malbrough, a former Golden Moon Hotel and Casino employee.

10. The statement referred to in number eight (8) of this document could not possibly be true if Plaintiffs had NO contract (sic) with any current employee or member of the tribe.

10. Although, Defendants did not cite to case law in the district court ruling that a hotel reservation is a form of contract and hence a consensual relationship under *Montana*, there exists plenty of case law holding that a hotel reservation is a form of contract and enforceable as such, even if obtained through a third party. *Wells v. Holiday Inns, Inc.*, 522 F.Supp. 1023 (W.D. Missouri 1982) (hotel reservation booked through third party was enforceable contract); *Dold v. Outrigger Hotel*, 501 P.2d 368 (Hw. 1972) (hotel reservation booked through third party agent of hotel company is an enforceable contract); *Brown v. Hilton Hotels Corp.*, 211 SE.2d 125 (Ga. 1974) (guaranteed hotel reservation was an enforceable contract); *Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.*, 2008 WL 649024 (App. N.J. 2008) (guaranteed hotel reservation was an enforceable contract).

And, the U.S. Supreme Court has expressly held that any form of contract between a tribe and a non-Indian party involving on-reservation activity constitutes a form of consensual relationship under *Montana*. *Montana, supra* at 565 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."(Emphasis added.)); *accord, Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316 (2008).

11. Rule 16-401(A) provides:

16-401. Truthfulness in statements to others.

In the course of representing a client, a lawyer shall not knowingly:

A. make a false statement of material fact or law to a third person; or ... (Emphasis added).

12. Mr. Brown asserts in his Bar Complaint at ¶s 4 and 5 that:

4. C. Bryant Rogers, hereinafter known as "Rogers," in the course of conducting his business and interests,

has violated Rule 16-401 Truthfulness in statements to others of the New Mexico Code of Professional Conduct. (Emphasis in original).

5. Rule 16-401 of the New Mexico Rule of Professional Conduct prohibits a lawyer from making any false statement of material fact or law to a third person. (Emphasis added).

13. The undersigned agrees that Rule 16-401(A) prohibits an attorney from "knowingly making a false statement to a third person," *In Re Chavez*, 927 P.2d 1042, 122 N.M. 504 (1996), although per the commentary to this rule it is generally only applied to false "statements of fact." Putting aside Mr. Brown's omission of the key qualifying word "knowingly" from his summary of what that rule requires, nothing like that occurred here. No false statement of any kind occurred here.

14. Making a well-founded legal argument—even one Plaintiffs' dispute—does not constitute the making of a false statement of material fact or law. Further, the question whether any series of events gives rise to a "contract" (and thus a "consensual relationship" under *Montana*) is ultimately a question of law for the court if (as here) there is no dispute as to the underlying facts which are alleged to have given rise to that contract. This is the rule in both Mississippi and New Mexico. *Jackson HMA, LLC v. Morales*, 130 So.3d 493, 497-498 (Ms. 2014) ("Whether a contract exists involves both questions of fact and questions of law." *Ham Marine Inc. v. Dresser Indus., Inc.*, 72 F.3d 454-458 (5th Cir. 1995), but is a question of law for the court if there is no dispute as to underlying facts and no competing inferences grounded in those facts); *Segua v. MolyCorp, Inc.*, 636 P.2d 284, 289 (1981) (whether a contract exists is a question of law for the court, "but when the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the jury to determine whether the contract did in fact exist.").

15. Plaintiffs' concede that they voluntarily accepted and possessed a hotel reservation at the Tribe's Golden Moon Hotel and Casino for a stay on October 12, 2021, and that they tried to enter the hotel to use that reservation on that date and were denied entry for their refusal to wear a mask. None of those underlying facts are disputed. Thus, whether their hotel reservation constituted a contract is a question of law for the court. The premise of their Doc. 9 argument and their Rule 16-401 complaint is that their hotel reservation was not a contract which can anchor *Montana* jurisdiction because they did not directly negotiate with the Tribe or any tribal employee to obtain it. (Doc. 9, ¶ 28). They claim it was obtained for

them by or through a third party ("David Malbrough, a former Golden Moon Hotel and Casino employee," Bar Compl., ¶ 9). *Id.* But, as argued in Defendants' Reply (Doc. 12, p. 10), even if that were true, that fact would not alter the reality that they had a reservation for the hotel—a reservation which constituted a contractual relationship between Plaintiffs and the Tribe involving on-reservation obligations and activities.

16. In conclusion, this Bar Complaint is frivolous, meritless and unfounded on its face. It was clearly filed as part of Plaintiffs' ongoing effort to badger the tribal defendants to surrender to Plaintiffs' equally unfounded demand for \$2 million in damages based on their refusal to honor the Tribe's legally authorized mask mandate. *See, Neitzke v. Williams*, 490 U.S. 319 (1989) (a complaint is frivolous where "none of the legal points are arguable on their merits" or is based on a "fanciful factual allegation"); *Schicher v. Thomas*, 111 F.3d 777, 779 (10th Cir. 1997) ("A complaint is frivolous if it is based on an indisputably meritless legal theory or if it is founded on clearly baseless factual contentions"); *Harris III v. Sale*, 2018 WL 6583017 (App. NM) (unpublished) (holding that a claim filed "without support either factually or as a matter of law" is "plainly frivolous").

17. Mr. Brown seems to view the State Bar's attorney disciplinary process as an adjunct to his rather hopeless litigation effort. In this regard, Mr. Brown has also threatened to seek sanctions against the undersigned in that same federal court proceeding unless Defendants withdraw Defendants' argument—or, as Mr. Brown put it— "unless he [the undersigned] withdraws his lies") obviously referencing Defendants' argument that Plaintiffs' hotel reservation was a form of contract (hence a consensual relationship) under *Montana* and Plaintiffs' claim that that argument constitutes a "false statement of fact or law." This threat was made by Mr. Brown in a telephone call to the undersigned's office on August 3, 2022, a call taken by our office receptionist (Theresa Barela) since I was then out of town. If the threatened sanctions motion is filed in that proceeding, the undersigned will respond in that forum and will show that any such claim is as frivolous if presented there as it is here.

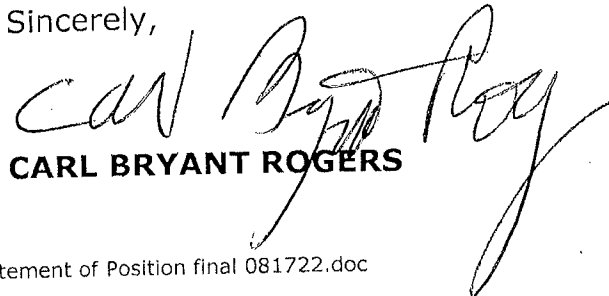
18. Mr. Sibley (Gary Brown's Co-Plaintiff) has at <https://youtube/TGL5mRO17MU> renewed and elaborated on the above threat to file a motion for sanctions against me for their fanciful (indeed farcical) views (rooted in their fundamental ignorance of even the most basic of the applicable legal concepts involved) that our submission of a number of legal arguments in that case (including the "hotel reservation equals a contract" argument addressed in this Bar Complaint) constitute knowing and deliberate lies intended to mislead the court. The portion of Mr. Sibley's incoherent diatribe that addresses my work in the Mississippi Choctaw Court

begins at about the 43-minute mark of that You Tube presentation. Again, none of the alleged "lies" were lies, but were good faith legal arguments that Plaintiffs do not understand or which they just will not accept. Again, all will be addressed to the court if any such motion is filed.

19. In closing, I am an attorney with a successful Federal Indian law practice. (See enclosed statement on my background and expertise). I am very familiar with the issues of law addressed in the referenced federal lawsuit and have not made any arguments that constitute false statements of law or fact.

The undersigned respectfully requests that this complaint be dismissed as frivolous, meritless or otherwise unfounded

Sincerely,



CARL BRYANT ROGERS

CBR/jt

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C. BRYANT ROGERS

VanAMBERG, ROGERS, YEPA, ABEITA, GOMEZ & WILKINSON, LLP

FEBRUARY 7, 2021

Mr. Rogers has been a partner with law firm since 1981. He received his law degree from Harvard Law School (J.D., cum laude) in 1977 and his undergraduate degree from Mississippi State University in 1970. He was admitted to practice law in New Mexico in 1978. He also admitted to practice in Mississippi in 1979. Mr. Rogers' experience includes working as a staff attorney with Indian Pueblo Legal Services serving Laguna and Zuni Pueblos, a public defender for the Oglala Sioux Tribal Court and was the program founder and attorney for the Choctaw Legal Services. Mr. Rogers' professional associations include Chairman of the Federal Bar Association, National Indian Law Conference, member of the Federal and American Bar Association, the Interior Board of Contract Appeals (1984) and the Interior Board of Indian Appeals (1982). He was also a recipient of the Reginald Heber Smith Community Lawyer Fellowship award (1977). Mr. Rogers received his certificate in Specialization in Federal Indian Law from the New Mexico Board of Legal Specialization in 2005 and has served as a board member or board chairman since 2006, presently serving as chairman. Mr. Rogers has practiced before the U.S. Supreme Court, the New Mexico Supreme Court and the Supreme Court of the Mississippi Band of Choctaw Indians.

Mr. Rogers' areas of practice are Indian law, commercial litigation, contract and tort claims, construction litigation and civil trial practice. He has particular experience in matters involving Public Law 93-638 contracts and self-governance compacts, Indian country jurisdiction disputes, protection of tribal sovereignty, reservation economic development and land use issues. Other areas of expertise include Federal Indian law (Indian Self-determination Act, Tribally Controlled Schools Act, Federal Tort Claims Act, Single Audit Act and OMB Super Circular); Education issues per 25 U.S.C. § 2000, et seq.; TSCA; ISDEAA contracts and CSC issues re contracted IHS and BIA programs; Every Student Succeeds Act; federal and state court litigation; business, contract, general administrative law and Federal Indian law; federal legislation and federal agency and Congressional relations. See, *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014) (affirming tribal court civil jurisdiction over a tort claim against the Dollar General Corporation under the *Montana* test), affirmed by an equally divided court at 136 S.Ct. 2159 (2016).

Mr. Rogers was a co-counsel in the 30 year class action over ISDEAA contract support cost claims in *Ramah Navajo Chapter, et al. v. Jewell*, 90-CV-00957 (D.N.M.). More detail on Mr. Rogers' background and experience and reported cases are available in the 9/29/2015 Affidavit filed in support of the final attorneys' fee request in the Ramah class action at Doc. 1313-11, 90-CV-00957. See, *Salazar v. Ramah Navajo Chapter*, 587 U.S. 182 (2012) (rejecting government's core defense against tribal ISDA contract claims seeking damages for unpaid contract support

costs in years in which the Congress capped the amount of appropriations that could be spent for that purpose); *see also, Ramah Navajo Chapter v. Jewell*, 167 F.Supp.3d 1217 (D.N.M. 2016) (reviewing history of the 26 year Ramah Navajo class action and making final fee and cost award after approval of final Settlement Agreement). My 30 plus years of work on federal Indian law issues is summarized there.

Mr. Rogers has also been recognized as a Southwest "Super Lawyer" in Native American Law in 2007, 2009-2010, and Best Lawyers in Native American Law in 2018-2020, and has an AV rating from Martindale, which is the highest rating for ethics and professionalism.