No. 15-16654

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PASKENTA BAND OF NOMLAKI INDIANS, *et al.*,

Plaintiffs-Appellants,

v.

INES CROSBY, *et al.,*

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Hon. Judge Garland E. Burrell, Jr.
Case No. 2:15-cv-00538-GEB-CMK

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants state that none of them have a parent corporation and that no publicly-held companies hold 10% or more of a party's stock.

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INTRODUCTION

The instant case arises out of an almost two decade-long conspiracy 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") out of tens of millions of dollars, in violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.* and other provisions of law. At the core of this conspiracy were Defendants John Crosby, Ines Crosby, Leslie Lohse, and Larry Lohse (the "RICO Ringleaders"), who, from high-ranking positions in the Tribe's administration, were the architects of the scheme, and its primary beneficiaries.

In their Motion for a Preliminary Injunction (the "Motion"), the denial of which Plaintiffs here appeal, Plaintiffs sought a targeted freeze on the assets of the RICO Ringleaders. In support of the Motion, Plaintiffs submitted overwhelming evidence probative *inter alia* of the strong likelihood that the Ringleaders will dissipate assets absent injunction. This evidence more than satisfied Plaintiffs' burden to show a likelihood of irreparable harm, as well as the other requirements necessary for preliminary injunctive relief to be granted under Fed. R. Civ. Pro. 65. However, due to a mistake of law, the District Court never got beyond the irreparable harm prong of the standard.

Specifically, the District Court ignored the fundamental, well-established rule of law that when a group of individuals act as one, each person is liable for the actions of the group, as well as this Court's cases applying that rule to motions for preliminary freeze orders in conspiracy cases similar to this one. As a result, the District Court applied an erroneous legal standard under which a plaintiff, in a conspiracy case such as this, cannot meet its burden to show a likelihood of dissipation of assets through evidence demonstrating a pattern of fraud, theft, or efforts to evade liability by the conspiracy (or in RICO terms, the "enterprise"), as a whole, but rather must make an individualized showing for each of the conspiracy's members whose assets it seeks to freeze. Not only is there no legal support for the existence of such a standard and is it contrary to this Court's decisions concerning freeze orders in conspiracy cases, it also runs directly afoul with the nature of RICO conspiracy and Congress' purposes in enacting RICO.

This mistake of law constitutes an abuse of discretion. Plaintiffs respectfully submit that the District's Court's Order Denying Plaintiffs' Motion for a Preliminary Injunction ("Order") must be reversed.

However, in the alternative (and in addition), accepting *arguendo* that the District Court did not make a mistake of law in the standard it applied, in light of the overwhelming evidence submitted by Plaintiffs that individually demonstrated a clear pattern of fraud, theft, and efforts to evade liability by each of the RICO

Ringleaders, its conclusion that Plaintiffs had not met that standard was clearly erroneous, requiring reversal on this ground as well.

Accordingly, Plaintiffs respectfully submit the Order should be reversed and because, as demonstrated below, Plaintiffs have clearly satisfied *all* of the requirements for issuance of the requested relief, this Court should grant immediate relief enjoining the RICO Ringleaders from transferring or otherwise disposing of any assets in their possession, custody, or control now or acquired in the future, with an allowance for reasonable living expenses and collective legal expenses of $10,000 per month.[1]

STATEMENT OF JURISDICTION

An order specifically denying a party's request for an injunction is appealable under 28 U.S.C § 1292(a). *Shee Atika, Inc. v Sealaska Corp.*, 39 F.3d 247, 248 (9th Cir. 1994).

STATEMENT OF THE ISSUES

1. Did the District Court make a mistake of law in applying a legal standard to Plaintiffs' motion for a preliminary injunction that required Plaintiffs to present evidence that individually demonstrated a pattern of fraud, theft, or efforts

[1] The RICO Ringleaders, as well as their co-RICO Defendants, are represented in the instant matter by the same counsel.

to evade liability for each member of a RICO conspiracy Plaintiffs sought to enjoin.

2. In the alternative, was the District Court's conclusion that Plaintiffs failed to present sufficient evidence establishing a likelihood of irreparable harm justifying a preliminary injunction clearly erroneous.

3. Should this Court issue a preliminary injunction freezing the RICO Ringleaders' assets with an allowance for reasonable living expenses and collective legal expenses of $10,000 per month.

STATUTORY PROVISIONS

In accord with Ninth Circuit Rule 28-2.7, the pertinent rule, Fed. R. Civ. Pro. 65, is included in the Addendum to this Brief beginning on Page A-1.

STATEMENT OF THE CASE

This is an appeal from the denial of Plaintiffs' Motion for a Preliminary Injunction seeking to freeze the assets of the RICO Ringleaders. 1-ER-000005-000007. The underlying action arises from Plaintiffs' suit seeking to hold the RICO Ringleaders responsible for their theft of millions of dollars from Plaintiffs over the course of a well over decade-long conspiracy. The requested relief is warranted and necessary to ensure that Plaintiffs have the opportunity to

meaningfully pursue their claims arising from the fraudulent scheme perpetrated by the RICO Ringleaders and their co-conspirators

I. FACTUAL BACKGROUND RELEVANT TO REVIEW

The RICO Ringleaders, with the substantial assistance of others, stole and diverted tens of millions of dollars in Tribal money for their own personal benefit by orchestrating a concerted and systematic program of fraud, coercion, and deception. *See* 6-ER-001001-2, 001040-001106 (¶¶ 5-8,165-372). That scheme is now the subject of an ongoing criminal investigation by the Department of Justice and the Internal Revenue Service. 4-ER-000780 (¶¶ 3, 4).

The RICO Ringleaders, together with those they eventually brought into the ambit of their scheme—Defendants Ted Pata, Juan "Jon" Pata, Chris Pata, Sherry Myers, and Frank James (collectively with the RICO Ringleaders, the "RICO Defendants")—abused their positions as senior employees of the Tribe in order to steal and embezzle from the Tribe with impunity. These individuals were terminated from their employment with the Tribe in April 2014. 5-ER-000831

Upon the RICO Ringleaders' removal, the Tribe engaged Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"), as part of a mediated process, to investigate, *inter alia,* allegations of financial mismanagement of Tribal assets and certain spending and operational irregularities of the Tribe. 5-ER-000818. On September 1, 2014, WilmerHale issued its Report of Findings and

Recommendations which found that the RICO Ringleaders had "fallen far short of their legal and ethical obligations to the Tribe" and that the RICO Ringleaders had made "unreasonable expenditures…including compensation of the [RICO Ringleaders] and extravagant expenses" in addition to "irresponsible management of the Tribe's financial assets." 5-ER-000819. WilmerHale Report found that during the RICO Ringleaders' tenure, "of the $191 million in Tribal funds available…at least $61 million – over 30 percent – was spent on Tribal administration and overhead, including compensation paid to the [RICO Ringleaders]." 5-ER-000820. WilmerHale ultimately recommended that the Tribe pursue legal action. 5-ER-000822.

Between early 2001 and April 2014, the RICO Ringleaders controlled much, if not all, of the Tribe's financial operations. *See* 5-ER-000820. RICO Ringleader Ines Crosby became its Tribal Administrator sometime in 1996. 5-ER-000829. RICO Ringleader John Crosby left the Federal Bureau of Investigation ("FBI") in early 2001 to become the Tribe's "Economic Development Director." *Id*. Mr. Crosby—Ines Crosby's son—has degrees in accounting and law and served as a Special Agent in the FBI's white-collar crime division. *Id.* RICO Ringleader Leslie Lohse is Ms. Crosby's sister and John Crosby's aunt. 5-ER-000829-30. RICO Ringleader Larry Lohse is Ms. Lohse's husband and became the Tribe's "Environmental Director" in 2001; he is not a member of the Tribe. 5-ER-000830

After the Tribe terminated the RICO Ringleaders' employment, their criminal conduct continued.[2] They continued to loot money from Tribal accounts, cashed out their fraudulently maintained Tribal retirement accounts, and looked to transfer assets stolen from the Tribe overseas. *See, e.g.,* 4-ER-613-635; 2-ER-000127. The RICO Ringleaders also attempted to destroy evidence of their crimes. Certain of the RICO Defendants launched three separate cyber-attacks, culminating in an attack which systematically deleted all of the Tribe's primary storage locations of data for their principal business, the Rolling Hills Casino (the "Casino"). *See* 2-ER-000161 (¶¶ 6-9). The attack cost the Casino and the Tribe hundreds of thousands of dollars. 2-ER-000269 (¶13).

Attempting to justify their theft of Tribal money, the RICO Ringleaders presented WilmerHale with purported employment agreements ("Fraudulent Employment Agreements"). These Fraudulent Employment Agreements, for reasons discussed herein, were fabricated *post hoc* and were executed with forged signatures.

[2] Given the extent of Plaintiffs' allegations against the RICO Ringleaders, which involve egregious theft and other illicit conduct spanning almost two decades, the evidence presented before the District Court necessarily addressed only a small portion of this conduct.

The Tribe even now continues to find evidence, some of which is discussed below, confirming WilmerHale's conclusions and indicating the RICO Ringleaders' commission of an even greater level of illegal conduct.

II. PROCEDURAL HISTORY AT THE DISTRICT COURT

On April 17, 2015, Plaintiffs filed the operative First Amended Complaint ("FAC"). *See* 6-ER-000995. On May 13, 2015, the RICO Defendants filed a demand for arbitration against the Tribe pursuant to the Fraudulent Employment Agreements, and, on May 15, 2015, the RICO Defendants filed their Stay Motion and Plaintiffs filed their opposition on June 16, 2015. The Stay Motion was denied by the District Court on July 10, 2015. 1-ER-000032-36.

On June 29, 2015, Plaintiffs filed their Motion for a Preliminary Injunction seeking to freeze the RICO Ringleaders assets during the pendency of the instant action. This Motion was denied by the District Court on August 17, 2015. 1-ER-000005-08. Plaintiffs filed their Notice of Appeal the following day, on August 18, 2015. 2-ER-000037-38.

On September 3, 2015, the RICO Defendants filed a motion for additional time to file an answer to the FAC. The District Court granted this motion and the RICO Defendants answer to Plaintiffs' forthcoming Second Amended Complaint ("SAC") is due on November 2, 2015. 1-ER-000002.

SUMMARY OF THE ARGUMENT

The District Court's holding that, in order to obtain a reasonable preliminary freeze order against the RICO Ringleaders, Plaintiffs were required to make an individualized showing for each RICO Ringleader of a pattern or fraud, theft or efforts to evade liability was legally erroneous. There is no legal authority for such a standard, and it runs contrary to decisions rendered by this Court in connection with motions to freeze brought in conspiracy cases such as this. Such a standard is further at odds with the nature of a RICO conspiracy – which requires collective conduct – and would render a freeze order unavailable or illusory in many RICO, and non-RICO, conspiracy cases. As the legal standard applied by the District Court in it Order was legally erroneous, the Order represents an abuse of discretion and so must be reversed.

Secondly and in the alternative, assuming *arguendo*, that the legal standard applied by the District Court was correct, Plaintiffs submitted overwhelming evidence to the District Court independently establishing, for each of the RICO Ringleaders, a pattern of fraud, theft, and efforts to evade liability that makes it likely to dissipate assets. Thus, its conclusion to the contrary was clearly erroneous and so requires reversal, in the alternative, on this ground.

Lastly, the District Court did not reach the question whether the Plaintiffs had satisfied the other three requirements for issuance of a preliminary injunction,

due to its erroneous determination that Plaintiffs had not satisfied the irreparable harm requirement. However, in fact, Plaintiffs presented evidence more than satisfying these other requirements, as well. Accordingly, Plaintiffs respectfully request that this Court, upon reversal of the Order, further grant Plaintiffs the requested injunction, preliminarily enjoining the RICO Ringleaders from transferring or otherwise disposing of any assets in their possession, custody, or control now or acquired in the future, with an allowance for reasonable living expenses and legal expenses collectively totaling $10,000 a month.

STANDARD OF REVIEW-REVIEWABILITY

A district court's denial of a preliminary injunction is reviewed for an abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Cmty. House, Inc. v. City of Boise*, 468 F.3d 1118, 1123 (9th Cir. 2006) (internal quotations and citations omitted). When the district court is alleged to have relied on an erroneous legal premise, this Court reviews the underlying issues of law de novo. *Id.*

The decision whether to remand for further proceedings or resolve the motion incorrectly decided below rests within the discretion of this Court. *See McAllister v.*

Sullivan, 888 F.2d 599, 603 (9th Cir. 1989); *see also*, *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 847-48 (9th Cir. 2014).

ARGUMENT

I. THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD BY REQUIRING PLAINTIFFS TO MAKE A SPECIFIC INDIVIDUALIZED SHOWING THAT EACH MEMBER OF THE ALLEGED RICO CONSPIRACY IS LIKELY TO DISSIPATE ASSETS

In denying Plaintiffs' Motion, the District Court concluded that Plaintiffs were required, and failed, to make a specific and individualized showing that each of the four RICO Ringleaders are likely to dissipate the stolen assets acquired via the RICO conspiracy. 1-ER-000005-7. Not only is there no legal support for such a standard, it is fundamentally inapposite in a case such as this, in which a plaintiff has alleged the existence of a RICO conspiracy.

This Court has established a clear legal standard for issuance of preliminary injunction freezing assets, which looks to the existence of a pattern of fraud, theft, and evasion of liability. There is no law supporting the requirement that where, as here, the defendants are alleged to have engaged together in such a pattern of fraud, theft, and evasion of liability, as part of a RICO conspiracy, that a plaintiff seeking such an injunction must make an individualized showing for *each* member of the conspiracy. Indeed, requiring such an individualized showing is antithetical to the very nature of a RICO conspiracy. At its core, a RICO conspiracy requires

collective action, in which each member of the conspiracy occupies a different position in the RICO enterprise and takes different actions in fulfillment of the conspiracy's goals. To require an individualized showing of the likely dissipation of assets by each RICO co-conspirator renders the relief of an asset freeze essentially unavailable or meaningless to many RICO plaintiffs.

Because of the District Court's erroneous application of the law, the holding that Plaintiffs are not entitled to an asset freeze should be reversed and the Court should grant immediate relief enjoining the RICO Ringleaders from transferring or otherwise disposing of any assets in their possession, custody, or control, now or acquired in the future, with an allowance for reasonable living and legal expenses.

A. The Legal Standard Established By This Court Makes Clear that This Court Looks to a Pattern of Behavior Demonstrating a Likelihood that the Defendants Will Dissipate Assets, and There is No Legal Support for the Proposition that Such a Showing Must Be Individualized in the Context of a Case Alleging a RICO Conspiracy

Quoting directly from the RICO Ringleaders' Opposition, the District Court held that because Plaintiffs "are seeking injunctions against each individual [they] are therefore required to show that each individual is likely to dissipate assets or put them beyond the reach of the Court." 1-ER-000006-7. The District Court went on to dismiss Plaintiffs' Motion in one sentence, opining that: "Plaintiffs have

failed to present evidence justifying the injunctive relief they seek." 1-ER-000007. The District Court misconstrued this Court's established precedent.

1. The Legal Standard Established by This Court Requires a Plaintiff to Demonstrate a Pattern of Fraud, Theft, and Attempts to Evade Liability

For a preliminary injunction to issue, a plaintiff 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." *Am. Trucking Ass'ns., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009), citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). To establish irreparable harm in the context of an asset freeze, "[a] party seeking an asset freeze must show a likelihood of dissipation of the claimed assets, or other inability to recover monetary damages, if relief is not granted." *Johnson v. Couturier*, 572 F.3d 1067, 1058 (9th Cir. 2009).

This Court has routinely found irreparable harm (*i.e.*, a likelihood of dissipation of the claimed assets) where there has been a pattern of theft, fraud, and attempts to evade liability. Such conduct, this Court has emphasized, indicates a likelihood of dissipation of assets in the absence of an asset freeze. *See, e.g., Johnson*, 572 F.3d at 1085 (CEO's theft of nearly $35 million of company money showed he was likely to place personal assets beyond the reach of a judgment,

establishing "a likelihood that in the absence of an asset freeze and accounting, Plaintiffs will not be able to recover the improperly diverted funds and will thus be irreparably harmed."); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988), *cert. denied,* 490 U.S. 1035 (1989) (defendants' past fraudulent conduct warranted a preliminary injunction barring defendants from disposing of any of their assets pending a trial on the merits of plaintiff's constructive trust claim); *In re Focus Media Inc. v. Pringle*, 387 F.3d 1077, 1086 (9th Cir. 2004) (finding "the specter of irreparable harm" in part because of "evidence in the record that in the past [the defendant] made away with [the bankrupt company's] funds"); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881 (9th Cir. 2003) (affirming district court's finding of a likelihood of dissipation given the defendants' "history of fraudulent intra-family transfers, their refusal to disclose asset information in defiance of court order and their convenient divorce settlement"); *FTC v. Affordable Media, LLC,* 179 F.3d 1228, 1236-37 (9th Cir. 1999) (finding a likelihood of a dissipation of assets "[g]iven the [defendants'] history of spiriting their commissions away to a Cook Islands trust, which was intentionally designed to frustrate United States courts' powers to grant effective relief to prevailing parties.").

As these cases make plain, this Court looks to an underlying history or pattern of fraudulent, deceptive behavior, and evasion of liability.

2. No Authority Supports the Legal Standard Applied by the District Court

There is no authority that supports the proposition that a party seeking to preliminary enjoin members of a conspiracy from disposing of assets that were wrongfully acquired through the conspiracy must make *individualized* showing of the likelihood of dissipation for each individual conspirator, and the District Court's Order is notably absent of any such authority. *See* 1-ER-000005-7. Indeed, several of this Court's leading cases on the standard applicable to motions to preliminarily freeze assets appear to reject this notion, and thus require an outcome contrary to the Order.

In its Order, the District Court cites two cases addressing motions to preliminarily freeze assets, 1-ER-00006, on which it appeared to rely when denying Appellant's Motion. Neither, however, stand for the proposition that an individualized showing of a likelihood of dissipation of assets for each member of a conspiracy is required in order for a movant to prevail on a motion to preliminarily enjoin such members from disposing of assets that were wrongfully acquired through the conspiracy. In fact, these cases do not even mention a supposed requirement for "individualized" proof.

In *Allstate Insurance Co. v. Baglioni,* the court denied Allstate's request for an asset freeze on the basis that "Allstate points only to the fact that [the defendant] transferred title of his house to his mother…" and "this single transfer of a primary

residence to a coresident, immediate relative … is not enough to demonstrate [the defendant] is likely to dissipate any other assets he may have to avoid a potential judgment." No. CV 11-06704 DDP (VBKx), 2011 U.S. Dist. LEXIS 129112 (C.D. Cal., November 8, 2011), at *5-*6. Thus, in *Allstate,* the court found that defendant's ***single*** fraudulent act was insufficient to warrant an asset freeze – a finding entirely consistent with the application of the legal standard set forth by this Court, which requires showing a pattern of actions. However, nothing in *Allstate* stands for the proposition, or even addresses, the supposed requirement that members of a conspiracy must each, individually, be shown to have the intention to dispose of fraudulently obtained assets in order for an injunction to issue.

The second case cited by the District Court, *Fid. Nat'l Title Ins. Co. v. Castle*, is also bereft of any such authority. No. C 11-00896 SI, 2011 U.S. Dist. LEXIS 135316 (N.D. Cal., Nov. 23, 2011). In that case, the court, in fact, granted an asset freeze opining that: "when allegations of past fraud are coupled with supplemental evidence that demonstrates a likelihood of dissipation, courts may freeze assets." *Id*. at *20. As with *Allstate*, the court in *Castle* does not even address the concept of a requirement for an individualized showing of an intention to dispose of assets when a preliminary injunction is sought. Thus, is it hard to square the Order with the authority cited by the District Court in support thereof.

There is, however, significant authority in this Circuit that strongly suggests that, when deciding a motion for a preliminary injunction to freeze the assets of conspirators obtained through a conspiracy, courts should look to the conduct of the enterprise as a whole – not each of its members – to determine whether the enterprise has exhibited a pattern of fraud, theft, and evasion of liability such that its members are likely to dissipate assets.

For example, in *Marcos,* 862 F.2d 1355, the Republic of the Philippines (the "Republic") sued the Republic's former president and first lady Ferdinand and Imelda Marcos, bringing causes of action for violations of RICO, 18 U.S.C. §§ 1961 *et seq.*, as well as common law torts, including conversion, fraud and deceit, constructive fraud, and accounting. 862 F.2d at 1357-59.The Republic alleged that Mr. and Mrs. Marcos, together with their co-conspirators, formed a RICO enterprise that conspired through a pattern of racketeering activity to conceal millions of dollars stolen from the Republic during the period of Mr. Marcos' reign. *Id.* at 1358-59.

In affirming the district court's holding that the Republic had presented sufficient evidence to show a likelihood of dissipation of assets by Mr. and Mrs. Marcos and thus to prevail on its motion to preliminarily enjoin such conduct, this Court relied on evidence that was almost entirely probative not of any individual pattern conduct of either defendant, but rather of their collective pattern of conduct

as members of the alleged RICO enterprise. *See id.*, 1362-63(" . . . the Marcoses had transported . . . the Marcoses had a checking account . . . a code was worked out between the Marcoses and the trust . . . the Marcoses' clandestine dealings with . . ."). Nowhere, in *Marcos,* is there any indication that this Court applied the standard of individualized proof that the District Court required here. In fact, it is likely that if such a standard had been used in *Marcos*, this Court would have been required to reverse the lower court's order granting the freeze, as it does not appear that individualized proof of a pattern of fraud, theft, or evasion of liability by each of the Marcoses was ever presented in support of the motion for a preliminary injunction.

This Court's decision in *Affordable Media,* 179 F.3d 1228, also suggests that the District Court's imposition of a requirement for an individualized finding of a pattern of theft, fraud, and attempts to evade liability is unfounded. In *Affordable Media*, the Federal Trade Commission ("FTC") brought an action against a husband and wife and their company arising out of their conduct of a Ponzi scheme. 179 F.3d at 1231. After issuing a preliminary injunction freezing the defendants' assets, the district court found the defendants in contempt of the injunction, and the defendants appealed. *Id.*

In rejecting what this Court described as an "astounding assertion" by the defendants that "'the district court did not find that there was a likelihood of asset

dissipation" and thus its issuance of the freeze order was erroneous, this Court rested its rejection of this argument on the following collective finding: "Given the ***Andersons' history*** of spiriting their commissions away to a Cook Islands trust, which was intentionally designed to frustrate United States courts' powers to grant effective relief to prevailing parties, the district court's finding regarding the likelihood of dissipation is far from clearly erroneous." *Id*. at 1236-37 (emphasis added). Thus, this Court looked to the collective actions of the conspirators, not to the actions of each member of the conspiracy on an individualized basis.

This Court, in both *Marcos* and *Affordable Media,* did not require a showing of each defendant's pattern, on an individual basis, of theft, fraud, or evasion of liability because: (1) there is no requirement in the law that any such individualized showing be made; and (2) any such requirement would, as discussed below, be fundamentally at odds with the nature of conspiracies, generally, and RICO conspiracies, in particular.

B. The Legal Standard Applied by the District Court Is Incompatible with RICO Conspiracy Claims

RICO conspiracy claims, including those at issue here, typically involve an alleged RICO enterprise consisting of a "'group of persons associated together for a common purpose of engaging in a course of conduct,'" *Boyle v. United States*, 556 U.S. 938, 944 (2009) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981), who together conspire to violate the act's provisions. *See Oki*

Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 775 (9th Cir. 2002); *see also* 18 U.S.C. 1962(c), (d). In this context "[a]ll conspirators are liable for the acts of their co-conspirators . . . reflect[ing] the notion that the damage wrought by the conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Oki Semiconductor Co.*, 298 F.3d at 775 (internal quotations omitted). In other words, ***the act of a single RICO conspirator amounts to the act of every member of the RICO conspiracy***. *See id.*; *see also, e.g., CGC Holding Co., LLC v. Hutchens,* 773 F.3d 1076, 1088 (10th Cir. 2014) (one conspires to violate RICO, in violation of 18 U.S.C. §1962(d), and becomes liable for all of the damage caused by the conspiracy, by adopting the goal of furthering the enterprise, "even if the conspirator does not commit a predicate act").

Given that there is no requirement for all members of a RICO conspiracy to have committed or intended to commit a predicate act in order for all members to be liable for the damage caused by the conspiracy, it is illogical, in the context of a motion to enjoin the disposition of assets by RICO conspirators, to require a showing that each member of a RICO conspiracy has, on an individual basis, exhibited a pattern of fraudulent behavior demonstrating an intention to dispose of the assets obtained through the conspiracy. *See Boyle,* 556 U.S. at 945 (quoting its previous decision in *Turkette*, 452 U.S. at 583, for the proposition that a RICO

"enterprise . . . 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'"); *see also H. J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 237 (1989) (defining "pattern" as used in RICO to mean "multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity").

The decisions by this Court in *Marcos* and *Affordable Media* appear to account for the nature of a conspiracy, and, in the case of *Marcos,* a RICO conspiracy, in particular, as both looked to the pattern of fraud, theft, and evasion of liability by the entire RICO enterprise when considering whether a preliminary injunction was appropriate, not just those of its individual members. This approach makes sense as a conspiracy naturally extends to the expenditure, use, and dissipation of the fruits of this criminal enterprise – the exact conduct Plaintiffs sought to enjoin here. Thus, an attempt to dissipate stolen assets by one RICO Ringleader is attributable to all four. *See, e.g., Oki Semiconductor Co.*, 298 F.3d at 775 ("[a]ll conspirators are liable for the acts of their co-conspirators.")(citation omitted).

The District Court's approach – requiring a RICO plaintiff to demonstrate, on an individual basis, a pattern of theft, fraud or evasion of liability of each member of a RICO conspiracy before granting an asset freeze – would: (1) deprive

most RICO plaintiffs the ability to obtain a preliminary asset freeze to which they were otherwise entitled under Fed. R. Civ. P. 65; and (2) deny those RICO plaintiffs that were able to obtain such a freeze any meaningful relief.

1. The Legal Standard Applied by the District Court Would Effectively Preclude a Large Number of RICO Plaintiffs from Obtaining an Asset Freeze to which They Were Otherwise Entitled

As discussed above, the essence of a RICO conspiracy is the functioning of its members "as a continuing unit" engaged together in the common purpose of conducting racketeering activities. *See Boyle,* 556 U.S. at 948 (internal quotation omitted); *see also Oki Semiconductor*, 298 F.3d at 773-775. Members of such a RICO enterprise need not have fixed roles, and the nature and extent of each conspirator's actions in pursuit of the conspiracy's objectives can vary, *id.* at 948; however, often members do have relatively fixed roles in the enterprise and their actions in those roles are relatively consistent. *See, e.g., United States v. Smith*, 413 F.3d 1253, 1267-68 (10th Cir. 2005). Furthermore, actions performed by an individual conspirator may constitute only a portion of what—collectively with the actions of his/her co-conspirators—constitutes the intended racketeering activity. *See Salinas v. United States*, 522 U.S. 52, 63-64 (1997) ("A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the

same criminal objective and may divide up the work, yet each is responsible for the acts of each other.") (internal quotations omitted).

In such a context, any legal requirement that an asset freeze be issued only upon a showing that each defendant, individually, demonstrated a pattern of fraud, theft, or evasion of liability, not only creates an effective bar to preliminary relief for a RICO plaintiff, but would perversely reward and incentivize the type of concerted, organized criminal conduct that RICO was enacted to prevent. *See generally United States v. Boylan*, 620 F.2d 359, 361 (2d Cir. 1980) .

For example, participants in a RICO conspiracy could structure their collective conduct so that no member, *individually,* engaged in a pattern of theft, fraud, or evasion of liability sufficient to support an asset freeze. Once sued by the conspiracy's victims, the conspirators could simply dissipate the wrongful proceeds of the conspiracy's racketeering activities before any judgment against any conspirator was entered, since, following the standard used by the District Court, plaintiffs would be unable to obtain any preliminary relief enjoining such continued unlawful conduct.

2. The Legal Standard Applied by the District Court Would also Prevent Many RICO Plaintiffs from Obtaining Meaningful Relief, Even if They Were Able to Obtain a Preliminary Asset Freeze

Given the compartmentalized manner in which many RICO enterprises are conducted, the District Court's standard would, as discussed *supra*, not only render

preliminary asset freezes unavailable for many RICO plaintiffs, but also render any such relief, by and large, meaningless.

Using the standard applied by the District Court, a RICO plaintiff would only be able to obtain an injunction prohibiting the disposition of assets against those conspirators that it could prove, on an individual basis, engaged in pattern of theft, fraud, or evasion of liability. Unfortunately, given the nature of RICO conspiracies, preliminary relief against only this subset of conspirators would, in many instances, be illusory.

As discussed, the pattern of racketeering activity giving rise to the RICO's application is constituted by "multiple predicates within a single scheme that [are] related and that amounted to, or threaten[] the likelihood of, continued criminal activity," *H. J. Inc.,* 492 U.S. at 237. Furthermore, while RICO enterprises can be characterized by fairly static assignments of roles to, and conduct by, its members, they need not always be so, and can involve "different members . . . perform[ing] different roles at different times." *Boyle*, 556 U.S. at 549.

In this context, an injunction prohibiting the disposition of assets that applies only to certain RICO enterprise members is likely to result in what is sometimes referred to as the "balloon effect." Often used in the context of criticism of U.S. drug supply eradication policies, the balloon effect is a metaphor for the phenomenon by which, in seeking to eliminate a problem in a certain place, one

just moves it to another: in the way squeezing part of a balloon does not eliminate the air in the portion of the balloon that is squeezed but rather displaces it to another part of the balloon. Analogously, in the context of RICO conspiracy, a freeze order that applies to only certain RICO enterprise members is not likely to prevent the dissipation of assets, as other members of the enterprise are likely to step-in and engage in the dissipating activities from which their co-members—but not they—are enjoined.

"RICO is to be read broadly" in order to achieve the purposes for which Congress enacted it. *Boyle*, 556 U.S. at 944 (internal quotation omitted). Applying the standard used by the District Court to a motion for a preliminary asset freeze under Fed. R. Civ. Pro. 65 would defeat those purposes. *Cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 158 ("When acts can be harmonized by a fair and liberal construction it must be done.") (Stevens, J. dissenting) (internal quotation omitted). Accordingly, the Order, which the District Court premised on a legally erroneous standard that does not comport with precedent in this Circuit or with the manner of relief that Congress intended to be available under RICO, must be reversed.

II. THE DISTRICT COURT'S FACTUAL CONCLUSION THAT PLAINTIFFS FAILED TO MEET THEIR BURDEN ESTABLISHING IRREPARABLE HARM WAS CLEARLY ERRONEOUS

Even assuming, *arguendo*, that the legal standard applied by the District Court was proper, the evidence set forth by Plaintiffs overwhelmingly demonstrates that ***each*** of the RICO Ringleaders' continuous patterns of theft, fraud, and evasion of liability indicate the likelihood that, absent a freeze order, each is likely to dissipate the assets in their control and thus deny Plaintiffs the opportunity for meaningful relief. Furthermore, the evidence provided by Plaintiffs clearly satisfies that standard that *should* be applied in RICO cases; namely, a showing by their collective conduct that the RICO Ringleaders, unless enjoined, are likely to dissipate the millions of dollars they stole from Plaintiffs.

Thus, whatever standard the District Court applied, its conclusion that Plaintiffs had not met their burden in this regard was clearly erroneous.

As the evidence submitted to the District Court clearly demonstrates, the RICO Ringleaders stole millions of dollars over the course of a conspiracy lasting over 12 years. This criminal RICO enterprise was orchestrated and run by RICO Ringleaders Ines Crosby, John Crosby, Leslie Lohse, and Larry Lohse. The evidence presented to the District Court was more than sufficient to establish that each of these individuals, independently, as well as collectively, has demonstrated a pattern of theft, fraud, and attempts to evade liability, such that there is a

substantial likelihood that, absent an asset freeze, the RICO Ringleaders will continue in their attempts to dissipate assets.

A. Plaintiffs Presented Overwhelming Evidence Demonstrating Individual Patterns of Theft, Fraud, and Evasions of Liability by Each of the RICO Ringleaders

1. Ines Crosby

Plaintiffs presented overwhelming evidence to the District Court probative of Ms. Crosby's pattern of theft and fraud during the RICO Ringleaders' conspiracy, including evidence of: (a) a sizeable loan made with the Tribe's money that she arranged to be repaid personally; (b) numerous large denomination checks that she and her co-RICO Ringleader Leslie Lohse wrote to each other and themselves from the Tribe's bank account at Umpqua, often with fraudulent and pretextual memos; (c) her structuring of thefts from the Tribe's bank accounts so as to avoid federal reporting requirements; and (d) her concerted and successful effort to empty hundreds of thousands of dollars from the Tribe's bank accounts following her termination from her position with the Tribe. Together, this evidence is more than sufficient to support the conclusion that Ms. Crosby is likely, even when viewed individually, to dissipate assets absent a freeze, and the District Court's finding to the contrary was clearly erroneous.

a. Evidence of a Loan Made by Ms. Crosby with Tribal Money in Order to be Personally Repaid

Plaintiffs presented indisputable evidence that RICO Ringleader Ines Crosby loaned approximately $192,000 of the Tribe's money to her future brother-in-law, arranging that he repay her personally and taking measures to prevent evidence of the transaction from being recorded.

Specifically, Plaintiffs submitted bank records showing that on January 15, 2013, Ms. Crosby withdrew $191,750 from a Tribal bank account, 3-ER-000355, along with evidence that the same day she loaned $192,000 to her future brother in law. 3-ER-000357-361. Evidence submitted by Plaintiffs further showed that, in September 2013, her future brother in law repaid the loan via $192,000 cashier's check payable to Ms. Crosby. 3-ER-000363. Ms. Crosby cashed the cashier's check at the Casino, taking specific actions with the assistance of her co-RICO Defendant and brother, Jon Pata, to evade observation of the transaction or its recordation. *See* 2-ER-000128-133.

Plaintiffs submitted further evidence showing that, upon being confronted with this evidence, Ms. Crosby admitted to having conducted the transaction, but claimed that she was entitled to take this money by virtue of a 5 million dollar forgivable line of credit contained in a purported employment agreement that the District Court had previously found was likely a forgery. 2-ER-000186 (¶6); 1-ER-

000007; 1-ER-000032. She claimed that she didn't just cash the check at a bank or deposit the check because of "the state of the economy." 2-ER-000186 (¶6 (i)).

b. Evidence that Ms. Crosby and Ms. Lohse Wrote Each Other and Themselves Numerous Large Denomination Checks From a Tribal Bank Account, Often with Pretextual and Fraudulent Memos

Plaintiffs also submitted substantial evidence demonstrating the consistent pattern by which Ms. Crosby and Ms. Lohse wrote themselves and one another large denomination checks from a bank account of the Tribe, often with pretextual and fraudulent memos designed to conceal their unlawful conduct. This included, without limitation, evidence of the following:

- January 8, 2013: Ms. Lohse to Ms. Crosby for $5,842.75. 3-ER-000329;
- February 21, 2013: Ms. Crosby to cash for $7,500. 3-ER-000326;
- February 26, 2013: Ms. Lohse to Ms. Crosby for $3,410.40. 3-ER-000323;
- March 10, 2013: Ms. Lohse to Ms. Crosby for $5,341.16, memo "cultural video." 3-ER-000323;
- April 1, 2013: Ms. Lohse to Ms. Crosby for $6,500, memo "reimburse." 3-ER-000320;
- April 17, 2013: Ms. Crosby to cash for $4,000. 3-ER-000320;
- May 20, 2013: Ms. Crosby to cash for $7,500. 3-ER-000317;
- June 4, 2013: Ms. Crosby to cash for $3,000. 3-ER-000308;

- July 3, 2013: Ms. Crosby to cash for $7,500. 3-ER-000311;
- July 26, 2013: Ms. Crosby to cash for $7,500. 3-ER-000311;
- August 21, 2013: Ms. Crosby to cash for $7,500. 3-ER-000308;
- September 9, 2013: Ms. Crosby to cash for $6,500. 3-ER-000305;
- September 10, 2013: Ms. Lohse to Ms. Crosby for $2,010.50, memo "cultural reimbursement." 3-ER-000305;
- September 27, 2013: Ms. Crosby to cash for $7,500. 3-ER-000305;
- October 25, 2013: Ms. Crosby to cash for $7,500. 3-ER-000302;
- October 30, 2013: Ms. Lohse to Ms. Crosby for $3,417.62. 3-ER-000299;
- November 20, 2013: Ms. Crosby to cash for $7,500. 3-ER-000299; and
- March 2, 2014: Ms. Lohse to Ms. Crosby for $3,175.16. 3-ER-000287.

c. Evidence that Ms. Crosby Structured Unauthorized Withdrawals from the Tribe's Bank Account to Avoid Federal Reporting Requirements

In addition to submitting evidence demonstrating that Ms. Crosby regularly withdrew thousands of dollars in cash for personal purposes from a Tribal bank account, Plaintiffs submitted evidence showing that Ms. Crosby frequently structured those withdrawals to avoid Currency Transaction Reporting ("CTR") requirements, which require banks to report any cash transaction over $10,000. *See* 31 U.S.C. §5311. Ms. Crosby was aware of the CTR requirements by virtue of the experience of her son and co-RICO Ringleader John Crosby, as an accountant and

FBI special agent focusing on white-collar crime. 5-ER-000798 (¶ 18(b)). This included, for example, evidence showing that between January 15, 2013, and April 7, 2014, Ms. Crosby cashed 15 checks of exactly $7,500, and five additional checks made out to cash for between $1,000 and $6,500 from one of the Tribe's accounts, often within close temporal proximity of one another but never on the same day. *See* 3-ER-000287-329.

d. Evidence that Ms. Crosby Withdrew Hundreds of Thousands of Dollars from a Tribal Bank Account After Her Employment Ended

Plaintiffs submitted evidence unequivocally demonstrating that, following her termination from employment with the Tribe on April 16, 2014, Ms. Crosby essentially emptied the Tribe's bank accounts at Umpqua bank until her access to the account was finally cut off at the end of May 2014. The evidence included records of her cash withdrawal, on April 17, 2014, of $10,000 (just $.01 below CTR reporting thresholds). 3-ER-000284; 4-ER-000640. This was followed, on May 5, 2014, by Ms. Crosby's transfer of $250,000 from the Tribe's money market account at Umpqua Bank into its checking account at the same bank. 3-ER-000279. That very same day, Ms. Crosby purchased a cashier's check from the checking account at Umpqua Bank in the amount of $59,839. 3-ER-000281. The day following the money market transfer, May 6, 2014, a check for $300,000

written by Ms. Crosby from the Umpqua checking account to an "NPI," cleared. *Id*. The identity of NPI is still unknown to the Tribe.

2. John Crosby

Plaintiffs provided substantial evidence demonstrating that Mr. Crosby: (a) repeatedly stole money from accounts of PEC, the Tribe's principal business and investment vehicle, at Cornerstone Community Bank ("Cornerstone Bank"), on whose board he sat, disguising these thefts as business expenses or investments by the Tribe; (b) withdrew over $800,000 from a PEC account to purchase a luxury house, wrote checks totaling approximately $600,000 from the same account to renovate the house, while simultaneously taking out home equity loans totaling $600,000 secured by the house; (c) engaged in a reciprocal arrangement whereby he and Mr. Lohse repeatedly wrote each other large denomination checks from a PEC account at Cornerstone; (d) attempted to transfer ownership of hundreds of thousands of dollars of assets not long before and after the filing of the instant suit – assets that Crosby has admitted to purchasing with the Tribe's money; and (e) has actively pursued moving money stolen from Plaintiffs by way of the conspiracy to the Philippines. Together, this evidence is more than sufficient to support the conclusion that Mr. Crosby is likely, even when viewed individually, to dissipate assets absent a freeze, and the District Court's finding to the contrary was clearly erroneous.

a. Evidence that Mr. Crosby Regularly Made Large Withdrawals from the Tribe's Principal Investment Accounts at Cornerstone Bank, Where He was a Member of the Board of Directors, in Order to Veil The Thefts as Investments and Business Expenses

Plaintiffs submitted evidence demonstrating that Mr. Crosby regularly transferred large lump sums from the operating accounts of the Tribe at Cornerstone Bank—on whose Board of Directors Mr. Crosby sat—to the accounts of PEC at the Bank, then made large withdrawals from those PEC accounts for his own personal benefit as well as that of other RICO Ringleaders. The Tribe made the bulk of its investments through PEC - a fact that Mr. Crosby was well aware of, the knowledge of which he used disguise these fraudulent transfers as investments, and thereby avoid detection. 5-ER-000802 (¶¶18(u), (v)). Evidence submitted concerning such transactions includes:

- August 18, 2010: $1.2 million transferred from a Tribal operating account to a PEC account, with check for $50,000 written by Mr. Crosby to Mr. Lohse from that PEC account the same day. 3-ER-000366.
- April 13, 2011: $300,000 transferred from a Tribal operating account to a PEC account, with a check for over $45,000 written by Mr. Crosby to a car dealer from that account two days later. 3-ER-000645-646. When later confronted, Mr. Crosby admitted to purchasing at least three vehicles with money from PEC accounts at Cornerstone, the value of which he estimated

to be approximately $160,000 or $170,000. 5-ER-000802 (¶ 18(u)(i).). As discussed below, Mr. Crosby recently has sought to transfer ownership of one of those vehicles. 2-ER-000158.

- June 30, 2011: $100,000 transferred from a Tribal operating account into a PEC account, with a check for $100,000 written by Mr. Crosby from the PEC account on the same day to a Jack Stringer for storage of a private jet the RICO Ringleaders purchased with Tribal funds but used for personal purposes. 3-ER-000371-373.
- May 16, 2013: $200,000 transferred from a Tribal operating account into the PEC account at Cornerstone Bank, with a check written for $63,410.84 written by Mr. Crosby to Mr. Lohse from that PEC account two days prior. 4-ER-000648. Two days prior, Mr. Crosby wrote himself a check for just over $33,000 from the same PEC account. *Id.*

b. Evidence that Mr. Crosby Used Well Over $1.2 Million of the Tribe's Money to Purchase and Renovate a Luxury Home, While Simultaneously Withdrawing $617,000 in Equity from the Home

Plaintiffs submitted evidence showing that Mr. Crosby used approximately $1.5 million of the Tribe's money, withdrawn without authorization from a PEC account at Cornerstone Bank, to purchase and renovate a luxury home. Not long thereafter, Mr. Crosby withdrew $617,000 in equity from the home through home equity loans. Specifically, the record evidence, including admissions made by Mr.

Crosby when confronted, demonstrates that, on January 2012, Mr. Crosby withdrew $838,434.14 from a PEC account at Cornerstone bank in order to purchase a cashier's check for the same amount made out to an escrow company to complete the purchase of a luxury home at 7857 Deer Hollow Court in Redding, California ("Deer Hollow Property"). 3-ER-000421; *see also* 5-ER-000802 (¶18(u)(iii)). Then, over the course of approximately the next two years, Mr. Crosby wrote checks from the same PEC account for major renovations to the property, the total of which he estimated to be over $300,000, 5-ER-000802 (¶18(u)(iv)), but which appears to have been at least twice that much. *See* 6-ER-001095-1097 (¶337). At the same time, Mr. Crosby took out two home equity loans totaling $617,000 secured by the property: a $200,000 loan from Cornerstone Bank taken out on May 15, 2012, 6-ER-001296; and a $417,000 home equity loan from Quicken Loans, Inc. on October 30, 2012, 6-ER-001304-1319. In order to assist Mr. Crosby in obtaining the latter loan, Cornerstone Bank, on whose board Mr. Crosby sat, agreed to subordinate its loan made to Mr. Crosby to the second home equity loan provided by Quicken. *See* 6-ER-001300-302.

c. Evidence that Mr. Crosby and Mr. Lohse Wrote Each other and Themselves Large Denomination Checks From the Accounts of PEC at Cornerstone

Plaintiffs further submitted substantial evidence that—much like the pattern between Ms. Crosby and Ms. Lohse—Mr. Crosby and Mr. Lohse repeatedly wrote

each other and themselves large checks from PEC's accounts at Cornerstone. Examples include:

- August 12, 2010:, Mr. Crosby and Mr. Lohse each wrote the other a $50,000 check. 4-ER-000643.
- December 2, 2010: Mr. Crosby and Mr. Lohse each wrote the other two $50,000 checks, totaling $100,000 each. 4-ER-000650-652.
- December 21-22, 2010: Mr. Crosby wrote Mr. Lohse a check for $42,790.60. 3-ER-000397;
- December 22, 2011: Mr. Crosby wrote Mr. Lohse a check for $13,972.50. 3-ER-000403;
- December 20, 2012: Mr. Crosby wrote Mr. Lohse a check for over $75,000 and himself a check for $47,682.50. 3-ER-000399-401;
- May 14-16, 2013: Mr. Crosby wrote a check to Mr. Lohse for $63,410.84 and himself a check for over $33,000. 3-ER-000405; 4-ER000648;

d. Evidence of Mr. Crosby's Efforts to Dispose of Assets Purchased with Tribe's Money After Termination from His Position with the Tribe

Plaintiffs further submitted evidence that Mr. Crosby, in a transparent effort to impede Plaintiffs' ability to receive any meaningful remedy against him through this lawsuit, made efforts following his termination from the Tribe—including during the pendency of this suit—to dispose of assets that he has admitted to

purchasing with money taken from PEC's accounts at Cornerstone Bank, in one case at a price that strongly indicates a collusive transfer. The evidence included:

- Deer Hollow Property: On November 6, 2014, Mr. Crosby listed the property—which he has admitted to buying and renovating with money taken from a PEC bank account, 5-ER-000802 (¶18(u)(iii), (iv)), for sale for $1,300,000. 6-ER-001238. The listing was removed on February 27, 2015, after Plaintiffs initiated a quiet title action with respect to the property. *See id.* In August 2015, Mr. Crosby made arrangements to transfer the home for $500,000—approximately one third of the amount of the Tribe's money Mr. Crosby spent on the property—with the assistance of fellow member of his church. 6-ER-001320-21.
- Mustang 302 – Laguna Seca: In July 2015, Mr. Crosby took actions to sell a specialty Ford Mustang, 2-ER-000158, one of the several high-end sports cars he has admitted to purchasing with money taken from a PEC bank account. 5-ER-000802(¶18(u)(i)).

e. Evidence that Mr. Crosby Has Made Efforts to Move Money Offshore Since His Termination from Tribe

Plaintiffs also submitted substantial evidence probative of efforts made by Mr. Crosby to move money offshore, beyond the reach of U.S. courts. Such evidence included:

- Transfer of Assets to the Philippines: In an October 14, 2014 email to member of the current Tribal Counsel, Chad Jones, a member of Mr. Crosby's family, stated that Mr. Crosby was "in the Philippines looking to invest in different ventures." 2-ER-000127. When confronted with this email, Mr. Crosby admitted to traveling to the Philippines last year, where he is considering starting a call center business and where he has relatives. 2-ER-149.

It is relevant to note in this regard that Plaintiffs submitted further evidence showing that Mr. Crosby has no significant source of capital available to him other than the money which he and his co-conspirators took from the Tribe. 5-ER-000801 (¶18(r)).

3. Leslie Lohse

As discussed above, Plaintiffs submitted evidence of numerous examples of Ms. Lohse and Ms. Crosby writing each other and themselves large denomination checks from a bank account of the Tribe. In addition, Plaintiffs submitted evidence showing that Ms. Lohse orchestrated a devastating cyber-attack on the Tribe following the RICO Ringleaders' termination, which had the purpose and effect of destroying significant amounts of incriminating evidence. Specifically, the evidence—which included several admissions by Ms. Lohse of her role in its orchestration—showed that, in May 2014, approximately one month after the

RICO Ringleaders' termination, the RICO Ringleaders, with the active assistance of their co-RICO Defendants Frank James and Chris Pata (a brother of Ms. Lohse and Ms. Crosby) launched several devastating cyber-attacks against the Tribe, which ultimately shut down and wiped clean the data servers for the Casino and other Tribal entities, destroying a very substantial amount of data and (likely incriminating) evidence, and resulting in hundreds of thousands of dollars in losses to the Tribe. 2-ER-000161 (¶¶ 6-9); 2-ER-000269 (¶ 13); 2-ER-000187(¶8). Plaintiffs also submitted evidence demonstrating that one of the homes raided by the FBI as part of its ongoing and related criminal investigation (one that includes criminal violations of the Federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030), included that of Frank James. 4-ER-000780 (¶¶ 3, 4).

Together, this evidence is more than sufficient to support the conclusion that Ms. Lohse is likely, even when viewed individually, to dissipate assets absent a freeze, and the District Court's finding to the contrary was clearly erroneous.

4. Larry Lohse

As discussed above, Plaintiffs submitted evidence of numerous examples of Mr. Crosby's and Mr. Lohse's pattern of writing each other checks in large denominations from PEC accounts at Cornerstone Bank. In fact, between just August 2010 and May 2013, Mr. Crosby and Mr. Lohse wrote each other checks

from accounts of PEC at Cornerstone Bank, totaling approximately $495,172, of which Mr. Lohse received approximately $345,000. *See* Section II(A)(1)(b)(3).

Together, this evidence is more than sufficient to support the conclusion that Mr. Lohse is likely, even when viewed individually, to dissipate assets absent a freeze, and the District Court's finding to the contrary was clearly erroneous

B. Evidence of Coordinated Actions by the RICO Ringleaders to Defraud the Tribe and Evade Liability

In addition to the evidence summarized above, which is probative of each RICO Ringleader's individual pattern of thefts, fraud, efforts to evade liability, Plaintiffs further submitted overwhelming evidence of similar coordinated efforts by the RICO Ringleaders. Categories of such evidence included: (1) their coordinated post hac fabrication of virtually identical purported employment agreements that provided each of the RICO Ringleaders with $5 million forgivable lines of credit that each employed as a basis to falsely claim that their admitted thefts from the Tribe were authorized; (1) their coordinated deletion of all non-spam emails in their paskenta.org email accounts; (3) their coordinated efforts to impede the investigation of the Tribe's internal investigation conducted in the summer of 2014 by Wilmer Hale; (4) their coordinated withdrawal of all funds from their retirement accounts after their termination from employment by the Tribe; (5) their coordinated punishment of Tribe members who raised questions concerning the RICO Ringleaders' financial dealings during the period of their

control of the Tribe; and (6) their coordinated prevention of any audit of the Tribe's finances during that period.

1. Evidence of the RICO Ringleaders' Coordinated Fabrication of Employment Agreements In a Post Hoc Attempt to Justify Their Theft From the Tribe

Plaintiffs presented substantial evidence showing that in the wake of the RICO Ringleaders' termination from employment with the Tribe, and in the face of accusations of their financial misconduct, the RICO Ringleaders fabricated nearly identical purported employment agreements in an attempt to justify taking millions of dollars from the Tribe.

Specifically, during Wilmer Hale's interviews of the RICO Ringleaders in the summer of 2014, each of the four RICO Ringleaders "revealed" employment agreements purportedly entered into by them with the Tribe on January 25 or 26, 2001, which purportedly provided each with a forgivable $5 million line of credit at 1% annual interest. 5-ER-000796, 000799, 000807, 000810 (¶¶6(g),18(h), 20(l), 22(f)). Each then claimed that these lines of credit allowed them to take millions of dollars of Tribal money for their personal benefit, including for the purchase of luxury homes and cars and payment for extravagant personal expenses. *See* 5-ER-000797, 000802, 000808, 000811(6(j), 18(u), 20(n), 22(k)).

Plaintiffs submitted overwhelming evidence that these purported employment agreements were, in fact, forgeries. This included without limitation:

testimony by the only purported signatory of any of the agreements, who was neither deceased nor one of the RICO Ringleaders, that he did not sign the agreement in question and had never heard of, or seen, any of the purported agreements prior to August 2014, 4-ER-000576-77 (¶8); testimony by a handwriting expert that the latter as well as the two deceased purported signatories "probably did not write" their purported signatures on the documents, 3-ER-000462; evidence of another agreement entered into by Mr. Crosby with the Tribe, on January 1, 2001, less than a month before the date of the purported agreements, the terms of which were both far less generous and virtually identical to those of an agreement entered into by another employee of the Tribe at the same time, 5-ER-000462, 5-ER-000893-921; the terms of the purported agreements themselves, which were consistent not with the reality of the Tribe in 2001 but rather a *post hac* effort by the RICO Ringleaders to justify their conduct, 5-ER-000923-950; the lack of any evidence that the purported agreements existed prior to the summer of 2014 and the inability of the RICO Ringleaders to convincingly account for this fact or to convincingly describe the circumstances of executing the purported agreements, 5-ER-000800-801, (¶¶18(k), (l), (m), (n)); evidence that Mr. Crosby sought to negotiate a new employment agreement with the Tribe in 2003 that not only was far less favorable than the agreement he purportedly signed on January 25, 2001, but which was based on his earlier January 1, 2001 agreement with the Tribe, 4-

ER-000528-545; evidence that Mr. Crosby never once mentioned during those negotiations the existence of an agreement entered into by him with the Tribe on January 25, 2001, 4-ER-000529-30 (¶6); evidence of numerous other actions taken by the RICO Ringleaders that were inconsistent with the existence of the purported agreements, 5-ER-000848-854; as well as the circumstances of the purported agreements "revelation" in the summer of 2014 and efforts later by the RICO Ringleaders to have the purported agreements "ratified," 5-ER-000850, 1-ER-000032-36, 3-ER-000458 (¶5), 3-ER-000451 (¶4), 4-ER-000611 (¶16), 4-ER-000656 (¶¶16-18).

Based on this evidence, and the RICO Ringleaders' failure to provide a meaningful response, the District Court denied a motion by the RICO Ringleaders to stay the proceeding in favor of arbitration, which they had brought based on arbitration provisions contained in the forged agreements. 1-ER-000032-36. In doing so the District Court found that the RICO Ringleaders had "not presented any evidence from which a reasonable inference could be drawn that the . . . signatures [on the forged agreements] are authentic." 1-ER-000035.

2. The RICO Ringleaders Deleted All Non-Spam Emails in Their Tribal Accounts

Plaintiffs also submitted evidence that the RICO Ringleaders upon their termination from positions at the Tribe deleted everything but spam from their Tribal accounts. 2-ER-000162 (¶10).

3. Evidence that the RICO Ringleaders Impeded Investigations Into Their Conduct After Their Termination

Plaintiffs further submitted evidence that the RICO Ringleaders intentionally impeded the internal investigation conducted by Wilmer Hale into their activities. Such evidence included statements by Wilmer Hale that the RICO Ringleaders denied requests for access to "important records in certain Tribal accounts." 5-ER-000826. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2nd Cir. 1972) (explaining the continued failure to furnish information necessary to a complete understanding of the situation justified extension of the temporary freeze).

4. Evidence the RICO Ringleaders Emptied Their Retirement Accounts Shortly After Their Termination

Plaintiffs further submitted evidence that between June 27, 2014 and June 30, 2014, each of the RICO Ringleaders liquidated their 401(k) accounts. The RICO Ringleaders created these accounts to convert hundreds of thousands of dollars from the Tribe and withdrew the funds ***in cash*** to impede any effort by the Tribe to recover them. *See* 4-ER-613-635.

5. Evidence that the RICO Ringleaders Punished Tribe Members who Raised Questions Concerning the RICO Ringleaders' Financial Dealings

While much of the foregoing evidence submitted to the District Court is probative of efforts taken by the RICO Ringleaders after their termination to evade liability for over a decade of fraud and theft, Plaintiffs also submitted

evidence of severe punishments that the RICO Ringleaders doled out to Tribe members that raised questions concerning their financial dealings. For example, Plaintiffs submitted evidence that in 2013, a Tribe member was suspended from the Tribe for ten years for asking questions during a meeting of Tribe members about the RICO Ringleaders' purchase with Tribal money of a private jet and political contributions made with the Tribe's money by Mr. Crosby's wife. 2-ER-000164 (¶¶3-5). Per the terms of her suspension, Ms. Freeman's monthly per capita payments from the Tribe – upon which she depended for basic living expenses – were revoked. 2-ER-000164 (¶5). As most other Tribe members also depend on the per capita payments to meet their basic living expenses, 3-ER-000274 (¶23), this and other similar suspensions were designed by the RICO Ringleaders with the specific intent to quash and discourage any inquiries into their conduct by Tribe members.

6. Evidence of the RICO Ringleaders' Prevention of Audits of the Tribe's Finances During Their Tenure

Plaintiffs further submitted evidence of efforts taken by the RICO Ringleaders to prevent any financial audit of the Tribe from occurring during the period of their tenure. 2-ER-000166 (¶4). Indeed, Plaintiffs submitted evidence showing that the RICO Ringleaders intentionally structured certain contracts for the receipt of federal funds so that the payments were below the threshold that would have required the Tribe to perform and submit a financial audit, denying the

Tribe hundreds of thousands of dollars in federal funds, if not millions, to which it was entitled in order to protect their fraudulent scheme from detection. *Id*.

As the foregoing shows, independent of the District Court's failure to apply the correct legal standard, the District Court's failure to find that the Plaintiffs had satisfied their burden to show a likelihood of asset dissipation necessary to support issuance of the requested relief was clearly erroneous.

III. ALTHOUGH THE DISTRICT COURT FAILED TO REACH THIS ISSUE, PLAINTIFFS HAVE MET THE OTHER ELEMENTS OF A PRELIMINARY INJUNCTION

In its Order, the District Court expressed no opinion regarding the additional elements required to issue a preliminary injunction: (1) that they are likely to succeed on the merits, (2) that the balance of equities tips in their favor, and (3) that an injunction is in the public interest. *See Am. Trucking Ass'ns., Inc.*, 559 F.3d at 1052 (citation omitted). It's clear, however, that Plaintiffs have sufficiently established these additional elements.

A. Plaintiffs' Have Demonstrated a Likelihood of Success on the Merits on Their Claims Against the RICO Ringleaders or Have at Least Raised Serious Questions on the Merits

Plaintiffs' are likely to succeed on each of their claims for relief against the RICO Ringleaders: (1) civil RICO; (2) conversion and money had and received, (3) fraud and breach of fiduciary duty claims, (4) state and federal cyber-crime

laws, (5) civil conspiracy, and (6) constructive trust and accounting. *See* 6-ER-1120-1140, 1143-1144, 1150, 1151-1152, 1144-1150, 1140-1143, 1151, 1183-1184 (¶¶ 431-501, 519-525, 565-568, 575-582, 526-564, 502-518, 569-574, 755-763).

1. Civil RICO

Plaintiffs allege the RICO Ringleaders violated 18 U.S.C. § 1962(a), (b), (c), and (d). 6-ER-1120-1140 (¶¶ 431-501). In addition to establishing a RICO "enterprise," Plaintiffs must show a pattern of "racketeering activity," which under RICO includes: mail fraud, wire fraud, theft, embezzlement, money laundering, bribery, and obstruction of justice – all of which have been alleged against the RICO Defendants. *See* 18 U.S.C. § 1961; *see* 6-ER-1120-1140 (¶¶ 431-501). In this context, "money laundering" includes the intentional act to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956. "Wire fraud" and "mail fraud" include the use of mail or wire in furtherance of any scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses. 18 U.S.C §§ 1341, 1343.

The RICO Ringleaders and other RICO Defendants conspired with the purpose of controlling the Tribes' finances and ultimately stealing from them. *See, e.g.,* 3-ER-270-356, 362-421, 2-ER-042-064, 2-ER-184-265. This enterprise was

directed by, and chiefly benefited, RICO Ringleaders John Crosby, Leslie Lohse, Ines Crosby, and Larry Lohse.

The RICO Defendants furthered their scheme through a pattern of criminal racketeering activity, including: stealing from Tribal bank accounts, 3-ER-270-356, 362-421, transferring money between Tribal accounts so as to hide their thefts (*see id.*); making withdrawals just below federal bank fraud reporting requirements (*see id.*);and paying each other with large checks written from Tribal accounts(*see id.*).This was all done with the purpose of concealing or disguising the nature of their theft from the Tribe. This conduct constitutes money laundering. *See* 18 U.S.C. § 1956 ("money laundering" includes the intentional act to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."). In many cases, it also involved wire fraud. *See* 18 U.S.C. § 1343. This enterprise was conducted in interstate commerce in that it involved, *inter alia*: international wire transfers from the PEC account at Cornerstone Bank to foreign and out-of-state bank accounts, including that of Marcus Evans, Inc. in England, (s*ee* 3-ER-270-274, 406-419), interstate emails, and interstate credit card payments (s*ee* 3-ER-270-356).

Accordingly, Plaintiffs have set forth sufficient evidence before the District Court demonstrating that they are likely to succeed, on their claims under 18

U.S.C. § 1962 (a), (b), (c), and (d). This likelihood is increased by the existence of the DOJ's ongoing criminal investigation into the conduct on which it is based.

2. Conversion and Money Had and Received

Plaintiffs ninth and fifteenth claims for relief are for conversion (6-ER-1143-1144 (¶¶ 519-525)), and money had and received (6-ER-1150 (¶¶ 565-568)), respectively. Plaintiffs are likely to succeed on the merits of these claims.

With respect to Plaintiffs' conversion claim, Plaintiffs need show only: (1) Plaintiffs ownership of property: (2) the RICO Ringleaders' wrongful act interfered with the Plaintiffs' possession; and (3) resulting damages. *See PCO, Inc. v. Christensen*, 150 Cal.App.4th 384, 524 (2007). Plaintiffs' money had and received claim requires that Plaintiffs similarly show: (1) the RICO Ringleaders received money that was intended to be used for the benefit of Plaintiffs; (2) that money was not used for the benefit of Plaintiffs; and (3) that the RICO Ringleaders have not given this money to Plaintiffs. *See* CACI No. 370; *Mains v. City Title Ins. Co.*, 34 Cal.2d 580, 586 (1949).

At their core, these causes of action hold responsible persons who wrongfully take the property of another for their own benefit. Here, the RICO Ringleaders took tens of millions of dollars from the Tribe, *see* 3-ER-270-356, 362-421, and used that money to buy, *inter alia*, luxury houses, cars, and jets for their personal benefit. *See* 5-ER-793-812 (¶¶ 6(k), 18(u), 20(n), 22(f)). In fact, each

of the RICO Ringleaders admit that they helped themselves to millions of dollars of the Tribe's money for their personal benefit. *See id*.

3. Breach of Fiduciary Duty Claims

Plaintiffs' thirteenth and fourteenth claims for relief are for breach of the RICO Ringleaders' fiduciary duties to the Tribe of: (1) undivided loyalty and (2) reasonable care. 6-ER-1149-1150 (¶¶ 554-564). A cause of action for breach of fiduciary duty requires the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." *Knox v. Dean,* 205 Cal.App.4th 417, 432 (2012).

Each of the Ringleaders were senior level employees of the Tribe—or in Mrs. Lohse's case, the Tribal Treasurer and a member of the Tribal Council—and clearly owed the Tribe a fiduciary duty. *See Thomas Weisel Partners LLC v. BNP Paribas*, No. C 07-6198 MHP, 2010 U.S. Dist. LEXIS 32332, at *16 (N.D. Cal., April 1, 2010) (quotation omitted) ("an employer is entitled to its employees' 'undivided loyalty'" during the term of employment). "The duty of loyalty is breached . . . when the employee takes action which is inimical to the best interests of the employer." *Id.* (quotation omitted); *see also Sequoia Vacuum Sys. v. Stransky,* 229 Cal.App.2d 257, 287 (1964) (holding that a fiduciary duty existed where the defendant was a "managerial employee and director of the . . . corporation").

As senior employees of the Tribe, the RICO Ringleaders had fiduciary obligations of loyalty and reasonable care. 5-ER-793-812 (¶¶ 6(b), 17(c), 19, and 22(a)). Despite these obligations, they used their positions to enrich themselves at the expense of the Tribe. 5-ER-793-812 (¶¶ 6(k), 18(u), 20(n), 22(f)); 2-ER-184-187 (¶ 6(a)); 3-ER-270-274, 362-421. This is a clear breach of their fiduciary duties to act reasonably and in the best interests of the Tribe. Accordingly,, Plaintiffs are likely to succeed on their breach of fiduciary duty claim.

4. Fraud

Plaintiffs' tenth and eleventh claims for relief are for fraudulent concealment and fraudulent misrepresentation, respectively.6-ER-1144-1148 (¶¶ 526-546). California Civil Code section 1709 provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." The elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression

of the fact, the plaintiff must have sustained damage." *Boschma v. Home Loan Center, Inc.,* 198 Cal.App.4th 230, 248 (2011).

As senior employees of the Tribe, the RICO Ringleaders were under a fiduciary duty to act in the best interests of the Tribe; instead, they stole millions of dollars and went to great lengths to hide these thefts. 5-ER-793-812 (¶¶ 6(b), 17(c), 19, and 22(a)). Because of the RICO Ringleaders' continued misrepresentations, their theft was not discovered for nearly two decades. As a result, the Tribe has suffered the loss of millions of dollars at the hands of its former officials. As such, Plaintiffs are likely to prevail on this claim as well.

5. State and Federal Cyber-Crimes Claims

Plaintiffs' seventh and eighth claims for relief are, respectively, for violations of the Federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, and the California Comprehensive Computer Data Access and Fraud Act, Cal. Penal Code § 502 (collectively "Cyber-Crime Claims"). 6-ER-1140-1143 (¶¶ 502-518). The CFAA holds any person liable that "intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss." 18. U.S.C.§ 1030(a)(5)(C). Under this section, a "protected computer" is one "which is used in or affecting interstate or foreign commerce…". 18. U.S.C.§ 1030(e)(2)(B). CFAA's California counterpart holds liable individuals who "disrupt" a computer when they are not authorized. Cal. Penal Code § 502.

RICO Ringleader Leslie Lohse admits to participating in the cyber-attacks at the Casino. 5-ER-793-812 (¶ 8); 6-ER-1207-1210, 1243-1260. In the attacks, which occurred after the RICO Ringleaders admitted termination from employment with the Tribe, (*see* 6-ER-1211-1234), the RICO Ringleaders systematically hacked into the Tribe's computer systems and deleted all of the Tribe's primary data storage locations and destroyed a significant amount of evidence. 2-ER-160-162. As former employees of the Tribe, the RICO Ringleaders were not authorized to access the Casino's network. *Id*. However, even assuming *arguendo,* they did have such authorization, they lost this authority once they acted to the detriment of the Tribe. *See, e.g., Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006)2006) (authorized access to a company computer under the CFAA terminated once an employee acted with adverse interests). Furthermore, CFAA imposes liability on not just those who act "without authorization" but also those who "exceed authorized access." *United States v Nosal*, 676 F.3d 854, 859 (9th Cir. 2012). The RICO Defendants exceeded any conceivable authority they may have had when they deleted evidence of their illegal conduct and other data contained on the Tribe's computer systems.

A reasonable inference can be drawn that the RICO Ringleaders or those working at their direction were responsible because Mr. Crosby, as well as RICO Defendants Frank James and Chris Pata have all refused to respond on Fifth

Amendment grounds to Plaintiffs' interrogatories regarding the May 9 and May 15 cyber-attacks. 2-ER-065-133.

6. Civil Conspiracy

Plaintiffs' sixteenth claim for relief alleges civil conspiracy. 6-ER-1151 (¶¶ 569-574). To support a conspiracy claim, Plaintiffs must allege: "(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." *AREI II Cases,* 216 Cal.App.4th 1004, 1022 (2013) (citations omitted). As set forth herein, the RICO Ringleaders agreed to, and did, steal millions of dollars from the Tribe. 3-ER-270-356, 362-421. As such, Plaintiffs are likely to prevail on this claim.

7. Constructive Trust and Accounting

Plaintiffs' thirty-fourth and thirty-fifth claims for relief are for equitable relief: constructive trust (6-ER-1183 (¶¶ 755-759)), and accounting (6-ER-1183 (¶¶ 760-763)). Plaintiffs are likely to succeed, or at the very least have raised serious questions on the merits of their claims, that due to the wrongful acts of the RICO Ringleaders the Tribe is entitled to a constructive trust and an accounting. *See Communist Party v. 522 Valencia, Inc.,* 35 Cal.App.4th 980, 990 (1995) (a constructive trust may be imposed when "(1) the existence of a *res* (property or some interest in property); (2) the *right* of a complaining party to that res; and (3) some *wrongful* acquisition or detention of the res by another party who is not

entitled to it.") (emphasis in original); *see also Stilwell v. Trutanich*, 178 Cal.App.2d 614, 620 (1960) (accounting ordered when an amount is due plaintiff); Cal. Civ. Code § 2224.

Here, Plaintiffs' claims support the creation of a constructive trust: (1) the Tribe attained assets through a diversity of Tribal enterprises, including operation of the Casino (2-ER-267-269); (2) this property belonged to the Tribe collectively; and (3) the RICO Ringleaders took this property through the deceitful and malicious conduct discussed above. Moreover, an accounting is appropriate because the Tribe lacks knowledge as to the extent of the RICO Ringleaders theft, and it cannot account for all the large sums of money the RICO Ringleaders spend or disbursed to themselves 3-ER-270-274 (¶ 24). *See Huong Que, Inc. v. Luu,* 150 Cal.App.4th 400, 418 (2007) (extreme difficulty in ascertaining damages is a factor favoring injunctive relief.)

B. The Balance of Equities Tips Sharply in Plaintiffs' Favor

In issuing a preliminary injunction, "[t]he court balances the harm that the injunction might cause the defendant with the plaintiff's threatened injury. But the balance of hardships tipping in favor of plaintiff is not a prerequisite to awarding preliminary injunctive relief." *QBAS Co. v. C Walters Intercoastal Corp.*, No. SACV 10-0406 AG, 2010 U.S. Dist. LEXIS 143945, at * 37 (C.D. Cal. Dec. 16, 2010) (citation omitted). The court needs only consider the balance, and even if

"neither party has a clear advantage," it may grant preliminary relief if the plaintiff is likely to succeed on the merits of one or more of its claims and the other conditions are met. *Id*. *Cf. Alliance For The Wild Rockies*, 632 F.3d at 1132. Here, the balance of the hardships tip sharply in Plaintiffs' favor.

The RICO Ringleaders have amassed extravagant riches and have led very comfortable lives at the Tribe's expense. Plaintiffs ultimately may be deprived of any meaningful redress for the RICO Ringleaders' illicit conduct barring an injunction. The RICO Ringleaders, however, will suffer little to no conceivable or claimed hardship if their ill-gotten gains are frozen. While an asset freeze of all the RICO Ringleaders' assets in their entirety would be appropriate here, Plaintiffs are not requesting such an order be issued.

Plaintiffs' request provides the RICO Ringleaders funds for reasonable living expenses, and a collective monthly allowance of $10,000 in attorneys' fees and costs. This should relieve any potential apprehension the Court may have as to any hardship on the Defendants. In fact, this Court has found zero hardship under similar circumstances. *Marcos*, 862 F.2d at 1362 (finding "zero evidence of hardship" because "the district court stipulated in the injunction that the Marcoses may use their assets to cover normal living expenses and legal fees.")

Only Ringleader John Crosby, in his declaration, explicitly claimed that an injunction could potentially cause him hardship because of his children's tuition

payments and his need to "loan money to his business to meet expenses." 2-ER-151 (¶¶ 19-20)..[3] These arguments ring hollow considering the lavish lifestyle Mr. Crosby built for himself over nearly two decades by spending the Tribal money as if it were his own.

Mr. Crosby's potential tuition obligations and business expenses give no reason for the District Court to deny outright Plaintiffs' requested freezing of his assets as a hardship. Asset freeze orders can be crafted by the Court to account for reasonable expenses, and the Court has the ultimate discretion in determining the legitimacy and reasonableness of allowances for living and other expenses. *See CFTC v. Noble Metals Int'l*, 67 F.3d 766, 775, fn. 8 (9th Cir. Nev. 1995) (district court froze defendants' assets but allowed them to expend funds "for ordinary, reasonable, and necessary living expenses"); *SEC v. Private Equity Mgmt. Group*, 2009 U.S. Dist. LEXIS 64724, at *9 (C.D. Cal. July 9, 2009) ("Courts regularly hold that they have discretion to modify the asset freeze to release funds to pay living expenses")(citations omitted). As long as a preliminary injunction is sufficiently limited such that it does not freeze personal funds to cover reasonable

[3] Ringleaders Ines Crosby, Larry Lohse, and Leslie Lohse failed to present any evidence showing how Plaintiffs' proposed injunction—which would provide each of them reasonable living and legal expense allowances as determined by the District Court—would cause them any financial hardship. 2-ER-153-156 (Ines Crosby Decl.), 2-ER-145-146 (Larry Lohse Decl.), 2-ER-134-137 (Leslie Lohse Decl.).

living expenses, the balance of equities tips in a plaintiffs' favor. *See Fid. Nat'l Title Ins. Co*, 2011 U.S. Dist. LEXIS 135316 at *24; *see also Johnson v. Couturier*, 572 F.3d 1067, 1085-86 (9th Cir. 2009) (finding that where an asset freeze permitted defendant to cover normal living expenses and legal fees, the district court was correct that a narrowly tailored asset freeze would prejudice defendant less than a denial of relief would prejudice plaintiffs).

As with living expenses, the Court also has discretion to forbid or limit payment of legal expenses out of frozen assets. *See FSLIC v. Ferm*, 909 F.2d 372, 374 (9th Cir. 1990) (approving limitation on attorney's fees); *see also F.T.C. v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (observing that "courts regularly have frozen assets and denied attorney fees or limited the amount for attorney fees"). A court may restrain a defendant from using disputed funds to pay for attorney's fees before a final judgment on the merits has been rendered. *United States v. Monsanto*, 491 U.S. 600, 614 (1989). "These decisions recognized the importance of preserving the integrity of disputed assets to ensure that such assets are not squandered by one party to the potential detriment of another." *Ferm*, 909 F.2d at 374.

C. Public Policy Favors the Issuance of an Asset Freeze

The Supreme Court has consistently expressed the view that the federal government is firmly committed to the goal of promoting tribal economic

development and self-sufficiency. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341-44 (1983)(expressing Congress' desire to promote the goal of tribal economic development); *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (same).

To promote its members' economic self-sufficiency, in March 2003 the Tribe began providing its members health and education benefits and per capita payments. 3-ER-270-274 (¶ 23). The median income of Tribe members by 2005 was approximately $13,000 and 46% of all Tribe members were unemployed. 2-ER-165-183. While the per capita payments and benefits the Tribe provided its members kept members above the poverty line, the vast majority of members still had incomes lower in comparison to other residents in the area. *Id.* Presently, the Tribe's per capita payments to its members—approximately $50,000 a year—keeps its members above the poverty line. *Id.*

The RICO Ringleaders have dealt a substantial blow to the Tribe's economic independence and stability. Their acts have undone a significant amount of the Tribe's progress towards achieving economic self-sufficiency. The Tribe is now consumed with piecing together the financial ruins the RICO Ringleaders left behind. The RICO Ringleaders should be penalized for encroaching on federal government's interest in perpetuating the Tribe's economic development.. If this Court considers the question presented in this appeal to be a close one, public

policy concerns counsel in favor of freezing the RICO Ringleaders' assets to prevent them from further benefiting from their illegal enterprise.

The public interest would further be served by ordering the requested injunction, as Congress intended that federal courts be available as forums in which Indian tribes can seek relief for violations of federal law. *See* 28 U.S.C. § 1362.Federal policy strongly encourages self-government and self-determination by Indian tribes. *See Alvarez v. Tracy*, 773 F.3d 1011, 1013 (9th Cir. 2014). The Tribe's decision to file the instant action exemplifies this self-government and self-determination. Accordingly, the public interest would be frustrated here for a federal court to deny the Tribe the redress they now seek against the RICO Ringleaders.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request this Court reverse the District Court's Order Denying Plaintiffs' Motion for Preliminary Injunction.

Dated: September 15, 2015 GROSS LAW, P.C.

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

Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: September 15, 2015

Respectfully Submitted,

GROSS LAW, P.C.

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

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,444 words (based on the word processing system used to prepare the brief).

Dated: September 15, 2015

GROSS LAW, P.C.

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

Attorneys for Plaintiffs-Appellees

ADDENDUM

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to

have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.