

1 John M. Murray (232419)
2 Liberty Law, A.P.C.
2150 N. Main Street, STE 10
3 Red Bluff, CA 96080
4 530-529-4329
john@libertylawapc.com

5 Attorneys For Defendants Ines Crosby, John Crosby,
6 Leslie Lohse, Larry Lohse, Ted Pata, Juan Pata;
7 Chris Pata, Sherry Myers, Frank James, The Patriot
Gold And Silver Exchange, Inc. and Norman R. Ryan

8
9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**

11 **PASKENTA BAND OF NOMLAKI INDIANS;**
12 **and PASKENTA ENTERPRISES**
13 **CORPORATION,**

14 **Plaintiffs,**

15 v.

16 **INES CROSBY; JOHN CROSBY; LESLIE**
LOHSE; LARRY LOHSE; TED PATA; JUAN
17 **PATA; CHRIS PATA; SHERRY MYERS;**
FRANK JAMES; UMPQUA BANK; UMPQUA
18 **HOLDINGS CORPORATION;**
19 **CORNERSTONE COMMUNITY BANK;**
CORNERSTONE COMMUNITY BANCORP;
20 **JEFFERY FINCK; GARTH MOORE;**
21 **GARTH MOORE INSURANCE AND**
FINANCIAL SERVICES, INC.;
22 **ASSOCIATED PENSION CONSULTANTS,**
INC.; HANESS & ASSOCIATES, LLC;
23 **ROBERT M. HANESS; THE PATRIOT**
GOLD & SILVER EXCHANGE, INC.; and
24 **NORMAN R. RYAN,**

25 **Defendants,**

26 **QUICKEN LOANS, INC.; CRP 111 WEST**
141ST LLC; CASTELLAN MANAGING
27 **MEMBER LLC; CRP WEST 168TH STREET**
LLC; and CRP SHERMAN AVENUE LLC,

28 **Nominal Defendants.**

Case No. 15-cv-00538-GEB-CMK

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
MOTION TO STAY OR IN THE
ALTERNATIVE DISMISS
ACTION PENDING
ARBITRATION

Date: June 29, 2015
Time: 9:00 a.m.
Courtroom: 10
Hon. Garland E. Burrell, Jr.

[Declarations of Geraldine Freeman,
David Swearinger, and Allen
Swearinger submitted concurrently
herewith]

Amended Complaint Filed 4-17-2015

Table of Contents

1
2
3 **I. INTRODUCTION**..... 2
4 **II. FACTUAL BACKGROUND** 3
5 **A. The Employee Defendants Were Employed Pursuant To Executive Employment**
6 **Agreements Dated January, 2001, Which Agreements Were Ratified By The**
7 **Tribe’s Tribal Council In September, 2014.** 3
8 **B. The Executive Employment Agreements Contain An Arbitration Provision, And**
9 **Defendants Filed A Demand In Arbitration Under The Agreements.** 4
10 **C. The Tribe’s Allegations Regarding The Employee Defendants’ Allegedly Wrongful**
11 **Conduct Are Within The Arbitration Provision Of The Executive Employment**
12 **Agreements.**..... 5
13 **D. The Tribe’s Allegations That The Executive Employment Agreements Are**
14 **Fraudulent Are Belied By Its Own Tribal Council’s Ratification and Affirmation**
15 **Of The Agreements Less Than Six Months Before The Tribe Filed This Action.** 5
16 **III. STANDARD**..... 6
17 **IV. DISCUSSION** 7
18 **A. The Parties’ Written Arbitration Agreements Are Enforceable And Apply To**
19 **Defendants’ Claims.** 7
20 **1. The Parties Entered Into Written Arbitration Agreements, And Plaintiff’s**
21 **Challenge To The Existence Of The Arbitration Agreement Is Untenable**
22 **Because Its Own Tribal Council Reaffirmed The Contracts In 2014.**..... 7
23 **2. By Incorporating The American Arbitration Association’s Rules In Their**
24 **Arbitration Agreement, The Parties Have Delegated To The Arbitrator The**
25 **Power To Determine Threshold Issues Of Arbitrability.** 8
26 **3. Assuming For The Sake Of Argument There Is No Delegation To The AAA To**
27 **Determine Arbitrability, The Parties Are Bound By The Arbitration Provision**
28 **And The Tribe’s Allegations Of Financial Misappropriation Fall Within The**
 Scope Of The Arbitration Provision...... 10
 B. In Light Of The Parties’ Arbitration Agreement, All Claims Against The
 Defendants Should Be Stayed Or Dismissed Pending Arbitration...... 11
 C. The Claims Against The Non-Signatories Should Also Be Stayed Or Dismissed. .. 12
V. CONCLUSION..... 13

TABLE OF AUTHORITIES

CASES

1

2

3 AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011)..... 6

4 Farrow v. Fujitsu America, Inc., 37 F.Supp.3d 1115 (N.D. Cal. 2014)..... 6

5 Jaffe v. Zamora, --- F.Supp.3d --- (2014 WL 5786241) at p. *3 13

6 Momot v. Mastro, 652 F.3d 982 (9th Cir. 2011)..... 6, 7, 9

7 Momot v. Mastro, 652 F.3d 982 (9th Cir. 2011)..... 6

8 Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069 (9th Cir. 2013) 7, 10

9 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 87 S.Ct. 1801 (1967) 7

10 Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991)..... 7

11

12 Sparling v. Hoffman Constr. Co., 864 F.2d 635 (9th Cir.1988) 13

13 Three Valleys Mun. Water Dist. V. E.F. Hutton & Co., Inc.,

14 925 F.2d 1136 (9th Cir. 1990)..... 7

15 United States for Use & Benefit of Newton v. Neumann Caribbean Int’l, Ltd.,

16 750 F.2d 1422 (9th Cir. 1985)..... 12

STATUTES

17 9 U.S.C. § 3 2, 5, 6, 12, 14

OTHER AUTHORITIES

18

19

20 Rule 6 of the American Arbitration Association’s “Employment Arbitration Rules And

21 Mediation Procedures,” 9

22

23

24

25

26

27

28

I. INTRODUCTION

1
2 Though Plaintiffs’ First Amended Complaint (the “FAC”) spans over 200 pages, it
3 essentially alleges the “RICO Ringleader” defendants wrongfully wormed their way in to
4 positions of power within Plaintiff’s governing structure and then stole millions of dollars from
5 Plaintiff over the course of a decade. Plaintiffs allege the other defendants helped the RICO
6 Ringleader defendants.

7 All four of the alleged “Ringleaders” – Defendants Leslie Lohse, Ines Crosby, John
8 Crosby, and Larry Lohse (referred to herein as the “Employee Defendants”) – are parties to
9 Executive Employment Agreements with Plaintiff Paskenta Band of Nomlaki Indians (the
10 “Tribe”). Those agreements were originally signed in January, 2001. On September 8, 2014,
11 the Tribe’s Tribal Council reaffirmed and ratified all four of the Executive Employment
12 Agreements. These are the same agreements the Tribe now alleges in the FAC are fraudulent.

13 The Executive Employment Agreements entitle each Employee Defendant to a draw on
14 a substantial line of credit, and state that money taken under the lines of credit would be
15 forgiven if the Tribe terminated the employment of the Employee Defendants without cause (as
16 defined in the agreements). The Tribe terminated the Employee Defendants’ employment
17 without cause, and the Tribe’s new Tribal Council fails and refuses to acknowledge that those
18 lines of credit have been forgiven.

19 Each of the executive employment agreements contains an identical dispute resolution
20 provision requiring arbitration before the American Arbitration Association (the “AAA”) of
21 “any dispute or controversy arising under or in connection with” the agreements. On May 13,
22 2015, the Employee Defendants filed a demand for arbitration with the AAA seeking, among
23 other things, declaratory relief that advances taken under the lines of credit are forgiven.

24 Pursuant to 9 U.S.C. § 3, it is appropriate for this Court to stay or dismiss this case until
25 the pending arbitration is resolved. Plaintiffs’ claims of financial mismanagement against the
26 Tribe’s former executives, and any potential liability to the Employee Defendants, cannot be
27 resolved without reference to the parties’ rights under the Executive Employment Agreements.

1 Additionally, the moving parties, which include Employee Defendants and several co-
2 defendants, believe staying this case is appropriate because resolution of the claims raised in
3 the arbitration will have a material impact on the claims against all other defendants in the
4 FAC.¹

5 II. FACTUAL BACKGROUND

6 A. The Employee Defendants Were Employed Pursuant To Executive Employment 7 Agreements Dated January, 2001, Which Agreements Were Ratified By The 8 Tribe's Tribal Council In September, 2014.

9 The Employee Defendants each signed Executive Employment Agreements with the
10 Tribe in January, 2001. Copies of the Executive Employment Agreements are attached as
11 Exhibit 4 to the declarations of Geraldine Freeman, David Swearinger, and Allen Swearinger,
12 submitted concurrently herewith.

13 Each of the employment agreements provided for payment of a salary to the Employee
14 Defendants, along with health insurance, retirement, and vacation benefits. The employment
15 agreements also contained the promise that the Employee Defendants would get to use a
16 \$5,000,000 line of credit once "Land is put into trust for gaming for Employer [the Tribe], the
17 casino construction is complete, the Casino is profitable and maintains at least 40% EBIDTA
18 and per capita [distribution] has commenced for Employer's tribal members." See, e.g.,
19 Geraldine Freeman Decl. at ¶3.d. The line of credit, if drawn on, was to be repaid with interest
20 unless the Tribe terminated the Employee Defendants' employment without cause. See id. Ex.
21 4 at ¶3.d. The phrases "without cause" and "with cause" are defined by the agreements. See id.
22 at ¶¶4.b. & 4.c.

23 On September 8, 2014, the Tribe's recognized Tribal Council ratified, confirmed,
24 approved and adopted each of the four Executive Employment Agreements. See Declarations
25 of Geraldine Freeman, David Swearinger, and Allen Swearinger at ¶8 & Ex. 4. This action

26 ¹ Moving Parties are the Employee Defendants (Leslie Lohse, Ines Crosby, John Crosby, and Larry Lohse), Ted
27 Pata, Juan Pata, Chris Pata, Sherry Myers, Frank James, The Patriot Gold And Silver Exchange, Inc. and Norman
28 R. Ryan. All moving parties with the exception of The Patriot Gold And Silver Exchange, Inc. and Norman Ryan
are referred to in the FAC as the "RICO Defendants." The Patriot Gold And Silver Exchange, Inc. and Norman
Ryan are part of group referred to in the FAC as the "Abettor Defendants."

1 was memorialized in a Tribal Council resolution signed by a majority of the Tribe's federally
2 recognized Tribal Council. Id.

3 **B. The Executive Employment Agreements Contain An Arbitration Provision, And**
4 **Defendants Filed A Demand In Arbitration Under The Agreements.**

5 Each of the four Executive Employment Agreements contains an identical dispute
6 resolution provision in paragraph 8.h of the agreements. That provision states,

7 **Arbitration.** Any dispute or controversy arising under or in connection with
8 this Agreement shall be settled first by arbitration, conducted before a panel of
9 three arbitrators in Sacramento, California, in accordance with the rules of the
10 American Arbitration Association then in effect, and judgment may be enforced
11 on the arbitrators' award in any court having jurisdiction. The Employer shall
12 pay all costs of the American Arbitration Association and the arbitrator. Each
13 party shall select one arbitrator, and the two so designated shall select a third
14 arbitrator. If either party shall fail to designate an arbitrator within seven (7)
15 days after arbitration is requested, or if the two arbitrators shall fail to select a
16 third arbitrator within fourteen (14) days after arbitration is requested, then an
17 arbitrator shall be selected by the American Arbitration Association upon
18 application of either party. Notwithstanding the foregoing, the Executive shall
19 be entitled to seek specific performance from a court of the Executive's right to
20 be paid until the date of termination during the pendency of any dispute or
21 controversy arising under or in connection with this Agreement and the
22 Employer shall have the right to obtain injunctive relief from the court.

23 See Geraldine Freeman Decl. at 3:10-13 & Ex. 4 at ¶8.h.

24 On May 13, 2015, the Employee Defendants filed a demand for arbitration under the
25 Executive Employment Agreements with the AAA. The demand alleges the Tribe breached its
26 obligation to make required payments to the Employee Defendants and seeks a declaration that
27 advances taken on the lines of credit provided for in the agreements are forgiven. A copy of
28 the demand for arbitration is attached as Exhibit 1 to the declaration of John Murray submitted
concurrently herewith.

////

1 **C. The Tribe's Allegations Regarding The Employee Defendants' Allegedly Wrongful**
2 **Conduct Are Within The Arbitration Provision Of The Executive Employment**
3 **Agreements.**

4 Setting aside issues of Tribal membership (which Defendants contend are matters of
5 Tribal governance), the allegations contained in the 200 plus pages of the FAC allege the
6 Employee Defendants were in control of the Tribe and its wholly owned corporation for nearly
7 17 years and during part of that time allegedly looted the Tribe of millions of dollars. The
8 alleged "RICO Ringleaders" are the same individuals as the Employee Defendants, all of
9 whom were employees of the Tribe over this same period of time. See FAC ¶¶ 27-30; see also
10 FAC ¶¶ 32-36; Geraldine Freeman Decl. at Ex. 4 (attaching employment agreements).

11 Though couched in allegations of RICO violations and schemes to defraud, the Tribe's
12 allegations against Defendants relate to Defendant's employment with the Tribe. The Tribe's
13 allegations directly invoke Defendants' use of the lines of credit provided in the Executive
14 Employment Agreements. Moreover, the relevant timeframe involved in the FAC is virtually
15 co-extensive with the effective dates of the Employment Agreements. Compare FAC ¶1
16 (alleging a scheme existing for over 17 years), with Geraldine Freeman Decl. at Ex. 4
17 (attaching employment agreements dated January, 2001).

18 **D. The Tribe's Allegations That The Executive Employment Agreements Are**
19 **Fraudulent Are Belied By Its Own Tribal Council's Ratification and Affirmation**
20 **Of The Agreements Less Than Six Months Before The Tribe Filed This Action.**

21 In the FAC, the Tribe acknowledges the existence of the Executive Employment
22 Agreements, but claims the agreements are fraudulent. See FAC at ¶377. The Tribe's
23 allegations of fraud are belied by the fact the Tribe's prior Tribal Council reaffirmed and
24 ratified each of the Executive Employment Agreements less than 6 months prior to the Tribe
25 filing this lawsuit, and at a time the when that Tribal Council was recognized by the federal
26 government as the Tribe's governing body. See Declarations of Geraldine Freeman, David
27 Swearinger and Allen Swearinger at ¶¶ 5-8 & Exs. 1-4.

28 Three of the four Tribal Council members who ratified and approved the Executive
Employment Agreements are not defendants in this action and are not alleged to be part of the
schemes and frauds Plaintiffs allege.

III. STANDARD

1
2 Under the Federal Arbitration Act (FAA), the Court is required to stay a lawsuit if the
3 issue involved in such suit or proceeding is referable to arbitration under a written arbitration
4 agreement. (9 U.S.C. § 3.) If the Court stays the suit, the stay is to remain in place until the
5 arbitration has been conducted in accordance with the arbitration agreement. (Id.)

6 The FAA reflects a “liberal federal policy favoring arbitration.” See AT&T Mobility
7 LLC v. Concepcion, 131 S.Ct. 1740, 1745 (2011). The “principal purpose” of the FAA is to
8 “ensur[e] that private arbitration agreements are enforced according to their terms.” (Id. at
9 1748 (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior
10 Univ., 489 U.S. 468, 478). Generally, when examining an arbitration contract, “the [FAA]
11 establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues
12 should be resolved in favor of arbitration. . . .” Momot v. Mastro, 652 F.3d 982, 987 (9th Cir.
13 2011) (quoting Moses H. Cone Mem’l Hosp., 460 U.S. at 24–25 (1983)).

14 The FAA states that written arbitration agreements “‘shall be valid, irrevocable, and
15 enforceable, save upon such grounds as exist at law or in equity for the revocation of any
16 contract.’ 9 U.S.C. § 2. In deciding whether a dispute is arbitrable, a court must answer two
17 questions: (1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope of that
18 agreement to arbitrate encompasses the claims at issue.” Farrow v. Fujitsu America, Inc., 37
19 F.Supp.3d 1115, 1119 (N.D. Cal. 2014) (quoting Chiron Corp. v. Ortho Diagnostic Sys., Inc.,
20 207 F.3d 1126, 1130 (9th Cir.2000)); see also Momot v. Mastro, 652 F.3d 982, 986-988 (9th
21 Cir. 2011).

22 If a court finds the parties agreed to arbitrate a dispute, it will enforce the arbitration
23 provision even though the parties’ agreement as a whole may be unenforceable. See, e.g.,
24 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 87 S.Ct. 1801, 1806 (1967) (holding that “in
25 passing upon a s[ection] 3 application for a stay while the parties arbitrate, a federal court may
26 consider only issues relating to the making and performance of the agreement to arbitrate”); see
27 also Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 (9th Cir. 1991).

1 Courts do not always make threshold determinations regarding arbitrability. Where
2 Parties have delegated to the arbitrator the power to determine the arbitrability of a dispute, and
3 courts will defer to that delegation rather than decide the issue themselves. See, e.g., Momot,
4 652 F.3d at 986-988. Incorporating the American Arbitration Association’s rules into an
5 arbitration provision has been held to constitute delegation to the arbitrator to determine issues
6 of arbitrability. See Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069, 1074 (9th Cir.
7 2013) (observing in commercial dispute, “[v]irtually every circuit to have considered the issue
8 has determined that incorporation of the American Arbitration Association’s (AAA) arbitration
9 rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate
10 arbitrability”).

11 However, Court’s will decide if an agreement to arbitrate exists if a party disputes the
12 making of the agreement. Three Valleys Mun. Water Dist. V. E.F. Hutton & Co., Inc., 925
13 F.2d 1136, 1140-1141 (9th Cir. 1990).

14 IV. DISCUSSION

15 A. The Parties’ Written Arbitration Agreements Are Enforceable And Apply To 16 Defendants’ Claims.

17 1. The Parties Entered Into Written Arbitration Agreements, And Plaintiff’s 18 Challenge To The Existence Of The Arbitration Agreement Is Untenable 19 Because Its Own Tribal Council Reaffirmed The Contracts In 2014.

20 Each of the written Executive Employment Agreements is signed on behalf of the Tribe
21 and obligates the Tribe to submit “[a]ny dispute or controversy arising under or in connection
22 with” the Executive Employment to arbitration before a panel of 3 arbitrators conducted in
23 accordance with the rules of the American Arbitration Association. See Geraldine Freeman
24 Decl. at ¶8 & Ex. 4 (Executive Employment Agreements at ¶8.h.).

25 Not only did the Tribe enter into those agreements in 2001, but the Tribe’s own
26 federally recognized Tribal Council ratified, confirmed, approved and adopted each of the four
27 Executive Employment Agreements in September, 2014. See Declarations of Declarations of
28 Geraldine Freeman, David Swearinger and Allen Swearinger at ¶7-8 & Ex. 3-4.

1 The Tribe now claims the Executive Employment Agreements are fraudulent. Yet its
2 own Tribal Council reaffirmed and ratified each of the agreements less than 6 months prior to
3 the Tribe filing this lawsuit. A majority of the Tribal Council members who ratified and
4 approved the Executive Employment Contracts are not defendants in this action and are not
5 alleged to be part of the grand conspiracy Plaintiffs allege. The Tribe cannot simply disavow a
6 valid act of its own government.

7 In light of the fact the Tribe's own Tribal Council, acting within its authority, approved
8 the Executive Employment Contracts as late as September, 2014, the Tribe's self-serving
9 allegations the Employee Defendants "made up" the agreements defies reason. There is no
10 basis on which the Tribe can claim an agreement to arbitrate does not exist or that it did not
11 agree to arbitrate disputes arising out of the Executive Employment Agreements.

12 2. **By Incorporating The American Arbitration Association's Rules In Their**
13 **Arbitration Agreement, The Parties Have Delegated To The Arbitrator**
14 **The Power To Determine Threshold Issues Of Arbitrability.**

15 Although, "gateway questions of arbitrability" such as whether the parties are bound by
16 a given arbitration clause, and whether an arbitration clause applies to a given controversy, are
17 presumptively reserved to the Court, parties may delegate them to the arbitrator. Momot, 652
18 F.3d at 987. Thus, where parties have clearly agreed to arbitrate the arbitrability of their
19 dispute, courts must enforce the parties' agreement, "and may do so by staying federal
20 litigation under section 3 of the FAA or compelling arbitration under Section 4 of the FAA."
21 Id. (citing Rent-A-Center, West, Inc. v Jackson, 561 U.S. 63 (2010)).

22 Here, the parties' arbitration agreement clearly evidences their agreement to have the
23 arbitration conducted pursuant to the rules of the American Arbitration Association. See
24 Geraldine Freeman Decl. at ¶8 & Ex. 4 (Executive Employment Agreements at ¶8.h.).

25 Rule 6 of the American Arbitration Association's "Employment Arbitration Rules And
26 Mediation Procedures," entitled "Jurisdiction" states as follows²:

27 ² In the event the Employment Arbitration And Mediation Procedures did not apply, the
28 American Arbitration Association's Commercial Arbitration Rules And Mediation Procedures
would. Rule 7 of the Commercial Arbitration Rules And Mediation Procedures contains an
identical jurisdiction rule.

1 a. The arbitrator shall have the power to rule on his or her own jurisdiction, including
2 any objections with respect to the existence, scope or validity of the arbitration
3 agreement.

4 b. The arbitrator shall have the power to determine the existence or validity of a
5 contract of which an arbitration clause forms a part. Such an arbitration clause shall be
6 treated as an agreement independent of the other terms of the contract. A decision by
7 the arbitrator that the contract is null and void shall not for that reason alone render
8 invalid the arbitration clause.

9 c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a
10 claim or counterclaim no later than the filing of the answering statement to the claim or
11 counterclaim that gives rise to the objection. The arbitrator may rule on such objections
12 as a preliminary matter or as part of the final award.

13 See Murray Decl., Ex. 2 (attaching excerpt of rule).

14 By incorporating the American Arbitration Association's rules into the arbitration
15 provision of the agreements, the parties have delegated the power to determine the "gateway
16 questions of arbitrability" to the arbitrator. This conclusion is buttressed by Oracle America,
17 Inc. v. Myriad Group A.G., in which the appellate court observed, "[v]irtually every circuit to
18 have considered the issue has determined that incorporation of the American Arbitration
19 Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the
20 parties agreed to arbitrate arbitrability." 724 F.3d 1069, 1074 (9th Cir. 2013) (dealing with
21 commercial arbitration rules); see also Fadal Machining Centers, LLC v. Compumachine, Inc.,
22 461 Fed. Appx. 630, 632 (9th Cir. 2011) (unpub.) (holding incorporation of American
23 Arbitration Commercial Arbitration Rules into arbitration provision evidenced "clear and
24 unmistakable intent to delegate questions of scope to the arbitrator").

25 The American Arbitration Association rule empowers the arbitrator to determine his or
26 her own jurisdiction, including the "existence, scope or validity of the arbitration agreement."
27 By incorporating those rules into the arbitration provision, the parties intended the arbitrator
28 would determine his or her own jurisdiction, the enforceability of the arbitration agreement the
29 Tribe agreed to, and the scope of the arbitration agreement. Accordingly, this Court should
30 refrain from making those determinations and allow the arbitrators to properly determine
31 arbitrability.

1 ////

2 3. **Assuming For The Sake Of Argument There Is No Delegation To The AAA**
3 **To Determine Arbitrability, The Parties Are Bound By The Arbitration**
4 **Provision And The Tribe's Allegations Of Financial Misappropriation Fall**
5 **Within The Scope Of The Arbitration Provision.**

6 Assuming for the sake of argument the parties did not effectively delegate authority to
7 the arbitrator to determine threshold issues of arbitrability, the facts strongly support a finding
8 that the Tribe is bound by the arbitration agreement, and the Tribe's allegations of racketeering
9 and financial misappropriation fall within the scope of the arbitration provision.

10 The Tribe's own federally recognized Tribal Council ratified and approved the four
11 Executive Employment Agreements. The Tribe can hardly disclaim the authority of the act of
12 a majority of its own federally recognized Tribal Council. The Tribe is therefore bound by the
13 arbitration agreement.

14 With regard to the scope of the agreement, the claims asserted in the FAC fall within
15 the scope of the arbitration provision. The FAC alleges Defendants used their positions to loot
16 millions of dollars from the Tribe.

17 The allegations in the FAC leveled against the Tribe's former executives directly
18 implicate the Employee Defendants' authority under the Executive Employment Agreements to
19 engage in the financial activities alleged.³ One need not look far to see the connection between
20 the claims alleged in the FAC and the Executive Employment Agreements. The Agreements
21 (1) make the Employee Defendants executives of the Tribe and its businesses, (2) entitle the
22 Employee Defendants to substantial lines of credit, and (3) are largely co-extensive in time
23 with the allegedly 17 year scheme alleged in the FAC. The Tribe all but concedes its
24 allegations invoke the Executive Employment Agreements by going to great lengths to
25 discount those agreements as allegedly fraudulent. See FAC ¶¶ 377-392

26 ³ The allegations also call on the Court to interpret and enforce Tribal law, the extent of the
27 Tribal Council members' authority, to determine whether alleged expenditures were personal
28 or for Tribal business, and to review years of Tribal Council oversight of its members and
employees. Defendants contend the court lacks subject matter jurisdiction to engage in those
inquiries, as detailed in their motion to dismiss for lack of subject matter jurisdiction.

1 It is not possible to resolve the claims in the FAC, or anticipated defenses thereto,
2 without first resolving the parties' rights and obligations under Tribal law and also under the
3 Executive Employment Agreements. Those agreements state that "[a]ny dispute or
4 controversy arising under or in connection with this Agreement" shall be settled by arbitration.
5 See Geraldine Freeman Decl. at Ex. 4, ¶8.h. The Tribe's allegations attacking the executive's
6 management of the Tribe's business and allegedly taking money from the Tribe undoubtedly
7 "arise under or in connection with" the Executive Employment Agreements.

8 To the extent the parties have not delegated the determination of arbitrability to the
9 arbitrator, the facts compel a finding the arbitration provision in the Executive Employment
10 Agreements are enforceable and the claims asserted by the Tribe fall within the scope of those
11 arbitration provisions.

12 **B. In Light Of The Parties' Arbitration Agreement, All Claims Against The**
13 **Defendants Should Be Stayed Or Dismissed Pending Arbitration.**

14 The Employee Defendants filed a complaint in arbitration with the American
15 Arbitration Agreement on May 13, 2015, seeking in part a declaration that advances under the
16 lines of credit have been completely forgiven. See Murray Decl. Ex. 1 (complaint in
17 arbitration). In light of that pending arbitration, and the fact the claims in this lawsuit fall
18 within the scope of the parties' arbitration agreement, the FAA requires the Court to stay or
19 dismiss this action pending arbitration. 9 U.S.C. § 3.

20 In those instances where a lawsuit includes some claims that are subject to arbitration
21 and some that are not, the Court has the discretion to stay litigation of all claims pending the
22 outcome of arbitration. See United States for Use & Benefit of Newton v. Neumann Caribbean
23 Int'l, Ltd., 750 F.2d 1422, 1426 (9th Cir. 1985) (staying arbitrable and nonarbitrable claims).
24 Here, the FAC alleges a litany of claims relating to and originating from the Employee
25 Defendants' employment with the Tribe, and invoking the validity of the Executive
26 Employment Agreements. Accordingly, all the claims in the FAC should be stayed or
27 dismissed pending arbitration.

1 Dismissal is warranted in this case. Courts have discretion to dismiss litigation entirely
2 rather than simply stay the case. See Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th
3 Cir.1988) (affirming sua sponte dismissal of case on motion to stay pending arbitration where
4 arbitration clause covered all claims). Not only are the Tribe's claims in the FAC subject to
5 arbitration because they arise out of defendants' employment, but this Court lacks subject
6 matter jurisdiction to hear the intra-tribal governance dispute inextricably intertwined with this
7 case. The Employee Defendants have filed a motion to dismiss on that basis. This Court
8 should dismiss this case in favor of arbitration.

9 **C. The Claims Against The Non-Signatories Should Also Be Stayed Or Dismissed.**

10 "Where some litigants are not parties to the arbitration agreement, the court may
11 nonetheless stay the entire action if arbitration of claims against a party to an arbitration
12 agreement is likely to resolve factual questions coextensive with claims against nonparties to
13 that arbitration agreement." Jaffe v. Zamora, --- F.Supp.3d --- (2014 WL 5786241) at p. *3
14 (citing case; quotations and citation omitted) (granting motion to stay).

15 Here, arbitration of the Executive Employment Agreements will undoubtedly resolve
16 factual questions coextensive with claims against nonparties to the arbitration agreements. The
17 FAC alleges the Employee Defendants are the "ringleaders" of a scheme to loot money from
18 the Tribe. A fair reading of the FAC suggests the alleged liability of all the other defendants
19 flows from the Employee Defendants' allegedly wrongful conduct. Arbitration under the
20 Executive Employment Agreements, and thus a resolution of the Employee Defendant's rights
21 to the forgivable lines of credit in those agreements will resolve threshold factual issues
22 common to the claims against all other defendants in the action.

23 If the action is not stayed as to all defendants, it would be difficult for an alleged abettor
24 defendant like defendant The Patriot Gold And Silver Exchange, Inc., for example, to defend
25 against allegations it assisted the Employee Defendants' loot the Tribe. It would first be
26 necessary to determine whether the Employee Defendants were entitled, under the Executive
27 Employment Agreements, to money they allegedly took. Resolving that issue would require
28

1 the Court to pass on the meaning and enforceability of the Executive Employment Agreements,
2 even though the Tribe and the Employee Defendants clearly intended to arbitrate those issues.
3 Indeed, it would be difficult for all defendants to proceed without first resolving whether the
4 Employee Defendants were rightfully entitled to use the lines of credit. As a result, this Court
5 should stay or dismiss the claims against all defendants pending arbitration.

6
7 **V. CONCLUSION**

8 The Tribe agreed to arbitrate all disputes or controversies arising under or in connection
9 with the Employee Defendant's Executive Employment Agreements. Indeed, the Tribe's own
10 government just recently reaffirmed those agreements. Through those agreements, the parties
11 delegated to the arbitrators the power to determine the arbitrability of the dispute. To the
12 extent the Court concludes it has the obligation to determine arbitrability, the claims raised in
13 the FAC fall squarely within the arbitration provision of the Executive Employment
14 Agreements and are subject to arbitration. For these reasons, the Employee Defendants
15 respectfully request a stay or dismissal of this case, as to all claims and as to all parties,
16 pending arbitration pursuant to 9 U.S.C. § 3.

17 Dated: May 15, 2015

Liberty Law, A.P.C.

18
19 /s/ John Murray

20 By: John Murray
21 Attorneys for Defendants
22 Ines Crosby, John Crosby, Leslie Lohse,
23 Larry Lohse, Ted Pata, Juan Pata; Chris
24 Pata, Sherry Myers, Frank James, The
25 Patriot Gold And Silver Exchange, Inc.
26 and Norman R. Ryan
27
28