UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOAN PETERS

Plaintiff,

Civ. No.: 12-cv-0234-A

v.

HONORABLE ROBERT C. NOONAN,
NEW YORK STATE ACTING SUPREME
COURT JUSTICE, COUNTY OF GENESEE
AND GENESEE COUNTY COURT AND
SURROGATE COURT JUDGE,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

This memorandum of law is submitted by plaintiff, Joan Peters, in support of her motion pursuant to FRCP 65 and Local Rule 65(a)(2) and (b) seeking, among other relief, a temporary restraining order and preliminary injunction against the defendant as set forth in the complaint and supporting papers herein.

For the reasons that follow, this Court should grant plaintiff's motion in its entirety and issue a temporary restraining order and preliminary injunction against the defendant, enjoining and restraining the defendant and the Genesee County Surrogate Court from exercising any further jurisdiction over property on or located within the reservation lands of the Tonawanda Band of

Senecas ('the Nation") pursuant to claims of inheritance in the Surrogate Court action now pending in that Court denominated In Re David C. Peters, File No. 2011-16915 ("the probate proceeding"). The bases for this application are set forth in detail below.

STATEMENT OF FACTS

The relevant facts are set forth in the complaint, supporting affirmation of Michael T. Feeley, Esq., sworn to March 23, 2012, with exhibits, and the affidavit of Joan Peters, sworn to on March 21, 2012 ("Peters Aff.") to which this Court respectfully is referred. For the sake of brevity, the facts are not repeated at length herein.

ARGUMENT

It is within this Court's wide discretion to grant a request for a temporary restraining order and/or a preliminary injunction. *See Grand River Ent. Six Nations, Ltd. v. Pryor*, 481 F.3d 60 (2d Cir. 2007). Generally, in order to warrant a court's intervention in the form of injunctive relief, "[t]he party seeking the injunction must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief." *Resolution Trust Corp. v. Elman*, 949 F.2d 624,626 (2d Cir. 1991); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *Citibank v. Citytrust,* 756 F.2d 273 (2d Cir. 1985); *Virgin Enterprises, Ltd. v. Nawab*, 335 F.3d 141 (2d Cir. 2003).

Here, plaintiff can demonstrate a likelihood of success on the merits as well as irreparable harm. "[A] showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction . . . ." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotations and citations omitted); *see also Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir. 2005). Moreover, plaintiff can also demonstrate a sufficiently serious question going to the merits and the balance of hardships tipping decidedly in her favor.

POINT I

IN THE ABSENCE OF INJUNCTIVE RELIEF, PLAINTIFF WILL SUFFER IRREPARABLE HARM.

Courts have long recognized that "[t]o satisfy the irreparable harm requirement, [p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent . . . ." *See Grand River*, 481 F.3d at 66 (internal citations omitted). Plaintiff easily meets this standard.

A. THE LOSS OF PLAINTIFF'S BUSINESS CONSTITUTES IRREPARABLE HARM AS A MATTER OF LAW.

"In this circuit it is firmly settled that the loss or destruction of a going business constitutes irreparable harm, whether viewed as an injury not compensable in monetary terms, or as one which cannot be reduced to monetary value with sufficient accuracy to make damages an adequate substitute for injunctive relief." *Janmort Leasing, Inc. v. Econo-Car Int'l., Inc.*, 475 F. Supp. 1282, 1294 (E.D.N.Y. 1979) (internal quotations and citations omitted). Thus, the loss of a business or even a line of business – whether it has been in existence for two or twenty

years – constitutes irreparable harm. *See Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984) (11 years); *Semmes Motors, Inc. v. Ford Motor Co*., 429 F.2d 1197 (2d Cir. 1970) (20 years); *Travellers Int'l AG v. Trans World Airlines, Inc*., 684 F. Supp. 1206 (S.D.N.Y. 1988) (three years); *Janmort Leasing,* 475 F. Supp. 1282 (two years).

Joan Peters, an enrolled Tonawanda Seneca, acquired the business premises in 1965 and began a business together with her husband, Ellis. *See* Peters Aff. at ¶ 2, 11-14. Upon Order of the State Surrogate Court in the probate proceeding, Joan Peters must halt her business operations and surrender them to a third party or be subject to criminal sanctions. Where, as here, plaintiff would lose control, clients and goodwill of her business, irreparable harm should be presumed.

B. THE THREAT OF CRIMINAL PROSECUTION ALSO CONSTITUTES IRREPARABLE HARM.

Plaintiff is and will be confronted by a Court Order from a Court that lacks subject matter jurisdiction in violation of her right to due process of law that she must either obey or face contempt sanctions. "The threat of prosecution for engaging in one or more constitutionally-protected acts is sufficient to demonstrate irreparable harm". *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974); *Gary D. Peake Excavating, Inc. v. Town Bd. of the Town of Hancock*, 93 F.3d 68, 72 (2d Cir.1996); *Ward v. State of New York*, 291 F. Supp.2d 188, 198 (W.D.N.Y. 2003). In *Steffel*, the Supreme Court "did not require the plaintiff to proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution." *Id*. at 458-460,

94 S. Ct. 1209; *see also 414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974) (affirming grant of preliminary injunction to business, restraining enforcement of a city license ordinance while it challenged the ordinance's constitutionality). In another instance, where owners of massage parlors were threatened with criminal prosecution, injunctive relief was proper. *Joseph v. Blair*, 482 F.2d 575, 579 (4th Cir. 1973), *cert. denied*, 416 U.S. 955, 94 S. Ct. 1968 (1974) ("[t]he threat to plaintiffs' continued livelihood and freedom from prosecution was real.").

Similarly, where individuals who had been convicted of sex offenses sought to invalidate a statute prohibiting them from living within 2000 feet of schools and child-care centers, the court noted that the threat of criminal prosecution was sufficient to justify preliminary injunctive relief. *Doe v. Miller*, 216 F.R.D. 462, 471 (S.D. Iowa 2003) (seeking to invalidate the law on constitutional grounds, "[c]lass members will face criminal prosecutions for exercising what they believe is their constitutional right to live in privacy with their families as they so choose"). Thus, "[a]n individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril." *Edgar v. Mite Corp.*, 457 U.S. 624, 651, 102 S. Ct. 2629, 2645 (1982) (Stevens, J., concurring).

Here, plaintiff must either obey the Order of a Court that lacks subject matter jurisdiction over the property and business that she operates or face contempt sanctions. Thus, plaintiff has demonstrated a second, wholly distinct reason why in the absence of injunctive relief she will suffer irreparable harm. As a result, the injunctive relief should be granted.

C. THE DEPRIVATION OF A CONSTITUTIONAL RIGHT CONSTITUTES IRREPARABLE HARM.

Deprivation of a constitutional right is presumptively recognized as irreparable

harm. *See Johnson v. Miles*, 355 Fed. Appx. 188, 196 (2d Cir. 2009) ("because an alleged violation of a constitutional right 'triggers a finding of irreparable harm,' [plaintiff] necessarily satisfied the requirement that a party applying for a preliminary injunction show irreparable harm.") (citing *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)); *Ward,* 291 F. Supp. 2d at 196. This principle of law does not apply exclusively to violations of a movant's First Amendment rights. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2000) (Fourteenth Amendment); *Jolly*, 76 F.3d at 482 (Eighth Amendment); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (Fourth Amendment); *Ward*, 291 F. Supp. 2d at 196 (rights granted to Native Americans under the Constitution).

As set forth above, if the Court is not enjoined, plaintiff would be deprived of her treaty rights, her right to due process of law under the Fifth Amendment and her rights secured by the Equal Protection principles of the Constitution. Plaintiff risks criminal prosecution for violations of the Orders of a Court which lack subject matter jurisdiction in derogation of these rights. Accordingly, plaintiff has shown a third way why, without the grant of a preliminary injunction, she will suffer irreparable harm.

POINT II

PLAINTIFF LIKELY WILL SUCCEED ON THE MERITS OF HER CLAIM OF LACK OF SUBJECT MATTER JURISDICTION.

A. NEW YORK STATE COURTS DO NOT HAVE JURISDICTION OVER THE PROBATE OF TRIBAL LANDS OR PROPERTY LOCATED ON TRIBAL LANDS THAT WERE HELD BY TRIBAL MEMBERS WHO DIE AS RESIDENTS OF TRIBAL LANDS.

"The Commerce Clause of the Constitution grants Congress the power 'to regulate

Commerce with foreign Nations, and among the several States, and with Indian Tribes'." *Maine v. Taylor*, 477 U.S. 131, 137, 106 S. Ct. 2440, 2446-47 (1986) (citing U.S. Const. art. I, § 8, cl. 3). The Commerce Clause both grants power to Congress to regulate commerce with the Indian tribes and limits the power of the States to do the same. *Id*. The Nation is governed by a Council of Chiefs, who may be removed at the discretion of the clan mother who appointed each of them. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 876-877 (2d Cir. 1996).

The United States Constitution, duly adopted treaties and numerous Congressional enactments, including the Trade and Intercourse Act of 1790, limit the power of the individual states in interacting with Indian Tribes and upon Indian territory. While the previous limitation expressed by Chief Justice Marshall in *Worcester v. Georgia,* 31 U.S. 515, 561 (1832), that state laws "can have no force" within Indian territory has been somewhat abridged, it has been recognized that state laws and state civil and adjudicatory authority do not generally apply within Indian country. *Fisher v. District County Court*, 424 U.S. 382, 386, 96 S. Ct. 943 (1976) (denying state court jurisdiction over adoption proceedings involving tribal members as interfering with the "right of the Northern Cheyenne Tribe to govern itself independently of state law"); *Kennerly v. District Court of Montana*, 400 U.S. 423, 91 S. Ct. 480 (1971); *McClanahan v. Arizona Tax Commissioners*, 411 U.S. 164, 93 S. Ct. 1257 (1973); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 686-687, 85. S. Ct. 1242 (1965)("from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference."); *The Kansas Indians*, 72. U.S. 737 (1867), *Okla.. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125, 128, (1993); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942).

It is submitted respectfully that jurisdiction of a New York State Court over inheritance issues for tribal land and property located on those tribal lands of the Nation would constitute an infringement upon Indian self-government and the right of the Nation to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269 (1959). Further, it would infringe on "the authority of Indian governments over their reservations." *Id*., at 223. *See*, also, *Ex parte Crow Dog*, 109 U.S. 556, 568, 3 S. Ct. 396 (1883). Moreover, it is submitted respectfully that with respect to the use of tribal lands and the inheritance of property located on tribal lands of the Nation, that the power of the tribe to determine these purely internal matters is **exclusive**. *United States v. Charles*, 23 F. Supp. 346 (W.D.N.Y. 1938). *Mulkins v. Snow*, 232 N.Y. 47 (1921)(requiring an affirmative demonstration of the lack of tribal jurisdiction before a New York state court may assume jurisdiction). Further, the claimed absence of a specific tribal mechanism for the enforcement of tribal rules or of court judgments does not affect a tribe's exclusive jurisdiction over its members and territory. *Joe v. Marcum*, 621 F. 2d 358 (10th Cir. 1980); and *United States v. Jackson*, 600 F.2d (9th Cir. 1979). There exists a present mechanism to administer matters of inheritance within the Nation, as this court has previously held. *United States v. Charles*, supra.

The Supreme Court has observed that:

> Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509, 111 S. Ct. 905 (1991), (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). Tribes retain their sovereign powers except where restricted by treaty or statute or where the exercise of a

particular power is inconsistent with a tribe's status as a domestic dependent nation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011 (1978). Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079 (1978). "Unless this power is removed by explicit legislation or is given up by the tribe, either expressly or as part of its coming under the protection of the United States, exclusive tribal judicial jurisdiction over reservation affairs is retained." *Cohen's Handbook of Federal Indian Law*, 4.01[2][d](2005 ed.) (citing *United States v. Wheeler*, supra; *Fisher v. Dist. Ct.*, supra). Congressional support for both tribal sovereignty and self-determination has been repeatedly recognized by the Supreme Court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15, 107 S.Ct. 1971 (1987); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856-57, 105 S. Ct. 2447 (1985). Among the elements of inherent authority retained by the tribes are "to prescribe rules of inheritance for their members" *Montana v. United States*, 450 U.S. 544, 564, 101 S. Ct. 1245 (1981), (citing *United States v. Wheeler*, supra, at 322, n. 18); *See, also*, *Jones v. Mehan*, 175 U. S. 1, 29; *United States ex rel. Mackey v. Coze*, 59 U.S. 100 (1885).

In *Jones v. Meeehan* 175 U.S. 1 (1899), the Supreme Court, in a dispute over title between two non-Indians, held that a Chippewa Indian custom of primogeniture should govern a dispute concerning claimed land ownership where several other children were dispossessed of claimed rights of inheritance. In holding that the Chippewa custom that only the first son of the Chief could inherit his goods and land applied, the Supreme Court held that:

> [B]eing a member of an Indian tribe, whose tribal organization was still recognized by the United States, the right of inheritance in [decedent's] land, at the time of his death was controlled by the laws, usages and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior.

Id., at 29-30.

Notably, the Supreme Court in *Jones* cited with approval, an early New York case, *Dole v. Irish*, 2 Barb. 639 (1848), which had held that all personalty owned by a Seneca Indian, in particular, a horse, was governed in its disposition on inheritance by the laws of the Seneca Nation, which at that time also included the Tonawanda Band of the Senecas, and not New York laws. The Court decision in *Dole v. Irish*, was also quoted with approval in *Matter of Patterson v. Council of Seneca Nation,* 245 N.Y. 433 (1927), as stating that "We have not attempted to extend our laws to [Native American] domestic relations or to regulate the manner of their acquiring, holding or conveying property among themselves." *Patterson*, supra, at 440. Thus, it is clear that there has been no effort to abrogate or disturb the tribal laws of inheritance in New York, nor to assume adjudicatory jurisdiction. The Court in *Dole* further held that "the distribution of Indian property according to their customs passes a good title, which our Courts will not disturb; and therefore that the defendant has a good title to the horse in question." *Dole*, supra, at 642-643.

In yet another ancient case, it was held by the Supreme Court in *The New York Indians*, 72 U.S. 761, 769, 5 Wall. 761, 18 L. Ed. 2d 708 (1867) that New York "possessed no power to deal with Indian rights or title." Thus, it is clear that New York State has no general regulatory jurisdiction concerning inheritance or the adjudication of inheritance within tribal

reservation lands.[1] Obviously, this exclusion of State regulatory authority would prevent the application of New York civil laws applicable to both inheritance and will execution under the Estates Powers and Trusts Law of the State of New York, since neither of those could be considered as prohibitory under the regulatory/prohibitory analysis for the application of state laws to tribal lands as set forth in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987). The general presumption is that state law is inapplicable to on-reservation conduct involving only tribe members. *Nevada v. Hicks*, 533 U.S. 353, 362, 121 S. Ct. 2304 (2001).

Moreover, it is well established that "the sovereignty retained by tribes includes 'the power of regulating their internal or social relations.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S. Ct. 2378 (1983) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82, 6 S. Ct. 1109 (1886). It has also been held that this authority includes the "power to make their own substantive law in internal matters and to enforce that law *in their own forums*." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) (citations

[1] Insofar as Public Law 280 led to concurrent civil adjudicatory jurisdiction in Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, it, also, stated for those six states, that:

> those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State

28 U.S.C. § 1360(a).

In contrast, the grant of limited concurrent civil adjudicatory jurisdiction by Congress under 25 U.S.C. § 233 to the New York Courts contained no similar extension into Reservation Lands of the civil regulatory authority of the State of New York.

omitted)(italics added). *See, also*, *Bowen v. Doyle*, 880 F. Supp 99, 112-113 (W.D.N.Y. 1995).

In *Fisher v. District County Court*, supra, the Supreme Court held that a state court could not exercise jurisdiction in an adoption proceeding in which all parties were tribal members because "[i]t would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." 424 U.S. at 386. The Supreme Court presciently observed that to permit state court jurisdiction "would create a substantial risk of conflicting adjudications." *Id.*

Commentators have noted with respect to inheritance that, where, as here, "[w]hen the deceased was domiciled and the property is located within tribal Indian country, the tribe usually has jurisdiction over heirship and probate **exclusive** of state jurisdiction" *Cohen's Handbook of Federal Indian Law* (1982 ed.), at 632 (emphasis added). "Jurisdiction over succession to deceased members' property is an important aspect of tribal sovereignty. Tribes retain **exclusive jurisdiction over inheritance** of individual use and occupancy rights in tribal property." *Cohen's Handbook of Federal Indian Law* 16.05 [1] (2005 ed.), at 1061 (emphasis added). Additionally, it has been observed that "State courts have no jurisdiction over the probate of Indian trust property; such jurisdiction is exclusively federal. In other respects authority is sparse, but an application of *Williams v. Lee*, [supra], would prevent the state from exercising jurisdiction over the probate of non-trust movables of a tribal member (and possibly any Indian) who died domiciled in the Indian country." *West's American Indian Law in a Nutshell* (5th edition), at 219. Notably, also, the negative effect of forcing tribal authorities to adopt a confrontation based system of dispute resolution was discussed at length by, then Professor and, now, Seneca

Nation President, Robert B. Porter in "*Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies,*" 28 Colum. Human Rights L. Rev. 235 (1997).

Significantly, this Court has already ruled against New York State court interference in tribal probate matters concerning tribal lands of the Nation in *United States v. Charles*, 23 F. Supp. 346 (W.D.N.Y. 1938).[2] In *Charles*, a petition was made to State Supreme Court to enjoin the very same Tonawanda Band of Senecas at issue herein from determining the use and inheritance of the right of use of reservation based lands and property following the death of a tribal member. Supreme Court, Genesee County had gone so far as to order a partition and sale of the subject reservation lands. In *Charles*, the United States, on behalf of the tribal member, successfully sued to set aside the deed of partition as an infringement of tribal sovereignty and the rights of the rightful tribal heir as determined by the Chiefs Council. This Court held that:

> The right of a tribe to govern itself in accord with the tribal laws and customs without interference or dictation from state courts has been upheld by the highest courts of New York state.

Id., at 348 (citing *Mulkins v. Snow*, supra; *Patterson v. Seneca Nation*, supra).

This Court further held that the determination of the Council of Chiefs of the Tonawanda Band of Senecas should be upheld since that body was "an established tribunal in accordance with the custom and usage of the tribe for determining the right to possession of tribal lands." *Id*. This Court then went on to hold that "[i]nterference with [the Chiefs Council's] procedures was an unwarranted and unlawful disturbance of the right of the Indians to the free use

[2] Cohen's Federal Handbook of Indian Law (2005), at 1061, cites *United States v. Charles* for the proposition of **exclusive** tribal authority in matters of inheritance.

and enjoyment of its tribal property and a violation of treaties guaranteeing those rights…Until such time as Congress sees fit to change it, any interference with [the probate authority of the Chiefs' Council] either by state legislation or by extension of the jurisdiction of the state courts over internal affairs of Indians on the reservation is an unlawful interference with a governmental function." *Id.*, 348-349. Thus, this Court has clearly held as far back as 1938 that there is absolutely no New York State Court jurisdiction over probate disposition of tribal lands and property on the reservation of the Tonawanda Band of Senecas. A similar holding with respect to the "purely internal affairs" of Seneca Nation Council governmental authority was more recently upheld in *Bowen v. Doyle*, supra. It is difficult to conceive of a matter that could be considered more "internal" to the affairs of the Nation than the use and occupation of it lands.[3]

Thus, it is well established that the jurisdiction of Indian tribes over matters of inheritance is exclusive, that there is no application of New York State laws of inheritance to the lands of the reservation of the Nation and that the Courts of the State of New York may not exercise jurisdiction over matters of title or inheritance concerning the disposition of tribal lands and property on the reservation of the Nation following the death of tribal member residing on tribal land.[4] As a consequence, it is submitted respectfully, that there is a sufficient showing of likelihood of success on the merits for this Court to grant a preliminary injunction in this matter.

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[3] Note that N.Y. Indian Law §55 cites as a concern of the Nation's Chiefs' Council in allotting land to any individual member for personal use an assessment of "so much of the common lands as they shall deem reasonable and an equitable proportion in reference to the whole number not possessing land." Divesting the Nation of exclusive jurisdiction over matters of inheritance would prevent any ongoing or future analysis by it of such well founded concerns. It should also be noted that the enforceability of N.Y. Indian Law §55 is greatly in question based on the legal analysis set forth herein.

[4] The anticipated, but unprecedented, claim that 25 U.S.C. §233 confers probate jurisdiction is addressed at Point II.

B. 25 USC §233 DOES NOT CONFER JURISDICTION TO NEW YORK STATE COURTS IN PROBATE MATTERS <u>ARISING ON TRIBAL LANDS</u>

Congress did not confer jurisdiction to New York State Court in probate matters arising from the death of tribal members concerning tribal lands and property under 25 U.S.C. §233.[5] Thus, there is no basis under 25 U.S.C. §233 for New York State Courts to exercise

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[5] 25 U.S.C. §233, entitled "Jurisdiction of New York State courts in civil actions" states as follows:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: Provided, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or

jurisdiction.

Notably, a similar argument to this effect was raised and rejected in *Bowen v. Doyle*, supra, for three reasons: (1) tribal jurisdiction over internal affairs cannot be abrogated absent a "clear and plain" showing that Congress intended to interfere with those rights; (2) federal courts have consistently rejected construction of treaties and statutes that would terminate or diminish the authority of Indian tribes over their internal affairs; and (3) the rationale of *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102 (1976), limiting state jurisdiction to "private civil jurisdiction between Indians" in state court is controlling, and when applied herein to §233 requires a finding that no jurisdiction is granted to state Courts over tribal land based probate matters. Additionally, it should be noted that unlike Public Law 280 ("PL 280), analyzed in *Bryan v. Itasca County*, supra, § 233 is far more limited and does not contain a grant of general civil regulatory jurisdiction over tribal lands. (See, footnote 1, infra.) Thus, it must be concluded that the retained sovereignty of the tribal authorities over probate matters as discussed above remains undisturbed by Congressional action in enacting §233. Moreover, the terms of §233 include utterly no reference to probate matters, but are limited to "civil actions and proceedings **between** Indians and between one or more Indians and any other person", a definition which clearly does not include probate jurisdiction over tribal based property and the consequential court mediated probate title transfer. Indeed, matters of inheritance arising from the death of a tribal member would not necessarily be "between Indians" at all due to the matrilineal descent of tribal membership in the Nation. *See*, *Patterson v. Seneca Nation*, supra.

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events transpiring prior to September 13, 1952.

Further supporting the lack of probate jurisdiction under §233, PL 280, which Court decisions counsel is to be read in conjunction with §233, specifically states that it **does not grant probate jurisdiction** over property located on tribal lands. 25 U.S.C. §1322 (b)("Nothing in this section… shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [tribal based] property or any interest therein"). *See, also*, *Bowen v. Doyle*, supra, at 119 (citing *United States v. Burns*, 725 F. Supp 116, 125 (N.D.N.Y. 1989)). Thus, it would be an extreme reading of §233 to conclude that it grants jurisdiction to New York state courts over tribal based probate matters while its contemporaneous companion statute, PL 280, a similar and even broader provision applicable to other states, clearly and specifically does not.

As this Court held in *Bowen v. Doyle* with respect to a foreign adjudication concerning purely internal affairs:

> [i]t makes no difference that the State Court would be applying only tribal law. Indeed, the threat to tribal sovereignty arises from that very fact: the Nation's internal affairs would be controlled by the rulings and interpretations of the Nation's law by a court of a different sovereign…[T]he adjudication of any case arising on the reservation and involving Indians 'by any non-tribal court…infringes upon tribal lawmaking authority.' Such an adjudication 'cannot help but unsettle a tribal government's ability to maintain authority.

Bowen v. Doyle, supra, at 122, quoting LaPlante, 480 U.S. at 16,) (citing *Santa Clara Pueblo v.* 436 U.S., at 60). In probate matters, such interference by a foreign forum would be particularly egregious since, according to commentators, "[t]ribal inheritance laws are often unwritten." *Cohen's Handbook of Federal Indian Law* (1982 ed.), at 632, n. 2, (citing Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 Iowa L. Rev. 304, (1935)(addressing the Hopi

matrilineal inheritance customs); and Hagan, *Tribal Law of American Indian*, 23 Case & Com. 735 (1916). Consequently, the construction and application by a foreign forum of potentially unwritten and non-common law customs such as matrilineal inheritance infringes upon and undermines the sovereignty of the Nation.

In construing the import of §233, it is important to note that "[j]urisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " *Palmore v. United States*, 411 U.S. 389, 396, 93 S.Ct. 1670, 1675(1973) (quoting *Cheng Fan Kwok v. Immigration & Naturalization Serv.*, 392 U.S. 206, 212, 88 S.Ct. 1970, 1974 (1968)). Further, "statutes passed for the benefit of dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40 (1918).

Plainly, as addressed above, the right of tribal authorities to determine and adjudicate the probate of tribal land and property located thereon is both a retained sovereign right and a right protected by treaty with the United States. In matters arising from the retained sovereignty of a tribe under treaties with the United States, the Supreme Court has held that in order for a Court to hold that an Indian treaty right has been subsequently abrogated by statute, it is "essential" that there be:

> clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating that treaty.

United States v. Dion, 476 U.S. 734, 740, 106 S.St. 2216 (1986).

Nowhere, in the language or legislative history of §233 is there any expression or even discussion of abrogating tribal probate authority over tribal lands and tribally based property. In fact, as discussed in *Bowen v. Doyle*, supra, at 120-122, it was primarily the decision in *United State v. Forness*, 125 F.2d 928 (2d Cir. 1942), and its holding that neither the law of the State of New York nor the provisions of the New York Civil Practice Act could be applied to the Seneca Indians that led to the passage of §233, not a concern about Indian nations controlling the probate of deceased tribal members, an historically internal affair. "There are no indications in the legislative history that Congress intended to permit the State of New York to interfere in internal tribal affairs with the limited grant of civil court jurisdiction." *Id.*, at 121.

As was noted by the Court in *Bowens v. Doyle*, supra, at 118, §233 does not provide for state court jurisdiction over the Indian nations themselves. Thus, the most practical of questions arises as to how a state court may enforce a probate Order over tribally located property if that were the intent of §233 without infringing upon and flouting tribal sovereignty. See, eg. *Joe v. Marcum*, supra, (limiting state garnishment actions on tribal lands). The fact that no such mechanism for enforcement exists or is even discussed is clear evidence that Congress did not intend to confer jurisdiction over this type of internal affair and that no state court probate jurisdiction exists under §233 for tribal reservation land or any portable property located thereon. As a consequence, it is submitted respectfully, that there is a sufficient showing of likelihood of success on the merits with respect to a claimed application of 25 U.S.C. §233 for this Court to grant a preliminary injunction in this matter.

C. STATE COURT SHOULD APPLY THE RULE OF ABSTENTION AND REFRAIN FROM INTERVENING IN A PURELY INTERNAL TRIBAL PROBATE DISPUTE.

In tribal matters, both federal and state courts are required to exercise the Rule of Abstention where their jurisdiction would interfere with tribal self-government. *Iowa Mut. Ins. Co. v. LaPlante*, supra, at 16; *National Farmers Union Ins. Co. v. Crow Tribe*, supra; *Fisher v. District County Court*, supra, *Bowen v. Doyle*, supra, at 123-126; *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992) ("both state courts and federal courts would undermine the ability of the tribes to govern themselves by exercising jurisdiction over activities taking place on tribal lands"). The tribal court exhaustion doctrine recognizes that Indian tribes retain sovereignty over both their members and their territory. *Id*. Moreover, the tribal court exhaustion doctrine applies even where there is no action pending in tribal forums and does not dictate that the type of forum be analogous to Anglo-American Courts. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), *Wellman v. Chevron, U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987), *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997); *See, also*, *United States v. Charles*, supra. (recognizing the Chiefs' Council of the Nation as the appropriate forum for resolution of issues of inheritance of the right of use of tribal lands and property thereon). Further, it is for tribal authorities to initially determine the nature and extent of applicable tribal law and procedures prior to any non-tribal forum taking jurisdiction. *United States v. Charles*, supra; *Basil Cook Enterprises, Inc.,* supra. In this matter, insofar as the appropriate authority of the Nation is acting on these claims, the Rule of Abstention applicable to state courts requires that any disposition in state court await the outcome of an exhaustion of tribal remedies before proceeding. As a consequence, it is submitted respectfully, that there is a sufficient showing of likelihood of success

on the merits for this Court to grant a preliminary injunction in this matter.

D. EVEN IF A BALANCING OF INTERESTS TEST IS APPLIED, THE STATE COURT SHOULD CLEARLY REFRAIN FROM INTERVENING IN A PURELY INTERNAL TRIBAL PROBATE MATTER AS AN INFRINGEMENT ON TRIBAL SOVEREIGNTY.

Williams v. Lee, supra, makes plain that the overwhelming concern in the evaluation of the effect on tribal sovereignty of the attempted application of state law to reservation lands is the infringement upon the right of tribal members "to make their own laws and be ruled by them." *Id.*, at 220. The consequences of a foreign forum construing largely unwritten and non-common-law customs, usages and rules and distributing the individual rights to reside on tribal land based on that foreign forum's assessment of both the meaning and import of these customs and laws could not be more corrosive to tribal sovereignty. For the reasons set forth in Point II(A), (B) and (C), above, it is evident that a balancing of interests test clearly favors the interests of the tribe in retaining jurisdiction over the use, occupation and inheritance of its limited quantity of land. The application of state law and adjudicatory authority to reservation lands can occur only (1) when Congress has authorized it, or (2) when such laws do not infringe upon Indian self government or are not preempted by Federal Law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980). Since neither of the foregoing two exceptions applies, it is evident that there is no subject matter jurisdiction in the state courts of the State of New York. Consequently, the plaintiff has demonstrated a likelihood of success on the merits sufficient for this court to grant a preliminary injunction herein.

POINT III

SERIOUS QUESTIONS GOING TO THE MERITS AND A BALANCE OF HARDSHIPS WEIGH IN FAVOR OF PLAINTIFF

Under federal law and by virtue of Native-American sovereign rights,[6] plaintiff is entitled to individually enjoy the benefits of government by the institutions of the Nation. The implications of a New York state court assuming jurisdiction over what has customarily and historically been an exclusively internal area of adjudicatory jurisdiction for the Nation raises serious concerns, which are outlined in Points II (A), (B), (C) and (D). This inconsistency of jurisdiction will result in a chilling effect on plaintiff's exercise of her Native American rights and may lead to conflicting adjudications, conflicting directions and potential imprisonment. The hardship of an attorney, let alone a lay person, making a determination of which forum from which to seek counsel or to obey in this context clearly militates in favor of the Court acting to halt the potential consequences of loss of business, property and Native American rights pending a

[6] For nearly two centuries the Supreme Court has recognized Indian tribes as "distinct, independent political communities," qualified to exercise many of the powers and prerogatives of self-government. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008) (citing *Worcester v. Georgia*, 31 U.S. 515 (1832); *United States v. Wheeler*, 435 U.S. 313, 322-323, 98 S. Ct. 1079, 1085 (1978)). Supreme Court cases are replete with recognition of the role Native American sovereignty plays in restricting State encroachments upon an individual's Native American rights. *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717 (1975) ("[I]ndian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are 'separate people' possessing 'the power of regulating their internal and social relations . . .'.") (quoting *United States v. Kagama*, 118 U.S. 375, 381-382, 6 S. Ct. 1109, 1113 (1886)); *McClanahan*, 411 U.S. at 173, 93 S. Ct. at 1263.

determination of the appropriate forum for the disposition of inheritance issues for tribal based property.

Where the life of a litigant's business or enterprise is threatened, courts have recognized that those hardships tip in favor of the party requesting injunctive relief. *See Random House v. Rosetta Books, LLC*, 283 F.3d 490 (2d Cir. 2002). As set forth above and in the accompanying affidavit of Ms. Peters, plaintiff's current business will be destroyed if the provisions of the Surrogate's Court's Order are enforced.

Plaintiff will not have a business to operate, let alone provide work for the people who currently run its day-to-day operations. On the other hand, if plaintiff's request for a preliminary injunction is granted, and, assuming, for the sake of argument, that the Surrogate Court is found to have jurisdiction, the only harm to those interested in the probate proceeding is that they will be delayed in acquiring their interests. Because of the profound harm that will befall plaintiff if the Surrogate's Court's Orders and future orders are enforced, and the slight harm, if any, to those interested in the probate proceeding, the balancing of the equities tip in plaintiff's favor.

The Supreme Court has said that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 667 (1978) (citing *North Carolina v. Pearce*, 395 U.S. 711, 738-739, 89 S. Ct. 2072, 2083 (1969), *overruled in part on other grds.*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201 (1989) (finding that the enactment of two inconsistent statutes, one legalizing conduct and the other criminalizing the same conduct creates "doubt, ambiguity, and

uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow, and would thus violate one of the first principles of due process"); *see also Wright v. Georgia*, 373 U.S. 284, 292, 83 S. Ct. 1240, 1245 (1963) ("a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute"). It is precisely between this Scylla and Charybdis of competing jurisdictions where plaintiff finds herself now. Consequently, it is submitted respectfully that both a serious question and a balancing of hardships are present sufficiently for this Court to grant both a temporary restraining Order and a preliminary injunction as sought herein.

CONCLUSION

For these reasons, as well as those outlined in the supporting papers and other evidence tendered, it respectfully is requested that the Court grant plaintiff's motion for a preliminary injunction and enjoin defendants as set forth herein, together with granting to plaintiff such other and further relief as the Court deems just and proper.

Dated: March 23, 2012
Buffalo, New York

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