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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STIMSON LUMBER COMPANY, Plaintiff, v. COEUR D'ALENE TRIBE, Defendant.	Case No. 2:22-cv-00089-DCN **COEUR D'ALENE TRIBE'S RESPONSE BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION [DKT.3]**

Defendant Coeur d'Alene Tribe ("Tribe") specially appears and responds in opposition to plaintiff Stimson Lumber Company's ("Stimson") Motion for Preliminary Injunction (Dkt. 3). The Tribe respectfully requests the Court deny the Motion for the reasons that follow.

INTRODUCTION

Stimson seeks to invoke this Court's limited jurisdiction in a desperate attempt to avoid ejectment from the Tribe's land. This action is nothing more than a tactic to delay the Tribe from regaining possession of property it rightfully owns. The Court lacks subject matter jurisdiction over this action, requiring dismissal of all claims, because the Tribe is not a citizen of any state for diversity jurisdiction and also because Stimson has no valid waiver of the Tribe's sovereign immunity. Even if this Court had jurisdiction, Stimson has not come close to showing it is entitled to the extraordinary and drastic remedy of a preliminary injunction. Stimson's claims would fail because the company never exercised its option to purchase land and assets owned by the Tribe. The Court correctly denied Stimson's attempt to obtain a temporary restraining order *ex parte*. Dkt. 8. Stimson's request for a preliminary injunction fares no better. Having seen the fatal flaws with Stimson's claims, the Court should similarly deny Stimson's motion for a preliminary injunction.

BACKGROUND

On May 31, 2000, the Tribe entered into a "Lease and Option Agreement" with TOBD, Inc. ("Agreement"), to lease land and assets owned by the Tribe for a sawmill ("Mill"). Dkt. 6-2 at 25. In 2006, Stimson acquired rights in the Agreement as a successor tenant. Dkt. 1 ¶ 10. The Agreement had an initial term of one year (the "Lease Term"), followed by a series of automatic renewal terms of either four or five years (a "Renewal Term"). Dkt. 6-3 at 1-2 (§§ 3.1, 3.2.2.).

The Tribe granted an option to purchase the Mill that only lasted "during the Lease Term and all Renewal Terms." *Id.* at 7 (§ 14.1). In order to exercise this option, the Agreement expressly required Stimson to send the Tribe "written notice . . . not less than sixty (60) days prior to the termination of the Lease Term or any Renewal Term." *Id.* (§ 14.1(a)). Consequently,

Stimson had approximately fourteen years to decide whether to exercise the option since acquiring the right in 2006. The latest Stimson could exercise the option was April 1, 2020, which was sixty days "prior to the termination" of the last Renewal Term. *Id.* (§ 14.1(a)).

On May 27, 2020, Stimson's chief operating officer, Dan McFall, wrote to the Tribe regarding the Agreement. Dkt. 6-4 at 2. Without any specific evidence, Mr. McFall claimed "[w]e have tried over the past few months without success to contact the Tribe regarding extending for one year the Lease . . . ." *Id.* Mr. McFall proposed that "Stimson is willing to extend the Lease for another year at the current monthly rental rate, and defer until at least early 2021 exercising the option to acquire the property described in the Lease . . . ." *Id.* He said that, "as a precautionary measure, and in the alternative to extending the Lease for one year, Stimson hereby submits to the Tribe Stimson's notice of exercise of the Option for immediate effect." *Id.* Mr. McFall said Stimson "look[s] forward to working with the Tribe on either extending the Lease for a year or acquiring the Property now pursuant to the Option." *Id.*

The Tribe's in-house counsel responded by letter to Mr. McFall the next day on May 28, 2020. *Id.* at 6. The Tribe's counsel noted that Mr. McFall's letter "is the first written communication I have received regarding the expiration of the Sawmill Lease." *Id.* The Tribe's counsel said he would "not have an opportunity to discuss the terms of the Sawmill Lease and your proposed offer to extend the Lease for one year until after the Tribal Council election." *Id.* He understood that "this may create a holdover situation under the Lease so the Tribe will not expect a rent payment for the month of June 2020, until we can meet and discuss the terms of a new lease agreement." *Id.*

Outside counsel for the Tribe, Peter Smith, wrote to Stimson on July 1, 2020. *Id.* at 8. This letter noted that Stimson "purported to exercise the option to purchase the Property" on May 27,

2020. *Id.* at 8-9. But Mr. Smith explained in detail that Stimson's "right to exercise the option under the Lease expired" on April 1, 2020. *Id.* at 9. Mr. Smith notified Stimson that the Tribe "declines to extend the term of the Lease." *Id.* Mr. Smith told Stimson that it was a "holdover tenant of the Property" as of June 1, 2020. *Id.* At no time did the Tribe ever acknowledge Mr. McFall's May 27 letter as a valid exercise of the option. Likewise, Stimson took no steps to acquire the Mill pursuant to the option. Rather, the Tribe and Stimson entered negotiations for a new lease agreement. *Id.*

The Tribe wrote to Stimson on January 25, 2022, to tell Stimson to "please stop sending electronic payments until a new agreement is in place" and to return all rent payments made by Stimson "following the expiration of the Sawmill Lease on May 31, 2020." Declaration of Kristofer Nixon ("Nixon Decl."), Ex. 1. Ultimately, the parties could not agree to a new lease agreement and the negotiations recently ended. *Id.* ¶ 7. The Tribe therefore exercised its right as property owner to notify Stimson to vacate the Mill no later than March 31, 2022. Dkt. 6-4 at 11.

Rather than work with the Tribe to orderly vacate the Mill, Stimson filed this action on February 25, 2022. Dkt. 1. Stimson then filed for a temporary restraining order *ex parte*, Dkt. 3, even though the company had thirty days to vacate the Mill before the Tribe took action, Dkt. 6-4 at 11. Stimson did not bother to certify in its motion efforts made to notify the Tribe, and no efforts had been made. *See* Fed. R. Civ. P. 65(b)(1)(B). On March 3, 2022, this Court denied Stimson's request for a temporary restraining order and set its motion for a preliminary injunction for expedited briefing. Dkt. 8 at 4.

LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations and internal quotation marks

omitted). The moving party "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The moving party has the burden to make a "clear showing" that each of the four elements are satisfied. *Id.* at 22; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (preliminary injunctions "requirement for substantial proof is much higher" than even a motion for summary judgment). This Court's jurisdiction is also a "question the court is bound to ask and answer for itself, even when not otherwise suggested." *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

ARGUMENT

Stimson's Motion fails for several reasons. First, this Court does not have subject matter jurisdiction to issue a preliminary injunction against the Tribe, because this action cannot be founded upon diversity of citizenship and the Tribe has not expressly waived its sovereign immunity for Stimson's claims. Second, even if this Court had jurisdiction, Stimson has not made the clear showing required to demonstrate that the extraordinary and drastic remedy of a preliminary injunction is warranted. Stimson would not succeed on the merits; the company would not be likely to suffer irreparable harm; the balance of equities would not tip in the company's favor; and an injunction would not be in the public interest. Accordingly, the Court should deny the Motion. Dkt. 3.

I. The Court Cannot Issue a Preliminary Injunction Because It Lacks Subject Matter Jurisdiction.

This Court should deny the Motion for the simple reason that the Court lacks subject matter jurisdiction. *See, e.g.*, *Proven Methods Seminars, LLC v. Am. Grants & Affordable Hous. Inst., LLC*, 519 F. Supp. 2d 1057, 1063 (E.D. Cal. 2007) ("Before considering the likelihood that

plaintiffs will succeed on the merits . . . the court must determine whether it has subject matter jurisdiction over the claim."). Federal courts "are courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute" and "which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). "It is presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted).

Stimson attempts to invoke this Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. In particular, Stimson alleges this "Court has original jurisdiction pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs." Dkt. 1 ¶ 4. There can be no diversity of citizenship with respect to the Tribe because it is not a citizen of any state.

Diversity jurisdiction requires, among other things, complete diversity of citizenship between all plaintiffs and all defendants. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). An Indian tribe, such as the Tribe, is not a citizen of any state. *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1095 (9th Cir. 2002); *see also Romanella v. Hayward*¸ 114 F.3d 15, 16 (2d Cir. 1997); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993). Stimson's complaint acknowledges the "Tribe is a federally recognized Indian tribe." Dkt. 1 ¶ 3. This is undoubtedly true. *See* 87 Fed. Reg. 4636, 4637 (Jan. 28, 2022) (listing the Tribe as an Indian entity recognized and eligible to receive services because it is an Indian tribe). But the Tribe is stateless for jurisdictional purposes and its presence destroys diversity. *Table Mountain*, 292 F.3d at 1095; *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829-30 (1989) (a stateless person is a "jurisdictional spoiler[]").

The complaint does not allege any other basis for this Court's jurisdiction, and there is none. This is fatal to Stimson's action and the Court cannot issue a preliminary injunction. "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation omitted). "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* (citation omitted). This is the threshold question that "the court is bound to ask and answer for itself, even when not otherwise suggested." *Id.* This is fundamental to the federal judicial power, and it is "inflexible and without exception." *Id.* at 94-95 (citation omitted).

The Tribe also contests the Court's jurisdiction because the Tribe has not expressly waived its sovereign immunity for Stimson's claims. "The Supreme Court has repeatedly declared a presumption favoring tribal sovereign immunity." *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001). The Tribe's sovereign immunity precludes this Court's subject matter jurisdiction. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). A waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks and citations omitted). Waivers of sovereign immunity also must be "strictly construed." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 41-42 (1992).

The Agreement provided a limited waiver of the Tribe's sovereign immunity. Dkt. 6-3 at 14 (§ 19.1). But the Agreement is no longer in effect, and it does not provide that this waiver survives. As such, the Agreement's waiver is inoperable. *See, e.g.*, *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986) (finding a waiver of sovereign immunity in a contract "is not operable" because the "entire contract is inoperable"). Even if

Stimson could rely on a defunct waiver, it does not extend to all of Stimson's claims, such as its claims for unjust enrichment and conversion. *See, e.g.*, *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1180 (D.S.D. 2012) (holding waiver of sovereign immunity to claims arising out of contract did not apply to unjust enrichment claim).

The Tribe will bring a motion to dismiss Stimson's complaint for these reasons in due course. While hereby reserving its right to contest the Court's jurisdiction for these reasons and not waiving any such defenses, the Tribe explains below that Stimson's Motion would nevertheless fail on the merits.

II. Stimson Is Not Entitled to a Preliminary Injunction.

A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. Due to its drastic nature, the Supreme Court has held "the requirement for substantial proof" for a preliminary injunction "is much higher" than even a motion for summary judgment. *Mazurek*, 520 U.S. at 972. Stimson's paltry Motion and memorandum, consisting largely of counsel's unsupported statements, falls far short of the proof required to sustain a preliminary injunction. *See generally* Dkt. 4. As discussed below, Stimson fails to make a sufficient showing on any of the four *Winter* factors.

A. Stimson Would Not Succeed on the Merits.

Stimson cannot show a likelihood of success on the merits because the Court does not have subject matter jurisdiction over Stimson's claims for the reasons discussed in Part I *supra*. *See, e.g.*, *Ramos v. Wolf*, 975 F.3d 872, 895 (9th Cir. 2020) (because court had no jurisdiction over plaintiff's claim, the "claim cannot serve as a basis for the preliminary injunction and we need not consider its likelihood of success on the merits"). Even if this Court had jurisdiction, which it does not, Stimson would not succeed on the merits of its claims.

1. Stimson Failed to Exercise the Option.

Stimson concedes the "fundamental question in this case is whether Stimson exercised the Purchase Option." Dkt. 4 at 7. Stimson's claims would fail on their merits because the company did not validly exercise the option. Therefore, the Tribe is not obligated to sell the Mill to Stimson. *See* Dkt. 6-3 at 7 (§ 14.1(b)).

"Under general principles of contract law, an optionee to an option contract can only exercise the option 'strictly in accordance with its terms.'" *U.S. Postal Serv. v. Ester*, 836 F.3d 1189, 1195 (9th Cir. 2016) (quoting 15 Williston on Contracts § 46:12 (4th ed. 2010)). An option is "to be strictly construed and where the option is to be exercised within a stated time and in a particular manner, that must be done exactly as prescribed." *Cummings v. Bullock*, 367 F.2d 182, 183 (9th Cir. 1966) (applying Wyoming law). Further, the "time stated for the exercise of an option is of the essence, and no express provision stating that time 'is of the essence' need be contained therein to make it so." *Southern v. Southern*, 438 P.2d 925, 926 (Idaho 1968) (citations omitted). The exercise must also be "unconditional." *Ester*, 836 F.3d at 1195.

Stimson's allegation that it exercised the option clearly does not fit the bill because it (1) did not comply with terms of the Agreement, and (2) was conditional.

a. Stimson did not exercise the option at least sixty days before the end of the Agreement's last Renewal Term.

Stimson's entire argument ignores the Agreement's plain language that required Stimson to exercise the option no later than sixty days before the end of the last Renewal Term. Stimson did not do so.

The Tribe granted the option only "during the *Lease Term* and all *Renewal Terms*." Dkt. 6-3 at 7 (§ 14.1) (emphasis added). The "Lease Term" and "Renewal Term" are defined terms under the Agreement that must be applied according to their terms. The "Lease Term" was the

initial one-year term from June 1, 2000 to May 31, 2001. *Id.* at 1 (§ 3.1). A "Renewal Term" was any of four automatic "renewal periods" for either four or five years each. *See id.* at 2 (§ 3.2.2). The final Renewal Term ended on May 31, 2020. *See* Dkt. 1 ¶ 19; Dkt. 6 ¶ 8.

Section 14.1(a) of the Agreement governs the exercise of the option. Dkt. 6-3 at 7. Section 14.1(a) provides as follows:

> Such Option *shall* be exercised, *if at all*, by written notice given by Lessee to Lessor ("Exercise Notice") not less than sixty (60) days prior to the termination of the *Lease Term* or any *Renewal Term*.

Id. (emphasis added). Clearly, Stimson could only exercise the option no later than sixty days prior to the end of the "Lease Term" or any "Renewal Term." Thus, the latest Stimson could exercise the option was April 1, 2020, which was sixty days before the end of the last Renewal Term.

Stimson admits "the expiration of the final renewal period" was May 31, 2020. *See* Dkt. 1 ¶ 19; Dkt. 6 ¶ 8. Stimson also admits it attempted to exercise its option on May 27, 2020, Dkt. 1 ¶ 20, which was four days before the end of the last Renewal Term and fifty-six days after the April 1, 2020 deadline to exercise the option. Thus, Stimson did not validly exercise its option under the Agreement. Stimson attempts to address this obvious deficiency in a footnote in its memorandum. *See* Dkt. 4 at 7 n.1. But in doing so, Stimson concedes it did not comply with the Agreement's requirements. *Id.* This concession alone defeats Stimson's claims because an option is strictly construed. *Ester*, 836 F.3d at 1195. Nevertheless, Stimson argues that this "did not cause Stimson to forfeit its option" because "Section 14.1(c) expressly states that the Purchase Option terminate [sic] only if (1) the option is exercised or (2) the Agreement is terminated." Dkt. 4 at 7 n.1. Stimson's argument fails.

Stimson's contention that "the Agreement remains in full force and effect" relies entirely on a holdover tenancy under section 21 of the Agreement. *Id.* at 7. Section 21 provides, in relevant part, as follows:

> If Lessee should occupy the Premises with the consent of Lessor after the expiration of this Agreement, and rent is accepted from Lessee, such occupancy and payment shall be construed as an extension of this Agreement *for a month-to-month tenancy* from the date of expiration . . . .

Dkt. 6-3 at 22 (emphasis added). Relying on section 21, Stimson argues that "all terms of the Agreement are extended, including the Purchase Option." Dkt. 4 at 7. Stimson is simply wrong.

Section 21 provides that a holdover "shall be construed as an extension of this Agreement *for a month-to-month tenancy* from the date of expiration." Dkt. 6-3 at 22 (emphasis added). The well-established rule is that the "terms of the original lease are usually carried over into the new tenancy" but courts "refuse to allow an option to purchase to be exercised after expiration of the original lease." *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 718 P.2d 551, 556 (Idaho Ct. App. 1985). This is because "only the terms which relate to the landlord-tenant relationship are carried over" and an option to purchase relates to a relationship of vendor-vendee. *Id.*

Indeed, the Agreement consisted of a "Lease *and* Option." Dkt. 6-2 at 25 (emphasis added). These are not the same thing, as an option is an offer to sell that "may not be revoked for an agreed upon amount of time." *Justad v. Ward*, 211 P.3d 118, 121 (Idaho 2009). Section 21 plainly provides that the Agreement is extended *only* "for a month-to-month tenancy" in the event of a holdover tenancy. The Agreement plainly provides that the option was in effect only "during the Lease Term and all Renewal Terms." Dkt. 6-3 at 7 (§14.1). Regardless of whether Stimson became a month-to-month holdover tenant under section 21, the option expired on May 31, 2020 at the end of the last Renewal Term and did not carry over into any holdover tenancy. Simply put,

Stimson was required to accept and exercise the option no later than April 1, 2020, which was sixty days before the end of the last Renewal Term on May 31, 2020. Stimson failed to do so.

b. Stimson's attempt to exercise the Option is invalid because it was conditional.

Stimson's attempt to exercise the option also fails because it was conditional on whether the parties agreed to "extend the Lease for another year at the current monthly rental rate." Dkt. 6-4 at 2. As noted above, an option contract "is an offer that, upon sufficient consideration, may not be revoked for an agreed upon amount of time." *Ward*, 211 P.3d at 121. Thus, an acceptance of this offer "must be unequivocal." *Id.*; *see also Ester*, 836 F.3d at 1195 (exercise of option must be "unconditional"). Stimson's attempt to exercise the option fails because the company "did not unequivocally state" that it accepted the Tribe's offer to purchase the Mill. *Ward*, 211 P.3d at 122.

In particular, Mr. McFall's May 27 letter proposed that Stimson was "willing to extend the Lease for another year at the current monthly rental rate, and defer until at least early 2021 exercising the option . . . ." Dkt. 6-4 at 2. Consequently, Stimson said it "hereby submits to the Tribe Stimson's notice of exercise of the Option for immediate effect" as a "precautionary measure, and *in the alternative* to extending the Lease for one year." *Id.* (emphasis added). There is no such thing as exercising a purchase option "in the alternative." *See Ward*, 211 P.3d at 122 (acceptance "must be unequivocal"). As such, Stimson's alleged attempt to exercise the option fails for this reason, as well.

Further, Stimson's conduct shows it never intended to exercise the option. Despite Stimson's newly minted allegation that it "is ready, willing and able to close the purchase and sale of the Mill," Dkt. 1 ¶ 36, Stimson never complied with the Agreement's requirements following exercise of an option. If Stimson believed it had exercised the option, the Agreement required Stimson to open an escrow for the transaction "[p]romptly" and for the parties to close on the

transaction no later than sixty days following an exercise of the option. Dkt. 6-3 at 8 (§ 14.1(e), (g)). That Stimson's attempt was conditional is confirmed by the fact that Stimson never treated its acceptance as unequivocal, nor acted upon its purported exercise of the option. Rather than conduct itself as if it had exercised the option, Stimson has behaved as a holdover month-to-month tenant for nearly *two years* by submitting monthly rent payments. Stimson has only now claimed it exercised the option after negotiations for a new lease agreement failed and the Tribe notified Stimson that it needs to vacate, because Stimson refused to negotiate a fair market rent for a new lease agreement. *See* Nixon Decl. ¶¶ 7, 15-16. Stimson cannot have it both ways because acceptance of an option must be unconditional.

Stimson's attempts to blame the Tribe as being "unresponsive" are irrelevant and without merit. Dkt. 1 ¶ 19. Stimson had *fourteen years* to exercise the option. Stimson had a unilateral right to accept the option to purchase and simply needed to mail the Tribe notice in accordance with the Agreement. *See* Dkt. 6-3 at 12 (§ 16). The Tribe responded one day after Mr. McFall's failed attempt to exercise the option and explained the Tribe was only willing to "meet and discuss the terms of a new lease agreement." Dkt. 6-4 at 6. Stimson's conduct discloses that it never actually wanted to purchase the Mill.

2. Stimson Has Not Shown It Will Likely Succeed on Its Conversion and Unjust Enrichment Claims.

Stimson would not likely succeed on its unfounded claims for unjust enrichment and conversion. Dkt. 1 ¶¶ 51-56, 57-63.

Stimson must prove the following three elements for its unjust enrichment claim:

> (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.

Turcott v. Estate of Bates, 443 P.3d 197, 204 (Idaho 2019) (citations omitted). Stimson merely alleges the Tribe "will have been unjustly enriched" *if* the "Tribe is permitted to retain full interest and value of the assets and services provided by Stimson without payment." Dkt. 1 ¶ 54. The only evidence Stimson offers is Mr. McFall's contention that the Tribe will be left with "nothing more than an old building and a section of land," Dkt. 6 ¶ 18, which clearly cannot sustain a claim of unjust enrichment. The Tribe disputes Mr. McFall's assertion. Regardless, Stimson has not provided any proof to show it would likely succeed on the merits of its unjust enrichment claim.

Stimson's conversion claim fares no better. A conversion claim requires proof "(1) that the charged party wrongfully gained dominion of property; (2) that property is owned or possessed by plaintiff at the time of possession; and (3) the property in question is personal property." *Clark v. Jones Gledhill Furham Gourley, P.A.*, 409 P.3d 795, 803 (Idaho 2017). Stimson's conversion claim is baseless because there is no allegation that the Tribe "wrongfully gained dominion" of anything. Stimson merely alleges on "information and belief" that the "Tribe *intends* to take dominion and control over Stimson's property and use it to continue Mill operations without Stimson." Dkt. 1 ¶ 60 (emphasis added). A conversion claim requires the Tribe to have "in fact exercised dominion or control." *Wiseman v. Schaffer*, 768 P.2d 800, 804 (Idaho 1989). And any property the Tribe gains "dominion" over will be because the Tribe rightfully owns it, which defeats a conversion claim. *See Carver v. Ketchum*, 26 P.2d 139, 141 (Idaho 1933) (conversion is a "distinct act of dominion wrongfully exerted over *another's personal property*") (emphasis added).

* * *

In short, the Tribe agreed on May 31, 2000 to an option that expired in twenty years on May 31, 2020. Dkt. 1 ¶ 8; Dkt. 6-3 at 1-2 (§§ 3.1, 3.2.2.). Stimson was required to exercise the

option no later than sixty days before May 31, 2020. Stimson admits it did not do so. *See* Dkt. 1 ¶ 20. Accordingly, Stimson would not prevail on the merits and this Court need not evaluate the other *Winter* factors. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (court "need not consider the remaining three" *Winter* factors when a "plaintiff has failed to show the likelihood of success on the merits") (citation omitted).[1]

B. Stimson Would Not Suffer Irreparable Harm.

The second *Winter* factor requires Stimson to prove it "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Stimson has not demonstrated it would be likely to suffer irreparable harm. *See Mazurek*, 520 U.S. at 972 (motion for preliminary injunction requires "substantial proof").

First, Stimson "must proffer *evidence* sufficient to establish a likelihood of irreparable harm." *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013) (emphasis added). Stimson's "evidence" consists of counsel's unsupported statements in the Motion's memorandum and two speculative statements by Mr. McFall. *See* Dkt. 4 at 8. Mr. McFall claims "Stimson's business will suffer immediate injury" because "good employees will likely leave, and it may be impossible to recruit replacements under the circumstances." Dkt. 6 ¶ 21. Mr. McFall does not identify any of these "good employees" or provide evidence to show it would be "impossible to recruit replacements." He also speculates that "timber sellers will likely be reluctant to supply logs due to the uncertainty of future operations at the Mill." *Id.* Again, Mr. McFall offers no concrete evidence to support this claim. Similarly, Stimson's counsel baldly

[1] Stimson has not raised "serious questions" going to the merits so the company cannot invoke the Ninth Circuit's "sliding scale" approach. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Even if it did, Stimson has not shown the "balance of hardships tips sharply" in its favor for the reasons discussed below. *Id.*

asserts the "damage to Stimson if denied the right to continue to operate the Mill during this adjudication would destroy Stimson's business." Dkt. 4 at 11.

These unsupported statements are clearly deficient to carry Stimson's burden to make a "clear showing" with "substantial proof" that it will suffer irreparable harm. *Mazurek*, 520 U.S. at 972. Stimson offers nothing more than self-serving statements that are simply not enough. *See, e.g.*, *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 802 (3d Cir. 1989) (plaintiff offered no hard evidence that a breached contract would force plaintiff out of business); *Augusta News Co. v. News Am. Pub. Inc.*, 750 F. Supp. 28, 32 (D. Me. 1990) (rejecting "bare conclusory assertions of Plaintiff's president"). Moreover, Stimson's unsupported statements are wholly speculative. "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also Auto Sunroof of Larchmont, Inc. v. Am. Sunroof Corp.*, 639 F. Supp. 1492, 1494 (S.D.N.Y. 1986) (plaintiff's claim to irreparable harm was speculative because it offered "only the self-serving statement of its President" rather than "presenting concrete data").

Stimson's assertions also fail for the fundamental reason that the alleged injuries do not constitute irreparable harm. Stimson's alleged injuries of lost employees, business, and land would all be compensable by money damages in the *very* unlikely event Stimson were to prevail on the merits. Stimson's alleged injuries all relate to "money, time and energy necessarily expended" and are therefore "not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *see also L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (finding claims of lost revenue, diminution of property's market value, and loss of goodwill are "but monetary injuries which could be remedied by a damage award"). Stimson offers no evidence to show it could not "at a later date, in the ordinary course of litigation" recover money damages for these

alleged losses. *Sampson*, 415 U.S. at 90. Just as in this Circuit's *Goldie's Bookstore*, Stimson's injuries, "if forced to remove its business from the premises . . . will not constitute irreparable harm . . . ." 739 F.2d at 471 (citations omitted).

Stimson further argues it would be "irreparably injured because of the unique nature of the land that is the subject of this dispute." Dkt. 4 at 9. As with other claimed injuries, Stimson offers no evidence to support its contention that the Mill is unique and irreplaceable. The fact that Stimson needs to incur money, time, and energy to relocate its business to another property does not constitute irreparable harm. *Sampson*, 415 U.S. at 90; *Goldie's Bookstore*, 739 F.2d at 471. Stimson's assertion of irreparable harm is also belied by its second claim for relief, which seeks money damages in "the alternative" to the first claim for specific performance. *See* Dkt. 1 ¶ 42; *see also id.* ¶ 38 (alleging the "Mill property consists of unique real estate, justifying the remedy of specific performance"). Stimson's claim of irreparable harm "because of the unique nature of the land" is contradicted by its own acknowledgement that money damages are an adequate remedy.

Thus, Stimson has utterly failed to meet its burden to make a clear showing with evidence that the company is likely to suffer irreparable harm.

C. The Balance of Equities Tips in the Tribe's Favor.

The third *Winter* factor requires that the "balance of equities" tip in Stimson's favor. *Winter*, 555 U.S. at 20. The balance of equities tips in favor of the Tribe's opposition to the Motion. Stimson requests that the Court enjoin the Tribe from "[t]erminating the Agreement," evicting Stimson, and interfering "in any way with Stimson's ability to possess, access and operate the Mill." Dkt. 4 at 11. The delay of Stimson's continued possession of the Mill Site would cause significant harm to the Tribe. *See* Nixon Decl. ¶¶ 12-16. This would result in forgone

opportunities and other consequences from the delay that unlawful detainer actions are designed to prevent. *See Goldie's Bookstore*, 739 F.2d at 472. The Tribe cannot begin to advertise or look for another lessee for the property so long as Stimson is permitted to remain on the premises pursuant to a court order. Nixon Decl. ¶ 12. The Tribe will also be injured by a preliminary injunction because it will be forced to accept rent payments from Stimson that are below market rate. *Id.* ¶ 15-16. The Tribe is also a sovereign Tribal government that uses revenues from leasing the Mill to fund essential programs and government services for tribal members. *Id.* ¶ 13.

Set against the Tribe's hardship, the hardship to Stimson is merely that "good employees will likely leave" and "timber sellers will likely be reluctant to supply logs." Dkt. 6 ¶ 21. These claimed harms are so conclusory and speculative that they cannot provide a strong counterweight to the harm that will be caused to the Tribe.

Further, any harm to Stimson is entirely of its own making. A "party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Stimson has known since May 28, 2020, that the Tribe did not acknowledge the attempted exercise of the option as valid. Dkt. 6-4 at 6. The Tribe's outside counsel reiterated the Tribe's position on July 1, 2020. *Id.* at 8. Stimson also never even attempted to invoke the Agreement's requirements if the company truly believed it had exercised the option. *See* Dkt. 6-3 at 8 (§ 14.1(e), (g)). The parties never treated Stimson's untimely and conditional attempt to exercise the option as valid. Rather, the parties have been engaged in negotiations for a *new lease* because Stimson held over and has no right to purchase the Mill.

Stimson did not file this action, nor move for a preliminary injunction, until nearly two years after it alleges to have exercised its option. Stimson's long delay weighs heavily against a

preliminary injunction. *Benisek*, 138 S. Ct. at 1944. Therefore, the balance of equities does not tip in Stimson's favor.

D. A Preliminary Injunction is Not in the Public Interest.

The final *Winter* factor considers whether an injunction "is in the public interest." *Winter*, 555 U.S. at 20. Stimson contends the public interest is "neutral" because the "injunction would implicate only the private commercial relationship of the parties." Dkt. 4 at 10. Stimson ignores that this case involves much more than a "private commercial relationship." The Tribe is a sovereign Tribal government that uses revenues from its leasing agreements to fund essential government programs and services and to promote economic development on the Reservation. Nixon Decl. ¶ 13-14. An injunction against the Tribe would be contrary to the public interest in promoting the federal policy "of encouraging tribal self-sufficiency and economic development." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (internal quotation marks and citations omitted). Accordingly, the public interest is relevant to the Tribe's ability to determine who to enter into business relationships with for maximizing the financial and economic benefits from those relationships to use to fund essential governmental programs and services. A preliminary injunction in this case is not in the public interest because it would restrain the Tribe from taking action with respect to its own property within its Reservation.

CONCLUSION

For these reasons, the Tribe respectfully requests the Court deny Stimson's Motion (Dkt. 3).

Respectfully submitted this 10th day of March 2022.

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