

Robert A. Rosette (CA No. 224437)
David M. Osterfeld (AZ No. 019238)
ROSETTE, LLP
565 W. Chandler Blvd., Suite 212
Chandler, AZ 85225
Telephone: (480) 889-8990
Facsimile: (480) 889-8997
rosette@rosettela.com

*Attorneys for the Paskenta Band of Nomlaki
Indians*

**TRIBAL COURT
OF THE
PASKENTA BAND OF NOMLAKI INDIANS**

PASKENTA BAND OF NOMLAKI INDIANS,
a federally recognized Indian tribe; **ANDREW
FREEMAN; LATISHA MILLER; AMBROSIA
RICO; ANDREW ALEJANDRE**; and
NATASHA MARANGA, each in their official
capacities as Tribal Council members,

Plaintiffs,

v.

**DAVID SWEARINGER; LESLIE LOHSE;
GERALDINE FREEMAN**; and **ALLEN
SWEARINGER**, each in their individual
capacities;

and

JOHN DOES 1-100, certain unidentified
individuals,

and

XYZ ENTITIES 1-100, certain unidentified
entities,

Defendants.

Case No.:

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' EX PARTE
EMERGENCY APPLICATION AND
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION**

Date:

Time:

Dept:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' EX PARTE EMERGENCY
APPLICATION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION

1 Pursuant to Federal Rule of Civil Procedure 65, the Paskenta Band of Nomlaki Indians, a
2 federally recognized Indian Tribe (the “Tribe”), Tribal Council Chairman Andrew Freeman, Tribal
3 Treasurer Ambrosia Rico, Tribal Vice Chairperson Latisha Miller, Tribal Secretary Andrew Alejandre,
4 and Tribal Council Member-at-Large Natasha Magana (collectively “Plaintiffs”), hereby move this
5 Court to issue, Ex Parte, a Temporary Restraining Order restraining and enjoining Leslie Lohse, David
6 Swearinger, Geraldine Freeman and Allen Swearinger (collectively “Defendants”), individually or
7 collectively, from acting on behalf of the Tribe as the Tribal Council, from exercising control over any
8 tribal assets, from using a shadow tribal court to issue any orders against Plaintiffs, and from otherwise
9 interfering with Tribal governance.

10 In support of this Ex Parte Application and Motion, Plaintiffs rely upon the attached
11 Memorandum of Points and Authorities, the Declaration of Chairman Andrew Freeman filed
12 concurrently herewith, and all other pleadings and papers on file herein. If Defendants are not restrained
13 immediately, it is believed that they will, in violation of the Tribe’s laws, continue to act on behalf of the
14 Tribe, permanently dispose of tribal assets, disrupt the tribal government, and cause great and
15 irreparable harm to the Tribe and its membership. A proposed order is attached for this Court’s
16 convenience.

17 Dated: May 16, 2014

RESPECTFULLY SUBMITTED,

ROSETTE, LLP

/s/ Robert A. Rosette

Robert A. Rosette

565 West Chandler Blvd., Suite 212

Chandler, Arizona 85225

(480) 889-8990

(480) 889-8997

Attorneys for Plaintiffs

1 **I. INTRODUCTION**

2 On April 12, 2014, the General Council of the Tribe held a duly called and noticed meeting at the
3 Rolling Hills Casino. Three members of the Tribal Council walked out of the meeting and, as a result,
4 were deemed to have abandoned their positions and their seats were filled. At a subsequent General
5 Council meeting held on May 10, a fourth Tribal Council member refused to attend, and he was
6 removed and replaced as well. Despite their lawful removal from the Tribal Council, these four former
7 Tribal Council members, now Defendants in this action, have continued to act as if they represent the
8 Tribe. To prevent great and irreparable harm to the Tribe and its membership, Plaintiffs request this
9 Court's entry of a temporary restraining order directing Defendants to stop their illegal conduct.

10 **II. STATEMENT OF FACTS**

11 On April 12, 2014, the General Council of Tribe, which is comprised of all tribal members
12 eighteen years of age or older, held a duly called and noticed meeting at the Rolling Hills Casino. *See*
13 Decl. of A. Freeman, ¶¶ 4, 6; Constitution of the Paskenta Band of Nomlaki Indians, Art. III, § 2. There
14 were 103 enrolled members in attendance out of a total of 216, thus constituting a quorum. *See* Freeman
15 Decl., ¶¶ 4, 6; Art. VII, § 2(c) ("A quorum of the General Council shall consist of thirty per cent (30%)
16 of its members . . ."). After then-Secretary Geraldine Freeman established that a quorum was present,
17 Chairman Andrew Freeman proceeded to lead the meeting. Freeman Decl., ¶ 7.

18 The Chairman explained that it had come to his attention that members of the Pata family did not
19 meet the constitutional requirements for Tribal membership. *Id.* Upon hearing that the General Council
20 would consider this matter, Leslie Lohse (then-Treasurer) immediately instructed David Swearingner
21 (then-Vice Chairperson) and Geraldine Freeman (then-Secretary) to end the meeting. *Id.* Leslie Lohse
22 is a member of the Pata family and presumably did not want the membership issue to be addressed. *See*
23 *id.* Out of order, David Swearingner made a motion to adjourn and Geraldine Freeman seconded the
24 motion. *Id.* The General Council did not vote on the motion and the Chairman informed the three
25 former Tribal Council members that they had no authority to end the General Council meeting and
26 warned that if they left the meeting they would be deemed to have abandoned their positions on the

27 ...

1 Tribal Council, thus requiring their immediate removal from the Tribal Council and their replacement
2 pursuant to the Constitution. *Id.* at ¶ 8.

3 Notwithstanding the Chairman’s warning, Leslie Lohse, David Swearinger, and Geraldine
4 Freeman walked out of the meeting. *Id.* at ¶ 9. The General Council voted by acclamation to remove
5 Leslie Lohse, David Swearinger, and Geraldine Freeman from office for having abandoned their Tribal
6 council positions. *Id.* To fill their seats, the Tribal Council appointed Ambrosia Rico as Treasurer,
7 Latisha Miller as Vice Chairperson, and Andrew Alejandro as Secretary. *Id.* at ¶ 11. Allen Swearinger,
8 the Member-at-Large, remained at the meeting but abstained from voting on all three appointments; as a
9 result, Chairman Freeman voted alone. *Id.* at ¶ 11. David Swearinger’s and Geraldine Freeman’s terms
10 of office were set to expire in September 2014, while Leslie Lohse’s was set to expire in September
11 2016. *Id.* at ¶ 10. Normally, an office with a term of more than twelve months remaining is filled by a
12 special election, but the General Council deemed an immediate appointment to be necessary until the
13 special election could be held. *Id.* at ¶ 11. Accordingly, Ambrosia Rico was appointed on a provisional
14 basis. *Id.* The Chairman then swore all three appointees into office. *Id.*

15 These above-stated facts have been grossly mischaracterized by Leslie Lohse, who has proved to
16 have considerable political connections in the White House, the Bureau of Indian Affairs (“BIA”), the
17 National Indian Gaming Commission (“NIGC”), the National Congress of American Indians (“NCAI”),
18 as well as in the United States Congress. *Id.* at ¶¶ 12–13. In fact, she is directly related to Jackie
19 Johnson-Pata, the Executive Director of NCAI. *Id.* at ¶ 12. She has used these political connections to
20 obtain letters from the BIA and NIGC expressing concerns about the General Council actions of April
21 12, 2014. *Id.* at ¶ 13.

22 Through a series of subsequent meetings with the BIA and NIGC, Chairman Freeman learned
23 that those agencies were questioning whether the actions taken on April 12 were truly the will of the
24 Tribe or whether it was the Chairman acting alone. *Id.* at ¶ 14. Based upon the concerns of the BIA and
25 NIGC, and with the full confidence of the Tribal Council and the General Council, on April 28, 2014,
26 the Chairman and the Tribal Council distributed to the membership a “Notice of a Special Meeting of

1 the General Council to be Held on May 10, 2014 to Start Initiative Process and Conduct Other
2 Business.” *Id.* at ¶ 15 & Ex. A attached thereto. The Notice of the May 10, 2014 Meeting explains that
3 a special meeting of the General Council was being called so that the General Council could affirm its
4 position on the issues that were the subject of the April 12, 2014 meeting. *Id.* at ¶ 16 & Ex. A. This
5 included the removal of Leslie Lohse, David Swearinger, and Geraldine Freeman and the appointment
6 of replacement Tribal Council members. *Id.* at ¶ 16.

7 Though the General Council’s and Chairman Freeman’s actions taken April 12 were completely
8 consistent with tribal law, the Tribal Council believed that it would be beneficial for the General Council
9 to reaffirm those actions at a special General Council meeting in order to assure the BIA, NIGC, and any
10 other outside parties that Leslie Lohse, David Swearinger, and Geraldine Freeman no longer served on
11 the Tribal Council. *See id.* at ¶ 16. Essentially, the General Council meeting was planned so that the
12 General Council can assure outside parties that its actions constitute to true will of the Tribe, not the
13 unilateral actions of Chairman Freeman. *See id.*

14 A reaffirmation of the April 12 actions was deemed to be in the best interests of the tribal
15 membership, as since April 12, Leslie Lohse, David Swearinger, and Geraldine Freeman have refused to
16 accept that they no longer represent the Tribe. Indeed, Leslie Lohse has organized the group as a rogue
17 tribal council; this illegal faction has made, and continues to make, representations to the general
18 membership and to outside parties that it is in fact the governing body of the Tribe. *Id.* at ¶ 30.
19 Additionally, though he was not formally removed from office on April 12, almost immediately after the
20 April 12 meeting Allen Swearinger began working together with Leslie Lohse, David Swearinger, and
21 Geraldine Freeman as part of their illegal faction. *Id.* at ¶ 19. On May 6, 2014, Plaintiff sent letters to
22 the illegal faction ordering that they cease and desist holding themselves out as having any authority to
23 act on the Tribe’s behalf or otherwise making representations that they are the lawful governing body of
24 the Tribe. *Id.* at ¶¶ 18–19 and Ex. B attached thereto.

25 The orders to cease and desist have been utterly disregarded. Despite their complete lack of
26 authority, Defendants continue to act as if they are Tribal Council members and in fact are exercising

1 control over a variety of tribal assets, including bank accounts, a private jet and/or fractional interests in
2 aviation services, cars, and silver and gold bullion. *Id.* at ¶ 29. Further, on May 8, 2014, the illegal
3 faction filed suit in its own illegal shadow “tribal court” seeking a temporary restraining order against
4 Chairman Freeman, Ambrosia Rico, Andrew Alejandro, Latisha Miller, and a number of other
5 individuals. *Id.* at ¶ 20 & Ex. C attached thereto. As relief, the illegal faction sought (1) a declaration
6 that Andrew Freeman was no longer the Chairman due to a “Tribal Council Resolution” passed by the
7 illegal faction the day before they filed the lawsuit; (2) an injunction preventing Chairman Freeman,
8 Ambrosia Rico, Andrew Alejandro, and Latisha Miller from “interfering in Paskenta Tribal
9 governmental or business affairs”; (3) an injunction preventing twenty-four other individuals from
10 entering tribal lands or “interfering in any and all Paskenta Tribal governmental or business affairs”; and
11 (4) an injunction preventing the Chairman Freeman, Ambrosia Rico, Andrew Alejandro, Latisha Miller,
12 and all other named defendants from “gathering at Carlino’s Event Center at Rolling Hills Casino on
13 May 10, 2014.” *See id.* at ¶ 21 & Ex. C.

14 Although Defendants’ Motion for a Temporary Restraining Order was granted, because their
15 shadow tribal court has no legal authority, Plaintiffs attended the May 10, 2014 General Council
16 meeting at Rolling Hills Casino. *Id.* at ¶ 24. There were 115 General Council members in attendance,
17 thus constituting a quorum. *Id.* at ¶ 23. Allen Swearingen, however, was not in attendance. *Id.* at ¶ 24.
18 As stated above, non-attendance of a General Council meeting is grounds for immediate removal under
19 Article VIII, Section 6 Attendance at General Council Meetings, of the Constitution. On this basis, the
20 General Council voted overwhelmingly—108 in favor, 5 against—to remove Allen Swearingen from
21 office. *Id.* at ¶ 25. The Tribal Council used its appointment power under Article V, § 1 to appoint
22 Natasha Magana as a Member-at-Large to serve the remainder of Allen’s term, which was scheduled to
23 expire in September 2014. *Id.*

24 Next, the General Council proceeded to vote on four initiatives. *Id.* at ¶ 26. The first of those—
25 and the only one relevant to the relief sought in this lawsuit—was Initiative #2014-01, reaffirming the
26 General Council’s actions from April 12, 2014 and recognizing the lawful composition of the Tribal

Council. The Initiative expressly recognized that Leslie Lohse, David Swearinger, and Geraldine Freeman were removed from office on April 12 for their intentional non-attendance at the General Council meeting, and that the Tribal Council lawfully appointed Ambrosia Rico, Latisha Miller, and Geraldine Freeman to replace them (with Ambrosia's appointment on an interim basis). *See id.*, Ex. D attached thereto. Further, the Initiative expressly recognized that Allen Swearinger had been likewise removed from office for his failure to attend the General Council meeting that day and recognized that the Tribal Council had lawfully appointed Natasha Magana to take his place. *Id.* The General Council overwhelmingly approved Initiative #2014-01 with 104 voting in favor, 5 against, and 6 abstaining. *Id.*

On May 12, 2014, pursuant to Article IX, the Tribal Council ratified the initiatives that the General Council passed on May 10. *Id.* at ¶ 28. Initiative #2014-01 was ratified by a unanimous vote. *Id.*

III. ARGUMENT

A. Standard For Emergency Temporary Restraining Order

Absent a specific provision to the contrary, the Paskenta Tribal Court follows the Federal Rules of Civil Procedure. Tribal Court Ordinance § 22. The Tribal Court Ordinance clearly gives this Court the authority to issue a temporary restraining order, *see* § 5.1 (giving the Court the power to issue all "relief in equity"); however, there is no specific provision governing the standard applicable for issuing a temporary restraining order. Thus, this Court should refer to Federal Rule 65(b)(1)(A), which permits a federal court to issue a temporary restraining order "only if ... specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Accordingly, the Court may only grant a temporary restraining order "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). To prevail, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm absent preliminary injunctive relief; (3) that the balance of equities tips in the moving party's favor; and (4) that preliminary injunctive relief is in the public interest. *Id.* at 20. In considering the four factors,

1 the Court “must balance the competing claims of injury and must consider the effect on each party of the
2 granting or withholding of the requested relief.” *Id.* at 23.

3 **B. Plaintiffs Are Likely To Succeed On The Merits.**

4 Plaintiffs submit that there is a strong likelihood that they will succeed on the merits of their
5 claim. The merits of their claim is that Leslie Lohse, David Swearinger, Geraldine Freeman, and Allen
6 Swearinger are no longer members of the Tribal Council, and thus have no authority to conduct business
7 or otherwise act on the Tribe’s behalf. This claim is fully supported by the actions taken on April 12
8 and May 10, 2014 and the governing tribal law.

9 The Tribe’s supreme law is its Constitution. Article VIII of the Constitution prescribes a number
10 of duties to the Tribal Council members, including the duty to attend all meetings of the General
11 Council. Specifically, Section 6, Attendance at General Council Meetings, provides:

12 All members of the Tribal Council **shall attend all General Council meetings . . .**
13 **Failure of any Council member to attend a General Council meeting**, except for
14 illness, the death of a member of the Tribal Council member’s immediate family (i.e.,
15 spouse, grandparents, parents, uncles, aunts, siblings, first cousins, children or
16 grandchildren), the serious illness of a Council member’s immediate family or recognized
17 and official Tribal business **shall be grounds for immediate removal. The removal of**
18 **a Council member under this section shall be decided by a majority vote of the**
19 **members of the General Council** in attendance, provided that the quorum requirements
20 of Article VII(2)(c) are met.

21 This case presents a clear instance of dereliction of constitutional duties under Article VIII. On
22 April 12, 2014, after a quorum of the General Council was established, Leslie Lohse, David Swearinger,
23 and Geraldine Freeman purposefully left. They were warned that by leaving the meeting, they would be
24 violating their constitutional duties, would be deemed to have abandoned their Tribal Council positions,
25 and would thus be subject to immediate removal. Despite full awareness of the consequences, they
26 walked out. The General Council is given the authority in Article VIII to “immediately remov[e]”
27 Tribal Council members that fail to attend a General Council meeting; therefore, with a quorum
28 established, the General Council acted entirely within its constitutional authority in immediately
removing Leslie Lohse, David Swearinger, and Geraldine Freeman from office. Similarly, Allen

1 Swearinger failed to attend the May 10, 2014 General Council meeting and therefore the General
2 Council was fully empowered to immediately remove him from office.

3 Having been lawfully removed from tribal office pursuant to Article VIII and replaced through
4 Tribal Council appointments under Article V, Defendants have no legitimate basis to claim that they
5 have authority to represent the Tribe, to exercise control over tribal assets, or to establish a tribal court
6 and use that court to issue orders and injunctions against the lawful Tribal Council. In sum, Plaintiffs
7 have clearly demonstrated a likelihood of success on the merits of their claim.

8 **C. Plaintiffs Will Suffer Irreparable Harm Absent Preliminary Injunctive Relief.**

9 If this Court does not issue injunctive relief, Defendants will continue to make
10 misrepresentations that they can act on behalf of the tribe, including by controlling tribal assets and by
11 establishing shadow tribal courts. Assets currently being held by Defendants are at a great risk of being
12 permanently disposed or destroyed; e.g., once bank accounts held by Defendants are depleted, it will
13 likely be impossible to trace and recover the funds. This, of course, would be irreparable.

14 Plaintiffs have no equally plain, speedy or adequate remedy to prevent the irreparable harm
15 caused by the unlawful control of tribal assets and the misrepresentations of Defendants that they are the
16 Tribal Council. This Court is the only forum equipped to interpret Tribal law and to grant emergency
17 injunctive relief to prevent a violation of that law.

18 **D. The Balance of Equities Tips In Plaintiffs' Favor.**

19 As shown above, Defendants have no right to take any action on behalf of the Tribe. In
20 determining whether to grant a temporary restraining order and a preliminary injunction, this Court must
21 determine whether the balance of hardships in issuing such an order would tip in favor of the party
22 seeking the restraint, here the Plaintiffs, or tip otherwise in favor of Defendants. *See Winter*, 555 U.S. at
23 23. In this case, there is ample evidence that the balance undeniably tips in Plaintiffs' favor.

24 As a result of the actions taken by the General Council on April 12 and May 10, 2014,
25 Defendants have no right to exercise any authority reserved for Tribal Council members of the Tribe.
26 Without this Court's grant of an ex parte temporary restraining order, Plaintiffs are left to simply watch

1 as unauthorized individuals unlawfully act on behalf of the Tribe, control tribal assets, establish shadow
2 tribal courts, and otherwise disrupt the Tribe's government to the detriment of all tribal members.

3 **E. Preliminary Injunctive Relief Is In The Public Interest.**

4 The final *Winter* factor that this Court must examine is whether a temporary restraining order
5 would serve the public interest. *See Winter*, 555 U.S. at 24. In this case, such relief would clearly serve
6 the public interest of the Tribe's members. This is true because a majority of the General Council—i.e.,
7 the membership—at the April 12 and May 10 General Council meetings, has already declared that
8 Defendants have no authority to act on behalf of the Tribe in any capacity.

9 Moreover, ultimately, Defendants' illegal control of tribal assets, their shadow government,
10 shadow court, and their rogue actions destroys the Tribe's credibility and public image. This will
11 severely damage the Tribe's financial position and therefore its ability to provide important social
12 services to tribal members not to mention interfere with and likely irreparably damage its ability to meet
13 its contractual obligations to third-parties, employees, and others. Allowing Defendants to continue to
14 exercise control over those assets and to otherwise continue to act as if they represent the Tribe would
15 not serve the public interest at all and would instead cause the Tribe, its members, and its business
16 partners to suffer irreparable harm.

17 **F. Plaintiffs Are Exempt From Having to Post A Bond.**

18 Absent a specific tribal rule to the contrary, this Court applies the Federal Rules of Civil
19 Procedure for civil actions under its consideration. According to Rule 65(c), the representative
20 government, the United States, is exempt from having to post a bond when seeking a temporary
21 restraining order. There is no contrary tribal rule, so coordinately, because Plaintiffs are the lawful
22 Tribal Council, and they appear in their official capacities, they are exempt from having to post bond
23 when seeking a temporary restraining order in this Court.

24 ...

25 ...

26 ...

1 **IV. CONCLUSION**

2 For all of the foregoing reasons, Plaintiffs pray that this Court will issue a temporary
3 restraining order granting the relief that Plaintiffs have requested in this Motion.
4

5 Respectfully submitted,

6 ROSETTE, LLP
7

8
9 Dated: May 16, 2014

By: /s/ Robert A. Rosette
Robert A. Rosette
Attorney for Plaintiffs
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26