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

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

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

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: July 27, 2015
Time: 9:00 a.m.
Courtroom: 10
Hon. Garland E. Burrell, Jr.

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I. INTRODUCTION

Plaintiffs Motion For A Preliminary Injunction is based on speculation, exaggerated and, at times, outright mischaracterized facts. At its core, what little evidence Plaintiffs have proffered fails to establish their burden of establishing a likelihood of irreparable harm if the Court does not freeze Defendants' assets ("Defendants" as used herein means defendants Leslie Lohse, Larry Lohse, John Crosby and Ines Crosby).

Plaintiffs spend pages engaging in fanciful speculation describing the allegedly wrongful acts Defendants committed in order to conceal their alleged financial improprieties, accusing Defendants of suspending a Tribal member who blew the whistle on them, bribing two people who allegedly knew the Tribe had purchased a jet in order to keep them quiet, orchestrating a cyber-attack, stealing money after they were locked out of the Tribe, and hiding the Tribe's jet in order to hold it as ransom. Plaintiffs go so far as to falsely accuse Defendants of hiring "armed thugs with automatic weapons" in a last ditch effort to maintain their control over the Tribe.

In comparison to Plaintiffs' speculation and unsupported leaps of logic, the declarations of Plaintiff's former Tribal Council members submitted concurrently with this opposition show just how wrong Plaintiffs are on the facts. The declarations of Geraldine Freeman, David Swearinger and Allen Swearinger – all of whom are disinterested parties – not only refute Plaintiffs' assertions that Defendants engaged in activities to cover their tracks, but also refute the key arguments underlying Plaintiffs motion.

The voice of the Tribe's government cannot be overlooked or brushed aside as Plaintiffs are so quick to do in their quest to destroy Defendants over what, at its core, is an intra-Tribal membership feud.[1] Not only do those declarations show that the acts Plaintiffs attempt to attribute to Defendants were, in reality, acts of the Tribal Council, but the declarations also establish the Tribal Council was so pleased with Defendants' tireless services

[1] See Plaintiffs First Amended Complaint ¶¶82-88, where Plaintiffs allege the beginnings of the alleged RICO conspiracy when Defendants' forced their way onto the Tribe's membership rolls under "illegitimate and coercive means" and allege that Defendants' gained membership in the Tribe under "circumstances that are irregular at best."

to the Tribe, and the results Defendants were producing, that the Tribal Council was not at all concerned with the compensation and perquisites Defendants were getting.

The facts demonstrate that Plaintiffs have not, and cannot, established a likelihood of irreparable harm if the Court does not freeze Defendants' assets. Defendants have not engaged in any activity showing they are likely to dissipate their assets or place them out of reach of the Court. And, Plaintiffs cannot point to any persuasive evidence showing otherwise.[2] Moreover, Plaintiffs have not established the other elements necessary for issuance of a preliminary injunction, including a probability of success of establishing the Court has subject matter jurisdiction of this Tribal dispute.

Plaintiffs' true motives for seeking an injunction are revealed through its patently overbroad and unsupported request the Court limit their collective monthly expenditures on attorneys' fees to $10,000 ($2,500 each per month). Plaintiffs cite no authority supporting their efforts to cripple Defendants. Even the cases Plaintiffs cite where courts have frozen assets do not limit the enjoined parties' legal fee expenditures.

Defendants respectfully request that the Court deny Plaintiffs' motion in its entirety.

II. **BRIEF FACTUAL OVERVIEW**

For the last several years until September 13, 2014, Plaintiff's Tribal Council consisted of Chairman Andrew Freemen (who replaced his father Everett Freeman), Vice-Chairman David Swearinger, Geraldine Freemen, Allen Swearinger, and defendant Leslie Lohse.

On April 12, 2014, Andrew Freeman and persons associated with him (the "Freeman Faction") staged a coup of sorts to oust from the Tribe Leslie Lohse and the entire Pata family from whom she and the other Defendants involved in this motion (not including Larry Lohse) derive their Nomlaki heritage. Leslie Lohse Decl. ¶ 4. According to Chairman Andrew Freeman and the Freeman Faction, the Pata family was not true Nomlaki blood. Id. ¶ 5; see also Plaintiff's First Amended Complaint ("FAC") ¶82 (discussing blood lines and alleging

[2] Plaintiffs are sure to make much of the fact defendant John Crosby made limited effort to sell a Mustang after Plaintiffs filed this Motion. Mr. Crosby was asking *over* the Kelly Blue Book value for the vehicle and only contacted one person about selling it. Such behavior is not indicative of a likelihood to dissipate assets. See Docket #78.

Pata family obtained membership under "unusual circumstances" thus beginning the decades-long RICO conspiracy).

As a result of the Freeman Faction's actions, Vice-Chairman David Swearinger, Geraldine Freeman, and Allen Swearinger, all of whom are related to the Freeman/Simmons families, stood with Leslie Lohse and resisted Chairman Freeman's actions. Leslie Lohse Decl. ¶ 6. Undeterred, the Freeman Faction seized control of the Tribe's thriving casino, the Tribal business office, and excluded the entire Pata family from Tribal property (including Defendants), and excluded Tribal Council members David Swearinger, Geraldine Freeman, and Allen Swearinger from Tribal property. The Freeman Faction then purported to appoint a new Tribal Council chaired by Andrew Freeman. Id. ¶7.

Despite the Freeman Faction's actions, the Tribal Council members remained Andrew Freeman, David Swearinger, Geraldine Freeman, Allen Swearinger, and Leslie Lohse. See, e.g., David Swearinger Decl. ¶ 5 ("D. Swearinger Decl."). This was also the Tribal Council recognized by the federal government as the government of the Paskenta Band of Nomlaki Indians. Id. at ¶5 & Exs. 1-3. This Tribal Council continued to be the Tribe's lawful government until the make-up of the Tribal Council changed subsequent to a September 13, 2014 vote of the Tribe's General Council. Id. ¶ 5.

After the events of April 12, 2014, members of the Freeman Faction forced their way into the Tribe's business office in the middle of the night and carted away computers, financial records, and Tribal documents. There is video of individuals walking out of the Tribe's office in the middle of the night with the Tribe's computers and records. Leslie Lohse Decl. ¶ 9; Ines Crosby Decl. ¶ 12 (I. Crosby Decl.").

To prove Defendants' alleged financial misdeeds, Plaintiffs have provided the Court with an incomplete set of financial records, in the way of some bank records, but then fail to

explain how those records demonstrate a likelihood of success on their underlying claims.[3] Rather than proffer evidence that the financial transactions in questions are unauthorized or unlawful, Plaintiffs simply raise questions about certain financial transactions and then ask the court to rely on the WilmerHale report, including the findings of fact and conclusions contained therein, as evidence.

While the Court may give hearsay evidence "some" weight, Plaintiffs' request that the Court rely on the findings and conclusions set forth in the WilmerHale report appears to go well beyond the holding of Flynt Distributing Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984) , and similar cases, and should be declined.

Additionally, although Plaintiffs claim Defendants were robbing the Tribe blind, the declarations of Geraldine Freeman, David Swearinger, and Allen Swearinger paint a very different picture. These former Tribal Council members set forth in their declarations that they believed Defendants were worth every penny of the $5 million dollar lines of credit the Tribal Council voted to approve in September 2014. See D. Swearinger Decl. 6:6-11; Geraldine Freeman Decl. 4:19-26 ("G. Freeman Decl."); Allen Swearinger Decl. 2:24-27 ("A. Swearinger Decl."). This disinterested majority of the Tribal Council also states that, as Tribal Council Members, they were not at all concerned with the compensation, benefits and perquisites Defendants were receiving because Defendants had played such a vital and continuing role in the Tribe's unparalleled financial and social success. G. Freeman Decl. 5:5-7; D. Swearinger Decl. 6:25-27; A. Swearinger Decl. 3:3-5.

As set forth in more factual detail below, and in the declarations of the former Tribal Council Members, virtually all of the post-April 12, 2014 acts Plaintiffs attribute to Defendants were actions the Tribal Council directed or approved. The notion Defendants were thugs who ruthlessly guarded their power and went to extreme measures to cover the tracks of their

[3] It is impractical for Defendants, with only 2 weeks to prepare an opposition, to be able to explain each and every financial transaction based on the limited and incomplete records Plaintiffs provide to the Court. For instance, Plaintiffs question Paskenta Enterprises Corporation's expenditures but do not offer any board meeting minutes or resolutions showing discussion of the expenditures, yet such documents existed prior April 12, 2014. See John Crosby Decl. ¶15 ("J. Crosby Decl.").

alleged crime syndicate is contradicted by the Tribal Council's declarations and unsupported by the evidence.

III. **STANDARD**

A. The Party Seeking An Injunction Must Establish A Reasonable Probability That The Court Has Jurisdiction Over The Dispute.

As a threshold issue, when a defendant raises a jurisdictional challenge, a court may not issue a preliminary injunction unless the plaintiff establishes a reasonable probability that jurisdiction exists. A prima facie showing of jurisdiction is not enough. Rather, a "plaintiff is required to adequately establish that there is at least a reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits." Enterprise. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 470-71 (5th Cir. 1985). In Enterprise, the Fifth Circuit Court of Appeals stated,

> Fed.R.Civ.P. 65 determines only the method of seeking and obtaining any sort of an injunction, and has no bearing on either the jurisdiction to exercise, or the propriety of exercising, the injunctive power. Because Rule 65 confers no jurisdiction, the district court must have both subject matter jurisdiction and in personam jurisdiction over the party against whom the injunction runs. . . . The district court has no power to grant an interlocutory or final injunction against a party over whom it has not acquired valid jurisdiction. . . . As we stated long ago in reviewing the injunctive power of the district court: [T]he question of jurisdiction is always vital. A court must have jurisdiction as a prerequisite to the exercise of discretion. . . .
>
> The Second Circuit in Visual Sciences, Inc. v. Integrated Communications, Inc. [660 F.2d 56 (2d Cir.1981)] noted that ordinarily a plaintiff need only make a prima facie showing of jurisdiction in response to a motion to dismiss, in the absence of a full-blown hearing on the merits. Before a trial court may validly enter a preliminary injunction, however, more is required: Where a challenge to jurisdiction is interposed on an application for a

> preliminary injunction [t]he plaintiff is required to adequately establish that there is at least a reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits.

Internal citations omitted; cited with approval in Leo Servs., Inc. v. Gabon Airlines, 2008 WL 4723241, at *3 (C.D. Cal. Oct. 23, 2008).

B. Standard Applicable To Injunctions Freezing Assets

In addition to establishing through admissible evidence a reasonable probability that jurisdiction exists, "[a] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Johnson v. Couturier, 572 F.3d 1067, 1078 (9th Cir. 2009) (quoting Winter v. Natural Res. Defense Council, Inc., 555 U.S. 7 (2008)).[4]

A preliminary injunction may not be granted based on a "possibility" of irreparable harm. Rather, a plaintiff "must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (emphasis in original). Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

Likewise, establishing a risk of irreparable harm in the indefinite future is not enough. The harm must be shown to be imminent. Church v. City of Huntsville, 30 F3d 1332, 1337 (11th Cir. 1994); see also Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008) (stating that a preliminary injunction is an "extraordinary remedy that may only be

[4] As an alternative to demonstrating a likelihood of success on the merits, a plaintiff may show the existence of "serious questions" going to the merits and that the balance of hardships tips sharply in the plaintiff's favor, provided the plaintiff also demonstrates he is likely to suffer irreparable harm and the injunction is in the public interest. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-1135 (9th Cir. 2011). "Serious questions" going to the merits "need not promise a certainly of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'" Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc) (quoting National Wildlife Fed'n v. Coston, 773 F.2d 1513, 1517 (9th Cir. 1985)).

awarded upon a clear showing that the plaintiff is entitled to such relief."). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects. Church, 30 F.3d at 1337 (internal quotes and references omitted).

When a plaintiff seeks an injunction freezing a defendant's assets, the plaintiff must present evidence that in the absence of an injunction, the defendant is likely to dissipate or place his assets outside the reach of the court. See Securities and Exchange Commission v. ABS Manager, LLC, 2013 WL 1164413 at *6 (denying SEC's request for asset freeze because no evidence defendant would dissipate allegedly ill-gotten assets). "Courts have construed this standard narrowly, only exercising their inherent authority to freeze assets where there is considerable evidence of likely asset dissipation." Allstate Ins. Co. v. Baglioni, 2011 WL 5402487, at *2 (C.D. Cal. Nov. 8, 2011).

IV. **DISCUSSION**

Defendants oppose Plaintiffs' motion for a preliminary injunction on the grounds that (1) Plaintiffs have not established a reasonable possibility the Court has subject matter jurisdiction, and (2) Plaintiffs' evidence fails to establish a likelihood of irreparable harm if an injunction is not entered. Defendants also oppose the motion on the basis that the balance of equities and the public's interest does not favor injunctive relief, and on the basis Plaintiffs cannot show a reasonable likelihood of success on the merits. Finally, Defendants oppose Plaintiff's request that the Court limit their monthly attorney's fees expenditures.[5]

A. Plaintiffs Have Not Established A Reasonable Probability Of Ultimate Success On The Question Of Subject Matter Jurisdiction, And An Injunction Therefore Should Not Issue.

Defendants have raised a jurisdictional challenge by filing a motion to dismiss the case for lack of subject matter jurisdiction, which motion is pending. Rather than repeat the lengthy

[5] For purposes of this motion only, and without prejudice, Defendants cannot defend against each financial transaction raised by Plaintiffs in the limited time available. However, Defendants do challenge Plaintiffs' likelihood of success on the merits on legal grounds and on the fact set forth in the declarations of Geraldine Freeman and David Swearinger. See Section IV.E., *infra*.

arguments here, Defendants incorporate their opening and reply arguments in support of their motion to dismiss, and request the Court take judicial notice of, and consider, those filings, as well as the additional facts presented with this opposition.

Because Defendants have raised a challenge to the Court's subject matter jurisdiction over this Tribal matter, Plaintiffs are "'required to adequately establish that there is at least a reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits.'" See Enterprise, 762 F.2d at 471 (quoting Visual Sciences, Inc., 660 F.2d 56 (2d Cir.1981)). A prima facie showing of jurisdiction by a Plaintiff is not sufficient for issuing a preliminary injunction. See id.

Defendants raised a challenge to the Court's subject matter jurisdiction over this matter many weeks prior to Plaintiffs filing this motion. Yet, Plaintiffs set forth *no* evidentiary facts demonstrating a probability of ultimate success on the question of jurisdiction. It is Plaintiff's burden to establish jurisdiction. Id. Plaintiffs have not met that burden. Plaintiffs' motion should be denied on this basis alone.

B. Plaintiffs' Conclusory And Speculative Evidence Fails To Establish A Likelihood Of Irreparable Harm In The Absence Of Preliminary Relief. The Evidence Establishes No Defendant Has Or Will Dissipate Assets Or Put Assets Out Of Reach Of The Court.

1. Plaintiffs' Have Failed To Make Any Individualized Showing That Each Individual Defendant Is Likely To Cause Plaintiffs To Suffer Irreparable Harm By Dissipating Or Hiding Assets.

As an initial matter, Plaintiffs lump all Defendants together, pejoratively refer to Defendants as RICO Ringleaders, and broadly assert all Defendants should be enjoined. Plaintiffs, however, are seeking injunctions against each individual and are therefore required to show that each individual is likely to dissipate assets or put them beyond the reach of the Court before the Court can enjoin them.

As detailed more factually below, Plaintiffs have presented no evidence showing that each Defendant (or any one individual) is likely to dissipate assets or put their assets out of reach of the Court. Absent that showing, Plaintiffs motion should be denied.

2. The Evidence Shows Plaintiffs Are Not Likely To Suffer Irreparable Harm If An Injunction Is Not Issued.

Even assuming Defendants can be enjoined without any individualized showing that each defendant is likely to dissipate assets, Plaintiffs still have not established their burden of proving they are likely to suffer irreparable harm if the Court does not issue an injunction. Each of the alleged instances of past conduct cited by Plaintiffs is a distorted exaggeration based on speculation and inference, contradicted by Defendants' evidence.

a. Plaintiffs' Flimsy Argument Defendant John Crosby Bribed Two Tribal Employees To Keep Them Quiet About The Tribe's Ownership Of A Jet Is Unsupported And Illogical.

As one of many alleged examples of Defendants' alleged propensity to hide or dissipate assets, Plaintiffs claim Defendants (John Crosby in particular) bribed two Tribe members to prevent them from revealing Defendants' caused the Tribe to buy a jet. See Mot. 16:10.

According to Casino executive Bruce Thomas, defendant John Crosby bribed his own uncles, John and Ted Pata, with new pickup trucks to keep them quiet about the existence of a jet the Tribe purchased. See Mot. 16:15-24; J. Crosby Decl. 2:9 (identifying John and Ted Pata as his uncles). Yet both John and Ted Pata received the new trucks in return for their substantial assistance and expertise in helping the Tribe realize a business opportunity and then helping to build a two million dollar horse arena at the Casino on their own time (both are former commercial construction superintendents). Murray Decl. Exs. 1 & 2 (attaching discovery responses from Ted and John Pata). John Crosby confirms this. See John Crosby Decl. ¶4.

In contrast, Plaintiff's "evidence" is Bruce Thomas' speculation, which is neither admissible nor sufficient to establish a likelihood of irreparable harm. See American Passage Media Corp. v. Cass Communications, Inc., 750 F.2d 1470, 1473 (9th Cir. 1985) (stating conclusory affidavits lacking sufficient support cannot establish a likelihood of irreparable harm).

Bruce Thomas, the CEO of the Casino, knew about the jet. He claims Ted Pata told him about it in September, 2011. B. Thomas Decl. ¶5. Additionally, he flew on the Tribe's jet between 12 and 20 times over the past several years, sometimes with his wife. See J. Crosby Decl. ¶5. Other Casino executives also knew about the jet, including Jeff Realander and Terry Contreras. Id. Chuck Galford, who was a director and executive of Plaintiff Paskenta Enterprises Corporation (and who filed a declaration in support of Plaintiffs' opposition to Defendants' motion to stay at Docket #67-12) regularly flew on the jet, including multiple trips for personal travel. Id. Executives of TEPA, LLC, which is a business owned by the Tribe flew on the jet, too. Id.

Not only did Plaintiffs' business and Casino executives know about the jet, but Chairman Freeman also knew about the jet. See G. Freeman Decl. 2:16-19; J. Crosby Decl. 3:7; see also D. Swearinger Decl. ¶10 (describing discussion with Andrew Freeman about buying a jet).

If multiple executives at the Casino knew about the jet, what good would it do to bribe John and Ted Pata to keep them quiet? Plaintiffs' speculative argument just does not hold up under the weight of fact and logic.[6]

b. Plaintiffs' Assertion Defendants Threatened And Suspended Tribal Members Who Questioned Their Actions Is Not Credible In Light Of The Tribal Council Members' Declarations.

(1) Chairman Andrew Freeman Wanted To Disenroll, Rather Than Merely Suspend, Kimberly Freeman For Actions He Called "Treason."

Plaintiffs claim Defendants suspended Tribe members who threatened to expose their alleged wrongdoings. The evidence Plaintiffs put forward is a declaration from Kimberly Freeman (Chairman Andy Freeman's sister) stating that at a Tribal Council meeting in

[6] Plaintiffs assert that defendant John Crosby single-handedly prevented the IRS from auditing the Tribe. Mot. 17:19-20; Bruce Thomas Decl. 2:1-4. If Mr. Crosby is that savvy, it begs the question why he would bribe John and Ted Pata, who are his uncles, to be quiet about the jet while not bribing non-relatives such as Bruce Thomas and other Casino executives who would be less inclined than family to keep such a secret.

November 2013, she questioned the Tribe's purchase of a jet and questioned actions taken by defendant John Crosby's wife. She further states that during that Tribal Council meeting, Defendant John Crosby told her she was "done" because she questioned Defendants' expenditures, and that Defendants caused her to be suspended from the Tribe because she questioned Defendants' spending. See K. Freeman Decl. ¶¶3-5.

Again, Plaintiffs' assertion about Defendants is exaggerated and not credible.[7] The Tribal Council, and not Defendants, suspended Kimberly Freeman after a noticed hearing. See G. Freeman Decl. ¶¶ 7-8; D. Swearinger Decl. ¶¶7-8; A. Swearinger Decl. ¶4. And despite Ms. Freeman's speculation and Plaintiff's fanciful assertions, Ms. Freeman's suspension had nothing to do with her questioning the Tribe's purchase of a jet or what she alleged John Crosby's wife had done. See id.

No Tribal Council member voted against suspending Ms. Freeman. Id. Moreover, Chairman Andrew Freeman wanted to disenroll Ms. Freeman from the Tribe (i.e., permanently terminate membership). Id. He repeatedly called Ms. Freeman's actions "treason." See G. Freeman Decl. 3:3-5; D. Swearinger Decl. 3:1-3. Kimberly Freeman's and Andrew Freeman are siblings. Id.

Plaintiffs' fanciful assertion that *Defendants* suspended Ms. Freeman to keep her quiet is belied by the evidence.

(2) The Fact The Tribe Had Purchased A Jet Was Known By Chairman Andrew Freeman Before Kim Freeman Questioned The Expenditure.

Not only did Kimberly Freeman's suspension have nothing to do with questioning the Tribe's ownership of a jet, but Tribal Council members and others recall that Chairman Andrew Freeman acknowledged he already knew about the jet before Kimberly Freeman ever

[7] Despite her declaration stating a verbal exchange occurred between John Crosby and herself at the November 2013 Tribal Council meeting, the Tribal Council members at that meeting did not see it occur. See also John Crosby Decl. ¶6 (stating he did not threaten Kimberly Freeman); see also G. Freeman Decl. 2:14-15; D. Swearinger Decl. 2:21-22; A. Swearinger Decl. 2:9 (stating they did not see John Crosby confront Kimberly Freeman at the meeting in question).

questioned the expenditure in November 2013. This undercuts the assertions in Kimberly Freeman's declaration, and reveals the fallacy of Plaintiffs' claims that Defendants lied and concealed the fact they caused the Tribe to purchase a private jet. See Mot. 16:23-24.

At the Tribal Council meeting during which Kimberly Freeman raised questions about the jet, Council Member Geraldine Freeman heard Andrew Freeman state words to the effect, "***Of course we have a jet. Why wouldn't we?***" G. Freeman Decl. 2:16-19. She also heard Chairman Freeman acknowledge he previously knew the Tribe owned a jet. Id.

John Crosby recalls that in response to Kimberly Freeman's questioning about the Tribe's ownership of a jet, Andrew Freeman said words to the effect of, "*Of course we have a jet. This isn't some mom and pop operation. If you're going to be a big company, you have to act like a big company*." J. Crosby Decl. ¶7.

Council Member David Swearinger recalls having a discussion with Andrew Freeman in 2007 or 2008, *while the two were riding on a private jet together that the Tribe had chartered*, about how the Tribe should look into buying a jet. D. Swearinger Decl. 3:12-16.[8] Council member David Swearinger thought that the Tribe owning a jet would be a good business decision for the Tribe. Id.

(3) The Tribal Council Never Discussed The Jet After Kimberly Freeman Questioned The Expenditure.

Another nail in the coffin of Plaintiffs' assertion that Defendants were thugs silencing anyone who challenged them is the fact that after Kimberly Freeman challenging the Tribe's ownership of a jet, the Tribal Council never followed up on the issue. See G. Freeman Decl. 2:19-23; D. Swearinger Decl. 3:7-11; A. Swearinger Decl. ¶5. According to the disinterested Tribal Council members in this dispute, *the Tribe's ownership of a multi-million dollar jet was such a minor issue, it did not even warrant discussion*. Id.

[8] Council Member David Swearinger states that private jet travel was a necessity for the Tribe developing other business and investment opportunities, and explains his reasons why in his declaration. See D. Swearinger Decl. ¶10.

c. Plaintiffs' Assertion Ted And John Pata Tried To Cover Up Ines Crosby's Financial Transaction At The Casino Is Unsupported.

At page 8, lines 26-28, of Plaintiffs' motion, Plaintiffs claim John and Ted Pata tried to somehow cover-up the fact Ines Crosby was cashing a check at the Casino. The support for this is a declaration from Brandin Paya containing multiple levels of hearsay by and through individuals lacking any personal knowledge. For some unknown reason, Plaintiffs neglect to have the employee directly involved in the alleged situation provide a declaration.

How this alleged activity translates into a likelihood Defendants will dissipate their assets is not explained. And in contrast to Plaintiffs' vague hearsay evidence, Ted and John Pata stated in their verified discovery responses that neither has ever directed an employee of the Casino not to surveil. See J. Murray Decl. Exs. 1 & 2. Additionally, Ines Crosby did not see Ted Pata at the Casino that day. See I. Crosby Decl. ¶6.

Moreover, Plaintiffs acknowledge the Tribe's Casino prepared an IRS Currency Transaction Report documenting the transaction in question, and did so at the time Plaintiffs' claim the Tribe was under Defendants' iron-fist rule. See B. Paya Decl. (attaching currency transaction report). Plaintiffs' own evidence shows there was obviously no intent to hide the transaction by Ines Crosby or the other Defendants.

d. Plaintiffs' Assertion That Defendants Prevented Financial Audits Is Completely Unsupported By Fact.

Rather incredibly, Plaintiffs assert that John Crosby singlehandedly stopped the Internal Revenue Service from auditing the Tribe. See Mot. 17:19-22. Plaintiffs' proof is a statement in the declaration of Bruce Thomas that is based on speculation and lacks personal knowledge, and should not be considered. See B. Thomas Decl. ¶12 (stating, without support, "it is my understanding"); see American Passage Media Corp., 750 F.2d at 1473 (conclusory affidavits lacking sufficient support cannot establish a likelihood or irreparable harm).

The idea that an individual like John Crosby could stop the IRS is so highly exaggerated that it shows the lengths to which Plaintiffs will go to distort reality to suit their

needs. Not even individual Senators and Congressmen can stop the IRS. Moreover, the assertion is simply not true. See J. Crosby Decl. 8.

In the same vein, Plaintiffs claim that Defendants "intentionally structured" the receipt of federal funds under so-called 638 Contracts to avoid an audit by the federal government. See Mot. 17:23-18:11. Plaintiffs' evidence for this assertion is a declaration from its new Tribal Administrator, Jim Willis, stating the 638 contracts "appear" to be structured to avoid audits, and he "believes" the contracts were intentionally structured that way. See J. Willis Decl. ¶4.

While these statements from Mr. Willis might be sufficient to establish the 638 Contracts were under the audit threshold, they are not sufficient to establish, or support an inference, that the contracts were intentionally structured in that manner to avoid audits or that Defendants were responsible for doing so. This is particularly true in light of the declaration of Ines Crosby briefly explaining why it was difficult to get substantial amounts of 638 Contract dollars, and the declaration of Leslie Lohse stating that each year the Tribal Council approved through a resolution the gifting of the Tribe's 638 money to the BIA. See I. Crosby Decl. ¶5; Leslie Lohse Decl. ¶13. Geraldine Freeman also states that the Tribal Council was very aware of the fact that it could have directed that audits be performed, but never took that step under Chairman Freeman's leadership. See G. Freeman Decl. 4:27 to 5:3. If fault for a lack of audits is to be placed anywhere, it would be on the Tribal Council, not Defendants. Plaintiffs' assertion Defendant somehow rigged the 638 Contracts to avoid audits is simply unsupportable.

e. Plaintiffs' Characterizations And Allegations Of Defendants' Post-April 12, 2014 Acts Are Completely Belied By Fact.

Defendants next assert that after the Freeman Faction seized control of the Tribe on April 12, 2014, Defendants engaged in a series of transactions designed to steal money, hide assets, and destroy evidence. Once again, fact belies Plaintiffs' wild and speculative assertions.

(1) Ines Crosby's Withdraws Of Money From Tribal Bank Accounts After April 12, 2014 Were Authorized By The Tribal Council.

After the Freeman Faction seized control of the Casino, and the Tribal office (and all the computers and documents in the Tribal office) on April 12, 2014, they excluded Defendants, Defendants' entire family and the Tribal Council from the Tribe's property, including the Casino.

The Tribal Council – the real one and the one recognized by the federal government – consisting of David Swearinger, Leslie Lohse, Allen Swearinger and Geraldine Freeman – started engaging in efforts to regain control of the Casino and the Tribe and to resolve the chaos and danger Andrew Freeman's coup caused.

After April 12, 2014, the Tribal Council authorized and spent many hundreds of thousands of dollars, or more, to fund its activities. D. Swearinger Decl. ¶19; G. Freeman Decl. 3:26 to 4:5. The Tribal Council authorized and initially spent *hundreds* of thousands of dollars on a police and security force (who the Tribe refers to as "armed thugs" on page 4 of their motion[9]), and additional *hundreds* of thousands of dollars on attorneys, creating a new tribal court, hiring a tribal judge, paying vendors and incurring other expenses associated with the Tribal Council's activities and attempting to regain control of the Casino and the Tribe. Id.

Importantly, the Tribal Council was aware that, after April 12, 2014, money was being withdrawn from the Tribe's accounts by Ines Crosby and others in order to fund the Tribal Council's actions. See D. Swearinger Decl. 5:20-22; G. Freeman Decl. 4:3-5; see also I. Crosby Decl. ¶7. The post-April 12, 2014 bank withdraws Plaintiffs recklessly assert Ines Crosby stole were, in fact, authorized by the Tribal Council and used to fund Tribal Council activities. See id.

[9] In yet another example of Plaintiffs' distortion of fact, they call the police the Tribal Council hired "armed thugs" and carelessly assert the "thugs" were armed with *automatic* weapons. Mot. 4:14. Non-governmental possession of *automatic* weapons is almost completely illegal. If Plaintiffs were more careful, perhaps they would have said the *police force* the Tribal Council employed was carrying semi-automatic weapons. And despite monitoring by the Tehama County Sheriff's Office there is no allegation gun charges were brought against members of the Tribal Council's police force for the possession of automatic weapons.

(2) Defendants' Liquidation Of Retirement Accounts Was Done To Help Provide Liquidity To The Tribal Council, Not To Dissipate Or Hide Assets.

Plaintiffs next assert, without evidentiary support, that Defendants were paid "unauthorized" sums in retirement compensation, and then go on to suggest that Defendants' acts of liquidating their retirement plans is somehow proof Defendants will hide assets. See Mot. 18:25-19:3. Again, the facts belie Plaintiffs' assertions.

In anticipation of the costs of the Tribal Council's activities and the possibility the Tribal Council might lose access to the Tribe's bank accounts, the Tribal Council signed a promissory note on April 15, 2014 with Defendants and others. D. Swearinger Decl. ¶ 20 & Ex. 5; G. Freeman Decl. ¶13, & Ex. 2. The Tribal Council anticipated that if could not access the Tribe's bank accounts, it would need to borrow substantial amounts of money to help the Tribal Council fund its activities. See id. As time wore on in the standoff between the Tribal Council and the Freeman Faction, the Tribal Council was forced to borrow money, and Defendants loaned very substantial sums of their own money to the Tribal Council to help the Tribal Council fund its activities. See D. Swearinger Decl. 6:1-2; G. Freeman Decl. 4:9-12.

John Crosby loaned the Tribal Council approximately $1,000,000 of his own money to the Tribal Council. J. Crosby Decl. ¶12. Ines Crosby and Leslie Lohse collectively loaned in excess of $500,000. See I. Crosby Decl. ¶8; Leslie Lohse Decl. ¶10. To help provide the liquidity for these substantial loans, Defendants liquidated their retirement accounts. J. Crosby Decl. 12; Leslie. Lohse Decl.¶11; I Crosby Decl. ¶8; Larry Lohse Decl. ¶3. The accounts were liquidated not to hide or dissipate those assets.[10] Id.

The timing of the withdraws of the retirement accounts supports Defendants' facts. As Plaintiffs' own evidence shows, Defendants did not liquidate their retirement accounts until

[10] In their zeal, Plaintiffs will probably argue these loans of money to the Tribal Council show that Defendants controlled the Tribal Council. Aside from such an argument lacking support, it neglects the fact that as a result of the coup, the writing was on the wall that the *entire* Pata family was going to be disenrolled from the Tribe. Defendants not only had an interest as Tribal members in trying to bring the Tribe together, but they also owed an obligation to their extended relatives to help the Tribal Council attempt to resolve the split and heal the Tribe.

over two months after the Freeman Faction executed its coup, at a time when other sources of money were running dry. See Mot. 19:4. Waiting over two months is hardly the act of someone bent on hiding assets.

Additionally, Plaintiffs fail to explain how liquidating the funds directly from the existing account, versus transferring the funds to an Individual Retirement Account at a different broker (which is a widely prevalent practice), would yield any different result. Employees regularly move, and at times liquidate, retirement plans upon separation from employment.

(3) John Crosby's Efforts To Sell His House Months Before Any Lawsuit Was Filed By Plaintiffs Reflects Economic Realities Rather Than Establishes A Likelihood He Will Dissipate Assets.

Defendants assert that John Crosby's act of putting his house up for sale in "February, 2015" demonstrates his "hopes of impeding the Tribe's ability to recover . . . ." See Mot. 19:27-28. Plaintiffs' speculation could not be further from the truth.

Faced with the prospect of no job, no per capita income or Tribal benefits (because the Tribe suspended and then disenrolled him), and after contributing substantial sums of his savings to the Tribal Council after the Freeman Faction executed its coup, Mr. Crosby and his wife had a general desire to downsize their housing for financial reasons. See J. Crosby Decl. ¶17. Additionally their youngest children were getting ready to leave home for college this summer. J. Crosby Decl. 5:7-8.

Thus, in November, 2014, and well before any lawsuit was filed by either Plaintiff, Mr. Crosby and his wife listed the home through a broker at market value. See J. Crosby Decl. 5:10-11. Mr. Crosby did not list the home at a price that would result in an immediate "fire sale," which is evidenced by the fact the house did not sell for the 2 months it was on the market. See id. 5:10-13.

The fact Mr. Crosby wanted to sell his house and buy a smaller one is not in any way indicative of a desire, intent, or likelihood of concealing assets. Rather it is a reality of what happens when you unexpectedly lose your job and income and then loan $1,000,000 of your

retirement savings to your Tribe's government. The same is true of wanting to sell a sports car for market value.

f. The Tribal Council, Not Defendants, Directed The Remote Shut-Down Of The Tribe's Computers, And Plaintiffs' Argument To The Contrary Is A Gross Distortion Of Fact.

Plaintiffs next assert that Defendants conducted cyber-attacks (aka the "remote shut-down") on the Casino in an effort to further avoid liability.[11] Once again, Plaintiffs misstate the facts.

The Tribal Council, not the individual Defendants, voted to remotely shut down the Tribal Casino's computers on May 9, 2014. See G. Freeman Decl. 3:13-14; D. Swearinger Decl. 4:22-23. May 9, 2014 is the same day Plaintiffs allege the first "cyber-attack" occurred at the Casino. See Mot. 20:12-13.

The remote shut down was subsequently carried out according to the Tribal Council's resolution. G. Freeman Decl. 3:15-16; D. Swearinger Decl. 5:1-2. Aside from Leslie Lohse who was on the Tribal Council, no Defendant voted to approve the resolution. See, e.g., G. Freeman Decl. 3:13-14. The purpose of the remote shut down was to stop the illegal operation of the Casino by the Freeman Faction, stop the unauthorized flow of money out the backdoors of the Casino by the Freeman Faction, and attempt to bring the parties to the negotiating table. D. Swearinger Decl. 5:5-9

When the Tribal Council authorized the remote shut-down of the Casino's computers, the Tribal Council members anticipated the remote shut-down would disable the computers in such a manner that it would take weeks, or more, to get the computers back up and running, and that the destruction of data on the computers was a possibility. See G. Freeman Decl. 3:16-20; D. Swearinger Decl. ¶17.

[11] Plaintiffs multiple references that the IRS and FBI are investigating is not probative. As of this filing, neither agency has taken any enforcement action. Moreover, just as this Court will have to do if the case is not dismissed, determining whether cyber-crimes were committed would require a determination that the Tribal Council that authorized the remote shut-down, which Tribal Council was recognized by the federal government as the Tribe's government, was not, in fact, the Tribe's government.

Thus, completely contrary to Plaintiffs' assertion, the remote shut down was an act authorized and directed by the Tribe's government. It was not, as Plaintiffs recklessly assert, the rogue action of Defendants bent on hiding their tracks.[12]

g. Plaintiffs' Claim That Defendants Santized Their Emails From Their Work Accounts Is Unsupported And Untrue.

Plaintiffs' additional assertion that Defendants deleted emails from their Tribal email accounts is unsupported by any admissible evidence. See Mot. 21:12-15. Plaintiffs base this assertion on paragraph 10 the Declaration of Lance Heinle. Yet, the Heinle declaration regarding this assertion lacks foundation, fails to set forth any level of personal knowledge, and should not be credited. See American Passage Media Corp. v. Cass Communications, Inc., 750 F.2d at 1473 (stating conclusory affidavits lacking sufficient support cannot establish a likelihood of irreparable harm).

Defendants did not delete, or cause anyone to delete, emails from their work accounts. See J. Crosby Decl. ¶9; I. Crosby Decl. ¶9; Larry Lohse Decl. ¶4; Leslie Lohse Decl. ¶14. Moreover, Defendants rarely, if ever, used their Tribal email accounts; instead, they used their personal email accounts. Thus, there would not have been any emails in those accounts to delete other than junk mail. Id.

[12] Prior to filing this Motion, Plaintiffs were aware of the Tribal Council resolution authorizing the remote shut-down of the Casino's computers. The resolution was filed as an attachment to, and authenticated by, a declaration from David Swearinger in Eastern District case #2:14-cv-01449-KJM-CMK, in which the Tribe and the Freeman Faction were parties. See Docket #8-2 at 9-13, Eastern District case #2:14-cv-01449-KJM-CMK. A copy of the resolution, with the file mark on it from that case, was also attached by Plaintiffs as an exhibit to discovery they propounded to Defendants in the instant case. J. Murray Decl. ¶5.

Plaintiffs completely ignore the fact that the Tribal Council directed the remote shut-down and assert that the Rico Ringleaders (plural) took credit for the attacks. See Mot. 20:8-11. No reasonable reading of Leslie Lohse's comments to the media supports an argument that "Defendants" took credit for the remote shut-down. The comments were obviously by a Tribal Council member on behalf of the Tribal Council. See, e.g., Gross Decl. Ex. F at 2. Inexplicably, Plaintiffs' ignore these realities.

h. Plaintiffs Assertion That Defendants Absconded With The Tribe's Jet And Held It Hostage Is Belied By Tribal Council Members' Declarations.

Plaintiffs next claim Defendants absconded with the Tribe's jet and held the plane hostage in order to use it as a "bargaining chip." Mot. 21:17-20. Again, Plaintiffs' make an incorrect assumption.

While the Tribe's jet was sent to Idaho, the Tribal Council knew the jet was being stored in a secret location *and approved of that fact*. See G. Freeman Decl. ¶11; D. Swearinger Decl. ¶18; see also A. Swearinger Decl. ¶6. The Tribal Council wanted the jet hidden to keep the Freeman Faction from gaining control of it. Id. Like all the other alleged wrongdoing, this was not the rogue action of Defendants, but was the desire of the Tribe's governing body.

i. The Tribal Council Intended To Approve $5 Million Lines Of Credit To Defendants And Were Not At All Concerned With The Amount Of Defendants' Compensation, Benefits, And Perquisite.

Plaintiffs next attack the Executive Employment Agreements. Mot. 22:7. The Court just ruled on Defendants' Motion to Stay that Defendants did not meet their burden establishing an arbitration agreement exists under those agreements between Defendants and the Tribe. In this Opposition, Defendants are not challenging the Court's ruling. But it is important to note that when the *dis-interested majority* of the Tribal Council voted to approve those documents, they believed the Defendants' services to the Tribe were worth every penny of the $5 million forgivable line of credit in those documents, over and above their salaries. See G. Freeman Decl. ¶14; D. Swearinger Decl. ¶¶21-22; A. Swearinger Decl. ¶7.

These Tribal Council Members viewed the $5 million lines of credit as bonuses for Defendants' years of dedicated service to the Tribe. Id. These Tribal Council Members say that given the chance, they would vote to approve those documents again today, regardless of questions surrounding their authenticity. Id. Tribal Council Member David Swearinger said if Defendants had asked, he would have voted to given Defendants *more* money because, under Defendants' stewardship, the Tribe enjoyed unprecedented financial and social success. D. Swearinger Decl. 6:9-12.

Though Plaintiffs make much of Defendants alleged financial mis-dealings, the Tribal Council was, quite simply, not concerned with the amount of compensation, benefits and perquisites Defendants were getting because the Tribal Council was so pleased with the years of dedicated work Defendants had done on behalf of the Tribe and results Defendants had delivered to the Tribe. See D. Swearinger Decl. ¶24; G. Freeman Decl. 5:5-7; A. Swearinger Decl. ¶8.

This was the atmosphere under which Defendants were working, the atmosphere endorsed by the Tribe's government. And these statements by the disinterested majority of Plaintiffs' former Tribal Council members throw substantial doubt on Plaintiffs' claims that Defendants actions were unauthorized theft, embezzlement, or breaches of fiduciary duty. They also undermine Plaintiffs' arguments that the money Defendants were allegedly taking, and the employment agreements, evidence a possibility Defendants' will dissipate assets.

j. Plaintiffs' Assertions John Crosby Is Likely To Move Money Overseas Are Speculation Unsupported By Fact.

(1) There Is No Evidence Suggesting John Crosby Is Likely To Hide Assets In The Philippines, Or Anywhere Else.

Plaintiffs next make two rather incredible leaps of logic in their motion. First, they claim that a trip by John Crosby in October, 2014 (months before this lawsuit was filed) to the Philippines is evidence that "the potential that [John Crosby] will hide the Tribe's money overseas, out of the reach of this Court, is real and imminent." Mot. 23:13-14. Apparently, because Mr. Crosby's deceased maternal grandfather is from the Philippines, the likelihood Mr. Crosby will hide assets there is "real and imminent." See Mot. 23:13-14. Plaintiffs have no evidence of this and are merely speculating.[13]

Mr. Crosby is trying to develop a *U.S.-based company* with others that will provide out-sourced services to U.S.-based companies (much like computer technical support services out-

[13] Plaintiffs did not attach a copy of the email they reference, and the description of the email in the declaration is double-hearsay because it relays what John Crosby allegedly told Chad Jones, who then told that to yet another person in an email. The Court should disregard the email (which is not presented to the Court or Defendants), and the proffered description thereof.

sourced to other countries). This *U.S.-based company* is exploring whether the Philippines would be a good location to create a service/call-center. But these facts do not establish a likelihood Mr. Crosby will hide money in the Philippines. Mr. Crosby has not invested money in the Philippines, and does not know any relatives that might be living there. See J. Crosby Decl. ¶11.

(2) Plaintiffs' Suggestion John Crosby Intends To Move Money To, Of All Places, Sudan, Is Wild Speculation.

Plaintiffs' second leap of logic is in their claim they found a "link" between one of their own bank accounts and a bank in Sudan, which somehow means John Crosby is likely to move assets overseas. See Mot. 23 fn. 10. The supposed "link" with a bank in Sudan is not explained at all by Plaintiffs. However, close examination of the Stuart Gross Declaration shows that on wire transfer confirmation forms from the year 2011, under the heading "Errors" a "Bank of Sudan" appears. See Stuart Gross Decl. Ex. H, p. 5.

Plaintiffs' assertion that this unexplained *error* message from a 2011 wire transfer from Tribal account shows John Crosby is likely to move assets overseas demonstrates just how weak Plaintiffs' entire argument is regarding the likelihood Defendants will dissipate their assets or move them out of reach of the Court. See J. Crosby Decl. ¶10 (declaring he has absolutely no connection with, of all places, Sudan)

k. Defendants Did Not Impeded An Investigation. If They Had, Plaintiffs Could Have Forced Compliance Under A Written Agreement, But Never Did.

Plaintiffs next assert Defendants "intentionally impeded" an investigation into their conduct. Mot. 24:8. Their evidence in this regard is a statement by their own attorneys that Defendants' declined to authorize the attorneys access to a Tribal account. Defendants then cite a case for the proposition that impeding an investigation can support a finding that a party might dissipate assets. Yet, the case Plaintiffs cite is inapposite because it dealt with defendants who refused to turn over documents to the Securities And Exchange Commission after being ordered by the Court. See Securities And Exchange Commission v. Manor Nursing

Centers, Inc., 458 F.2d 1082 1106 fn. 29 (2nd Cir. 1972). Here, Plaintiffs claim Defendants did not voluntarily allow access to one of the Tribe's bank accounts. Plaintiffs' case lends little support to its claim.

Moreover, in asserting Defendants impeded an investigation, Plaintiffs completely fail to reference the fact Plaintiffs could have compelled cooperation through the enforcement mechanism built into an agreement between the Tribal Council and the Freeman Faction that called for all sides to cooperate in a financial investigation. See Leslie Lohse Decl. Ex. 1 at pp. 1 ¶3, 2 ¶7. Given the level of animosity, Plaintiffs failure to do so again undermines their claim Defendants' "intentionally impeded" an investigation. Plaintiffs also conveniently ignore that Defendants participated in extensive interviews with WilmerHale. Lohse Decl. ¶3:26-27.

l. The Unexplained Financial Transactions Plaintiffs Proffer Do Not Establish A Likelihood Defendants Will Dissipate Or Hide Their Assets Or That Plaintiffs Will Suffer Irreparable Harm In The Absence Of An Injunction.

In a "kitchen sink" approach, Plaintiffs dump an incomplete record of bank transactions on the Court, highlight the biggest transactions, and then, without any explanation, ask the Court to infer that Plaintiffs are likely to suffer irreparable harm if the Court does not freeze Defendants' assets because Defendants stole money. See Mot. 9-11; A. Rico Decl.

Plaintiffs have had months to prepare their motion; nothing in the motion is based on recent activity. Moreover, Plaintiffs, and not Defendants, have access to the financial records, Paskenta Enterprises Corporation board meeting minutes, and other tribe-owned business financial and board meeting minutes, to the extent Plaintiffs did not already shred them. See I. Crosby Decl. ¶¶ 11, 12 (stating Sherry Myers kept records of bank transactions at the Tribal office); Leslie Lohse Decl. ¶¶ 9 (setting forth evidence records from Tribal office were removed and subsequently shredded at the casino).

In light of the Defendants' lack of access to information and the two weeks in which Defendants have to prepare an opposition, it is not practicable for Defendants to be able to go through each alleged financial expenditure and, from memory, try to describe what the

withdraw or transfer was for. However, Defendants do recognize many of the largest transactions, which are legitimate business expenses and transactions, and not thefts as Plaintiffs imply.

For example, the money involved in the three withdraws of approximately $760,000 from Tri-Counties bank are believed to be Christmas gift cards for Tribal members, employment bonuses for Casino employees (including Bruce Thomas), and also could be distributions from minors' trust funds established by the Tribe. See I. Crosby Decl. ¶10. Sherry Myers, the Tribe's office assistant, kept detailed records of these withdraws, all of which have been in Plaintiffs' possession since April 12, 2014. See I. Crosby Decl. 11.

Plaintiffs also cite large transfers of money from the Tribe's accounts to Paskenta Enterprises Corporation's account, from which money is then transferred or paid elsewhere (Plaintiffs often fail to state where). However, as Plaintiffs know, Paskenta Enterprises Corporation is the Tribally-owned entity through which the Tribe conducts non-gaming business. J. Crosby Decl. ¶13. During the times involved in Plaintiffs' motion, Paskenta Enterprises Corporation owned or was heavily involved with approximately 7 different business and investments (including the purchase of investment properties in New York City), all of which required substantial outlays of money. Id. The Tribe, through Paskenta Enterprises Corporation, also was funding the construction of a Tribal Health Clinic and a $2 million horse arena. Id. Many of the substantially large transfers of money were for these purposes. See J. Crosby Decl. ¶¶14-15.[14]

[14] As evidence Plaintiffs submitted in connection with its motion to stay arbitration shows, Chuck Galford, Larry Lohse and John Crosby all took $150,000 loans (in the form of 9 separate $50,000 checks) from Paskenta Enterprises Corporation. That is what the $50,000 checks between John Crosby and Larry Lohse are for (Plaintiffs leave out the checks written to Chuck Galford, who still works for the Tribe). The other checks from Paskenta Enterprises to John Crosby and Larry Lohse are payrolled bonuses to its three executives. Chuck Galford, who was also a Board member and executive of Paskenta Enterprises Corporation also received similar payments. See J. Crosby Decl. ¶16. Chuck Galford is not named as a Defendant, and now consults for Plaintiffs, which gives some indication of what is motivating this lawsuit.

Notably, Plaintiffs point out the fact wire transfers were made, yet fail to provide any wire transfer information showing where the money went, even though that information is presumably available from Plaintiffs' banks, thus leaving the Court and Defendants to guess.

3. The Cases Plaintiffs Cite Do Not Establish A Likelihood Of Irreparable Harm Based On The Facts Of This Case.

On the whole, the unexplained bank statements (even with the explanations in the WilmerHale report) do not prove a likelihood Defendants will dissipate their assets and thereby irreparably harm Plaintiffs, particularly when considering that the Tribal Council was not concerned with Defendants' compensation, benefits and perquisites. Based on the facts before the Court, the cases Plaintiffs cite on the element of irreparable harm are inapposite.

For example, Plaintiffs cite Johnson v. Couturier, 572 F.2d 1067 (9th Cir. 2009), where the court froze the assets of a company's president who, through a series of corporate transactions over a span of five years, diverted $35 million to his own account. Id. at 1085. The appellate court noted that he did so "in contravention of the highest fiduciary duties known to the law." Id. The appellate court reasoned that if the defendant was able to convince his fellow directors and ERISA plan trustees to consent to such an egregious diversion of money, which left the company's ERISA Employee Stock Ownership Plan severely devalued, he was more than capable of putting assets out of reach of a judgment. In that case, the public interest, as expressed by Congressional, strongly favored protecting the ERISA plan. Id. at 1082.

In contrast to Johnson, Plaintiffs have not made any showing Defendants' collective actions, let alone individual actions, are anything like the defendant's conduct in Johnson. Moreover, the Court in Johnson was undoubtedly strongly motivated in its decision by the fact employees participating in the defrauded employee stock ownership plan were the class of plaintiffs in that case and the diversion of money hurt the employee stock ownership plan.

Another clearly distinguishable factor between Johnson and the instant case is the fact Plaintiffs' Tribal Council – Defendants' bosses – were not at all concerned with the compensation, benefits and perquisites Defendants were getting. And while the corporation's board of directors in Johnson apparently approved the transactions in question which

contravened "the highest fiduciary duties known to the law," no comparison can be drawn between corporate governance, and what, if any duties are owed to Indian Tribes by Tribal Councils and executives.

Plaintiffs also cite Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988, en banc) ("Marcos"). In that case, the Republic of the Philippines sued to recover over a *billion* dollars the Marcos' allegedly improperly removed from the Philippines during their presidency. See id. 1362. In support of a preliminary injunction, the plaintiff submitted evidence that the Marcoses fled the country with $8.2 million in cash and property, used aliases and codes to make secretive monetary transactions out of the country, and amassed approximately $1.3 billion in Swiss bank accounts and trusts in foreign countries. Id. 1362-1363. Based on this evidence the District Court enjoined the Marcoses from secreting certain assets by putting them beyond the reach of the Court. Id. 1364.

In contrast to Marcos, which like Johnson, is an extreme case, Plaintiffs have not proffered any evidence any Defendant has hidden money off-shore, or engaged in any of the extreme behavior the Marcoses were alleged to have engaged in, which the appellate court relied on to affirm the injunction.

In Federal Trade Commission v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999), also cited by Plaintiffs, the Federal Trade Commission (FTC) sued the Andersons, among others, under the Federal Trade Commission Act for their role in promoting a Ponzi scheme on television. Id. 1232. The Andersons had placed the profits from the Ponzi scheme in an irrevocable off-shore trust. Id. 1232. The District Court granted the FTC's motions for a temporary restraining order and preliminary injunction, which froze the Anderson's assets and required the Andersons to repatriate the assets held in the trust. Id. 1232 & fn. 2.

On appeal, the appellate court noted that under the Federal Trade Commission Act, the government is held to a "more lenient standard" when seeking preliminary injunctions, noting "Section 13(b), therefore, 'places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; *the Commission need not show irreparable*

harm to obtain a preliminary injunction.'" Id. at 1233 (quoting FTC v. Warner Communications, Inc., 742 F.2d 1156, 1159 (9th Cir. 1984) (emphasis added).

Federal Trade Commission v. Affordable Media, LLC is inapposite because it involved a different standard. It is also distinguishable because the defendants in that case had place their assets off-shore in an irrevocable trust.

Likewise, Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878 (9th Cir. 2003) is clearly distinguishable as an extreme case. In that case, a group of health insurers sued dozens of individuals for their roles in insurance fraud at various medical clinics. Id. 879-880. Plaintiffs obtained a substantial judgment against the husband of Haya Zilka (Haya). Id. 880. Plaintiffs then attempted to determine the husband's assets to enforce the judgment and served discovery on the husband and Haya. Both were subsequently incarcerated for refusing to respond to the discovery. Id. 880. Thereafter, plaintiff's amended their complaint to add Haya as a defendant and sought a temporary and preliminary injunction to freeze her assets and prevent her from making "material asset transfers." Id. 880.

In affirming the preliminary injunction, the appellate court noted that Haya and her husband had participated in intra-family transfers to frustrate creditors, including transferring their Beverly Hills mansion to the son, the sale of a surgery center to Haya for $20,000, and that after plaintiff attempted to collect its judgment against Haya's husband, Haya and her husband filed for divorce after the court issued an order compelling them to comply with Plaintiff's asset discovery and that the divorce purported to vest all the family's significant assets with Haya. Id. 880. Based on Haya's efforts to hide assets, the appellate court held the District Court did not err in finding that it was probable Haya would engage in misconduct to conceal or dissipate assets.

Connecticut General Life Ins. Co. is clearly distinguishable on multiple points, including the facts Haya had disobeyed court orders and engaged in series of transactions obviously designed to hide assets and defeat the plaintiffs' ability to recover. Plaintiffs have not presented any credible evidence showing such conduct by Defendants.

The case of In re Focus Media, 387 F.3d 1077 (9th Cir. 2004), cited by Plaintiffs, is also inapposite. In that case, a bankruptcy trustee filed an adversary action against the debtor's shareholder seeking to recover $20 million in stock distributions paid to the shareholder just prior to an involuntary bankruptcy petition being filed against the company. Id. 1079-1080. Unsurprisingly, the trial court determined the bankruptcy trustee established a likelihood of success on a fraudulent conveyance theory since the stock distribution occurred within ninety days of the bankruptcy petition and removed that money from creditors' reach. Id. 1086. In affirming an asset freeze in the amount of the shareholder's distribution, the court was persuaded by the fact the shareholder had caused the debtor company to dissipate an additional $2 million in assets *after* the bankruptcy petition was filed, which the court said demonstrated the shareholder was likely to continue to dissipate assets if an injunction was not entered. Id. 1086.

Unlike the defendants in Connecticut General Life Ins. Co. and In re Focus Media, Defendants here have not shown any likelihood they will dissipate or place assets outside the reach of the Court.

Plaintiffs also cite Walczak v. EPL Prolong, Inc., 198 F.3d 725 (9th Cir. 1999). However, in Walczak the District Court enjoined a company from completing a corporate transaction, which the appellate court was careful to note did not constitute a freeze on the defendants' assets. Id. 730.

In each of the cases cited by Plaintiffs (excepting Walczak) there was substantial evidence the defendants were likely to dissipate or hide assets beyond the reach of the court based on their prior efforts to do so, their demonstrated disregard for the courts' orders, or as in Johnson, the Defendant's massively outrageous breach of the "highest fiduciary duties known to the law." In contrast, Plaintiffs have not made any such showing with respect to Defendants here. In fact, as the declarations from the Tribal Council members demonstrate, almost all of the acts Plaintiffs use to assert Defendants are likely to dissipate or hide assets were, in fact, the acts of the Tribal Council or acts to which the Tribal Council was indifferent.

On this factual record, Plaintiffs have not demonstrated a likelihood of irreparable injury and Defendants respectfully suggest Plaintiffs' motion should be denied. See F.T.C. v. Evans Products Co., 775 F.2d 1084, 1089 (9th Cir. 1985) (affirming denial of injunction sought by government based on defendant's past alleged misrepresentations, stating "[w]e find no evidence that Evans is, or is likely to, secret away assets before relief can be effectuated"); Securities & Exchange Commission v. ABS Manager, LLC, 2013 WL 1164413 at *6 (S.D. Cal., March 20, 2013) (denying asset freeze, finding that despite the court's "wide discretion in fashioning relief and protective measures in SEC actions," the SEC offered no evidence that Defendant Price was likely to dissipate his own personal assets or the corporate assets" (internal quotes and citations omitted)); Allstate Ins. Co. v. Baglioni, 2011 WL 5402487, at *2 (C.D. Cal. Nov. 8, 2011) (denying asset freeze even where defendant transferred house to his mother after the plaintiff notified him of the claim, stating courts only exercising their inherent authority to freeze assets in narrow circumstances where there is considerable evidence of likely asset dissipation); F.T.C. v. John Beck Amazing Profits, LLC, 2009 WL 7844076, at *15 (C.D. Cal. Nov. 17, 2009) (in potential $300 million dollar case court denied government's request for asset freeze of corporate and individual defendants based on alleged fraudulent acts of defendants, finding government did not show defendants were likely to dissipate assets).

C. The Balance Of Equities Does Not Favor Injunctive Relief

1. An Asset Freeze Will Cause More Hardship To Defendants Than Plaintiffs Might Suffer In The Absence Of An Injunction.

Despite Plaintiffs' argument, the balance of equities does not favor granting injunctive relief. Plaintiffs have presented no evidence establishing a likelihood Defendants will dissipate their assets. Thus, restricting Defendants' spending to an amorphous "reasonable living expense" standard is unwarranted. Doing so also will create hardship to Defendant John Crosby.

John Crosby has two daughters living at home who are about to start college. They are relying on him to pay their tuition. He also has a third daughter in college who also relies on Mr. Crosby to pay her tuition. His wife does not work outside the home. Freezing his assets

(which Plaintiffs surely mean to exclude college tuition) will create a hardship on all three of his daughters and, absent some source of immediate student loans, may very well jeopardize their college enrollment. See J. Crosby Decl. ¶19; see Securities And Exchange Commission v. ABS Manager, LLC, 2013 WL 1164413 at *6 (denying government injunction; noting defendant objected to asset freeze, in part, because he had to provide for his wife and two children).

Mr. Crosby also has a retail business in Northern California. Businesses, including his, require infusions of capital from their owners from time to time. Freezing his assets and not allowing money to go into his business would create a hardship on him and could result in losing the business. See J. Crosby Decl. 20.

Likewise, this case, if not dismissed, is scheduled to continue for some time. It would be expensive and burdensome for Defendants to have to come to Court each time they need to incur a reasonable expense that may not be an "ordinary" expense – or may be a close call. Ines Crosby is over 70 and is not, for instance, in a position to do repairs around her own home. If she is required to come to Court – and pay her attorney from her $2,500 allowance – each time she needs to incur a home repair expense, it would create a burden.

2. Plaintiffs Request To Limit Defendants' Monthly Attorney's Fees Expenditures To $2,500 Each Is Unsupported And Would Clearly Preclude Defendants From Adequately Defending Themselves.

Plaintiffs also assert Defendants should each be limited to just $2,500 per month in attorney's fees expenditures (they don't mention expert witness costs but presumably such costs are included in their $2,500 per month figure). They cite no authority where a court has limited expenditures of attorney's fees, even in those instances where the court has frozen assets.

Freezing Defendants' assets so that they are limited to $2,500 per month in legal costs would severely prejudice Defendants' ability to adequately defend themselves in this action. That amount of money could be consumed in a matter of a few days just dealing with the substantial written discovery Plaintiff has, and will likely continue to propound, let alone

motion work, research, preparing for and attending depositions, and the host of legal activities necessary in a case of this type.

Moreover, to limit Defendants' expenditure of attorneys' fees would completely stack the deck against them, and surely spell defeat for Defendants simply because Plaintiffs are funded by a multi-million dollar revenue generating Casino and fueled by a vendetta the Freeman/Simmons families have for the Pata family.

Defendants can only guess at how much Plaintiffs are paying their attorneys each month, and those guesses are considerably more than $2,500 per month. The Court should not accept Defendants' unsupported and self-serving invitation to artificially limit Defendants' attorney's fees expenditures.

Finally, the Tribal Council members state they were not concerned with the amount of Defendants' compensation, benefits and perquisites. In light of these declarations, the balance of equities does not tip in Plaintiffs' favor.

D. Public Policy Does Not Favor Freezing Defendants' Assets And Is, At Most, A Neutral Factor.

Plaintiffs assert that Defendants actions have dealt a strong blow to the Tribe's economic independence and stability. See Mot. 34:10-11. Yet, it is precisely because of Defendants' dedicated efforts on behalf of the Tribe that the Tribe per capita payments to members went from nothing in 2003 to the substantial per member amount it is today.[15] See G. Freeman Decl. 4:19-24; D. Swearinger Decl. 6:13-18. It is because of Defendants' tireless efforts that the Tribe is doing so well economically, and has been able to build health clinics to increase the welfare of its members. Id.

Plaintiffs can try to re-write history, but the facts will get in the way. See id. And while Plaintiffs have dressed this case up as a RICO and embezzlement matter, a majority of the former and disinterested Tribal Council members – none of whom are parties to this case – have a very different outlook on Defendants' alleged acts. See G. Freeman Decl. ¶¶ 14-15; D.

[15] A per capita distribution is a distribution Tribal members get for being members of the Tribe. And as a result of Plaintiffs disenrolling the entire Pata family, they have reduced the number of Tribal members, which will result in the per capita payments increasing even more.

Swearinger Decl. ¶¶ 21-22, 24; A. Swearinger Decl. ¶¶7-8. Moreover, Plaintiff has been self-sufficient and governing itself for the last 12+ years with Defendants' help. Thus, while Plaintiffs claim this case is a step in self-determination and self-governance, in reality, it is one Tribal family prosecuting a vendetta against an another – and there is no public policy served in that.

E. Plaintiffs Have Not Established A Likelihood Of Success On The Merits.

Defendants seek the asset freeze under its claims for RICO violations, civil conspiracy, fraud, state and federal cyber-crime laws, conversion and money had and received, breach of fiduciary duty, and constructive trust and accounting. Plaintiffs have not established a likelihood of success on these claims.

An injunction may not be issued under civil RICO claims. See Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1089 (9th Cir. 1986).

Civil conspiracy is not a cause of action and requires the commission of an underlying tort. See AREI II Cases, 216 Cal.App.4th 1004, 1021 (2013). Plaintiffs provide no authority the state law theory can be used by federal courts in the exercise of their equitable jurisdiction to freezing assets.

Plaintiffs have cited absolutely no law establishing a common law fiduciary duty is owed by Tribal Council Members or executives to an Indian Tribe. Defendants cite state law for these duties, but nothing applying to sovereign Indian Tribes of to their wholly-owned entities, which are not state chartered corporation, but are instead chartered by the Secretary of the Interior. See 25 U.S.C. § 477. Defendants are not aware of such case of statutory authority. This throws substantial doubt on Plaintiffs' ability to succeed on its fraud claims, which Plaintiffs assert arise because Defendants owed Plaintiffs a fiduciary duty. See Mot. 30:28. It also defeats Plaintiffs' fiduciary duty claims. Moreover, these claims of Plaintiffs' are not likely to succeed in light of the fact Plaintiffs' own government was completely indifferent to Defendants' compensation and perquisites and voted to give them $5 million lines of credit. See, e.g., D. Swearinger Decl. ¶ 21-22, 24.

Plaintiffs also are not likely to succeed on their cyber-crime claims because the Tribe's lawful governing body authorized those actions. Succeeding on those claims would require this Court to conclude the Tribal Council recognized by the federal government was not the Tribal Council or did not have the legal authority to disrupt its own business operations.

Claims for conversion and money had and received are actions at law. See Mains v. City Title Ins. Co., 34 Cal. 2d 580, 586, 212 P.2d 873 (1949) (stating that while governed by principles of equity, conversion is an action at law). Federal courts cannot exercise their equitable powers to freeze assets when the claim arises in law and there is no other equitable claim allowing the exercise of equitable remedies. See generally Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999).

Finally, Plaintiffs are not likely to succeed on their claims for constructive trust and accounting. The Tribal Council declarations establish that the Tribal Council was completely indifferent to Defendants' compensation, benefits, and perquisites because Defendants were delivering outstanding result for the Tribe. Plaintiffs have not established they are likely to succeed on these claims in light of its own government's complete indifference and the fact a majority of the disinterested Tribal Council wanted to give Defendants each $5 million forgivable lines of credit.

V. CONCLUSION

Defendants respectfully request the Court deny Plaintiffs Motion. Plaintiffs have not established a probability of success on the issue of subject matter jurisdiction, and have not established a likelihood of irreparable harm. Plaintiffs have not proffered sufficient, admissible evidence showing that any one defendant is likely to dissipate or place assets outside the reach of the Court. Moreover, the declarations of the former Tribal Council Members demonstrate that Plaintiffs' trumped up accusations regarding Defendants do not comport with reality. For these reasons, the Court should deny the motion.

VI. BOND

If the Court is inclined to grant the motion, Defendants respectfully request a substantial bond be required by Plaintiffs. Plaintiffs are likely to assert a sovereign immunity defense to avoid any liability to Defendants arising out of a n injunction, and a bond will help protect against that.

VII. ORAL ARGUMENT

Defendants request 20 minutes of oral argument should the Court hold a hearing. Defendants do not intend to present live testimony.

Dated: July 13, 2015

Liberty Law, A.P.C.

/s/ John Murray
By: John Murray
Attorneys for Defendants
Ines Crosby, John Crosby, Leslie Lohse, Larry Lohse, Ted Pata, Juan Pata; Chris Pata, Sherry Myers, Frank James, The Patriot Gold And Silver Exchange, Inc. and Norman R. Ryan