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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

REBECCA SWEARINGER and KIM FREEMAN, on
behalf of themselves and the Tribal membership,

Plaintiffs,

v.

PASKENTA BAND OF NOMLAKI INDIANS TRIBAL
BUSINESS COUNCIL, DOES

Defendants.

Case No. 4:13-cv-02642-CW
Hon. Claudia Wilken

**BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

Date: August 29, 2013
Time: 2:00pm
Dept.: Courtroom 2

STATEMENT OF ISSUES

The Defendants, the officers of the Paskenta Band of Nomlaki Indians Business Council (“PBNIBC”) or {“Defendants”), request that this Court decide whether: (a) the defense of sovereign immunity is extended to the individual officers of the Business Council in this case; and whether (b) Plaintiffs’ have failed to state claims for which relief may be granted. As set forth below, the Motion must be denied as:

1. The Plaintiffs’ allegations that the officers of the PBNIBC have violated the Tribe’s Constitution and the federal law it stems from, if proven, would certainly be grounds for finding for the Plaintiffs.
2. Plaintiffs’ claims are validly pled and the Defendants have the authority to grant the relief requested.

STATEMENT OF FACTS

The Paskenta Band of Nomlaki Indians was indeed terminated under the California Rancheria Act in 1958 and was restored via the Paskenta Band Restoration Act on October 4, 1994 (“Restoration Act”). The Secretary was required under the Act to ensure that the Tribe followed the requirements of 25 CFR §81 in reorganizing itself as an Indian Reorganization Act (“IRA”) tribe. Everett Freeman and his siblings George Freeman and Rebecca Swearingen (a Plaintiff here) were founding members and among others, worked diligently to produce a Constitution that would accommodate the IRA required sections and provide for members’ rights. It was authorized by the Secretary on December 15, 1998, voted on by the membership on April 18, 1998 and approved by the Assistant Secretary for Indian Affairs. The Defendant claims authority to develop ordinances that further define membership and cites Section 3 of Article II. While the Plaintiffs do not dispute this power, it does assert that any ordinance must be drafted

1 so that it is “consistent with” the Constitution. *Id.* The Defendant does not mention Article X of
2 the Bill in their the Tribal Council nor the General Council shall exercise any power in such a
3 manner as to deprive any person of rights secured by this Constitution or applicable laws of the
4 United States. It continues with an enumeration of these rights in Section 1, “All members of the
5 Band shall enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly
6 and association.” The Defendants have individually and collectively used the authority granted to
7 them to punish and harm those who would dare ask even the simplest of questions regarding
8 tribal affairs. So sensitive to criticism are they that they lash out at the elderly and powerless
9 should they even so much as raise an objection.
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11 INTRODUCTION

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14 The Defendants seek to terminate this action by restructuring the Plaintiffs’ case and then
15 claiming sovereign immunity. Further, they seek to satisfy a “failure to state a claim” argument
16 by alleging that the corrective action sought by Plaintiffs are not the kind that can be required of
17 them although the Restoration Act made such requirements. The Tribe’s authority and
18 responsibilities to it members are so intertwined with the federal statute and regulations that
19 established the government-to-government relationship that the federal law is stated in the
20 Tribe’s Constitution. *See* Defendants’ Exhibit 1.
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23 When a tribal official or the whole tribal leadership collectively conspire to violate the
24 rights of the membership as stated under the Tribe’s Constitution, they do so risking violating the
25 federal law that formed the basis for those rights. In any case, a motion to dismiss before
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discovery has created even a minimal factual record is prejudicial to the Plaintiffs and premature by the Defendant.

ARGUMENT

I. Sovereign Immunity Does Not Protect Members of a Tribal Council Who have Acted Beyond Their Authority and in Contravention of Tribal and Federal Law.

As an officer of the Paskenta Band, the Council members are not immune from suit. *Santa Clara Pueblo* 436 U.S. 49, 59 (1978) (“As an officer of the Pueblo, petitioner . . . is not protected by the tribe's immunity from suit.”); *Timbisha Shoshone Tribe v. U.S. Dept. of Interior*, 2013 WL 1451360 *7 (“Because Plaintiffs do not allege any **members** of the 2011 Elected **Council** violated federal law, the **council members** retain their immunity from suit as **tribal** officials.”). In the case at bar, the Plaintiffs do allege violated of federal law and have so stated in the Complaint.

The Defendants betray their motives in enforcing the Membership Act¹ by introducing additional facts and allegations regarding other tribal member grievances concerning the Constitution, elections and membership criteria wherein they accuse the Plaintiffs of, “. . . engaging in a campaign intended to discredit Defendant and destabilize the Tribal government and businesses.” Motion to Dismiss, pages 3-4. None of these additional allegations are pertinent here but rather designed to bolster the Defendants’ absurd claim that, “. . . Plaintiffs seek to misuse this Court for a ‘backdoor’ challenge to the BIA’s action under the guise of purported violation of federal law.” Plaintiffs do not seek and have not claimed anything regarding the

¹ The Membership Act provides in Section 3-504(d)(2), “Suspend the Tribal privileges of said Tribal Member, including rights to vote and receive per capita distributions, for three (3) consecutive months for each such act . . .” The Plaintiffs were each suspended for 360 consecutive months.

Bureau of Indian Affairs since the causes of action are being brought against the PBNIBC members.

II. Dismissal Would Be Inappropriate.

The courts have universally held that, “[a] complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle it to relief.” *Colwell v. Dept. of Health and Human Services*, 558 F.3d 1112, 1121 (9th Cir. 2009). The United States Supreme Court has added, “. . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly.” *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 746 (1976). The fact that the Plaintiffs are alleging conduct on behalf of the PBNIBC members such as targeting their perceived detractors, violating due process and subjecting the membership to a dictatorial law that prohibits free speech is enough

The Plaintiffs anticipate that the Defendants will argue that the Complaint addresses the Business Council members versus the Tribe in an effort to circumvent the Tribe’s sovereign immunity. See *Cook v. AVI Casino Enterprises, Inc.* 548 F.3d 718, 727 (9th Cir. 2008)(“The principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe’s treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official—apply just as much to tribal employees when they are sued in their official capacity.”). In the case at bar, the relief sought is for the Defendants to undo what they did and restrain themselves from committing the harmful act again.

Perhaps the fulcrum for a decision regarding whether or not the individual PBNIBC members have applicable sovereign immunity will be a determination of their specific actions and motivations in committing the violations alleged. But those are factual determinations that

1 have not yet been made through discovery. This is yet another reason why the Defendants'
2 motion to dismiss is premature.

3 **III. The Claims Brought By Plaintiffs Will Be Factually Supported.**

4 Although factual evidence can be heard in the context of jurisdictional challenges, it
5 should not be heard where the jurisdictional question is intertwined with the merits of the
6 dispute. Defendants' motion is therefore both factually and procedurally improper. The
7 Defendants' attack on the Plaintiffs' ability to bring this action is little more than an attempt to
8 litigate, in the context of an abbreviated and limited motion to dismiss, the merits of the
9 Plaintiffs' claims. The merits of this dispute will be and should be resolved in the normal and
10 ordinary course of this litigation, not in the abbreviated and incomplete fashion that the
11 Defendants motion proposes.
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14 In addressing a motion to dismiss, courts generally view the facts alleged in the
15 complaint as true for purposes of the motion. However, where there are factual challenges to
16 subject matter jurisdiction, the courts do not apply the same presumption. *White v. Lee*, 227 F.3d
17 1214, 1242 (9th Cir. 2000); *see generally*, 5C Fed. Prac. & Proc. Civ. § 1363 (3d ed.) Ch. 4,
18 Pleadings and Motions. Once the moving party has presented factual evidence challenging
19 jurisdiction, the opposing party must come forward with evidence establishing subject matter
20 jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-1040 (9th Cir. 2004)
21 (quoting *Bell v. Hood*, 327 U.S. 678 (1946)).
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24 However, courts should not engage in factual determinations of disputed facts where
25 a jurisdictional question and the substantive issues in the case are intertwined such that the
26 jurisdictional issue is dependent upon resolving factual issues going to the merits of the dispute.
27 *Id.* at 1039. In this case, the Defendants' restructured Plaintiffs' case from one being against the
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1 Business Council to a case against the tribal entity. In the first instance, tribal officers are not
 2 entitled to absolute immunity whereas the tribal entity has a much greater level of protection
 3 from liability. Motion to Dismiss, page 1, lines 10-14. The Defendants do not even defend their
 4 actions by alleging that the Business Council was acting within its scope of authority. Moreover,
 5 these alleged factual disputes are inextricably intertwined with the merits of this case and
 6 therefore are inappropriate for resolution in this motion.
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8 The Defendants would ask the Court to rearrange the Plaintiff's case, discount every
 9 fact alleged and convert the Plaintiffs claims from being brought against a vengeful, tyrannical
 10 individual tribal leaders, to an action against the entire tribal entity that would disrupt tribal
 11 government and devastates the tribal economy. This is simply not true.
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13 **IV. Plaintiffs Have Alleged Sufficient Facts.**

14 The requirement that a Complaint be well-pleaded is such that the claims alleged
 15 make for a "plausible" likelihood that discovery will yield facts proving the claims. *Bell Atlantic*
 16 *Corp. v. Twombly*, 550 U.S. 544, 546 92007)("Asking for plausible grounds does not impose a
 17 probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable
 18 expectation that discovery will reveal evidence of illegal agreement."); *Erickson v. Pardus*, 551
 19 U.S. 81, 93 (2007)(citing Federal Rule of Civil Procedure 8(a)(2), "requires only 'a short and
 20 plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not
 21 necessary; the statements need only 'give the defendant fair notice of what the . . . claim is and
 22 the grounds upon which it rests.")(citations omitted). The Plaintiffs have alleged that the
 23 individual Council members have used tribal law to harm them in violation of federal law. The
 24 Plaintiffs expect that this case will be resolved through summary judgment.
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CONCLUSION

For the foregoing reasons stated above, the Plaintiffs respectfully requests that this Court deny the Defendants' Motion to Dismiss.

Dated: July 29, 2013

REBECCA SWEARINGER and KIM FREEMAN,
on behalf of themselves and the Tribal membership

/S/ Jeffrey Daly, Esq.
Jeffrey Daly, Esq.
Attorney for the Defendants

CERTIFICATE OF SERVICE

I, Joseph L. Kitto, hereby certify that on July 29, 2013, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 29, 2013 at Santa Rosa, California.

By: ___s/Joseph L. Kitto_____