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Galanda Broadman PLLC

IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE
NOOKSACK INDIAN TRIBE

ADAMS, *et al.*,

Plaintiffs,

v.

KELLY, *et al.*,

Defendants.

ADAMS II

Case No. 2014-CI-CL-006

DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE IN
OPPOSITION TO THE MOTION TO
DISMISS

Date: April 9, 2014

Time: 10:00 a.m.

COPY

COME NOW Defendants in the above-entitled action, by and through the Office of Tribal Attorney, without waiving other defenses and objections, and provide this Reply to Plaintiffs' Response in Opposition to the Motion to Dismiss.

I. INTRODUCTION

On January 21, 2014, Plaintiffs initiated a fifth lawsuit against Defendants in Tribal Court. Plaintiffs' Complaint alleges that Defendants have added an enrollment requirement that is inconsistent with the Nooksack Constitution, initiated involuntary disenrollment without authority, and unlawfully removed former Secretary St. Germain and former Councilmember Roberts from office.

1 Defendants move to dismiss Plaintiffs' Complaint, because Defendants are immune from
2 suit when they act within the scope of their authority, and this Court lacks jurisdiction.
3 Defendants have not added an extra-constitutional enrollment requirement or improperly
4 initiated disenrollment proceedings. Plaintiffs' arguments to the contrary require the Tribal
5 Council to ignore erroneous enrollments and the Council's sovereign authority to initiate
6 disenrollment proceedings. Additionally, the Nooksack Court of Appeals has upheld Resolution
7 No. 13-02 and Title 63, including certain provisions raised in Plaintiffs' Complaint. The Council
8 plainly followed the procedure outlined in the Constitution for removing Council members, and
9 this Court lacks jurisdiction over governmental functions. Some of Plaintiffs' claims are not
10 ripe.

11 II. FACT STATEMENT

12 Defendants incorporate the Fact Statement included in the Motion to Dismiss Plaintiffs'
13 Complaint filed on March 5, 2014. Plaintiffs' facts omit relevant portions of Resolution No. 13-
14 02,¹ which states (emphasis added):

15 Section 63.00.004[] defines a Base Enrollee as those individuals from whom all
16 persons applying for membership must prove direct descent. For the Nooksack
17 Tribe, the base enrollees are those persons who are original Nooksack Public
18 Domain allottees and/or all persons of Indian blood whose names appear on the
19 official census roll of the Nooksack Tribe dated January 1, 1942[....] [T]he
20 original erroneous enrollments into the Tribe relied on two provisions of the
21 Constitution that applied at the time of enrollment. Article II, Section 1(a), all
22 original Nooksack Public Domain Allottees, and their descendants living on
23 January 2, 1942 and Article II, Section 1(c), all persons born to (Constitution
24 1973) or lineal descendants of (Constitution 1989) . . . any enrolled member of
the Nooksack Indian Tribe subsequent to January 1, 1942, provided that such
persons possess at least one-fourth (1/4) Indian blood[....] [T]he erroneous
enrollments originated from persons who were enrolled as lineal descendants of
an original Nooksack Public Domain allottee living on January 1, 1942 with the
original Nooksack Public Domain allottee identified as "Jobe" [....] BE IT
FURTHER RESOLVED, that the Council directs that notice pursuant to Title 63,
be given to each member who descended from Annie James (George) or Andrew

¹ See Resp. in Opp'n to Defs.' Mot to Dismiss at 4:2-9.

1 James and claim [sic] right to membership based through lineal descendancy [sic]
2 of an original Nooksack Public Domain allottee[....]

3 Resolution No. 13-02 plainly authorized the initiation of disenrollment proceedings
4 against those who appear to be erroneously enrolled under either Article II, Section 1(a) or (c) of
5 the Constitution. The Nooksack Court of Appeals held that Resolution No. 13-02 initiated
6 disenrollment proceedings, and it upheld the Resolution as constitutional. *Lomeli v. Kelly*, 2013-
7 CI-APL-002, Opinion at 17-18 (January 15, 2014).

8 Plaintiffs allege that the Nooksack Court of Appeals has not ruled on Section
9 63.02.001(D)(5),² but the Court of Appeals held that Section 63.02.001(D):

10 requires a person applying for enrollment produce documentation that he or she
11 meets one of the listed criteria for enrollment. Any person can assert they are
entitled to enrollment, but without adequate documentary evidence that shows he
or she meets one of the criteria the person's mere assertion alone is insufficient.

12 *Id.* at 19. The Court of Appeals specifically addressed Section 63.02.001(D) when they upheld
13 Title 63. *See id.*

14 Plaintiffs' accusations regarding a "three strikes" conspiracy to remove Council members
15 are not based on any facts or law. *See* Resp. in Opp'n to Mot. to Dismiss at 9:11-15 and n.48.

16 **III. LEGAL ARGUMENT**

17 Defendants are immune from suit, the Tribe has not waived sovereign immunity, and this
18 Court lacks jurisdiction to hear this case. Additionally, the Court of Appeals has already ruled
19 on certain provisions raised by Plaintiffs. Some of Plaintiffs' claims are not ripe.

20 **A. Nooksack Law Governs This Case.**

21 Just as in *St. Germain v. Kelly*, 2013-CI-CL-005, Plaintiffs' Brief in Opposition to
22 Defendants' Motion to Dismiss, Plaintiffs here attempt to force this Court to apply Federal Rule
23 of Civil Procedure (FRCP) 56, but that rule does not apply in the Nooksack Tribal Court.

24 ² Resp. in Opp'n to Defs.' Mot. to Dismiss at 5:8-9.

1 Plaintiffs' imposition of FRCP 56 on the Tribal Court confuses the applicable legal standards and
2 ignores the process set out in *Lomeli*, Case No. 2013-CI-APL-002, Opinion. Additionally,
3 Section 10.05.050(f) of Title 10 provides rules for dispositive motions, so there is no reason to
4 resort to FRCP 56.

5 In *Lomeli*, the Court of Appeals explained the process for reviewing lawsuits brought by
6 a tribal member against an employee, officer, or agent acting in their official capacity. This
7 Court must determine whether the lawsuit concerns "the establishment and functions of the tribal
8 government" or nonjusticiable political questions. *Lomeli*, Case No. 2013-CI-APL-002, Opinion
9 at 11, 21 and n.26. If the suit concerns governmental functions and there has been no waiver of
10 immunity, the Court lacks jurisdiction; if the suit concerns nonjusticiable political questions, the
11 Court lacks jurisdiction. *Id.* The Court must dismiss any claims over which it lacks subject
12 matter jurisdiction. If any claims remain, the Court must determine whether they regard "civil
13 matters concerning members of the Nooksack Indian Tribe." *Id.* at 12. If so, the Court "must
14 make a threshold finding on the constitutionality of the law or policy the member seeks to have
15 the Tribal officers or employees enjoined from enforcing." *Id.* at 14. This process established
16 by the Nooksack Court of Appeals differs greatly from Plaintiffs' proposed FRCP 56 process.
17 See Resp. in Opp'n to Defs.' Mot. to Dismiss at 11-13. This Court does not have to hold a trial
18 when baseless, conclusory allegations confront the facts and Nooksack law.

19 Even if FRCP 56 does apply, Defendants should prevail. There is no genuine issue of
20 material fact here, and even viewing all the evidence in the light most favorable to Plaintiffs,
21 Defendants are entitled to judgment as a matter of law. In determining whether there is any
22 dispute involving material facts, the federal Supreme Court has explained that "the mere
23 existence of *some* alleged factual dispute between the parties will not defeat an otherwise
24 properly supported motion for summary judgment; the requirement is that there be no *genuine*

1 issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *accord*
2 *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952-53 (9th Cir. 1978). When a defendant
3 moves for summary judgment, the plaintiff must provide “evidence on which the jury could
4 reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252. Here, there is no evidence
5 supporting Plaintiffs’ claims.

6 **B. Defendants are Immune from Suit and This Court Lacks Jurisdiction.**

7 The Nooksack Indian Tribe, the Council, and tribal officials are immune from suit, which
8 means this Court lacks jurisdiction. An Indian tribe is immune from suit because it is a
9 sovereign entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5,
10 5-6 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).
11 Sovereign immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress
12 has authorized the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59;
13 *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of
14 immunity must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6
15 NICS App. 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign
16 immunity also applies to tribal officials and employees acting within the scope of their authority.
17 *Cline*, Case No. NOO-CIV-02-08-5, at 6; *see also Mitchell v. Pequette*, CV-07-38, 2008 WL
18 8567012 at *7-9 (Leech Lake Tribal Court May 9, 2008). Tribal sovereign immunity “extends to
19 actions brought against tribes in tribal court.” *Olson*, 6 NICS App. at 51.

20 The Nooksack Court of Appeals held that the Tribal Court lacks subject matter
21 jurisdiction over matters concerning “the establishment and functions of the tribal government”
22 unless the Tribe waives its sovereign immunity. *Lomeli*, 2013-CI-APL-002, Opinion at 11. The
23 Court of Appeals explained that “[e]lected Council members, and the Tribe’s agents, must be
24 free from intimidation, harassment and the threat of lawsuits in executing the functions of tribal

1 government.” *Id.* The “Tribe’s officers necessarily enjoy the discretion to determine the manner
2 and method in which it administers the Tribe’s governmental functions.” *Id.*

3 The Tribal Court does have jurisdiction over “civil matters concerning members of the
4 Nooksack Indian Tribe.” *Id.* at 12. When an officer, employee, or agent, “acting in his or her
5 official capacity, enforces or threatens to enforce an unconstitutional law or policy,” sovereign
6 immunity does not protect the officer, employee, or agent because there is no authority “to
7 enforce laws that do not comply with the Constitution.” *Id.* at 13. That is, when:

8 a suit is brought by a Tribal member against an officer, employee or agent of the
9 Tribe acting in his or her official capacity and alleges the law or policy the officer,
10 employee or agent is enforcing or threatening to enforce is unconstitutional, the
Tribal Court has subject matter jurisdiction... to order declaratory or injunctive
relief.

11 *Id.* at 14. In this instance, the “Tribal Court must make a threshold finding on the
12 constitutionality of the law or policy the member seeks to have the Tribal officers or employees
13 enjoined from enforcing.” *Id.* This threshold finding “may not be made, however, when the
14 Complaint centers on ‘non-justiciable political questions.’” Order Den. Pls.’ Mot. for Prelim.
15 Inj./Writ of Mandamus at 4:17-18 (quoting *id.* at 21). The Court of Appeals has explained that a
16 political question may arise when there is:

17 ‘a textually demonstrable constitutional commitment of the issue to a coordinate
18 political department; or a lack of judicially discoverable and manageable
19 standards for resolving it; or the impossibility of deciding without an initial policy
20 determination of a kind clearly for nonjudicial discretion; or the impossibility of a
court’s undertaking independent resolution without expressing lack of the respect
due coordinate branches of government[.]...’

21 *Lomeli*, 2013-CI-APL-002, Opinion at 21 n.26.

22 Plaintiffs mischaracterize the *Lomeli* Court of Appeals decision by stating that:

23 Sovereign immunity does not protect member-suits against officers, employees,
24 or agents of the Tribe acting in their official capacity if a plaintiff can make a
minimal “threshold” showing that the acts of the officer, employee, or agent has
violated the Nooksack Constitution or superior Nooksack law. The Nooksack
Court of Appeals has recently held that when a tribal member properly pleads

1 under this exception, this Court possesses a “constitutional grant of jurisdiction.”
2 See Resp. in Opp’n to Defs.’ Mot. to Dismiss at 11:1-6. Plaintiffs fail to explain that this Court
3 lacks jurisdiction over matters concerning governmental functions without a waiver of immunity
4 and nonjusticiable political questions. See *Lomeli*, 2013-CI-APL-002, Opinion at 11-14, 21 and
5 n.26. The Council has not added any extra-constitutional enrollment requirement or unlawfully
6 initiated disenrollment proceedings. The Tribal Council also precisely followed the
7 Constitution’s procedure for removing Council members.

8 1. The Tribal Council Has the Sole Authority to Make Membership Determinations.

9 The Tribal Council has the sole authority to make eligibility determinations for
10 enrollment in the Nooksack Tribe. *Const.* art. II, §§ 2, 4; Title 63, § 63.00.003 and
11 § 63.04.001(B)(2); *Lomeli, et al. v. Kelly, et al.*, Case No. 2013-CI-CL-001, at 9, *aff’d*, *Lomeli*,
12 2013-CI-APL-002, Opinion, at 17-18.

13 The Tribe, through the Tribal Council, has “the power to make [its] own substantive law
14 in internal matters,” including membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55
15 (1978). “A tribe’s right to define its own membership for tribal purposes has long been
16 recognized as central to its existence as an independent political community.” *Id.* at 72 n.32; *see*
17 *also Jeffredo v. Macarro*, 599 F.3d 913, 917-18 (9th Cir. 2009). The Court of Appeals
18 recognized that “determining its own membership is a hallmark of a tribe’s sovereignty.”
19 *Lomeli*, 2013-CI-APL-002, Opinion, at 1. The Tribe determined how its membership criteria
20 will be applied through adoption of Title 63 nearly 10 years ago, and the Bureau of Indian
21 Affairs approved Title 63.

22 The question of whether Plaintiffs qualify for membership under any constitutional
23 provision is a question that can only be answered by the Tribal Council under the Constitution
24 and Title 63. This Court lacks subject matter jurisdiction over membership determinations,

1 because membership determinations have been reserved to the Tribal Council alone, which
2 makes them nonjusticiable political questions. *See Const.* art. II, §§ 2, 4; Title 63, § 63.00.003
3 and § 63.04.001(B)(2); *Lomeli*, 2013-CI-APL-002, Opinion, at 17-18, 21 n.26.

4 2. The Council Has the Authority to Disenroll Erroneously Enrolled Members Under
5 the Constitution's Article II, Section 1(c).

6 Plaintiffs allege that Defendants lack the authority to initiate disenrollment proceedings
7 against members who were enrolled under Article II, Section 1(c) of the Constitution.

8 Resolution No. 13-02 recognizes the Council's authority to initiate disenrollment proceedings
9 against members who appear to be erroneously enrolled under either Article II, Section 1(a) or
10 (c) of the Constitution. Resolution No. 13-02 addresses the specific circumstances of potential
11 disenrollees, because even potential disenrollees who claimed membership through Article II,
12 Section 1(c) of the Constitution relied upon an ancestor's claimed descendancy from a Public
13 Domain Allottee. *See e.g., Lomeli*, 2013-CI-CL-001, Decl. of G. Galanda, Exh. A (attached to
14 Defs.' Mot. to Dismiss as Exh. 1) at 5.

15 Additionally, this Court and the Court of Appeals have upheld Resolution No. 13-02 as
16 constitutional. *Lomeli*, 2013-CI-APL-002, Opinion at 17-19. The Council has properly acted
17 under the authority of the Constitution, Title 63, and Resolution No. 13-02 in initiating
18 disenrollment proceedings. Plaintiffs attack on Resolution 13-02 in the *Lomeli* case failed. *See*
19 *id.* The Tribal Council has not applied any interpretation of the "base enrollment" language to
20 Plaintiffs, so Plaintiffs' attack is premature. *See infra* Section C. The Council has only initiated
21 disenrollment proceedings under Resolution No. 13-02, and that issue is *res judicata* under
22 *Lomeli*. *See Lomeli*, 2013-CI-APL-002, Opinion at 17-19.

23 3. Plaintiffs' Interpretation of the Membership Requirements Yields an Absurd
24 Result, Which Thwarts the Council's Authority Over Membership
 Determinations.

1 Plaintiffs allege Article II, Section 1(c) of the Constitution only requires proof that an
2 applicant's parents were enrolled after January 1, 1942 and that the applicant "possesses at least
3 ¼ Indian blood." Resp. in Opp'n to Defs.' Mot. to Dismiss at 14:3-5. Article II, Section 1(c) of
4 the Constitution states that Nooksack tribal membership consists of "[l]ineal descendants of any
5 enrolled member of the Nooksack Indian Tribe subsequent to January 1, 1942, provided such
6 descendants possess at least one-fourth (1/4) degree Indian blood." Section 63.00.004 of Title
7 63 defines a "Base enrollee" as:

8 those individuals from whom all persons applying for membership must prove
9 direct descent. For this Tribe, the base enrollees are those persons who are
10 original Nooksack Public Domain allottees and/or all persons of Indian blood
whose names appear on the official census roll of the Nooksack Tribe dated
January 1, 1942.

11 Lineal descendancy from an enrolled member may only allow for membership if it is
12 based on true information; otherwise, Section 1(c) would permit permanent membership even if
13 based on fraudulent or false statements. Article II, Section 4 of the Constitution, entitled "Loss
14 of Membership," clearly forecloses that idea of permanent membership in the Nooksack Indian
15 Tribe. Plaintiffs argue that Section 63.00.004's definition of a "base enrollee" adds an extra-
16 constitutional requirement for membership. Complaint, at 7-11; Resp. in Opp'n to Defs.' Mot. to
17 Dismiss at 13-17. On the contrary, this definition "provides a means for the Tribal Council to
18 enforce the constitutional requirements for enrollment, asks no more than what a person is
19 required to submit when applying for enrollment (adequate documentation), and ensures the
20 Tribal Council fulfills its authority to determine 'loss of membership.'" See *Lomeli*, 2013-CI-
21 APL-002, Opinion at 19. Despite Plaintiffs' protestations, there is no unconstitutional
22 requirement here. The "base enrollee" definition merely ensures that enrollment applicants meet
23 the constitutional criteria for membership.
24

1 An applicant for Nooksack tribal membership must submit a detailed application, which
2 states how the person is entitled to membership—including any lineal descendancy providing the
3 basis for membership. Title 63, § 63.02.001; *see e.g.*, Decl. of G. Galanda, Exh A at 31
4 (January 23, 2014) (application of Honorato Rapada the III stating that he is a lineal descendant
5 of a person named as an enrolled member on the January 1, 1942 census). Plaintiffs allege that
6 having an enrolled parent, regardless of whether that enrollment was based on a falsehood, and
7 possessing the proper Indian blood degree satisfies the constitutional requirements for
8 membership. Complaint, at 8:1-3; Resp. in Opp'n to Defs.' Mot. to Dismiss at 14-17. If that
9 were the case, erroneous or fraudulent enrollments would multiply with each subsequent
10 generation, and the Council's authority granted by Article II, Section 4 of the Constitution to
11 disenroll those who fail "to meet the requirements set forth for membership in this
12 constitution..." would be meaningless.

13 Plaintiffs argue that enrollment applicants are not required to demonstrate that their
14 ancestors met the constitutional requirements for membership or second-guess the Enrollment
15 Department's decision to enroll an ancestor. Resp. in Opp'n to Defs.' Mot. to Dismiss at 14:9-
16 16. As explained above, enrollment applicants must demonstrate that they meet enrollment
17 requirements, which includes detailing the applicant's lineal descendancy providing the basis for
18 enrollment. Title 63, § 63.02.001. If the Enrollment Department finds that an applicant's
19 ancestor was enrolled based on false or fraudulent information, that applicant fails to meet the
20 constitutional requirements for membership. If the Enrollment Department discovers that an
21 enrolled member's ancestor providing the basis for enrollment was enrolled based on false or
22 fraudulent information, the Council must initiate involuntary disenrollment proceedings against
23 the enrolled member. Title 63, § 63.04.001(B)(1)(a). Section 63.04.001(B)(1)(a) states that a
24 tribal member shall be disenrolled when it is discovered that he/she... was
erroneously enrolled in that he/she did not submit adequate documentation

1 proving he/she met the constitutional membership criteria at the time of
2 enrollment. This “erroneous enrollment” may have resulted from fraudulent
submissions, mistakes in blood degree computations or inadequate research....

3 Enrollment based on lineal descendancy necessarily depends on the enrollment
4 eligibility of the ancestor on whom the enrollment application is based. An enrolled member has
5 not submitted adequate documentation proving eligibility if the Enrollment Department
6 discovers that the ancestor on whom enrollment was based was erroneously enrolled regardless
7 of whether that error was due to fraud, a mistake, or inadequate research. *See id.* Plaintiffs
8 allege that a tribal member may only be disenrolled if that tribal member’s information initiates
9 the error (*e.g.*, false or fraudulent statements appear for the first time in that tribal member’s
10 application), but Section 63.04.001(B)(1)(a) says no such thing.

11 Title 63 has construed the Constitution as requiring direct descent from a base enrollee in
12 order to protect against erroneous enrollments. *See* Title 63, §§ 63.00.004, 63.02.001(C)(9),
13 63.02.001(D)(5), 63.04.001(B)(1)(a). Section 63.04.001(B)(1)(a), which the Nooksack Court of
14 Appeals has already upheld,³ plainly requires the Council to disenroll a member once it is
15 discovered that the person does not meet the constitutional membership requirements even if the
16 mistake occurred in a previous generation. Moreover, Plaintiffs lack any basis for stating that
17 the Council⁴ “is barred from revisiting the issue” if it “does not initiate disenrollment
18 proceedings against that member within his or her lifetime....” *See* Resp. in Opp’n to Defs.’
19 Mot. to Dismiss at 16:3-6.⁵ Just as the Council has the authority to remedy a mistake in blood

21 ³ *Lomeli*, 2013-CI-APL-002, Opinion at 19.

22 ⁴ Plaintiffs discussed the Enrollment Department initiating disenrollment, but the Council
initiates disenrollment under Section 63.04.001(B).

23 ⁵ Plaintiffs cite *Hendrickson v. Ho-Chunk Nation Office of Tribal Enrollment*, No. SU-
02-06, 30 ILR 6140 (Ho-Chunk Sup. Ct. March 21, 2003) for the proposition that the Tribe being
24 barred from revisiting a person’s erroneous enrollment after death provides stability and avoids
punishing members for mistakes of the Enrollment Department. Resp. in Opp’n. to Defs.’ Mot.
to Dismiss at 16:7 and n.89. *Hendrickson* does not stand for that proposition and is not on point.

1 degree computation, it also has the authority to remedy a mistake in a genealogy. If the Council
2 was limited to correcting only those errors first occurring in living generations, Section
3 63.06.001, which outlines the process for changing blood degree computations—including those
4 on the 1942 base roll, would make no sense.

5 This Court and the Nooksack Court of Appeals have rightly declined to interpret tribal
6 ordinances in a manner that yields absurd results. *See Lomeli*, 2013-CI-APL-002, Opinion at 17-
7 18 (“As the court pointed out, it would be absurd to read that language as somehow prohibiting
8 the Tribal Council from initiating disenrollment proceedings where it obtains evidence a member
9 is erroneously enrolled – particularly given the Tribal Council’s broad constitutional authority to
10 determine membership and loss of membership.”). Title 10 specifies that the:

11 Tribal Court shall interpret tribal ordinances[,] resolutions, regulations, and
12 policies in order that the substantive intent of the Tribal Council is ensured. The
13 court shall not indulge in highly technical or legalistic interpretations of tribal
ordinances, regulations, and policies when such interpretation would defeat the
overall legislative goals of the Tribal Council.

14 Title 10, § 10.01.020. Section 63.09.001 of Title 63 also states that “[t]his ordinance is exempted
15 from the rule of strict construction, and it shall be liberally construed to give full effect to the
16 objectives and purposes for which it was enacted.” Similarly, the federal Supreme Court follows
17 the purpose of a legislative enactment rather than the plain language when the latter leads to
18 “absurd or futile results[.]” *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940); *see*
19 *also MORI Associates, Inc. v. United States*, 102 Fed. Cl. 503, 539 (Fed. Cl. 2011) (recognizing
20 exception to application of plain language when the plain language results in an absurd
21 disposition).

22 Plaintiffs’ argument that the Tribal Council’s authority to rectify erroneous enrollments is
23 limited to actions on errors created in a living member’s application brings about an absurd

24 This Court has already warned against the use of misleading citations. *Adams v. Kelly (Adams
J)*, No. 2013-CI-CL-004, Order Den. Pls.’ Mot. to Disqualify at 5:3-6 (February 7, 2014).

1 result. It strips the Council of authority to disenroll members who were erroneously enrolled,
2 which is contrary to Article II, Sections 2 and 4 of the Constitution. An erroneous enrollment
3 does not disappear just because the false or fraudulent statement first arose in a deceased
4 ancestor's application.

5 The application forms and supporting documents are integral to the Tribe's understanding
6 of which, if any, constitutional category of membership each applicant fits. For example,
7 Honorato Rapada the III's enrollment application states that he is "a descendant of persons
8 named as an enrolled member on the 01-01-1942 census."⁶ Decl. of G. Galanda, Exh A at 31.
9 Mr. Rapada's application claims membership through Louise Rapada and Annie George, and the
10 family tree Mr. Rapada submitted claims that Madeline Jobe was Annie George's mother. *Id* at
11 31, 33. Madeline Jobe was not Annie George's mother, and she is not an ancestor of Mr.
12 Rapada, which means Mr. Rapada's application appears to be based on a falsehood.⁷ *See id.* at
13 47. The Tribal Council relied upon the accuracy of the information in Mr. Rapada's application
14 and supporting documents when it enrolled him in the Tribe; the false statements in his
15 application and supporting documents were material at the time of his enrollment, and they
16 remain material today.

17 At the time of Mr. Rapada's enrollment, the Tribal Council did not simply accept the fact
18 that his mother was an enrolled member in the Tribe; on the contrary, the Council required an
19 application and supporting documents to demonstrate Mr. Rapada's eligibility for membership.
20 The Nooksack Tribe and its governing body have construed the Constitution and continue to
21 construe the Constitution as requiring proof of eligibility for membership and not just a bare
22 assertion of having an enrolled parent. The Tribal Council must be able to enforce constitutional

23 ⁶ Honorato Rapada the III does not appear to be a descendant of a person named on the
1942 census.

24 ⁷ Mr. Rapada swore to the truthfulness of his enrollment application upon penalty of not
more than \$10,000 or imprisonment of not more than five years or both. *See id.* at 32.

1 membership requirements, which includes the authority to disenroll those whose enrollments
2 were based on false or fraudulent information. *See Lomeli*, 2013-CI-APL-002, Opinion at 18.

3 While Defendants have explained that the Council has the authority to disenroll
4 erroneously enrolled members, this Court should not rule on this issue. Under the Constitution,
5 only the Council may make membership determinations, and the Council has not taken any
6 action with respect to Article II, Section 1(c) apart from initiating disenrollment proceedings
7 under Resolution No. 13-02, which is *res judicata*.⁸ The Council has not interpreted “base
8 enrollee” language or Article II, Section 1(c) of the Constitution; a ruling on this issue would be
9 premature and would impinge on the Council’s constitutional authority. *See supra* Section B(1);
10 *infra* Section C.

11 4. The Court of Appeals Upheld Section 63.02.001(D) as Constitutional.

12 The Court of Appeals found that Section 63.02.001(D):

13 requires a person applying for enrollment produce documentation that he or she
14 meets one of the listed criteria for enrollment. Any person can assert they are
15 entitled to enrollment, but without adequate documentary evidence that shows he
or she meets one of the criteria the person’s mere assertion alone is insufficient.

16 *Lomeli*, 2013-CI-APL-002, Opinion at 19. The Court of Appeals upheld Section 63.02.001(D)
17 as constitutional, and Defendants are immune from suit. Thus Plaintiffs’ allegation that Section
18 63.02.001(D)(5) adds an unconstitutional membership requirement is frivolous and must fail.

19 Plaintiffs appear to argue that the Court of Appeals’ denial of the *Lomeli* Appellants’
20 Rule 40 Petition demonstrates that this issue has not been decided. Resp. in Opp’n to Defs.’
21 Mot. to Dismiss at 13 n.76. The *Lomeli* Appellants’ Rule 40 Petition sought a ruling on whether
22 Section 63.00.004’s “base enrollee” definition conflicted with former Section 1(h) of Article II
23 of the Constitution. *See Lomeli*, 2013-CI-APL-002, Order Den. Pet. for FRAP 40 Relief at 2.

24 ⁸ Plaintiffs cannot continue to challenge Resolution No. 13-02 when it was upheld by the
Nooksack Court of Appeals. *See Lomeli*, 2013-CI-APL-002, Opinion at 17-19.

1 The Court of Appeals held that any alleged conflict with former Section 1(h) is irrelevant and
2 without merit. *Id.* The *Lomeli* Appellants' Rule 40 Petition does not change the Court of
3 Appeals' ruling upholding Section 63.02.001(D).

4 5. This Court Lacks Jurisdiction Over The Council's Determination to Remove
5 Former Council Members Under the Constitution.

6 Plaintiffs challenge the constitutionality of Resolution Nos. 14-03 and 14-04, which
7 removed former Secretary St. Germain and former Councilmember Roberts from office. *See*
8 Complaint, at 9, 11-12; Resp. in Opp'n to Defs.' Mot. to Dismiss at 18-20. Article V, Section 1
9 of the Constitution states:

10 If any officer or member of the tribal council shall be absent from any three (3)
11 consecutive regular or special meetings without sufficient reason, the other
12 members may declare the council position vacant by a four-seventh (4/7) vote of
13 the tribal council. The councilmember subject to the removal may not participate
14 in the vote of the tribal council.

15 This Court has found that "the decision to remove a Tribal Council Member under Article V,
16 Section 1 of the Nooksack Constitution rests solely with the Tribal Council." Order Den. Pls.'
17 Mot. for Prelim. Inj./Writ of Mandamus, at 5:5-6. Removal of Council members under Article
18 V, Section 1 solely concerns the function of the tribal government, which means that Defendants
19 retain sovereign immunity absent a waiver. *See Lomeli*, 2013-CI-APL-002, at 11. As this Court
20 has explained, "[t]he function of removal from office under Article V, Section 1 lies with the
21 Tribal Council and it is the very definition of an allegation that concerns the establishment and
22 functions of the tribal government over which this Court has no subject matter jurisdiction."
23 Order Den. Pls.' Mot. for Prelim. Inj./Writ of Mandamus, at 5:14-17.

24 Former Secretary St. Germain and former Councilmember Roberts were removed from
office because they were absent from three consecutive special meetings and failed to provide
the Tribal Council with sufficient reasons for their absences. Defs.' Resp. in Opp'n to Pls.' Mot.
for Prelim. Inj., Decl. of Robert Kelly, Jr., Exhs. K and L. Plaintiffs argue that former Secretary

1 St. Germain and former Councilmember Roberts were not provided due process under Article IX
2 of the Constitution,⁹ but Plaintiffs fail to point to any evidence indicating that the Council did not
3 follow Article V, Section 1 procedures for removing former Secretary St. Germain and former
4 Councilmember Roberts. The email excerpts Plaintiffs have provided show that former
5 Secretary St. Germain and former Councilmember Roberts knew they were absent from the
6 Council meetings and had an opportunity to submit reasons for their absence. The Council voted
7 5-0 in favor of the determination that neither former Secretary St. Germain nor former
8 Councilmember Roberts attended the meetings, or provided sufficient reasons for their absences,
9 and in favor of removing them from office under Article V, Section 1 of the Constitution. *Id.*
10 The Council could not have violated Article IX's due process requirement by expressly
11 following Article V, Section 1 of the Constitution.

12 This Court lacks jurisdiction to determine whether Plaintiffs' reasons for failing to attend
13 three consecutive special meetings were sufficient, because that determination is a political
14 question reserved to the Tribal Council. *Const. art. V, § 1; Lomeli*, 2013-CI-APL-002, Opinion
15 at 21-22 and n.26; Order Den. Pls.' Mot. for Prelim. Inj./Writ of Mandamus, at 5:10-17 ("This is
16 exactly the kind of political question *Lomeli* contemplates in footnote 26."). The Constitution
17 specifically reserves the question of the sufficiency of a Council member's reason for absence to
18 the Council. *Const. art. V, § 1*. Additionally, there are no judicial standards governing this
19 question, and the Court's determination of this issue would impinge on the Council's authority.¹⁰
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22 ⁹ Plaintiffs also allege that the Council violated Article VI of the Constitution by
23 removing former Secretary St. Germain and former Councilmember Roberts from office, but it is
24 unclear how Article VI has anything to do with the removal of Council members, which is
specifically provided for in Article V, Section 1 of the Constitution.

¹⁰ In addition, former Secretary St. Germain's claim regarding his removal from office is
moot, because his Council position was up for election on March 15, 2014, and he did not run for
reelection. See <http://www.nooksacktribe.org/tribalelection/> (last accessed April 3, 2014).

1 **C. Plaintiffs' Claims Related to Enrollment Eligibility Are Not Ripe.**

2 A matter is not ripe when "the existence of the dispute hangs on future contingencies that
3 may or may not occur." *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003) (quoting *Clinton v.*
4 *Acequia Inc.* 94 F.3d 568, 572 (9th Cir. 1996)). Plaintiffs challenge the "base enrollee"
5 requirement in Title 63 and the authority to initiate disenrollment proceedings under Resolution
6 13-02.

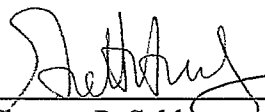
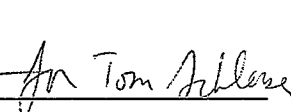
7 Apart from initiating disenrollment proceedings under Resolution No. 13-02, which was
8 upheld as constitutional and is *res judicata*,¹¹ the Council has not interpreted Title 63's "base
9 enrollment" language or Sections 1(a) and (c) of Article II of the Constitution with respect to any
10 of the Plaintiffs. Plaintiffs are litigating a hypothetical; nothing has changed related to
11 Resolution No. 13-02 and Title 63 since the *Lomeli* Court upheld them. This Court lacks the
12 authority to review the Council's membership determinations, and no membership
13 determinations have been made related to Plaintiffs other than automatic disenrollments
14 challenged in a related case. Plaintiffs' claims regarding enrollment eligibility under Title 63 are
15 not ripe.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Defendants request that the Court grant Defendants' Motion to
18 Dismiss Plaintiffs' Complaint.
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¹¹ See *Lomeli*, 2013-CI-APL-002, Opinion at 17-19.

1 Respectfully submitted this 4th day of April, 2014.

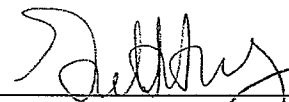
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