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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RONALD D. ALLEN JR., RAYMOND BOZIGIAN, ALEXANDRA M. CASTOR, KEITH DENVER, MILTON DENVER, JESSICA FLOREZ, ANTHONY FREEMAN, MIKKI A. GRABER, MIKE HACKMAN, JOSEPH HARRIS, NIKKI D. HARRIS, GINA HOWARD, BEN JOHNSON, PAUL JOHNSON, BONNIE J. KING, BRITTNEY LUTTERS, CHERYL MAJEL, JULIEANNE MENDOZA, LUANNE MORO, KALCIE ONTIVEROS, KIRSTEN ONTIVEROS, VIKKI L. OXLEY, JOEY PINK, MATTHEW PINK, JOHN RANDOLPH, LILLIAN VANCE, and MARIA J. VIVANCO

Plaintiffs,

vs.

ROBERT H. SMITH, LEROY H. MIRANDA JR., KILMA S. LATTIN, THERESA J. NIETO, and DION PEREZ

Defendants.

CASE NO. 12-CV-1668-WQH-KSC

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

DATE: November 5, 2012
CTRM: 4
The Honorable William Q. Hayes

Complaint Filed: July 3, 2012

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I. INTRODUCTION

The facts leading up to this case should be an affront and outrage to humanity. Defendants here are certain current and former members of the Executive Committee of the Pala Band of Mission Indians ("Pala" or the "Tribe") who have abused their positions of power by "disenrolling" Plaintiffs, or stripping them of their rightful Pala citizenship, without due process, thereby causing Plaintiffs to lose their per capita distributions from the Tribe, their medical and educational benefits, trust accounts for their minor children, not to mention their cultural identity and heritage.[1] Defendants' disenrollment of Plaintiffs had nothing to do with the legitimate exercise of their authority. Plaintiffs were Pala members from different ancestral lineage who posed a threat to Defendants because they constituted a large voting block within the Tribe and sought accountability and transparency from Defendants. When one of Plaintiffs' relatives began a petition to remove one of the Defendants from office for criminal conduct, in retaliation, Defendants disenrolled his family members. By disenrolling Plaintiffs, Defendants prevented Plaintiffs from petitioning and voting in tribal elections, prevented Plaintiffs from exposing their corrupt practices, and retained Plaintiffs' share of distribution from Pala's casino revenues for themselves and their own families. However, before disenrolling them, Defendants cleverly manipulated the system to ensure that there would be no outlet for Plaintiffs to redress their grievances. First, Defendants revised Pala's enrollment ordinance so that that their wrongful disenrollment actions could not be reversed by the Bureau of Indian Affairs ("BIA"). Then, they caused Pala to withdraw from the Intertribal Courts of Southern California to prevent Plaintiffs from obtaining recourse in tribal courts. Now, faced with this lawsuit, Defendants claim that they are immune from suit based on sovereign immunity. Defendants are wrong. They can – and indeed, must – be held accountable for their egregious conduct.

Indian tribes are "domestic dependent nations" that are "under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). "Tribal

[1] Defendants are Robert H. Smith ("Smith), Chairman of Pala's Executive Committee; Leroy H. Miranda ("Miranda"), Vice Chairman; Kilma S. Lattin ("Lattin"), Secretary; Theresa J. Nieto ("Nieto"), Treasurer; and Dion Perez ("Perez"), Council Member.

immunity is just that: sovereign immunity which attaches to a tribe because of its status as a dependent domestic nation. ***Tribal immunity does not extend to the individual members of the tribe***." *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (emphasis added). Where, as here, Defendants are U.S. citizens who, for reasons of personal animus, vendetta and greed, unlawfully deprived Plaintiffs, who are also U.S. citizens, of their rights and property, this case is properly before the Court, as "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *United States v. Farris*, 624 F.3d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

To be protected by sovereign immunity, tribal officials must have been "acting in their official capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1013 n.12 (9th Cir. 1981). Here, the Complaint alleges that Defendants did not act in their official capacity with respect to Plaintiffs' disenrollments because their conduct was personally motivated. ¶141.[2] Further, Defendants did not have the authority to disenroll Plaintiffs for numerous reasons, including that Pala's Constitution, from which Defendants purported to derive their power, was not validly adopted since it was not approved by a majority of Pala voters in an election, as required. ¶¶9, 78.

The Defendants' attempt to characterize this case as impinging on the right of an Indian tribe to define its own membership is wrong. Pala's membership definition has remained the same since the Tribe first adopted its Articles of Association in 1960. ¶72. As Plaintiffs had fit within Pala's membership definition, they were Pala members until their disenrollment by Defendants. ¶¶72, 73. Thus, this case is not about the right of a Tribe to determine its membership. It is about rogue tribal officials who overstepped the bounds of their authority by using tribal membership as a ruse to avenge personal vendettas.

Notably, in their motion to dismiss, Defendants seem unable to distinguish between the sovereign, or Pala – which is supposed to be governed by its General Council, consisting of all adult members eighteen years and older – and themselves. Defendants' confusion of identity

[2] "¶__" refers to paragraphs in the Complaint, filed on July 3, 2012 [Docket No. 1].

exemplifies the fact that, drunk with power, Defendants have equated their will with that of the Tribe. However, Defendants are ***not*** the Tribe, and their powers are limited by both Pala's Articles of Association and Constitution and Pala's General Council. *See* Exh. F.[3] Nonetheless, Defendants have persistently exceeded and ignored any restraint on their powers, and have deliberately subverted the will of the sovereign. For example, Defendants prevented the General Council, Pala's main governing body, from holding a meeting to discuss Defendants' disenrollment of Plaintiffs by announcing that the petition to hold the meeting was "unconstitutional." ¶¶110; Exh. V-X. Further, Defendants' disenrollment of Plaintiffs on the basis that their ancestor, Margarita Britten, was not a full-blooded Indian, was contrary to what the Tribe had already determined. ¶111; Exh. D (discussing Pala's General Council vote on February 22, 1984). Under these circumstances, the Court's exercise of jurisdiction would not be intruding upon Pala's sovereignty. Rather, the Court would be upholding it.

Additionally, the Tribe is not a necessary and indispensable party to this suit. As Defendants are Tribal officials, joining the Tribe is unnecessary because Defendants can adequately protect the Tribe's interests. *See, e.g., Salt River Project Agric. Improvement & Power Dist. v. Lee*, 2012 U.S. App. LEXIS 10862 (9th Cir. May 29, 2012) (tribe not a necessary party where tribal officials could be expected to adequately represent the tribe's interests). Further, where, as here, Defendants acted outside the scope of their authority such that their acts were invalid to begin with, voiding or enjoining Defendants' conduct does not implicate the sovereign. *See Big Horn Cnty. Elec. Coop. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (permanently enjoining tribal officials does not violate principles of sovereign immunity where officials acted in violation of the law).

Once the Court finds that Defendants acted beyond their authority – a fact that Defendants have not attempted to negate – Plaintiffs' claims against Defendants for their

[3] "Exh. __" refers to exhibits attached to the Declaration of Elizabeth P. Lin in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss.

violations of Plaintiffs' civil and property rights should be allowed to proceed, as Plaintiffs have alleged facts necessary to support each element of their claims.

At bottom, the fact is that sovereign immunity has its limits. And those limits have been reached here. If Defendants are protected by sovereign immunity in this egregious case of abuse of power, it would send a signal to tribal leaders everywhere that they have free reign to ignore all laws and be at liberty to dominate, instill fear, and remove any member at will. The chaos, corruption, and the loss of identity and heritage for native American Indians that is already occurring in Indian country through the scourge of disenrollments would not only continue, but would heighten. As deprivation of citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences that flow from conviction for crimes," *Poodry v. Tonawanda Band of Seneca*, 85 F.3d 874 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996), Defendants' motion to dismiss must be denied.

II. STATEMENT OF FACTS

The Pala Band of Mission Indians is a federally recognized Native American Indian tribe located in San Diego County. ¶70. Pala's main governing body is the General Council, consisting of all adult members eighteen years and older. ¶71. The General Council elects an Executive Committee that includes the chairman, vice chairman, treasurer, secretary, and two council persons. ¶71. Defendants are certain members of Pala's Executive Committee who maliciously and unlawfully disenrolled Plaintiffs without due process, thereby stripping Plaintiffs of their rightful Pala citizenship and the benefits they received therefrom. ¶1.

Pala was formed in the early 1900s, when U.S. officials forced the Cupeno Indians and Luseno Indians to combine into one. ¶2. Pala's "base roll" is the Allotment Rolls dated November 3, 1913, prepared by the Department of the Interior, which identified Pala's original members and their degree of Pala Indian blood. ¶¶3; Exh. A. In 1960, when Pala formally organized by adopting its Articles of Association, it defined its members as consisting of persons whose names appear on the 1913 Allotment Rolls, and all living descendants of those persons on the Allotment Rolls, provided that they have at least 1/16th or more degree of Pala Indian blood. ¶156; Exh. B. Pala uses the same membership definition to this day. ¶156; Exh. F. Plaintiffs

are descendants of Margarita Britten ("Britten Descendants"), who is identified on the 1913 Allotment Rolls as "4/4," or a full-blooded, Pala Indian. ¶3; Exh. A. Plaintiffs were members of the Tribe until their disenrollments on June 1, 2011, and February 1, 2012. ¶7.

A. Defendants Unlawfully Disenrolled Plaintiffs For Personal Reasons

Beginning in 2001, as Pala built a casino and became involved in other business ventures, the Tribe became very profitable. ¶4. As Pala was required to distribute its casino profits to its members through "per capita" payments, this created an incentive for Defendants to disenroll members, as the fewer the Tribal members, the more Defendants and the remaining members would receive. ¶¶66-67. To ensure that they would retain power and dominance over the Tribe, including its wealth, Defendants began unilaterally making changes to Pala's governing documents without the requisite authorization. First, Defendant/Chairman Smith replaced Pala's 1960 Articles of Associations with a Constitution that gave the Executive Committee the power to amend or replace its existing enrollment ordinance. ¶77-82; Exh. F. Then, Defendants revised Pala's enrollment ordinance to make themselves the sole arbiter with respect to Pala enrollments. ¶¶86-90; Exhs. J, K. Once Defendants obtained control over Pala's membership, they could control the Tribe by eliminating at will those who failed to "toe the line."

Defendants' accumulation of such powers was necessary for them to retain their domination and control over the Tribe because, as the wealth of the Tribe began to breed greed and corruption, Pala members – particularly the Britten Descendants – began questioning the conduct of members of the Executive Committee, headed by Defendant/Chairman Robert Smith. ¶4. The Britten Descendants, who constituted a large voting block within the General Council, raised questions concerning Defendants' transactions on behalf of the Tribe, Defendants' personal use of Tribal assets, and the propriety of Tribal elections, including whether Defendant Smith had allowed non-members to vote in Tribal elections, paid for votes, and changed or destroyed ballots. ¶4. Moreover, in 2003, some of the Britten Descendants petitioned to request a special meeting of the General Council to discuss inappropriate conduct by Defendant Smith at the Pala Casino; however, Smith cancelled the meeting, declaring the petition signed by more than 90 members to be illegal. ¶4; Exh. I.

In 2011, the animosity between Defendants and the Britten Descendants escalated after Reyes "King" Freeman ("Freeman"), a Britten Descendant and a former Chairman of the Tribe, petitioned for the recall of Defendant/Vice Chairman Leroy Miranda, after Miranda was arrested by police for allegedly soliciting a male prostitute in an adult bookstore. ¶97. However, Defendants again prevented any General Council meeting from being held on the issue, claiming that many of those who signed the petition subsequently requested to have their names removed such that the petition lacked the requisite signatures. ¶5; Exh. Q. Nonetheless, Freeman's efforts to challenge the Executive Committee greatly upset Defendant Smith. During a heated General Council meeting, Smith said to Freeman, "your kids are off the rolls." ¶98.

Shortly thereafter, on May 26, 2011, Defendants held a meeting where they disenrolled eight Pala members consisting of three of Freeman's children and other relatives, including several of the Plaintiffs. ¶99. The purported reason for the disenrollments was that these individuals did not possess the 1/16 blood quantum necessary to be Pala members because their ancestor, Margarita Britten, was allegedly not a full-blooded Pala Indian. ¶¶5, 100 n.6. As rumors of the disenrollments circulated, Defendant Smith assured some Pala members in a private conversation the next day that the rumors were not true. ¶99. However, just days later, on June 1, 2011, eight Britten Descendants received a letter notifying them that they had been disenrolled. ¶100. Prior to being disenrolled, they received no notice that they were being considered for disenrollment, and were provided with no opportunity to present evidence or attend hearings. ¶101. Further, just a couple of months prior to disenrolling them, Defendants caused Pala to withdraw from the Intertribal Courts of Southern California so that the disenrollees would not be able to seek recourse from tribal courts. ¶¶94-96.

Thereafter, a flyer was circulated regarding Defendants' unjustified actions. The flyer argued that Defendants had no reasonable grounds for disenrolling the eight Britten Descendants and warned other Tribal members that no one was safe from the disenrollments. ¶¶6, 103; Exh. R. The flyer also argued that the reason why Defendants disenrolled only eight members of the family and not the rest of the family who were also 1/16th descendants was because Defendants were dictators who were abusing their powers. ¶103; Exh. R. Angered by the flyer, which

Defendant Smith believed was written by Freeman, Smith issued a letter dated September 30, 2011 to all enrolled adult members of the General Council, threatening: "[King Freeman] wants the rest of his family who are 1/l6 descendants, disenrolled!!! Don't take my word for it, see his flyer!!!" ¶104; Exh. S. In his letter, Smith assured Pala members that Defendants had the authority to disenroll the eight Britten Descendants by representing that Pala's Constitution authorized "[t]he Executive Committee [to] keep membership roll current"; however, Smith failed to include the rest of the sentence in the Constitution providing that it could do so only "by striking therefrom the names of persons who have relinquished in writing their membership in the Band and of deceased members upon receipt of a death certificate or other evidence of death, and by adding the names of children born to members who meet the membership requirements." ¶¶104, 121; *compare* Exh. S *to* Exh. F. Smith's letter also falsely assured Tribal members that Constitutional protections were provided to the disenrollees, as Pala's Constitution required that procedures for loss of membership "shall provide that the member receives due process and equal protection as required by the Indian Civil Rights Act"; however, Smith failed to disclose that Defendants had taken steps to deliberately foreclose any true appeal of their decision to the BIA and had withdrawn Pala from the tribal court system. ¶¶104, 108; Exh. S.

On February 1, 2012, carrying out Smith's threat to disenroll the rest of Freeman's family, Defendants expelled 154 more Britten Descendants from Pala, including many of the Plaintiffs, under the guise that they had failed to meet the blood quantum requirement because their ancestor, Margarita Britten, was not a full-blooded Pala Indian. ¶106. In doing so, Defendants disenrolled approximately 15 percent of the Tribe. ¶106.

Soon thereafter, a petition was circulated among members of Pala's General Council for a special meeting regarding Defendants' disenrollment of the Britten Descendants. ¶109; Exh. W. In response, Chairman/Defendant Smith issued a letter to Tribal members claiming that the "petition is circulating under misleading pretenses" and that "[t]he merits of this petition are false." ¶110; Exh. V. Although the petition, with 79 signatures, garnered enough support for a special meeting, Defendants nonetheless rejected the petition and refused to call a meeting, claiming that "it violates the Pala Constitution and Enrollment Ordinance." ¶110; Exh. X.

On February 24, 2012, following the appeal of the eight Britten Descendants who were disenrolled on June 1, 2012, the BIA recommended that Defendants change their disenrollment decision because "it has been proven that [the disenrollees] possess the required degree of Indian blood." ¶136; Exh. T. On June 7, 2012, following an appeal filed by 53 of the 154 Britten Descendants who were disenrolled on February 1, 2012, the BIA also recommended that these individuals remain enrolled with the Band as "there was no evidence provided to support the disenrollment of these individuals." ¶138; Exh. U. However, in violation of Pala's revised enrollment ordinances, which required Defendants to issue a final decision only after receiving the BIA's recommendation, Defendants had already proclaimed these disenrollments to be "final," even before they received the BIA's recommendation. ¶139.

B. Defendants Lacked Authority to Disenroll Plaintiffs

Defendants lacked the authority to unilaterally disenroll Plaintiffs and other Britten Descendants. Among other things, Pala's Constitution, from which Defendants purported to derive their power, was not validly adopted because it was not approved by a majority of Pala adult members voting in a duly called election, as required. ¶¶78-79; Exhs. G & H. Instead, the Constitution was approved by 27 votes (when over 300 votes were required) in a special meeting of the General Council (as opposed to an election), that barely met the minimum quorum of 25 for holding a meeting. ¶80. Notably, the purportedly enacted Constitution is undated, contains no certification of adoption, has typos and grammatical errors, and contains randomly underlined sentences as if it were a draft. *Compare* Exh. F *to* Exh. B. Further, the fact that the Constitution was not validly adopted is evidenced by Pala's Tribal Gaming Ordinance, enacted in 2000, which stated that "the Tribe is governed by Articles of Association," several years after Pala's Constitution was purportedly adopted. ¶81. Further, even as of February 2012, Pala's website stated that "the tribe is organized under Articles of Association." ¶82.

Even assuming the validity of Pala's Constitution, Defendants had no authority to disenroll Plaintiffs. First, the Constitution only gave Pala's Executive Committee the power to add or delete persons from the Tribal rolls as members die, are born or voluntarily relinquish

their membership. ¶121; Exh. F. It did not give Defendants the authority to revisit the blood degree of an original Pala member, Margarita Britten, who died over eight-five years ago. ¶2.

Second, the Constitution provided that "procedures for disenrollment, if any … shall provide that the member receives due process and equal protection as required by the Indian Civil Rights Act." ¶122; Exh. F. However, when Defendants unilaterally revised Pala's enrollment ordinances to include disenrollment procedures, these procedures failed to provide members with due process by eliminating any true appeal of the Executive Committee's disenrollment decisions. Whereas Pala's original enrollment ordinance provided for oversight by the BIA over the enrollment process and provided that "[t]he decision of the Secretary on appeal shall be final and conclusive," the revised enrollment ordinances limited any appeals of the Executive Committee's decision to only a recommendation by the BIA as to whether it should uphold or change its decision. ¶¶85-90, 134; *compare* Exhs. J & K *to* C. Because the revised enrollment ordinances did not provide due process and equal protection to Pala members in connection with disenrollments, as required, Plaintiffs' disenrollments were invalid.

Third, Defendants were not authorized to disenroll anyone because, in 2002, the Tribe issued a moratorium on enrollment requirements for ten years. ¶123. As such, Defendants lacked the authorization to revise Pala's original enrollment ordinance. ¶123. Also, because the BIA had the final say on enrollments in 2002, when the moratorium was passed, the BIA should have had the final say on Defendants' disenrollment of the Plaintiffs in 2011 and 2012. ¶123.

Fourth, the revised enrollment ordinances were only supposed to be used in connection with the evaluation of ***new*** enrollment applications, as they specifically state that they are not "intend[ed] to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the membership roll of the Pala Band of Mission Indians …." ¶124; Exhs. J-L. Since Plaintiffs' membership had already been approved and they were on Pala's membership roll, Defendants had no authority to disenroll them.

Fifth, Defendants had no authority to unilaterally decide that Plaintiffs had misrepresented or omitted facts in their enrollment applications with respect to Margarita Britten's blood degree, as Pala's Tribal Council and the BIA had each previously concluded that

she was a full-blooded Pala Indian. ¶125; Exh. D. Even Defendant/Chairman Smith himself previously acknowledged that Margarita Britten was a full-blooded Indian. ¶117; Exh. E.

Sixth, the revised enrollment ordinances provide that, if an application was reevaluated for misrepresentation or omission, "such application shall be reevaluated in accordance with the procedures for processing an original application." ¶126; Exhs. J, K. To process an original application, the Executive Committee was required to make an initial determination and then send it to the BIA for its review and recommendation. ¶126; Exhs. J, K. Only "[a]fter a response is received from the [BIA]," could the Executive Committee approve or disapprove the application. ¶126; Exhs. J, K. Plaintiffs' disenrollments were unauthorized because they were done before Defendants followed these procedures and received a response from the BIA. ¶126.

Finally, Defendants had no authority to disenroll the Britten Descendants because at least two of the Defendants who participated in the disenrollment decision should not have been on the Executive Committee. ¶127; Exhs. M-O. Pala's Constitution prevents a person from being nominated for the Executive Committee if he has been "convicted of a felony or any other criminal offense." ¶127; Exh. F. It also requires that a vacancy in the office be "automatically created" if an officer is found guilty of a felony in any state or federal court. ¶127; Exh. F. It further provides for removal for "gross misconduct in office" or "conviction of a crime under federal, state, or tribal law while holding office." ¶127; Exh. F. In 2003, Vice Chairman/Defendant Miranda, while serving on Pala's Executive Committee, was charged with assault with a deadly weapon, which was a felony, and for brandishing a firearm and for willfully harming and/or injury to child, which were misdemeanors. ¶128; Exh. M. He pled guilty and was convicted of all charges. ¶128; Exh. M. In 2009, Miranda was also arrested and charged with a lewd act, to which he pled guilty of a misdemeanor and was convicted. ¶128; Exh. N. Despite his criminal convictions, and in violation of Pala's Constitution, Miranda remains on the Executive Committee to this day. ¶128. Similarly, in December 2006, while in office, Secretary/Defendant Kilma Lattin was charged with a felony for willful discharge of a firearm that could result in injury or death to a person. ¶129; Exh. O. Lattin's motion to reduce the charge to a misdemeanor was denied in February 2007, and he was ordered to stay away from

the victims and witnesses. ¶129; Exh. O. In July 2007, Lattin withdrew his "not guilty" plea and pled "guilty" to the crime. ¶129; Exh. O. Because Defendants Miranda and Lattin should not have been on Pala's Executive Committee, the Executive Committee's disenrollments of Plaintiffs and other Britten Descendants were invalid. ¶129.

Notably, in June 2010, when several Tribal members raised the fact that Lattin should not have been allowed to run for Secretary because of his criminal record, Defendant/Chairman Smith ignored these arguments and, instead, banished these members from tribal meetings and withheld their per capita payments for a year. ¶59; Exh. P. These members sought recourse in tribal court. Exh. P. Similarly, when the Britten Descendants attempted to remove Miranda as Vice Chairman in early 2011, they were met with retribution in the form of disenrollments. ¶¶5, 143, 157. However, this time around, to prevent interference by the tribal courts, Defendants withdrew Pala from the tribal court system shortly before disenrolling Plaintiffs. ¶¶94-96.

Defendant Smith and the other Defendants who remain on the Executive Committee continue to dominate the Tribe through fear and retribution. On information and belief, they are planning to institute a "treason ordinance" to punish any Pala members who might dare to challenge their authority so that they could continue their dictatorship *ad infinitum*. ¶110.

III. ARGUMENT

A. The Court Has Subject Matter Jurisdiction

Where, as here, Defendants have made a "facial" challenge to subject matter jurisdiction without presenting documents to contradict the allegations in the Complaint, *see* Defs' Mtn at 5, the Court must accept the Complaint's allegations as true. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). To the extent that Plaintiffs have presented documents to further support their allegations in the Complaint, the Court may review them to resolve factual disputes concerning the existence of the jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "Jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is

dependent on the resolution of factual issues going to the merits of an action." *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 71 F.2d 138, 139 (9th Cir. 1983).

1. This Case Is Not About Defining Tribal Membership

Conflating themselves with the Tribe, Defendants repeatedly assert throughout their motion to dismiss that sovereign immunity applies in this case because it was the ***Tribe*** that disenrolled the Plaintiffs. Not so. As Plaintiffs painstakingly explained in their Complaint, the disenrollments were committed by ***Defendants***, who acted outside the authority granted them by the Tribe. This is an important distinction because, here, ***the Tribe*** – the true sovereign – had previously voted on and determined that Plaintiffs' ancestor, Margarita Britten, was a full-blooded Pala Indian. *See* Exh. D. Thus, Defendants intentionally subverted the will of the sovereign by unilaterally declaring that Margarita Britten was not a full-blooded Indian.

Where, as here, tribal leaders act beyond their authority, they lose their entitlement to the immunity of the sovereign. *See United States v. Oregon*, 657 F.2d 1009, 1013 n.9 (9th Cir. 1981) (sovereign immunity only extends to tribal officials acting in their official capacity and within the scope of their authority); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1270 (9th Cir. 1991) ("tribal officials are not necessarily immune from suit. When such officials act beyond their authority, they lose their entitlement to the immunity of the sovereign"); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1051 (11th Cir. 1995) (individual defendants subject to suit given allegation that they acted beyond their authority).[4] The Complaint details how and why Defendants had acted outside the scope of their authority. ¶¶120-130. As these allegations must be accepted as true, and Defendants have not attempted to negate them, Defendants are not entitled to the protection of sovereign immunity.

Further, Defendants' reliance on *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), for immunity, is misplaced. In *Santa Clara Pueblo*, a female member of the Santa Clara Pueblo

[4] *See also Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) ("An Indian tribe's sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him"); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2d Cir. 2000) (a tribal official is "stripped" of tribal immunity when he acts "manifestly or palpably beyond his authority.").

tribe and her daughter brought suit in federal court alleging violation of the Indian Civil Rights Act ("ICRA") against the tribe and one of its officials, seeking declaratory and injunctive relief against enforcement of a tribal ordinance that denied membership to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. *Id.* at 51. There, in addressing a tribe's right to define its membership, the Supreme Court held that sovereign immunity applied to the tribe. *Id*. at 59-72.

In contrast to *Santa Clara Pueblo*, this case is not about a tribe's right to define its membership. Indeed, the definition of "who is Pala" was made when the Tribe adopted its Articles of Association in 1960, wherein it defined its members as consisting of those persons whose names appear on the Pala Allotment Rolls on November 3, 1913, and all living descendants of those persons on the Allotment Rolls, provided that they have at least 1/16 or more degree of Indian Blood of the Band. ¶3; Exh. B. This membership definition has not changed. ¶156; Exh. F. As Margarita Britten's name appears on Pala's 1913 Allotment Rolls, and the Rolls identify her as having "4/4" degree Pala blood, her descendants who have at least 1/16 or more degree of Pala Indian blood met Pala's membership definition and were properly enrolled in the Tribe. ¶3; Exh. A. However, Defendants, in an unauthorized exercise and abuse of power, unilaterally declared that Margarita Britten was not a full-blooded Indian as an excuse to further their personal agenda of power and greed by eliminating Plaintiffs from the Tribe.

Moreover, unlike *Santa Clara Pueblo*, sovereign immunity does not apply here because Pala is not a Defendant. Instead, Defendants are individuals who exceeded their authority as Tribal officials by using enrollment as an excuse to retaliate against Plaintiffs. Notably, *Santa Clara Pueblo* specifically provides that tribal officers are not protected by the tribe's immunity from suit. *Id*. at 59 ("As an officer of Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit.") In addition, the concerns raised in *Santa Clara Pueblo* – namely, that of undermining tribal courts and imposing serious financial burdens on financially disadvantaged tribes – are not present in this case. 436 U.S. at 59-72. Whereas *Santa Clara Pueblo* assumed that a tribal court could adjudicate Plaintiffs' claims, there is no such option here because Defendants deliberately withdrew Pala's participation from the Intertribal Courts in

order to prevent their unlawful acts from being reversed. Also, the concerns of imposing serious financial burden on Pala is non-existent given Pala's wealth from its casino revenues and the fact that Plaintiffs are seeking damages from Defendants, not Pala.

In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 888-89 (2d Cir. 1996), the court found the argument that a federally recognized Indian tribe possesses complete and absolute authority to determine all questions of its membership "simply goes too far." *Id*. at 888-889. In *Poodry*, where defendants removed plaintiffs from tribal rolls and banished them from the reservation, the Second Circuit reversed the lower court's dismissal for lack of jurisdiction, stating: "we decline … to equate the membership of Santa Clara Pueblo, which had general, ***prospective*** application, with action taken by members of the Tonawanda Band Council of Chiefs." *Id*. at 888. Here, this matter does not involve the prospective application of membership, but the unlawful and unauthorized actions taken by Defendants to remove existing members on the purported basis that their ancestor was not a full-blooded Indian, despite determinations previously made otherwise by the BIA and the Tribe itself.

Further, In *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), where an Indian was convicted by the Yakima Tribal Court for violating tribal fishing regulations, the Ninth Circuit concluded that the federal court could review his conviction because tribal action "so summary and arbitrary as to shock the conscience" can trigger a constitutional violation. *Id.* at 489. Although the petitioner in *Settler* was sentenced to merely a fine, the Ninth Circuit found that he had "no other procedural recourse for effective judicial review of the constitutional issues he raises." *Id.* at 490. Similarly, here, Defendants' actions were so summary and arbitrary as to shock the conscience. Also, like in *Settler*, Plaintiffs here have no other procedural recourse for effective judicial review because Defendants made sure that Plaintiffs would have no recourse via the tribal courts or through an appeal to the BIA.

2. This Case Does Not Call For Interpretation Of Tribal Law

Defendants also contend that the Court has no subject matter jurisdiction over this case because it would be required to interpret "tribal law." Defendants are wrong.

First, accepting Defendants' argument would vitiate the law providing that sovereign immunity does not apply to tribal officers who act outside their authority, as a litigant would never be able to demonstrate that tribal officers acted outside their authority since such authority, by definition, is derived from tribal law.

Second, where, as here, Pala's Constitution, ordinances, and procedures mirror those employed in the United States and do not reflect "Indian 'historical, governmental … or cultural values," no tribal law is implicated. *See Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900-901 (9th Cir. 1988) (where tribal procedures are Anglo-American in origin and parallel those employed in United States courts, federal standards are employed).

Further, federal courts often review tribal governing documents in connection with enrollment issues. For example, in *Cahto Tribe of Laytonville Rancheria v. Dutschke,* 2011 U.S. Dist. LEXIS 108393, *17-20 (S.D. Cal. May 20, 2011), where a tribe argued that the BIA's decision to require them to re-enroll certain members was unlawful, the court reviewed the tribe's Articles of Association and enrollment ordinances in determining whether the BIA's decision should be set aside. *Id.* at *15-18. There, the court found that the tribe's reliance on a voter list to disenroll certain members was groundless. *Id*. at *20. Similarly, in *Rincon Mushroom Corp. of Am. v. Mazzetti*, 2010 U.S. Dist. LEXIS 99926, *17 (S.D. Cal. Sept. 21, 2010), *rev'd on other grounds*, 2012 U.S. App. LEXIS 14984 (9th Cir. 2012), the court declined to dismiss several counts based on sovereign immunity where plaintiff alleged that defendants had acted pursuant to an invalid tribal ordinance that exceeded the scope of the tribe's regulatory jurisdiction. Likewise, in *Alto v. Salazar*, No. 11cv2276, slip op., at 3 (S.D. Cal. Dec. 19, 2011), the court reviewed a tribe's governing documents in assessing whether members were wrongfully disenrolled. Exh. Y.

Moreover, this case does not require interpretation of tribal law. For example, whether Pala's Constitution was validly adopted is a matter of federal law, not tribal law, because the process by which a federally recognized Indian tribe may adopt or amend its constitution is governed by the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476 – a federal statute. "[T]he IRA require[s] that tribal actions reflect the will of a majority of the tribal community, whether

or not they choose to organize under the IRA procedures," as "[t]he fair and full participation of tribal members is critical to the legitimacy of any constitutional reform." *Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 202 (D.D.C. 2006). An election to adopt or amend a tribe's constitution "is a ***federal*** election" because "[t]he right to vote in this election is a federal right protected by the Federal Constitution and the result of this election may fundamentally affect federal rights guaranteed to federally recognized 'tribal members.'" *Shakopee Mdewakanton Sioux Community v. Babbitt*, 906 F. Supp. 513, 515-16 (D. Minn. 1995). As such, in *Ransom v. Babbitt*, 69 F. Supp. 2d 141 (D.D.C. 1999), where a tribe attempted to revoke its constitution and to reinstate the former governing structure, the court found that the tribe's constitution was never validly ratified, since the approval of the constitution by 50.93% of the tribal members did not meet the threshold 51% vote required for its ratification. *Id.* at 151-52. Similarly, in *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008), the appellate court found that the BIA properly rejected a constitution that was adopted by a rogue leader and her supporters, because the passage of the constitution failed to "reflect majoritarian values." *Id*. at 1267-68. Likewise, in *Comstock Oil & Gas Inc.*, 261 F.3d 567 (5th Cir. 2001), the court found that no evidence supported the proper amendment of a tribal constitution. *Id.* at 572. Accordingly, the Court can adjudicate whether Pala's Constitution was validly enacted.

Additionally, determining whether Defendants violated Plaintiffs' due process rights does not implicate tribal law. Pala's Constitution specifically provides: "Procedures for disenrollment, if any, . . . shall provide that the member receives due process and equal protection as required by the Indian Civil Rights Act." ¶¶14, 104, 122-132; Exh. F. Pala's Constitution further provides: "The Pala Band shall provide all persons with due process and equal protection of the law required by the Indian Civil Rights Act (25 U.S.C. Section 1302)." ¶¶132; Exh. F. Because Pala's Constitution, without being required to, specifically incorporates the due process and equal protection requirements of the Indian Civil Rights Act – a federal statute – determining whether such protections were in fact provided to Plaintiffs does not require the Court to interpret tribal law. *See, e.g., New SD, Inc. v. Rockwell Int'l*, 79 F.3d 953, 955 (9th Cir. 1996) (federal court has jurisdiction where, without being required to, the parties to

a contract included language adopted from a federal statute).[5] As the Ninth Circuit has noted, "[t]he Indian Civil Rights Act 'substantially tracks the precise language of the Bill of Rights portion of the Constitution, thereby acting as a conduit to transmit federal constitutional protections to those individuals subject to tribal jurisdiction.'" *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899 (9th Cir. 1988) (citation omitted). As such, "federal constitutional standards are employed in determining whether the challenged procedure violates the Act." *Id.; Johnson v. Lower Elwha Tribal Cmty*, 484 F.2d 200, 203 n.4 (9th Cir. 1973) (rejecting argument that the due process within the meaning of the ICRA did not have the same meaning as traditional notions of due process under the Fourteenth Amendment). For example, in *Sweet v. Hinzman*, 2009 U.S. Dist. LEXIS 36716 (W.D. Wash. 2009), where plaintiffs alleged that elected members of the tribal council deprived them of due process rights by banishing them, the court evaluated the tribe's procedures and found that due process "requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," and "requires that a party affected by government action be given 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id.* at *22 (citations omitted).[6]

Further, the issue of Margarita Britten's blood quantum does not involve tribal law. Pala defines its members as those persons whose names appear on the Pala Allotment Roll as approved by the Secretary of the Interior on November 3, 1913, and their direct lineal descendants who have 1/16th or more Pala Indian blood. ¶156; Exh. B, F. The November 3, 1913, Pala Allotment Roll approved by the Secretary of the Interior included Margarita Britten

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[5] The cases Defendants rely to support their position, such as *Boe v. Ft. Belknap Indian Community of Ft. Belknap Reservations*, 624 F.2d 276 (9th Cir. 1981), are inapposite because none of the tribal governing documents in those cases incorporated the protections of any federal statutes by reference.

[6] Additionally by specifically incorporating the ICRA into its Constitution with respect to loss of membership, Pala may have waived sovereign immunity, or at least implied a willingness to submit to federal lawsuits, on this issue. *See C & L Enters. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 423 (2001) (tribe not shielded from lawsuit where the tribe had prepared the form contract that contained an arbitration clause).

on the Roll and identified her as having "4/4" degree Indian blood. Exh. A. Under 25 U.S.C. § 163, when the Secretary of Interior "cause[s] a roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood . . . and shall be ***conclusive*** both as to ages and quantum of blood . . . ." (emphasis added). In *Allery v. Swimmer*, 779 F. Supp. 126 (D. N.D. 1991), where the BIA attempted to recalculate the blood quantum of enrolled members listed on a tribal roll established in 1943, the court held that the BIA lacked authority to change the blood quantum of enrollees on the roll because federal law established the roll as conclusive. *Id.* at 130. There, the court noted: "[I]t is clear from the legislative history and ensuing use of the roll that Congress intended that the roll adopted by the Secretary in 1943 would establish the membership of the tribe; the roll being determinative both as to membership and blood quantum. This fact is particularly potent in light of the fact that the rights of descendants of enrolled members are dependent upon the established record." *Id.* at 128-29. *See also, Sac & Fox Tribe of Indians v. Andrus*, 645 F.2d 858, 862 (10th Cir. 1981) (final tribal roll was conclusive as to the quantum of Sac and Fox blood). As the 1913 Allotment Roll created by the Secretary of the Interior served as Pala's "base roll," and the roll was used and relied on by both the United States and Pala in determining Pala's membership and federal benefits, Defendants' attempt, decades later, to unilaterally declare that Margarita Britten was not a full-blooded Pala Indian in order to justify their disenrollment of her descendants, implicates federal interests and is an issue that the Court can adjudicate.

Finally, the Court can adjudicate whether Pala's Executive Committee was properly constituted in light of some Defendants' criminal convictions. As Pala had adopted the Anglo-American procedure for its governance, the Court can determine this issue. As noted in *Olney Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035 (D.S.D. 1977), "at the very core of due process is the proposition that a governing body must abide by and be governed by its own constitution and ordinances adopted pursuant to that constitution. To say that enforcement of the above proposition would somehow impose elements of an alien culture upon the Indians is, in this Court's opinion, incorrect." *Id.* at 1038.

3. Defendants Exceeded The Scope Of Their Authority

Defendants recite the mantra of sovereign immunity in an attempt to create a shield around them. Sovereign immunity, however, only applies if Defendants had acted within the scope of their authority. Since they did not do so here, Defendants are not protected.

The facts in this case are analogous to those in *Lacey v. Maricopa County*, 2012 U.S. App. LEXIS 18320 (9th Cir. 2012). There, the Ninth Circuit found that a state prosecutor was not entitled to immunity where it was clear that his primary intent was to silence plaintiffs' speech criticizing public officials. In finding that there was a strong inference that the state prosecutor was motivated by retaliatory animus, the Ninth Circuit noted that plaintiffs' arrests occurred shortly after their activities, defendant issued broad invalid subpoenas, and defendant did not wait for other official approval before arresting plaintiffs. *Id*. at *34. Similarly, here, the Complaint describes how, shortly after King Freeman had circulated a petition to remove Vice Chairman Miranda, and after a heated General Council meeting where Chairman Smith told Freeman "your kids are off the rolls," Defendants disenrolled three of King's children and five other relatives. ¶¶98. Thereafter, when a flyer was circulated questioning Defendants' action and why other 1/16th degree Britten Descendants were not disenrolled, Chairman Smith responded with a letter stating: "[King Freeman] wants the rest of his family who are 1/16 descendants discenrolled! Don't take my word for it, see his flyer!!!" ¶¶104, 106. Shortly thereafter, Defendants disenrolled 154 more Britten Descendants. ¶111. Like *Lacey*, Defendants' conduct here was patently invalid, as the purported reason for the disenrollments – Margarita Britten's blood degree – had been conclusively established. ¶126. Additionally, as in *Lacey*, in their eagerness to disenroll Plaintiffs, Defendants did not wait for the BIA's recommendation before pronouncing these disenrollments to be "final," as required. ¶¶126. Indeed, when petitions were later circulated to have a General Council meeting about the disenrollments, Defendants tried to persuade Pala's membership that the petition was circulated under false pretenses. ¶110. Then when the requisite signatures were obtained for the petition, Defendants claimed that the petition was "unconstitutional." ¶143. These compelling facts demonstrate that Defendants' disenrollment of the Plaintiffs was really about punishing the

Britten Descendants for challenging them rather than about Defendants' legitimate determination of who belongs in the Tribe.

Although Defendants argue that they are shielded by immunity because only the Tribe had the right to define its membership, and therefore the disenrollments were an act of the Tribe, this argument is contrary to the facts alleged. Notably, Defendants consistently took actions that were contrary to the Tribe's wishes, and routinely ignored the Tribe's laws. ¶91. Emblematic of the Defendants deceit of the General Council is the fact that Defendant/Chairman Smith told General Council members that the Britten Descendants had failed to timely file the appeal of their disenrollments with the BIA, when it was not true. ¶103. Further, the fact that Defendants protected each other from being removed from office (¶¶59, 97-99), despite evidence that certain of the Defendants should have been removed for engaging in gross misconduct or crimes, not only demonstrates Defendants' disregard of Pala's laws, but suggests extensive corruption within Pala's leadership. *See, e.g., Granite Valley Hotel Ltd. Pshp. v. Jackpot Junction Bingo & Casino,* 559 N.W.2d 135, 150-151 (Minn. Ct. App. 1997) (noting that nonfeasance of the tribal executive committee to the conviction of other committee members reveals a pervasive political ethic of criminality within the tribal leadership).

B. The Tribe Is Not A Necessary Or Indispensable Party

Defendants further argue that dismissal is required under Rule 19(b) because the Tribe is a necessary and indispensable party. The Rule 19(b) inquiry requires the Court to engage in a two-part analysis: "[I]t must first determine if an absent party is 'necessary' to the suit; then if [] the absent party cannot be joined, the court must determine whether the party is 'indispensable' so that in 'equity and good conscience' the suit must be dismissed." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (same). "The [Rule 19(b)] inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe*, 910 F.2d at 558 (citations omitted). In such a motion, "[t]he moving party has the burden of persuasion in arguing for dismissal." *Id.* Further, the moving party bears the burden of producing evidence in support of the motion. *Citizen Band Potawatomi Indian Tribe v. Collier*, 17 F.3d 1292, 1293 (10th Cir.

1994). Where, as here, Defendants have not produced any evidence that Pala is a "necessary" and "indispensable" party, this lawsuit should be allowed to proceed.

1. Pala Is Not A Necessary Party

To determine whether a party is "necessary," the court must decide whether (1) complete relief is possible among those already parties to the suit, and (2) the absent party has a legally protected interest in the suit. *Makah Indian Tribe*, 910 F.2d at 558. The governing inquiry is whether the Tribe will be adequately represented by existing parties. *See Southwest Ctr. For Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998); *Ransom v. Babbitt*, 69 F. Sup. 2d 141, 148 (D. D. Cir. 1999) (if the nonparties' interests are adequately represented by a party, the nonparties will not be considered "necessary"). Where, as here, Defendants are Pala representatives who have made no showing that they would not adequately represent the Tribe, the Tribe is not a necessary party to this suit. *See Salt River Project Agric. Improvement & Power Dist. v. Lee*, 2012 U.S. App. LEXIS 10862, at *11-12 (9th Cir. May 29, 2012) (in action to enjoin tribal officials from applying tribal law to plaintiffs in tribal courts, the district court's dismissal of the case under Rule 19 was reversed because the tribe was not a necessary party); *State of Washington v. Daley*, 173 F.3d 1158, 1167-1168 (9th Cir. 1994) (where there is no direct conflict between defendants and the tribe, the defendant can adequately represent the tribe's interest in the proceedings for purposes of Rule 19).[7]

Additionally, Plaintiffs can obtain complete relief without the presence of the Tribe. Contrary to Defendants' misrepresentation, Plaintiffs have not sought money and lost benefits from the Tribe, as the Complaint pleads that Plaintiffs are seeking monetary recovery from the ***Defendants***, not the Tribe. *Compare* Defs' Mtn., at 16:25-18, *to* Complaint, at 61. Moreover,

[7] *See also, Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (finding potential for prejudice to the tribe was "largely nonexistent" due to the presence of tribal officials); *Sweet v. Hinzman*, 634 F. Supp. 2d 1196, 1201 (W.D. Wash. 2008) (declining to dismiss for failure to join an indispensable party where defendants, elected representatives of the tribe, will protect the interests of the tribe). *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992), cited by Defendants, is inapposite because it involved tribal council members who, as mere intervenors and not parties to the lawsuit, could not adequately represent the interest of the absent tribe. *Id.* at 1318.

any re-enrollment of Plaintiffs will not impact the Tribe's treasury, since re-enrollment would only impact ***to whom*** the Tribe's per capita payments are made, not the amount in its treasury or the percentage allocated to per capita distributions.

Further, where, as here, Defendants acted outside the scope of their authority and Plaintiffs continue to be wrongfully deprived of their civil and property rights, enjoining Defendants does not implicate the sovereign, as "actions for injunctive relief against an official are not treated as actions against the [sovereign]." *Hafer v. Melo*, 502 U.S. 21, 27 (1991). In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court found that a private party's injunction in federal court against a state official was not barred by sovereign immunity because the official acted in contravention of federal law and therefore was "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." *Id.* at 159-60. The *Ex parte Young* doctrine – namely, that enjoining or voiding an act by a state officer does not interfere with sovereignty – has been extended to tribal officers. *See, e.g., Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 171 (1977) ("whether or not the tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members (and tribal officials) is permissible."); *Burlington N. R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 901 (9th Cir. 1991) ("tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law"), *overruled on other grounds by Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000); *Big Horn Cnty. Elec. Coop.*, 219 F. 3d at 954 (decision to permanently enjoin tribal officials does not violate principles of sovereign immunity where officials acted in violation of the law).[8]

For instance, in *Salt River Project Agric. Improvement & Power Dist.*, where tribal officials argued that complete relief was not possible without joining the Indian tribe, the Ninth

[8] *See also, N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity"); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1050-1051 (11th Cir. 1995) (affirming ruling that individual officers were not shielded by the tribe's sovereign immunity under the *Ex Parte Young* doctrine).

Circuit found that because an injunction against the officials prohibiting the allegedly unlawful actions could afford complete remedy to Plaintiffs, the tribe need not be joined. 2012 U.S. App. LEXIS, at **9, 14-15. According to *Salt River*, if a tribe would have to be joined even when the complaint alleges that tribal officers acted outside their authority, this "would effectively gut the *Ex parte Young* doctrine." *Id.* at *14. Likewise, where Defendants continue to dominate Pala's Executive Committee and continue to unlawfully deprive Plaintiffs of their rights and property, an injunction against them could provide complete relief to Plaintiffs without joining the Tribe.[9]

Finally, because Defendants acted ultra vires, their actions are void. *See United States v. Wildcat*, 244 U.S. 111, 125 (1917) (an attempt of the Secretary of the Interior to set aside the enrollment and allotment of a deceased Indian by striking his name from the rolls without notice to his heirs was ultra vires and void); *In re J.M.*, 718 P.2d 150, 154 (Alaska 1986) (unilateral action by tribal chief was void as an ultra vires act where he was not empowered to act by the tribal constitution); *Turlock Irrigation Dist. v. Hetrick*, 71 Cal. App. 4th 948 (1999) (an entity that acts outside the scope of its authority acts ultra vires and the act is void). Thus, prohibiting Defendants from continuing to exclude Plaintiffs from the Tribal rolls or voiding Defendants' actions does not implicate the sovereign because Defendants' actions were unauthorized in the first place.

2. Pala Is Not An Indispensable Party

"Only if the absent parties are 'necessary' and cannot be joined must the court determine whether in 'equity and good conscience' the case should be dismissed under Fed. R. Civ. P.

[9] *See also Alto v. Salazar*, No. 11cv2276, slip op. at 23 (S.D. Cal. Dec. 19, 2011) (plaintiffs who were removed from tribal membership roll were not required to join the tribe to obtain complete relief because the lawsuit was against the party that had the final authority over all enrollment challenges); *Quair v. Sisco*, 359 F. Supp. 2d 948, 973-974 (E.D. Cal. 2004) (rejecting the argument that defendants, tribal council members, could not grant the relief to the petitioners, because the tribal council was empowered to cease enforcement or overrule the tribal order); *Vann v. Kempthorne*, 534 F.3d 741, 754 (D.D.C. 2008) (rejecting tribal officer defendants' argument that the suit cannot proceed if it has any effect on a sovereign, because "that is what *Ex parte Young* suits have always done"); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984) ("the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign.")

19(b)." *Makah Indian Tribe*, 910 F.2d at 559. As discussed above, because Pala is not a "necessary" party to this suit, the Court need not undertake this analysis.

Even assuming, *arguendo*, that Pala is a "necessary" party, it would not be "indispensable." Determining whether a party is indispensable under Rule 19(b) requires a four-part analysis: (1) "prejudice to any party resulting from a judgment militates toward dismissal"; (2) "shaping of relief to lessen prejudice may weigh against dismissal"; (3) "if an adequate remedy, even if not complete, can be awarded without the absent party, the suit may go forward"; and (4) "if no alternative forum is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Id*. Because a judgment of damages is not being sought against the Tribe, and an order enjoining or voiding Defendants' unauthorized acts would simply restore the parties to the status quo before Defendants committed them, there is no prejudice to the Tribe. Further, where, as here, even without the absent party, Plaintiffs have an adequate remedy by way of damages from Defendants individually, the suit should proceed. Finally, critical to Rule 19(b) analysis is the availability of an alternative forum, as "[t]he absence of an alternative forum [] weighs heavily, if not conclusively, against dismissal." *Rishell v. Jane Phillips Episcopal Mem. Medical Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996). Plaintiffs have no alternative forum because Defendants foreclosed Plaintiffs' access to tribal courts and prevented the BIA from acting on the disenrollments. Accordingly, this case should not be dismissed.

C. Plaintiffs Adequately State Their Claims.

In deciding whether Plaintiffs have satisfied the pleading standards, the Court must accept "all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Rowe v. Educ, Credit Mgmt Corp.*, 559 F.3d 1028, 1029-1030 (9th Cir. 2009). In the event dismissal is warranted, leave to amend should be granted. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

Although a motion to dismiss for lack of subject matter jurisdiction (Rule 12(b)(1)) and failure to state a claim (Rule 12(b)(6)) are two different inquiries, Defendants' argument for dismissal of the claims rests largely on their contention that they were tribal officers acting in

their official capacity. However, as alleged in the Complaint and discussed herein, Defendants' unlawful actions were in fact personal, subjecting them to individual liability.

1. Plaintiffs Adequately State A Claim Under 42 U.S.C. § 1985(3)

In *Griffin v. Breckenridge,* 403 U.S. 88 (1971), the Supreme Court held that 42 U.S.C. §1985(3) provides a cause of action against private conspiracies (*i.e.*, those not involving state action) to deprive citizens of equal protection of the law or equal privileges and immunities. *Id.* at 101-102. Tribal members can be liable for violating § 1985(3). *See Allen v. Gold Country Casino,* 464 F.3d 1044, 1048 (9th Cir. 2006) (finding that the district court erred in dismissing 42 U.S.C. § 1985 and § 1981 claims against individual defendants in suit by Indian casino employee for retaliatory termination); *McCurdy v. Steele,* 353 F. Supp. 629, 638 (D. Utah 1973) (allegations of an overt conspiracy among one faction of Indians to deprive another of civil rights is cognizable under § 1985(3), as Congress intended "to speak in § 1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source"); *Burrell,* 456 F.3d 1159 (remanding claims to district court for consideration on the merits of plaintiffs' § 1985 and § 1981 claims against tribal officers); *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926, 931 (10th Cir. 1975) (plaintiffs' § 1985 allegations against individual defendants, including members of a tribe's Joint Business Council, are to be determined at trial following discovery and other pretrial proceedings).

Defendants' contention that Plaintiffs have failed to identify a source of substantive right under § 1985(3) on which to base their claim is wrong. Among other things, the Indian Civil Rights Act ("ICRA") acts as a conduit to transmit federal constitutional protections of the Bill of Rights to individual Indians. *Randall v. Yakima Nation Tribal Court,* 841 F.2d 897, 899 (9th Cir. 1988) (citation omitted). Where, as here, Pala's Constitution explicitly extends the ICRA protections to its members in connection with disenrollments (¶132), this provides the substantive right on which Plaintiffs' § 1985(3) claims may be based.[10]

[10] Although the Supreme Court in *Santa Clara Pueblo* indicated that the only remedy under the ICRA is habeas corpus, it did not address whether ICRA violations could provide the basis for a § 1985(3) claim. Moreover, *Santa Clara Pueblo* did not involve tribal governing documents that specifically incorporated the protections of the ICRA by reference, as here.

Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), is instructive. There, § 1985 claims were brought against tribal officials who conspired to deprive plaintiffs of their right to vote because the plaintiffs supported a particular tribal candidate and had tried to oust the tribal council president. In finding that the complaint should not have been dismissed, the court held that § 1985(3) protects Indians' right to vote in tribal elections against interference from private conspiracies, and that tribal immunity does not protect a tribal officer from suit. *Id.* at 838. The court reasoned that the ICRA's equal protection concepts should apply to Indian tribes that have adopted Anglo-Saxon democratic processes for selecting tribal representatives; that Indians became endowed with the fundamental rights of national citizenship, including the right to vote, when Congress granted citizenship to all Indians in 1924; and that the alleged interference with plaintiffs' voting rights was not founded in tribal custom or governmental purpose. *Id.* at 839, 842. The rationale in *Means* is sound, and the Ninth Circuit has suggested that *Means* remains good law. *See, e.g., Canlis v. San Joaquin Sheriff's Posse Comitatus,* 641 F.2d 711, 720 (9th Cir. 1981) (citing *Means* for the proposition that Indian supporters of a political candidate may be protected by § 1985(3)).Where, as here, Plaintiffs similarly allege that Defendants disenrolled them as part of a conspiracy to deprive Plaintiffs of their right to petition and vote in Tribal elections, Plaintiffs' § 1985(3) claim should be upheld by the Court.

Apart from the ICRA, a violation of 42 U.S.C. § 1981 also constitutes proper substantive basis for claim of redress under § 1985(3). *See Witten v. A.H. Smith & Co.*, 567 F. Supp. 1063, 1072 (D. Md. 1983) (concluding that § 1981 is a proper substantive basis for a claim of redress under § 1985(3)); *Thompson v. Int'l Asso. of Machinists & Aerospace Workers*, 580 F. Supp. 662, 667-68 (D.D.C. 1984) (same); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 940 (D. Neb. 1986) (same). As the Complaint alleges that Defendants violated § 1981, this suffices to form the basis for a claim under § 1985(3). *See* ¶¶167-171.

Further, Defendants wrongly contend that Plaintiffs cannot establish their § 1985(3) claim because members of a tribal council cannot form a conspiracy. In making this argument, Defendants rely on *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985), which found that tribal council members cannot conspire when they act together in taking official action

because the conduct is essentially a single act by a single corporation. The Eighth Circuit's "intra-corporate conspiracy" doctrine, however, has not been adopted by the Ninth Circuit. In *Portman v. Cnty of Santa Clara*, 995 F.2d 898 (9th Cir. 1993), the Ninth Circuit noted that the Circuits are split on whether the intra-corporate conspiracy doctrine applies to § 1985 cases and that, while it has not resolved this conflict, a district court in the Ninth Circuit has "emphatically reject[ed] the application of the intra-corporate conspiracy doctrine to § 1985 cases." *Id*. at 910l. In any event, where defendants act outside the scope of their official capacity or for personal reasons, as here, an exception to the intra-corporate conspiracy doctrine is created. *Chambers*, 629 F. Supp. at 936 (citing cases).

2. Plaintiffs Adequately State A Claim Under 42 U.S.C. § 1981

Where tribal officials fail to act within their official capacities and under the authority of tribal law, they may be held liable for violations of civil rights. *Evans v. McKay*, 869 F.2d 1341, 1348 n.19 (9th Cir. 1988) (reversing dismissal of civil rights claim where district court erroneously concluded that tribal defendants were acting within their official capacities). For example, in *Vann v. Kempthorne*, 534 F.3d 741 (D.D.C. 2008), where persons on the "Freedmen Roll" of the Cherokee Nation were not permitted to vote because they lacked an ancestral link to the "Blood Roll" for native Cherokees, the appeals court sustained the lawsuit brought pursuant to § 1981 against tribal officers who had exercised authority in violation of the Thirteenth Amendment. *See also Burrell*, 456 F.3d 1159 (remanding claims to district court for consideration on the merits of plaintiffs' § 1985 and § 1981 claims against tribal officers); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (finding that district court erred in dismissing plaintiff's § 1981 claim against an individual tribal member).[11]

Additionally, Defendants' argument that discrimination against Plaintiffs is permissible because an Indian tribe can define membership in a manner that differentiates among ethnically distinctive subgroups of people is irrelevant. The fact is that Pala's membership definition has

[11] Defendants' reliance on *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457 (10th Cir. 1989), is misplaced. *Nero* contained no allegation that tribal officials had acted outside the scope of their authority and, unlike *Nero*, this case is not about a tribe's right to define its own membership.

remained the same for over fifty years, during which time Plaintiffs were properly enrolled as Tribal members. Thus, this case does not pertain to how Pala defines its membership. Instead, this case is about rogue tribal leaders who, acting outside the scope of their authority, deliberately selected Plaintiffs – descendants of Margarita Britten who are of Cupeno lineage – for disenrollment, while refusing to review other family lines within the Tribe. As "[a]ncestry can be a proxy for race," *Rice v. Cayetano*, 528 U.S. 495 (2000), Defendants' differential treatment of Plaintiffs violated § 1981. *See also, St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (§ 1981 prohibits discrimination against identifiable classes of persons because of their ancestry or ethnic characteristic, whether or not it would be classified as racial in terms of modern scientific theory); *Cf. Azar v. Conley*, 456 F.2d 1382, 1386 (6th Cir. 1972) (even a middle class white family could be protected by § 1985(3) where they were the object of invidious discrimination).[12]

3. Plaintiffs Adequately State A Claim For Conversion

Defendants also argue that Plaintiffs have failed to state a claim for conversion because Plaintiffs have no vested property rights in money and benefits stemming from their membership in Pala. This argument is absurd and circular. Plaintiffs have alleged a claim for conversion precisely because Defendants wrongfully stripped Plaintiffs' of their rights to such money and benefits, which were guaranteed to them under the Indian Gaming Regulatory Act ("IGRA"). Under the IGRA, for Pala to engage in Indian gaming, Pala was required to submit a plan to the Secretary of the Interior on allocation of its gaming revenue. 25 U.S.C. § 2710(b)(3)(A). The plan must provide that the revenues will be used only for certain purposes, including providing "for the general welfare of the Indian tribe and its members." 25 U.S.C. § 2710(b)(2)(B)(ii). ¶66. To that end, Pala adopted an allocation plan which provided that 60% of its gaming

[12] Even if Plaintiffs' federal claims are dismissed, the Court can still have jurisdiction over Plaintiffs' remaining claims. To invoke a federal court's jurisdiction under 28 U.S.C. § 1331, it is not essential that Plaintiffs base their claim on a federal statute or provision of the constitution, as long as they assert a claim "arising under" federal law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 850 (1985). Additionally, the district court retains discretion over whether to exercise supplemental jurisdiction over state law claims even after all federal claims are dismissed. *Lacey v. Maricopa Cnty*, 2012 U.S. App. LEXIS 18320, at *103 (9th Cir. 2012).

revenue would to go to per capita payments to its members, and 15% would go to providing for the general welfare of its member through various benefits such as medical care, tuition assistance, and trust funds for minors. ¶66. By unlawfully disenrolling Plaintiffs, who had vested ownership rights to the money and benefits, Defendants converted their property rights and caused damages. *See, e.g., Rasmussen & Assocs. v. Kalitta Flying Serv.*, 958 F.2d 896, 906 (9th Cir. 1992) (setting forth elements of conversion).

4. Plaintiffs Adequately State A Claim For Group Defamation

Defendants contend that Plaintiffs cannot state a claim for group defamation because Defendants' statement about Margarita Britten was made in their capacity as tribal officials. However, where, as here, Defendants in reality acted in their individual capacity for reasons of personal animus, and at least two of the Defendants were not even qualified to be tribal officials because of their criminal records, Defendants' argument in this regard is meritless.

Likewise, Defendants wrongly contend that their allegedly defamatory statement is not actionable. Within the Native American Indian community, tribal authenticity is very important. Those who are not considered authentic Indians are often discriminated against, ridiculed, or shunned by other Indians. Particularly because Pala is a small tribe, the Pala community and other Indians understood that Defendants' false statement referred to Plaintiffs. ¶¶82-87. In fact, some of the Plaintiffs have received "hate mail," and Plaintiffs have been shunned and harassed by members of the Pala community. ¶140. The fact that Defendants' false statement impacted over one hundred Britten Descendants is irrelevant. Where, as here, the remarks were reasonably understood by other Pala members to be of and concerning Plaintiffs, defamation is established. *See Church of Scientology v. Flynn*, 744 F.2d 694, 697 (1984) (even though "Scientolgy" referred to over 300 churches, plaintiff was adequately identified).

Similarly, Defendants' argument that statements about deceased individuals cannot constitute defamation is a red herring. A civil action can lie for the damation of one who is dead if there is a reflection upon those who are living who are themselves defamed. *See W. Prosser, Law of Torts*, § 111 at 744-45 (4th ed. 1971). As Plaintiffs allege that Defendants defamed them by derogating their ancestral lineage and heritage, this claim should not be dismissed.

5. Plaintiffs Adequately State A Claim For Tortious Inteference With Prospective Economic Advantage and Conspiracy

Contrary to Defendants contention, Plaintiffs have established a claim for tortious interference with prospective economic advantage by alleging that Defendants engaged in conduct that was wrongful by some other measure. An act is independently wrongful if it is unlawful, or proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003). Commonly included among improper means are deceit or misrepresentation, defamation, or disparaging falsehood. *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201 (1978) (citations omitted). Because Defendants misrepresented and defamed Plaintiffs by stating that Margarita Britten was not a full-blooded Indian, this claim is established.

Further, Defendants' argument that Plaintiffs failed to identify an actionable wrong as the premise for Plaintiffs' conspiracy claim is baseless. As the Complaint alleges that Defendants were co-conspirators who acted in combination to wrongfully and illegally take away Plaintiffs' rights and property in violation of Counts II through V in the Complaint, Plaintiffs have adequately stated their claim for conspiracy. ¶¶59-60, 189-195.

IV. CONCLUSION

This case epitomizes sovereign immunity gone amuck. Here, under the guise of sovereign immunity, Defendants have perpetrated egregious human and civil rights violations to keep those who might dethrone them or expose their corruption at bay. If the law is such that rogue leaders of an Indian tribe are allowed to flout the law with no repercussion, then it will not be long before Indians become extinct as tribes are overtaken by those who use sovereign immunity to rid Indian tribes of everyone but themselves, creating a disadvantaged subclass of "former" Indians ousted from their homes and communities. Sovereign immunity cannot be stretched to this extent to allow the "genocide" of rightful Indian citizens by individuals with personal motives purporting to act on behalf of the Indian tribe. For all of the foregoing reasons, Defendants' motion to dismiss must be denied.[13]

[13] If the Court nonetheless dismisses the Complaint, Plaintiffs respectfully request leave to amend. Since filing the Complaint, Plaintiffs have obtained additional information to further

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support Plaintiffs' allegations, including additional evidence that the Constitution purportedly adopted by the Tribe was in fact a draft; that the Revised Enrollment Ordinances were only supposed to apply to new enrollments; that Chairman Smith had been warned by the BIA to comply with the law in connection with Pala enrollments; that Defendants had a proclivity for retaliation; and that Pala's elections for Executive Committee members were likely tainted such that certain of the Defendants should not have been on the Executive Committee.