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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WELLS FARGO ADVISORS, LLC, a Missouri limited liability corporation, JASON ALLEN, an individual, and MICHAEL KRATZKE, an individual, Plaintiffs, v. THE HONORABLE RUTH KOLHOSS, an individual and Presiding Judge of the Moapa Tribal Court in and for the Moapa Band of Paiutes, Defendant.	Case No.: 2:13-cv-00190-MMD-PAL **PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION** **(EMERGENCY AND EXPEDITED HEARING REQUESTED)**

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Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Wells Fargo Advisors, LLC, James Allen, and Michael Kratzke (collectively, "WFA") move this Court for a temporary restraining order and preliminary injunction to prevent Defendant Hon. Ruth Kolhoss from continuing to improperly assert civil adjudicatory jurisdiction over WFA, thereby subjecting WFA to burdensome, lengthy, costly, and unwarranted proceedings in Moapa Tribal Court in and for the Moapa Band of Paiutes in contravention of federal law.

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INTRODUCTION AND STATEMENT OF GOOD CAUSE IN COMPLIANCE WITH LR 7-5

The undersigned has attempted to confer with Defendant orally, by telephone, by facsimile and by e-mail. WFA filed its Complaint in this matter on February 5, 2013. Thereafter, Plaintiffs took steps to serve the Complaint upon Defendant as quickly as possible, including sending the Complaint by both fax and email to her clerk at the Tribal Court. The undersigned also called Defendant at her other place of employment, the Moapa Justice Center, where she serves as a Justice of the Peace for Clark County.

Plaintiffs are seeking a temporary restraining order to avoid irreparable injury that will result if Defendant continues to violate federal law and subject Plaintiffs to improper entanglement in burdensome and costly Tribal Court proceedings.

Defendant is the Presiding Judge of the Moapa Tribal Court in and for the Moapa Band of Paiutes ("Tribe"). Defendant continues improperly to assert civil adjudicatory jurisdiction over Plaintiffs, a non-Indian company and non-Indian individuals, in connection with an *Ex Parte* action brought against WFA in Tribal Court. *See* Complaint, ¶ 1 and Exhibit F thereto, November 20, 2012 "EX PARTE INJUNCTIVE ORDER CEASE AND DESIST – Misappropriation of Tribal Funds Account 6700-0679 And any other unknown accounts belonging to the Moapa Band of Paiutes," *In the Matter of Wells Fargo Financial Advisors*, No. MPCV 1105-12 ("Tribal Court action"). The Tribal Court is not vested with the power to adjudicate the claims brought against WFA in the Tribal Court action because WFA has not consented to Tribal Court jurisdiction and (i) any claims the Tribe might have relating to its WFA accounts are subject to binding and enforceable arbitration

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agreements; (ii) WFA, Allen and Kratzke[1] are all non-Indians, and (iii) all the relevant events took place in Las Vegas, NV or more distant locations.

Despite the substantial body of federal law supporting WFA's Tribal Court Motion to Dismiss For Lack of Subject-Matter Jurisdiction presented to Defendant, Defendant has evinced her refusal to accept the limitations imposed on Tribal jurisdiction by federal law and instead, intends to burden WFA in Tribal Court merits proceedings on February 7, 2013. *Compare* Complaint Exhibit G *with Rolling Frito-Lay Sales LP v. Stover*, 2012 U.S. Dist. LEXIS 9555, *16 (D. Ariz. Jan. 26, 2012) (awarding preliminary injunction against continued tribal court litigation activity where there was no jurisdiction over non-Indian defendant). Defendant's continuing improper assertion of authority over WFA is *ultra vires* and therefore actionable in this Court. *Ex Parte Young*, 209 U.S. 123 (1908); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) ("there is an established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power'")(quoting *MacArthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002)); *accord Burlington N. R.R.. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991) ("tribal sovereign immunity does not bar suit from prospective relief against tribal officers allegedly acting in violation of federal law").

It is appropriate at this time for this Court to enjoin any further violation of federal law by Defendant because WFA has exhausted its available Tribal Court remedies as required by *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat. Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). In any event, no exhaustion of Tribal Court remedies is necessary here. As a prudential rule based on comity, the exhaustion rule is not without exception. Relevant here, exhaustion is not

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[1] Jason Allen served as part of the financial advisor team for the Tribe from 2009 until the Tribe determined it no longer desired WFA's services. Michael Kratzke is an administrative manager for WFA. Because both Allen and Kratzke were WFA employees at all relevant times, Allen, Kratzke and WFA are referenced collectively as "WFA" in this Complaint.

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required if it is "clear that the tribal court lacks jurisdiction," such that "the exhaustion requirement would serve no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

Ongoing violation of federal law is plainly Defendant's intent. Defendant continues to assert unbounded ability to impose burdensome, costly and unwarranted proceedings on WFA. Defendant's *Ex Parte* Order demands that WFA appear in Tribal Court (now set for February 7, 2013 at 2 p.m.), apparently with 11 years of account history by bringing "witnesses, books, receipts or other writings" to rebut whatever the Tribe's unsupported oral motion may have been to precipitate the *Ex Parte* Order in order to avoid "default judgment" on vague 'claims' that have never been articulated in writing to anybody, including Defendant.

Defendant's effort to hail WFA before her on February 7, 2013 is outside the scope of her authority. *Any* action Defendant might take vis-à-vis WFA in the Tribal Court action is outside the scope of her authority.

Accordingly, WFA respectfully moves that this Court grant emergency injunctive relief restricting any further proceedings in the Tribal Court action to prevent irreparable harm to Plaintiffs, namely the improper imposition of burdensome and costly proceedings in a forum without jurisdiction.

STATEMENT OF FACTS

1. Plaintiff Wells Fargo Advisors, LLC is a Missouri limited liability corporation with its principal place of business in St. Louis, Missouri and a branch office in Las Vegas, Nevada. It or its predecessors has serviced the Tribe's investment accounts for the last 11 years from this branch. (Compl. ¶ 5.)

2. Plaintiff Jason Allen is an individual and a Nevada resident. He served as a financial advisor to the Tribe during his employment with WFA from 2009 to November 2012. (*Id.* at ¶ 6.)

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3. Plaintiff Michael Kratzke is an individual and a Nevada resident. At all relevant times, Mr. Kratzke has been an administrative manager for WFA. He has never been to the Moapa Indian Reservation and never directed trades in the Tribe's accounts. (*Id.* at ¶ 7.)

4. Defendant is an individual and a Nevada resident. Defendant serves as Presiding Judge of the Moapa Tribal Court in and for the Moapa Band of Paiutes. (*Id.* at ¶ 8.)

5. The Tribe has maintained investment accounts managed by Ms. Barbara Allen at various investment firms over a period of many years, including, upon information and belief, at Smith Barney and at Sutro & Co., more than 11 years ago. (*Id.* at ¶ 15.) Those firms are unrelated to WFA. (*Id.*)

6. Since 2002, the Tribe's investment accounts have resided with WFA and its legal predecessors, First Union Securities, Inc. and Wachovia Securities. WFA, First Union Securities, Inc. and Wachovia Securities, Inc. are referred to collectively as "WFA" hereinafter because WFA is the legal successor to those entities.[2] (*Id.* at ¶ 16.)

7. Until Ms. Allen's retirement from WFA in March 2012, she managed the Tribe's accounts with her team, which included, at various times, Plaintiff Jason Allen (her son), and others. (*Id.* at ¶ 17.) As noted above, Plaintiff Kratzke is an administrative manager for WFA.

8. Ms. Allen met with Tribal leaders and staff often over the many years she managed the Tribe's accounts. (*Id.* at ¶ 18.) The Tribe never expressed any dissatisfaction with those services. (*Id.*)

9. The Tribe has never attempted to regulate, through licensing mechanisms or otherwise, Ms. Allen, Mr. Allen, Mr. Kratzke, or any other WFA personnel. (*Id.* at ¶ 19.)

10. In August 2012, the Tribe informed Plaintiff Jason Allen that the Tribe no longer desired WFA's services and wished to transfer its accounts to Wells Fargo Bank. (*Id.* at ¶ 22.) Mr.

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[2] On September 4, 2001, First Union Corporation and Wachovia Corporation merged to form the new Wachovia Corporation ("Wachovia"). It served retail brokerage clients under its affiliate Wachovia Securities, LLC. The merger between Wachovia by Wells Fargo & Co. was completed on or around December 31, 2008. Wachovia Securities, LLC became an indirect subsidiary of Wells Fargo & Co. On May 1, 2009 Wachovia Securities, LLC officially changed its name to Wells Fargo Advisors, LLC ("Wells Fargo Advisers" or "WFA").

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Allen ceased all trading in the Tribe's accounts following the Tribe's direction. (*Id.*) Only one narrow exception has occurred thereafter, when Mr. Allen made three trades in November 2012 at the Tribe's express direction. *See* Complaint Exhibit D.[3] Despite the fact that Chairman Anderson had directed those trades, they appear nonetheless to be the basis for the Tribal Court action. *See generally* Complaint Exhibit F; Compl. ¶ 22.

11. After the Tribe indicated to Mr. Allen that his services were no longer desired in August 2012, the Tribe submitted some paperwork to Wells Fargo Bank to establish new accounts and request transfer of the Tribe's WFA investments to Wells Fargo Bank. (*Id.* at ¶ 23.)

12. The Tribe's requested transfer to Wells Fargo Bank ultimately failed because the Tribe's transfer request included only two authorizing signatures, but the Tribe's Resolution and Appointment of Wells Fargo Bank required a minimum of four signatures for any action.[4] (*Id.* at ¶ 24.) Ultimately, the Tribe exercised its sovereign prerogative not to resubmit the transfer request to Wells Fargo Bank with the required number of signatures, but has instead determined to contract for the services of another firm. (*Id.*)

13. The Tribe has never filed a complaint with WFA, an arbitration organization or even with Defendant. (*Id.* at ¶ 25.) Rather, upon information and belief, Defendant issued her *Ex Parte* Order against WFA upon a same-day oral motion made by the Tribe's legal administrator in November 2012, without any reference to basic jurisdictional facts, binding federal law, or even the simplest written statement identifying the Tribe's concerns. (*Id.*)

14. Defendant's *Ex Parte* Order references a "long history of unauthorized transactions that appear to be churning," but identifies no allegedly offending transactions other than the three expressly authorized in October 2012 to support the Tribe's transfer request. (*Id.* at ¶ 26.)

15. Upon receipt of the *Ex Parte* Order, WFA has tried unsuccessfully to determine the Tribe's specific claims, if any, and to amicably resolve any concerns. (*Id.* at ¶ 27.)

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[3] The Tribe provided specific instructions for the transfer, including requesting liquidation of specifically-listed securities that could not be transferred on an in-kind basis. Complaint Exhibit D, p.3.

[4] Compare Complaint Exhibit D, p.4 with Complaint Exhibit E, p.1.

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16. On February 4, 2013, WFA received another transfer request on behalf of the Tribe, this time from Nevada State Bank. (*Id.* at ¶ 28.)

17. At all times, it has been understood and agreed by the Tribe that any disputes with regard to the Tribe's investment accounts would not be subject to Tribal Court jurisdiction but be subject to binding arbitration as is typical in the securities industry. (*Id.* at ¶ 29.)

18. Eleven years ago, the Tribe notified WFA that: (i) the Tribe had full power and authority to enter into account agreements with WFA; (ii) all steps necessary for execution, delivery and performance of the account agreements had been taken; and (iii) the Tribe had provided a valid and binding waiver of sovereign immunity for arbitration and arbitration enforcement. Complaint Exhibit A, p. 1; ¶ 30. The Tribe provided its official governmental resolutions evidencing that its representations were authorized under Tribal law. Complaint Exhibit A, pp. 2-4; Compl. ¶ 30. Further, the Tribe, through former Chairman Swain, executed the "Indian Tribal Government Supplemental Documentation" which provided:

> *Tribe Agrees to Arbitrate. The Tribe recognizes that:*
>
> - *Arbitration is final and binding on the parties.*
> - *The parties are waiving their right to seek remedies in court, including the right to jury trial. . . .*
>
> *The Tribe specifically agrees and recognizes that all controversies which may arise between [WFA] and the Tribe, concerning any transaction, account or the construction, performance or breach of any agreement between [WFA] and the Tribe,* ***whether entered into prior, on or subsequent to the date hereof****, shall be determined by arbitration to the full extent provided by law.*

Complaint Exhibit A, p.5 (emphasis supplied) (repeated on p. 8).

19. The Tribe further agreed:

> *The Tribe hereby expressly waives its sovereign immunity from suit or arbitration should an action be commenced on any agreement between the Tribe and [WFA] or regarding the subject matter of any agreement between the*

> *Tribe and [WFA], and hereby consents to the jurisdiction of any court of competent jurisdiction and to the process and orders of arbitrators in connection with any such action, including, in particular, in any action to compel arbitration in accordance with the arbitration agreements, above, and the corresponding provision of the Tribal Council resolution authorizing such arbitration . . .*

Complaint Exhibit A, p.6; Compl. ¶ 31. The Tribe also agreed that its waiver of sovereign immunity for purposes of arbitration and arbitration enforcement was "irrevocable." Complaint Exhibit A, p. 8.

20. The Tribe expressly reaffirmed its commitment to final and binding arbitration in its January 2008 Wachovia account documents, again executed by former Chairman Swain. Complaint Exhibit B, pp. 2, 11; Compl. ¶ 32.

21. In October 2012, the Tribe again affirmed to Wells Fargo Bank its continuing waiver of sovereign immunity "to legal action, including without limitation, a lawsuit to enforce arbitration provisions contained in any of the Investment Management Account Agreements, brought against the Bank by the Tribe or against the Tribe by Bank and/or Bank's affiliates, successors, or assigns and arising from or in connection with any of the products, services, or activities contemplated in the Investment Management Account Agreements . . ." Complaint Exhibit C, p.1; Compl. ¶ 33.

22. The Tribe's repeated agreement to arbitrate and supporting waivers of sovereign immunity were, at all times, in keeping with investment industry norms and standards. (*Id.* at ¶ 34.)

23. Throughout the known history of the Tribe's accounts managed by Ms. Allen and others, the Tribe has clearly, expressly, unequivocally and irrevocably agreed to valid and binding arbitration with respect to any account-related disputes and has provided valid and enforceable waivers of sovereign immunity to enforce those arbitration provisions. (*Id.* at ¶ 35.)

24. WFA has never consented or agreed to adjudicate any account-related or other disputes between it and the Tribe before the Tribal Court. (*Id.* at ¶ 36.)

25. All WFA trading and transaction with respect to the Tribe's accounts took place in Las Vegas, Nevada or more distant locations. (*Id.* at ¶ 37.)

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26. WFA has never maintained a Moapa, Nevada office or taken any account actions from that location. (*Id.* at ¶ 38.)

27. On November 20, 2012, Defendant issued the "EX PARTE INJUNCTIVE ORDER CEASE AND DESIST – Misappropriation of Tribal Funds Account 6700-0679 And any other unknown accounts belonging to the Moapa Band of Paiutes," (Complaint Exhibit F, "*Ex Parte* Order"), in which she summarily concluded the Tribal Court "has both personal, civil and subject matter jurisdiction over how WELLS FARGO FINANCIAL ADVISORS, Jason Allen and Mike Kratzke have handled the tribe's investment accounts." Complaint Exhibit F, p. 1; Compl. ¶ 39.

28. Defendant's *Ex Parte* Order makes no mention of the lack of consent to Tribal Court jurisdiction, exclusive and binding arbitration agreements between the Tribe and WFA, or where the actions giving rise to any Tribal claims occurred. (*Id.* at ¶ 40.) Nor does the *Ex Parte* Order identify any legal basis for Tribal Court jurisdiction over WFA whatsoever. (*Id.*)

29. Defendant's *Ex Parte* Order demands that WFA appear in Tribal Court apparently with 11 years of account history, without regard to any concept of statutes of limitation, by bringing "witnesses, books, receipts or other writings" to rebut whatever the Tribe's oral motion may have been to precipitate the *Ex Parte* Order in order to avoid "default judgment." (*Id.* at ¶ 41.)

30. Defendant has not acted, and indicated she will not act, with respect to WFA's February 4, 2013 Tribal Court submission on subject-matter jurisdiction which demonstrates that Defendant's unsupported jurisdictional conclusions, as stated in the *Ex Parte* Order, were incorrect. (*Id.* at ¶ 42.) Rather, Defendant has ordered that WFA appear in Tribal Court on February 7, 2013 to defend the entire 11-year history of the Tribe's accounts without any clue, much less a written complaint, identifying what the Tribe's problem with WFA is. (*Id.*)

31. Defendant's limitless and improper *Ex Parte* Order is extremely burdensome to WFA, Allen and Kratzke. (*Id.* at ¶ 43.)

32. WFA could not participate in the hearing scheduled before the Tribal Court on February 7, 2013, because such participation would burden WFA with the risk of a judicial determination that such participation means that WFA has waived its right to arbitration. *See, e.g.*,

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Forrester v. Penn Lyon Homes, Inc., 553 F.3d 340 (4th Cir. 2009) (waiver of arbitration agreement due to participation in litigation proceeding).

ARGUMENT

WFA is entitled to a temporary restraining order and a preliminary injunction preventing Defendant from infringing WFA's rights to be free from improper Tribal Court jurisdiction with the scheduled February 7, 2013 hearing. WFA is also entitled to a preliminary injunction enjoining Defendant from further violation of federal law in connection with any Tribal Court proceedings against WFA because WFA, Allen and Kratzke are all entitled to exclusive, binding and enforceable arbitration under the Tribe's contracts with WFA and no contractual or other basis exists for the Defendant's civil adjudicatory jurisdiction over the non-Indian Plaintiffs.

To obtain a preliminary injunction, WFA must show that: (1) it will suffer irreparable harm if injunctive relief is not granted; (2) it is likely to succeed on the merits; (3) the balance of equities tips in favor of the moving party; and (4) granting the injunction is in the public interest. *Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994). Alternatively, this Court may issue injunctive relief if it finds: (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000). A "serious question" is one for which the moving party has a "fair chance" of success on the merits. *See Stanley*, 13 F.3d at 1319. In the instant case, WFA is entitled to a temporary restraining order and preliminary injunction under either test.

Moreover, injunctive relief is especially warrented where, as here, a party has been improperly subjected to Tribal Court proceedings. *Crowe & Dunlevy*, 640 F.3d at 1158; *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *16. This is because a party seeking injunctive relief under Fed. R. Civ. P. 65 must demonstrate irreparable harm, meaning that "money damages alone will not suffice to restore the moving party to its rightful position." *Clark Pacific v. Krump Constr., Inc.*, 942 F.Supp. 1324, 1346 (D. Nev. 1996). No money damages would be available against the Tribe,

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which has sovereign immunity, and any further entanglement in Tribal Court proceedings would require WFA, Allen and Kratzke to endure the loss of the very federal rights they seek to protect in the instant action.

A. WFA HAS SATISFIED EACH OF THE PREREQUISITES FOR INJUNCTIVE RELIEF.

1. There Is a Substantial Likelihood That WFA Will Prevail on the Merits of Its Claims.

Where a tribal court plainly lacks jurisdiction over a non-Indian, the non-Indian's "probability of success on the merits is without question." *Crowe & Dunlevy*, 640 F.3d at 1158. And the lack of Tribal Court jurisdiction over WFA could not be more clear. As detailed in WFA's Complaint, it is a matter of hornbook federal law that there is no tribal court jurisdiction over non-Indian defendants with regard to conduct outside an Indian reservation that does not implicate a tribe's ability to continue to exist or govern itself. *See Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008). The United States Supreme Court's seminal cases on tribal civil jurisdiction -- *Montana*, *Strate*, *Atkinson Trading, Hicks*, and *Plains Commerce Bank* -- have been universally interpreted exactly as WFA has set forth in its Complaint at paragraphs 44-57. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, §§ 7.01, 7.02 (2005 ed. & Supp. 2009). The very limited boundaries of tribal jurisdiction prescribed by the Supreme Court's precedents apply with equal force in the context of preliminary injunctions issued against tribal courts improperly asserting jurisdiction over non-Indians. *Crowe & Dunlevy*, 640 F.3d at 1158; *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *16.

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a. The Defendant has no civil adjudicatory jurisdiction over the non-Indian Plaintiffs.

There is a strong presumption against tribal jurisdiction over non-Indians. This presumption has become only clearer and stronger since the Supreme Court first extended its implicit divestiture jurisprudence to the civil context with *Montana* in 1981:

> The Court's most recent pronouncement leaves no ambiguity. The Court said that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," *Plains*, 554 U.S. at 328, 128 S. Ct. at 2718, and that "the general rule [of *Montana* . . .] restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id.* at 328, 128 S. Ct. at 2719 (emphasis added). If there were any doubt about this, the Court then relied on *Montana's* general proposition to state that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Id.* at 330, 128 S. Ct. at 2720.

Rolling Frito-Lay, 2012 U.S. Dist. LEXIS 9555, *7-8 (quoting *Plains Commerce Bank).*

Montana declared that in civil cases, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 563-565. Of course there has been no such congressional delegation to the Tribe here. Moreover, "Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*." *Hornell Brewing Co. v. Rosebud Sioux Tribe*, 133 F.3d 1087, 1091 (8th Cir. 1998) (emphasis in original). "The mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create jurisdiction of a tribal court under its powers of limited inherent sovereignty." *Id.*; *see also Plains Commerce Bank*, 554 U.S. at 332 ("*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's

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sovereign interests") (underlined emphasis supplied, italicized emphasis in original). The *Strate* Court recognized that "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances," 520 U.S. at 445, and thus tribal regulatory powers and adjudicatory powers are co-extensive; "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453. Accordingly, Defendant may not assert adjudicative jurisdiction over a non-Indian company that the Tribe lacks any corresponding power to regulate. Defendant has never articulated any basis upon which she believes the Tribe would be entitled to regulate the non-Indian Plaintiffs or their actions in Las Vegas or other more distant locations. In juxtaposition, "a tribal court's power is limited to that which is needed to (1) protect self-government, and (2) 'control internal relations.'" *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *10 (quoting *Montana*, 450 U.S. at 564).

b. Neither of the *Montana* exceptions justifies the Defendant's continued exercise of civil adjudicatory jurisdiction over WFA.

Montana provided two narrow exceptions to the general rule that Indian tribes lack civil jurisdiction over non-members on tribal lands:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566. Neither applies here. Any activities at issue here occurred far beyond Tribal lands, where *Montana* permits the Tribe no civil jurisdiction whatsoever. The two *Montana* exceptions do not apply because WFA has *never* expressly consented to the civil jurisdiction in Tribal Court and WFA's willingness to agree to exclusive arbitration in its contracts with Tribe

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cannot somehow be inferred to signal some acquiescence to general Tribal jurisdiction. Indeed, WFA specifically did not submit to Tribal jurisdiction and instead agreed on arbitration as a forum to adjudicate disputes and the application of state law. (*See* Compl. Ex. B.) Moreover, WFA has never submitted to any Tribal licensing or other regulatory processes.

The Supreme Court's more recent cases clarify how very narrowly the Court views the *Montana* exceptions. In *Atkinson Trading*, 532 U.S. 645, the Court held that the Navajo Nation lacked civil jurisdiction to levy a tax on non-member guests of a hotel located on fee lands within the exterior boundaries of the Navajo Indian Reservation. The Court rejected the argument that the Navajo Nation had satisfied *Montana*'s "consensual relationships" exception by providing various governmental services, including frequently used emergency response services, to the petitioner hotel and its guests, finding "the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Id.* at 655. Notably, the governmental services provided by the Navajo Nation to the hotel were far more comprehensive than any in the case at bar (where WFA received no services from the Tribe whatsoever).

Additionally, the Court rejected the non-member's compliance with a general licensing regime as sufficient to establish a consensual relationship:

> *Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. In *Strate*, for example, even though respondent A-1 Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident, we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember "was not a party to the subcontract, and the Tribes were strangers to the accident." 520 U.S. at 457 (internal quotation marks and citation omitted). A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another -- it is not "in for a penny, in for a Pound." E. Ravenscroft, The Canterbury Guests; Or A Bargain Broken, act v, sc. 1.

532 U.S. at 656. Therefore, WFA's compliance or not with tribal policies with respect to on-Reservation activities – even if such compliance had occurred – could not give rise to a consensual

relationship triggering the first *Montana* exception. This is because "consent alone is not enough." *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *11. Rather, "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 128 S. Ct. at 2724. No such characteristics may be ascribed to the Defendant's efforts to exert extraterritorial reach over WFA in the Tribal Court action and consequently, the first *Montana* exception does not apply.

The second *Montana* exception is likewise inapplicable to the instant case. The *Atkinson Trading* Court also held the Navajo Nation's hotel occupancy tax as applied to non-members on non-Indian fee lands within the reservation's exterior boundaries was not justified under *Montana*'s second exception. Acknowledging that the hotel was located within a part of the Navajo Reservation that possessed "an overwhelmingly Indian character,"[5] the Court stated that it nevertheless "fail[ed] to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" 532 U.S. at 657 (quoting *Montana*, 450 U.S. at 566). The Court ruled that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." 532 U.S. at 657-658 n.12 (quoting *Montana,* 450 U.S. at 566). Nothing about WFA's investment transactions undertaken pursuant to contract with Tribe imperils the existence of the Tribe. If it did, surely the Tribe would have moved its accounts in fewer than six months after it notified Mr. Allen his services were no longer desired.

The Court's most recent *Montana* doctrine case, *Plains Commerce Bank,* further limits the applicability of the second *Montana* exception to extreme circumstances:

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[5] *Id.* at 657.

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> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S, at 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community.

554 U.S. at 341. No such catastrophe is present here, where WFA is operating *outside* of the Tribe's Reservation. Indeed, any catastrophe is belied by the fact that the Tribal Council has been free to end its relationship with WFA for more than 11 years, but even now, nearly three months after the Tribe initiated this *Ex Parte* action, the Tribe has not done so and instead, continues to maintain its account with WFA.[6] WFA respectfully submits that, under the Supreme Court's precedents, this is not a close case and there is no basis for Tribal Court jurisdiction here.

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c. The Tribe's Binding Agreements To Arbitrate Deprive Defendant of Subject-Matter Jurisdiction Over Any Dispute Between WFA and the Tribe.

The Tribe's *Ex Parte* action against WFA in Tribal Court is entirely inappropriate. The Tribe's contracts with WFA do not contain WFA's consent to Tribal Court jurisdiction for adjudicating disputes or otherwise. Instead, the contracts contain agreements to arbitrate disputes that arise between the parties.

The Tribe's agreements to arbitrate are binding and enforceable under clear United States Supreme Court precedent. *C& L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 420-421 (2001). If any dispute between the Tribe and WFA is to be adjudicated, it must be arbitrated because the Tribe's obligation to submit disputes to arbitration is mandatory. None of the Tribe's account documents contains any exception that would allow the Tribe to avoid arbitrating the issues raised in its *Ex Parte* action.

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[6] WFA is currently processing as required a transfer request received from Nevada State Bank received February 4, 2013.

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To allow the Tribe to thwart its obligation to arbitrate would be improper and would frustrate the worthy purpose of the arbitration clause the Tribe is legally and contractually bound to follow. *See Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (en banc) (noting that arbitration provides a forum for resolving disputes more "flexibly and expeditiously" than litigation). Likewise, in adopting the Federal Arbitration Act ("FAA"), Congress provided that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). As the Supreme Court has explained, the FAA embodies a strong federal policy in favor of arbitration:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . The Arbitration Act establishes that, as a matter of federal law, **any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration**, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or like defense to arbitrability.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24-25 (1983)) (emphasis supplied); *see also Sink v. Aden Enters., Inc.*, 352 F.3d 1197, 1201 (9th Cir. 2003) ("One purpose of the FAA's liberal approach to arbitration is the efficient and expeditious resolution of claims").

Recognizing this very clear federal support for arbitration enforcement, in *Simula Inc. v. Autoliv, Inc.*, the Ninth Circuit Court of Appeals noted that "[t]he standard for demonstrating arbitrability is not high" and that courts should "rigorously" enforce arbitration agreements. 175 F.3d 716, 719 (9th Cir. 1999) (citing *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985)); *see also United Steelworkers of Am. v. Ret. Income Plan for Hourly-Rated Emps. of ASARCO, Inc.*, 512

F.3d 555, 559 (9th Cir. 2008) ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage") (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960)).

The proper inquiry of a court attempting to determine whether to dismiss a matter in favor of arbitration is two-fold. First, the court must determine whether the parties have agreed to arbitrate. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (construing the FAA). If they have, the court must then assess whether the asserted claims are within the scope of that agreement. *Id.* If the answer to both questions is "yes," the court is required to enforce the arbitration agreement according to its terms and not to take jurisdiction over the dispute. *Id.*

Here, the first prong of the test is plainly satisfied – WFA and the Tribe entered into a valid and enforceable contract that incorporated a clear and unambiguous agreement that mandates disputes be arbitrated:

> *The Tribe specifically agrees and recognizes that all controversies which may arise . . . concerning any transaction, account or the construction, performance or breach of any agreement . . . whether entered into prior, on or subsequent to the date hereof,* ***shall*** *be determined by arbitration to the full extent provided by law.*

Complaint Exhibit A, p.5 (bold emphasis supplied) (repeated on p. 8). The second prong is also met in this same contractual language:

> *The Tribe specifically agrees and recognizes that* ***all controversies which may arise . . . concerning any transaction, account or the construction, performance or breach of any agreement . . . whether entered into prior, on or subsequent to the date hereof****, shall be determined by arbitration to the full extent provided by law.*

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Complaint Exhibit A, p.5 (bold emphasis supplied) (repeated on p. 8). The language reiterated by the Tribe in later account documents repeats essentially this same mandate. *See generally* Complaint Exhibits B and C.

Therefore, there can be no doubt that the only forum for adjudication of any dispute between the Tribe and WFA is arbitration. Defendant's actions to the contrary violate federal law and should be enjoined.

2. WFA WILL SUFFER IRREPARABLE INJURY WITHOUT A PRELIMINARY INJUNCTION.

A plaintiff satisfies the irreparable harm requirement by showing a "significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (internal quotation omitted). Without an order enjoining Defendant's further violation of federal law, WFA will most certainly suffer noncompensable harm by being forced to "expend time money and effort . . . litigating" before a court without jurisdiction but which enjoys sovereign immunity from suits for damages. *Crowe & Dunlevy*, 640 F.3d at 1157; *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3D 1222, 1232 (10th Cir. 2010) (*Ex Parte Young* doctrine extends only to prospective injunctive relief and not to actions for money damages); *Feinerman v. Bernardi*, 558 F. Supp 2d 36, 51 (D. D.C. 2008) ("[W]here . . . plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity, any loss of income suffered by plaintiff is irreparable *per se*."); *Kan. Health Care Ass'n Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (sovereign immunity's presence as barrier to monetary recovery meets irreparable harm requirement).

Without a preliminary injunction, WFA would be unable to recoup the monies certain to be expended further defending the Tribal Court action. Given the virtually unlimited scope of Tribal

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Court proceedings apparently contemplated by Defendant in her *Ex Parte* Order, WFA would be irreparably harmed by the loss of significant sums required to defend itself in a forum without jurisdiction. *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *16.

3. THE INJURY TO WFA OUTWEIGHS ANY *DE MINIMUS* INCONVENIENCE THE REQUESTED INJUNCTIVE RELIEF MIGHT CAUSE DEFENDANT.

Any inconvenience that Defendant may experience as a result of the issuance of injunctive relief is greatly outweighed by the harm that will inure to WFA in the absence of this remedy. Defendant will be only minimally impacted, if at all, by the issuance of an injunction. Specifically, the injunctive relief WFA seeks will only require Defendant to comply with federal law. Compliance with federal law cannot be the basis of any inconvenience to Defendant. Nor could requiring her to refrain for exercising jurisdiction that she does not have be inconvenient for Defendant. *Id.* at *16-17 (an injunction "will simply remove plaintiff's burden of defending itself in an improper forum"). Thus, this factor also supports the issuance of a preliminary injunction.

4. A PRELIMINARY INJUNCTION IS NOT CONTRARY TO THE PUBLIC INTEREST.

The granting of the injunctive relief sought by WFA will not offend the public interest. To the contrary, the issuance of a preliminary injunction will serve the public interest because it would protect well-established rights provided under federal law. The improper exertion of tribal authority over a non-consenting non-Indian is always at odds with the public's interest. *Crowe & Dunlevy*, 640 F.3d at 1158; *see also Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *17 ("[T]he public interest is not advanced by having a court that lacks jurisdiction determine a party's legal rights.").

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CONCLUSION

WFA has demonstrated all the predicate factors for entry of a temporary restraining order and a preliminary injunction against Defendant precluding any further violations of federal law by her. One very recent federal court opinion addresses the matter squarely:

> Thus, in order to determine whether plaintiff must first litigate its federal question in tribal court, we must examine the merits. If it is plain that the tribal court is without jurisdiction, plaintiff will be subjected to needless delay and expense for no countervailing purpose. Plaintiff claims the federal right to be free of tribal jurisdiction. It would be anomalous indeed to require plaintiff to first suffer the loss of the very right for which it seeks protection (to be free of tribal jurisdiction) before affording an opportunity to protect its right.

Rolling Frito-Lay Sales, 2012 U.S. Dist. LEXIS 9555, *4-5 (emphasis supplied). This Court should adopt the sound reasoning of its sister *Rolling Frito-Lay Sales* court and end Defendant's ongoing violations of federal law.

DATED this 5th day of February 2013.

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