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8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 ERTC, LLC, a Nevada limited liability
12 company,

13 Plaintiff,

14 v.

15 LOS COYOTES BAND OF CAHUILLA
16 AND CUPENO INDIANS, a federally
recognized Native American Cahuilla
Indian Tribe,

17 Defendants.
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CASE NO. 3:11-CV-02148-WQH-NLS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF ERTC, LLC'S *EX PARTE*
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE RE: PRELIMINARY
INJUNCTION PURSUANT TO FED. R.
CIV. P. 65**

[Concurrently filed with *Ex Parte* Application,
Declarations of Brian Bonfiglio, Greg Guedel,
Francine Kupsch, Sean Roach, George William
VanDeWeghe, Jr., and Jerry VanDeWeghe, and
[Proposed] Order]

Date: *Ex Parte*

Time: *Ex Parte*

Complaint Filed: September 15, 2011

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1 **I. INTRODUCTION**

2 Plaintiff ERTC, LLC (“ERTC”) renews its prior request for a Temporary Restraining
3 Order (“TRO”) enjoining defendant Los Coyotes Band of Cahuilla and Cupeno Indians (“Los
4 Coyotes” or the “Tribe”) from committing the following acts:

5 (1) Taking any action to evict or forcibly remove ERTC, its personnel, its equipment,
6 its improvements, and its guests from the leased premises;

7 (2) Taking any action to destroy, alter, tamper with, interfere with or inflict injury to
8 ERTC personnel, its equipment, its improvements, and its guests;

9 (3) Taking any action to restrict ingress and egress to and from the leased premises by
10 any ERTC personnel or its guests; and

11 (4) Taking any action to interfere with ERTC’s operations.

12 ERTC brought the underlying action for declaratory and injunctive relief over a written
13 lease (the “Lease” as is more fully defined in Section II.B. and II.C., below) between ERTC and
14 Los Coyotes. In March 2010, Plaintiff ERTC leased a portion of Los Coyotes’ 25,000-acre
15 reservation (the “Reservation”) to conduct law enforcement and military weapons and tactical
16 training. Although the Lease expressly included: (a) a valid and irrevocable waiver by Los
17 Coyotes of its sovereign immunity and consent to the jurisdiction of the United States District
18 Court for the Southern District of California, and (b) a representation by both parties that the lease
19 had been “duly and validly authorized, executed and delivered by such Party and no other action
20 is requisite to the valid and binding execution, delivery and performance of this Lease by such
21 Party,” Los Coyotes began disputing the validity of the Lease and has taken steps to evict ERTC.
22 Worse, members of the tribe threatened physical harm to ERTC if ERTC did not vacate the leased
23 premises. Tragically, such threats came to fruition when the Tribe allowed certain Tribal
24 members to take matters into their own hands by pouring gasoline on ERTC’s security booth and
25 lighting it on fire. That fire then spread to burn approximately 14,000 acres in Northeast San
26 Diego County.

27 ERTC originally applied *ex parte* for a TRO on or about September 19, 2011. ERTC
28 withdrew its application based on Los Coyotes’ representation that it would not take steps to evict

ERTC, and engage in mediation to resolve the parties' dispute. Unfortunately, ERTC now has to renew its application because Los Coyotes has breached its agreement. On October 7, 2011, one day after making such a representation in a joint motion made to this Court, Los Coyotes served ERTC with a Petition for Exclusion and Eviction ("Petition for Eviction") that it previously filed in the Intertribal Court of Southern California (the "Intertribal Court"). According to the Petition for Eviction and accompanying summons, ERTC must temporarily vacate the premises until the conclusion of the Intertribal Court matter.

Thus, pursuant to Federal Rules of Civil Procedure Rule 65, ERTC respectfully applies, *ex parte*, for a TRO and an Order to Show cause why a Preliminary Injunction should not be issued.

II. STATEMENT OF FACTS

A. Brief Description Of ERTC's Business

ERTC provides training to law enforcement and military personnel in weaponry and tactics. (Declaration of Brian Bonfiglio ("Bonfiglio Decl.") at ¶ 2; Declaration of Jerry VanDeWeghe ("J. VanDeWeghe Decl.") at ¶ 2.) ERTC's principal, Brian Bonfiglio, established ERTC with the vision to provide special training in rough, high desert terrain, to simulate the desert terrain found across the Southwestern United States and across the world (e.g., Afghanistan). (Bonfiglio Decl. at ¶ 3.) It was critical to ERTC that its training center be located in an uninhabited area in the high desert, and feature vast expanses of rough, undeveloped terrain. (Bonfiglio Decl. at ¶ 3; J. VanDeWeghe Decl. at ¶ 3.)

B. The Lease Between ERTC And Los Coyotes

ERTC learned of a desirable location within the Los Coyotes Indian Reservation (the "Reservation"). (Bonfiglio Decl. at ¶ 3; J. VanDeWeghe Decl. at ¶ 2-3.) The unique features of the terrain at the size of the Reservation were essential to ERTC's business. (Bonfiglio Decl. at ¶ 3; J. VanDeWeghe Decl. at ¶ 3.) On or about March 1, 2010, ERTC and Los Coyotes entered into a written agreement (the "Initial Lease") for the lease of approximately 25,000 acres (the "Premises") on the Reservation. (Initial Lease (3/1/10), Ex. A to Declaration of Francine Kupsch ("Kupsch Decl.").) Los Coyotes' attorneys reviewed and commented upon the Initial Lease, and the Tribe's leadership and members voted to approve the same. (Kupsch Decl. at ¶¶ 2-5.) The

1 lease was properly executed by ERTC and, on behalf of Los Coyotes, by Ms. Kupsch, who was at
 2 the time the authorized representative of Los Coyotes and Tribal Spokeswoman and Tribal
 3 Chairwoman. (Bonfiglio Decl. at ¶ 3; J. VanDeWeghe Decl. at ¶ 3; Kupsch Decl. at ¶ 4;
 4 Declaration of Sean Roach (“Roach Decl.”) at ¶ 2.) It is Los Coyotes’ custom and practice for the
 5 Tribal Spokesperson and Chairperson to have authority to enter into contracts and agreements on
 6 behalf of Los Coyotes. (Bonfiglio Decl. at ¶ 4; Roach Decl. at ¶ 2; J. VanDeWeghe Decl. at ¶ 4;
 7 Kupsch Decl. at ¶¶ 2-3.) Under its terms, the Initial Lease commenced on March 1, 2010 and ran
 8 until December 31, 2016. (Initial Lease (3/1/10), Ex. A to Kupsch Decl.)

9 The Initial Lease allowed ERTC to construct and/or locate and operate certain
 10 improvements on the Premises, and required ERTC to pay rent to Los Coyotes based on a
 11 percentage of ERTC’s net profit from its operations. (Initial Lease (3/1/10), Ex. A to Kupsch
 12 Decl.) In connection with negotiating, drafting, and executing the Initial Lease, the Tribe was
 13 represented by Attorney Mark Radoff of California Indian Legal Services—the Tribe’s current
 14 counsel in defense of ERTC’s action. (Roach Decl. at ¶ 2.)

15 Significantly, the Initial Lease contained Los Coyotes’ express waiver of sovereign
 16 immunity and consent to jurisdiction of this Court. (Initial Lease (3/1/10) at ¶ 16.16, Ex. A to
 17 Kupsch Decl.; Kupsch Decl. at ¶ 5.) It also contained Los Coyotes’ express representation that
 18 the lease was duly and validly authorized, executed and delivered by Los Coyotes, and no other
 19 action was requisite to the valid and binding execution, delivery and performance of the lease.
 20 (Initial Lease (3/1/10) at ¶ 16.21, Ex. A to Kupsch Decl.)

21 **C. The Addenda And Updated Lease**

22 On or about November 5, 2010, ERTC and Los Coyotes executed two addenda (the
 23 “Addenda”) to the Initial Lease, extending the expiration date from December 31, 2016 to
 24 February 1, 2034. (Addenda (11/5/10), Ex. B to Kupsch Decl.)

25 Pursuant to Addendum No. 1, ERTC agreed to develop for Los Coyotes a Children’s Park,
 26 a Tribal Hall, and a Tribal Office. (Addendum No. 1 (11/5/10) at ¶ 1, Ex. B to Kupsch Decl.)
 27 Addendum No. 1 was executed by ERTC and, on behalf of Los Coyotes, by Ms. Kupsch.
 28 (Bonfiglio Decl. at ¶¶ 5-6; Roach Decl. at ¶¶ 4-6; J. VanDeWeghe Decl. at ¶ 5; Kupsch Decl. at

¶ 6.) The Tribal Hall was to be approximately 50 feet by 25 feet in size, including a kitchen and wood fireplace. (Addenda (11/5/10) at ¶ 1, Ex. B to Kupsch Decl.) The Tribal Office was to be approximately the same size as the Tribal Hall, connected thereto, and include office space, secured storage and a conference room. (*Id.*) In exchange for these benefits, Los Coyotes agreed to extend the lease term to 24 years and 11 months. (*Id.* at ¶ 2.)

Pursuant to Addendum No. 3, ERTC agreed to pay a monthly use fee of \$500 in exchange for the right to develop and use, for 24 years and 11 months, a portion of the Premises as a Driver Training Complex and adjacent Office, Classroom, and Garage. (Addenda (11/5/10) at ¶ 3, Ex. B to Kupsch Decl.) Addendum No. 3 was executed by ERTC and, on behalf of Los Coyotes, by Kupsch. (Addenda (11/5/10), Ex. B to Kupsch Decl.; Bonfiglio Decl. at ¶ 7; Roach Decl. at ¶ 7; J. VanDeWeghe Decl. at ¶ 6; Kupsch Decl. at ¶ 6.) It was also executed by Messrs. Milton Campbell and Andy Campbell, who have an interest in some of the property leased pursuant to Addendum No. 3. (Bonfiglio Decl. at ¶ 7; Roach Decl. at ¶ 7; J. VanDeWeghe Decl. at ¶ 6; Kupsch Decl. at ¶ 6.) In addition, Milton Campbell is a member of the Tribe's Executive Committee and an Elder. (Roach Decl. at ¶ 7.)

On or about December 21, 2010, ERTC and Kupsch executed an updated lease (the "Updated Lease"; the Initial Lease, Addenda, and Updated Lease are referred to collectively herein as the "Lease") to correct the status and name of the tenant from "EAGLE ROCK TRAINING CENTER, INC." and "EAGLE ROCK TRAINING CENTER, LLC," to "ERTC, LLC." (Bonfiglio Decl. at ¶ 8; Roach Decl. at ¶ 8; J. VanDeWeghe Decl. at ¶ 7; Kupsch Decl. at ¶ 7; Initial Lease (3/1/10), Ex. A to Kupsch Decl.; Updated Lease (12/21/10), Ex. C to Kupsch Decl.) None of the lease documents (the Initial Lease, Addenda, and Updated Lease) bear the Tribe's seal because the Tribe did not have a seal at the time the lease documents were executed. (Roach Decl. at ¶ 3.)

D. Los Coyotes' Ratification Of The Lease And Its Addenda

Since the execution of the Lease, ERTC has expended in excess of \$100,000 grading and improving the Children's Park, developing the plans for the Tribal Hall and Tribal Office, and taking other action in reliance on the Lease. (Bonfiglio Decl. at ¶ 9; J. VanDeWeghe Decl. at ¶ 8;

1 Roach Decl. at ¶ 13.) It has also paid Los Coyotes in excess of \$25,000 in rental payments.
 2 (Bonfiglio Decl. at ¶ 10; Roach Decl. at ¶ 14.) In addition, ERTC has invested over \$300,000 in
 3 new facilities and improvement to the Tribe's land to support current and future business
 4 activities to benefit Los Coyotes. (Bonfiglio Decl. at ¶ 9; J. VanDeWeghe Decl. at ¶ 8; Roach
 5 Decl. at ¶ 13.)

6 Also, on or about January 2011, representatives of ERTC attended Los Coyotes'
 7 Executive Council meeting, at the behest of new Tribal Chairman and Spokesman Shane
 8 Chapparosa, and presented to the Tribe plans for the Children's Park, the Tribal Hall and the
 9 Tribal Offices. (Roach Decl. at ¶¶ 5, 9.) At that meeting, the Executive Council made specific
 10 recommendations concerning the plans, including significantly increasing the size of the
 11 individual offices within the Tribal Office. (Bonfiglio Decl. at ¶ 6; Roach Decl. at ¶¶ 5, 9; J.
 12 VanDeWeghe Decl. at ¶ 5.) Moreover, in or about March 2011, Los Coyotes' Executive Council
 13 members and several other Tribe members took two tours of the Premises to observe ERTC's
 14 facilities and the improvements ERTC was making pursuant to the Lease. (Roach Decl. at ¶ 10.)

15 **E. Los Coyotes' Notice To Vacate And Threats Of Violence**

16 On or about June 16, 2011, without any prior discussion or warning, Los Coyotes'
 17 attorney, Mark Radoff, issued a letter (the "Notice to Vacate") to ERTC claiming, for the first
 18 time, that the Lease was invalid. (June 16, 2011 Letter from Mr. Radoff to ERTC, Ex. 1 to Roach
 19 Decl.) The Notice to Vacate purportedly required ERTC to vacate the property by July 16, 2011,
 20 and threatened to eject ERTC for trespass after that date. (*Id.*) Although the Tribe initially
 21 agreed to temporarily forbear enforcing the Notice to Vacate, ERTC's numerous attempts to
 22 engage Los Coyotes in mediation failed, and the Tribe consistently refused ERTC's request that
 23 the Tribe rescind the Notice to Vacate. (Declaration of W. Gregory Guedel ("Guedel Decl.") at
 24 ¶¶ 6, 8, 10, 11, 12, 13; Declaration of George William VanDeWeghe, Jr. ("B. VanDeWeghe
 25 Decl.") at ¶¶ 2-5.) Unfortunately, during the purported "forbearance period," members of Los
 26 Coyotes threatened violence against personnel or property if ERTC failed to vacate the leased
 27 premises, and otherwise interfere with ERTC's operations. (Bonfiglio Decl. at ¶¶ 11-12; J.

1 VanDeWeghe Decl. at ¶ 9-10.) That threat became a reality on July 22, 2011, when a Tribal
 2 member set fire to ERTC's security booth. (J. VanDeWeghe Decl. at ¶ 11-12.)

3 Then, on or about September 12, 2011, the Tribe issued a "Notice of Violation of Tribal
 4 Ordinance" ("Notice of Violation"), reiterating the Tribe's position that the Lease was invalid,
 5 and therefore, ERTC was illegally trespassing on the Reservation. (Notice of Violation (9/12/11),
 6 Ex. 3 to Roach Decl.) The Tribe's Notice of Violation was followed by a letter from Officer
 7 David Sossaman, the Chief of Police of the Los Coyotes Police Department, stating that "[A]ll
 8 persons associated with, clients of, and/or employees of ERTC...are prohibited from entering
 9 and/or remaining within the exterior boundaries of the Los Coyotes Indian Reservation...."
 10 (Roach Decl. at ¶ 16; September 13, 2011 Letter from David Sossaman to ERTC, Ex. 5 to J.
 11 VanDeWeghe Decl.)

12 **F. ERTC's Prior TRO Application**

13 ERTC previously applied for a TRO on or about September 16, 2011. Just minutes prior
 14 to the hearing on ERTC's application, the parties reached a temporary compromise, where Los
 15 Coyotes agreed to allow ERTC to conduct the previously scheduled 10-day training starting on
 16 September 21, 2011. (B. VanDeWeghe Decl. at ¶ 9.) After further discussions, ERTC and Los
 17 Coyotes agreed to extend the time for Los Coyotes to respond to ERTC's complaint from
 18 October 6, 2011 to October 28, 2011, so that the parties may engage in mediation without having
 19 to spend time preparing responsive pleadings and motions. (B. VanDeWeghe Decl. at ¶ 10-11.)
 20 The parties also agreed that they would maintain the status quo and allow "ERTC may access and
 21 use the premises" for its business operations until "the Court rules on a Motion for Preliminary
 22 Injunction and Los Coyotes' Motion to Quash." (B. VanDeWeghe Decl. at ¶ 11; Joint Motion
 23 (10/6/11), Ex. 13 to B. VanDeWeghe Decl.)

24 Only one day after filing the Joint Motion, Los Coyotes served ERTC with the Petition for
 25 Eviction. (J. VanDeWeghe Decl. at ¶ 14; B. VanDeWeghe Decl. at ¶ 12.) The Petition for
 26 Eviction was signed on September 29, 2011, at a time Los Coyotes represented to ERTC that Los
 27 Coyotes would maintain the status quo. (B. VanDeWeghe Decl. at ¶ 13.) The Petition for
 28 Eviction was filed in the Intertribal Court on October 3, 2011, just days before Los Coyotes stated

1 in the Joint Motion that “the status quo will remain in place such that ERTC may access and use
 2 the leased premises for its business operations.” (B. VanDeWeghe Decl. at ¶ 11, 13.) The
 3 Petition for Eviction and summons purports that ERTC must temporarily vacate the premises and
 4 request a hearing—if not, the eviction may become permanent. (Petition for Eviction (9/29/11),
 5 Ex. 14 to B. VanDeWeghe Decl.; Summons (10/7/11), Ex. 15 to B. VanDeWeghe Decl.)

6 ERTC now brings this new application for a TRO and Order to show cause why a
 7 Preliminary Injunction should not issue, because Los Coyotes’ Intertribal Court Petition for
 8 Eviction violates both the parties’ agreement to maintain the status quo and interferes with
 9 numerous ERTC contracts for training between now and August 2012, including training
 10 scheduled for October 31, 2011 through November 3, 2011. (J. VanDeWeghe Decl. at ¶¶ 15-16.)

11 **III. THE COURT HAS PERSONAL JURISDICTION OVER THE TRIBE**

12 The Lease between Los Coyotes and ERTC contained Los Coyotes’ express waiver of
 13 sovereign immunity and consent to jurisdiction of this Court. (Initial Lease (3/1/10) at ¶ 16.16,
 14 Ex. A to Kupsch Decl.; Kupsch Decl. at ¶ 5.) Specifically, the Tribe agreed as follows:

15 **16.16 Tribe’s Waiver of Sovereign Immunity.** The Tribe
 16 irrevocably grants ERTC, its agents, successors, and counsel, a
 17 waiver of the Tribe’s sovereign immunity from suits on claims
 18 arising from or related to the parties’ relationship and/or this Lease.
 19 This waiver encompasses all suits in law or equity, for damages, or
 20 injunctive or declaratory relief. The tribe consents to the
 21 jurisdiction of the United States District Court for the Southern
 22 District of California and/or the Superior Court of California in the
 23 County of San Diego, and any federal or state court having
 appellate jurisdiction thereover. The tribe agrees to accept and be
 bound by any judgment and/or order from or by the aforementioned
 courts. Accordingly, the Tribe waives the right to have any dispute,
 controversy, suit, or any proceeding heard in a tribal forum,
 council, tribunal, or adjudicative body. The Tribe represents it will
 not seek to revoke, limit, impair, or renounce these waivers, and
 acknowledges that the waivers also apply to suits against the Tribe
 for any attempt to do the same.

24 (Initial Lease (3/1/10) at ¶ 16.16 (emphasis in original), Ex. A to Kupsch Decl.) Pursuant to this
 25 express waiver of the Tribe’s sovereign immunity, this Court has personal jurisdiction over the
 26 Tribe and may hear this *ex parte* application by ERTC. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*,
 27 523 U.S. 751, 754, 756-58 (1998); *C&L Enters., Inc. v. Potawatomi Indian Tribe*, 532 U.S. 411,
 28 418 (2001).

1 **IV. ERTC IS ENTITLED TO A TRO**

2 “The purpose of a TRO is to preserve the status quo before a preliminary injunction
3 hearing may be held; its provisional remedial nature is designed merely to prevent irreparable loss
4 of rights prior to judgment.” *Cruz v. Washington Mut. Bank*, 2011 U.S. Dist. LEXIS 25439, *4
5 (S.D. Cal. Mar. 14, 2011) (citing *Granny Gooze Foods, Inc. v. Brotherhood of Teamsters & Auto*
6 *Truck Drivers*, 415 U.S. 423, 439 (1974)). The standard for issuing a TRO is the same as the
7 standard for issuing a preliminary injunction. *Id.*

8 A party is entitled to injunctive relief when it shows: (1) a likelihood of success on the
9 merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that the
10 balance of the equities tips in its favor; and (4) that the injunction is in the public interest. *Am.*
11 *Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). As detailed below,
12 ERTC can satisfy each of these elements.

13 **A. ERTC Is Likely To Succeed On The Merits Of Its Claim**

14 There is little question that the Lease is valid and enforceable—there exists a written
15 agreement that bears the parties’ signature, and there is no dispute regarding the authenticity of
16 the signature.

17 1. **Ms. Kupsch, As Tribal Spokesperson And Chairperson Had Authority To**
18 **Enter Into A Binding Lease**

19 As Ms. Kupsch declares under penalty of perjury, it is the Tribe’s custom and practice that
20 the Tribe’s Spokesperson and Chairperson have actual authority to execute contracts that bind the
21 Tribe, including leases. (Kupsch Decl. at ¶¶ 2-3.) And even if Ms. Kupsch somehow lacked
22 actual authority to enter into the Lease and bind the Tribe to the same, Ms. Kupsch had apparent
23 or ostensible authority to do so, because the Tribe allowed ERTC to believe that Ms. Kupsch has
24 such authority. *C.A.R. Transportation v. Darden Restaurants, Inc.*, 213 F.3d 474, 479-481 (9th
25 Cir. 2000). ERTC was directed to deal solely with Ms. Kupsch on all communications related to
26 the Lease. (Bonfiglio Decl. at ¶ 4; Roach Decl. at ¶ 2; J. VanDeWeghe Decl. at ¶ 4.) Ms. Kupsch
27 executed the Lease on behalf of the Tribe, as the Tribe’s authorized representative and Tribal
28 Spokeswoman and Tribal Chairwoman. (Bonfiglio Decl. at ¶ 3, 4; Roach Decl. at ¶ 2; Kupsch

Decl. at ¶ 4; J. VanDeWeghe Decl. at ¶ 3-4.) Despite their extensive dealings, the Tribe never informed ERTC that Ms. Kupsch lacked the authority to execute the Lease. *C.A.R. Transportation*, 213 F.3d at 479-480; *see also*, Cal. Civ. Code § 2317 (“[o]stensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess”).¹ As Ms. Kupsch had actual and/or ostensible authority to act and execute leases on behalf of the Tribe, there can be no question that the Lease is binding on the Tribe. *Dazo v. Globe Airport Security Services*, 295 F.3d 934, 939 (9th Cir. 2002) (“when the agent is acting within the scope of its agency, the principal is liable for the agent’s acts”).

2. The Tribe Ratified The Lease

Even if Ms. Kupsch lacked actual or ostensible authority to enter into the Lease, the Tribe has subsequently ratified and affirmed the same by receiving the benefits from the Lease. *Rayonier Inc. v. Polson*, 400 F.2d 909, 915 (9th Cir. 1968) (citing Restatement (Second) of Agency, and stating that ratification can be established by “conduct manifesting an election to treat an unauthorized act as authorized,” or “conduct justifiable only if there were such an election” including “the failure to repudiate the contract”). The Tribe received over \$100,000 in the form of ERTC’s work to improve and install the Children’s Park and developing the Plans for the Tribal Hall and Tribal Office. (Bonfiglio Decl. at ¶¶ 6, 9; J. VanDeWeghe Decl. at ¶ 8; Roach Decl. at ¶¶ 5, 9, 10, 13.) ERTC has also paid Los Coyotes in excess of \$25,000 in rental payments. (Bonfiglio Decl. at ¶ 10; Roach Decl. at ¶ 14.) In addition, ERTC has invested over \$300,000 in new facilities and improvement to the Tribe’s land to support current and future business activities to benefit Los Coyotes. (Bonfiglio Decl. at ¶ 9; J. VanDeWeghe Decl. at ¶ 8; Roach Decl. at ¶ 13.)

Also, in or about January 2011, representatives of ERTC attended Los Coyotes Executive Council meeting, at the behest of new Tribal Chairman and Spokesman Shane Chapparosa, and presented to the Tribe plans for the Children’s Park, the Tribal Hall, and the Tribal Offices—

¹ California Law governs the determination of a principal-agent relationship, as the Lease contains an express choice-of-law provision in Section 16.9 selecting California law. (See Initial Lease (3/1/10) at § 16.9, p. 12, Ex. A to Kupsch Decl.; Updated Lease (12/21/10) at § 16.9, p. 12, Ex. C to Kupsch Decl.)

1 which constitute ERTC's consideration to Los Coyotes in exchange for the extended lease term
2 under Addendum No. 1. (Bonfiglio Decl. at ¶ 6; Roach Decl. at ¶¶ 6, 9.) At that meeting, the
3 Executive Council made specific recommendations concerning the plans, including significantly
4 increasing the size of the individual offices within the Tribal Office. (Roach Decl. at ¶ 9.) A few
5 months later, ERTC provided Los Coyotes' Executive Council with a tour of the leased property
6 to observe ERTC's facilities and the improvements being made by ERTC. (Roach Decl. at ¶ 10.)

7 3. The Tribe Has No Valid Defenses To The Enforcement Of The Lease

8 None of the Tribe's arguments contesting the validity of the Lease have merit. First, the
9 Tribe knowingly entered into the Lease. The Lease is not a product of a sophisticated party
10 taking advantage of an unsophisticated Native American tribe. Indeed, Tribe's knowledge of the
11 Lease terms (including the waiver of sovereign immunity) and informed decision to enter into the
12 Lease is highlighted by the fact that the Tribe was represented by legal counsel (Mr. Radoff of
13 California Indian Legal Services—the Tribe's current counsel in defense of ERTC's action) in
14 connection with the Lease. (Roach Decl. at ¶ 2.) Second, although the lease documents contain a
15 space for the Tribe's seal, they do not bear the Tribe's seal because the Tribe did not have a stamp
16 at the time the lease documents were executed. (Roach Decl. at ¶ 3.) Third, although the Tribe
17 now argues that the Lease is invalid because the Tribe failed to seek approval from the Bureau of
18 Indian Affairs (June 16, 2011 Letter from Mr. Radoff to ERTC, Ex. 1 to Roach Decl.), at the time
19 the parties entered into the Lease, the Tribe expressly stated the Lease was "duly and validly
20 authorized, executed and delivered by such Party and no other action is requisite to the valid and
21 binding execution, delivery and performance of this Lease by such Party." (Initial Lease (3/1/10)
22 at § 16.21, Ex. A to Kupsch Decl.) Moreover, the Bureau of Indian Affairs has informed ERTC
23 that the Bureau has no involvement in the dispute between ERTC and the Tribe concerning the
24 Lease. (B. VanDeWeghe Decl. at ¶ 7.)

1 **B. ERTC Will Suffer Great And Irreparable Injury In The Absence Of**
2 **Preliminary Relief**

3 ERTC will suffer great and irreparable injury unless Los Coyotes' wrongful acts are
4 enjoined. Los Coyotes has notified ERTC that ERTC's presence on the Reservation, including
5 the leased property, to be a trespass, notwithstanding the fact that the Lease does not expire until
6 February 1, 2035. (June 16, 2011 Letter from Mr. Radoff to ERTC, Ex. 1 to Roach Decl.; Notice
7 of Violation (9/12/11), Ex. 3 to Roach Decl.; September 13, 2011 Letter from David Sossaman,
8 Ex. 4 to Roach Decl.; Petition for Eviction (9/29/11), Ex. 14 to B. VanDeWeghe Decl.) Without
9 a TRO and/or injunction preventing Los Coyotes from evicting ERTC, ERTC faces the loss of its
10 legitimate lease interest in real property, and the right to quiet enjoyment of the leased property.
11 *Park Village Apartment Tenants Association v. Mortimer Howard Trust*, 636 F.3d 1150, 1159
12 (9th Cir. 2011) (holding that the tenant was entitled to a preliminary injunction enjoining the
13 lessor from evicting the tenant because "it is well established that the loss of interest in real
14 property constitutes an irreparable injury"). This alone satisfies the irreparable harm requirement.

15 ERTC also has current, ongoing business activities on the leased premises. (J.
16 VanDeWeghe Decl. at ¶¶ 15-16.) Due to Los Coyotes' interference, ERTC cannot perform
17 contracts it entered into with third parties to conduct training on the leased property, including
18 one training program set to begin on October 31, 2011. (J. VanDeWeghe Decl. at ¶¶ 16-18.)
19 Because ERTC is a new company, its failure to perform this and other contracts will be
20 devastating to ERTC's reputation, and cause ERTC to lose prospective customers. *See Stuhlbarg*
21 *Intern. Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001)
22 ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of
23 the possibility of irreparable harm."); *United Healthcare Ins. Co. v. AdvancePCS*, 316 F. 3d 737,
24 741 (8th Cir. 2002) ("Loss of intangible assets such as reputation and goodwill can constitute
25 irreparable injury."). Also, ERTC does not have an adequate remedy at law because the losses
26 ERTC may suffer due to the Tribe's wrongful interference with ERTC's current and future
27 business opportunities cannot be fully ascertained. *Danielson v. Local 275, Laborers Intern.*
28 *Union of North America, AFL-CIO*, 479 F.2d 1033, 1037 (2nd Cir. 1973) ("Irreparable injury is

suffered where monetary damages are difficult to ascertain or are inadequate.”). Worse yet, the Tribe’s interference all but seals ERTC’s fate, as the substantial business losses will likely lead to ERTC’s bankruptcy. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (“As required to support such relief, these respondents alleged (and petitioner did not deny) that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless”).

In addition, ERTC has been warned by law enforcement that certain members of the Los Coyotes tribe plan to use physical force and violence against ERTC personnel and property unless ERTC vacates the leased premises. (Bonfiglio Decl. at ¶¶ 11-12; J. VanDeWeghe Decl. at ¶ 9-10.) That threat became a reality when a Tribal member set ERTC’s security booth on fire, which then spread and burned over 14,000 acres in Northeastern San Diego County. (J. VanDeWeghe Decl. at ¶ 11-12.) Unless the Tribe and its members are enjoined from using further physical force and violence to remove ERTC, its personnel, its equipment, its improvement, and its guests, ERTC will suffer irreparable injury to its personnel, equipment, and business.

C. The Balance Of Equities Tips In ERTC’s Favor

ERTC’s request for a TRO was triggered by the unjustified conduct of Los Coyotes. ERTC is the victim of Los Coyotes’ unexpected and unwarranted claim that the Lease was invalid and that ERTC was trespassing. Making matters worse, Tribe members have threatened to take matters into their own hands, destroy ERTC property, and forcibly remove ERTC from the Reservation. (Bonfiglio Decl. at ¶¶ 11-12; J. VanDeWeghe Decl. at ¶¶ 9-10.) ERTC is facing significant economic losses that cannot be fully quantified, as well as the threat of physical violence to its personnel and property. (Bonfiglio Decl. at ¶ 12; J. VanDeWeghe Decl. at ¶¶ 9-13.)

On the other hand, Los Coyotes has decided to declare the Lease void and unenforceable, despite having accepting over \$400,000 in benefits under the Lease in the form of improvements made by ERTC on Tribal land and rent paid by ERTC to the Tribe. (Bonfiglio Decl. at ¶¶ 6, 9; Roach Decl. at ¶¶ 5, 9, 10, 13; J. VanDeWeghe Decl. at ¶8.) Also, Los Coyotes breached their

1 representation to ERTC and to this Court that it would maintain the status quo at least until the
 2 Court rules on a future motion by ERTC for a preliminary injunction and a future motion by Los
 3 Coyotes to quash the summons. (Joint Motion (10/6/11), Ex. 13 to B. VanDeWeghe Decl.) Not
 4 only has there been no ruling on such motions, neither motion has been filed. Yet, Los Coyotes
 5 took affirmative steps to evict ERTC by drafting and filing its Petition for Eviction, and thus
 6 disrupting ERTC's quiet enjoyment of the leased premises and threatening its business
 7 operations.

8 Under these circumstances, the equities undeniably favor ERTC.

9 **D. The Injunction Is In The Public Interest**

10 Lastly, the relief ERTC seeks is in the public interest because it will maintain the peace
 11 and avoid any chance of physical altercations between the Tribe and ERTC and loss of property.

12 **V. THERE IS NO NEED FOR A BOND**

13 Although a bond is required under Federal Rules of Civil Procedure Rule 65(c), the Court
 14 has wide discretion as to the amount. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 733 (9th Cir.
 15 1999). In fact, "[t]he district court may dispense with the filing of a bond when it concludes there
 16 is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen*
 17 *v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003).

18 Here, the TRO would not cause any harm to the Tribe. All ERTC is seeking is to
 19 maintain the status quo until the final adjudication of the validity of the Lease. On the other hand,
 20 the Tribe is seeking to evict ERTC, even after bargaining for ERTC to lease the premises for
 21 almost 25 years. Further, by Los Coyotes' own admission, the rugged and undeveloped nature of
 22 the property leased to ERTC is not suitable for any other type of economic development—thus,
 23 the property leased to ERTC would not be used for any other purposes if not for ERTC's law
 24 enforcement and military training programs. Thus, there is no harm to the Tribe arising out of
 25 ERTC occupying the premises already leased to ERTC for 25 years.

1 **VI. CONCLUSION**

2 Based on the foregoing, ERTC respectfully requests that the Court grant this *ex parte*
3 application and issue a TRO enjoining and restricting Los Coyotes, its members, and anyone
4 acting in concert with them, from committing the following acts:

5 (1) Taking any action to evict or forcibly remove ERTC, its personnel, its equipment,
6 its improvements, and its guests from the leased premises;

7 (2) Taking any action to destroy, alter, tamper with, interfere with or inflict injury to
8 ERTC personnel, its equipment, its improvements, and its guests;

9 (3) Taking any action to restrict ingress and egress to and from the leased premises by
10 any ERTC personnel or its guests; and

11 (4) Taking any action to interfere with ERTC's operations.

12 ERTC further respectfully requests that the Court issue an Order to Show Cause why a
13 Preliminary Injunction should not be issued.

14 Dated: October 26, 2011

Respectfully submitted,

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16
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