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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RONALD D. ALLEN, JR., et al.,

Plaintiffs,

vs.

ROBERT H. SMITH, et al.,

Defendants.

Case No. 12-CV-1668-WQH-KSC

*AMENDED** MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FOR FAILURE TO JOIN AN INDISPENSABLE PARTY, AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

[Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(b)(7)]

Date: November 5, 2012
Ctrm: 4
Judge: William Q. Hayes

Complaint Filed: July 3, 2012

* *Document amended only to correct formatting errors caused in PDF conversion.*

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TABLE OF CONTENTS

Page:

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TABLE OF AUTHORITIES

Page(s)

CASES

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I. INTRODUCTION

By this lawsuit, Plaintiffs ask this Court to usurp one of an Indian tribal government's "most basic powers"—specifically, "the authority to determine questions of its own membership." *United States v. Bruce*, 394 F. 3d 1215, 1225 (9th Cir. 2005). Defendants Robert H. Smith, Leroy H. Miranda, Jr., Kilma S. Lattin, Theresa J. Nieto, and Dion Perez (collectively "Defendants") are current and former duly-elected leaders of the Pala Band of Mission Indians ("Tribe"), a federally recognized sovereign Indian tribe. Plaintiffs are twenty-seven former members of the Tribe, who were among those removed from the Tribe's membership rolls as a result of a determination by Defendants, acting in their official capacity as the elected leadership of the Tribe and members of the Tribe's governing body (the Tribe's "Executive Committee"), that Plaintiffs (and others) do not meet the requirements for Tribal membership. Specifically, Defendants concluded that deceased Tribal member Margarita Britten (Plaintiffs' ancestor, through whom they claimed membership in the Tribe) was not a full-blood Pala Indian.[1]

Plaintiffs ask this Court to intrude upon the Tribe's sovereign power to make and enforce Tribal laws governing, and decisions relating to, membership in the Tribe. Their Complaint seeks a permanent injunction invalidating the decisions leading to their removal from the Tribe's membership rolls, declaring their removal to be null and void, and requiring that benefits extended only to Tribal members be restored to Plaintiffs. Plaintiffs admit that every one of their alleged injuries is the direct and exclusive result of decisions related to tribal enrollments, and thus, decisions of a sovereign tribal government in the exercise of its inherent authority. In bringing this action, Plaintiffs thus ignore bedrock federal law that only the Tribe, as part of its inherent powers of self-government, maintains exclusive authority in the area of Tribal membership, to the exclusion of all others, including the federal courts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 72 n.32 (1978); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005).

[1] To be a member under the Tribe's laws, an individual must (1) be a lineal descendent of a person whose name appeared on a particular Tribal allotment roll prepared by the United States, and (2) must possess 1/16 or more degree of Indian blood of the Pala Band. (Complaint For Conspiracy To Interfere With Civil Rights, Violations Of Equal Protection, Conversion, Tortious Interference With Prospective Economic Advantage, Group Defamation, And Civil Conspiracy, filed July 3, 2012 (Doc. 1) ("Complaint"), at 53:16-22.)

Plaintiffs also disregard the well-established principle that tribal immunity protects not only the Tribe from suit, but the Tribe's officials as well. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). They fail to acknowledge that the Tribe itself, which is not named in this litigation, is a necessary and indispensable party without which Plaintiffs cannot obtain the relief they seek, and which (like the Tribal officials named here) cannot be sued, and thus joined, without its consent. *See Santa Clara Pueblo*, 436 U.S. at 58. So despite Plaintiffs' pretense that they can sue Defendants in a federal court, their artful pleading cannot avoid the "double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." *Lewis*, 424 F.3d at 960. To be sure, the actions about which Plaintiffs' complain—specifically, their removal from the Tribe's membership rolls—are necessarily actions Defendants could only have taken in their official capacity as members of the Tribe's governing body, as only the Tribe has the power to determine membership, not any individual member or official. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32 (recognizing "[a] *tribe's* right to define its own membership for tribal purposes" (emphasis added).). Moreover, assuming solely for argument's sake that Defendants did somehow exceed their authority as elected members of the Tribe's governing body, this Court nevertheless lacks jurisdiction over Plaintiffs' claims because it lacks power to grant relief predicated on alleged violations of tribal law. *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 276-77 (9th Cir. 1981).

In a further attempted end-run around these jurisdictional barriers, Plaintiffs try to bring this intratribal dispute before the Court under the guise of various federal statutes that, in reality, provide no basis for relief. The Supreme Court has unequivocally held that the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, affords federal courts no jurisdiction to hear intratribal disputes regarding membership. *Santa Clara Pueblo*, 436 U.S. at 58 (limiting review to habeas corpus petitions). Furthermore, neither of the civil rights statutes raised in Plaintiffs' Complaint are implicated here. There is no source of substantive rights or underlying conspiracy to support Plaintiffs' Section 1985(3) claim, and Section 1981 does not apply to an Indian tribe's membership determinations either.

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Finally, Plaintiffs' claims under state law also fail. Plaintiffs have no vested property right in Tribal membership, and the benefits flowing therefrom, so as to support their conversion claim. Similarly, Plaintiffs cannot show they were defamed by Defendants, as "group defamation" is not actionable as a matter of California law. Plaintiffs' claims for tortious interference and conspiracy likewise fail because they cannot show Defendants engaged in conduct that is wrongful under California or federal law. However, even assuming the efficacy of Plaintiffs' various state law claims, this Court simply could not grant the requested relief under the guise of state law or otherwise. It cannot because it would require the Court to impose its will on a sovereign tribal government by deciding whether the Tribe should—indeed must—recognize Plaintiffs as members under its own internal laws.

In the end, Plaintiffs' attempts to bring this intratribal dispute before this Court are futile. For more than thirty years, the Supreme Court's pronouncements in *Santa Clara Pueblo* have held strong, and this Court should not be the first to disturb the well-established principle that Indian tribes, pursuant to their inherent authority as sovereign nations, possess the exclusive authority to make and enforce rules governing their membership.

II. SUMMARY OF FACTUAL ALLEGATIONS

As Plaintiffs concede, the Tribe is a federally recognized sovereign Indian tribe, maintaining a government-to-government relationship with the United States. (Complaint at 3:19-21.) *See* 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012).

Plaintiffs allege the Tribe formally organized in 1960, with the adoption of the Pala Articles of Association ("Articles"), which formerly served as the Tribe's primary governing document. (Complaint at 21:16-18.) They further allege that, in 1994, the Tribe, in an exercise of its sovereign authority and to transition from the era of federal oversight over Indian affairs to the modern era of tribal self-determination and self-governance, began the process of replacing and revising the Articles, by vote of its General Council (the Tribe's adult membership), which ultimately led to the adoption of the Constitution of the Pala Band of Mission Indians ("Pala Constitution"). (*Id*. at 22:25-27.) Development of the Pala Constitution was a process, rather than

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single event, as Plaintiffs allege that it was not until 1997 that the General Council voted to adopt the Pala Constitution, effectively superseding the Articles. (*Id*. at 23:1-3.)

Plaintiffs admit the Defendants are current and former members of the Pala Executive Committee, the elected governing body of the Tribe. (Complaint at 4:3-4, 14:11-27, 15:1-3, 21:13-16.) They contend that, as the Tribe's duly-elected leadership, the Executive Committee maintains the Tribe's membership roll, a responsibility expressly delegated to the Committee by the Tribe's General Council and as enumerated in the Pala Constitution. (*Id*. at 7:10-12, 8:23-27, 23:4-6.) Plaintiffs allege that, pursuant to this delegated authority, and acting in their capacity as Executive Committee members, in May 2011, Defendants reviewed the enrollment applications of certain individuals who were descendents of deceased Tribal member Margarita Britten. (*Id*. at 6:19-21, 31:14.) Ultimately, as Plaintiffs allege, the Executive Committee's investigation in response to the request for action boiled down to a single issue: the degree of Pala Indian blood of Margarita Britten, which had been a matter of controversy for many years. (*Id*., at 31:18-23.).

Plaintiffs allege that, in the end, the Executive Committee found that Margarita Britten was not a full-blood Pala Indian. (Complaint at 5:12-15, 31:18-20.) Accordingly, they contend Defendants, carrying out their governmental responsibility to maintain the Tribe's membership roll, began reviewing the enrollment applications of Tribal members whose membership depended on lineal descent from Margarita Britten. (*Id*. at 6:19-20, 30:19-24, 35:1-6.) Plaintiffs further allege that, following this review and as a result of the Committee's determination that Margarita Britten was not a full-blood Pala Indian, the Committee then determined Plaintiffs and other former Tribal members had been wrongly enrolled in the Tribe. (*Id*. at 5:11-15, 7:21-23.) Plaintiffs contend Defendants' actions in this regard violated various Tribal laws, including the Pala Constitution, the Tribe's Enrollment Ordinance, and a Resolution of the Tribe's membership. (*Id*. at 37:21-24, 39:20-22.)

Finally, Plaintiffs allege that every harm suffered by them—specifically, loss of Pala Citizenship, cession of Tribal member benefits, and loss of standing within the Tribal community—are directly and solely the result of Defendants' determination that Margarita Britten was not a full-blood Pala Indian, and consequent removal of Plaintiffs from the Tribe's

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membership roll. (Complaint at 3:5-16; 35:10-12, 55:8-12, 56:18-21, 57:11-13, 58:13-15, 59:1-5, 59:22-60:3.) As remedies, Plaintiffs seek, *inter alia*, an order (1) declaring Defendants' governmental actions to be invalid, (2) permanently enjoining Defendants from carrying out their governmental duties relating to enrollment in the Tribe, (3) an order requiring that Defendants allocate additional Tribal funds to "pay back" Plaintiffs for the benefits lost as a result of Defendants' decision that Plaintiffs are no longer eligible for membership in the Tribe, and (4) compensatory and punitive damages against Defendants. (*Id*. at 60:21-26, 61:1-7.)

III. ARGUMENT

A. Plaintiffs' Complaint Establishes That This Court Lacks Subject Matter Jurisdiction Over Their Claims.

As demonstrated by the face of Plaintiffs' Complaint, this Court lacks subject matter jurisdiction to adjudicate Plaintiffs' claims, which ask this Court to intercede in the membership determinations of a federally recognized Indian tribe. Plaintiffs' lawsuit involves an intratribal dispute involving Tribal membership, which falls within the exclusive province of the Tribe, and raises no substantial question of federal law. And because Plaintiffs' suit is, fundamentally, one against the Tribe, the Tribe's sovereign immunity bars Plaintiffs' claims against Defendants, who are sued for actions taken as Tribal officials. Neither the Tribe, nor Congress, has waived that immunity, by federal statute or otherwise.

Where the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction, the complaint is properly dismissed for lack of subject matter jurisdiction. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). Where, as here, such a "facial" subject matter jurisdiction defect appears, the court dismisses the action without considering extrinsic evidence or affidavits. *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Li v. Chertoff*, 482 F. Supp. 2d 1172, 1175 (S.D. Cal. 2007). In evaluating a facial attack on subject matter jurisdiction, the court accepts all factual allegations in the complaint as true, but is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Warren*, 328 F.3d at 1139 (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)). Nor may the court "assume the truth of legal

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conclusions merely because they are cast in the form of factual allegations." *Id.* (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). The plaintiff, as the party asserting jurisdiction, has the burden of establishing that the federal court has jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Li*, 482 F. Supp. 2d at 1175.

1. This Court Lacks Jurisdiction To Adjudicate Plaintiffs' Claimed Right To Tribal Membership And Tribal Benefits Under Tribal Law.

Fundamentally, Plaintiffs challenge the right of the Tribe to determine its own membership. It is by now well established that "the authority to determine questions of [a tribe's] own membership" falls within the exclusive province of the Tribal government, as one of its "most basic powers." *Bruce*, 394 F. 3d at 1225. As such, federal courts simply may not, under the guise of federal law, "interfere with [a] sovereign tribe's ability to determine its own membership," as such matters "lie[] at the very core of tribal self-determination" and Indian sovereignty. *Smith v. Babbitt*, 100 F. 3d 556, 559 (8th Cir. 1996), *cert. denied*, 522 U.S. 807. Corollary to the power to determine their own membership, Indian tribes are sovereign political entities that possess the exclusive authority to develop their own laws and govern their own internal affairs. *Williams v. Lee*, 358 U.S. 217, 223 (1959). Where, as here, a federal lawsuit seeks relief challenging an Indian tribe's governance of its internal affairs, and application of its own laws, the federal court lacks subject matter jurisdiction and must dismiss the action. *Santa Clara Pueblo*, 436 U.S. at 55; *Lewis*, 424 F.3d at 960-61.

a) This Court Lacks Power To Intrude Upon This Intra-Tribal Dispute.

The principle that a tribe's membership determinations constitute a unique attribute of tribal sovereignty, raising no substantial question of federal law and falling within the exclusive jurisdiction of the tribe, was first enunciated by the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez*. In that case, a female tribal member challenged a tribal ordinance that sexually discriminated against women who married outside the tribe, denying membership to their children, while extending membership to the children of male members who did so. *Santa Clara Pueblo*, 436 U.S. at 51. The Supreme Court rejected her effort to challenge the ordinance as violating the

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"equal protection clause" of the federal Indian Civil Rights Act, reasoning that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government," and that, while "no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.'" *Id.* at 55. Thus, the Court concluded federal courts may not "pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members." *Id.* at 51, 72.

The *Santa Clara Pueblo* Court recognized the "well-established federal 'policy of furthering Indian self-government,'" noting that "resolution in a foreign forum of intra tribal disputes . . . cannot help but unsettle a tribal government's ability to maintain authority." *Id.* at 59, 62 (internal quotations and citations omitted). Underscoring the import of protecting tribal sovereignty over matters of self governance, including "[a] tribe's right to define its own membership for tribal purposes," the Court held that, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Id.* at 72 n.32.

Following *Santa Clara Pueblo*, the Ninth Circuit has repeatedly held that internal tribal matters, especially membership disputes, are left to the discretion of the tribe to the exclusion of federal courts. *Lewis*, 424 F.3d at 960 (holding that internal dispute over membership benefits "cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes"); *see also Alvarado v. Table Mountain Rancheria,*, 509 F.3d 1008, 1011 (9th Cir. 2007); *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribal membership"); *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185 (E.D. Cal. 2009) ("Unless surrendered by the tribe, or abrogated by Congress, tribes possess an inherent and exclusive power over matters of internal tribal governance."); *cf. Donovan v. Coeur d'Alene Tribal Farm.*, 751 F.2d 1113, 1116 (9th Cir. 1985) (federal statutes of general applicability will not apply to Indian tribes where the subject matter involves "purely intramural matters such as conditions of tribal membership").

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On the basis of the same broad principles of tribal sovereignty articulated in *Santa Clara Pueblo*, a litany of federal courts have consistently declined to intervene in internal tribal disputes under the guise of federal claims. *See, e.g., Ordinance 59 Ass'n v. United States Dept. of the Interior*, 163 F.3d 1150, 1152 (10th Cir. 1998) (a suit "asking this court to step in and tell a tribal government what to do in a membership dispute" constitutes "exactly the kind of interference in tribal self-determination prohibited by *Santa Clara*"); *Smith*, 100 F.3d at 559 ("The great weight of authority holds that tribes have exclusive authority to determine membership issues[.]"); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir. 1989) (finding that review of tribe's allegedly racist membership determinations "would in effect eviscerate the tribe's sovereign power to define itself, and thus would constitute an unacceptable interference 'with a tribe's ability to maintain itself as a culturally and politically distinct entity'").

Here, the premise for each of Plaintiffs' claims is that Defendants, acting as the governing body of the Tribe (Complaint at 14:11-15:6), removed Plaintiffs from the Tribe's membership rolls in violation of the Tribe's laws. (*Id.* at 55:8-12, 56:18-21, 57:11-13, 58:13-15, 59:1-5, 59:22-60:3.) In turn, Plaintiffs ask this Court to "invalidate Defendants' wrongful disenrollment actions," to "[e]nter an order declaring the wrongful disenrollment of Plaintiffs by Defendants to be null and void," and to award damages for "the money and lost benefits that were withheld and/or taken away from Plaintiffs while they were wrongfully disenrolled." (Complaint at 60:21-61:2.) This Court simply lacks jurisdiction to entertain such claims. *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Lewis*, 424 F.3d at 960-61; *Smith*, 100 F.3d at 558-59.

Plaintiffs' allegations that the Defendants' disenrollment violates various federal and state laws cannot salvage their claims. *Smith*, 100 F.3d at 559 (plaintiffs' claims under IGRA, ICRA, IRA, and RICO failed because "[f]ederal court jurisdiction does not reach" plaintiffs' claims attacking the tribal government's distribution of gaming revenue); *Timbisha Shoshone*, 687 F. Supp. 2d at 1181, 1184-85 (no jurisdiction to grant relief on various state law theories, including conversion); *In re Sac & Fox Tribe of the Miss. in Iowa / Meskwaki Casino Litig.*, 340 F.3d 749, 763-64 (8th Cir. 2003) (no jurisdiction to hear state law trespass claim in the context of a tribal leadership dispute). This Court simply lacks "[j]urisdiction to resolve internal tribal disputes,

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interpret tribal constitutions and laws, and issue tribal membership determinations" regardless of the procedural vehicle Plaintiffs employ. *In re Sac & Fox Tribe*, 340 F.3d at 763-64; *Lewis*, 424 F.3d at 960-61; *Boe*, 642 F.2d at 276-78.

Moreover, further revealing of the nature of Plaintiffs' claims, they could not try to prove their claims without introduction into evidence of government documents solely in possession of the Tribe, which itself cannot be subpoenaed by virtue of its sovereign immunity. *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992); *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893, 902 (9th Cir. 2002). Putting aside this practical roadblock to Plaintiffs' evidentiary burden, the Court would, at each step of the factual and legal inquiry into Plaintiffs' claims, be overstepping its jurisdictional boundaries and "interject[ing] itself into the internal affairs of the Tribe." *Timbisha Shoshone*, 687 F. Supp. 2d at 1186.

Once a federal court determines the claims before it rest on the actions of an Indian tribe exercising its inherent powers of self-governance over internal affairs, the court must find it lacks jurisdiction, and its inquiry is over. Plaintiffs' claims against Tribal Defendants constitute precisely this sort of suit, and must be dismissed.

b) This Court Lacks Power To Interpret Tribal Laws To Evaluate Whether The Tribe Wrongly Disenrolled Plaintiffs.

Related to the principle that federal courts may not intercede in internal tribal matters, federal courts cannot grant relief for civil claims predicated on the violation of tribal laws. *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 276-77 (9th Cir. 1981). Rather, Indian tribes' "inherent and exclusive power over matters of internal tribal governance," deprive a federal court of jurisdiction to entertain claims requiring it to interpret and apply tribal law. *Timbisha Shoshone*, 687 F. Supp. 2d at 1184-85; *Boe*, 642 F.2d at 276-78; *In re Sac & Fox Tribe*, 340 F.3d at 763-64 ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts."); *Runs After v. United States of America*, 766 F.2d 347, 352 (8th Cir. 1985) (plaintiffs' claims "necessarily require the district court to interpret the tribal constitution and tribal law . . . is not within the jurisdiction of the district court"); *Goodface v.*

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Grassrope, 708 F.2d 335, 339 (8th Cir. 1983) ("[T]he district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute."); *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995), *aff'd* 100 F.3d 556 (8th Cir. 1996) (holding a dispute "involving questions of [a] tribal constitution and tribal law is not within the jurisdiction of the district court").

In pursuit of their claims of wrongful disenrollment, Plaintiffs ask the Court to interpret the Tribe's 1960 Articles of Association (Complaint at 4:1-11), the Tribe's Constitution and the resolution adopting it (*id.* at 6:19-25, 50:25-27), the Tribe's Original and Revised Enrollment Ordinances (*id.* at 6:19-21, 31:3-6), the Tribe's Gaming Ordinance (*id.* at 24:15-26), and a General Council petition (*id.* at 52:10-13). Plaintiffs further ask the Court to evaluate the substance of the Tribe's General Council meetings (Complaint at 8:13-15), Executive Committee meetings (*id.* at 15:4-10), and Enrollment Committee meetings (*id.* at 15:12-16:2).

The theory of the case is that Defendants violated the Tribe's laws in the course of disenrolling Plaintiffs from the Tribe. (*See e.g.*, Complaint at 3:2-8, 6:14-21.) Among the many issues Plaintiffs raise and that require interpretation of the Tribe's laws:

- whether the Tribe validly adopted its Constitution of November 19, 1997 (*id.* at 22:21-25:3);
- whether the Tribe's Constitution or the Tribe's Original or Revised Enrollment Ordinances guaranteed Plaintiffs due process or equal protection rights that the Tribe violated (*id.* at 31:3-6, 44:21-46:5);
- whether, under the Tribe's Constitution and Ordinances, a vote by the Tribe's General Council foreclosed the Tribe's Executive Committee from revisiting the issue of whether Margarita Britten's was a full-blooded Indian (*id.* at 36:23-37:24, 39:12-17);
- whether the Tribe's Constitution authorized the Tribe's Executive Committee to enact the Revised Enrollment Ordinances (*id.* at 39:23-40:17);
- whether a ten-year moratorium on enrollment requirements allegedly passed by the Tribe's General Council prohibited the Executive Committee from enacting the Revised Enrollment Ordinances (*id.* at 40:18-41:24);

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- whether the Tribe's Executive Committee violated the Revised Enrollment Ordinances by allegedly disenrolling members who did not misrepresent or omit facts in an enrollment application (*id.* at 41:25-42:3); and
- whether the procedures Tribe's Executive Committee followed the Revised Enrollment Ordinances in disenrolling Plaintiffs (*id.* at 42:4-12).

This Court simply lacks the power to interpret and apply tribal law to reach the issues upon which Plaintiffs' membership dispute necessarily rests. *Boe*, 642 F.2d at 276-77; *Timbisha Shoshone*, 687 F. Supp. 2d at 1184-85; *In re Sac & Fox Tribe*, 340 F.3d at 763-64.

To establish their claim to membership, Plaintiffs also ask this Court to resolve the issue of whether, as a matter of the Tribe's law, the Tribal governing body that disenrolled them (to wit, comprised of Defendants) was properly constituted. (Complaint at 8:8-12, 42:13-44:19.) Of course, a dispute about the legitimacy of the governing body of an Indian tribe is also an internal tribal matter a federal court may not resolve. *Boe*, 642 F.2d at 276-78 (holding federal court lacks power to resolve plaintiffs' claims that tribal government officials violated the tribe's constitution, bylaws, and ordinances in certifying tribal election involving ineligible candidate); *Timbisha Shoshone*, 687 F. Supp. 2d at 1184-85 (refusing to grant relief requiring the district court "to determine whether the 2008 Death Valley Tribal Council acted with legitimate authority when it accepted the recommendation of the Enrollment Committee to disenroll Plaintiffs from the Tribe"); *County of Charles Mix v. U.S. Dept. of the Interior*, 674 F.3d 898, 903 (8th Cir. 2012) (holding that district court lacked jurisdiction to evaluate whether a tribe's business committee exceeded its authority under tribal law); *Goodface*, 708 F.2d at 339 ("[T]he district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute.").

Because the Court cannot resolve Plaintiffs' claims without interjecting itself into an internal tribal matter over which only the Tribe possesses jurisdiction, involving issues of tribal law unsuitable for a federal forum, this Court lacks subject matter jurisdiction and the action should be dismissed.

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c) The Indian Civil Rights Act Does Not Authorize This Court To Adjudicate This Internal Tribal Dispute.

Throughout their Complaint, Plaintiffs scatter references to the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, ("ICRA") (Complaint at 44:24-45:11, 55:8-12, 56:14-17), apparently hoping to make this dispute seem like something other than what it is: an internal tribal dispute Congress has left for tribal resolution.

ICRA simply does not authorize claims for damages or equitable relief based on membership disputes. The ICRA permits but one remedy, namely, "the 'privilege of the writ of habeas corpus' is made 'available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.'" *Santa Clara Pueblo*, 436 U.S. at 58. The Ninth Circuit has held that, apart from habeas relief, "[n]o other private cause of action may be implied from the ICRA." *Boe*, 642 F.2d at 279. Indeed, the Ninth Circuit has foreclosed any attempt to challenge tribal membership determinations via the ICRA. *Id.* at 278 (rejecting plaintiffs' argument that the ICRA is a "vehicle[] through which the federal courts are empowered to grant relief in civil cases arising out of tribal actions taken in connection with the process of tribal self-government"); *accord Ordinance 59 Ass'n*, 163 F.3d at 1155 (holding ICRA claim involving tribal membership and implicating tribal government relations was exactly the type of federal court relief *Santa Clara Pueblo* foreclosed); *Smith*, 100 F.3d at 557-59 (holding ICRA did not support a challenge regarding membership and gaming-related payments). Moreover, "[c]laims for damages are not cognizable under the ICRA." *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1386 n.8 (9th Cir. 1988) (citing *Santa Clara Pueblo*, 436 U.S. at 59).

To be sure, even Plaintiffs do not suggest they can allege a habeas claim under ICRA, but rather attempt to use it as a source for rights under other statutes, none of which purport to authorize a federal court to entertain an internal tribal dispute. (Complaint at 55:8-12, 56:14-17.) Indeed, even if Plaintiffs had alleged a claim for habeas relief, the Ninth Circuit has concluded that disenrollment from an Indian tribe does not constitute "detention" supporting habeas relief under the ICRA. *Jeffredo v. Macarro*, 599 F.3d 913, 920 (9th Cir. 2010) (declining to "expand the scope of the writ of habeas corpus to cover" appeals of tribal enrollment decisions); *see also Moore v.*

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Nelson, 270 F.3d 789, 790-91 (9th Cir. 2001) (holding ICRA inapplicable to deprivation of property where plaintiff "was never arrested, imprisoned, or otherwise held by the Tribe").

Plaintiffs do not, and cannot, claim to have suffered "detention by order of an Indian tribe" or that Defendants restrained, arrested, or imprisoned them. 5 U.S.C. § 1303. Accordingly, ICRA, and the binding case law applying it, confirm this Court cannot entertain any claim that Plaintiffs wrongly lost the benefits of membership in the Tribe.

2. The Tribe's Sovereign Immunity Bars Plaintiffs' Claims That The Tribe, Acting Through Defendants, Wrongly Disenrolled Them.

Putting aside the Court's inherent lack of power to resolve intratribal membership disputes, the doctrine of sovereign immunity also deprives this Court of jurisdiction to adjudicate Plaintiffs' claims. Plaintiffs' action rests solely on Defendants' acts of tribal governance, and necessarily seeks relief only the Tribe can provide. Plaintiffs cannot skirt the Tribe's sovereign immunity through artful pleading, by simply suing Tribal officials, like Defendants, instead of the Tribe. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

As "'distinct, independent political communities' with sovereign powers that have never been extinguished, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. Tribal immunity, like all aspects of tribal sovereignty, "is subject to the superior and plenary control of Congress" (*id.* at 58), and "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). "[T]ribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado*, 509 F.3d at 1015-16. Accordingly, the Tribe's sovereign immunity compels dismissal of Plaintiff's claims against Defendants. *Id.*

a) Tribal Immunity Is Broad And Protects Tribal Officials From Suit And Liability Arising From Their Sovereign Acts On Behalf Of The Tribe.

Because preserving tribal resources and autonomy are matters of vital importance, tribal immunity is "broad" (*Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1157 (1990)), extending to

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both governmental and commercial activities on or off the tribe's reservation. *Kiowa Tribe*, 523 U.S. at 760. Tribal sovereign immunity extends to tribal officials in their acts of governance, *i.e.*, when acting in their official capacity and within the scope of their authority. *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Imperial Granite*, 940 F.2d at 1271.

Moreover, because a plaintiff cannot avoid tribal immunity through "a mere pleading device," sovereign immunity cannot be circumvented by naming individual tribal officials in place of the tribe itself. *Cook*, 548 F.3d at 727; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, (1984) 467 U.S. 1214.

b) Naming The Tribe's Officials Instead Of The Tribe Cannot Circumvent The Tribe's Immunity.

In a futile effort to establish jurisdiction, Plaintiffs ask this Court to delve into the Tribe's laws, and evaluate whether Defendants exceeded their authority under those Tribal laws—which, as shown above, is a request the Court lacks the fundamental power to satisfy. This very request also reveals this lawsuit for what it inherently is—a challenge to the actions of a sovereign tribal government, which this Court lacks the power to adjudicate. The Ninth Circuit's analysis in *Imperial Granite* is dispositive. There, the plaintiff claimed the right to access a tract of land by the Tribe's reservation surrounded. 940 F.2d at 1270. The Tribe's government voted to deny plaintiff use of a tribal road. *Id.* Plaintiff then sued individual members of the Tribe's government, claiming they had improperly denied it access to his property in violation of his federal constitutional rights, the Indian Civil Rights Act, and state law. *Id.* at 1270-71.

As the court noted, the plaintiff's grievance was with the Tribe's actions through its officials, and "the only action taken by those officials was to vote as members of the [Tribe]'s governing body against permitting Imperial to use the road." *Id.* Because it was the Tribe's government, not the individual members, who controlled the tribe's property, lawsuit against the individuals was not "anything other than a suit against the [Tribe]." *Id.* at 1271. Reasoning that "[t]he votes individually have no legal effect; it is the official action of the Band, following the

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votes, that caused Imperial's alleged injury," the Ninth Circuit held that the individual defendants "share . . . the sovereign immunity of the Band" and affirmed dismissal on that basis. *Id.* at 1272.

Here, the source and claimed cause of Plaintiffs' alleged injury is the official action of the Tribe to disenroll plaintiffs. (Complaint at 55:8-12, 56:18-21, 57:11-13, 58:13-15, 59:1-5, 59:22-60:3.) Defendants allegedly injured them in their "positions of power" on the Tribe's Executive Committee and Enrollment Committee. (*Id.* at 15:11-13.) Plaintiffs seek "a permanent injunction to invalidate Defendants' wrongful disenrollment actions," which, in the end, could only be effected by an official act of the Tribe, adding Plaintiffs to its membership rolls. (*Id.* at 60:23-24.).

Plaintiffs themselves acknowledge, as they must (Complaint at 9:18-10:2), that only the Tribe's government has the power to determine membership, as the right to define its membership is vested in an Indian tribe itself, not any individual member or official. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32 (recognizing "[a] *tribe's* right to define its own membership for tribal purposes" (emphasis added)); *Bruce*, 394 F. 3d at 1225 ("one of an Indian tribe's most basic powers" is "the authority to determine questions of its own membership.") As Plaintiffs claim to have been injured by the official action of an Indian tribe, and seek relief in the form of an order binding an Indian tribe, their action is necessarily one against the Tribe itself. *Imperial Granite*, 940 F.2d at 1271-72; *Dawavendewa*, 276 F.3d at 1161. Accordingly, Plaintiffs' claims against Defendants constitute no more than "an attempted end run around tribal sovereign immunity" (*id.*, 276 F.3d at 1160), which are still jurisdictionally barred.

Indeed, the Supreme Court's admonition that federal courts may not "intrude on" an Indian tribe's right to define its membership (*Santa Clara Pueblo*, 436 U.S. at 72 n.32) would ring hollow indeed if aggrieved individuals could obtain federal intervention by simply suing tribal officials and alleging they violated tribal law. *See id.* at 72 (holding ICRA "does not impliedly authorize actions for declaratory or injunctive relief against either the tribe *or its officers*" (emphasis added)); *Alvarado*, 509 F.3d at 1014, 1016 n.6 (dismissing membership claims against tribal government officials for lack of subject matter jurisdiction). It is hardly surprising, therefore, that sovereign immunity cannot be circumvented through the "mere pleading device" of naming individual tribal officials in place of the tribe itself. *Cook*, 548 F.3d at 727.

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B. The Tribe Is A Necessary And Indispensable Party That Cannot Be Joined.

Plaintiffs' claims are separately subject to dismissal because the Tribe is an indispensable party that cannot be joined because of its sovereign immunity. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19. This lawsuit is fundamentally one against the Tribe, involving membership in the Tribe and benefits paid from the Tribe's treasury, and seeking relief only the Tribe can provide.

1. The Tribe Is A Necessary Party Because Plaintiffs Cannot Obtain Complete Relief Without The Tribe And The Tribe Has A Legally Protected Interest In The Outcome Of The Action.

This Circuit applies a two-part analysis to determine whether an absent party is necessary under Rule 19. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991); *see also, Kennedy v. United States DOI*, 2012 U.S. Dist. LEXIS 65352, *17 (E.D. Cal. May 9, 2012). Under Rule 19(a), a party must be joined if feasible (*i.e.*, is "necessary") where: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. Proc. 19(a). If either criteria is met, "the absent party is a 'required party.'" *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *17. Not just one, but both Rule 19(a) criteria are satisfied here, meaning the Tribe is a necessary party.

a) The Tribe Is A Necessary Party Because Plaintiffs Cannot Obtain Complete Relief Without The Tribe.

Plaintiffs sue Defendants for their official actions in their "positions of power" with the Tribe (Complaint at 14:11-15:3; 15:11-13; 55:8-12, 56:18-21, 57:11-13; 58:13-15, 59:1-5, 59:22-60:3), which are necessarily protected by the Tribe's immunity. *Imperial Granite*, 940 F.2d at 1271-72. Plaintiffs seek relief that only the Tribe, not any private individual can grant: reversal of their disenrollment in the Tribe (*id.* at 60:23-26) and payment of "the money and lost benefits [of tribal membership] that were withheld and/or taken away from Plaintiffs while they were wrongfully disenrolled." (*id*. at 61:1-2).

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Thus, to the extent Plaintiffs seek to avoid the Tribe's sovereign immunity by claiming they are suing Defendants in their individual capacities, Defendants in their individual capacities lack the ability to cause the Tribe to take the actions Plaintiffs ask this Court to direct. *See Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) (holding injunctive relief sought by plaintiff could be "obtained only from the defedants in their official capacities, not as private individuals" because relief sought was for violations of policy carried out in their official capacities); *Kuck v. Danaher*, 822 F. Supp. 2d 109, 148 (D. Conn. 2011). Stated otherwise, Defendants cannot reinstate Plaintiffs into the Tribe in their individual capacities. *See DeLoreto v. Ment*, 944 F. Supp. 1023, 1031 (D. Conn. 1996) (holding "injunctive relief of reinstatement [as a state agency employee] could only be awarded against Defendants in their official capacities" because "[c]learly, in their individual capacities they have no authority to reinstate Plaintiffs"); *Kobe v. Haley*, 2012 U.S. Dist. LEXIS 112425, at *7-8, *25 (D.S.C. Aug. 10, 2012) (finding plaintiffs could not obtain prospective injunctive relief from defendant in his individual capacity because he would lack the authority to cause a state agency to provide plaintiffs health care). Thus, even if Plaintiffs sued Defendants in their individual capacities, complete relief would be impossible without the Tribe.

b) The Tribe Is A Necessary Party Because It Has A Legally Protected Interest In The Outcome Of This Action That Defendants Cannot Adequately Protect.

The Ninth Circuit has held that "absent tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have [their] legal duties judicially determined without consent.'" *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992); *Confederated Tribes*, 928 F.2d at 1498-99 (holding Indian tribe "undoubtedly has a legal interest in the litigation" regarding its "current status as the exclusive governing authority of the reservation"); *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *21 (finding absent tribe had a legally protected interest in preventing court from "delv[ing] into the merits of tribal leadership and membership disputes, disputes the Tribe, not this Court, should be permitted to resolve"); *see also Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994) (dismissing action for failure to join an indispensable party where "complete relief would implicate the [tribe's] governing status").

Here, the Tribe has a number of legally protected interests in the outcome of this action. First, it has an interest in preserving its own sovereign immunity and its "right not to have [its] legal duties judicially determined without consent." *Shermoen,* 982 F.2d at1317. Plaintiffs are asking this Court usurp the Tribe's authority and second guess its determination as to who is a member of the Tribe. (Complaint at 60:21-26.) Putting aside the jurisdictional bar to this request, it also necessarily encroaches on the Tribe's legally protected right to determine its own tribal membership. *See Kennedy,* 2012 U.S. Dist. LEXIS 65352, at *17, *19 (*citing Santa Clara Pueblo,* 436 U.S. at 72 n. 32). Moreover, the Tribe has an interest in the outcome of this case "because the dispute . . . raises questions about compliance with the Tribe's constitution,…and [Enrollment] Ordinance." *Id.* at *17-18 (dismissing action involving intratribal leadership and membership disputes due to failure to join Tribe); *see supra* Section III.A.1.b. (enumerating issues of interpretation of the Tribe's governing documents Plaintiffs' claims raise). In addition, because the lawsuit seeks the recovery of Tribal benefits only available to Tribal members, it necessarily impacts the Tribe's sovereign treasury, which federal law protects. (Complaint at 3:8-12, 61:1-2.) *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1307 (2007) (recognizing that "one of the historic purposes of sovereign immunity" is "protect[ing] the sovereign Tribe's treasury"); *Shermoen,* 982 F.2d at 1320 (recognizing a suit is against the sovereign if "the judgment sought would expend itself on the public treasury" (quoting *Land v. Dollar,* 330 U.S. 731, 738 (1947))).

Defendants cannot "adequately represent" these legally protected interests of the Tribe. *Shermoen,* 982 F.2d at 1318. In determining whether existing parties adequately represent the interests of an absent Indian tribe, courts consider the following: "whether 'the interests of a present party to the suit are such that it will undoubtedly make all' of the absent party's arguments; whether the party is 'capable of and willing to make such arguments'; and whether the absent party would 'offer any necessary element to the proceedings' that the present parties would neglect." *Id.*

Here, the Tribe's interests lie in protecting its sovereign immunity and treasury, upholding its constitution and governing documents, and determining issues of tribal membership without

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outside interference. *See Confederated Tribes*, 928 F.2d at 1498-99; *Allen*, 464 F.3d at 1047; *Shermoen*, 982 F.2d at 1317; *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *21. If Defendants face individual liability, their primary interest is in avoiding that liability, and assuming Plaintiffs somehow were to avoid the jurisdictional barriers to their claims, Defendants would have more incentive to make the arguments necessary to protect their own individual interests, as compared to the Tribe's. (Complaint at 3:8-12.). *See Andrews v. Daw*, 201 F.3d 521, 525 (4th Cir. 2000) (because "'personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law,' [and] official-capacity suits 'generally represent only another way of pleading an action against an entity' . . . . a government official in his official capacity does not represent 'precisely the same legal right' as he does in his individual capacity" (citations omitted)); *Weber v. King*, 110 F. Supp. 2d 124, 128 (E.D.N.Y. 2000) (finding suit against all the partners of a company could not proceed without the company because "in representing themselves the partners are no longer effecting an adequate representation of the totality of interests" of the company). Rather, Defendants incentives would lead them to seek to avoid personal liability, to the possible detriment of the Tribe's sovereign interests, perhaps by blaming other officials of the Tribe or taking actions that are more protective of individual resources than the Tribal treasury. *Weber*, 110 F. Supp. 2d at 128; *see Allen*, 464 F.3d at 1047 (noting protection of a tribe's treasury "is one of the historic purposes of sovereign immunity in general"). This would directly conflict with the Tribe's interests, including the autonomous management over its internal affairs, but also the protection of its resources. *Confederated Tribes*, 928 F.2d at 1498-99.

Accordingly, members of a tribe's governing council cannot adequately represent the tribe where the litigation "affects the rights of the [council members] as individuals, in addition to benefiting the tribe to which they belong and which appellants would have them represent." *Shermoen*, 982 F.2d 1312 at 1318 ("Given this potential conflict, we cannot with any certainty conclude that the [tribal council] would be willing to make all of the arguments of the absent tribe."). Accordingly, in an intertribal dispute, the Tribe must be joined or its "perspective on tribal issues . . . will likely be neglected." *See Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *32.

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2. The Tribe is an Indispensable Party That Cannot Be Added Due To Its Sovereign Immunity.

Rule 19(b) provides a four-part test to determine whether a non-party is indispensable to an action. *Confederated Tribes*, 928 F.2d at 1499. The district court must consider the following factors to determine whether a non-party is indispensable to an action, such that "the action cannot in '"equity and good conscience'" proceed in its absence": "(1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum." *Id.* "[W]hen the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Id.*; *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (although Rule 19(b) factors did not clearly favor dismissal, "concern for the protection of tribal sovereignty" was sufficient); *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *34.

"The first factor in the Rule 19(b) analysis is essentially the same as the legal interest test in the 'necessary party' analysis." *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *35. For the reasons discussed above, the sovereign Tribe clearly has a legally protected interest in the outcome of this action and thus will suffer prejudice if not a party to this action. *Dawavendewa*, 276 F.3d at 1162 (dismissing action for failure to join tribe where "decision so rendered would prejudice the Nation's sovereign interest in . . . governing the reservation"); *Shermoen*, 982 F.2d at 1317; *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *17-19.

As to prongs two and three, the relief Plaintiffs seek cannot be shaped to lessen prejudice; nor can another adequate remedy be awarded absent the Tribe. Plaintiffs effectively seek reinstatement into the Tribe (Complaint at 60:23-26.), which cannot possibly be granted without usurping the Tribe's autonomous power over its membership. *See Santa Clara*, 436 U.S. at 72 n. 32 ("A tribe's right to define its own membership for tribal purposes has been long recognized as central to its existence as an independent political community."); *Dawavendewa*, 276 F.3d at 1162 (holding relief could not be shaped in any way to mitigate prejudice where relief would affect governance of the tribe); *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *35 (finding relief requested

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could not be effectively minimized where relief would affect the Tribe's ability to govern itself). Moreover, Plaintiffs' complaint suggests the only remedy adequate from their perspective would be reinstatement of all benefits as members of the Tribe. (Complaint at 3:8-12, 60:23-26.)

With regards to the fourth factor, the Ninth Circuit has held that the "lack of an alternative forum does not automatically prevent dismissal of a suit." *Confederated Tribes*, 928 F.2d at 1500. "Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Id.*; *see also Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *36. Indeed, "the Tribe's sovereignty immunity in this case presents a compelling factor favoring dismissal." *Kennedy*, 2012 U.S. Dist. LEXIS 63526, at *36. Accordingly, even if Plaintiffs lack an alternative forum to bring this claim, that factor does not weigh against dismissal. Because the Tribe is a necessary and indispensable party that cannot be joined due to its sovereign immunity, "equity and good conscience," not to mention binding precedent, require dismissal.

C. Putting Aside the Jurisdictional Barriers to Plaintiffs' Claims And Their Failure To Join An Indispensable Party, Plaintiffs' Complaint Is Separately Properly Dismissed Because They Cannot State A Claim Upon Which Relief Can Be Granted.

Even assuming Plaintiffs could somehow circumvent the jurisdictional bars of sovereign immunity and absence of federal power to adjudicate internal tribal disputes (and they cannot), and even if the Tribe were not a necessary and indispensable party, Plaintiffs' Complaint is separately subject to dismissal because Plaintiffs have not (and cannot) state a claim upon which this Court can grant relief. This is perhaps not surprising, given that federal and state law simply do not countenance causes of action in favor of those disappointed by an Indian tribe's membership decisions. *Santa Clara Pueblo*, 436 U.S. at 72 & n.32; *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1067 (2005).

A complaint that fails to state a claim upon which relief can be granted should be dismissed. Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim is proper when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1041 (9th Cir. 2010). "[A]

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wholly conclusory statement of claim" does not "survive a motion to dismiss" under Rule 12(b)(6) simply because the pleadings have "left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007) (*abrogating Conley v. Gibson*, 355 U.S. 41 (1957)). Rather, a complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *Id.* at 570. Conclusory allegations or legal characterizations cast in the form of factual allegations may be disregarded. *Warren*, 328 F.3d at 1139; *see also Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001).

1. Plaintiffs Cannot Bring This Intratribal Membership Dispute Into Federal Court Under 42 U.S.C. § 1985(3).

Plaintiffs cannot raise a cognizable claim under § 1985(3) because they cannot establish a source of substantive rights over which this Court has jurisdiction and which may serve as the basis for their § 1985(3) claim. Furthermore, even if the Plaintiffs could identify a substantive basis for their claim, they cannot show Defendants engaged in a conspiracy, an essential element of any § 1985(3) claim.

a) No Substantive Rights Support Plaintiffs' § 1985(3) Claim.

Section 1985(3), which prohibits conspiracies to interfere with civil rights, does not provide substantive rights. *See Great American Federal Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Accordingly, a party must identify another source of substantive rights to bring a claim under § 1985(3). Here, Plaintiffs point to various sources of substantive rights purportedly supporting this cause of action: the First and Fifth Amendments, ICRA, the Indian Citizenship Act of 1924, and Pala Constitution. (Complaint at 55:8-15.) None support a § 1985(3) claim here.

Neither the First nor Fifth Amendments can serve as the source of substantive rights for Plaintiffs' § 1985(3) action because, as the Supreme Court has recognized, "the Bill of Rights . . . do[es] not of [its] own force apply to Indian tribes." *Nevada v. Hicks*, 533 U.S. 353, 383 (2001); *see also Santa Clara Pueblo*, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Trans-Canada*

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Enterprises, Ltd., v. Muckleshoot Indian Tribe, 634 F.2d 474, 476-77 (9th Cir. 1978). Indeed, "[p]laintiffs must look to the ICRA as the source of their alleged entitlement to the rights and privileges of tribal membership, because federal constitutional protections extend to individual Indians only to the extent incorporated in the ICRA." *Nero*, 892 F.2d at 1462; *accord Settler v. Lameer*, 507 F.2d 231, 241 (9th Cir. 1974). Here, Plaintiffs' claims establish Defendants were acting in their capacity as the Tribe's elected leadership in the course of allegedly injuring Plaintiffs, and as such, their actions are not constrained by the First or Fifth Amendments.

Moreover, even assuming that Defendants were not acting in their official roles in the Tribe's government while engaging in the conduct upon which Plaintiffs base their § 1985(3) claim, it nevertheless fails because Plaintiffs do not and cannot allege Defendants have in any way acted on behalf of the federal government. "The First Amendment applies only to Congress," and does not apply to Indian tribes. *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959). Similarly, the Fifth Amendment "operates solely on the Constitution itself by qualifying the powers of the National Government which the Constitution called into being," and does not restrict the states or other governments. *Talton v. Mayes*, 163 U.S. 376, 382 (1896); *accord Trans-Canada Enterprises*, 634 F.2d at 476-77.

Plaintiffs nowhere allege Defendants were members of, or acting on behalf of, the federal government. Indeed, as demonstrated above, Defendants' actions were necessarily taken on behalf of an Indian tribal government, as membership determinations are within the exclusive province of the Tribe. *Santa Clara Pueblo*, 436 U.S. at 72. Because the First and Fifth Amendments do not protect individuals form violations of constitutional guarantees by other governments or private actors (*Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 461 (1952)), they cannot support a § 1985(3) claim.

Plaintiffs' remaining substantive sources of rights—Pala Constitution, ICRA, and Indian Citizenship Act—also cannot support their § 1985(3) claim. As discussed above in Section 2.c above, ICRA cannot serve as the substantive basis for this Court's jurisdiction over this intratribal dispute. *See Nero*, 892 F.2d at 1462 ("[C]onsiderations of tribal sovereignty . . . persuaded us that the ICRA does not provide an independent basis for suit under sections 1985(3) and 1986."). Nor

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can the Pala Constitution support Plaintiffs' § 1985(3) claim because the bedrock law cited above establishes this Court is not empowered to grant relief for civil claims predicated on the violation of tribal laws. *Boe*, 642 F.2d at 276-77. Likewise, Plaintiffs cannot bring their claims under the Indian Citizenship Act, which merely bestows United States citizenship upon Native Americans, and does not create a private right of action against tribal officials. *See* 8 U.S.C. § 1401(b).

b) Plaintiffs Cannot Establish That Defendants Engaged In A Conspiracy.

Because conspiracy is part of a *prima facie* case under § 1985(3), Plaintiffs must establish that Defendants conspired to deprive them equal protection of the law, and that Defendants acted in furtherance of that alleged conspiracy. *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971). Government actors, acting in their official capacity, cannot conspire with one another so as to support a claim for violation of § 1985(3). *Gladden v. Barry*, 558 F. Supp. 676, 679 (D.D.C. 1983) (holding that District of Columbia officials could not conspire with one another because their conduct was "essentially a single act by a single entity"); *accord Lieberman v. Gant*, 474 F. Supp. 848, 875 (D. Conn. 1979), *aff'd*, 630 F.2d 60 (2nd Cir. 1980). Accordingly, a § 1985(3) claim cannot be sustained where, as here, the defendants are tribal officials sued for their governance of an Indian tribe. *See Runs After*, 766 F.2d at 354 ("[I]ndividual members of the Tribal Council, acting in their official capacity as tribal council members, cannot conspire when they act together with other tribal council members in taking official action on behalf of the Tribal Council."). Plaintiffs concede, as they must, that Defendants are all members of the Tribe's governing body, and allege that Defendants "as members of Pala's Executive Committee, participated in the scheme and conspiracy to disenroll Plaintiffs." (Complaint at 3:2-3, 15: 4-6.) Because Plaintiffs do not and cannot identify any cognizable substantive basis for their § 1985(3) claim, and because Defendants could not conspire as members of the Tribe's governing body as a matter of law, Plaintiffs cannot establish a claim cognizable under § 1985(3).

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2. Plaintiffs Also Cannot State A Claim Under 42 U.S.C. § 1981 Based On An Intratribal Membership Dispute.

Plaintiffs' claim under 42 U.S.C. § 1981 also fails, as it does not apply to an Indian tribe's membership determinations. *Nero, v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989). Enacted pursuant to Congress's power to address the "badges and incidents of slavery" (*see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-43 (1968))," § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

The decision in *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989) clarifies why § 1981 does not apply to an Indian tribe, a separate sovereign preexisting the Constitution. In *Nero*, the Tenth Circuit swiftly rejected the plaintiffs' claim that tribal officials violated § 1981 because the officials refused plaintiffs the rights and privileges of Cherokee citizenship, including the right to vote and the receipt of tribal benefits. *Id.* at 1458. Applying the rule that a statute of general applicability that does not mention Indian tribes—like § 1981—will not apply to a tribe if the law touches exclusive rights of self-governance in purely intramural-matters (*see Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d at 1116), the *Nero* court held that allowing the plaintiffs to assert tribal membership–related claims under § 1981 "would affect the Tribe's right to self-governance in a purely internal matter." *Nero*, 892 F.2d at 1463. Emphasizing "no right is more integral to a tribe's self-governance than its ability to establish its membership," the Tenth Circuit explained that "[a]pplying the statutory prohibitions against race discrimination to a tribe's designation of tribal members would in effect eviscerate the tribe's sovereign power to define itself." *Id.*; *see Santa Clara Pueblo*, 436 U.S. at 71-72 (refusing read statute to create a cause of action attacking tribal membership decisions, as doing so would "interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity").

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Indeed, as *Nero* recognized (892 F.2d at 1463), imposing prohibitions against racial discrimination on Indian tribes' membership determinations would be inimical to the concept of tribal sovereignty itself. An Indian tribe, by definition, constitutes a "people distinct from others." *Kansas Indians*, 72 U.S. 737, 755 (1867). Indeed, federal recognition as an Indian tribe requires that the group has behaved in an insular manner to the exclusion of outsiders. 25 C.F.R. § 83.7(b) (recognition depends on whether the group has existed as a "distinct community," demonstrated by "[s]ignificant rates of marriage within the group" or "with other Indian populations"); *see also* 25 C.F.R. § 83.7(e) (recognition requires the group's "membership consists of individuals who descend from a historical Indian tribe"). Thus, the conduct of which Plaintiffs complain—defining membership in a manner that differentiates among "eth[n]ically distinctive subgroup[s] of people" (Complaint at 56:22-23)—is not only permissible and historic practice, but it is essential to the distinct existence of an Indian tribal entity. To be sure, Congress has embraced the racial component of Indian identity. 25 U.S.C. § 479 (providing that the term "Indian" shall include, in part, "all other persons of one-half or more Indian blood")

Because it is central to the Tribe's existence to define itself as a distinct community to the exclusion of outsiders, Plaintiffs cannot bring through § 1981, membership-based claims Congress refused to grant under the ICRA. *Santa Clara Pueblo*, 436 U.S. at 71; *Nero*, 892 F.2d at 1463.

3. Plaintiffs Also Cannot State A Claim For Conversion Based On Loss Of Benefits Granted By An Indian Tribe.

Plaintiffs' allegations of conversion of the "money and benefits provided by Pala" stemming from the alleged wrongful disenrollment fail to satisfy the elements of a conversion claim. Conversion is defined as "the wrongful exercise of dominion over the personal property of another." *Peklar v. Ikerd*, 260 F.3d 1035, 1037 (9th Cir. 2001). The elements of a California law claim for conversion are (1) ownership or a right to possession of property; (2) wrongful disposition of the property right of another; and (3) damages. *See G.S. Rasmussen & Assocs. v. Kalitta Flying Serv.*, 958 F.2d 896, 906 (9th Cir. 1992).

Plaintiffs' claim for conversion fails because they have not alleged conversion of a vested property right. The Ninth Circuit applies a three-part test to determine whether a property right

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exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003). "To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." *Moore v. Regents of University of California*, 51 Cal. 3d 120, 136 (1990).

Plaintiffs allege conversion of their property interest in "money and benefits" stemming from membership in the Tribe. (Complaint at 57:6-9 (alleging property ownership in "per capita payments" and "health care and education expenses").) However, Plaintiffs admit their alleged right to any property was dependent on their membership in the Tribe. (*Id*. at 16:3-6, 18:26-19:1, 57:11-13, 61:1-2.) As such, following their removal from the Tribe's membership rolls, Plaintiffs necessarily lack a property interest in any "money and benefits" stemming from tribal membership. *See Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 743, 746 (D.S.D. 1995) (dismissing state law claims for conversion based on loss of tribal membership). Indeed, it is a basic principle of federal Indian law that individual Indians lack a vested right in their tribe's real and personal property. *United States v. Jim*, 409 U.S. 80, 81-82 (1972); *Sizemore v. Brady*, 235 U.S. 441, 446-47 (1914) ("[T]he [tribe's] lands and funds belonged to the tribe as a community," and "[t]he right of each individual to participate in the enjoyment of such property depended upon tribal membership.").

Nor is the membership privilege itself an actionable property right. As Plaintiffs must concede (Complaint at 52:20), the Tribe has absolute and exclusive power to determine its membership, which includes the unfettered discretion to remove members from its rolls. *Jeffredo*, 599 F.3d at 917-18 (citing *Santa Clara Pueblo*, 436 U.S. at 72 n.32); *Smith*, 100 F.3d at 559. Accordingly, a tribal member necessarily lacks "a legitimate claim to exclusivity" of the benefits of membership, which are, by their very nature, not "capable of exclusive possession or control." *Kremen*, 337 F.3d at 1030.

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In sum, because Plaintiffs lack a property right supporting a conversion claim based on their disenrollment from a sovereign Indian tribe, they cannot state a claim for conversion as a matter of law.

4. Plaintiffs' "Group Defamation" Claim Necessarily Fails, As State Defamation Law Cannot Control The Acts Of A Sovereign, And Defamation Of A Group Is Not Actionable Under California Law.

Plaintiffs cannot seek to control the manner in which officials of a sovereign Indian tribe administer membership matters under the guise of a state law defamation claim. *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968) (holding tribal official's reports to the tribal council on a personnel matter were absolutely privileged and could not support a defamation claim based on "the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired"); *see Santa Clara Pueblo*, 436 U.S. at 55 (holding Indian tribes retain "the power of regulating their internal and social relations"); *Timbisha Shoshone*, 687 F. Supp. 2d at 1181, 1184-85 (suit alleging state law tort claims could not circumvent the prohibition on federal courts resolving "[i]nternal matters of a tribe"); Cal. Civ. Code § 47(a) (publications made in the discharge of an official duty are privileged). Indeed, resolution of Plaintiffs' defamation claim would necessarily require this Court to evaluate whether Defendants enjoy a truth defense (*Washer v. Bank of America*, 87 Cal.2d 501, 509 (1948))—*i.e.*, whether Plaintiffs' are authentically members of the Tribe, under Tribal law (Complaint at 59:1-5)—which necessarily raises precisely the sort of questions this Court lacks jurisdiction to decide. *See supra* Section III.A.1.

In any event, Plaintiffs fail to state a defamation claim, as the First Amendment dictates that an allegedly defamatory publication "must specifically refer to, or be 'of and concerning,' the plaintiff," limiting relief "to those who are the direct object of criticism." *Blatty v. New York Times*, 42 Cal. 3d 1033, 1042, 1044 (1986); Code Civ. Proc. § 460. The First Amendment thus forecloses claims of "those who merely complain of nonspecific statements that they believe cause them some hurt," which "pose[] an unjustifiable threat to society." *Blatty*, 42 Cal. 3d at 1044.

Plaintiffs cannot show that Defendants' statements refer to, or concern, them, because the class of individuals potentially affected by the statements is large enough that the statements

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cannot reasonably be understood to refer to Plaintiffs. "[W]here the group [allegedly defamed] is large—in general, any group numbering over twenty-five members—the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them.'" *Id.* at 1046; *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 350 (1940) (holding president and chief official could not meet the "of and concerning" requirement as a matter of law based on a statement allegedly defaming "officials of the Workers Alliance" where the entity had at least 162 officials). This "limitation on liability safeguards freedom of speech by effecting a sound compromise between the conflicting interests involved in libel cases." *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983).

Here, Plaintiffs allege Defendants' statement that "Margarita Britten was not a full-blooded Pala Indian and that her descendants are not Pala" (Complaint at 59:1-2) referred to over 150 of Ms. Britten's descendants.[2] (*Id.* at 35:7-10, 35:15-17.) Such a group is too large, as a matter of law, for Defendants' statements to have defamed any ascertainable person. *Blatty*, 42 Cal. 3d at 1046; *Noral*, 40 Cal. App. 2d at 350.

To the extent Plaintiffs contend they have a claim based on defamation of Ms. Britten herself, the law in California is clear: statements regarding deceased individuals do not constitute defamation. *Kelly v. Johnson Pub. Co.*, 160 Cal. App. 2d 718, 723 (1958) (statements regarding a deceased person do not give rise to civil right of action in favor of surviving relatives); *Saucer v. Giroux*, 54 Cal. App. 732, 733 (1921) (statements "tending to blacken the memory of one who is dead" do not support cause of action in favor of relatives).

In short, Plaintiffs' defamation claim fails as a matter of law.

5. Plaintiffs' Tortious Interference And Conspiracy Claims Fail Because They Cannot Allege Any Actionable Predicate Wrongful Act.

Plaintiffs' state law claim for tortious interference with a prospective economic advantage fails because they have not alleged, and cannot establish, that Defendants engaged in conduct that was wrongful by some other legal measure. *Contemporary Services Corp. v. Staff Pro Inc.*, 152

[2] Only a fraction of those allegedly disenrolled because of Ms. Brittain's degree of Indian blood chose to join this action. (Complaint at 12:7-14:8.)

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Cal. App. 4th 1043, 1060 (2007). ("In order to prove intentional or negligent interference with prospective economic advantage, plaintiffs must show defendants engaged in conduct that was wrongful by some legal measure other than the fact of the interference itself."). Similarly, Plaintiffs' state law cause of action for civil conspiracy requires an agreement to commit an act that is itself independently actionable. *See Youst v. Longo*, 43 Cal. 3d 64, 79 (1987) ("[T]he conspirators must agree to do some act which is classified as a 'civil wrong.'" (citations omitted)).

Plaintiffs' failure to identify a wrong actionable under California law is not surprising. California law, like federal law, simply provides no remedy for those allegedly aggrieved by internal tribal disputes. *Lamere*, 131 Cal. App. 4th at 1067. Because Plaintiffs' allegations that the Tribe wrongly disenrolled them fail to identify any act by Defendants that is legally actionable under California law, their tortious interference and conspiracy claims fail as a matter of law.

IV. CONCLUSION

With this litigation, Plaintiffs seek to control the manner in which a sovereign Indian tribe decides who is, and who is not, a Tribal member, which, in the words of the Ninth Circuit, is one of the "most basic powers" of a sovereign tribal government and upon which the courts simply may not intrude. However couched, such claims are beyond the jurisdiction of this Court. Indeed, even if there was no jurisdictional bar to this lawsuit, and this were the proper forum to rule on an intratribal dispute, the Tribe's decision that Plaintiffs were improperly enrolled in the Tribe simply gives rise to no substantive rights under federal or California law, whatsoever. Accordingly, dismissal of Plaintiffs' claims is the only proper course.

Respectfully submitted,

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