STUART G. GROSS (#251019)
sgross@gross-law.com
DANIEL C. GOLDBERG (#287923)
dgoldberg@gross-law.com
GROSS LAW, P.C.
The Embarcadero
Pier 9, Suite 100
San Francisco, CA 94111
t (415) 671-4628
f (415) 480-6688

JOSEPH R. SAVERI (#130064)
jsaveri@saverilawfirm.com
ANDREW M. PURDY (#261912)
apurdy@saverilawfirm.com
KEVIN E. RAYHILL (#267496)
krayhill@saverilawfirm.com
JOSEPH SAVERI LAW FIRM, INC.
505 Montgomery Street, Suite 625
San Francisco, CA 94111
t (415) 500-6800
f (415) 395-9940

Attorneys for Plaintiffs the Paskenta Band of Nomlaki Indians and the Paskenta Enterprises Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PASKENTA BAND OF NOMLAKI INDIANS; and **PASKENTA ENTERPRISES CORPORATION**,

Plaintiffs,

v.

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

Defendants,

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

Nominal Defendants.

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

PLAINTIFFS' OPPOSITION TO RICO DEFENDANTS' MOTION TO STAY OR IN THE ALTERNATIVE DISMISS PENDING ARBITRATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR COUNTER-MOTION TO STAY THE ARBITRATION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

INTRODUCTION

Defendants John Crosby, Ines Crosby, Leslie Lohse, and Larry Lohse (collectively, the "RICO Ringleaders"), with the active assistance of their co-conspirators (collectively with the RICO Ringleaders, "RICO Defendants"), and abettors (collectively with the RICO Defendants, "Defendants"), engaged in an over decade-long scheme to defraud Plaintiffs the Paskenta Band of Nomlaki Indians (the "Tribe") and its principal business vehicle the Paskenta Enterprises Corporation ("PEC," collectively with the Tribe, "Plaintiffs" or the "Tribe"). In the course of the conspiracy, the RICO Ringleaders stole tens of millions of dollars from the Tribe and violated numerous California state and federal laws, including the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. §§ 1961, *et seq.* and the Federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. *See* First Amended Complaint ("FAC"). The United States Department of Justice (the "DOJ") and the Internal Revenue Service ("IRS") are engaged in a related criminal investigation, in connection with which the RICO Ringleaders, their co-RICO Defendant Frank James, as well as likely others, were recently served with search warrants. *See* Declaration of Stuart G. Gross ("Gross Dec.") in Support of Plaintiffs' Opposition to the RICO Defendants' Motion to Stay the Proceeding Pending Arbitration ("RICO Defendants' Stay Motion" or "Ds' Mtn.") and Plaintiffs' Counter-Motion to Stay the Arbitration ("Plaintiffs' Opposition/Counter-Motion" or "Ps' Opp./Cntr-Mtn."), ¶ 3.

Through their Stay Motion, the RICO Ringleaders, together with their co-RICO Defendants and two other Defendants represented by the same counsel,[1] seek to avoid answering for this criminal conduct before this Court. Specifically, they seek a stay of this proceeding or its complete dismissal on the basis of arbitration provisions contained with in four purported employment agreements that the RICO Ringleaders claim the Tribe entered into with them, on January 25, 2001 or January 26, 2001, and purportedly "ratified" on September 8, 2014 (the "Fraudulent Employment Agreements"). *See* Declaration of John Murray in Support of Ds' Stay

[1] The moving Defendants, in addition to the RICO Ringleaders are RICO Defendants Ted Pata, Juan Pata, Chris Pata, Sherry Myers, Frank James, as well as Abettor Defendants The Patriot Gold And Silver Exchange, Inc. and Norman R. Ryan. For simplicity all will be referred to herein as the "RICO Defendants."

Mtn. ("Murray Dec."), Exs. 1-A to 1-D (copies of the Fraudulent Employment Agreements).

Plaintiffs may defeat the RICO Defendants' Stay Motion and prevail on their own counter-motion to stay the arbitration by showing there exist material issues of fact as to whether the Tribe ever entered into the Fraudulent Employment Agreements. *See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc*., 925 F.2d 1136 (9th Cir. 1991). As detailed herein, there is overwhelming evidence that the Fraudulent Employment Agreements are forgeries, fabricated by the RICO Ringleaders, in the Spring/Summer of 2014, after being terminated from their positions with the Tribe, in a *post hac* effort to manufacture authorization for their thefts of millions from the Tribe.[2] If they are forgeries, the Fraudulent Employment Agreements are void *ab initio*, nullities; and they are incapable of being ratified. Thus, the material issues of fact raised by this evidence of forgery include whether the Tribe ever into the Fraudulent Employment Agreements, either in 2001, when they were purportedly executed, or in 2014, when they were purportedly ratified; and on this basis the RICO Defendants' Stay Motion must be denied and Plaintiffs' Counter-Motion to stay the arbitration granted.[3]

Furthermore, the RICO Defendants' Stay Motion must be denied and Plaintiffs' Counter-Motion must be granted on independently sufficient grounds related to issues of sovereign immunity and the scope of the purported arbitration provisions. An Indian Tribe has not made a legally effective agreement to arbitrate unless it has waived its sovereign immunity in connection with that purported agreement. *See C&L Enters. v. Citizen Band Potawatomi Indian Tribe of*

---

[2] In marked contrast to the voluminous evidence of fraud submitted by Plaintiffs herewith—including that of statements made by the RICO Ringleaders to WilmerHale attorneys in connection with an internal investigation conducted by the Tribe in Summer of 2014, *see* Declaration of Christopher Davies in Support of Ps' Opp./Cntr-Mtn.—the RICO Defendants submit no evidence directly probative of the Tribe having made the Fraudulent Employment Agreements in 2001. Absent even are declarations from any of the RICO Ringleaders swearing under oath that this occurred. Rather, the RICO Defendants purported to rely exclusively on evidence of the purported "ratification" of the Fraudulent Employment Agreements thirteen years later.

[3] In addition, as discussed herein, even if *arguendo* it was legally possible, notwithstanding the forgery, for the Fraudulent Employment Agreements to be ratified (it isn't), there are still material issues of fact whether the purported ratifiers acted with the required knowledge of material facts and freedom from fraudulent inducement necessary for the purported ratification to have been effective.

Okla., 532 U.S. 411 (2001). As discussed herein, in light of the wording of the purported ratification on which the RICO Defendants rely, as well as that of the only other evidence submitted in support of their argument that the Tribe waived its sovereign immunity, the same evidence probative of the Fraudulent Employment Agreements' being forgeries creates a material issue of fact as to whether the Tribe ever entered into the Fraudulent Employment Agreements, irrespective of whether it was legally possible to have ratified the Fraudulent Employment Agreements. And while Plaintiffs respectfully submit that the very significant material issues of fact as to whether the Tribe *ever made* an agreement to arbitrate with the RICO Ringleaders moot any analysis whether Plaintiffs' claims fall sufficiently within the scope of any such agreement to require that this action be stayed, as discussed herein, they do not; and on this basis as well Defendants' Motion to Stay should be denied.[4]

BACKGROUND

I. Factual Background

On April 12, 2014, the Tribe terminated the RICO Ringleaders employment. *See* Declaration of Natasha Magana in Support of Ps' Opp./Cntr-Mtn. ("Magana Dec."), ¶ 3; *see also* Declaration of Ambrosia Rico in Support of Ps' Opp./Cntr-Mtn. ("A. Rico Dec."), ¶¶ 3-6, Exs. A-D (RICO Ringleaders' requests to liquidate and withdraw in cash the balance of their Tribal 401k's, indicating April 16, 2014 as their date of separation from employment).

At or around the time of their termination and soon thereafter, allegations were widely made by Tribe members that the RICO Ringleaders had stolen large amounts of money from the

[4] Plaintiffs respectfully request that the RICO Defendants' Motion to Stay and Plaintiffs' Counter Motion be heard on June 29, 2015, the date on which Defendants noticed their Motion for hearing. As discussed herein, the standard applicable to both Motions is the same: whether Plaintiffs' claims are subject to an agreement to arbitrate. *See Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.,* 776 F.2d 812, 815 (9th Cir. 1985); *cf. Wolf v. Langemeier*, No. 09-03086-GEB-EFB, 2010 U.S. Dist. LEXIS 87017, at *4 (E.D. Cal. Aug. 24, 2010). Thus, there seems little justification to continue the hearing in order to provide the RICO Defendants an opportunity to file an opposition to Plaintiffs' Counter-Motion separate from a reply in support of their Motion to Stay; and, in the event the Court does not continue the hearing date from June 29, 2015, Plaintiffs would waive their right to file a reply in support of their Counter-Motion. Furthermore, if the arbitration is not stayed on or soon after June 29, 2015, there is a risk that the Plaintiffs will be required to begin incurring not insignificant attorneys' fees and costs in connection with the arbitration requested by the RICO Ringleaders.

Tribe during their tenure. *See* Declaration of Andrew Freeman in Support of Ps' Opp./Cntr-Mtn. ("A. Freeman Dec."), ¶ 4. In the days and weeks that followed, Tribe members—having finally gained access to Tribal records after having been denied such access for well over a decade by the RICO Ringleaders—began discovering irrefutable evidence of such thefts, including records of hundreds of thousands of dollars withdrawn from the Tribe's bank accounts by the RICO Ringleaders after their termination. *See* Magana Dec., ¶¶ 3, 18; *see also, e.g.*, A. Rico Dec., ¶¶ 8-13, Exs. E-J. Ultimately, in or around May 2014, it was agreed that the Tribe would hire WilmerHale to conduct an investigation on behalf of the Tribe into the allegations of such thefts and other issues. *See* Declaration of Christopher Davies in Support of Ps' Opp./Cntr-Mtn. ("Davies Dec."), ¶ [3]; Declaration of Christopher Casamassima in Support of Ps' Opp./Cntr-Mtn. ("Casamassima Dec."), ¶ 3; Declaration of Rebecca Kline in Support of Ps' Opp./Cntr-Mtn. ("Kline Dec."), ¶ 3.

Sometime thereafter, in or around May or June 2014, the RICO Ringleaders began claiming that they had employment agreements with the Tribe (the "Fraudulent Employment Agreements"), pursuant to which each had been given a forgivable $5 million line of credit ("LOC") at 1% simple interest, and that they had not *stolen* millions of dollars from the Tribe, but rather only borrowed it; no one had ever heard of any such agreements or any lines of credit before. *See* A. Freeman Dec., ¶ 4; A. Rico Dec., ¶ 16; Magana Dec., ¶ 16; Declaration of Latisha Miller in Support of Ps' Opp./Cntr-Mtn. ("Miller Dec."), ¶ 4; Declaration of Andrew Alejandra in Support of Ps' Opp./Cntr-Mtn. ("Alejandra Dec."), ¶ 4; Declaration of Chuck Galford in Support of Ps' Opp./Cntr-Mtn. ("Alejandra Dec."), ¶ 7; *see also* Kline Dec., ¶¶ 6-7 (Geraldine Freeman stating she had no knowledge concerning any such agreements or lines of credit until sometime after April 12, 2014), ¶¶ 19-20 (David Swearinger stating the same), ¶¶ 23-24 (Alen Swearinger stating the same);[5] Declaration of Fred Winters in Support of Ps' Opp./Cntr-Mtn. ("Winters

[5] Geraldine Freeman, David Swearinger, and Allen Swearinger are the individuals who, together with Leslie Lohse and Andrew Freeman, the RICO Defendants claim made up the "recognized Tribal Council" as of September 8, 2014. *See* Ds' Mtn. at 3. As the RICO Defendants' decision to include the qualifier "recognized" implicitly concedes, whether or not these persons constituted the Tribal Council on September 8, 2014 is a matter of dispute. *See* A. Rico Dec., ¶ 2 (testifying that she has been a member of the Tribal Council since April 2014, and was most recently re-

Dec."), ¶¶ 6-9; *see also generally* Davies Dec., ¶¶ 6(j), 18(u), 22(f) (relating estimates by the RICO Ringleaders of the amounts they had "borrowed" from the Tribe).

In her interview conducted by WilmerHale as part of its investigation, RICO Ringleader Leslie Lohse claimed that no one had ever heard of the Fraudulent Employment Agreements or the extremely generous LOCs purportedly given to each of the RICO Ringleaders therein because Everett Freeman—now deceased, but the Chairman of the Tribal Council in 2001—wanted to keep the Fraudulent Employment Agreements a "secret" from the rest of the Tribe. *See* Davies Dec., ¶ 20(h). The true reason, however, is that the Fraudulent Employment Agreements were fabricated and the signatures of Everett Freeman, Andrew Freeman, and Carlino Swearinger forged thereon, most likely some time in the Spring/Summer of 2014 in preparation for the WilmerHale investigation. The evidence of this, some but not all of which is discussed in detail herein, is overwhelming.

II. Procedural Background

On March 15, 2015, Plaintiffs filed the original complaint in this action. *See* Dkt. No. 1. On April 17, 2015, Plaintiffs filed the FAC. *See* Dkt. No. 30. Pursuant to a stipulated briefing schedule, Defendants filed motions to dismiss on May 15, 2015, which are set for hearing on July 27, 2015, and Plaintiffs response to which are due June 29, 2017. *see* Dkt. No. 27. The RICO Defendants did not challenge the legal sufficiency of any of the claims alleged against them in the FAC, including claims under RICO and the CFAA. *See* FAC, ¶¶ 431-508.

On May 13, 2015, the RICO Defendants filed a demand for arbitration against the Tribe pursuant to the Fraudulent Employment Agreements with the American Arbitration Association ("AAA"), *see* Murray Dec., Ex. 1; and, on May 15, 2015, the RICO Defendants filed their Stay

---

elected on September 13, 2014); Miller Dec., ¶ 2 (same); Magana Dec., ¶ 2 (same); Alenjandre Dec., ¶ 2 (same); *cf.* Declaration of Geraldine Freeman in Support of Ds' Mtn. ("G. Freeman Dec."), Dkt. 55-2, ¶ 2 (testifying she was a member of the Tribal Council for over a decade until September 13, 2014); Declaration of David Swearinger in Support of Ds' Mtn. ("D. Swearinger Dec."), Dkt. 55-3, ¶ 2 (same); Declaration of Allen Swearinger in Support of Ds' Mtn. ("A. Swearinger Dec."), Dkt. 55-4, ¶ 2 (same). As discussed herein, resolution of the question whether Geraldine Freeman, David Swearinger, and Allen Swearinger had the authority to speak for the Tribe on September 8, 2014 has no bearing on the resolution of the instant Cross-Motions.

Motion, *see* Dkt. No. 55. Counsel for the RICO Defendants has indicated that he believes, unless the arbitration is stayed by this Court, an arbitration panel will be established at the end of June 2015, after which a briefing schedule on the Tribe's response would be established. *See* Gross Dec., ¶ 5.

On May 23, 2015, Plaintiffs served on the RICO Ringleaders a demand for inspection of the original signed versions of the Fraudulent Employment Agreements for analysis by Plaintiffs' handwriting expert, Dr. Linton Mohammed. *Id.*, ¶ 2. By agreement of the parties the inspection was to occur on June 12, 2015. *Id.* However, on June 10, 2015, counsel for the RICO Defendants informed the undersigned by phone that pursuant to federal criminal search warrants all of the electronic devises, as well as paper documents relevant to this action, had been seized from the RICO Ringleaders and RICO Defendant Frank James. *Id.*, ¶ 3. Included in the seized documents were the original, signed versions of the four Fraudulent Employment Agreements, all of which had been in the possession of RICO Ringleader John Crosby. *Id*.

LEGAL STANDARD

"In deciding a motion to stay a proceeding pending arbitration, a court must determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Wolf v. Langemeier*, No. 09-03086-GEB-EFB, 2010 U.S. Dist. LEXIS 87017, at *4 (E.D. Cal. Aug. 24, 2010). If either of these questions is answered in the negative, the motion to stay the proceeding should be denied and any counter motion to stay the arbitration should be granted. *See Alascom Inc. v. ITT North Elec. Co.,* 727 F.2d 1419, 1422 (9th Cir. 1984); *Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.,* 776 F.2d 812, 815 (9th Cir. 1985).

The FAA does not provide for dismissal of a federal action averred to be subject to arbitration. Thus, where, as here, a party includes in its motion to stay brought solely under 9 U.S.C. § 3, a request that the court, in the alternative, dismiss rather than stay the action, the party effectively moves for summary judgment on the ground that "all claims are barred by an arbitration clause." *Sparling v. Hoffman Constr. Co*., 864 F.2d 635, 638 (9th Cir. 1988). Accordingly, a court can only grant such relief if it finds as a matter of law, giving the non-

movant the benefit of all doubts and inferences that may arise, that all claims brought by the plaintiff are barred by an arbitration clause; and such relief must be denied if there are any triable issues of material fact in this regard. *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A court's determination whether a valid agreement to arbitrate exists encompasses a determination whether the purported contract containing the arbitration clause, itself, was ever made. *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc*., 925 F.2d 1136, 1142 (9th Cir. 1991). To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the first principle of arbitration that ***a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit***. *Three Valleys,* 925 F.2d at 1142 (emphasis added); *accord Rosenthal v. Great Western Fin. Securities Corp*., 14 Cal. 4th 394, 416 (1996) ("[C]laims of fraud in the execution of the entire agreement are not arbitrable under either state or federal law. If the entire contract is *void ab initio* because of fraud, the parties have not agreed to arbitrate any controversy.").

Thus, where, as here, the party opposing arbitration denies it entered into the contract under which arbitration is sought, the motion seeking to require arbitration is effectively transformed into a motion for summary adjudication on the existence of the reported contract. "'If there is doubt as to whether such an agreement exists,'" the request to stay federal litigation in favor of arbitration should be denied and "the matter, upon a proper and timely demand, should be submitted to a jury." *Three Valleys,* 925 F.2d at 1141 (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co*., 636 F.2d 51, 54 (3d Cir. 1980)).

> "[T]he matter, upon a proper and timely demand, should be submitted to a jury. Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement. The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise."

Id.(quoting *Par-Knit Mills*, 636 F.2d at 54) (modifications and emphasis added)

> "This standard is . . . recognized as the standard used by district courts in resolving summary judgment motions pursuant to [Rule] 56(c). An unequivocal denial that the agreement had been made, accompanied by supporting affidavits, . . . in most

> cases should be sufficient to require a jury determination on whether there had in fact been a 'meeting of the minds'."

Heath v. Langemeier, No. 09-03086-GEB-EFB, 2011 U.S. Dist. LEXIS 85394, at *7 (E.D. Cal. Aug. 3, 2011) (quoting with modifications *Par-Knit Mills*, 636 F.2d at 54, n. 9, 55).[6]

If a court determines that no valid agreement to arbitrate exists or that there are material issues of fact in this regard, the analysis ends, as the second prong of the analysis—whether the arbitration agreement encompasses the dispute before the court—depends on a finding that there is an agreement to arbitrate. *See Wolf*, 2010 U.S. Dist. LEXIS 87017, at *4. However, assuming that such an agreement exists, [a] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." *Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 297 (2010). The Supreme Court has "never held that [the federal policy favoring arbitration] overrides the principle that a court may submit to arbitration only those disputes that the parties have agreed to submit." *Id*. at 302 (internal quotations omitted).

Furthermore, "where some portions of an action are arbitrable and others not, the decision to stay those claims not subject to arbitration is in the court's discretion." *Wolf*, 2010 U.S. Dist. LEXIS 87017, at *21 (internal quotation omitted). "In deciding whether to stay non-arbitrable claims, a court considers economy and efficiency, the similarity of the issues of law and fact to those that will be considered during arbitration, and the potential for inconsistent findings absent a stay." *Id.,* at *22. Staying proceedings on the nonarbitrable claims is appropriate only "'where the arbitrable claims predominate, or where the outcome of the nonarbitrable claims will depend upon the arbitrator's decision.'" *Global Live Events v. Ja-Tail,* No. CV13-8293SVW 2014 U.S. Dist. LEXIS 63963, at *6-7 (May 8, 2014) (internal citation omitted). "Courts generally refuse to

[6] Though the motion brought in *Three Valleys* was brought under both Section 3 and Section 4 of the FAA, whereas the Motion, here, is brought under just Section 3, the difference is without significance, as the same law applies. *Accord Heath*, 2011 U.S. Dist. LEXIS 85394, at *6 (this Court describing the same legal standard for resolving a motion to compel arbitration, under 9 U.S.C. § 4, as that described by this Court in *Wolf*, 2010 U.S. Dist. LEXIS 87017, at *4, for resolving a motion to stay, under 9 U.S.C. § 3); *see also Par-Knit Mills*, 636 F.2d at 52 (indicating that the order from which appeal was taken was "of the district court staying federal court proceedings pending the completion of arbitration.").

stay proceedings of non-arbitrable claims when it is feasible to proceed with the litigation." *Klay v. Pacificare Health Sys., Inc.*, 389 F.3d 1191, 2014 (11th Cir. 2004) (internal citation omitted).

ARGUMENT

I. Material Issues of Fact Exist as to Whether the Fraudulent Employment Agreements Are Forgeries, Thus, This Litigation *Cannot* be Stayed Based on the Arbitration Provisions Contained Therein, Rather the Arbitration Must be Stayed; the Purported "Ratification" of the Fraudulent Employment Agreements Does Not Change this Result

The RICO Defendants present no evidence that the Tribe entered into the Fraudulent Employment Agreements with the RICO Ringleaders on their purported dates, January 25 2001, and January 26, 2001. Indeed, tellingly absent from the RICO Defendants' filing is even a single declaration from any of the RICO Ringleaders swearing under oath that this occurred. Rather, the RICO Defendants rest their claim that contracts exist between the RICO Ringleaders and the Tribe requiring arbitration almost entirely on the purported ratification of the Fraudulent Employment Agreements, by Geraldine Freeman, Allen Swearinger, David Swearinger, and RICO Ringleader Leslie Lohse, on September 8, 2014, five days before these four individuals lost even their highly questionable claim to authority to speak for the Tribe.

To resolve the parties' cross-motions however, does not require the Court to resolve whether they had such authority or even reach it. Rather, the Court's analysis effectively starts and ends with a determinant whether there exists a material issue of fact as to whether the Fraudulent Employment Agreement are forgeries. Once such a material issue of fact is found to exist, the question of whether these four individuals had any authority to speak for the Tribe on September 8, 2014 is rendered irrelevant: as matter of basic contract law, if the Fraudulent Employment Agreements are forgeries they are void, nullities, and not capable of ratification by anyone.

As the Ninth Circuit made clear, a party cannot "forge [another] party['s] . . . name to a contract and compel [that] party . . . to arbitrate the question of the genuineness of its signature." *Three Valleys*, 925 F.2d at 1140. Notwithstanding the RICO Ringleaders' obvious hope to the contrary, no purported ratification changes this result. Accordingly, Plaintiffs respectfully submit the RICO Defendants' Motion should be denied, and their Counter-Motion should be granted.

A. Federal Common Law Governs the Court's Analysis of the Fraudulent Employment Agreements and Their Purported "Ratification"

Though not outcome determinative, as between federal common law and California state law—the two conceivable sources of law on which to resolve the validity of Fraudulent Employment Agreements and the effect of their purported "ratification"—federal common law governs.

Each of the Fraudulent Employment Agreements provides: "This Agreement shall be subject to and governed by federal law. In the event that the laws of the United States looks to the law of a particular state for its content, the applicable law will be the laws of the State of California." Murray Declaration, Exs. 1-A to 1-D (§ 8(d)). The Ninth Circuit recognize that contractual choice of law provisions choosing federal law are effective, and in such cases federal common law will apply. *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JP Morgan Chase Bank, N.A.*, 671 F.3d 1027, 1033 (9th Cir. 2012). "Under federal common law, a court looks to general principles for interpreting contracts." *Id.*

At first blush, this analysis appears complicated by the fact that if—as the evidence strongly suggests—the purported agreements containing these provisions are void, these choice-of-law provisions are, like the arbitration provisions contained therein, without legal effect. However, in *C&L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla*., 532 U.S. 411, 418 (2001), the Supreme Court—without reference to a contractual choice of law provision—approved of the application of federal common law to issues of contract interpretation involving Indian tribes, in particular, concerning issues of arbitrability. Indeed, courts have found it appropriate, as general matter, to apply federal, as opposed to state law to resolve questions that could affect the court's determination of whether an Indian tribe has agreed to arbitrate, as such a determination, at its core, requires the court to determine whether the tribe has waived its sovereign immunity. *See, e.g., Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, No. 10-995 (RAJ), 2011 U.S. Dist. LEXIS 101222, *15 (W.D. Wash. Sept. 7, 2011) (relying, in part, on the holding of *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) that "tribal immunity is a matter of federal law and is not subject to diminution by the States"). Thus, even

were the Court to determine that, because of questions going to whether the Fraudulent Employment Agreements are forgeries and thus not contracts at all, *see* Restatement (Second) Contracts § 7 comment *a* (a void agreement "is not a contract at all; it is the 'promise' or 'agreement' that is void of legal effect."), it was not proper to look to the documents' provisions for choice-of-law purposes, it would still be appropriate to apply federal common law here.

B. Overwhelming Evidence Indicates the Fraudulent Employment Agreements Were Fabricated, and the Signatures on Behalf of the Tribe Forged, Most Likely Some Time in 2014 and Are, Therefore, Void

Under general contract law principles, fraud in the *factum*, such as forgery, "signifies 'the absence of that degree of mutual assent prerequisite to formation of a binding contract; absent the proverbial 'meeting of the minds' one cannot be said to have obligated himself in law and the purported transaction is regarded as void.'" *Smith v. Dorchester Real Estate, Inc*., 732 F.3d 51, 75 (1st Cir. Mass. 2013) (quoting 26 Williston on Contracts § 69:4 (4th ed.)); *accord, e.g.,* Restatement (Second) Contracts § 7 comment *a*; *Southern California Edison Co. v. Hurley*, 202 F.2d 257, 262 (9th Cir. 1953). The same is true under California law. *See, e.g., Wutzke v. Bill Reid Painting Serv*., 151 Cal. App. 3d 36, 43 (1984) ("It has been uniformly established that a forged document is void *ab initio* and constitutes a nullity."); *Rosenthal*, 14 Cal. 4th at 415 (in cases of "fraud in the 'execution' or 'inception' of a contract mutual assent is lacking, and the contract is void.") (internal quotation omitted); *Rodriguez v. Bank Of The West,* 162 Cal. App. 4th 454, 460-461 (2008); Cal. Civ. Code § 1550 (identifying "consent" as "essential to the existence of a contract").

Overwhelming evidence, in several categories, supports the conclusion that the Fraudulent Employment Agreements were fabricated, and the signatures of members of the Tribal Council thereon forged, in the wake of the RICO Ringleaders' removal from their positions with the Tribe in 2014, in a *post hac* attempt by the RICO Ringleaders to avoid—through farcically generous Lines of Credit ("LOC") provisions inserted in each—liability for over a decade of theft from the Tribe, and—through the arbitration provisions inserted in each—having to answer for that theft in federal court. The categories of evidence include: (1) direct evidence that the purported signatures of the Tribal Council members on the documents are forgeries, including the sworn testimony of

Andrew Freeman—the only one of the purported signatories who is neither one of the RICO Ringleaders nor deceased—and the sworn testimony of Plaintiffs' handwriting expert; (2) the terms of the Fraudulent Employment Agreements, themselves which are disconsonant with the Tribe's reality in 2001 but pronouncedly consistent with a *post hac* effort by the RICO Ringleaders to manufacture justifications for their past conduct; (3) the manner in which the RICO Ringleaders claim the Tribe entered into the Fraudulent Employment Agreements, which is not only inconsistent with the manner the Tribe actually entered contracts at the time, but also involves factual assertions by the RICO Ringleaders that are conflicted by the evidence or are simply uncredible; (4) negotiations by John Crosby and the Tribe in 2003, to revise a contract entered into by the Tribe and Mr. Crosby on January 1, 2001 ("1/1/01 JC Contract")—twenty-four days prior to the date on which his Fraudulent Employment Agreement was purportedly executed—in which terms substantially less favorable than those in Mr. Crosby's Fraudulent Employment Agreement were proposed without apparent objection from Mr. Crosby and the existence of Mr. Crosby's Fraudulent Employment Agreement was never mentioned or discussed; (5) conduct by the RICO Ringleaders between 2001 and their removal from control that is inconsistent with the Tribe having given them $5 million LOCs through the Fraudulent Employment Agreements; (6) the lack of any evidence of the Fraudulent Employment Agreements' existence prior to their "revelation" by the RICO Ringleaders after their removal from control and the circumstances of that "revelation"; and (7) the RICO Ringleaders' last minute effort to have the Fraudulent Employment Agreements "ratified."

In contrast, the RICO Defendants present no evidence independent of the purported ratification that the Fraudulent Employment Agreements were, in fact, entered into by the Tribe in 2001. *See* Defendants' Mtn. at 5.

Plaintiffs respectfully submit that even a portion of the foregoing is more than sufficient to create a material issue of fact as to whether the Fraudulent Employment Agreements are forgeries and thus void and incapable of forming a basis for arbitration, irrespective of any acts taken with the purported goal of achieving their "ratification."

1. Substantial Direct Evidence Demonstrates the Purported Signatures on the Fraudulent Employment Agreements of Andrew Freeman, Everett Freeman, and Carlino Swearinger Are Forgeries

The Fraudulent Employment Contracts of John Crosby, Ines Crosby, and Larry Lohse, were purportedly signed, on behalf of the Tribe, by Everett Freeman, Carlino Swearinger, and RICO Ringleader Leslie Lohse, *see* Murray Dec., Exs. 1-A, 1-B, 1-C, while that of Ms. Lohse was purportedly signed by Everett Freeman, Carlino Swearinger, Andrew Freeman. *Id.*, Ex. 1-D. Substantial direct evidence demonstrates that the signatures of Andrew Freeman, Everett Freeman, and Carlino Swearinger on the Fraudulent Employment Agreements are forgeries.

As a result of their recent seizure by the FBI in connection with the DOJ's and IRS's criminal investigation of the conduct giving rise to this action, Plaintiffs' handwriting expert, Dr. Linton Mohammed was not able to examine the original versions of the Fraudulent Employment Agreements. *See* Mohamed Dec., Ex. A at p. 1; *see also* Gross Dec., ¶ 2.[7] While this placed some limitations on his analysis, Dr. Mohammed was still able to conclude Andrew Freeman, Everett Freeman, and Carlino Swearinger "probably did not write" their purported signatures on the Fraudulent Employment Agreements. Mohammed Dec., Ex. A at p. 1. Dr. Mohammed has worked as a forensic document examiner for over twenty years, including a number of years at the San Diego County Sherriff's Crime Laboratory where he ultimately held the position of Senior Forensic Document Examiner, has been certified by the American Board of Forensic Document Examiners since August 1998, and holds Masters of Forensic Sciences and PhD in Human Biosciences. *Id.* at pp. 1-2. According to Dr. Mohammed, a conclusion of "probably did not write" means that there is "strong demonstrable support" for the conclusion. *Id.* at p. 5.[8]

---

[7] Dr. Mohamed compared the purported signatures of Andrew Freeman, Everett Freeman, and Carlino Swearinger on copies of the Fraudulent Employment Agreements of Ms. Lohse, Mr. Lohse and Mr. Crosby provided by their counsel to WilmerHale, *see* Gross Dec., ¶ 11-16; Davies Dec., ¶¶ 6(d), 18(h), 20(c), 22(d), Exs. D-H; with several examples of each of these persons on documents in the files of the Tribe, *see* Gross Dec., ¶¶ 5-10; Magana Dec., ¶¶ 20-25; Exs. G-L. *See* Mohammed Dec., Ex. A at pp. 3-4.

[8] Dr. Mohammed further indicates that being limited to the examination copies created "significant limitations," resulting in qualifications of conclusions that might not otherwise be required. Mohammed Dec., Ex. A at pp. 5-6. He, nonetheless, concluded "the copies submitted were of sufficient quality to allow meaningful examination," and identified several bases for his conclusion. *Id*. at pp. 6-9

Corroborating the forgoing conclusions by Dr. Mohammed, Andrew Freeman denies ever having signed Leslie Lohse's Fraudulent Employment Agreement and unambiguously states that the signature above his name on the document, which he saw for the first time in August of 2014—is not his and that he never signed this document. Declaration of Andrew Freeman in Support of Plaintiffs' Opposition/Counter-Motion ("A. Freeman Dec."), ¶5. Mr. Freeman, furthermore, testifies that he had no knowledge whatsoever concerning the existence of the Fraudulent Employment Agreements or any purported LOC provided thereby, until the RICO Ringleaders first claimed that they existed in May or June of 2014. A. Freeman Dec., ¶ 4.

While the foregoing evidence is sufficient, in-and-of-itself, to create a material issue of fact sufficient to defeat the RICO Defendants' Motion and grant Plaintiffs' Counter-Motion. *Cf. Heath*, 2011 U.S. Dist. LEXIS 85394, at *7-10, it is further corroborated by overwhelming evidence.

2. The Terms of the Fraudulent Employment Agreements, Themselves, Are Probative of Their Fabrication in 2014, as Opposed to Their Legitimate Drafting in 2001

RICO Ringleader John Crosby admits that, on January 1, 2001, he and the Tribe entered into the 1/1/01 JC Contract. *See* Davies Dec., ¶ 4; *accord* A. Freeman Dec., ¶ 8; Ex. A. That the Tribe entered into an employment contract with Mr. Crosby less than a month before the RICO Defendants claim the Tribe executed a *different* employment contract with him, his Fraudulent Employment Agreement, is probative of the latter's falsity. Further probative of that falsity are the terms of the Fraudulent Employment Agreement, which are disconsonant with the situation of the Tribe in January, 2001 but consonant with a *post hac* effort in 2014 to cover up, the RICO Ringleaders' crimes committed during the previous thirteen-plus years. First, as a side-by-side comparison of the terms of the 1/1/01 JC Contract with those of his Fraudulent Employment Agreement—provided in tabular form on **Exhibit A** hereto—shows that the terms of his Fraudulent Employment Agreement are dramatically more generous to Mr. Crosby and less protective of the Tribe than the 1/1/01 JC Contract.

It defies logic that the Tribe, less than one month after executing an employment contract with Mr. Crosby—who just been hired by the Tribe, *see* Davies Dec., ¶ 18(m)—would decide to

enter a new contract with him and his co-RICO Ringleaders that was so much less favorable to the Tribe.[9] When challenged by WilmerHale concerning this, Mr. Crosby offered two explanations: (1) between January 1, 2001 and January 25, 2001, Mr. Crosby had grown concerned with the Casino's financial prospects, and so wanted a "more incentive-based" contract for himself and fellow RICO Ringleaders; and (2) the severance package the Tribe had been required to pay its former General Counsel, Kyong C. Yi,[10] upon his departure, motivated the Tribe to negotiate a new agreement that was more "incentive based." Davies Dec., ¶¶ 18(m-n).

Mr. Crosby's first offered explanation goes to *his* purported motivations, not the Tribe's; thus, it sheds no light on why the Tribe, less than a month after making the 1/1/01 JC Contract, would agree to conclude a new agreement with him that was both far more generous to Mr. Crosby and far less protective of the Tribe. Hypothetically, Mr. Crosby's further claim that he came up with the idea that the Tribe make the Fraudulent Employment Agreements with him and his co-conspirators explains this. *Id.*, ¶ 18(l-m). However, not only is this claim contradicted by Leslie Lohse, who claims that the now-deceased Tribal Chairman at the time, Everett Freeman, came up with the idea for the agreements, *see id.*, ¶ 20(e), it strains credulity that Mr. Crosby, less than one month on the job with the Tribe, *see* Davies Dec., ¶¶ q-r, would have held the necessary sway with the Tribal Council to have made it happened. Rather, in light of several factors—including that, until they were recently seized by the FBI, the original versions of the Fraudulent Employment Agreements appear to have been held exclusively by John Crosby at his home, *see, e.g.,* Gross Dec., ¶ 2—it appears what Mr. Crosby meant was that he came up with the idea of the Fraudulent Employment Agreements following the RICO Ringleaders removal from control in 2014, as a way for the RICO Ringleaders to avoid liability for the previous decade of thefts.

Mr. Crosby's second explanation is belied by the fact that, as Mr. Crosby later admitted,

---

[9] It is also notable in this regard that Mr. Crosby's Fraudulent Employment Agreement makes no mention at all of the 1/1/01 JC Contract or its status, *see* Davies Dec., Ex. #, an odd omission from a contract that is purportedly effecting a novation of a previous agreement executed less than a month before, especially when one considers that Mr. Crosby has a law degree and the Tribe had a General Counsel at the time.

[10] On January 1, 2001, the Tribe entered into an employment agreement with Mr. Yi almost identical to the 1/1/01 JC Contract. *See* A. Freeman Dec., Ex. A; *cf id.*, Ex. B.

Mr. Yi left the Tribe's employment in or shortly after 2003. Davies, ¶ 18(o). Thus, it is impossible for the circumstances of Mr. Yi's departure to have motivated *any* decision by *anyone* in January of 2001.

Finally, few, if any, of the provisions of (or omissions from) the Fraudulent Employment Contract, when compared to the 1/1/01 JC Contract, can be fairly described as reflecting a "more incentive-based" approach. Indeed, major elements of the Fraudulent Employment Agreement—such as the very limited "for cause" termination provision, the $5 million LOC provision, and the virtual absence of covenants in favor of the Tribe, *see* **Exhibit A**—would incentivize not superior service for the Tribe, but rather the sort of self-dealing in which the RICO Ringleaders engaged and which the Fraudulent Employment Agreements were fabricated to justify.

RICO Ringleader Ines Crosby—during her interview with WilmerHale, which occurred on *the same day* as that of her son John Crosby—gave basically the same uncredible explanations as Mr. Crosby for the Tribe's purported decision to enter into "close to identical" Fraudulent Employment Agreements with her and the each of the other RICO Ringleaders, on January 25 and 26, 2001. Davies Dec., ¶ 6(b). Her only addition was to claim that the Tribe's then Chairman Everett Freeman was motivated to give them the contracts so as to ensure that she and Mr. Crosby would continue working for the Tribe, Davies Dec., ¶ 6(c), an odd claim given that, in late January 2001, Mr. Crosby had been working for the Tribe less than a month, *see id.*, ¶ 18(m).

RICO Ringleaders Leslie Lohse—during her interview, the following day—potentially reflecting a warning by Mr. Crosby as to chronology, did not claim that the Tribe was motivated to enter into the Fraudulent Employment Agreements by its experience in connection with Mr. Yi's departure; in fact, she claimed there was discussion about offering Mr. Yi the same package.[11] *See id.*, ¶ 6(b). Rather, she cited as the motivating factor for the agreements in addition to the same purported risk regarding the establishment of the Casino mentioned by the Crosbies, the desire by Everett Freeman to ensure that the RICO Ringleaders were taken care of and secure. *Id.*, ¶ 6(c). The only explanation given by Larry Lohse was that Everett Freeman wanted him and

[11] Mr. Crosby, in contrast, claimed that Mr. Yi did not get a Fraudulent Employment Agreement because he had already lost favor with the Tribe, *see* Davies Dec., ¶ 18(j).

the other RICO Ringleaders to continue working for the Tribe. *Id.*, ¶ 22(c).

These explanations, however, like the generous terms of the Fraudulent Employment Agreements, themselves, simply don't comport with the reality of the Tribe in 2001, but rather a *post hac* effort by the RICO Ringleaders to justify their conduct. As all of the RICO Ringleaders admitted, the Tribe had not even built the Casino in January, 2001, and thus was not yet producing any income. Davies, ¶ 18(d). Indeed, they have claimed that the prospects for the Casino being built at all were uncertain at the time. It strains credulity that the Tribal Council would, nonetheless, have given three employees (two of whom, John Crosby and Larry Lohse, had only just started working for the Tribe) and one Tribal Council member, LOCs totaling $20 million at 1% simple interest, on which no balance needed to be paid for the next 19 years, if repaid at all. Rather, the decision to include the LOC provisions is far more explicable if made in late Spring/Summer of 2014 by the RICO Ringleaders, who, looking back at the last thirteen-plus years, realized that, unless they had something that could justify the huge sums of Tribal money taken by them, they would likely face both civil and criminal liability. Indeed, terms of the Fraudulent Employment Agreements' LOC provisions in combination with the "for cause" termination provisions, would exculpate the RICO Ringleaders from even having to pay back any of the money they "borrowed" from the Tribe, given that they had not (yet) been convicted of a felony or embezzlement from the Tribe when they were terminated in April, 2014.[12]

Other subtler, chronology-related problems also affect the Fraudulent Employment Agreements, including several references to Tribal "businesses" and "enterprises," in various provisions. For example: the LOC provisions provide *inter alia,* "[s]aid line of credit may be borrowed from any of Employers [SIC] businesses or enterprises," *see, e.g.* Davies Dec., Exs. D-G, § 3(d); the bonus provisions provide that bonuses will be calculated based "on the performance of the Enterprises of the Employer," *see, e.g., id*. §3(c); and the compensation provisions provide for, "compensation in the form of payroll or stipends for all other boards that Executive resides on

[12] This also gave the RICO Ringleaders a useful weapon in their effort to regain control of the Tribe—i.e. the threat that the Tribe would lose its ability to get back the money "borrowed" by the RICO Ringleaders if they were not restored to their former positions.

in order to fulfill his/her duties for Employer's benefit," *see, e.g., id*. § 2(b). However, the Tribe had no businesses or enterprises in 2001. *See* Declaration of Chuck Galford ISO Plaintiffs' Opposition/Counter-Motion ("Galford Dec."), ¶ 3. In fact, the Tribe didn't even create PEC, which it used as a vehicle to engage in non-Casino businesses until 2003; and the Tribe did not engage in any non-Casino business until that year. *Id.*, ¶ 4. Thus, providing, in 2001, four employees of the Tribe the ability to borrow up to $20 million from the Tribe's "businesses or enterprises" does not make sense. Nor would it make sense, in 2001, to peg their bonuses to the performance of (capitalized but undefined and nonexistent) "Enterprises" of the Tribe, or to provide that they would be compensated "in the form of payroll or stipends for all other boards" on which they sat for the Tribe's benefit: there were no such boards.

However, like retroactively giving themselves each a $5 million LOC that was effectively forgiven as a result of their termination, these provisions make perfect sense, when viewed from the perspective of an effort by the RICO Ringleaders, in Spring/Summer 2014, to avoid liability for their past conduct. Allowing the RICO Ringleaders to "borrow" against their LOCs not only from the Tribe but also its "businesses and enterprises" makes perfect sense when you consider that large portions of the amounts stolen by the RICO Ringleaders came from the bank accounts of Paskenta *Enterprise* Corporation. *See* A. Rico Dec., ¶¶ 9-13; Ex. F-J; Davies Dec., ¶¶ 18(u-v). Providing for themselves to be paid for sitting on boards "for the benefit of" the Tribe makes perfect sense in light of the RICO Ringleaders' practice of paying themselves (and their family members) large sums to sit on the boards of various companies that they caused the Tribe to purchase or invest in, as well as, in the case of Leslie Lohse, the California Tribal Business Association to which the RICO Ringleaders caused the Tribe to donate millions of dollars. *See* Davies Dec., ¶¶ 12, 18(ll-mm), 20(v-w), 22(o). And providing for themselves to be paid bonuses based vaguely on the performance of Tribal businesses and enterprises provides a helpful explanation for why the actual amounts the RICO Ringleaders were paid in compensation was almost, every year, far greater than the amounts provided for in their Fraudulent Employment Agreements. *See* Davies Dec., ¶¶ 11, 18(nn), 20(x), 22(n).

3. Manner and Circumstances in Which RICO Ringleaders Claim the Tribe Entered into the Fraudulent Employment Agreements Are Not Credible, Further Belying Their Claim that the Agreements Are Valid

Similar to the terms of the Fraudulent Employment Agreements, themselves, the manner and circumstances in which the RICO Ringleaders claim the Tribe entered the Fraudulent Employment Agreement simply do not ring true, but rather are again probative of the documents (and the RICO Ringleaders' story regarding them) having been fabricated in a *post hac* effort to avoid liability.

First, on the Fraudulent Employment Agreements, are only the signatures of three, rather than all five, Tribal Council members—including that of the two members who are deceased, Everett Freeman, and Carlino Swearinger, but excluding that of the one member still living, Geraldine Freeman—without any seal of the Tribe. *See* Davies Dec., Exs. D-G.[13] By way of comparison, the 1/1/01 JC Contract and Mr. Yi's very similar contract with the Tribe, which is also dated January 1, 2001, were executed by all five members of the Tribal Council—Everett Freeman, Andrew Freeman, Leslie Lohse, Geraldine Freeman, and Carlino Swearinger—and bear on their signature pages a seal of the Tribe. *See* A. Freeman Dec., ¶ 8, Exs. A, B.

The RICO Ringleaders' proffered explanations for this increase, rather than reduce, the inference of fraud. Ms. Lohse, Mr. Crosby, and Ms. Crosby all claimed that (the still-living) Geraldine Freeman did not sign the agreements—and according to Ms. Lohse did not even know about them—because she was in in-patient rehabilitation at the time the contracts were discussed and signed, *id.*, ¶ 6(e)(iii), being treated, according to John Crosby for a medical condition that

[13] An additional problem with the claimed validity of Larry Lohse's Fraudulent Employment Contract, in particular, is that it is purportedly signed by his wife Leslie Lohse, notwithstanding Section 1(d) of the Tribal Constitution which prohibits Tribal Council members "who reside in the same household as a person having a direct financial interest . . . [from] participat[ing] in the discussion or determination of any matter in which he/she has a direct financial interest, or any matter directly affecting any person who resides in that Council member's household." Magana Dec., Ex. A at Article VII(1)(d). Section 1(c) furthermore provides in order for a purported act of the Tribal Council to be effective, at least three members of the Council must participate in it. *Id.* Accordingly, even if one accepted *arguendo* that Larry Lohse's Fraudulent Employment Agreement was signed by Everett Freeman and Carlino Swearinger (it wasn't), given the ineffectiveness of any action by Leslie Lohse concerning the purported contract, it would only be signed by two Tribal Council members, making it ineffective to bind the Tribe.

developed between January 1, 2001—when she signed the 1/1/01 JC Contract and Mr. Yi's contract—and January 25, 2001. *Id.*, ¶ 18(k)(ii). However, as Tribal Council records and Ms. Freeman's own statements show, Ms. Freeman did not suddenly fall ill between January 1, 2001 and January 25, 2001, but rather continued to participate in Tribal businesses through this period; and her absence because of medical issues occurred in the middle of 2002, not anytime in 2001. *See* Magana Dec., ¶¶ 7-12,; Exs. B-F; Kline Dec. ¶¶ 14-18.

Their explanation for why the signature of Andrew Freeman—another still living member of that Tribal Council—only appears on Leslie Lohse's Fraudulent Employment Agreement is also uncredible. John Crosby claimed that Andrew Freeman did not sign Mr. Crosby's Fraudulent Employment Agreement because Mr. Freeman was busy and not sitting with the Tribal Council at the time. Davies Dec., ¶ 18(k)(iii). Ms. Lohse, while disclaiming recollection of whether Mr. Freeman was there the day Mr. Crosby's Fraudulent Employment Agreement was signed, dismissed the significance of the fact that Mr. Freeman's signature shows up on her Fraudulent Employment Agreement, dated January 26, 2001, but not of the others date the previous day, on grounds that the Tribal Council did not always do things the same way and it was "hit-or-miss" about who was around on any particular day. *Id.*, ¶¶ 20(h-j). It conflicts with common sense that the RICO Ringleaders would have been so *laissez faire* about the execution of these agreements that they would not simply have waited one day to have Mr. Freeman sign all four. Rather, the more reasonable inference is that when the RICO Ringleaders came up with the idea for the Fraudulent Employment Agreements, in 2014, they realized that Ms. Lohse could not provide the necessary third signature from the Tribal Council on her own agreement; however, thinking it less risky to forge Andrew Freeman's signature on just her agreement, rather than all four, they purported to date hers differently than the others to explain why he would have signed only hers.

The lack of any record that the Tribal Council ever considered the Fraudulent Employment Agreements, on January 25 or 26, 2001, such as minutes, resolutions, etc., Magana Dec., ¶ 15, and the lack of evidence that anyone had ever even heard of the documents before 2014, *see* A. Freeman Dec., ¶¶ 4-5; Miller Dec., ¶ 4; A. Rico Dec., ¶¶ 16-18; Magana Dec., ¶ 16; Alejandre Dec., ¶¶ 4-5; Casamassima Dec., ¶¶ 6, 11, 13, are also disprobative of the RICO

Ringleaders' claim that the agreements were entered into by the Tribe. Moreover, once again, the RICO Ringleaders' explanations do nothing to lessen this, but rather increase it. According to RICO Ringleader Leslie Lohse, no one other than the signatories to the Fraudulent Employment Agreements were aware of their existence because Everett Freeman did not want others to know about them, on the ground that Indian people would not understand or appreciate the value of the work the RICO Ringleaders were doing and would be mad about the agreements. Davies Dec., ¶ 20(h).

Finally, the (inconsistent) stories the RICO Ringleaders have told about the purported drafting of the Fraudulent Employment Agreements also bely their claim that the Tribe entered into them. John Crosby stated that while he and Mr. Yi, the Tribe's general counsel at the time, together drafted all of the contracts for the Tribe during a period inclusive of 2001, he alone drafted the Fraudulent Employment Agreements. *Id.*, ¶ 18(l). Not only does this explanation too conveniently eliminate Mr. Yi as a potential loose end in the story, it is not credible that the Tribe would exclude its then recently hired general counsel in the drafting of agreements of this magnitude. Leslie Lohse vaguely claimed that no person in particular drafted the documents, but rather it was just done. *Id.*, ¶ 20(g). Ines Crosby first claimed that Fred Winters, a former attorney of the Tribe, drafted the agreements but then backtracked and claimed not to know who did. *Id.*, ¶ 6(f). And Larry Lohse first volunteered that Chuck Galford—who, as part of the Polaris Group, began providing services to the Tribe in the Spring of 2001, *see* Galford Dec., ¶ 2—drafted the documents, before correcting himself and stating that he did not know who drafted them. Davies Dec., ¶ 22(c). Both Mr. Galford and Mr. Winters have confirmed that they took no part in the draft of the Fraudulent Employment Agreements and, in fact, had no knowledge of them prior to 2014. Galford Dec., ¶ 6; Winters Dec., ¶ 9.

4. Negotiations, in 2003, between John Crosby and the Tribe to Revise His January 1, 2001 Contract Further Demonstrates the Tribe Never Entered the Fraudulent Employment Agreements

Further probative that the Fraudulent Employment Agreements were fabricated in 2014 is evidence from negotiations of a new employment agreement between John Crosby and the Tribe, in 2003, in which Mr. Crosby admits the Tribe was represented by Fred Winters of Perkins Coie .

Davies Dec., ¶ 18(z).

According to Mr. Winters, ***the purpose of these negotiations was to revise the 1/1/01 JC Employment Contract, which was used as the basis for the drafting of a new agreement***. Winters Dec., ¶ 5. Moreover, Mr. Winters recalls no discussion, during these negotiations or the related drafting process, of any other employment contract between Mr. Crosby and the Tribe or any line of credit provided by the Tribe to Mr. Crosby. *Id.*, ¶ 6. In fact, the first time that Mr. Winters ever even heard of the Fraudulent Employment Agreements was in the Summer or Fall of 2014. *Id.*, ¶ 9.

A comparison (which is included in tabular form as **Exhibit B** hereto) of the proposed employment agreement resulting from the 2003 negotiations (the "2003 JC Proposed Employment Agreement") with the 1/1/01 JC Contract, as well as Mr. Crosby's Fraudulent Employment Agreement corroborates the 2003 JC Proposed Employment Agreement's provenance as a revision of the 1/1/01 JC Agreement and the lack of any relationship between it and Mr. Crosby's Fraudulent Employment Agreement. Most notably, the 2003 JC Draft Employment Agreement lacks any provision for an LOC in Mr. Crosby's favor, let alone a $5 million forgivable LOC at 1% simple interest. *See* Winters Dec., Ex. A. And more generally, the similarities between the 2003 JC Draft Employment Agreements and the 1/1/01 JC Contract are remarkable, as, correspondingly, are the differences between the 2003 JC Draft Employment Agreements and Mr. Crosby's Fraudulent Employment Agreement, both as to their respective terms, *see* **Exhibit B**, and as to their respective structures. *See id.*; *cf.* A. Freeman Dec., Ex. A; Davies Dec., Ex. E, H. Furthermore, in Section 5.4 of the 2003 JC Proposed Employment Agreement titled "Supercedes All Prior Agreements; Modifications or Waiver," the following verbiage appears:

> This Agreement supercedes all prior oral or written agreements or understandings between the Tribe and Crosby, including but not limited to ***the Employment Agreement dated January 1, 2001***.

Winters Dec., Ex. A, §5.4 (emphasis added). Nowhere is there mention of any other agreement.

As demonstrated in drafts of the 2003 JC Proposed Employment Agreement exchanged between Mr. Crosby and Mr. Winters by fax, *id.*, Ex. B, on which Mr. Crosby admits his

handwriting appears, Davies Dec., ¶ 18(bb), Mr. Crosby took an active part in the negotiations. These drafts show that the above quoted Section 5.4 contained blanks in which any previous agreement could have been identified. *See* Winters Dec., Ex. B, pp. [10] and [24]. However, Mr. Crosby, while inserting by hand, in other blanks, things like his and the Tribe's address, never wrote in anything to indicate that a contract dated January 25, 2001 between him and the Tribe existed, apparently indicating that only 1/1/01 JC Contract existed.

Mr. Crosby stated that he engaged in the 2003 contract negotiations, because he wanted greater security and incentives as he knew how "crazy" Indian Country can become. Davies Dec., ¶ 18(aa). However, there is no evidence that he ever indicated his objection to major differences between the 2003 JC Draft Employment Agreement and his Fraudulent Employment Agreement, that would have reduced his "security and incentives," including the omission of any provision providing him an LOC or compensation for board service, and the inclusion of "for cause" provisions and covenants in favor of the Tribe that were much more onerous. *See* **Exhibit B**. When asked why, if his Fraudulent Employment Agreement had actually been entered into on January 25, 2001, he would be negotiating an agreement two years later that had terms so markedly less favorable to him and why he would have effectively indicated his agreement with those terms by marking-up drafts of an agreement without objection or protest to these differences, Mr. Crosby had no explanation. *Davies Dec.*, ¶ 18(ee).

5. Numerous Actions and Omissions by the RICO Ringleaders Belie the Existence of the $5 Million LOCs Purportedly Provided for Each in Their Fraudulent Fraudulent Employment Agreements

As discussed, provisions purportedly providing a $5 million LOC to each RICO Ringleader were transparently included in the Fraudulent Employment Agreements to retroactively and fraudulently justify the millions stolen by them from the Tribe. However, actions and omissions by them belie that such LOCs actually existed. These include:

- Their admitted failure to have kept records of the amounts that they purportedly "borrowed" from the Tribe, its businesses, or enterprises pursuant to the LOCs. *See* Davies Dec, ¶¶ 6(i), 18(x), 20(l), 22(k).
- Their admitted failure to have made any kind of report to the IRS, or have the Tribe make

any kind of report to the IRS, concerning the purported loans, *see* Davies Dec., ¶ 6(i), 18(x), 20(m), 22(j), despite the income reporting requirements triggered by both the dramatically below-market rates of the "loans," *see* 26 U.S.C. § 7872, and their forgivable character, *see* Gross Dec., Ex. A (IRS Technical Advice Memorandum (TAM) 200040004).

- The decision by John Crosby and Larry Lohse, in 2010, to each borrow $150,000 from PEC at an interest rate of approximately 4% *per anum*, Galford Dec., ¶ 8, despite the fact that, in 2014, John Crosby claimed to have only "borrowed" $1.5 million of the $5 million that was purportedly available on his LOC at 1% and subject to forgiveness, and Larry Lohse, with his wife Leslie, claimed to have only "borrowed" $2 million of the $10 million that was purportedly available to them on their LOCs at 1% and subject to forgiveness. Davies Dec., ¶¶ 18(u), 22(f). Mr. Crosby was not able to explain this decision, *see id.*, ¶ 18(jj), and when asked about it a couple of days later, Larry Loshe was prevented from answering by his counsel, *id.,* ¶ 18(h).
- And, more generally, the failure of any of RICO Ringleaders to have quickly drawn down most or all of the $5 million to which each claimed to have been entitled and invest it in vehicles earning more than 1% *per anum*, as economic rationality would dictate; rather, each claimed to have used a small portion of their LOCs by 2014. *See id.*, ¶¶ 6(j), 18(u), 20(n), 22(f).

The inconsistency of these actions and omissions with the existence of the purported lines of credit is all the more notable in light of the facts that John Crosby has an accounting degree and Leslie Lohse worked for many years as a bookkeeper. *See id.*, ¶¶ 18(a), 20(a).

6. Lack of Evidence of Fraudulent Employment Agreements' Existence Before Their "Revelation" by RICO Ringleaders and the Timing of Their "Revelation" Are Further Probative of Their Fabricated Quality

Also probative of the fabricated quality of the Fraudulent Employment Agreements are both the lack of any evidence corroborating the RICO Ringleaders' claim that the agreements existed prior to their "revelation" in the Summer of 2014 and the timing of that "revelation."

When the Tribal Office's files were searched after the RICO Ringleaders' removal, not

only were no copies of the Fraudulent Employment Agreements found, no documents that referenced them or corroborated there existence were found. Magana Dec., ¶ 15. It's implausible that the execution, and operation for over 13 years, of what would have been the largest four employment contracts of the Tribe would have left no paper record. This is especially so in light of the Fraudulent Employment Agreements' unusual LOC provisions, which should have generated significant records, and the existence in the files of standard records concerning other employment agreements into which the Tribe actually entered. *See* Magana Dec., ¶¶ 15-16.

Indeed, Leslie Lohse acknowledged that it would have been appropriate for the Tribe to have kept the Fraudulent Employment Agreements in the files of the Tribal Office. Davies Dec., ¶ 20(k). However, in fact, the original signed versions of the agreements appear to have been in the sole possession of John Crosby from the time of their fabrication until they were recently seized by the FBI. *See* Gross Dec., ¶ 2 (relating statements by Mr. Crosby's counsel); Davies Dec., ¶¶ 6(d), 18(e), 20(c), 22(d) (describing provision of the copies of the documents by Mr. Crosby or his counsel in connection with the WilmerHale interview). Moreover, no other copies of the documents appear to have existed. *Accord, e.g., id.* ¶ 20(k) (Ms. Lohse disclaiming possession of a copy of hers or Larry Lohse's, but indicating that John Crosby had copies of those of all four RICO Ringleaders), ¶ 22(e) (Mr. Lohse indicating his belief that Ms. Lohse had a copy of his), ¶ 6(d) (Ms. Crosby stating she did not have a copy of her agreement, but vaguely indicating that a copy existed somewhere).

Consistent with this and independently probative that the documents were fabricated, it was not until several weeks after the RICO Ringleaders termination on April 12, 2014 that members of the Tribal Council, or apparently anyone else, first learned that the RICO Ringleaders were claiming to have contracts with the Tribe that provided them the $5 million LOCs, *see* A. Freeman Dec., ¶ 4; Miller Dec., ¶ 4; A. Rico Dec., ¶¶ 16-17; Magana Dec., ¶ 16-17; Alejandre Dec., ¶ 4; and, the first time any member of the Tribal Council saw a copy of any of the Fraudulent Employment Agreements was in August, 2014. *See* A. Freeman Dec., ¶ 5; *see also* Miller Dec., ¶ 5; A. Rico Dec., ¶ 18; Magana Dec., ¶ 16. Mr. Winters, whom some of the RICO Ringleaders claimed might know about the documents, had no knowledge concerning them until

the Fall of 2014, at the earliest. *See* Winters Dec., ¶ 9.

Leslie Lohse—in an attempt provide cover for the otherwise inexplicable facts that, despite the Fraudulent Employment Agreements' purported existence for over 13 years, no living person other than the RICO Ringleaders knew of them and no records related to them existed outside of Mr. Crosby's possession—claimed that the RICO Ringleaders kept the Fraudulent Employment Agreements a secret from the rest of the Tribe—including Geraldine Freeman who was a member of the Tribal Council in January, 2001—at Everett Freeman's request. *See* Davies Dec., ¶ 20(h). This explanation is not credible for several reasons, including the timing of the RICO Ringleaders "revelation" of the agreements.

If the Fraudulent Employment Agreements were actually made in 2001, you'd expected the RICO Ringleaders to have—in light of the enormous sums that they were purportedly "borrowing" against the LOCs purportedly provided therein—felt it prudent to disclose their existence to *someone* at some point prior to their termination, if, as they claim, these documents provide the sole evidence that their taking of such money from the Tribe was authorized. At the very least, you'd expect them to have disclosed them to their accountants and/or financial advisors. Furthermore, you'd expect them to have at least disclosed the documents in the immediate wake of their termination on April 12, 2014, when people were accusing them of financial improprieties; and you'd expect them to have disclosed the documents immediately to WilmerHale, when they began their investigation in July. However, in fact, the RICO Ringleaders did not raise the existence of the Fraudulent Employment Agreements, or the LOCs purportedly provided therein, as a defense to such accusations until several weeks after April 12, 2014, *see* A. Freeman Dec., ¶ 4; A. Rico Dec., ¶¶ 16-17; Magana Dec., ¶ 16-17; Alejandre Dec., ¶ 4, and they did not disclose the documents to WilmerHale until mid to late August, 2014, *see* Davies Dec., ¶¶ 6(d), 18(h), 20(c), 22(d). It strains credulity that, if the Fraudulent Employment Agreements were, in fact, legitimately entered into by the Tribe thirteen years before, the RICO Ringleaders would have waited so long to reveal their existence, especially in light of the weight they have placed on the documents as justifications for their actions since.

7. RICO Ringleaders' Last Minute Effort to "Ratify" the Fraudulent Employment Agreements and Their Dependence on the Purported Ratification Is Further Probative of the Documents' Fabrication

Finally, the RICO Ringleaders' apparent scramble to have the Fraudulent Employment Agreements "ratified," on September 8, 2014, just days before the purported ratifiers lost any tenuous claim to authority, is probative of the documents' falsity, as is their exclusive reliance on that purported ratification as proof of the documents' validity.[14] As discussed herein, this purported "ratification" had no legal effect; however, these actions indicate (well-founded) concern on the part of the RICO Ringleaders that they would be unable to prove that the Tribe had entered into the purported agreements on January 25, 2001 and January 26, 2001. A party comfortable in the validity of an agreement does not seek its ratification.

C. Claimed "Ratification" of the Fraudulent Employment Agreements Does Not Resolve the Material Issue of Fact as to Whether the Tribe Ever Entered into the Fraudulent Employment Agreements with the RICO Ringleaders

1. Under Federal Common Law, Applicable Here, Forgeries Cannot be Ratified; Thus, Claimed Ratification of the Fraudulent Employment Agreements Has No Legal Significance

"[T]he great weight of authority at common law denies the possibility of ratification of a forgery." 12 Williston on Contracts § 35:29 (4th ed.); *see also GECCMC 2005-C1*, 671 F.3d at 1033 (where as here a court is called on to apply federal common law to a contract dispute, it "looks to general principles.").

According to Professor Williston, the chief basis for denying the possibility of ratification of a forgery is grounded in the law of agency from which the equitable doctrine of ratification derives: "the unauthorized signer does not intend or purport to act on behalf of the person whose signature is being forged, but instead intends to be a principal, and hence there is nothing to ratify." *Id*. "Ratification requires that the principal, knowing the facts, accepts the benefits of the agent's actions." *Mallott & Peterson v. Director, Office of Workers' Compensation Programs, DOL,* 98 F.3d 1170, 1174 (9th Cir. 1996). Accordingly, a person "[can]not 'ratify' the acts of one

[14] As mentioned, the RICO Ringleaders have not offered even their own testimony in support of their claim that the Tribe entered into the Fraudulent Employment Agreements in 2001, an odd choice if they could have provided truthful testimony in that regard.

not acting, or purporting to act, in his behalf." *Gandelman v. Mercantile Ins. Co. of Am.*, 187 F.2d 654, 657 (9th Cir. 1951) *cert denied* 342 U.S. 896 (1951); *accord* Restatement (Third) Agency § 4.03, comment b ("When an actor is not an agent and does not purport to be one, the agency-law doctrine of ratification is not a basis on which another person may become subject to the legal consequences of the actor's conduct."). The forger commits the forgery to secure a benefit for him/herself; thus, there is nothing to ratify.

Here, that is exactly what the evidence suggests occurred: the RICO Ringleaders in order to further their fraudulent scheme and thus advance their own interests, in contravention of those of the Tribe, fabricated the Fraudulent Employment Agreements and forged the signatures of Andrew Freeman, Everett Freeman, and Carlino Swearinger. In doing so, they were not acting, or purporting to act, on behalf of anyone other than themselves; thus, such actions were not subject to ratification by any person, and the purported ratification was without legal effect.

A further potential problem recognized in common law with allowing ratification of forgeries is that so doing "would involve the compounding of a felony, since ratification, if equivalent to prior authorization, would obliterate the crime." 12 Williston on Contracts § 35:29 (4th ed.); *see also* Cal. Penal Code § 153 (defining compounding of a felony as: "Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement, or promise thereof, upon any agreement or understanding to compound or conceal that crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof"). In other words, if the law allowed ratifications of forgeries, it would effectively allow people to agree to take actions that would free the forger of the criminal liability for his/her forgery. *Cf.* Cal. Penal Code § 470 (defining the crime of forgery).

Such concerns are particularly pertinent here. As discussed below, there are, at the very least, material issues of fact whether the purported "ratifiers" knew that they were ratifying forgeries and thus would be subject to prosecution under Cal. Penal Code § 153. However, irrespective of such questions, the evidence strongly suggests that the RICO Ringleaders fabricated the Fraudulent Employment Agreements in order to avoid not only civil liability, in a case such as this, but also criminal liability, in a case like that concerning which they and others

were recently served with search warrants by the U.S. Department of Justice. *See* Gross Dec., ¶ 3; *see also, e.g,* 18 U.S.C. § 1163 (defining the crime of "Embezzlement and theft from Indian tribal organizations."). Allowing the RICO Ringleaders to avoid such liability on the ground that they convinced three people with highly questionable Tribal authority to "ratify" forged documents, under which the RICO Ringleaders claimed their thefts were actually lawful, would directly implicate compounding a felony related concerns.

Thus, the material issues of fact as to whether the Fraudulent Employment Agreements are forgeries necessarily raise material issues of fact as to whether the purported ratification of them was effective. Thus, the purported ratification does not change the result required by the overwhelming evidence that the Fraudulent Employment Agreements are forgeries: the RICO Defendants' Motion must be denied and Plaintiffs' Motion must be granted.

2. If California State Law Is Applied, the Result Remains the Same: the Fraudulent Employment Agreements Were Incapable of Having been Ratified

Some cases decided under California state law recognize the possibility of "ratification" by a principal of the unauthorized signing of a contract on the principal's behalf by an agent. *See Rakestraw v. Rodrigues,* 8 Cal. 3d 67 (1972).[15] While the use in these cases of the word "forgery" to describe the unauthorized signing by the agent on behalf of the principal suggests a divergence from federal common law; the difference, at its core, is semantic. Thus, the result is not changed

[15] While federal common law does not recognize the possibility of ratification of a forgery, it does recognize that the person whose signature is forged can be bound based on the doctrine of *estoppel.* 12 Williston on Contracts § 35:29 (4th ed.). Perhaps not surprisingly, many, if not all, of the cases in which California courts have found a principal has ratified the unauthorized signing of his/her signature by his/her agent, the court could also have found the principal bound based on the doctrine of estoppel. *See, e.g.*, *Rakestraw*, 8 Cal.3d at 71 (the defendant, after knowingly benefiting from the proceeds of a loan, asserted that the loan was invalid based on the forgery of her signature on the loan paperwork by her husband, only "[w]hen both her marriage and the business failed" and "benefits failed to materialize as anticipated."); *Behniwal v. Mix*, 133 Cal.App.4th 1027, 1042, n. 17 (2005) (finding it "hard to imagine a case where the estoppel doctrine would be more applicable than this one," where defendants-sellers had listed their property for sale and let the escrow proceed, without objection, until, motivated by illness or the desire to accept a higher offer, they called off the sale to the detriment of bona fide innocent buyers, but not applying the estoppel doctrine because "for some reason" no one argued it). The RICO Defendants have not, and could not, argue estoppel here.

here if one applies federal common law, as required, or California State law.

As discussed *supra*, it has long been the law in California that "a forged document is void *ab initio* and constitutes a nullity." *Wutzke*, 151 Cal.App.3d at 43. And it is equally well established that "[v]oid contracts cannot be ratified." *Estate of Molino*, 165 Cal. App. 4th 913, 925 (2008).

California cases holding that "forgeries" by agents can be ratified by principals are not in conflict with this law, or the federal common law discussed above, when one recognizes that such California cases do not actually involve "forgery" as defined in *Wutzke*, criminal law, or federal common law. As discussed *supra*, the latter defines "forgery" in a manner that rests fundamentally on the fact that the forger acted ***for his/her own fraudulent purpose***. *See Wutzke*, 151 Cal.App.3d at 41 (quoting and applying the definition of "forgery" set forth in Cal. Penal Code § 470, which requires that the action have been done "'with the intent to defraud"); *People v. Meldrum,* 2 Cal. 2d 52, 54 (1934) ("the intent to defraud is an essential and important element " of forgery); 12 Williston on Contracts § 35:29 ("the unauthorized signer does not intend or purport to act on behalf of the person whose signature is being forged, but instead intends to be a principal."). In contrast, the "forgeries" at issue in the referenced California cases are unauthorized signings "purportedly done on [a principal's] behalf," but without the requisite authority to do so. *Rakestraw,* 8 Cal. 3d at 73; *see, e.g., id.* at 71 (defendant's husband signed her name to loan documents used to attain credit used by husband and wife to operate a business); *Behniwal*, 133 Cal.App.4th at 1031 (the defendants' real estate agent signed their names to a counteroffer that the defendants had indicated their desire to make). Notwithstanding the use of the word "forgery," in cases such as this, in which a person signs on a document the name of another "'whom he intends to represent, it is no forgery; it is no *false making* of the instrument, but merely a false assumption of authority.'" *Wutzke*, 151 Cal. App. 3d at 42 (quoting *People v. Bendit*, 111 Cal. 274, 277 (1896)) (emphasis in original). Thus, there is no conflict between the law providing that "forgeries," as the term is used in criminal law, federal common law, and California cases like *Wutke*, cannot be ratified, and the law providing that "forgeries," as the term is used in California cases like *Rakestraw*, can be ratified. Both derive from the same

fundamentals of agency law. *See Ellison v. Jackson Water Co*., 12 Cal. 542, 542 (1859) ("The term 'ratified,' when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. For adoption and ratification there must be some relation, actual or assumed, of principal and agent."); *accord Rakestraw*, 8 Cal.3d at 72 (described the issues before it as "involv[ing] the application of traditional principles of agency law"); 12 Williston on Contracts § 35:29.[16]

Again, the evidence is strongly probative that the RICO Ringleaders fabricated the Fraudulent Employment Agreements and forged the signatures of Messrs. Freeman and Swearinger thereon with fraudulent intent and for their own fraudulent purposes, rather than purportedly on behalf of Messrs. Freeman and Swearinger. And, under California law, as under federal common law, if this is ultimately proven to be the case, no ratification of the documents was legally possible. Thus, the material issues of fact raised by this evidence require that the RICO Defendants' Motion be denied and Plaintiffs' Motion be granted.

3. Assuming *Arguendo* that California State Law Applied and, Notwithstanding Evidence of the RICO Ringleaders' Fraudulent Intent, the Fraudulent Employment Agreements Could be Ratified, There Would Still Be, at Least, Material Issues of Fact as to Whether the Purported Ratification Was Effective

Assuming away, first, the requirement that federal common law rather California State law be applied here and, second, the bar under California law to ratifications of forgeries done with fraudulent intent, there would still be insurmountable obstacles to finding, under the law described in *Rakestraw* and its progeny, that as a matter of law the ratifications were effective and thus no material issues of fact existed as to whether the Tribe entered the Fraudulent Employment Agreements by virtue of the purported ratification.

First, the law articulated in *Rakestraw* and its progeny, as a matter of logic, does not apply where the purported ratifiers, as here, are not the same individuals as those whose signatures were

[16] Ratifications of "forgeries" by agents purportedly done on behalf of principals at issue *Rakestraw* and cases like it also do not give rise to issues of compounding a felony, as the crime of forgery depends fundamentally on the forger not having acted purportedly on behalf of his/her principal, but rather with "the intent to defraud." Cal. Penal Code § 470.

forged. At their core, the holdings of *Rakestraw* and its progeny are based on a finding that the person whose name was signed, through his/her ratification, retroactively granted the person who signed on his/her behalf the authority to do so. *See, e.g., Rakestraw*, 8 Cal. at 73 ("Ratification is the voluntary election ***by a person to adopt in some manner as his own*** an act ***which was purportedly done on his behalf*** by another person, the effect of which, as to some or all persons, is to treat the act ***as if originally authorized by him***.") (emphasis added). This reasoning has no application in situations where, as here, the purported ratifiers are not the same individuals as those on whose signatures were forged. [17]

Second, none of the estoppel-related equitable concerns related to the protection of innocent third parties and issues of estoppel that animated the decisions to find ratifications in *Rakestraw* and its progeny are applicable here. The Tribe has taken no actions on which a finding of estoppel could be based and no innocent third party would be harmed if the Tribe was allowed to deny the validity of the Fraudulent Employment Agreements. Rather, the only parties harmed would be the RICO Ringleaders, i.e. the forgers themselves; and equity would be dramatically disserved by allowing the RICO Ringleaders to avoid, through the forgeries, answering for large portions of their more than a decade-long pattern of unlawful conduct. *Accord generally Allied Mut. Ins. Co. v. Webb*, 91 Cal. App. 4th 1190, 1195 (2001) (refusing to allow for ratification when the result would be inequitable).

Third, accepting *arguendo* that it was legally possible for Messrs. Swearinger, Ms. Freeman, and Ms. Lohse to have ratified the Fraudulent Employment Agreements, there are very significant material issues of fact as to whether: (1) the purported ratification was done by them without knowledge of material facts, and (2) the purported ratification was fraudulently induced. In either case, the purported ratification would have been ineffective. *See Rakestraw*, 8 Cal.3d at 73; *see also generally Gates v. Bank of America Nat'l Trust & Sav. Asso*., 120 Cal. App. 2d 571,

[17] In light of this and the other law already discussed, whether these four individuals had the authority to act as the lawful Tribal Council of the Tribe is essentially irrelevant. However, in point of fact, their claim to such authority is dubious at best. Moreover, Ms. Lohse, because of her very significant personal interest in the purported ratification was barred under the Tribe's Constitution from participating in the decision. *See* Magana Dec., Ex. A at Article VII(1)(d).

575 (1953) (whether a ratification of an unauthorized signature has occurred is a question of fact).

Among the material facts of which a purported ratifier must have knowledge in order for his/her ratification to qualify as "voluntary," and thus effective, is that the forgeries occurred. *Rakestraw*, 8 Cal.3d at 74. Here, the evidence strongly indicates that that not only were Messrs. Swearinger and Ms. Freeman not aware that the purported signatures of Andrew Freeman, Everett Freeman, and Carlino Swearinger on the Fraudulent Employment Agreements were forgeries, but that the RICO Ringleaders represented the opposite to them. *see* [Casamassima] Dec., ¶ 9, (Messrs. Swearinger and Ms. Freeman indicating that they believed Andrew Freeman, Everett Freeman, and Carlino Swearinger had signed the Fraudulent Employment Agreements based on information provided to them by Ms. Lohse and/or Mr. Crosby); *see also* Davies Dec., ¶¶ 6(e)(iii), 18(k)(i), 20(i-j) (RICO Ringleaders consistently claiming that Andrew Freeman, Everett Freeman, and Carlino Swearinger signed the Fraudulent Employment Agreements). Combined with evidence giving rise to material issues of fact as to whether the Fraudulent Employment Agreements were forgeries, this evidence gives rise to material issues of fact as to whether the purported ratifiers had the requisite knowledge of material facts when they purportedly ratified the documents, as well as the independent and related question whether the purported ratifiers were fraudulently induced to take such actions. In either case, their purported ratification would be ineffective.[18]

Similarly, there are materials issues of fact as to whether, at the time of the purported ratification, Messrs. Swearinger and Ms. Freeman had the requisite knowledge of the RICO Ringleaders' thefts for which the RICO Ringleaders sought, through the Fraudulent Employment Agreements, to evade responsibility; and there are material issues of fact as to whether, in fact, the RICO Ringleaders made related misrepresentations to Messrs. Swearinger and Ms. Freeman in order to induce them to "ratify" the documents. *See* Davies Dec., ¶¶ 6(j), 20(h), 22(f) (relating RICO Ringleaders' claim to have collectively spent approximately $4.5 million of the Tribe's

[18] In this context, the RICO Defendants' feigned lack of understanding how Plaintiffs could allege that the Fraudulent Employment Agreements are forgeries, notwithstanding their purported ratification by Messrs. Swearinger, Ms. Freeman, and Ms. Lohse, rings hollow. *See* Ds' Mtn. at 8.

money for personal purposes); *cf.* FAC, ¶¶ 5-7 (alleging the RICO Ringleaders stole many times this amount from the Tribe). This, again, independently prevents a finding, as a matter of law, that through the purported ratification the Tribe entered the Fraudulent Employment Agreements.

As the foregoing makes clear, there are very significant material issues of fact whether the Tribe ever entered the Fraudulent Employment Agreements. These material issues of fact bar an order staying this proceeding in favor of arbitration under those agreements and require, instead, an order staying any such arbitration, until a jury has answered this question.

II. Related and Independent Material Issues of Fact Exist as to Whether the Tribe Waived its Sovereign Immunity as to Suits in Arbitration Arising Out of the Fraudulent Employment Agreements

In order for there to be an enforceable contract to arbitrate with an Indian tribe, the tribe must have clearly waived its sovereign immunity as to such arbitration. *See C&L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). The purported ratification of the Fraudulent Employment Agreements by Messrs. Swearinger, Ms. Freeman, and Ms. Lohse does not purport to effect any independent waiver of sovereign immunity; rather, it purportedly "ratifies, confirms, approves and adopts all waivers of sovereign immunity of the Tribe in [the Fraudulent Employment Agreements]." D. Swearinger Dec., Ex. 3. Thus, if the Tribe never waived its sovereign immunity through the Fraudulent Employment Agreements, there was no waiver of sovereign immunity. As there exist significant material issues of fact as to whether this ever happened, this provides an independent basis on which to deny the RICO Defendants' Motion and grant Plaintiffs' Counter-Motion, regardless of whether the Court finds the purported ratification was legally effective;[19] and once again these material issues of fact primarily derive from the overwhelming evidence that the Fraudulent Employment Agreements are forgeries.

---

[19] Obviously, if the Fraudulent Employment Agreements were not capable of ratification due to their forged quality or the purported ratification was legally ineffective, the purported ratification would be as ineffective as to any provision in the documents purporting to waive sovereign immunity as it would be to any other provision. Thus, should the Court determine that there are material issues of fact in either regard, it need not separately examine whether there are material issues of fact as to whether the Tribe waived its sovereign immunity.

The RICO Defendants are vague as to whether they are claiming that the Fraudulent Employment Agreements directly effected a waiver of the Tribe's sovereign immunity on their own, or whether the purported waiver depends for its effectiveness on a General Council Resolution from 2003, which purportedly delegates the authority to waive sovereign immunity to the Tribal Council for future contracts and retroactively waives sovereign immunity for "all existing contracts of the Tribe related to the development, financing, and operation of the Rolling Hills Casino." D. Swearinger Dec., Ex. 5. Fundamentally, however, it does not matter. If the Fraudulent Employment Agreements are forgeries and thus void, any provision in the documents purporting to waive the Tribe's sovereign immunity would be as much a nullity as any other provision of the documents. Thus, these provisions could not be relied upon as effecting a direct waiver of the Tribe's sovereign immunity on their own.[20] However, this would also prevent the 2003 Resolution from having any effect in connection with the documents. The resolution's retroactive waiver of sovereign immunity explicitly covers only "***existing contracts*** of the Tribe." D. Swearinger Dec., Ex. 5 (emphasis added). As indicted by their description as "void" and "nullities," forged agreements are "not . . . contract[s] at all." Restatement (Second) Contracts § 7 comment a. Thus, the Fraudulent Employment Agreements, if forgeries, would not fall within the purview of the resolution's waiver.[21]

An additional material issue of fact—independent of those presented by the evidence of forgery—is whether, the Fraudulent Employment Agreements would qualify as "related to the development, financing, and operation of the Rolling Hills Casino" and thus fall within the

[20] An additional problem with any claim that the Tribe's sovereign immunity was waived directly via the Fraudulent Employment Agreements and the likely reason that the RICO Defendants reference the 2003 General Council Resolution is that under the Section 2 of the Tribe's Constitution only the General Council, and not the Tribal Council, has the authority to waive the Tribe's sovereign immunity. *See* Magana Dec., Ex. A; *see also generally Stillaguamish*, 2011 U.S. Dist. LEXIS 101222, at *17 ("where tribal law includes specific provisions governing immunity waivers, federal courts respect those provisions") (collecting cases). Thus, unless the Fraudulent Employment Agreements fell within the purview of the 2003 General Council Resolution, any waiver of sovereign immunity purportedly effected therein would be ineffective.

[21] A more prosaic issue in this regard is presented by the substantial evidence that the Fraudulent Employment Agreements were fabricated in the Spring/Summer of 2014 and thus did not exist at all, whether contracts or not.

purview of the 2003 General Council Resolution. D. Swearinger Dec., Ex. 5. As discussed in footnote 20 *supra*, as matter of Tribal law, unless the purported waivers in the Fraudulent Employment Agreements fell within the purview of the 2003 General Council Resolution or some other action by the General Council concerning waiver of sovereign immunity, they would not be effective. Only the Fraudulent Employment Agreement of John Crosby appears on its face to relate "to the development, financing, and operation of the Rolling Hills Casino," and the RICO Defendants present no evidence suggesting that those of the other three RICO Ringleaders do as well or that some other action by the General Council covers the waivers purportedly contained within them. Thus, as to these documents this would present another bar to requiring arbitration at this stage.

III. Even if *Arguendo* the Arbitration Provisions in the Fraudulent Employment Agreements Could Hypothetically Form the Basis for Arbitration between the Tribe and the RICO Ringleaders, Plaintiffs' Claims Are, at Most, Only Marginally Within their Scope and Thus, the RICO Defendants' Requested Stay Should be Denied

If the Court concludes there are material issues of fact whether the Tribe ever entered the Fraudulent Employment Agreements and/or waived its sovereign immunity related to the arbitration provisions therein, its analysis ends, and it need to inquire further whether Plaintiffs claims. However, assuming *arguendo* neither was the case, the Court should still deny the RICO Defendants' requested stay, as Plaintiffs' claims, if they fall within the scope of the arbitration provisions in the Fraudulent Employment Agreements at all, only do so marginally; while non-arbitrable claims predominate.

The arbitration provisions in Section 8(h) of the Fraudulent Employment Agreements state, in pertinent part, "[a]ny dispute or controversy arising under or in connection with this Agreement shall be settled first by arbitration…" D. Swearinger Dec., at Ex. 4.

The Ninth Circuit has held that such language reaches only a "dispute between the parties having a significant relationship to the contract" or which has its "origin or genesis in the contract." *Simula, Inc. v. Autoliv. Inc.*, 175 F.3d 716, 721 (9th Cir. 1999). In other words, the "factual allegations must 'touch matters' covered by the contract containing the arbitration clause in order for arbitration to be proper." *Porter v. Dollar Financial Group, Inc.,* No. 14-1638-WBS,

2014 US Dist. LEXIS 122865, at *5 (E.D. Cal. September 2, 2014) (quoting *Simula, Inc.*, 175 F.3d at 721).

Applying this standard, courts have refused to compel arbitration where claims do not require the interpretation of the contract containing the arbitration clause, or the evaluation of conduct with reference to the terms of the contract. *See e.g., Faegin v. LivingSocial, Inc.*, No. 14-0418, 2014 US Dist. LEXIS 147588, at *10 (S.D. Cal. October 15, 2014) (finding the plaintiff's claims "constitute independent wrongs and do not require interpretation of the Agreement or evaluation of either parties performance under the Agreement"); *Capital Group Communs. Inc. v. Xedar Corp.*, No. 13-1793, 2013 U.S. Dist. LEXIS 109856, at *11-12 (N.D. Cal. August 5, 2013), ("Plaintiffs' claims do not "arise out of" the [agreement] because the alleged misrepresentations...have nothing to do with the parties performance of the [agreement] or its interpretation...").

Similarly here, Plaintiffs' claims, in the main, do not require the Court to interpret the language of the Fraudulent Employment Agreements or evaluate the RICO Ringleaders' conduct pursuant to those purported agreements. Rather, they constitute wholly independent wrongs. For example, Plaintiffs' RICO claims, and civil conspiracy are based, *inter alia*, on the RICO Ringleaders' bribery, coercion, and concealment, s*ee* FAC ¶¶ 431-501, 569-574; Plaintiffs' federal and state cyber-crime claims are based upon the RICO Ringleaders' scheme to unlawfully access the Casino's network and destroy substantial amounts of electronic evidence following their removal*, see* FAC ¶¶ 502-518; Plaintiffs' claims of fraud are based upon, *inter alia*, the RICO Defendants purposeful and intentional concealment of numerous illicit acts, including, without limitation, their purchase of a private jet with Tribal money, establishment of illegal retirement accounts, and the location of certain Tribal funds, *see* FAC ¶¶ 526-546; and Plaintiffs' claims for intentional interference with prospective economic relations are premised on the RICO Ringleaders' purposeful diversion of potential Tribal financial opportunities for their own personal benefit, *see* FAC ¶¶ 547-553. No interpretation of any provision of the Fraudulent Employment Agreements is required to find any of this and other conduct alleged by the RICO Defendants' illegal.

Accordingly—even if, not withstanding the overwhelming evidence to this contrary, the Court found there were no material issues of fact as to whether the Tribe ever entered the Fraudulent Employment Agreements—it would still be inappropriate to grant the RICO Defendants' Motion to Stay.

IV. The RICO Defendants Have Come Nowhere Close to Showing that, as a Matter of Law, the Arbitration Provisions in the Fraudulent Employment Agreements Bar All of Plaintiffs from Pursuing Any of their Claims Here

As discussed *supra,* there are very significant material issues of fact as to whether there is *any* agreement to arbitrate *any* of Plaintiffs' claims, and even assuming *arguendo* that there was such an agreement, it does not include within its ambit all of Plaintiffs' claims. Accordingly, there is no basis on which to find that, as a matter of law, *all* of Plaintiffs' claims are barred by the arbitration provisions in the Fraudulent Employment Agreements and thus no basis on which to dismiss Plaintiffs' complaint. *Cf. Sparling*, 864 F.2d at 638. Thus, the RICO Defendants request that they be freed from the possibility of having to answer for their unlawful actions in federal court must be denied.

CONCLUSION

Dated: June 15, 2015

GROSS LAW, P.C.

By: */s/ Stuart G. Gross*
STUART G. GROSS

Exhibit A

(Comparison Between the 1/1/01 JC Contract; Fraudulent Employment Agreements)

1/1/01 JC Contract (A. Freeman Dec., Ex. A)	**Fraudulent Employment Agreements** (Davies Dec., Exs. D-G)
• No LOC.	• $5,000,0000 LOC at 1% *per anum* simple interest, borrowable "from any Employer's businesses or enterprises," forgiven if terminated without cause or by decision of the Tribe at end of term of employment. § 3(d).
• At will employment term. § 1.1.	• Nineteen-year term of employment. § 4(a)
• Bonuses to be set via annual negotiation unless fixed at set percentage. § 3.2.	• Bonuses "based on the performance of the Enterprises of the Employer." § 3(c).
• No provision concerning board service.	• "[C]ompensation in the form of payroll or stipends for all other boards that Executive resides on in order to fulfill his/her duties for Employer's benefit." § 2(b).
• Termination for cause for if the RICO Ringleader: (a) confesses, pleads guilty or is convicted of theft, larceny or embezzlement from Tribe; (b) confesses, pleads guilty or is convicted of a felony; (c) confesses, pleads guilty or is convicted of crimes involving moral turpitude in federal or state court; or (d) "grossly violates any explicit term of this Agreement." § 2.2.	• Termination for cause only if RICO Ringleader: (a) confesses, pleads guilty or is convicted of theft, larceny or embezzlement from Tribe; or (b) confesses, pleads guilty or is convicted of a felony. § 4(b).
• Severance pay contingent on compliance with non-compete provision. §§ 3.4-3.5.	• Severance pay contingent only on execution of a release. § 6(a).
• Detailed provision re: ownership and return of documents Tribe's documents. § 4.1	• No ownership and return of documents provision.
• Detailed, two-page long confidential information provision. § 4.2.	• Minimal, two-sentence long confidential information provision. § 5(a)
• Detailed non-solicitation provision, covering clients, customers, and employees of Tribe in perpetuity. § 4.3.	• Minimal non-solicitation provision, covering only clients and customers of Tribe for a period of just three-months after termination. § 5(b)
• Detailed non-compete provision. § 4.4.	• No non-compete provision.
• Detailed provisions acknowledging reasonableness of restrictions imposed on Mr. Crosby and providing for preliminary and permanent injunctive relief if violated	• No reasonableness or injunctive relief provision.

by Mr. Crosby's. §§ 4.5, 4.7.	
• Detailed indemnity provision in favor of Tribe in the event of suit by a former employer of Mr. Crosby. § 4.6.	• No prior employer suit indemnity provision.
• Prohibition of assignment by Mr. Crosby. § 5.1.	• No such prohibition of assignment.
• Right of Tribe to assign. § 5.2.	• No provision for right of Tribe to assign.
• Provision requiring all modifications of the agreement be in writing, signed by both parties. § 6.3.	• No provision governing modifications.
• Indian Gaming Regulatory Act ("IGRA") compliance provision. § 6.12	• No IGRA compliance provision.

Exhibit B

(Comparison Between Mr. Crosby's Fraudulent Employment Agreement; the 1/1/01 JC Contract; and the 2003 JC Proposed Employment Agreement)

Mr. Crosby's Fraudulent Employment Agreement (Davies Dec., Ex. E)	**1/1/01 JC Contract** (A. Freeman Dec., Ex. A)	**2003 JC Proposed Employment Agreement** (Winters Dec., Ex. A)[22]
• $5,000,0000 LOC at 1% *per anum* simple interest, borrowable "from any Employer's businesses or enterprises," forgiven if Mr. Crosby is terminated without cause or by decision of the Tribe at end of term of employment. § 3(d).	• No LOC.	• No LOC
• Discretionary bonuses "based on the performance of the Enterprises of the Employer." § 3(c).	• Bonuses to be set via annual negotiation unless fixed at set percentage. § 3.2.	• Bonuses to be set via annual negotiation unless fixed at set percentage. § 3.2.
• "[C]ompensation in the form of payroll or stipends for all other boards that Executive resides on in order to fulfill his/her duties for Employer's benefit." § 2(b).	• No provision concerning board service.	• No provision concerning board service.
• Termination for cause only if Mr Crosby: (a) confesses, pleads guilty or is convicted of theft, larceny or embezzlement from Tribe; or (b) confesses, pleads guilty or is convicted of a felony. § 4(b).	• Termination for cause for if the RICO Ringleader: (a) confesses, pleads guilty or is convicted of theft, larceny or embezzlement from Tribe; (b) confesses, pleads guilty or is convicted of a felony; (c) confesses, pleads guilty or is convicted of crimes involving moral turpitude in federal or state court; or (d) "grossly violates any explicit term of this Agreement." § 2.2.	• Same grounds as in the 1/1/01 JC Contract and additional grounds. § 2.1(c)
• No ownership and return of documents provision.	• Detailed ownership and return of documents provision, prohibiting the	• Detailed ownership and return of documents provision, prohibiting the

[22] Except where specifically noted, description relates to draft included with Mr. Winters July 31, 2003 letter to Everett Freeman and Leslie Lohse, on behalf of the Tribe. *See* Magana Dec., Ex. #.

	copying, use, removal, etc. of the Tribe's document for personal purposes, and requiring return of all Tribe's documents at termination or on demand from Tribe. § 4.1	copying, use, removal, etc. of the Tribe's document for personal purposes, and requiring return of all Tribe's documents at termination or on demand from Tribe. § 4.1
• Minimal, two-sentence long confidential information provision. § 5(a)	• Detailed, two-page long confidential information provision. § 4.2.	• Detailed, two-page long confidential information provision. § 4.2.
• Minimal non-solicitation provision, covering only clients and customers of Tribe for a period of just three-months after termination. § 5(b)	• Detailed non-solicitation provision, covering clients, customers, and employees of Tribe in perpetuity. § 4.3.	• Detailed non-solicitation provision, covering clients, customers, and employees of Tribe in perpetuity. § 4.4.
• No non-competition provision.	• Detailed non-competition provision. § 4.4.	• Detailed non-competition provision. § 4.4.
• No reasonableness or injunctive relief provision.	• Detailed provisions acknowledging reasonableness of restrictions imposed on Mr. Crosby and providing for preliminary and permanent injunctive relief if violated by Mr. Crosby's. §§ 4.5, 4.7.	• Detailed provisions acknowledging reasonableness of restrictions imposed on Mr. Crosby and providing for preliminary and permanent injunctive relief if violated by Mr. Crosby's. §§ 4.6, 4.8.
• No prior employer suit indemnity provision.	• Detailed indemnity provision in favor of Tribe in the event of suit by a former employer of Mr. Crosby. § 4.6.	• Detailed indemnity provision in favor of Tribe in the event of suit by a former employer of Mr. Crosby. § 4.7.
• No prohibition of assignment by Mr. Crosby.	• Prohibition of assignment by Mr. Crosby. § 5.1.	• Prohibition of assignment by Mr. Crosby. § 5.1.
• No provision for right of Tribe to assign.	• Right of Tribe to assign. § 5.2.	• Right of Tribe to assign. § 5.1.
• No provision governing modifications.	• Provision requiring all modifications of the agreement be in writing, signed by both parties. § 6.3.	• Provision requiring all modifications of the agreement be in writing, signed by both parties. § 5.4.