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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

KPMG LLP, a Delaware Limited Liability Partnership,

Plaintiff,

v.

KURT KANAM, individually and as Tribal Attorney for the Native Village of Karluk, and ORBIE MULLINS, individually and as Village of Karluk Tribal Court Judge for the Karluk Tribal Court for the Native Village of Karluk,

Defendants.

Case No.: 3:15-cv-00129-SLG

KPMG LLP'S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (Rule 65)

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I. INTRODUCTION

On July 3, 2015, Defendant Kurt Kanam, purporting to act on behalf of the People of the United States, the Karluk Tribal Council and the Karluk Native Corporation, filed a complaint (the "Tribal Court Complaint") against "KPMG Corp." in the Karluk Tribal Court for the Native Village of Karluk ("Karluk Tribal Court").[1] The Tribal Court Complaint appears to seek entry of a judgment against KPMG Corp. for over $10 million to be paid to the People of the United

[1] Declaration of George E. Greer in Support of KPMG LLP's Motion for a Temporary Restraining Order ("Greer Decl."), Ex. B, at 4.

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States. On July 13, 2015, Defendant Judge Orbie Mullins, Village of Karluk Tribal Judge, issued an Order to Show Cause directing KPMG Corp. to show cause "within 10 days and by 7-30-15" why the Tribal Court should not grant the relief sought in the Tribal Court Complaint.[2] Defendants' actions in purporting to exercise the jurisdiction of the Karluk Tribal Court over "KPMG Corp." violate federal law, pose the immediate threat of irreparable harm to KPMG LLP,[3] and should be enjoined.

The Tribal Court Complaint appears to be the latest development in an ongoing dispute between the Native Village of Karluk and Koniag, Inc. ("Koniag"), a corporation established by Congress under the Alaska Native Claims Settlement Act (ANCSA). In March 2012, Mr. Kanam filed an action on behalf of the Native Village of Karluk against Koniag in Karluk Tribal Court, alleging that a December 10, 1980 merger of the Karluk Native Corporation and Koniag was invalid ("Koniag Tribal Court Action").[4] Thereafter, Koniag and Michael O'Connell filed an action in this Court styled *Koniag, Inc. and O'Connell v. Kanam, et al.*, seeking to enjoin Defendants from unlawfully purporting to exercise Karluk Tribal Court's jurisdiction over them ("Koniag Federal Action").[5] The Court issued a preliminary injunction on July 3, 2012,[6] and

[2] Greer Decl., Ex. B. at 11.

[3] While the Tribal Court Complaint identifies "KPMG Corp." as the defendant, the Complaint and Summons were served on KPMG LLP through its statutory agent for service of process, CT Corporation. KPMG LLP reserves the right to raise the defense that it is not the party named in the Tribal Court Complaint and that the Tribal Court Complaint was served on the wrong party.

[4] *Koniag, Inc. and O'Connell v. Kanam, et al.*, 3:12-cv-00077-JWS (D. Alaska), Dkt No. 9-1 at 8.

[5] Mr. O'Connell initially represented Koniag as its outside counsel in the Koniag Federal Action, but was subsequently named as a defendant in another action filed by Defendant Kanam

(continued . . .)

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ultimately imposed sanctions on Defendants Kanam and Mullins for violating that injunction by failing to dismiss two complaints with prejudice in Karluk Tribal Court and by filing two additional complaints against Koniag and Mr. O'Connell in Karluk Tribal Court.[7] Defendants filed an appeal and the Koniag Federal Action is currently pending before the Ninth Circuit Court of Appeals.

Here, the Defendants appear to revisit the same dispute raised in the Koniag Tribal Court Action, but now against KPMG, an independent public accounting firm, which is not a member of the Native Village of Karluk and with which Defendants do **not** allege any consensual relationship. The Tribal Court Complaint asserts that KPMG is liable for $10 million based on the sole substantive allegation that KPMG, "falsely claimed that [Koniag] acquired lands in a merger agreement [the same merger agreement that was the subject of the Koniag Tribal Court Action]." This alleged false statement was contained in the Annual Report for Koniag for 2012, a document that KPMG, as the independent public accounting firm for Koniag, Inc., notably does not prepare.[8]

Defendants' latest attempt to unlawfully exercise the Karluk Tribal Court's jurisdiction over KPMG should be enjoined by this Court for the same reasons identified in the Opinion and Order dated July 3, 2012 in the Koniag Federal Action. Karluk no longer occupies "Indian

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(. . . continued)
in Karluk Tribal Court. Accordingly, an amended complaint was filed in the district court adding Mr. O'Connell as a plaintiff. *Koniag*, Dkt No. 13.

[6] *Koniag*, Dkt. No. 31.

[7] *Koniag*, Dkt No. 100.

[8] Greer Decl.; Ex. B at 10.

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country," by virtue of ANCSA, and KPMG, an independent public accounting firm, is not a member of the Karluk Tribe. Under well-settled law, therefore, Defendants attempt to exercise Karluk Tribal Court jurisdiction over KPMG violates federal law.[9]

In the absence of injunctive relief, KPMG faces the immediate threat of irreparable harm. The Order to Show Cause indicates that an adverse judgment for $10 million may be entered against KPMG if it does not respond to it in Karluk Tribal Court by July 30, 2015.[10] Moreover, any such judgment entered by the Tribal Court would not be appealable to a state or federal court. As a public accounting firm that provides audit, advisory, and tax services for clients throughout the United States, including in Alaska and including numerous publicly traded corporations, governmental entities and Alaska Native Corporations created by ANCSA, KPMG's reputation is critical to its business.[11] Even an invalid final judgment against KPMG in Karluk Tribal Court would result in immediate and irreparable harm to its reputation.

Accordingly, KPMG respectfully requests this Court to issue a temporary restraining order (TRO) and preliminary injunction enjoining and restraining Defendants Kurt Kanam and Judge Orbie Mullins, each in his individual and official capacities, from violating federal

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[9] *See Koniag*, Dkt No. 31.

[10] Based on Judge Mullins' rulings in the Koniag Tribal Action, it appears that any appearance before the Karluk Tribal Court will be viewed as a consent to the jurisdiction of the Tribal Court, a ruling that this Court has recognized violates procedural Due Process. *Koniag*, Dkt No. 31 at 3 n. 15, citing *Koniag*, Dkt No. 23 at 3. Thus, forcing KPMG to file a response to the Order to Show Cause for the limited purpose of contesting jurisdiction would effectively force KPMG to surrender its due process rights—and thereby suffer irreparable harm as a matter of law.

[11] Declaration of Elizabeth M. Stuart in Support of Plaintiff KPMG LLP's Motion for Temporary Restraining Order and Preliminary Injunction ("Stuart Decl."), ¶¶ 2 and 4.

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common law by continuing to attempt to exercise the jurisdiction of the Karluk Tribal Court over KPMG.

II. BACKGROUND

On July 20, KPMG received from its agent for service of process, CT Corporation, a Summons, Complaint, Order to Show Cause and related documents that purport to have been filed in the Karluk Tribal Court (the "Tribal Court Documents").[12] The Tribal Court Summons bears a file-stamped date of July 3, 2015. The Tribal Court Summons identifies the plaintiff as Kurt Kanam, Karluk Tribal Attorney, and the defendant as "KPMG Corp." The Tribal Court Summons was purportedly issued by the Clerk of Karluk Tribal Court and states in part that: "Within 21 days after service of this summons on you . . . you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. . . . If you fail to respond, [judgment] by default will be entered against you for the relief demanded in the complaint . . ."[13]

The Tribal Court Complaint is signed by Mr. Kanam, tribal attorney for the Karluk Tribal Council, representing the "People of the United [S]tates Ex rel" and the "Karluk Tribal Council."[14] The sole substantive allegation regarding KPMG in the Tribal Complaint asserts that: "KPMG falsely claimed that Koniag Inc [sic] acquired lands in a merger in the Koniag Inc [sic] annual financial statement. Attachment F (Annual financial report page 9)."[15] Page 9 of the Koniag 2012 Annual Report, as attached to the Tribal Court Complaint, is entitled "Management's Discussion & Analysis," and contains a statement that refers to 105,000 acres of

[12] Greer Decl., Exs. A, B.

[13] Greer Decl., Ex. B at 2-3.

[14] *Id.* at 4.

[15] *Id.* at 7.

surface estate that Koniag received as "a result of a merger with two village corporations."[16] Based on this one allegation, a representation that notably is not made by KPMG, the Tribal Court Complaint asserts, *inter alia*, that "KPMG is liable to the people of the United States the over $10,000,000 paid to Koniag Inc [sic] in the July 31, 2002 Master agreement for certain lands and resources between Koniag Inc [sic] and the State of Alaska."[17]

The Tribal Court Order to Show Cause is signed by Judge Mullins as Village of Karluk Tribal Judge. The Tribal Court Order to Show Cause is dated July 13, 2015, but bears a file-stamped date of July 3, 2015. The Tribal Court Order to Show Cause states: "This court hereby **orders** the defendant to show cause within 10 days and by 7-30-15 date why this court should not grant Plaintiff's requested relief."[18]

On July 24, KPMG attempted unsuccessfully to contact Defendant Kanam telephonically.[19] The same day, KPMG sent a letter by overnight delivery to Defendant Kanam, informing him of the Karluk Tribal Court's lack of jurisdiction over KPMG, KPMG was not the author of the representation referenced in the Tribal Court Complaint, and requesting that Defendant Kanam dismiss the Tribal Court Complaint against KPMG in Karluk Tribal Court.[20] As of the date of this filing, KPMG has received no response from Defendant Kanam.

III. STANDARD OF DECISION

To obtain a TRO or a preliminary injunction, the moving party must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of

[16] *Id.* at 26.

[17] *Id.* at 8.

[18] *Id.* at 11 (emphasis in original).

[19] Greer Decl., ¶ 4.

[20] Greer Decl., ¶ 5, Ex. C.

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preliminary relief; (3) the balance of equities tips in its favor; and (4) a TRO or preliminary injunction is in the public interest.[21] This four-part "traditional test" generally applies whenever preliminary injunctive relief is sought.[22]

The Ninth Circuit also has used an alternative test known as the "sliding scale." The sliding scale test provides that a party is entitled to injunctive relief upon a showing of either: (1) a combination of probable success on the merits and the likelihood of irreparable injury if injunctive relief is denied, or (2) a likelihood of success such that "serious questions going to the merits were raised and the balance of hardships tip[ped] sharply in the plaintiff's favor."[23] This test has been praised for its flexibility in that it allows the trial court to "balance" the traditional requirements for a preliminary injunction (i.e., a stronger showing of one factor may offset a weaker showing of another factor).[24]

IV. JURISDICTION

Federal law, 28 U.S.C. § 1331, provides that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United

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[21] *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (*citing Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *see also Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010); Fed. R. Civ. P. 65(b)(1).

[22] *Winter*, 555 U.S. at 20; *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

[23] *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted).

[24] *See id.* at 1134-35 (sliding scale test may be used in conjunction with traditional test); *see also, e.g., Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (finding that weaker claim on the merits can be offset by "net harm an injunction can prevent").

States." The Supreme Court held in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*:

> This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. . . . In all of these cases, the governing rule of decision has been provided by federal law. . . .
>
> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331.[25]

As in *National Farmers* and *Arizona Public Service Co.*, whether the Tribal Court may exercise jurisdiction over Koniag is a federal question within this Court's jurisdiction.

V. ARGUMENT

KPMG is entitled to injunctive relief because it satisfies the traditional four-factor test, with or without consideration of the Ninth Circuit's sliding scale. Specifically, the requested TRO and preliminary injunctive relief should be granted because (i) KPMG is likely to succeed on the merits, (ii) KPMG is likely to suffer irreparable harm if injunctive relief is not granted, (iii) the balance of the equities tips in KPMG's favor, and (iv) an injunction is in the public interest. The TRO and other injunctive relief KPMG seeks would do no harm to Defendants' or Karluk's lawful interests. Courts of the State of Alaska and, if jurisdiction is present, this Court are available to hear any claim Karluk may assert, subject to applicable law.

[25] 471 U.S. 845, 851-52 (1985); *see also Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995) ("[T]he issue of the tribal authority to regulate a non-Indian issue is a federal question.").

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A. KPMG Is Likely to Succeed on the Merits Under Federal Law Governing Tribal Court Jurisdiction over Nonmembers.

1. The Native Village of Karluk Lacks Territorial Jurisdiction.

The Karluk Tribe lacks territorial jurisdiction over KPMG because the Karluk Reservation was extinguished by the Alaska Native Claims Settlement Act (ANCSA) and there is no dependent Indian community constituting "Indian country" as defined in 18 U.S.C. § 1151 over which Karluk exercises territorial sovereignty over nonmembers.

In 1971, Congress enacted ANCSA, a comprehensive statute governing rights, obligations and liabilities of, by and among the regional and village corporations established under it and their respective shareholders.[26] In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court held that: "In enacting ANCSA, Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy."[27] Accordingly, with the exception of the Indian reservation on Annette Island, ANCSA revoked all of the various reserves set aside in Alaska by legislation or by executive or secretarial order for Native use, subject to existing rights.[28]

While Karluk is a federally recognized Indian tribe,[29] neither the former Karluk Reservation nor any lands owned by the Native Village of Karluk qualifies as "dependent Indian communities" and therefore as "Indian country" over which it may exercise territorial

[26] 43 U.S.C. § 1601, *et seq*.

[27] 522 U.S. 520, 523-24 (1998).

[28] 43 U.S.C. § 1618(a).

[29] 75 Fed. Reg. 60,810, 60,814 (Oct. 1, 2010).

jurisdiction.[30] Rather, such tribes have inherent sovereign jurisdiction "to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy."[31]

Thus, as this Court held in the Koniag Federal Action, "Alaska Native tribes such as the Native Village of Karluk do not have territorial jurisdiction, in light of the United States Supreme Court's holding in *Venetie* that by and large extinguished 'Indian country' within Alaska."[32] Moreover, because KPMG, an independent public accounting firm, is not a member of the Karluk Tribe[33] and the claim asserted against it does not involve domestic affairs, the Karluk Tribal Court cannot exercise any inherent sovereign jurisdiction over KPMG.[34] Accordingly, Defendants attempt to exercise jurisdiction over KPMG in the Karluk Tribal Court violates federal law.

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[30] *Native Vill. of Venetie*, 522 U.S. at 527 ("[T]he term 'dependent Indian communities' … refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."). "With respect to the federal set-aside requirement," the Court observed regarding ANCSA's revocation of "all existing reservations in Alaska" except the Annette Island Reservation: "In no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands." *Id.* at 532. As to lands held by Alaska Native Corporations, "ANCSA transferred [former] reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'" *Id.* at 532-33 (*quoting* 43 U.S.C. § 1601(b)).

[31] *State v. Native Vill. of Tanana*, 249 P.3d 734, 743 (Alaska 2011) (citation omitted).

[32] *Koniag*, Dkt No. 31 at 11.

[33] Stuart Decl. ¶ 3.

[34] *Koniag*, Dkt No. 31 at 12.

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2. The Native Village of Karluk Does Not Have Jurisdiction over non-member KPMG.

Because of its lack of territorial jurisdiction, Karluk is similarly precluded from exercising jurisdiction over KPMG as a non-member of the Karluk Tribe under any of the exceptions set forth in the United States Supreme Court's holding in *Montana v. United States*.[35]

In *Montana,* the United States Supreme Court held that an assertion of tribal jurisdiction over non-members is "presumptively invalid" and casts on the proponent of tribal jurisdiction the burden of proving otherwise; upon failure to do so, "the presumption ripens into a holding."[36] *Montana*, however, set forth two limited exceptions in which a tribe may exercise jurisdiction over non-members.

> Indian tribes retain inherent sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations, even on non-Indian 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."[37]

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[35] 450 U.S. 544 (1981).

[36] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001). *See also Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("'[T]he inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.'").

[37] 450 U.S. at 565 (citations omitted). The Supreme Court has narrowly construed both *Montana* exceptions, stating, "[t]hese exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink it.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (citations omitted).

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As this Court held in the Koniag Federal Action, "these *Montana* exceptions confer jurisdiction over non-Indians only with respect to activities on the Indian tribe's reservation, including land within reservation borders that has been sold in fee simple to non-Indian owners [non-Indian lands]."[38] Because, as noted above, Congress divested Karluk of "Indian country" by revoking the Karluk Reservation, the *Montana* exceptions cannot apply to this action.

Even if this were not the case, the *Montana* exceptions would still not apply to KPMG. First, KPMG has not entered into (and Defendants do not allege) any agreement or arrangement to provide services to Karluk or the Karluk Tribal Council that could potentially be interpreted as constituting a consensual relationship with Karluk, through commercial dealing, contracts, leases or otherwise.[39] Second, KPMG is solely alleged to have made a single statement in Koniag's 2012 Annual Report regarding the Karluk merger. This single allegation (which is not even accurate), cannot conceivably be viewed as menacing the 'political integrity, the economic security, or the health or welfare of the [Karluk] tribe."[40]

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[38] *Koniag*, Dkt No. 31 at 9.

[39] Stuart Decl., ¶ 3. Moreover, "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. . . . 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 [p]ound.'" *Atkinson Trading Co.*, 532 U.S. at 656. Here, KPMG is alleged to have made a false statement in the Annual Report of another entity, Koniag. Thus, no such nexus exists.

[40] *Plains Commerce*, 554 U.S. at 341 ("The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."). One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Felix S. Cohen, Handbook of Federal Indian Law § 4.02[3][c][i] at 233-234, n.75

Accordingly, whether under a straightforward analysis of Karluk's lack of territorial jurisdiction or an analysis under *Montana* and its progeny, Defendants' attempts to exercise the Karluk Tribal Court's jurisdiction over KPMG clearly violate federal law.

3. *Ex Parte Young* Authorizes Prospective Injunctive Relief Against the Defendants.

Ex Parte Young[41] authorizes suits for prospective injunctive relief against persons who are fulfilling public roles in both their official and individual capacities, to enjoin the actions of such persons that would violate federal law. While "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers,"[42] "an officer of [an Indian tribe] … is not protected by the tribe's immunity from suit."[43] Thus, while the tribe may be protected from suit, the individuals acting on the tribe's behalf are not.[44]

The Ninth Circuit has applied *Ex Parte Young* as recently as March 15, 2012, to prospectively enjoin Navajo Nation officials, "without the presence of the immune . . . tribe."[45] Significantly, the Ninth Circuit in that case added: "*Ex parte Young* is not limited to claims that

[41] 209 U.S. 123 (1908).

[42] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

[43] *Id.* at 59 (referencing *Ex Parte Young*).

[44] *Ariz. Pub. Serv. Co.*, 77 F.3d at 1133-34 ("Tribal sovereign immunity, however, does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal laws.").

[45] *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 372 F.3d 1176, 1181 (9th Cir. 2012) (*citing Ex Parte Young*).

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officials are violating the federal Constitution or federal statute; it applies to federal common law as well."[46]

Here, as in the Koniag Federal Action, Defendant Kanam executed the Original Complaint as Karluk Tribal Attorney and states under penalty of perjury that his statements therein "would be offered by me as testimony at trial."[47] Similarly, Defendant Mullins executed an Order to Show Cause that requires KPMG to "show cause within 10 days and by 7-30-2012 date ..." and threatens to "grant Plaintiff's requested relief."[48] Defendants' actions raise a question of federal common law, constitute an ongoing violation of federal law, and present precisely the type of conduct that may be enjoined under *Ex Parte Young*.[49]

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[46] *Id.* at 1182. *See also Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (affirming the district court's denial of a motion to dismiss by one tribal official, where the Ninth Circuit stated: "In determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether BNSF has *alleged* an ongoing violation of federal law and seeks prospective relief." (emphasis omitted); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) ("Applying the . . . logic of *Ex parte Young*, we hold that the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law is an ongoing violation of 'federal law' sufficient to sustain application of the *Ex parte Young* doctrine.").

[47] Greer Decl., Ex B at 5.

[48] *Id.* at 11.

[49] Defendants may argue that the Court should abstain from exercising its jurisdiction in this case under the "Exhaustion of Tribal Remedies" policy set forth in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), or *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). Under both cases, however, this prudential policy should not be applied where, as here, it is "plain" that the Karluk Tribal Court lacks jurisdiction over KPMG as to the "novel" claim set forth in the Tribal Court Complaint. Under these circumstances, the exhaustion requirement would serve no purpose but delay.

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B. KPMG Is Likely to Suffer Irreparable Harm.

It cannot reasonably be disputed that KPMG will suffer irreparable harm if Defendants are not enjoined from continuing their unlawful actions.

Most significantly, KPMG faces the imminent risk of the entry of an adverse judgment for $10 million being entered on July 30, 2015, the date by which KPMG was ordered to respond to the Order to Show Cause.

KPMG has not filed a response to that Order to Show Cause because any appearance would likely be interpreted (incorrectly) by the Karluk Tribal Court as consent to jurisdiction. Based on Judge Mullins' prior rulings in the Koniag Tribal Action, the Karluk Tribal Court does not allow parties to make a special appearance to contest jurisdiction and views any appearance before the Karluk Tribal Court as consenting to jurisdiction. As this Court has observed, however, such a rule is inconsistent with the requirements of procedural Due Process and the Federal Rules of Civil Procedure, which the Karluk Tribal Court has purportedly adopted.[50] Responding to the Order to Show Cause, therefore, would effectively force KPMG to surrender its due process rights, which constitutes irreparable injury as a matter of law.[51]

In the absence of a response to the Order to Show Cause, KPMG will likely face an adverse judgment unless this Court grants the requested injunction. As a public accounting firm, KPMG's reputation is critical to its business, and an adverse judgment (even though invalid),

[50] *Koniag*, Dkt No. 31 at 3 n. 15.

[51] *Martins v. United States Citizenship & Immigration Servs*., 962 F. Supp. 2d 1106, 1125-26 (N.D. Cal. 2013) ("it is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury" (internal quotations omitted) (citing *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).

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would irreparably damage that reputation.[52] An adverse judgment entered against it by the Karluk Tribal Court could well impose a significant burden on KPMG with respect to its existing and potential relationships (business or otherwise) with the State of Alaska, state and local governmental agencies, Alaska Native Corporations and other public and private clients.[53] Further, KPMG could not appeal a judgment entered by the Karluk Tribal Court to a federal or state court, despite the fact that such a judgment would be the result of an unlawful exercise of jurisdiction.[54]

The actual and threatened imminent and irreparable harm threatened by Defendants' actions warrants enjoining Defendants (a) from exercising the Karluk Tribal Court's jurisdiction over KPMG in the Tribal Court Case, (b) from taking any action on the Show Cause Order issued by Judge Mullins on July 13, 2015, (c) from enforcing or attempting to enforce any "order" entered by the Karluk Tribal Court against KPMG, and (d) from continuing to pursue any claims against KPMG in Tribal Court as to any matters related to the Tribal Court Documents.

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[52] Stuart Decl., ¶ 4.

[53] *Id.*

[54] Federal district courts have original, but not appellate jurisdiction, over actions brought by federally recognized tribes raising a federal question. *See* 28 U.S.C. §§ 1331 and 1362. Likewise, federal courts of appeals do not have appellate jurisdiction over tribal court actions. *Compare* 28 U.S.C. § 1291.

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C. The Balance of Equities Tips Sharply in Koniag's Favor, and Enjoining Illegal Conduct Is in the Public Interest.

The balance of equities clearly tips in KPMG's favor. Subjecting KPMG to litigation in a forum that lacks jurisdiction violates federal law and KPMG's due process rights. Moreover, the entry of an adverse judgment would cause irreparable harm to KPMG's reputation.

Karluk, on the other hand, can pursue any claims it might have in a competent forum where KPMG is subject to jurisdiction, and thus will not be denied an opportunity to present his its claims. Entry of the requested TRO, therefore, and eventually a similar preliminary injunction, would in no way diminish Defendants' lawful rights or Karluk's ability to pursue its claims, if justiciable, in any state or federal court of competent jurisdiction.

Further, there is a strong public interest in upholding federal law and the integrity of the judicial process. Allowing the Karluk Tribal Court to assert jurisdiction over non-members of the Karluk Tribe for alleged actions that are unrelated to any territory or "Indian country," would turn decades of federal law on its head and only encourage Defendants or others to persist in their unlawful conduct.[55] Moreover, the continuing efforts of Mr. Kanam and Judge Mullins to assert Karluk Tribal Court jurisdiction over KPMG, Koniag, and others who are not members of the Karluk Tribe disserves the public interest in maintaining a system of well-functioning tribal courts in which tribal members and the general public can have trust and confidence.

[55] Indeed, Defendants have also had an injunction entered against them for purporting to exercise the jurisdiction of a supposed tribal court for the "Kikiallus Nation," which is not a federally recognized tribe, to transfer the ownership of oil and gas leases in Oklahoma to a TMI Ministries, a Washington corporation. *See Unit Corp. v. TMI Ministries*, No. 5:14-cv-00070R (W.D. Okla.) (Order and Permanent Injunction June 13, 2014).

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At the very least, KPMG's contentions here raise serious questions going to the merits, and the balance of the hardships clearly favors KPMG. Therefore, under either the traditional or sliding scale standard, KPMG is entitled to immediate injunctive relief.

VI. CONCLUSION

For the foregoing reasons, KPMG has established that: (1) it is likely to succeed on the merits against Defendants; (2) it is likely to suffer immediate and irreparable harm in the absence of the injunctive relief requested; (3) the balance of the equities tips in KPMG's favor; and (4) a TRO and preliminary injunction are in the public interest. Accordingly, KPMG respectfully requests this Court to enter a TRO, as set forth in the [Proposed] Order accompanying KPMG's motion, and preliminary and other injunctive relief as set forth in the motion and Verified Complaint.

DATED: July 30, 2015

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