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Berry [Signature]

IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE
NOOKSACK INDIAN TRIBE

ST. GERMAIN, *et al.*,
Plaintiffs,
v.
KELLY, *et al.*,
Defendants.

Case No. 2013-CI-CL-005
DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR ORDER
TO SHOW CAUSE RE: CONTEMPT

COPY

COME NOW Defendants in the above-entitled action, by and through the Office of Tribal Attorney, without waiving other defenses and objections, and provide this Response to Plaintiffs' Motion for Order to Show Cause Re: Contempt.¹ Defendants are immune from suit, and this Court lacks jurisdiction. Defendants have not violated this Court's Order of December 18, 2013 related to Resolution No. 13-171. Even if Defendants had violated this Court's Order, however, Plaintiffs' claims related to Resolution No. 13-171 are moot because Resolution No. 13-181 completely superseded Resolution No. 13-171.

¹ Plaintiffs again failed to comply with Title 10, Section 10.05.050(e). They did not file their Motion for Order to Show Cause Re: Contempt six court days before the date of the hearing, and they failed to "make reasonable, good faith efforts to coordinate with the opposing party or his advocate, if he has one, prior to scheduling a hearing." Title 10, § 10.05.050(e)(1). Defendants object to Plaintiffs' continued disregard of the Nooksack Court rules.

1
2 **I. FACT STATEMENT**

3 On December 3, 2013, the Tribal Council passed Resolution No. 13-171, which provided
4 Christmas Support funds to Nooksack Tribal members in the amount of \$250. Decl. of M.
5 Roberts, Exh B. The written resolution mistakenly omitted language requested by the Tribal
6 Council that authorized later payments to Plaintiffs if their enrollment appeals are successfully
7 concluded. Decl. of A. Smith ¶¶5, 10. Plaintiffs filed their Complaint and Motion for TRO on
8 December 9. Compl. 1; Mot. for TRO 1. On December 13, 2013, the Council superseded
9 Resolution No. 13-171 through passage of Resolution No. 13-181. See Defs.' Resp. in Opp'n to
10 Pls.' Mot. for TRO (Opp'n to TRO), Exh. A, Resolution 13-181. On December 18, 2013, this
11 Court issued an Order Granting on Motion for TRO. The Nooksack Tribal Accounting
12 Department did not prepare any Christmas Support checks on December 19, 2013. Decl. of E.
13 Ames ¶9. The Nooksack Tribal Accounting Department reissued seven Christmas Support
14 checks on December 20, 2013, to replace seven Christmas Support checks that were initially sent
15 on or about December 12, 2013. Decl. of E. Ames ¶10; Decl. of A. Smith ¶11; Decl. of F. Leyva
16 ¶¶8-9. These replacement checks were reissued due to the original checks being mailed to an
17 incorrect address or containing an incorrect name. Decl. of A. Smith ¶11; Decl. of F. Leyva ¶8.
18 None of the Plaintiffs were in the same position as those members who received a reissued
19 check. Decl. of A. Smith ¶11(e); Decl. of F. Leyva ¶8(e).

20 **II. LEGAL ARGUMENT**

21 Defendants are immune from suit, the Tribe has not waived sovereign immunity, and this
22 Court lacks jurisdiction to hear this case. While this suit is brought against certain individuals it
23 is the Tribal Council's official actions that aggrieve Plaintiffs. Defendant officials have not
24 violated this Court's Order of December 18, 2013. Plaintiffs' claims regarding Resolution No.
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1 13-171 became moot when that Resolution was superseded on December 13, 2013.

2 **A. Defendants are Immune from Suit and This Court Lacks Jurisdiction.**

3 This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and tribal
4 officials are immune from suit. Without a waiver of sovereign immunity, compensatory civil
5 contempt proceedings that would impact the public treasury cannot continue. *Coleman v. Espy*,
6 986 F.2d 1184, 1189-92 (8th Cir. 1993).² An Indian tribe is immune from suit because it is a
7 sovereign entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5,
8 5-6 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).
9 Sovereign immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress
10 has authorized the lawsuit or a tribe has waived its immunity.³ *Martinez*, 436 U.S. at 58-59;
11 *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of
12 immunity must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6
13 NICS App. 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign
14 immunity also applies to tribal officials and employees acting within the scope of their authority.
15 *Cline*, Case No. NOO-CIV-02-08-5, at 6 (citing *Hardin v. White Mountain Apache Tribe*, 779
16 F.2d 476, 479 (9th Cir. 1985); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir.
17 1986), *cert. denied*, 481 U.S. 1069 (1987)); *see also Mitchell v. Pequette*, CV-07-38, 2008 WL
18 8567012 at *7-9 (Leech Lake Tribal Court May 9, 2008) (holding that tribal employees retained

19 _____
20 ² Plaintiffs cite a Tulalip Tribal Court decision for the proposition that sovereign
21 immunity does not bar a contempt holding against Defendants, but that decision, *T.S. v. Tulalip*
22 *Tribes*, No. TUL-CV-ET-2012-0478 (Tulalip Tribal Ct. Apr. 9, 2013), was vacated and
23 expunged from the record by *T.S. v. Tulalip Tribes*, No. TUL-CV-ET-2012-0478, Order on Joint
24 Motion to Vacate Order and Memorandum in Support (Tulalip Tribal Ct. May 2, 2013) (attached
25 as Exh. A). The federal cases cited by Plaintiffs do not concern contempt proceedings at all. *See*
Mot. for Order to Show Cause Re: Contempt 4:23 – 5:3. Plaintiffs fail to cite any case that
would allow this Court to order the expenditure of tribal funds.

³ Generally, federal courts lack jurisdiction over the decisions of an Indian tribe to
disenroll any of its members. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978);
Jeffredo v. Macarro, 599 F.3d 913, 915, 917-18 (9th Cir. 2010); *Lewis v. Norton*, 424 F.3d 959,
960 (9th Cir. 2005).

1 sovereign immunity even though the plaintiff alleged that the employees acted outside the scope
2 of their authority, because the plaintiff failed to legally or factually support this allegation).
3 Tribal sovereign immunity “extends to actions brought against tribes in tribal court.” *Olson*, 6
4 NICS App. at 51.

5 In the *Cline* case, the plaintiff-appellants sued the Council Chairman and the Council for
6 declaratory relief and damages based on allegations of civil rights violations and a challenge to
7 the Nooksack Tribal Election Ordinance. *Cline*, Case No. NOO-CIV-02-08-5, at 1. The
8 Nooksack Court of Appeals found that the appellees retained sovereign immunity even though
9 the complaint named individual officers. *Id.* at 7. Importantly the Court found that, “[t]he
10 Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct
11 business without constantly having to defend themselves against suit.”

12 The Nooksack Constitution entrusts the Council with the authority to establish the Tribal
13 Court by ordinance. *Const.*, art. VI, § 2(A)(1). Article VI, § 2(A)(3) of the Constitution
14 provides that the Tribal Court shall have jurisdiction “over all matters concerning the
15 establishment and functions of tribal government, provided that nothing herein shall be construed
16 as a waiver of sovereign immunity by the tribal government.” Under this jurisdictional
17 provision, a suit against the Tribal Government and the Council can only proceed when there is
18 an express waiver of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6.

19 The Council acted upon its constitutional authority to establish a tribal court by ordinance
20 when it adopted Title 10—the Nooksack Indian Tribe’s Tribal Court System and Court Rules.
21 The Tribal Court has limited civil and criminal subject matter jurisdiction only as to matters
22 “specifically enumerated in the Nooksack Code of Laws. Title 10, § 10.00.030. Title 10,
23 § 10.00.050 provides for exclusive, original jurisdiction in the Tribal Court in any matter where
24 the Tribe or its officers and employees are parties in their official capacities, but this jurisdiction
25

1 is limited by the following sentence:

2 Nothing contained in the preceding sentence or elsewhere in this Code shall be
3 construed as a waiver of the sovereign immunity of the Tribe or its officers or
4 enterprises unless specifically denominated as such and the court is expressly
prohibited from exercising jurisdiction over the Nooksack Indian Tribe without
and [sic] express wavier [sic] of sovereign immunity.

5 Title 10, § 10.00.050. Title 10 contains an additional provision explaining that nothing in
6 Title 10 or any other law waives the Tribe's, its officials', its entities', or its employees'
7 immunity without an express waiver enacted by the Council. Title 10, § 10.00.100. In addition,
8 Title 10 limits the remedies in a suit against the Tribe's agent or employee to declaratory and
9 prospective injunctive relief. Title 10, § 10.00100(b). Neither Congress⁴ nor the Council has
10 expressly waived the Tribe's sovereign immunity, as required under the Constitution, Title 10,
11 and federal law. Plaintiffs cannot use a contempt motion to obtain relief that is barred by federal
12 and tribal law.

13 **B. Defendants Have Complied with the Court's December 18, 2013 Order.**

14 In order to find a party in civil contempt, the "moving party has the burden of showing by
15 clear and convincing evidence that the contemnors violated a specific and definite order of the
16 court." *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999). To avoid mistaken
17 violations, injunctions must "describe in reasonable detail ... the acts restrained or required."
18 Fed. R. Civ. P. 65(d)(1)(C). Such an injunction binds the parties and other persons in active
19 concert with them. Fed. R. Civ. P. 65(d)(2). Upon such a showing, the "burden then shifts to the
20 contemnors to demonstrate why they were unable to comply." *F.T.C.*, 179 F.3d at 1239. Here,
21 Plaintiffs have not put forth any evidence showing Defendants have violated the Court's
22 December 18, 2013 Order; rather, they have made conclusory and incorrect statements of

23 _____
24 ⁴ Inclusion of the Indian Civil Rights Act in the Constitution does not constitute a waiver
25 of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6; *Martinez*, 436 U.S. at 58-73;
Gallegos v. Jicarilla Apache Nation, 97 F. App'x 806, 811 (10th Cir. 2003).

1 violation. *See* Mot. for Order to Show Cause Re: Contempt 5:24 – 6:3. The Court’s Order
2 stated:

3 Therefore, the Court finds that, *at this preliminary TRO stage in this matter*, the
4 Defendants have violated the Nooksack Indian Tribe’s Constitution, Article IX
5 and the Equal Protection clause of the Indian Civil Rights Act in passing
6 Resolution 13-171 and acting upon it. **The Court orders that the Defendants be
enjoined from treating the proposed disenrollees differently from other tribal
members with respect to the Christmas Support distribution. However, the
Court finds that the Court cannot order specific relief requiring the
expenditure of tribal funds.**

7 Order Granting on Mot. for TRO 13:2-7.

8 Resolution No. 13-181 completely superseded Resolution No. 13-171 such that
9 Resolution No. 13-171 has not had any effect since December 13, 2013. *See* Opp’n to TRO,
10 Exh. A. Defendants have not acted under Resolution No. 13-171 since it was superseded on
11 December 13, 2013. *See* Decl. of E. Ames ¶10(b).

12 This Court’s December 18, 2013 Order only and preliminarily found that Resolution No.
13 13-171 violated the law, but the Order did not conclude that Resolution No. 13-181 violated any
14 law. *See* Order Granting on Mot. for TRO. The Court explicitly distinguished action under
15 Resolution No. 13-171 from the Back to School Support action in the *Roberts* case based on the
16 “carve out,” which allows a member subject to pending disenrollment proceedings to obtain the
17 discretionary funds upon a decision by the Tribal Council that such a member will remain
18 enrolled. Order Granting on Mot. for TRO 9:6-14. Resolution No. 13-181 contains the same
19 “carve out” present in the *Roberts* Back to School Support Resolution. *See* Opp’n to TRO, Exh.
20 A. The fact that the “carve out” was erroneously omitted⁵ from Resolution No. 13-171 does not
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22 _____
23 ⁵ The Tribal Council had requested that Resolution No. 13-171 contain the “carve out”
24 language included in the Back to School Support Resolution, and the Council believed that
25 Resolution No. 13-171 contained this language upon passing it. Decl. of A. Smith ¶¶ 5, 10 .
Unfortunately, the language was inadvertently omitted, and as soon as the Council became aware
of this omission, the Council passed Resolution No. 13-181, which superseded Resolution No.
13-171 and included the “carve out” language. *See* Decl. of A. Smith ¶10.

1 impact whether any member subject to pending disenrollment proceedings will be able to receive
2 Christmas Support funds. Plaintiffs suffered no harm during the days prior to the correction of
3 Resolution No. 13-171 by No. 13-181. Plaintiffs are in the exact same position with respect to
4 Christmas Support funds now as they were in with respect to the Back to School Support funds
5 in the *Roberts* case.⁶

6 The Court stated, however, that “[w]hile 13-181 appears to carve out a means by which
7 the proposed disenrollees could access the Christmas Support, the fact remains that the
8 Christmas Support check distribution took place under the authority of Resolution 13-171 and
9 13-181 does not, at least in the Court’s preliminary view, fix that.” Order Granting on Mot. for
10 TRO 9:11-14. Defendants are troubled by this sentence and do not understand the Court’s
11 language, particularly because the “carve out” included in Resolution No. 13-181 was approved
12 by this Court in *Roberts*, and similar “carve outs” have been used widely in analogous cases. For
13 example, the Ninth Circuit and District Court for the Southern District of California approved of
14 the Bureau of Indian Affairs’ Memorandum Order allowing the San Pasqual Band of Mission
15 Indians to place per capita distributions for members subject to disenrollment proceedings in an
16 escrow account pending a final membership determination. *Alto v. Black*, 12-56145, 2013 WL
17 6813816, at *4-7 (9th Cir. Dec. 26, 2013); *see also Mathews*, 424 U.S. at 335-41; *Ass’n for Los*
18 *Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 992 (9th Cir. 2011) (the plaintiffs
19 were suspended without a hearing when it was confirmed that they had been charged with a
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22 ⁶ This Court properly upheld the Back to School Support funds in the *Roberts* case, as
23 delaying benefits once eligibility is challenged has been found to be constitutional by the federal
24 Supreme Court. *See Mathews v. Eldridge*, 424 U.S. 319, 335-41 (1976) (finding that a disability
25 benefits recipient whose benefits were terminated after an eligibility challenge was afforded due
process even though there was no pre-termination hearing, because full retroactive relief would
be provided if the recipient ultimately prevailed); *see also Gary v. Nichols*, 447 F. Supp. 320,
325 (D. Idaho 1978).

1 felony, and Due Process only required post-suspension hearings); *Gary v. Nichols*, 447 F. Supp.
2 320, 325 (D. Idaho 1978).

3 Plaintiffs falsely allege that, on December 19 and 20, Defendants directed the Accounting
4 Department to issue approximately 20 Christmas Support checks. *See* Mot. for Order to Show
5 Cause Re: Contempt 5:24 – 6:1; Decl. of L. Zapata ¶¶ 9-10. Defendants did not give any
6 directives regarding Christmas Support funds after the Court’s December 18, 2013 Order. Decl.
7 of A. Smith ¶13; Decl. of E. Ames ¶¶5(f), 7; Decl. of E. King George ¶4(f); Decl. of F. Leyva
8 ¶6. Thus Defendants did not violate this Court’s Order.

9 Ms. Zapata, an aggrieved former employee, was not fully aware of the situation and is
10 wrong about many details. Decl. of E. Ames ¶¶5, 8(b)10. The Accounting Department reissued
11 seven Christmas Support checks on December 20, 2013, because the original checks sent on or
12 about December 12, 2013, were mailed to an incorrect address or contained incorrect
13 information and were not cashed. *See* Decl. of A. Smith ¶11; Decl. of E. Ames ¶10; Decl. of F.
14 Leyva ¶¶8-9. These reissued checks were not new Christmas Support checks; rather normal
15 Accounting Department practice led tribal employees to simply replace checks that were issued
16 prior to the Court’s December 18, 2013 Order. No Plaintiff was in a similar situation due to
17 missing or incorrect check information. *See* Decl. of A. Smith ¶11(e); Decl. of F. Leyva ¶8(e).
18 Additionally, these reissued checks were sent under the authority of Resolution No. 13-181—the
19 only operative Resolution concerning Christmas Support checks on December 20, 2013.
20 Resolution No. 13-181 has not been found to violate the law, which means that even if
21 Defendants had directed the reissuance of seven Christmas Support checks on December 20,
22 2013—which they did not—any such action would not have violated a specific requirement of
23 this Court’s Order. *See* Order Granting on Mot. for TRO. Defendants have complied with this
24 Court’s Order; there can be no finding of contempt.

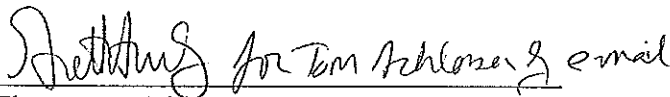
1 **C. Plaintiffs' Claims Related to Resolution No. 13-171 Are Moot.**

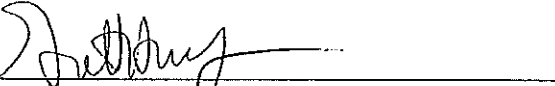
2 An issue is moot if a change in circumstance has "forestalled any occasion for
3 meaningful relief." *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).
4 Voluntary cessation moots an issue as long as "subsequent events [have] made it absolutely clear
5 that the allegedly wrongful behavior cannot reasonably be expected to recur." *F.T.C. v.*
6 *Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (internal citations omitted). Resolution
7 No. 13-171 was completely superseded by Resolution No. 13-181. *See* Opp'n to TRO, Exh. A.
8 Resolution No. 13-171 was only in effect from December 3, 2013 to December 13, 2013. *See id.*
9 Plaintiffs allege that Defendants violated this Court's Order related to Resolution No. 13-171 by
10 directing tribal employees to issue Christmas Support checks on December 19 and 20, but even if
11 Defendants so acted, Defendants could not have violated this Court's Order of December 18,
12 2013, because Resolution No. 13-171 was not in effect on December 19 and 20. Plaintiffs'
13 allegations are not only false, they are moot.

14 **III. CONCLUSION**

15 For the foregoing reasons, Defendants request that the Court deny Plaintiffs' Motion for
16 Order to Show Cause Re: Contempt.

17 Respectfully submitted this 8th day of January, 2014.

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19 
Thomas P. Schlosser
20 Rebecca JCH Jackson
Morisset, Schlosser, Jozwiak & Somerville
21 Attorneys for Defendants

22
23 
Grett Hurley, Senior Tribal Attorney
24 Rickie Armstrong, Tribal Attorney
Attorneys for Defendants
25 Office of Tribal Attorney, Nooksack Indian Tribe

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IN AND FOR THE TULALIP TRIBAL EMPLOYMENT COURT
TULALIP, WASHINGTON

T.S., Appellant

v.

No. TUL-CV-ET-2012-0478

Tulalip Tribes, Respondent

JOINT MOTION TO VACATE ORDER
AND MEMORANDUM IN SUPPORT

[Proposed Order Attached]

TO: TULALIP EMPLOYMENT COURT;
THE HONORABLE JUDGE BROWN
CLERK OF THE TULALIP TRIBAL COURT;

JOINT MOTION TO VACATE

COME NOW Appellant, T.S., and Respondent, Tulalip Tribes, jointly, and move the Court to VACATE the order entered in this matter on April 9, 2013, entitled *Findings, Conclustons and Order re Contempt of the Court's November 7, 2012 Order*, on the ground that the parties have reached a settlement agreement that renders this matter moot upon entry of the subjoined proposed order; and as further grounds for vacating said Order the parties respectfully represent to this honorable Court as follows:

1 MEMORANDUM IN SUPPORT OF MOTION TO VACATE
2

3 I. THE PARTIES JOINTLY REQUEST THE COURT VACATE THE APRIL 9, 2013
4 FINDINGS, CONCLUSION AND ORDER RE CONTEMPT OF THE COURT'S NOVEMBER 7, 2012
5 ORDER.

6 The above-referenced parties seek this Court's assistance in their efforts to amicably
7 settle the pending issues in this action and its related matters. The parties do not lightly make
8 this request of the Court, but do so after careful consideration and discussion. The parties have
9 reached a global settlement agreement that is contingent upon the Court granting this request
10 and executing the subjoined order, as soon as is practically possible for reasons offered below,
11 vacating in its entirety the April 9, 2013 Order, entitled *Findings, Conclusion and Order re*
12 *Contempt of the Court's November 7, 2012 Order*.

13 The parties stipulate to the Court that the underlying employment conditions at issue in
14 these contempt proceedings have been rendered moot due to a substantial change in
15 circumstances, and that vacating the order of April 9, 2013 as a condition of settlement is just
16 and equitable. Furthermore, granting this motion will enhance judicial economy by obviating
17 the need for further trial court and appellate proceedings. Therefore, it is proper for this Court
18 to grant relief from judgment pursuant to TTC § 2.10.170(3)(f) (authorizing the Court to grant
19 relief from judgment for "[a]ny other reason justifying relief from the operation of the
20 judgment").

21
22 II. Immediate Relief Requested. In light of (1) the Tribes' pending appeals of the
23 November 7, 2012 and April 9, 2013 Orders in this matter, and (2) a Court of Appeals stay that
24 was jointly obtained by the parties, which stay the parties have jointly requested be extended in
25 part to make this request of this Court for global settlement purposes, the parties request that
26 the Court rule on this motion as soon as is practically possible, ideally no later than Monday,
27 May 13, 2013, as the Court of Appeals has extended its stay only until May 17, 2013.
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1 Dated this 2nd day of May, 2013.

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RESPECTFULLY SUBMITTED,

OFFICE OF RESERVATION ATTORNEY

Lisa M Vanderford-Anderson

Lisa M. Vanderford-Anderson, Reservation Attorney, WSBA No. 29736
Representing Tulalip Tribes

GALANDA BROADMAN

Lisa M Vanderford-Anderson, for

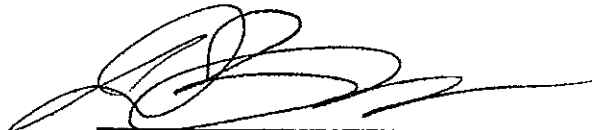
Gabriel Galanda, Attorney representing T.S.

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ORDER

This matter having come before this Court on a Joint Motion to Vacate the April 9, 2013 Findings, Conclusion and Order re Contempt of the Court's November 7, 2012 Order. The court finds there is good cause to VACATE the April 9, 2013 Order Findings, Conclusion and Order re Contempt of the Court's November 7, 2012 Order. Therefore it is hereby Ordered that the April 9, 2013 Findings, Conclusion and Order re Contempt of the Court's November 7, 2012 Order is VACATED and shall be expunged from the above-referenced court file(s) and records immediately.

Dated this 2nd day of May, 2013.


Tulalip Tribal Court Judge
Daniel A. Brown, PROTEM