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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE BRANCH
10

11 ADMIRAL INSURANCE COMPANY,

12 Plaintiff,

13 vs.

14 BLUE LAKE RANCHERIA TRIBAL
15 COURT; LESTER J. MARSTON, Chief
16 Judge of the BLUE LAKE RANCHERIA
17 TRIBAL COURT OF THE BLUE LAKE
RANCHERIA INDIAN TRIBE; WOOD'S
18 ROOFING INC., a California Corporation,
DOES 1-10.

19 Defendants.
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CASE NO. CV12-01266 HRL

**PLAINTIFF'S EX PARTE APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW CAUSE
WHY PRELIMINARY INJUNCTION
SHOULD NOT BE ISSUED;
DECLARATION OF LYNN H. TRANG,
ESQ.**

TRIAL DATE: TBD

PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

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1 This is an action to enjoin the Blue Lake Rancheria Tribal Court (“Tribal Court”), its
2 Chief and Presiding Judge, the Honorable Lester J. Marston (“Judge Marston”), and Wood’s
3 Roofing, Inc. (“WRI”), from taking any further action on a case currently before the Blue Lake
4 Rancheria Tribal Court known as Case No. C-09-0612-LJM. This action is necessitated because
5 the Blue Lake Rancheria Tribal Court and Judge Marston have unlawfully and improperly
6 sought to exercise jurisdiction over moving party, a non-tribe member who has no connection
7 with the tribe.

8 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff moves this
9 Honorable Court for a temporary restraining order. The temporary restraining order seeks to
10 enjoin the Defendants from exercising tribal court jurisdiction over Admiral Insurance Company
11 (“Admiral”) and to vacate its currently set orders requiring the parties to file cross-motions for
12 summary judgment prior to the Tribal Court deciding jurisdictional questions, i.e. Admiral’s
13 motion to dismiss Cross-Complaint, and to preserve the status quo and Admiral’s due process
14 rights.

15 Plaintiff further moves this Honorable Court for an order requiring Defendants to show
16 cause why they should not be preliminarily enjoined from exercising tribal court jurisdiction and
17 from taking any further action on Judge Marston’s order requiring that Admiral and all other
18 parties file a Motion for Summary Judgment on the substantive legal insurance coverage issues.
19 Admiral had filed a Motion to Dismiss in the Tribal Court based on lack of jurisdiction, both
20 personal and subject matter, as well as an ex parte application for an order shortening time to
21 ensure that the Motion to Dismiss is heard prior to any substantive issues being adjudicated. The
22 Tribal Court has refused to entertain Admiral’s motion, ex parte application or even provide
23 hearing dates. Instead, Judge Marston has continued to issue orders to force Admiral and WRI to
24 file cross-motions for summary judgment and indicated that the summary judgment motions
25 shall be briefed and heard prior to Judge Marston even providing a hearing date for Admiral’s
26 motion to dismiss. Meanwhile, Judge Marston has also indicated that if any party did not file a
27 motion for summary judgment by March 15, 2012, it would be subject to sanctions. It is
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1 therefore crucial that this relief be granted as soon as possible as Plaintiff will be further
2 prejudiced upon any attempt by WRI to move for summary judgment as to Admiral in the Tribal
3 Action and Judge Marston's order that Admiral would be "subject to sanctions" if it did not
4 comply with the order.

5 **A. FACTUAL BACKGROUND**

6 Plaintiff is a Cross-Defendant in the underlying action commonly known as *Mainstay*
7 *Business Solutions v. Wood's Roofing, Inc.*, which is currently on file in the Tribal Court of Blue
8 Lake Rancheria, case no. C-09-0612-LJM, ("Tribal Action"). Mainstay Business Solutions
9 ("MBS"), is and at all times mentioned was a division of Blue Lake Rancheria Economic
10 Development Corporation, a federally chartered corporation pursuant to Section 17 of the Indian
11 Reorganization Act (25 U.S.C. § 477), wholly owned by Blue Lake Rancheria, a federally
12 recognized Indian tribe. MBS's principal place of business and residence is Blue Lake
13 Rancheria, Blue Lake, California.

14 The Tribal Action arises out of a dispute between MBS and a non-Indian contractor,
15 WRI. In particular, WRI entered into written contracts dated June 2007 and June 2008 with
16 MBS wherein MBS assigned its employees to WRI to work at various WRI jobsites in exchange
17 for certain consideration as provided for in the contracts. As part of those agreements, WRI
18 agreed to submit to the jurisdiction of the Blue Lake Rancheria Tribal Court.

19 During the course of the contracts, three of the MBS employees suffered injuries while
20 working with WRI from October 2007 to November 2008. Pursuant to the agreement between
21 MBS and WRI, MBS provided workers compensation benefits to those workers. By the Tribal
22 Action, MBS seeks to recover the benefits it paid to the injured workers from WRI. A true and
23 correct copy of MBS' operative Complaint is attached hereto as Exhibit "A" ("FAC"). In turn,
24 WRI filed a Cross-Complaint against Admiral after Admiral declined coverage as the general
25 liability policy issued to WRI does not afford coverage for injured employees. A true and
26 correct copy of WRI's Cross-Complaint against Admiral is attached hereto as Exhibit "B"

1 (“Cross-Complaint”). Also attached hereto as Exhibit “C” is a true and correct copy of Admiral
2 insurance policy number CA000001043-06.

3 Admiral is a Delaware Corporation, doing business in Cherry Hill, New Jersey. It is
4 domiciled in Delaware with its office in Cherry Hill, New Jersey. Admiral is duly authorized to
5 transact business in this State by the commissioner of the California Department of Insurance as
6 an eligible surplus lines insurer. Admiral is currently a Cross-Defendant in the underlying Tribal
7 Action. Admiral received notice of the Cross-Complaint via certified mail on September 27,
8 2011. Attached hereto as Exhibit “D” is a true and correct copy of the proof of certified mail of
9 the Cross-Complaint.

10 On or about October 18, 2011, Admiral filed and served a Notice of Motion to Quash
11 Summons and Dismiss the Cross-Complaint (“Motion to Dismiss”) in the Tribal Action on the
12 grounds that (1) the summons and Cross-Complaint were not properly served and (2) that the
13 Court lacks jurisdiction over Admiral and the Cross-Complaint. The Motion to Dismiss was
14 stamped endorsed-filed by the Tribal Court on October 25, 2011. Attached hereto as Exhibit “E”
15 is a true and correct copy of this motion. The first argument in the Motion to Dismiss was based
16 upon Rule 14 of the Civil Rules of Procedure for the Tribal Court of the Tribe which require that
17 “[i]f service must be made off the tribal trust land...services shall be made in accordance with
18 the laws of the State in which the defendant to be served resides.” The Cross-Complaint clearly
19 establishes that WRI knew Admiral is located in New Jersey. Cross-Complaint ¶2. Rule 4:4-
20 4(a)(6) of the New Jersey Rules of Court requires *personal delivery* of a copy of the relevant
21 pleadings “on any officer, director, trustee or managing or general agent, or any person
22 authorized by appointment or by law to reserve service of process on behalf of the corporation,
23 or on a person at the registered office of the corporation in charge thereof.” Service on Admiral
24 was clearly inadequate.

25 Admiral next argued in its Motion to Dismiss that the Tribal Court lacked jurisdiction
26 over Admiral and the Cross-Complaint. “Absent express authorization by federal statute or
27 treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.”

1 *Strate v. A-1 Contractors* (1997) 520 U.S. 438, 445. “[T]he inherent sovereign powers of an
2 Indian tribe’ – those powers a tribe enjoys apart from expression provision by treaty or statute –
3 ‘do not extend to the activities of nonmembers of the tribe.’” *Id.* at 445-446, citing *Montana v.*
4 *US* (1981) 450 U.S. 544, 565. “*Montana* thus describes a general rule that, absent a different
5 congressional direction, Indian tribes lack civil authority over the conduct of non-members on
6 non-Indian land...subject to two exceptions: The first exception relates to nonmembers who
7 enter consensual relationships with the tribe or its members; the second concerns activities that
8 directly affects the tribe’s political integrity, economic security, health, or welfare.” *Id.* at 446.
9 More directly to the point, “a non-Indian’s breach of an independent duty to another non-Indian,
10 occurring off of the reservation, falls without the nebulous confines of a ‘reservation affair’ and
11 does not arise on the reservation.” *Stock West Corp. v. Taylor* (9th Cir. 1991) 942 F.2d 655, 663.
12 The hearing date on Admiral’s Motion to Dismiss was scheduled for December 9, 2011.

13 On or about October 27, 2011, the Tribal Court issued an order specifying that the parties
14 shall file cross-motions for summary judgment (“Court Ordered Summary Judgment Motions”)
15 addressing the following issues: “(1) does the Court have personal jurisdiction over the cross-
16 defendants; (2) does the Court, as a matter of tribal law, have subject matter jurisdiction over the
17 cross-defendants; (3) does the Court, as a matter of federal law, have subject matter jurisdiction
18 over the cross-defendants, and (4) do the cross-defendants have an obligation to tender a defense
19 on behalf of Woods Roofing in this case pursuant to policies of insurance entered into between
20 cross-complainant and cross-defendants.” A true and correct copy of the October 27, 2011 order
21 is attached hereto as Exhibit “F”.

22 On or about November 4, 2011, the Tribal Court held a telephone conference with
23 counsel for all parties to discuss the briefing schedule and requirement for the Court Ordered
24 Summary Judgment Motions. Counsel for Admiral *specially appeared* at the conference
25 objecting to the Tribal Court’s order to the extent it required any substantive appearance/action
26 by Admiral before the hearing on its Motion to Dismiss. Admiral objected to the order as it
27 forces Admiral to file a motion for summary judgment on substantive coverage issues before
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1 there has been a determination on the jurisdictional issues, and before it has generally appeared
2 in the litigation. This is inconsistent with federal law and exceeds the Tribal Court's authority.

3 During this conference call, the Tribal Court also indicated that Admiral's Motion to
4 Dismiss *would not be heard* on the currently scheduled date of December 9, 2011 and the Tribal
5 Court would assign a new date. On or about December 20, 2011, the Tribal Court issued a
6 formal order vacating the hearing date on Admiral's Motion to Dismiss. The Tribal Court
7 indicated that "it will set a hearing on the Motion to Dismiss *after* the Court hears oral arguments
8 on the jurisdictional issues set for hearing on February 17, 2012." The December 20 Order still
9 required the parties, including Admiral, to file briefs on the substantive coverage issues before
10 the Tribal Court would hear or address the jurisdictional issues in Admiral's Motion to Dismiss.
11 A true and correct copy of this order is attached at Exhibit "G".

12 On December 21, 2011, Admiral filed an Ex Parte Application with the Tribal Court
13 requesting that the Tribal Court hear the Motion to Dismiss before Admiral was required to file
14 the Court Ordered Summary Judgment Motions on the substantive legal issue of whether it owes
15 a defense to WRI. A true and correct copy of this ex parte application is attached hereto as
16 Exhibit "H".

17 On January 9, 2012, Judge Marston issued an order granting Admiral's Motion to
18 Dismiss on the basis that Admiral had not been personally served. Judge Marston gave WRI
19 sixty-days (until March 12, 2012) to file a proof of service evidencing that Admiral had been
20 properly served with the Cross-Complaint. Having granted Admiral's motion to quash service of
21 the summons, Judge Marston specifically deferred the jurisdictional issue stating that he need not
22 now address the second argument raised in Admiral's motion that the Court lacks jurisdiction
23 over Admiral. Judge Marston also ordered that if service is perfected upon Admiral within the
24 sixty-day time frame, Admiral would be required to file its Court Ordered Summary Judgment
25 Motion by March 15, 2012. A true and correct copy of the January 9, 2012 order is attached as
26 Exhibit "I".

1 On February 14, 2012, counsel for WRI filed a request for entry of default. WRI's
2 request was based on the grounds that Admiral had apparently been personally served with the
3 Cross-Complaint on October 21, 2011, and that Admiral's original Motion to Dismiss did not
4 address that particular service. Significantly, Admiral's original Motion to Dismiss challenging
5 service **and jurisdiction** had been served and filed before the personal service occurred. The
6 February 14 request for entry was the first time that Admiral's counsel became aware of a claim
7 from WRI that Admiral had been personally served. It was the first time Admiral's counsel was
8 served with a proof asserting personal service on Admiral and, based on information and belief,
9 it also was the first time such proof had been filed with the Tribal Court. Attached as an exhibit
10 to the Request for Entry of Default was a copy of the proof of personal service of the Cross-
11 Complaint against Admiral. This is the first time Admiral was made aware that WRI had been
12 trying to file said proof of service. A true and correct copy of the request for entry of default is
13 attached as Exhibit "J".

14 As a result of WRI's actions, on February 28, 2012, Admiral filed an ex-parte application
15 in the Tribal Action seeking an order shortening time to hear another Motion to Dismiss, since
16 the jurisdictional issues within the motion had yet to be addressed. An order shortening time was
17 necessary since to comply with rule 18(b) of the Civil Rules of Procedure for the Tribal Court,
18 the earliest possible hearing date for Admiral's second Motion to Dismiss would be April 6,
19 2012, i.e. after opening briefs would be due on the Court Ordered Summary Judgment Motions.
20 Complying with this order will force Admiral to file a motion for summary judgment, which
21 Admiral fears will be viewed as a submission to the Tribal Court's jurisdiction, before the Tribal
22 Court has a chance to rule on Admiral's second Motion to Dismiss. Attached hereto as Exhibit
23 "K" is a true and correct copy of this ex parte application.

24 On or about March 1, 2012, Ms. Anita Huff, Court Clerk for the Blue Lake Tribal Court,
25 wrote an email to all counsel indicating that Judge Marston was issuing an order on March 5,
26 2012 addressing the (1) ex-parte application of Admiral; (2) Entry of Clerks Default against
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1 Admiral Insurance Company; and (3) Current Briefing Schedule that was established. A true
2 and correct copy of this letter is attached as Exhibit "L".

3 To date, this order has not been issued. Instead, on March 12, 2012 the Tribal Court's
4 Court Clerk notified all parties that the Court Ordered Summary Judgment Motions are still due
5 but the Tribal Court would not accept any further filings with respect to Admiral's ex parte
6 application. Attached hereto as Exhibit "M" is a true and correct copy of this e-mail. By virtue
7 of this e-mail, the Tribal Court has refused to allow Admiral to be heard on its Motion to Dismiss
8 for lack of jurisdiction, and instead is forcing Admiral to submit to the jurisdiction of the Tribal
9 Court. Admiral has since re-filed its Motion to Dismiss, but the hearing date on the motion is
10 after all briefs are due on the Court Ordered Summary Judgment Motions. Attached hereto as
11 Exhibit "N" is a true and correct copy of this motion. Being unable to file the Court Ordered
12 Summary Judgment Motion, lest it be seen as a submission to the Tribal Court's jurisdiction,
13 Admiral is now subject to the Court's prior indication that sanctions may be imposed against it.

14 A temporary restraining order is needed in order to preserve the status quo so that the
15 jurisdictional issues can be determined first. If this request is not granted, Admiral is forced to
16 submit to the jurisdiction of the Tribal Court without due process or be subject to sanctions for
17 failing to file a substantive motion on whether Admiral owes a duty to defend and indemnify
18 WRI and have a motion for summary judgment be pending against it to which it cannot oppose,
19 since an opposition would be viewed as subjection to the Tribal Court's jurisdiction.

20 **PLAINTIFFS SHOULD BE GRANTED AN EX-PARTE TEMPORARY**
21 **RESTRAINING ORDER**

22 The traditional test for preliminary injunctive relief includes consideration of four factors:
23 (1) The likelihood of the plaintiffs' success on the merits; (2) the threat of irreparable harm to the
24 plaintiff if the requested relief is not granted; (3) the relative balance of this harm to the plaintiff
25 and the harm to the defendant if the relief is granted; and (4) the public interest. *Alaska v. Native*
26 *Village of Venetie* (1988) 856 F.2d 1384, 1388, citing *Los Angeles Mem. Coliseum Comm'n v.*
27 *National Football League* (1980) 634 F.2d 1197, 1200.

1 The Ninth Circuit has collapsed the traditional four factors into an alternative two prong
 2 test. The moving party can alternatively show: (1) a combination of probable success on the
 3 merits and the possibility of irreparable harm, or (2) that serious questions are raised and the
 4 balance of hardships tips sharply in the moving party's favor. *Dr. Seuss Enter., L.P. v. Penguin*
 5 *Books USA, Inc.*, (1996) 924 F. Supp. 1559 1562, affirmed, 109 F.3d 1394 (9th Cir. 1997), cert.
 6 dismissed, 118 S. Ct. 27, 138 L.Ed.2d 1057 (1997); *Apple Computer Inc. v. Formula Int'l. Inc.*,
 7 (1984) 725 F.2d 521, 525. Application of either test to the facts of this case demonstrates that a
 8 temporary restraining order should issue.

9 **1. Plaintiff Has a Substantial Likelihood of Prevailing on the Merits of its**
 10 **Declaratory Relief Action**

11 To show a substantial likelihood of prevailing on the merits of this action, Plaintiff has to
 12 make a prima facie showing the Tribal Court does not have jurisdiction over Plaintiff. Here,
 13 there is no dispute that Admiral is not a tribal entity and is not a tribal member. Further, as
 14 Admiral's insurance policy is only with WRI, the policy does not afford coverage to a tribe
 15 member. Any obligation owed under the policy would be to WRI not MBS. Further Admiral
 16 has not done business with the Tribe, did not enter into a contractual relationship with MBS and
 17 did not sell an insurance policy to MBS. In fact, Admiral has not consented to the jurisdiction of
 18 the Tribal Court and there is no connection between Admiral and the Blue Lake Rancheria Tribe.

19 **a. As a Matter of Federal Law, the Tribal Court has No Jurisdiction over Admiral**

20 As a matter of federal law, the Courts have made clear that tribal sovereignty is limited,
 21 just as a state's sovereignty is limited by the U.S. Constitution. Tribal sovereignty allows Indian
 22 tribes to regulate their own members as well as those who consent to the jurisdiction of the tribe.
 23 In *Montana v. United States* (1980) 450 U.S. 544, the U.S. Supreme Court noted that the Indian
 24 tribal sovereignty was limited as follows:

25 A tribe may regulate, through taxation, licensing, or other means, the activities of
 26 nonmembers who enter consensual relationships with the tribe or its members, through
 27 commercial dealing, contracts, leases or other arrangements. ... A tribe may also retain
 28 inherent power to exercise civil authority over the conduct of non-Indians on fee lands

1 within its reservation when that conduct threatens or has some direct effect on the
2 political integrity, the economic security, or the health or welfare of the tribe.

3 *Montana, supra* 450 U.S. at 566.

4 The U.S. Supreme Court further explained this position in *Strate v. A-1 Contractors*
5 (1997) 520 U.S. 438 when it stated as follows:

6 Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land
7 within a reservation, subject to two exceptions: The first exception relates to
8 nonmembers who enter consensual relationships with the tribe or its members; the second
9 concerns activity that directly affects the tribe's political integrity, economic security,
10 health or welfare.

11 *Strate, supra* 520 U.S. at 466.

12 It is clear that an Indian tribe has jurisdiction over the conduct of its own members.
13 However, under *Strate v. A-1 Contractors*, in order to obtain jurisdiction over a non-member, the
14 tribe must show that either (1) the nonmember consented to jurisdiction or that (2) the activity
15 directly affects the tribe's policy integrity, economic security, health or welfare. Neither
16 condition exists here. More directly to the point, "a non-Indian's breach of an independent duty
17 to another non-Indian, occurring off of the reservation, falls *without* the nebulous confines of a
18 'reservation affair' and *does not arise* on the reservation." *Stock West Corp. v. Taylor* (9th Cir.
19 1991) 942 F.2d 655, 663, emphasis added. Thus Admiral's (a non-Indian) alleged breach of a
20 duty to defend and/or indemnify WRI (another non-Indian) under an insurance policy issued off
21 tribal lands is not a dispute over which a tribal court can have jurisdiction.

22 The miniscule connection between Admiral and the Tribe does not suffice for purposes of
23 finding if jurisdiction exists. "As the Supreme Court has stated, '[t]he impact must be
24 demonstrably serious and must imperil the political integrity, the economic security, or the health
25 and welfare of the tribe.'" *Yellowstone County v. Pease* (Mont. 1996) 96 F.3d 1169, 1177, citing
26 *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation* (1989) 492 U.S. 408, 431.
27 The lone fact that Admiral insured someone, a non-Indian, who did business with a wholly
28 owned tribal entity does not meet the only exceptions available under *Montana* to bring Admiral
before Tribal Court. Here, Admiral is not a tribal member and did not insure a tribal entity or a

1 tribal member. There is no basis for jurisdiction over Admiral in Tribal Court as a matter of
2 federal law.

3 **b. The Tribal Court lacks Jurisdiction over Admiral Under Its Own Statutes**

4 As Admiral has no affiliation with the Tribe, it is not subject to the Tribal Court's
5 jurisdiction and there is no basis for maintaining the Cross-Complaint in the Tribal Court. This
6 is true applying the Tribal Court's own rules and regulations concerning its jurisdictional
7 boundaries. The Blue Lake Rancheria Tribal Court's scope of jurisdiction is mandated and
8 controlled by Blue Lake Rancheria Business Council Ordinance No. 07-01 ("Ordinance No. 07-
9 01"). Under the heading subject matter jurisdiction, it states "[t]he Tribal Court shall have civil
10 jurisdiction over all matters in law or in equity which the Business Council *expressly authorizes*
11 *by ordinance.*" Section 11.1.1.030(A)(1), emphasis added. Thus, if WRI's Cross-Complaint
12 does not fall within an area the Tribal Court is authorized to have jurisdiction over, the Cross-
13 Complaint must be dismissed due to lack of jurisdiction. The Tribal Court simply cannot
14 adjudicate disputes over which it has not been granted authority.

15 Section 11.1.1.030(2) of Ordinance No. 07-01 outlines the Tribal Court's territorial
16 jurisdiction. It states: "[t]he Tribal Court shall exercise civil jurisdiction...over all causes of
17 action that arise (1) on lands within the exterior boundaries of the Reservation and (2) on all
18 lands owned by the United States of America in trust for the Tribe." So if a matter did not arise
19 upon tribal land, the Tribal Court cannot have territorial jurisdiction over the claim. Clearly,
20 there is no connection between the Admiral insurance policy and the Tribe's land. There are
21 only two possible locations where the insurance dispute outlined in the Cross-Complaint could
22 have arisen. First is in New Jersey since Admiral is located there and issued the subject policy.
23 Cross-Complaint ¶2; see also, Proof of Service re: Summons and Cross-Complaint. The second
24 possible location is Morgan Hill, California since that is where WRI is located and thus where
25 the policy was entered into.¹ Cross-Complaint, Exh. B. Under either scenario, only one
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27 ¹ Alternatively, Wood's Roofing is located in Torrance, California, which is also off tribal lands. FAC ¶2.
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1 conclusion can be made, the dispute arose outside of tribal lands. It is clear the Tribal Court has
2 no territorial jurisdiction over the Cross-Complaint.

3 Blue Lake Rancheria Business Council Ordinance No. 07-02 (“Ordinance No. 07-02”)
4 identifies the Tribal Court’s subject matter jurisdiction concerning contract claims. It states
5 “[t]he purpose of this ordinance is to provide the Blue Lake Rancheria Tribal Court with subject
6 matter jurisdiction over causes of action arising under contracts *with the Tribe.*” Ordinance No.
7 07-02, Section 1.5, emphasis added. Thus, for contract actions such as the subject Cross-
8 Complaint, “[t]he Tribal Court shall have jurisdiction over civil causes of action regarding...
9 contracts *to which the Tribe or Tribal Entities are parties.*” Ordinance No. 07-02, Section
10 11.1.2.030, emphasis added. Again, it is beyond dispute that neither the tribe nor any tribal
11 entities are a party to the subject contract, i.e. the Admiral policy. The only parties to that policy
12 are Admiral and WRI. The Tribal Court has not been granted subject matter jurisdiction over the
13 Cross-Complaint.

14 Section 11.1.1.030(3) of Ordinance No. 07-01 identifies the parties over whom the Tribal
15 Court shall have personal jurisdiction. It states:

16 The Scope of the Tribal Court’s civil jurisdiction shall extend to the following:

- 17 (a) The Tribe;
18 (b) Legal entities owned by the Tribe;
19 (c) Persons or entities employed by the Tribe or its wholly owned legal
20 entities;
21 (d) Persons or entities who have entered into contracts with the Tribe or its
22 wholly owned legal entities;
23 (e) Persons or entities doing business within the territorial jurisdiction of the
24 Tribal Court;
25 (f) Tribal members;
26 (g) Anyone the Tribe formally recognizes as Indian;
27 (h) Other Indians;
28 (i) Anyone who consents to Tribal Court jurisdiction;
(j) Other individuals or entities whose conduct affects the ability of the Tribe
to govern itself;
(k) All other individuals whose conduct threatens or has some direct effect on
the political integrity, the economic security, or the health and welfare of
the Tribe.

Admiral does not fit within any of these categories. It has no association or connection
with the Tribe. Its contract is with WRI and has no bearing on the Tribe’s autonomy and

1 sovereignty. The Tribe has no direct interest in the Admiral insurance policy. Admiral likewise
2 has done nothing to avail itself to the Tribe or the Tribe's land. Accordingly, the Tribal Court
3 lacks personal jurisdiction over Admiral.

4 This leaves only the Tribal Court's ancillary jurisdiction which is found in Ordinance No.
5 07-02. Section 11.1.2.030 of this ordinance states that "[t]he tribal court shall have ancillary
6 jurisdiction over any *non-contract claims* which arise out of the same transaction or occurrence,
7 relate to or arise out of the contract, or are asserted as counter- or cross-claims in the same
8 action." Emphasis added. The Cross-Complaint is clearly a contract dispute between Admiral
9 and WRI. Nor does WRI's dispute with Admiral arise out of WRI's contract dispute with MBS.
10 Accordingly, the Tribal Court's ancillary jurisdiction does not reach this matter.

11 **c. Admiral Will Prevail on the Merits of the Coverage Issues**

12 There is also a substantial likelihood that Admiral will prevail on the merits of the
13 coverage dispute between Admiral and WRI. MBS had to pay workers compensation benefits to
14 some of its workers as a result of some workplace injuries. MBS is suing WRI claiming WRI
15 contractually agreed to reimburse MBS for those monies. WRI believes that contractual
16 indemnity obligation is insured under Admiral's policy issued to it. However, the Admiral
17 policy does not insure this kind of loss. In order for coverage to be invoked under Coverage A of
18 the Admiral policy, it must be established that the claim against the insured requests damages for
19 "bodily injury" or "property damage" that occurs during the policy period, and that the "bodily
20 injury" or "property damage" is caused by an "occurrence". Exh. C, Pg. 6. Here, the entirety of
21 MBS' complaint is centered around WRI's alleged failure to comply with the terms of its
22 contract resulted in MBS having to pay workers compensation benefits for three separate
23 injuries. It is settled that under California law, strictly economic losses are not "property
24 damage" for liability insurance purposes. *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1,
25 26-27. "CGL policies do not provide coverage for intangible property losses, including economic
26 losses." *Id.* "Strictly economic losses like lost profits, loss of goodwill, loss of the anticipated
27 benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible
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1 property covered by a comprehensive general liability policy.” *Giddings v. Industrial Indemnity*
2 *Co.* (1980) 112 Cal.App.3d 213, 217. A breach of contract claim is essentially this, a claim for
3 an economic loss. MBS had to pay monies as a result of WRI’s alleged failure to follow the
4 terms of its contract. There is no evidence that MBS is making a claim because of a bodily
5 injury it suffered.

6 The California Supreme Court case of *Waller v. Truck Insurance Exchange* is instructive
7 here. It held that “CGL policies do not provide coverage for economic losses that cause
8 emotional distress. As we have observed, the CGL policy provides coverage for ‘occurrences’
9 that cause bodily injury or tangible property losses. These policies were never intended to cover
10 emotional distress damages that flow from an uncovered occurrence,’ and the parties could not
11 reasonably have expected that coverage would be expanded merely because a claim of emotional
12 or physical distress is alleged as a result of the economic loss.” *Waller*, 11 Cal.4th at 23. Thus,
13 there is no dispute that the injuries suffered by the employees flow from and are derivative of
14 WRI’s alleged breach of contract. MBS’s claim against WRI does not fall within the provisions
15 of the Admiral insuring agreement and Admiral rightly denied coverage for the same.

16 Assuming, arguendo, this matter falls within the terms of the insuring agreement, there
17 are two exclusions which apply to nevertheless preclude coverage. The first is the contractual
18 liability exclusion. Exh.C, Pg.7. The exclusion states that there is no coverage for “‘bodily
19 injury’...for which the insured is obligated to pay damages by reason of the assumption of
20 liability in a contract or agreement.” The second applicable exclusion here is the Employer’s
21 Liability exclusion. (Ibid.) It operates to preclude coverage for “‘bodily injury’ to an ‘employee’
22 of the insured.” There is no dispute that the three injured parties were “employees” of WRI as
23 that term is defined in the Admiral policy. See, Exh.C, Pg.16. Moreover, this exclusion equally
24 applies “[t]o any obligation to share damages with or repay someone else who must pay damages
25 because of the injury.” Exh.C, Pg.7. Thus, the claim by MBS falls within the provisions of this
26 exclusion and WRI is not entitled to coverage..

1 As such, Admiral has established a prima facie case of the lack of jurisdiction on behalf
2 of the Tribal Court. There can also be little doubt that Plaintiff will prevail on the merits of the
3 entirety of this Declaratory Relief Action and should be entitled to a temporary restraining order.

4 **2. Plaintiff is Suffering Irreparable Harm**

5 Plaintiff has suffered irreparable injury in that it is not subject to the jurisdiction of the
6 Blue Lake Rancheria Tribal Court, but is faced with the Tribal Court's refusal to allow Admiral
7 its due process by hearing its Motion to Dismiss on the jurisdiction question and instead
8 demanding Admiral subject itself to the Tribal Court's jurisdiction by filing a motion for
9 summary judgment on the substantive coverage issues. Admiral cannot exhaust any remedies at
10 the tribal level as the Tribal Court refuses to allow Admiral a date to hear its motion. Due to
11 these actions, it is clear that Admiral is facing irreparable harm if a temporary restraining order is
12 not granted. If Admiral refuses to submit to the Tribal Court's jurisdiction by denying the Tribal
13 Court's order, Admiral becomes subject to sanctions having not filed a motion for summary
14 judgment and faces a summary judgment motion to be filed by WRI which it cannot oppose.
15 Alternatively, Admiral must comply with the Tribal Court's order and thus subject itself to the
16 Tribal Court's jurisdiction without due process. Either scenario is irreparable since the
17 consequences cannot be undone.

18 The Ninth Circuit's alternative test combining the traditional elements of likelihood of
19 success and irreparable harm into a single prong of a two part test, and the substantial likelihood
20 of prevailing on the merits, as shown above, weigh in Plaintiff's favor. As such, a temporary
21 restraining order should issue.

22 **3. The Balance of Hardships Favors the Issuance of the Requested Injunctive**
23 **Relief**

24 The temporary restraining order will do nothing more than prohibit Defendants from
25 forcing Admiral to submit to the jurisdiction of the Tribal Court without due process and from
26 imposing sanctions as against Admiral, something they should be doing in any event. Admiral
27 has been unable to exhaust any tribal court remedies as its attempts have been thwarted.

1 Admiral's Motion to Dismiss has not been heard and it has not received any response to its ex
2 parte applications to have the hearing on the jurisdictional issues decided prior to the substantive
3 legal issues. The requested injunctive relief seeks nothing more than to require Defendants to
4 comply with the law and to preserve the status quo with respect to Plaintiff, so as to prevent
5 further injury. On the other hand, there is no threatened injury to the Defendants. No discovery
6 has taken place in the Tribal Action nor has a trial date been set. Since Admiral's Motion to
7 Dismiss has not been heard, the Cross-Complaint against Admiral is not yet at issue. All that is
8 being requested is that the Tribal Court hear the jurisdictional issues prior to the substantive legal
9 issues. A request which should not delay the Tribal Action by more than a month and may
10 actually resolve the entire case.

11 **4. The Requested Injunctive Relief Is in the Public Interest**

12 In addition to the heavily favoring injunctive relief under the Ninth Circuit's two prong
13 test, the facts in the present case meet the fourth element of the traditional test, since the public
14 interest can only be served by requiring the Blue Lake Rancheria Tribal Court and its Judge to
15 respect the jurisdiction laws of the United States and its own statutes. Thus, the public interest
16 favors the issuance of the requested injunctive relief.

17 In view of the foregoing, a temporary restraining order should be entered against
18 Defendants. Plaintiff has demonstrated a likelihood of success on the merits of this Declaratory
19 Relief Action. Plaintiff further submits that the clear, immediate, and irreparable harm they
20 presently suffer and will continue to suffer as a result of Defendants' rulings warrants a
21 temporary restraining order. Moreover, the balance of hardships weighs heavily in favor of
22 protecting Plaintiff's rights to be free from the unlawful exercise of improper jurisdiction by the
23 Blue Lake Rancheria Tribal Court. Finally, the requested temporary restraining order will
24 further the public interest in enforcing federal law, Tribal law and protecting Plaintiff from the
25 blatant abuse by the Tribal Court. Plaintiff's Motion for a temporary restraining order should
26 therefore be granted.

27 ///

1 **5. Ex Parte Relief is Essential in this Action**

2 Rule 65 of the Federal Rules of Civil Procedure permits the issuance of a temporary
3 restraining order without prior notice to the defendant. Fed. R. Civ. P. 65(b). Moreover, courts
4 have repeatedly recognized the need for ex parte temporary restraining order *American Can Co.*
5 *v. Mansukhani* (1984) 742 F.2d 314, 321 (Rule 65 “expressly contemplate the issuance of ex
6 parte temporary restraining orders”). In this matter, notice actually has been provided to all
7 defendants. See *Trang Decl.* ¶4.

8 The ex parte temporary restraining order is indispensable to the commencement of an
9 action when it is the sole method of preserving a state of affairs in which the Court can provide
10 effective final relief. Immediate action is vital here. Without a temporary restraining order
11 Admiral must decide between submitting to the Tribal Court’s jurisdiction without due process
12 or defying the Tribal Court’s order to face sanctions and a motion for summary judgment which
13 it cannot oppose. Either scenario is eminent, harmful and irreversible.

14 In this case, Defendants’ conduct includes flagrant, willful violations of the jurisdiction
15 laws of the United States, and the Tribal Court’s own jurisdiction rules. Defendants’ conduct is
16 even a violation of the United States Constitution and the Indian Civil Rights Act of 1968 by
17 denying Admiral its due process rights. Plaintiff submits that the clear, immediate, and
18 irreparable harm it presently suffers as a result of Defendants’ unlawful actions warrants a
19 temporary restraining order. Plaintiff further submits that its attempt to schedule an ex parte
20 hearing to have its Motion to Dismiss heard, the Tribal Court’s failure to even calendar
21 Admiral’s ex parte application, and its failure to issue a ruling according to its own schedule,
22 evidences the unlawful intent on the part of the Tribal Court to completely ignore its errors and
23 proceed with continuing to injure Plaintiff. Plaintiff therefore requests its motion for a
24 temporary restraining order be granted.

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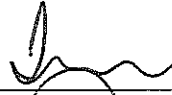
**C. DEFENDANTS SHOULD BE ORDERED TO SHOW CAUSE REGARDING THE
ISSUANCE OF A PRELIMINARY INJUNCTION**

Since a temporary restraining order is issued to preserve the status quo before a preliminary injunction hearing may be held, the standard for issuance of a temporary restraining order mirrors the standard for granting a preliminary injunction. See *Sierra On-Line, Inc. v. Phoenix Softward, Inc.*, (1997) 739 F.2d 1415, 1422; *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 312 (The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and inadequacy of legal remedies.”).

As demonstrated above, Plaintiff has met its burden for obtaining a temporary restraining order. This Court should therefore issue an order requiring Defendants to show cause why the Court should not issue a preliminary injunction.

DATED: March 16, 2012

WALSH MCKEAN FURCOLO LLP

By: 

Regan Furcolo
Lynn Trang
Christopher M. Lea
Attorneys for Plaintiff
ADMIRAL INSURANCE COMPANY

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DECLARATION OF LYNN H. TRANG

I, Lynn H. Trang, declare:

1. I am over 18 years of age and am competent to testify in this matter.

2. All of the statements made in this declaration are true as of my own personal knowledge.

3. I am an attorney duly admitted to practice before this court and licensed to practice law in the courts of the State of California and attorney of record for Plaintiff herein, ADMIRAL INSURANCE COMPANY (“Admiral”). I make this declaration in Support of Admiral’s Ex Parte Application for Temporary Restraining Order in this matter.

4. All parties have been contacted or notified, or are in the process thereof, about the request contained above for an ex parte Temporary Restraining Order. A courtesy copy of this ex parte application has been provided to counsel to WRI in the Tribal Action. All Defendants have also been notified that Admiral has filed the instant Declaratory Relief Action. A proof of service indicating formal service of this instant ex parte and this action will be filed once service has been accomplished.

5. Admiral is a Cross-Defendant in the underlying action commonly known as *Mainstay Business Solutions v. Wood’s Roofing, Inc.*, which is currently on file in the Tribal Court of Blue Lake Rancheria, case no. C-09-0612-LJM, (“Tribal Action”). A true and correct copy of MBS’ operative Complaint is attached hereto as Exhibit “A.” (“FAC”).

6. WRI filed a Cross-Complaint in the Tribal Action against Admiral. A true and correct copy of WRI’s Cross-Complaint against Admiral is attached hereto as Exhibit “B” (“Cross-Complaint”).

7. Also attached hereto as Exhibit “C” is a true and correct copy of Admiral Insurance Policy No. CA000001043-06.

8. Admiral received notice of the Cross-Complaint via certified mail on September 27, 2011. Attached hereto as Exhibit “D” is a true and correct copy of the proof of certified mail of the Cross-Complaint.

1 9. On or about October 18, 2011, Admiral filed and served a Notice of Motion to
2 Quash Summons and Dismiss the Cross-Complaint (“Motion to Dismiss”) in the Tribal Action
3 on the grounds that (1) the summons and Cross-Complaint were not properly served and (2) that
4 the Court lacks jurisdiction over Admiral and the Cross-Complaint. The Motion to Dismiss was
5 stamped endorsed-filed by the court on October 25, 2011. Attached hereto as Exhibit “E” is a
6 true and correct copy of this motion. The hearing date on Admiral’s Motion to Dismiss was
7 scheduled for December 9, 2011.

8 10. On or about October 27, 2011, the Tribal Court issued an order specifying that the
9 parties shall file cross-motions for summary judgment (“Court Ordered Summary Judgment
10 Motions”) addressing the following issues: “(1) does the Court have personal jurisdiction over
11 the cross-defendants; (2) does the Court, as a matter of tribal law, have subject matter
12 jurisdiction over the cross-defendants; (3) does the Court, as a matter of federal law, have subject
13 matter jurisdiction over the cross-defendants, and (4) do the cross-defendants have an obligation
14 to tender a defense on behalf of Woods Roofing in this case pursuant to policies of insurance
15 entered into between cross-complainant and cross-defendants.” A true and correct copy of the
16 October 27, 2011 order is attached hereto as Exhibit “F”.

17 11. On or about November 4, 2011, the Tribal Court held a telephone conference with
18 counsel for all parties to discuss the briefing schedule and requirement for the Court Ordered
19 Summary Judgment Motions. Counsel for Admiral *specially appeared* at the conference
20 objecting to the Tribal Court’s order to the extent it required any substantive appearance/action
21 by Admiral before the hearing on its Motion to Dismiss. Admiral objected to the order as it
22 forces Admiral to file a motion for summary judgment on substantive coverage issues before
23 there has been a determination on the jurisdictional issues, and before it has generally appeared
24 in the litigation. This is inconsistent with federal law and exceeds the Tribal Court’s authority.

25 12. During this conference call, the Tribal Court also indicated that Admiral’s Motion
26 to Dismiss *would not be heard* on the currently scheduled date of December 9, 2011 and the
27 Tribal Court would assign a new date.

1 13. On or about December 20, 2011, the Tribal Court issued a formal order vacating
2 the hearing date on Admiral's Motion to Dismiss. The Tribal Court indicated that "it will set a
3 hearing on the Motion to Dismiss *after* the Court hears oral arguments on the jurisdictional
4 issues set for hearing on February 17, 2012." The December 20 Order still required the parties,
5 including Admiral, to file briefs on the substantive coverage issues before the Tribal Court would
6 hear or address the jurisdictional issues in Admiral's Motion to Dismiss. A true and correct copy
7 of this order is attached at Exhibit "G".

8 14. On December 21, 2011, Admiral filed an Ex Parte Application with the Tribal
9 Court requesting that the Tribal Court hear the Motion to Dismiss before Admiral was required
10 to file the Court Ordered Summary Judgment Motions on the substantive legal issue of whether
11 it owes a defense to WRI. A true and correct copy of this ex parte application is attached hereto
12 as Exhibit "H".

13 15. On January 9, 2012, Judge Marston issued an order granting Admiral's Motion to
14 Dismiss on the basis that Admiral had not been personally served. Judge Marston gave WRI
15 sixty-days (until March 12, 2012) to file a proof of service evidencing that Admiral had been
16 properly served with the Cross-Complaint. Having granted Admiral's motion to quash service of
17 the summons, Judge Marston specifically deferred the jurisdictional issue stating that he need not
18 now address the second argument raised in Admiral's motion that the Court lacks jurisdiction
19 over Admiral. Judge Marston also ordered that if service is perfected upon Admiral within the
20 sixty-day time frame, Admiral would be required to file its Court Ordered Summary Judgment
21 Motion by March 15, 2012. A true and correct copy of the January 9, 2012 order is attached as
22 Exhibit "I".

23 16. On February 14, 2012, counsel for WRI filed a request for entry of default.
24 WRI's request was based on the grounds that Admiral had apparently been personally served
25 with the Cross-Complaint on October 21, 2011, and that Admiral's original Motion to Dismiss
26 did not address that particular service. Significantly, Admiral's original Motion to Dismiss
27 challenging service **and jurisdiction** had been served and filed before the personal service
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1 occurred. The February 14 request for entry was the first time that Admiral's counsel became
2 aware of a claim from WRI that Admiral had been personally served. It was the first time
3 Admiral's counsel was served with a proof asserting personal service on Admiral and, based on
4 information and belief, it also was the first time such proof had been filed with the Tribal Court.
5 Attached as an exhibit to the Request for Entry of Default was a copy of the proof of personal
6 service of the Cross-Complaint against Admiral. This is the first time Admiral was made aware
7 that WRI had been trying to file said proof of service. A true and correct copy of the request for
8 entry of default is attached as Exhibit "J".

9 17. As a result of WRI's actions, on February 28, 2012, Admiral filed an ex-parte
10 application in the Tribal Action seeking an order shortening time to hear another Motion to
11 Dismiss, since the jurisdictional issues within the motion had yet to be addressed. An order
12 shortening time was necessary since to comply with rule 18(b) of the Civil Rules of Procedure
13 for the Tribal Court, the earliest possible hearing date for Admiral's second motion to dismiss
14 would be April 6, 2012, i.e. after opening briefs would be due on the Court Ordered Summary
15 Judgment Motions. Complying with this order will force Admiral to file motion for summary
16 judgment, which Admiral fears will be viewed as a submission to the Tribal Court's jurisdiction,
17 before the Tribal Court has a chance to rule on Admiral's second Motion to Dismiss. Attached
18 hereto as Exhibit "K" is a true and correct copy of this ex parte application.

19 18. On or about March 1, 2012, Ms. Anita Huff, Court Clerk for the Blue Lake Tribal
20 Court, wrote an email to all counsel indicating that Judge Marston was issuing an order on
21 March 5, 2012 addressing the (1) ex-parte application of Admiral; (2) Entry of Clerks Default
22 against Admiral Insurance Company; and (3) Current Briefing Schedule that was established. A
23 true and correct copy of this letter is attached as Exhibit "L".

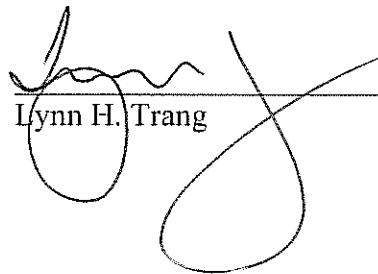
24 19. To date, this order has not been issued. Instead, on March 12, 2012 the Tribal
25 Court's Court Clerk notified all parties that the Court Ordered Summary Judgment Motions are
26 still due but the Tribal Court would not accept any further filings with respect to Admiral's ex
27 parte application. Attached hereto as Exhibit "M" is a true and correct copy of this e-mail. By
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1 virtue of this e-mail, the Tribal Court has refused to allow Admiral to be heard on its Motion to
2 Dismiss for lack of jurisdiction before forcing Admiral to submit to the jurisdiction of the Tribal
3 Court.

4 20. Admiral has since re-filed its Motion to Dismiss, but the hearing date on the
5 motion is after all briefs are due on the Court Ordered Summary Judgment Motions. Attached
6 hereto as Exhibit "N" is a true and correct copy of this motion.

7 21. Pursuant to Civil Local Rule No. 65 for the Northern District of California,
8 attached as Exhibit "O" is a true and correct copy of the instant declaratory relief action, without
9 the exhibits.

10 I declare under penalty of perjury of the laws of the United States of America that the
11 foregoing is true and correct. I executed this declaration on March 16, 2012.

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14 Lynn H. Trang
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