Case No. 15-16654

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.

Appeal from the United States District Court
Eastern District of California
The Honorable Garland E. Burrell, Jr., Presiding
Case No. 15-cv-00538-GEB-CMK

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I. INTRODUCTION

In *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the Supreme Court called a preliminary injunction freezing defendants' assets "a 'nuclear weapon' of the law." *Id.* at 332. Likewise, the Racketeering Influenced and Corrupt Organizations Act ("RICO") has been called "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). The gist of plaintiffs' appeal is that because RICO is so powerful, it must entail the right to deploy the additional nuclear weapon of an asset freeze, even in the absence of particular evidence that defendants are likely to dissipate their assets. Plaintiffs contend that the district court abused its discretion in ruling otherwise.

Plaintiffs are wrong.

Indeed, far from abusing its discretion in denying plaintiffs' motion for a preliminary injunction freezing defendants' assets, the district court would have abused its discretion if it had granted the preliminary injunction based on RICO, because "***injunctive relief is not available to a private plaintiff in a civil RICO action***." *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986) (emphasis added). Thus, plaintiffs are simply wrong to argue that the injunction is mandated by "Congress' purposes in enacting RICO." Appellants' Opening Brief ("AOB") at 2. This Court held the opposite in *Wollersheim*, 796 F.2d at 1077-89.

Furthermore, this case arises from an internal tribal dispute over which federal courts lack jurisdiction. Plaintiffs allege that defendants Ines Crosby, John Crosby, Leslie Lohse and Larry Lohse[1] took control of the Paskenta Band of Nomlaki Indians ("the Tribe"), and "then used their control to steal and embezzle from the Tribe with impunity." 6-ER-1000-01 ¶ 3. Even if that were true—which it is not—federal courts do not have jurisdiction over such intra-tribal disputes. *See, e.g.*, *Lewis v. Norton*, 424 F.3d 959, 960-63 (9th Cir. 2005); *In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 767 (8th Cir. 2003); *Miccosukee Tribe of Indians of Fla. v. Cypress*, 975 F. Supp. 2d 1298, 1300-09 (S.D. Fla. 2013). Given the absence of jurisdiction, this Court should not only affirm the district court's denial of the preliminary injunction, but should "terminate the litigation now." *Munaf v. Geren*, 553 U.S. 674, 691-92 (2008).

In any event, even if the district court had both the jurisdiction and the authority to freeze defendants' assets—which it did not—it could only have done so based on a "clear showing" that plaintiffs were entitled to such an "extraordinary remedy," taking into account the effect the requested freeze would have on "'each party.'" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22-24 (2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542

[1] Plaintiffs refer to these defendants with the absurdly loaded term "RICO Ringleaders"; they are referred to here as the "Crosby & Lohse Defendants," where distinguished from other defendants, and otherwise simply as "defendants."

(1987)). The district court did not abuse its discretion in finding that plaintiffs failed to carry that heavy burden.

For these reasons and others discussed below, this Court should affirm the district court's denial of the preliminary injunction. Further, because this Court and the district court lack jurisdiction, the Court should terminate the litigation and remand the case for immediate dismissal. *See Munaf*, 553 U.S. at 691-92, 705.

II. JURISDICTIONAL STATEMENT AND FACTUAL BACKGROUND[2]

A. Federal courts lack jurisdiction over this intra-tribal dispute.

Plaintiffs' three-line jurisdictional statement fails to mention, much less overcome, the "lack of federal court jurisdiction to intervene in tribal membership disputes" and other "'matters of local self-government.'" *Lewis*, 424 F.3d at 960-61 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)). In *Lewis*, for example, this Court held that it lacked jurisdiction over a tribal membership dispute even though it was "deeply troubling on the level of fundamental substantive justice." *Id.* at 963. "These doctrines of tribal sovereign immunity were developed decades ago, before the gaming boom created a new and economically valuable premium on tribal membership," and this Court is "not in a

[2] Defendants include relevant factual background in this section, consistent with Federal Rule of Appellate Procedure 28(a)(4)(A)-(B). Rather than repeat these facts in the Statement of the Case, below, defendants limit that section to procedural background. To be clear, however, defendants do not agree with the purported factual background recited in plaintiffs' Statement of the Case.

position to modify well-settled doctrines of tribal sovereign immunity." *Id.* The *Lewis* Court relied on, among other cases, *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996), in which the Eighth Circuit held that it lacked jurisdiction over RICO claims that were based on "an intra-tribal dispute" over allegations of "improper inclusion of non-members on the Tribe's membership rolls" and "improper payments of gaming revenues." *Id.* at 559.

The rule against federal assumption of jurisdiction over intra-tribal affairs is not limited to membership disputes. In *Sac & Fox*, for example, the Eighth Circuit held that the district court lacked subject matter jurisdiction over RICO claims brought by a tribe's "Elected Council" against a rival "Appointed Council" that "seized the casino by force and placed armed guards in various Tribal buildings," "excluded members of the Elected Council from the casino and other Tribal facilities," and asserted control over the Tribe's finances and "gaming proceeds." *Sac & Fox*, 340 F.3d at 752. The Eighth Circuit held that jurisdiction was lacking because "predicate violations alleged by the Elected Council could not be considered qualifying predicate violations unless the court first concluded that the Appointed Council was not the lawful governing body of the Tribe." *Id.* at 767. Moreover, "to define the Appointed Council as [a RICO] 'enterprise' separate from the Tribe itself we would first have to conclude that the Appointed Council does not, in fact, represent the Tribe." *Id.*

Likewise, in *Miccosukee*, the district court held that it lacked jurisdiction over RICO and pendent state-law claims that—just as here—the plaintiff tribe brought against its former leaders based on allegations of embezzlement and fraud. "[A]t its core, this is a dispute involving the Miccosukee Tribe and the alleged abuse of power granted to its former chairman under its tribal constitution. The Miccosukee Tribe is bootstrapping what is discontent with the prior leadership onto alleged federal claims that are better resolved in another venue." *Miccosukee*, 975 F. Supp. 2d at 1306.[3]

Here, the essence of plaintiffs' complaint is that defendants "took control of the Tribe and [its corporation, plaintiff Paskenta Enterprises Corporation (PEC)], and then used their control to steal and embezzle from the Tribe with impunity." 6-ER-1000-01 ¶ 3. Plaintiffs complain that, after the Tribe was restored to federal recognition in 1994,[4] the Tribe hired defendant Ines Crosby as Tribal Administrator. 6-ER-1020-21 ¶¶ 82-84. Two decades later, plaintiffs claim that the Tribe was hoodwinked, and that it should not have given Ms. Crosby that

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[3] *See also, e.g.*, *Timbisha Shoshone Tribe v. U.S. Dep't of the Interior*, No. 2:11-CV-00995-MCE, 2011 WL 1883862, at *5 (E.D. Cal. May 16, 2011) (district court lacked jurisdiction because "to reach the merits of Plaintiffs' claims it would have to resolve the parties' disenrollment and election disputes"); *Wandrie-Harjo v. Chief-Boswell*, No. CIV-11-171-F, 2011 WL 7807743, at *4-5 (W.D. Okla. Aug. 15, 2011) (district court lacked jurisdiction over plaintiffs' request for a preliminary injunction because it would require a determination of whether former tribal leader "had the authority to take the actions alleged").

[4] *See* 6-ER-1017 ¶ 75 (citing 25 U.S.C. § 1300m *et seq.* ("Restoration")).

position, because she is a member of the Pata family, which was not included on the initial post-Restoration tribal rolls, but was added to the rolls in July 1998. *Id.* ¶¶ 82-85.[5] Plaintiffs complain bitterly about that allegedly "irregular" expansion of the tribal rolls, claiming that "members of the Pata family always voted en masse for the [defendants'] chosen candidates." *Id.* ¶¶ 85-86; 6-ER-1027 ¶ 113.

According to plaintiffs, the "mass enrollment" of Pata family members "set the stage" for defendants to take control of the Tribal government. 6-ER-1021 ¶¶ 86-87. In particular, plaintiffs complain that the Tribe elected defendant Leslie Lohse to the position of Treasurer on the Tribal Council. 6-ER-1021-22 ¶¶ 87-88. Plaintiffs also allege that defendants orchestrated the election of other "chosen candidates." 6-ER-1027-28 ¶¶ 111-17. And plaintiffs complain about the Tribe's appointments of defendant John Crosby as Economic Development Director, and defendant Larry Lohse as Environmental Director. 6-ER-1022-24 ¶¶ 90-98.

In truly Orwellian fashion, plaintiffs allege that in "April 2014, in an impressive and inspiring expression of self-determination and democracy, the Tribe came together and removed the [defendants] from power." 6-ER-1003 ¶ 12.

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[5] The Pata family are descendants of Louella Henthorn Pata, including defendants Ted, Jon and Chris Pata, who are brothers; their sisters, defendants Leslie Lohse and Ines Crosby; and Ines's son, defendant John Crosby. These defendants, along with defendant Larry Lohse (Leslie's husband), and defendants Sherry Myers and Frank James (former employees of the Tribe), are referred to collectively as the "Pata Defendants." The Crosby & Lohse Defendants are the subset of the Pata Defendants whose assets plaintiffs sought to freeze in the motion at issue here.

In fact, what occurred was nothing short of a coup, as the Bureau of Indian Affairs ("BIA") and National Indian Gaming Commission ("NIGC") recognized at the time. *See* Supplemental Excerpts of Record ("SER") at 6-7 ¶¶ 11-14; SER11-22.

On April 12, 2014, the Chairman of the Tribal Council, Andrew Freeman, arrived at the Council meeting with armed security and purported to summarily cast the entire Pata family out of the tribe, and oust Leslie Lohse from the Council, based on his false and self-serving fiat that "the Pata family were not of Nomlaki blood lineage." 2-ER-135 ¶¶ 4-5; *see also* 7-ER-1254. Mr. Freeman and his faction were not motivated by high-minded ideals of "self-determination and democracy," 6-ER-1003 ¶ 12, but by their desire to cut the Pata family—especially the Crosby & Lohse Defendants, who are responsible for getting the Tribe's Rolling Hills Casino up and running[6]—out of the Casino profits.

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[6] *See, e.g.*, SER9 ¶¶ 21-24; SER36-37 ¶¶ 7-8; SER41-42 ¶¶ 14-15. This fact is also admitted in the WilmerHale report, on which plaintiffs improperly rely. *See* 2-ER-202, 204. Defendants objected, and continue to object, to that report, which (among other problems) consists of hearsay, double hearsay, and legal conclusions from lawyers who purported to be independent, yet admit they were hired by Andrew Freeman. *See* SER74; 2-ER-197-98. If, however, the Court considers the WilmerHale report at all—which it should not—the Court should note that it contradicts plaintiffs' assertion that "Rolling Hills Casino Was Established and Became Successful With Little Assistance from" the Crosby & Lohse Defendants. 6-ER-1024. On the contrary, "much of the work of establishing the Tribe's gaming operation was organized and performed by Ines Crosby, Leslie Lohse, and, beginning in 2000 and 2001, John Crosby and Lary Lohse," who "are substantially responsible for getting the Casino up and running." 2-ER-202, 204.

At that time, in addition to Chairman Freeman, the duly-elected Tribal Council consisted of: Vice-Chairman David Swearinger; Treasurer (and defendant) Leslie Lohse; Secretary Geraldine Freeman; and Member-at-Large Allen Swearinger ("Elected Council"). *See* SER5-7 ¶¶ 5, 12; SER11-14. Ms. Lohse was the only member of the Pata family on the Elected Council; the rest were members of the Freeman family. *See* 2-ER-135 ¶¶ 4, 6. Not coincidentally, Ms. Lohse, as the only Pata member of the Elected Council, is also the only member of the Elected Council whom plaintiffs have sued in this action, although the other Elected Council members supported defendants at the time (and still do), and resisted the ouster of Ms. Lohse and the Pata family. *See* SER4-54.

When the other non-Pata members of the Elected Council opposed Mr. Freeman's attempt to disenroll the Pata family, he ousted them, too, thus deposing four out of the five members of the Elected Council—*i.e.*, everyone but himself. Mr. Freeman purported to appoint four unelected members of his faction to form a new council ("Appointed Council"). 2-ER-135 ¶ 7; SER6-8 ¶¶ 11-17; SER11-28. Mr. Freeman and his Appointed Council then seized control of the Tribe's facilities and Casino, and excluded the Pata family and every member of the Elected Council except for Mr. Freeman from tribal property and the Casino. 2-ER-135 ¶ 7; SER6 ¶ 11. Individuals aligned with the Appointed Council were recorded on surveillance video breaking into the Tribe's business office in the middle of the

night and taking away computers, financial records, and other tribal documents, many of which they shredded. 2-ER-136 ¶ 9; 2-ER-156 ¶ 12.

On April 15, 2014, the BIA informed the City of Orland Police Department and Cornerstone Community Bank that the BIA recognized the Elected Council, ***not*** the Appointed Council, as the lawful government of the Tribe. *See* SER7 ¶ 12; SER11-14. The NIGC followed up on April 21, 2014 with a letter informing Mr. Freeman that, because he had deposed and excluded "four of the five members of the Tribal Council," the lawful tribal government was no longer in power, and "gaming at the Casino is not being conducted by the Band—that is, by the governmental authority recognized by the Secretary of the Interior—or by an entity licensed by the tribal government pursuant to NIGC regulations." SER7 ¶ 13; SER15-17. Thus, Mr. Freeman and his Appointed Council were depriving the Elected Council of their "sole proprietary interest in and responsibility for the gaming operation," in violation of federal law. SER16.

On May 9, 2014 the Elected Council—minus Mr. Freeman—passed a Resolution Adopting Emergency Security and Safety Measures. SER7 ¶ 15; SER23-28. In that Resolution, the Elected Council found that the April 2014 coup had put the safety and welfare of the Tribe "in serious peril, particularly through hostile statements and actions, and threats of physical violence," but also through financial depredations—including the Appointed Council's unauthorized

withdrawal of hundreds of thousands of dollars from the Tribe's accounts, attempts to withdraw even more, diversion of gaming revenues, and the transportation of large amounts of cash out of the Casino in the middle of the night without proper security, much less authorization. SER24-25. As the federally-recognized tribal government, the Elected Council took steps to protect the Tribe's assets and halt the Appointed Council's illegal operation of the Casino. SER7-8 ¶¶ 15-19; SER22-28; SER40-41 ¶¶ 9-12; SER43-48.

In particular, the Elected Council found, in its May 9, 2014 Resolution, that it was necessary "to protect Paskenta Tribal assets by remotely shutting down server-based computers and related systems associated" with gaming activities at the Casino, and therefore directed that those computer systems be remotely shut down. SER26. The Elected Council resolved to resume the operation of those computers and related systems if the Appointed Council would agree to a third-party accounting, identification of any revenues illegal taken away from the Casino, and appropriate remedial measures to ensure public safety at the Casino. *Id.* The Tribe's information-technology professionals then attempted to remotely shut down the Casino's servers, based on the Tribe's express authorization in the May 9, 2014 Resolution. SER7-8 ¶¶ 15-17; SER40 ¶¶ 9-10.

This is what plaintiffs misleadingly refer to as a "cyber-attack." *See* 6-ER-1114-18 ¶¶ 393-412; 6-ER-1140-43 ¶¶ 502-18. That terminology is not merely

hyperbole; it is a cynical effort to manufacture a basis for invoking the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("the CFAA"). But the May 2014 remote shutdown, conducted on the authorization of the federally-recognized Elected Council, was not a "cyber-attack." Indeed, it was not conducted by defendants, but ***authorized by the Tribe itself***, on the express Resolution of the federally-recognized Tribal government, the Elected Council—only one member of which is a defendant in this case. *See* SER5-8 ¶¶ 2, 11-17; SER11-28; SER36 ¶ 1; SER39-40 ¶¶ 2, 9-10.

The Elected Council also authorized and hired a police force, created a new tribal court and hired a tribal judge, and attempted to regain control of the Tribe and the Casino. SER8 ¶ 19; SER40-41 ¶ 12. The Elected Council worked hard to find a peaceful resolution to the chaos Mr. Freeman and his faction had caused. 2-ER-136 ¶ 10. But the two tribal factions ended up in an armed standoff at the Casino. *See id.* ¶ 12; SER7 ¶ 14; SER18-21.

On June 9, 2014, the BIA issued an Administrative Cease and Desist Order directing both factions to stand down. SER7 ¶ 14; SER18-21. The BIA also ordered the Appointed Council to cease and desist operating the Casino because the Appointed Council was not the federally-recognized tribal government. SER20-21. The BIA reconfirmed that it recognized the Elected Council, not the Appointed Council, "as the tribe's elected leadership and Tribal Council until this

internal dispute can be resolved by the Tribe, pursuant to the Tribe's own governing documents and processes." SER21.

On July 3, 2014, the two factions entered into a Mediated Settlement Agreement. 2-ER-139-44. The parties agreed to hold an election on September 13, 2014 for the four disputed Council seats, and to "preserve the status quo until the election." 2-ER-141. Thus, the parties stipulated that the Elected Council was and would remain the legitimate tribal government, as recognized by the BIA, at least until September 13, 2014. 2-ER-135-36 ¶ 8; SER6-7 ¶¶ 11-14; SER11-22.

Neither the district court nor this Court could conclude, preliminarily or otherwise, that the ***authorized*** remote shutdown of the Tribe's computers in May 2014 was, instead, an ***unauthorized*** "cyber-attack" in violation of the CFAA, "unless the court first concluded that the [Elected] Council was not the lawful governing body of the Tribe." *Sac & Fox*, 340 F.3d at 767; *see also* 18 U.S.C. § 1030 (CFAA does not prohibit authorized activity and, in particular, does not prohibit authorized "protective" activity). Likewise, plaintiffs' allegations of embezzlement are nothing more than "bootstrapping what is discontent with the prior leadership onto alleged federal claims that are better resolved in another venue." *Miccosukee*, 975 F. Supp. 2d at 1306. Even if plaintiffs' allegations were true, which they are not, federal jurisdiction is lacking because plaintiffs' own allegations make clear that this is, at bottom, a dispute over "tribal membership,"

Lewis, 424 F.3d at 960, and the alleged "appropriation of power" and "gaming proceeds," *Sac & Fox*, 340 F.3d at 752, based on allegations that defendants "exceeded the authority the … Tribe bestowed on them as contemplated in the Tribe Constitution." *Miccosukee*, 975 F. Supp. 2d at 1302-06; *see* 6-ER-1000-1119 ¶¶ 3, 61-64, 75, 82-98, 110-33, 413-18.

Because the district court lacks jurisdiction, this case "should have been promptly dismissed." *Munaf*, 553 U.S. at 692. Although this appeal arises from the denial of plaintiffs' motion for a preliminary injunction, rather than from the denial of the Pata Defendants' Rule 12(b)(1) motion to dismiss for lack of federal jurisdiction (*see* 1-ER-10-12), "[r]eview of a preliminary injunction 'is not confined to the act of granting [or denying] the injunction, but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of the bill, and, if so, to directing a final decree dismissing it.'" *Munaf*, 553 U.S. at 691 (brackets omitted) (quoting *City & Cty. of Denver v. N.Y. Trust Co.*, 229 U.S. 123, 136 (1913)). Because the lack of federal jurisdiction is evident from plaintiffs' own allegations, the Pata Defendants are "entitled to judgment as a matter of law," and "it is appropriate for [this Court] to terminate the litigation now." *Id.* at 692.

B. Plaintiffs also failed to establish the necessary equity jurisdiction.

Plaintiffs' three-line jurisdictional statement also ignores the independent question of whether the asset freeze they seek is within "'the equity jurisdiction of the federal courts.'" *Grupo Mexicano*, 527 U.S. at 318 (quoting A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).[7] Plaintiffs' only purported authority for an asset freeze is Federal Rule of Civil Procedure 65. *See* AOB at 3-4. But "a district court lacks authority to grant a preliminary injunction under Rule 65 if the party does not have a substantive right to the injunction." *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cnty.*, 550 F.3d 770, 776 (9th Cir. 2008). "Rule 65 concerns the procedure for issuing a preliminary injunction. The substantive basis and the jurisdictional authority for use of this procedure must be sought elsewhere." *F.T.C. v. H. N. Singer, Inc.*, 668 F.2d 1107, 1109 (9th Cir. 1982); *see also Grupo*

[7] While the Court in *Grupo Mexicano* used the phrase "equity jurisdiction," this Court aptly noted in *Wollersheim* that the "issue is best described as falling within the generic problem of 'federal jurisdiction' without attempting to characterize it with greater specificity." 796 F.2d at 1079. Whatever the label, this Court is "obligated" to address it "as a threshold question before considering a matter on its merits." *Id.* And the Court should consider this issue, even if not strictly "obligated" to do so, *id.*, because defendants raised it below, *see* SER77-78, and this Court "'can affirm the decision of the district court on any ground supported by the record, even one not relied on by that court.'" *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 692 (9th Cir. 2012) (quoting *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1080 (9th Cir. 2011)).

Mexicano, 527 U.S. at 321 (neither Rule 65 nor any purported "general power to grant [equitable] relief" provide the authority to freeze defendants' assets).

In *Grupo Mexicano*, the Supreme Court held that an asset freeze—the "'nuclear weapon' of the law"—is not available where plaintiffs' claims only allow for money damages. 527 U.S. at 332-33. Otherwise, a "'more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants.'" *Id.* at 330 (quoting F. WAIT, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 73, at 110-11 (1884)). Although *Grupo Mexicano* involved an action for contract damages, its reasoning applies to any action for damages "'in tort or contract.'" *Id.* at 327 (quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 222 (1945)).

Here, plaintiffs' primary alleged basis for federal jurisdiction is RICO, which is also the focus of their complaint and this appeal. 6-ER-1005 ¶ 22; *see generally* 6-ER-995-1206; AOB. As already mentioned, however, this Court held in *Wollersheim* that "injunctive relief is not available to a private plaintiff in a civil RICO action." 796 F.2d at 1077. Under *Grupo Mexicano* and *Wollersheim*, therefore, plaintiffs cannot rely on their RICO claims for the district court's purported authority to freeze defendants' assets. *See id.*; *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 328-29 (E.D.N.Y. 2009) (holding that *Grupo Mexicano* prohibits asset freeze based on RICO); *First Nat. Bank & Trust*

Co., Rogers, Arkansas v. Hollingsworth, 701 F. Supp. 701, 703-04 (W.D. Ark. 1988) (holding that *Wollersheim* prohibits asset freeze based on RICO).

Plaintiffs' only other alleged basis for federal jurisdiction is the CFAA. *See* 6-ER-1005 ¶ 22. Again, however, defendants' assets cannot be frozen on the basis of plaintiffs' CFAA claim "unless the court first concluded that the [Elected] Council was not the lawful governing body of the Tribe." *Sac & Fox*, 340 F.3d at 767. Given that the Elected Council ***was*** the lawful, federally-recognized governing body of the Tribe at the time, the remote shutdown could not possibly have violated the CFAA, because it was authorized by the Tribe itself. *See* 18 U.S.C. § 1030; SER6-8 ¶¶ 11-17; SER11-28.

Furthermore, because "the authority to issue a preliminary injunction rests upon the authority to give final relief, the authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy." *Singer*, 668 F.2d at 1112. Yet plaintiffs make no effort whatsoever to link their requested asset freeze to the injunctive relief they seek under the CFAA—against "attempting to access, damage, or destroy any computer, computer system, or electronically stored data of the Tribe or any Tribe-Owned Business." 6-ER-1185.[8] Even if money damages

[8] *See also, e.g.*, *Maxpower Corp. v. Abraham*, 557 F. Supp. 2d 955, 963 (W.D. Wis. 2008) ("Any claim for injunctive relief [under CFAA] would depend on plaintiffs' ability to show that defendants are continuing to access plaintiffs'

under CFAA were relevant here (which they are not, under *Grupo Mexicano*), plaintiffs have not argued, let alone proven, that any such damages could possibly justify the broad asset freeze plaintiffs seek. Rather, plaintiffs seek the freeze based on an alleged "two decade-long conspiracy to defraud Plaintiffs … out of tens of millions of dollars, in violation of … ***RICO***." AOB at 1 (emphasis added). Given that plaintiffs' stated basis for the asset freeze is directly contrary to *Wollersheim*, 796 F.2d at 1077, plaintiffs cannot salvage it by falling back on their jurisdictionally-forbidden CFAA claim, which, even as alleged, provides no "authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy." *Singer*, 668 F.2d at 1112; *see* 6-ER-1185.

Plaintiffs also purport to base their request for an asset freeze on their state-law claims, but they ignore Rule 64, which is the source of federal authority to grant prejudgment remedies "under the law of the state where the court is located," which, in this case, is California. Fed. R. Civ. P. 64.[9] If a federal statute does not

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computers or use the information they obtained improperly."); *S.E.C. v. Schooler*, 902 F. Supp. 2d 1341, 1360 (S.D. Cal. 2012) (refusing to freeze assets based on claims other than fraud because "it is really where fraud is found that an asset freeze has the most traction").

[9] Indeed, plaintiffs' failure to even mention Rule 64 is sufficient reason to reject their reliance on California law as purported authority for the asset freeze. *See Grupo Mexicano*, 527 U.S. at 318 n.3 (declining to consider state law where plaintiffs "sought the injunction pursuant to Rule 65, and the … decision was based on that rule and on federal equity principles"); *Allstate Ins. Co. v. Baglioni*, No. CV 11-06704 DDP, 2011 WL 5402487, at *1 (C.D. Cal. Nov. 8, 2011) ("Rule

provide the authority to freeze assets, federal courts must look to state law for such authority. *Id.* Federal courts do not have the "general power" to freeze assets. *Grupo Mexicano*, 527 U.S. at 321. Otherwise, a federal "all-purpose prejudgment injunction" would "render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance." *Id.* at 330-31. Under Rule 64, "state law is incorporated to determine the availability of prejudgment remedies." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 436 n.10 (1974); *accord United States v. Van Cauwenberghe*, 934 F.2d 1048, 1064 n.13 (9th Cir. 1991); *see also* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power–A Case Study*, 75 NOTRE DAME L. REV. 1291, 1322-33 (2000) ("*Bitter with the Sweet*") (explaining history of Rule 64 and "Congress's choice to require strict conformity to state law").

Under California law, "injunctions to prevent dissipation of assets" may ***only*** restrain the "use of ***identifiable assets*** for ***specific purposes***." *Doyka v. Superior Court*, 233 Cal. App. 3d 1134, 1136 (1991) (emphases added). Where, as here, plaintiffs seek an asset freeze that is not limited to a "readily identifiable" specific asset, but rather extends to "money from any and all of [defendants'] bank

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64 can provide such authority," but plaintiff "cites to no relevant state law," so "the court declines to grant [the] asset freeze pursuant to Rule 64.").

accounts," it is deemed an invalid attempt to obtain a "prejudgment attachment." *Id.* at 1137; *accord CHoPP Computer Corp. v. United States*, 5 F.3d 1344, 1349 (9th Cir. 1993) (citing *Doyka* for the proposition that a "general injunction freezing defendant's assets pending litigation [is] invalid as amounting to a prejudgment attachment without meeting requirements for attachment"). Thus, if the district court here had granted the broad asset freeze plaintiffs sought, it would have "exceeded its authority" under Rule 64 and the California law Rule 64 incorporates. *Doyka*, 233 Cal. App. 3d at 1137; *see* Fed. R. Civ. P. 64.[10]

The California rule in *Doyka* is consistent with longstanding rules of equity jurisprudence, as articulated by the United States Supreme Court in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). There, the Court held that ERISA does not provide for injunctive relief in the form of reimbursements. Although the plaintiffs prayed for restitution, "not all relief falling under the rubric of restitution is available in equity." *Id.* at 212. Equitable restitution applies to money or property that can "clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. But where, as here,

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[10] It is also worth noting that California courts, like federal courts, lack the authority to grant injunctive relief in relation to intra-tribal disputes. *Ackerman v. Edwards*, 121 Cal. App. 4th 946, 953 (2004). "Congress did not intend that the courts of this state should have the power to intervene—or interfere—in purely tribal matters. Insofar as plaintiffs sue for violations of [tribal law,] it is for the [tribe] to determine what that law is and whether or not it has been violated." *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1067 (2005).

plaintiffs themselves allege that the funds they seek "'have been dissipated,'" plaintiffs' claims are only those "'of a general creditor,'" which cannot be enforced in equity. *Id.* at 213-14 (quoting Restatement (First) of Restitution § 215, cmt. a (1937)). "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214; *see also, e.g.*, *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 243 F. Supp. 2d 1179, 1183-85 (D. Colo. 2003) (following *Great-West Life* and holding that "this court does not have equitable authority to enter an asset freeze injunction").

Similarly, in *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725 (9th Cir. 1999), this Court upheld a preliminary injunction precisely because it was not a general injunction freezing defendant's assets, but a narrow injunction directed to specific property. Based on claims for fraudulent conveyance and breach of fiduciary duty under California law, the district court restrained the sale or swap of particular stocks. *See id.* at 728-33. This Court upheld that narrow injunction because, "unlike the injunction at issue in *Grupo Mexicano*, this injunction does not completely prohibit Appellants from taking any action with regard to their assets." *Id.* at 730. The effect of the injunction "was not to 'freeze' Appellants' assets," but merely to restrain identifiable assets for specific purposes. *Id.*

Although plaintiffs do not discuss, let alone establish, equity jurisdiction, they rely heavily on *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988), and may seek, in reply, to rely on its statement that "[w]hile a freeze of assets has the effect of an attachment, it is not an attachment." *Id.* at 1361. But the preliminary injunction the Court upheld in *Marcos*, unlike the asset freeze plaintiffs seek here, was based on "specific funds and real property." *Id.* at 1364. To the extent plaintiffs interpret *Marcos* to support a broader asset freeze, their interpretation would put *Marcos* in conflict with *Doyka*, *Great-West Life*, and *Grupo Mexicano*. The court in *Doyka* held, and this Court has since confirmed, that under California law a "general injunction freezing defendant's assets pending litigation" ***is*** "invalid as amounting to a prejudgment attachment without meeting requirements for attachment." *CHoPP*, 5 F.3d at 1349 (citing *Doyka*, 233 Cal. App. 3d at 1136-37); *see also Walczak*, 198 F.3d at 730. That is consistent with the traditional limitation of equitable restitution to "particular funds or property," rather than all assets that might ultimately be recovered by the imposition of "personal liability." *Great-West Life*, 534 U.S. at 214. And to the extent *Marcos* relied on "a general power to grant [equitable] relief," *Grupo Mexicano* rejected that "expansive view of equity." 527 U.S. at 321. Again, because the injunction in *Marcos* was based on "specific funds and real property," 862 F.2d at 1364, it was not necessarily inconsistent with these controlling authorities; but if it were, this

Court must, of course, defer to the United States Supreme Court, and also "must defer to the California Court of Appeal's interpretation" of California law. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1099 (9th Cir. 2003).

Plaintiffs also rely on *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009), and *In re Focus Media Inc.*, 387 F.3d 1077 (9th Cir. 2004), and may seek to rely on them further in reply to argue that *Grupo Mexicano* does not apply here. But those cases simply hold that *Grupo Mexicano* does not bar district courts from freezing assets based on ***valid*** claims for ***related*** equitable relief under ***federal*** statutes such as ERISA (*Johnson*),[11] or the Bankruptcy Code (*Focus Media*). *Johnson* and *Focus Media* do not hold that plaintiffs may seek such relief under RICO; this Court held the opposite in *Wollersheim*, 796 F.2d at 1077-89. Nor do *Johnson* and *Focus Media* indicate that federal courts may freeze assets based on CFAA claims that crucially depend on questions of tribal authority that federal courts cannot answer, and lack the requisite nexus with the requested asset freeze in any event. *See, e.g., Lewis*, 424 F.3d at 960-63; *Singer*, 668 F.2d at 1112. And *Johnson* and *Focus Media* neither hold nor suggest that federal courts may freeze assets based on claims for which "California provides the relevant substantive law," when California law forbids such a "general injunction freezing defendant's assets." *CHoPP*, 5 F.3d at 1347, 1349 (citing *Doyka*, 233 Cal. App. 3d at 1136-

[11] *But cf. Great-West Life*, 534 U.S. at 212-18.

37). Any such interpretation would contravene the plain meaning and history of Rule 64. *See* Fed. R. Civ. P. 64; *Granny Goose*, 415 U.S. at 436; *Cauwenberghe*, 934 F.2d at 1064 n.13; *Bitter with the Sweet*, 75 NOTRE DAME L. REV. at 1322-33.

In sum, plaintiffs have failed to establish federal jurisdiction over this intra-tribal dispute; and even if federal jurisdiction exists for purposes of awarding legal damages, plaintiffs have failed to establish the necessary equity jurisdiction.

III. STATEMENT OF THE ISSUES

1. Do this Court and the district court have jurisdiction over this intra-tribal dispute; and, if not, should this Court remand the case to the district court for immediate dismissal? *See* § II.A, *supra*.

2. Did plaintiffs establish the necessary equity jurisdiction for the asset freeze they seek? *See* § II.B, *supra*.

3. Did the district court abuse its discretion in denying the asset freeze? *See* § VII, *infra*.

IV. PERTINENT STATUTES AND RULES

Except for Federal Rule of Civil Procedure 64 and 18 U.S.C. § 1030 (the CFAA), which plaintiffs omitted, plaintiffs' Addendum included pertinent statutes and rules—*i.e.*, Rule 65. Pursuant to Ninth Circuit Rule 28-2.7, defendants reproduce Rule 64 and 18 U.S.C. § 1030 verbatim in the Addendum below.

V. STATEMENT OF THE CASE

Having taken control of the Tribe by means of a coup, which they then purported to ratify through an election, plaintiffs filed their original complaint against the Pata Defendants and others on March 10, 2015, and filed their First Amended Complaint on April 17, 2015. 6-ER-995-1206. Plaintiffs assert thirty-five claims, against twenty-six defendants, under RICO, the CFAA, and California law. *See id.* Notably, none of those claims are against the ***non-Pata*** members of the Elected Council—David Swearinger, Geraldine Freeman, and Allen Swearinger (not to mention Andrew Freeman)—even though all of the members of the Elected Council supported, and (with the exception of Mr. Freeman) continue to support, the actions of the Pata Defendants in general, and the Crosby & Lohse Defendants in particular. *See* 2-ER-134-56; SER4-54. Indeed, every member of the Tribe named as a defendant in this case is a member of the Pata family, further confirming that this case is, at bottom, an intra-tribal membership dispute. *See generally* 6-ER-995-1206.

On May 15, 2015, several groups of defendants filed motions to dismiss, including the Pata Defendants, who moved to dismiss on the grounds that the district court lacks jurisdiction over this intra-tribal dispute. *See* 7-ER-1325-26.

On June 29, 2015, plaintiffs filed their motion for a preliminary injunction. Plaintiffs asked the district court to impose "'an immediate freeze on the assets of

Defendants John Crosby, Ines Crosby, Leslie Lohse, and Larry Lohse, with an exception for reasonable living expenses and a collective allowance of $10,000 in attorneys' fees and costs." 1-ER-5-6 (quotation marks and brackets omitted). Plaintiffs did not seek to freeze the assets of any of the other defendants.

On August 14, 2015, the district court dismissed some of plaintiffs' claims against other defendants for failure to state a claim, but denied the Pata Defendants' motion to dismiss for lack of federal subject matter jurisdiction. *See* 1-ER-8-31. Plaintiffs have since filed a Second Amended Complaint and have indicated that they may file a Third Amended Complaint. But their First Amended Complaint is the operative complaint for this appeal. *See* 6-ER-995-1206.

On August 17, 2015, in the Order that is the subject of this appeal, the district court denied plaintiffs' motion to freeze the Crosby & Lohse Defendants' assets. *See* 1-ER-5-7. The district court noted that plaintiffs seeking a preliminary injunction must show the likelihood of irreparable harm, which requires more than monetary harm. 1-ER-6. When plaintiffs seek to freeze defendants' assets, therefore, they must show that dissipation of the claimed assets is likely. *Id.* The district court noted that plaintiffs' purported proof of likely dissipation was their argument that defendants allegedly engaged in a "'pattern of theft, fraudulent behavior, and attempts to evade liability'"—*i.e.*, the same conduct that allegedly gave rise to plaintiffs' RICO claims in the first place. *Id.* (quoting Pls.' Mot.); *see*

also, *e.g.*, 6-ER-1040-1120. The district court also noted defendants' argument that plaintiffs cannot carry their burden by lumping the defendants together, but must show that each individual is likely to dissipate assets. 1-ER-6-7. The district court concluded that "Plaintiffs have failed to present evidence justifying the injunctive relief they seek," and denied their motion accordingly. 1-ER-7.

This appeal followed.

VI. SUMMARY OF THE ARGUMENT

As already explained in the jurisdictional statement above, there is no federal jurisdiction over this intra-tribal dispute. For that reason alone, the Court should affirm the district court's denial of the asset freeze. Further, the Court should remand this case for immediate dismissal in light of this "'insuperable objection, in point of jurisdiction.'" *Munaf*, 553 U.S. at 691 (quoting *Denver*, 229 U.S. at 136). Plaintiffs also failed to establish the necessary equity jurisdiction for the asset freeze they seek. This is yet another reason for the Court to affirm the district court's denial of the asset freeze, as discussed above. And, regardless of the foregoing jurisdictional issues, plaintiffs failed to carry their burden to show that they are entitled to the extraordinary relief they seek. As discussed below, the district court did not abuse its discretion in denying plaintiffs' motion to freeze defendants' assets.

VII. ARGUMENT

A. Standard of Review

This Court's review of the district court's denial of a preliminary injunction is "limited and deferential." *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (quoting *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)). The Court may "reverse only where the district court abused its discretion." *Id.* "An abuse of discretion occurs when the district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (quotation marks omitted). The district court's assessment of the evidence may only be reversed if, "on the entire evidence," this Court "is left with the definite and firm conviction that a mistake has been committed." *Zepeda v. INS*, 753 F.2d 719, 725 (9th Cir. 1983) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). This Court "is not empowered to substitute its judgment for that of the district court." *Id.* (brackets omitted) (quoting *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982)).

Here, the district court based its denial of plaintiffs' motion to freeze defendants' assets on the standard for preliminary injunctions as articulated by this Court in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011): "To justify an injunction, a plaintiff 'must establish that irreparable harm is likely, not just possible." 1-ER-6 (quoting *Cottrell*, 632 F.3d at 1131). That is

undoubtedly the correct standard. It comes from the Supreme Court's decision in *Winter*. *See Cottrell*, 632 F.3d at 1131 (citing *Winter*, 129 S.Ct. at 375-76).

In *Winter*, the Supreme Court held that a "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The Court overturned the "too lenient" standard employed by the Ninth Circuit at the time, which required only the "possibility" of irreparable harm. *Id.* at 22. "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* at 22 (emphasis in original). This follows from the nature of "injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* In evaluating whether plaintiffs have carried that burden, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* at 24 (quoting *Amoco*, 480 U.S. at 542).

This, again, is the standard the district court applied. *See* 1-ER-6. "Because the district court used the proper legal standard when it denied the preliminary injunction, [this Court's] only task is to determine whether the lower court abused its discretion in applying that standard." *Half Moon Bay Fishermans' Mktg. Ass'n*

v. Carlucci, 857 F.2d 505, 507 (9th Cir. 1988). Contrary to plaintiffs' contentions, the district court did not abuse its discretion.

B. Plaintiffs' attempt to evade the abuse-of-discretion standard misstates the district court's decision and is wrong as a matter of law.

Plaintiffs spend the first sixteen pages of their argument trying to talk their way out of the abuse-of-discretion standard. *See* AOB at 10-25. According to plaintiffs, the district court's order "relied on an erroneous legal premise," and thus is subject to de novo review, because the district court "concluded that Plaintiffs were required, and failed, to make a specific and individualized showing that each of the four [defendants] are likely to dissipate the stolen assets acquired via the RICO conspiracy." *Id.* at 10-11. Plaintiffs are wrong for two reasons.

First, the district court did not adopt a new "individualized showing" standard separate from the standard already established by the Supreme Court in *Winter* and reiterated by this Court in *Alliance for the Wild Rockies*. In reciting the parties' arguments, the district court quoted defendants' statement that plaintiffs are "'required to show that each individual is likely to dissipate assets.'" 1-ER-6 (quoting Defs.' Opp'n). As discussed below, defendants' statement was and is correct, and follows from the standards established by this Court and the Supreme

Court. But it is important to note at the outset that the district court did not purport to adopt a new standard. *See id.*[12]

Second, plaintiffs ***were*** required to make an individualized showing. The Supreme Court has made clear that in deciding whether to grant a preliminary injunction, district courts "'must consider the effect on ***each party*** of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (emphasis added) (quoting *Amoco*, 480 U.S.at 542). Accordingly, district courts cannot freeze defendants' assets where, as here, plaintiffs fail to carry their burden as to each defendant whose assets they seek to freeze. *See, e.g.*, *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 707-09 (S.D. Tex. 2002).

In *Newby*, for example, the district court held that a plaintiff "must show that ***each defendant*** is likely to dissipate the assets that may satisfy the equitable remedies [plaintiff] has asserted, absent intervention by this court." *Id.* at 707 (emphasis added). The plaintiff failed to carry its burden because it did "not distinguish among the defendants on the basis of their … present or future risk of

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[12] Plaintiffs' criticism of the district court for citing *Fidelity National Title Insurance Co. v. Castle*, No. C 11-00896 SI, 2011 WL 5882878 (N.D. Cal. Nov. 23, 2011), and *Allstate*, 2011 WL 5402487, is similarly misguided. Plaintiffs assert that those cases "do not even mention a supposed requirement for 'individualized' proof." AOB at 15. The district court, however, did not cite those cases for that requirement, but for the requirement that plaintiffs must show "'considerable evidence of likely dissipation.'" 1-ER-6 (quoting *Allstate*, 2011 WL 5402487, at *2). Plaintiffs concede the latter requirement, which is equally fatal to their appeal, as discussed below. *See* § VII.D, *infra*.

asset concealment or dissipation. Nor do the pleadings and submissions distinguish among the individual defendants on the basis of their current activities or present or future risk of asset concealment or dissipation." *Id.* at 708.

In particular, the court rejected plaintiff's argument that one defendant's experience with "offshore entities shows that [he] knows how to conduct international financial transactions. So do many individuals and entities; that alone is not a sufficient basis for the relief sought." *Id.* at 708. The court also rejected the argument that dissipation was likely because two of the defendants had allegedly been to foreign countries. *Id.* The court concluded that it could not freeze defendants' assets because "the record does not disclose the necessary showing that the individual defendants will remove the assets from the reach of the plaintiffs, so as to cause irreparable injury absent an asset freeze." *Id.* at 708; *see also*, *e.g.*, *SEC v. ABS Manager, LLC*, No. 13CV319-GPC JMA, 2013 WL 1164413, at *6 (S.D. Cal. Mar. 20, 2013) (refusing to freeze individual defendant's personal assets because "the SEC has offered no evidence that Defendant Price will likely dissipate his own personal assets or the corporate assets"); *DuFour v. BE LLC*, No. CV 09-3770 CRB, 2009 WL 4730897, at *1-3 (N.D. Cal. Dec. 7, 2009) (denying preliminary injunction against defendants for whom plaintiff failed to make individualized showing).

None of plaintiffs' cases support their argument that it is an abuse of discretion for a district court to require plaintiffs to carry their burden as to "'each party.'" *Winter*, 555 U.S. at 24 (quoting *Amoco*, 480 U.S. at 542). Indeed, plaintiffs do not and cannot cite a single case overturning a district court's decision to deny an asset freeze where the plaintiff failed to carry its burden as to each individual whose assets plaintiff sought to freeze. The notion that this could be an abuse of discretion turns the very concept of discretion on its head. *See, e.g.*, *F.T.C. v. Evans Products Co.*, 775 F.2d 1084, 1089 (9th Cir. 1985) (district court did not abuse its discretion in denying FTC's request for an asset freeze).

Plaintiffs rely most heavily on *Marcos*, but *Marcos* followed this Court's old, too-lenient preliminary-injunction standard, which the Supreme Court overturned in *Winter*. *See Winter*, 555 U.S. at 22 ("[T]he Ninth Circuit's 'possibility' standard is too lenient."); *Marcos*, 862 F.2d at 1362 (requiring only "the possibility of irreparable injury"). In any event, *Marcos* never suggested that the plaintiff was not required to make a showing as to each defendant, and certainly did not suggest that the district court would have abused its discretion by requiring such a showing. On the contrary, the Court discussed evidence specific to Ferdinand and Imelda Marcos, *see* 862 F.2d at 1362-63, which supported the injunction as to "specific funds and real property." *Id.* at 1364. More than anything else, *Marcos* is testament to the deference given to district courts in the

context of preliminary injunctions, which mandates affirmance here even more than it did in *Marcos*. *See id.* at 1361-64; *cf. Winter*, 555 U.S. at 22.

Plaintiffs also rely heavily on *F.T.C. v. Affordable Media*, 179 F.3d 1228 (9th Cir. 1999), but that case is even further off the mark than *Marcos*. The standard in *Affordable Media* wasn't the *Winter* standard, or even the overly lenient "possibility" standard this Court employed before *Winter*, but a still "more lenient standard" for Federal Trade Commission cases, under which "'the Commission ***need not show irreparable harm*** to obtain a preliminary injunction.'" *Id.* at 1233 (emphasis added) (quoting *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984)). Even though no evidence of irreparable harm, individualized or not, was required, there was plenty of it in that case. *See id.* at 1234-37. Indeed, after the preliminary injunction was entered, the defendants violated it and were held in contempt, which is how the case ended up on appeal. *See id.* at 1231. *Affordable Media*, therefore, is inapposite. The same is true of plaintiffs' other cases.[13]

[13] *See Johnson*, 572 F.3d at 1072, 1075, 1084-86 (only defendant Couturier's assets were frozen, and "the freeze on Couturier's assets is limited to those in which Plaintiffs have an equitable interest"); *Focus Media*, 387 F.3d at 1085-87 (only one person's assets were frozen, and case was decided based on the defunct "possibility" standard); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881-82 (9th Cir. 2003) (same).

C. Plaintiffs' reliance on RICO is utterly misplaced.

Plaintiffs argue, at length, that requiring plaintiffs to carry their burden as to each defendant whose assets they seek to freeze is contrary to "the manner of relief that Congress intended to be made available under RICO." AOB at 25; *see also id.* at 1-3, 19-25. But, in making these arguments, plaintiffs completely ignore *Wollersheim*. There, after careful analysis of RICO and its legislative history, this Court concluded that "***Congress did not intend to give private RICO plaintiffs any right to injunctive relief***." *Wollersheim*, 796 F.2d at 1088 (emphasis added).

Although the preliminary injunction at issue in *Wollersheim* was not an asset freeze, subsequent cases have recognized, as is clear from *Wollersheim* itself, that the Court's ruling is not limited to the particular preliminary injunction requested there, but applies to all preliminary injunctions, including asset freezes. *See, e.g.*, *First Nat. Bank*, 701 F. Supp. at 703-04. Indeed, in *Marcos*, the majority made clear that the preliminary injunction there was not based on RICO, but on plaintiff's state-law claim for a constructive trust. *See Marcos*, 862 F.2d at 1364. And the concurring judges left no doubt that "plaintiff sought an injunction to be entered solely in the exercise of pendent jurisdiction because ***RICO does not authorize injunctive relief***." *Id.* at 1365 (Schroeder & Canby, JJ., concurring in part and dissenting in part) (emphasis added) (citing *Wollersheim*).

Thus, this Court should disregard plaintiffs' misplaced reliance on RICO. *Wollersheim* refutes plaintiffs' suggestion that RICO somehow deprived the district court of discretion to deny the asset freeze. *See Wollersheim*, 796 F.2d at 1077-89. Indeed, it would have been an abuse of discretion for the district court to grant the asset freeze based on plaintiffs' RICO claims, even if plaintiffs had otherwise carried their burden, which they did not. *See id.*

D. Plaintiffs failed to carry their burden of showing likely irreparable harm through dissipation of assets, and certainly did not carry that burden so clearly as to establish an abuse of discretion.

As plaintiffs concede, the irreparable-injury factor, in the context of a request to freeze defendants' assets, requires plaintiffs to "'show a likelihood of dissipation of the claimed assets.'" AOB at 13 (quoting *Johnson*, 572 F.3d at 1085). "Courts have construed this standard narrowly," only freezing assets "where there is considerable evidence of likely asset dissipation." *Allstate*, 2011 WL 5402487, at *2; *see also, e.g.*, *Evans*, 775 F.2d at 1089 (affirming denial of asset freeze where plaintiff failed to carry its burden of showing that defendant was likely to "secret away assets before relief can be effectuated"). Plaintiffs cannot show the likelihood of asset dissipation by merely repeating their underlying allegations of fraud, combined with speculation that "Defendants intend to remove the funds at issue from Plaintiffs' reach." *TAGC Mgmt., LLC v. Lehman, Lee & Xu Ltd.*, No. CV 10-5447 PSG JEMX, 2010 WL 3119254, at *3 (C.D. Cal. Aug. 2,

2010). "The fact that Defendants may have been engaged in some sort of fraud does not automatically justify the issuance of an asset freeze." *Vaccaro v. Sparks*, No. SACV 11-00164 DOC, 2011 WL 772394, at *2 (C.D. Cal. Feb. 1, 2011). Nor can an asset freeze be granted on the basis of plaintiffs' speculation that a defendant's alleged "willingness to commit a fraud evinces the same defendant's willingness to wrongfully dissipate assets," because "speculative injury does not constitute irreparable injury." *Id.* (brackets omitted) (quoting *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984)). Accordingly, plaintiffs must present evidence of the "current activities" of each defendant whose assets plaintiffs seek to freeze, showing that each defendant presents a likely "present or future risk of asset concealment or dissipation." *Newby*, 188 F. Supp. 2d at 708.

1. Plaintiffs failed to carry their burden as to Ines Crosby.

With regard to Ines Crosby, plaintiffs present ***nothing but*** their underlying allegations purporting to show that she is "a fraudster," which cannot "justify the issuance of an asset freeze." *Vaccaro*, 2011 WL 772394, at *2; *see* AOB at 27-32. Plaintiffs' allegations are false, but even if true, they are insufficient to justify an asset freeze, and are certainly insufficient to show that the district court abused its discretion in denying the asset freeze. Every single alleged act of purported fraud mentioned in the section of plaintiffs' brief devoted to Ms. Crosby occurred ***before September 13, 2014***—*i.e.*, when the Elected Council was still the federally-

recognized tribal government. *See* AOB at 27-32; 2-ER-153-56; SER4-34. *A fortiori*, all of Ms. Crosby's alleged misconduct purportedly establishing a likelihood of dissipation occurred before plaintiffs filed their complaint, on ***March 10, 2015***. *See* 7-ER-1322. Plaintiffs, therefore, failed to carry their burden of showing that Ms. Crosby is likely to "secret away assets before relief can be effectuated." *Evans*, 775 F.2d at 1089; *see also*, *e.g.*, *Newby*, 188 F. Supp. 2d at 708 (each defendant's "current activities" must show a likely "present or future risk of asset concealment or dissipation").

2. Plaintiffs failed to carry their burden as to John Crosby.

As for John Crosby, plaintiffs primarily rely on alleged misconduct before plaintiffs' April 12, 2014 coup, before the September 13, 2014 election purporting to ratify that coup, and long before the March 10, 2015 filing of plaintiffs' original complaint. *See* AOB at 32-38. Again, such stale accusations do not and cannot satisfy plaintiffs' burden of producing "evidence" that defendants are "likely" to "secret away assets." *Evans*, 775 F.2d at 1089. Plaintiffs mentioned only ***one*** event to the district court that allegedly occurred after plaintiffs filed their complaint, and two others that allegedly occurred between the September 13, 2014 election and the filing of plaintiffs' original complaint. Everything else occurred before plaintiffs' April 2014 coup. *See* AOB at 32-38.

First, plaintiffs assert that in July 2015, "Mr. Crosby took actions to sell a specialty Ford Mustang." AOB at 37. But Mr. Crosby explained that he offered the car, for a fair price, to a person he knew had been interested in buying a similar car. SER81 ¶¶ 2-5. Mr. Crosby was not using the car and thought it would be wise to sell it. *Id.* ¶ 6. But Mr. Crosby did not sell the car, and made no further efforts to do so once plaintiffs expressed their concerns. *Id.* ¶ 4. This does not show likely dissipation of assets; it shows the opposite. *See id.*

Second, plaintiffs allege that on November 6, 2014—more than four months before plaintiffs filed their complaint, on March 10, 2015—Mr. Crosby put his house on the market. *See* AOB at 37. As Mr. Crosby explained, however, he and his wife wanted to sell the house because they needed the money after Mr. Crosby was disenrolled from the Tribe and deprived of his income. 2-ER-151 ¶ 17. Mr. Crosby had loaned his savings to the Tribe to help fund the Elected Council's attempt to stop the Appointed Council's depredations and violations of federal gaming laws. *Id.* And the Crosbys' daughters were leaving for college, so it made sense to move to a smaller house. *Id.* But Mr. Crosby did not sell the house, due to an action plaintiffs filed in state court. *Id.* ¶ 18. That does not show that Mr. Crosby is likely to dissipate assets; again, just the opposite. *See id.* ¶¶ 17-18.[14]

[14] Plaintiffs also cite to a declaration filed on September 8, 2015, *weeks after the district court issued the order from which plaintiffs appeal, on August 17, 2015.* *See* AOB at 37 (citing 7-ER-1320-21); *cf.* 1-ER-5-7. Documents that were not

Third, plaintiffs assert that on October 14, 2014—five months before plaintiffs filed their complaint—a member of the current Tribal Council asserted in an email that Mr. Crosby was in the Philippines, where he "has relatives" and was purportedly "'looking to invest.'" AOB at 38. As Mr. Crosby explained, however, he went to the Philippines to explore the possibility that a U.S.-based company might locate a call center there, but did not invest his money in the Philippines, and does not know any relatives who might be living there. 2-ER-149 ¶ 11. As in *Newby*, the fact that Mr. Crosby briefly traveled abroad for business reasons "is not a sufficient basis for the relief sought." *Newby*, 188 F. Supp. 2d at 708.

Plaintiffs also offhandedly remark that "Mr. Crosby has no significant source of capital available to him other than the money" plaintiffs seek in damages. AOB at 38. But in *Grupo Mexicano*, the Supreme Court expressly held that a district court cannot freeze a defendant's assets simply because "[defendant] is at

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before the district court at the time of its decision are not properly part of the record on appeal and should be stricken. *See, e.g., Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). And even if it were part of the record on appeal, which it is not, the declaration consists of double hearsay that is both conclusory and misleading—again, Mr. Crosby has not sold the house, due to plaintiffs' state-court action—and would have been insufficient to show irreparable harm even if it had been presented to the district court at the relevant time, which, again, it was not. *See, e.g., Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). Defendants move to strike this extra-record declaration, 7-ER-1320-21, along with the first two documents in plaintiffs' excerpts, 1-ER-1-4, which are scheduling orders dated September 9, 2015 and August 21, 2015, and are simply irrelevant, in addition to being outside the record on appeal. *See Kirshner*, 842 F.2d at 1077.

risk of insolvency if not already insolvent," and plaintiffs seek defendant's "only substantial asset[s]" in damages. 527 U.S. at 312; *see also*, *e.g.*, *Newby*, 188 F. Supp. 2d at 707-08 ("A prejudgment asset freeze is not available in a case simply because the potential equitable award is likely to exceed available assets.").

3. Plaintiffs failed to carry their burden as to Leslie Lohse.

Plaintiffs' purported showing as to Leslie Lohse, like their showing as to Ines Crosby, relies ***exclusively*** on events prior to the September 13, 2014 election and the March 10, 2015 filing of the complaint. *See* AOB at 38-39. Further, it relies almost exclusively on the alleged "cyber-attack." *Id.* Aside from the fact that the "cyber-attack" was a remote shutdown authorized by the Tribe itself, as discussed above, plaintiffs do not and cannot explain how it could possibly justify freezing Ms. Lohse's personal assets. Plaintiffs have presented no evidence whatsoever that Ms. Lohse is likely to dissipate assets, let alone "considerable evidence," *Allstate*, 2011 WL 5402487, at *2, and plaintiffs most certainly have not offered evidence that would mandate reversal of the district court for abuse of discretion. *See*, *e.g.*, *Evans*, 775 F.2d at 1089.

4. Plaintiffs failed to carry their burden as to Larry Lohse.

With regard to Larry Lohse, plaintiffs' purported evidence is even more stale. Plaintiffs rely exclusively on checks allegedly written between "August 2010 and May 2013." AOB at 39 (plaintiffs' emphasis). Those allegations are

plainly insufficient to establish that Mr. Lohse would likely dissipate assets during the pendency of this case filed ***two years later***, on March 10, 2015. *See id.*; *Evans*, 775 F.2d at 1089; *Allstate*, 2011 WL 5402487, at *2; *Vaccaro*, 2011 WL 772394, at *2; *TAGC*, 2010 WL 3119254, at *3; *Newby*, 188 F. Supp. 2d at 707-08. Even if a district court ***might*** consider such allegations sufficient—for which plaintiffs provide no authority—there is clearly no authority for plaintiffs' suggestion that a district court would be ***required*** to consider such evidence sufficient, such that denying the asset freeze would be an abuse of discretion. *See, e.g.*, *Evans*, 775 F.2d at 1089.

5. Plaintiffs' arguments about defendants as a group also fail.

Plaintiffs' arguments about defendants as a group also fail to establish that the district court abused its discretion. *See* AOB at 40-46. The allegations based on the hearsay WilmerHale report are inadmissible. *See* SER 74; n.6, *supra*. And plaintiffs' assertions that defendants were not entitled to their $5 million lines of credit are refuted by the declarations of every disinterested member of the Elected Council—*i.e.*, every member other than Andrew Freeman, who led the coup, and Leslie Lohse, the only member of the Elected Council who is a defendant here. *See* SER5-9 ¶¶ 2-3, 21-24; SER36-37 ¶¶ 1-2, 7-8; SER39-42 ¶¶ 2-3, 14-15.

Plaintiffs' one-sentence reference to the alleged deletion of emails has nothing to do with the dissipation of assets, and was refuted by defendants in any case. *See* AOB at 43; 2-ER-138 ¶ 14; 2-ER-146 ¶ 4; 2-ER-149 ¶ 9; 2-ER-155 ¶ 9.

Plaintiffs' suggestion that defendants were required to give plaintiffs' lawyers at WilmerHale whatever they asked for on pain of an asset freeze, AOB at 44, finds no support in the case plaintiffs cite, *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972). There, the Second Circuit nearly overturned an asset freeze, but deferred to the district court in light of the fact that appellants had refused to provide information the court—not the opponents' lawyers—had requested. *Id.* at 1106 & n.29. This is yet another example of the deference afforded to district court decisions regarding asset freezes; it provides no support for plaintiffs' attempt to eliminate that deference.

Plaintiffs' remaining allegations likewise fail. *See* AOB at 44-46. As defendants and the non-defendant Elected Council members explained to the district court:

- Defendants used their retirement savings to help fund the Elected Council's response to plaintiffs' coup;
- Defendants did not structure any transactions to avoid audits; and
- Kimberly Freeman's suspension had nothing to do with the Tribe's ownership of a jet or plaintiffs' other allegations, but resulted from

accusations of "treason" brought against Kimberly by her brother, Andrew Freeman—the same person who summarily ejected the entire Pata family from the Tribe.

See 2-ER-136-37 ¶¶ 11, 13; 2-ER-146 ¶ 3; 2-ER-150 ¶ 12; 2-ER-154-55 ¶¶ 4-5, 8; SER5-8 ¶¶ 6-10, 18; SER36 ¶¶ 2-6; SER39-40 ¶¶ 3-8; SER55-71.

Plaintiffs, of course, presented their own version of these events to the district court, and repeat that version on appeal, but they do not and cannot show that the district court clearly erred in finding that plaintiffs failed to make the "clear showing" required for this "extraordinary remedy," taking into account the effect it would have on "'each party.'" *Winter*, 555 U.S. at 22-24 (quoting *Amoco*, 480 U.S. at 542). That finding cannot be overturned on appeal because plaintiffs have not shown, and do not really even argue that they have shown, that "the entire evidence" compels the "definite and firm conviction" that the district court abused its discretion. *Zepeda*, 753 F.2d at 725.

E. Plaintiffs failed to carry their burden as to the other necessary elements for a preliminary injunction, and certainly have not shown that the district court abused its discretion with respect to those elements.

1. Plaintiffs are unlikely to—indeed, *cannot*—succeed on the merits.

Plaintiffs also have not shown and cannot show that they are likely to succeed on the merits. Plaintiffs are not only unlikely to succeed, they ***cannot*** succeed because, as discussed above, the district court lacks jurisdiction over this

intra-tribal dispute. *See* § II.A, *supra*. Plaintiffs also have failed to show that they are likely to succeed on the merits of any claim that provides for injunctive relief, even if this Court has jurisdiction for purposes of awarding money damages, which it does not. *See* § II.B, *supra*. Although plaintiffs recite the elements of their various claims and baldly assert that they will prevail, "the authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy." *Singer*, 668 F.2d at 1112. None of plaintiffs' claims provides for such relief.

a. Plaintiffs are not only unlikely to obtain injunctive relief on their RICO claims, such relief is barred as a matter of law.

As already discussed, plaintiffs cannot obtain preliminary injunctive relief based on their RICO claim. *See Wollersheim*, 796 F.2d at 1077-89. Thus, plaintiffs' discussion of that claim is irrelevant. *See* AOB at 47-49.

b. Plaintiffs are unlikely to prevail under the CFAA, and the injunctive relief they seek is unrelated to an asset freeze.

Plaintiffs also fail to show that they are likely to prevail on their CFAA claim, much less prevail in a way that could justify an asset freeze. As already discussed, the district court lacks jurisdiction over the CFAA claim, which plainly and ineluctably raises questions of tribal authority that federal courts do not have jurisdiction to decide. *See Lewis*, 424 F.3d at 960-63; *Sac & Fox*, 340 F.3d at 752; *Miccosukee*, 975 F. Supp. 2d at 1300-09. Even if the district court has jurisdiction,

plaintiffs' CFAA claim will fail because the federally-recognized Elected Council expressly authorized the remote shutdown of the Tribe's computers in the wake of plaintiffs' coup. *See* 18 U.S.C. § 1030; SER4-48. In any event, the only injunctive relief plaintiffs request relating to their CFAA claim simply enjoins defendants from accessing or damaging computers. 6-ER-1185. Assuming, for argument's sake, that plaintiffs are likely to obtain that "form of final relief," it has nothing to do with "the authority to freeze assets." *Singer*, 668 F.2d at 1112.

c. Plaintiffs are unlikely to obtain any injunctive relief on their state-law claims that could justify an asset freeze.

Plaintiffs further fail to show that they are likely to prevail on any of their state-law claims such that an asset freeze would have been authorized, let alone mandatory. As discussed above, plaintiffs never even mention Rule 64, and thus have waived any reliance on that rule, and the California law it incorporates, for the district court's purported authority to freeze defendants' assets. *See* § II.B, *supra*; *Grupo Mexicano*, 527 U.S. at 318 n.3; *Allstate*, 2011 WL 5402487, at *1. Moreover, as also discussed above, California law prohibits the type of general asset freeze plaintiffs seek. *See Doyka*, 233 Cal. App. 3d at 1136-37; *CHoPP*, 5 F.3d at 1349; *see also Walczak*, 198 F.3d at 730.

In addition to these fatal threshold defects, nearly all of plaintiffs' claims are, on their face, not claims for equitable relief at all, but legal claims for money damages, for which plaintiffs demand a jury trial. *See* 6-ER-995-1206; AOB at 49-

54. The only claims plaintiffs even argue are "for equitable relief" are their claims for "constructive trust" and "accounting." AOB at 54. But the relief plaintiffs seek under these claims is ***not*** equitable under the Supreme Court's ruling in *Great-West Life*, by plaintiffs' own admissions. Plaintiffs themselves argue that that the property at issue has been "spen[t] or disbursed." AOB at 55. Because plaintiffs seek to recover property that they allege has been "'dissipated,'" they are, at most, "'general creditor[s]'" as a matter of law, and therefore "'cannot enforce a constructive trust." *Great-West Life*, 534 U.S. at 213-14. Similarly, their claim for an accounting is not an equitable claim for "an accounting of profits," because plaintiffs have not established that they are entitled to "a constructive trust on particular property," *id.* at 214 n.2, and do not even pray for profits. 6-ER-1185. Rather, defendants pray for an "accounting of Defendants' ill-gotten gains," *id.*, which is an attempt "to impose personal liability on the defendant[s]," and is therefore not a claim for equitable relief. *Great-West Life*, 534 U.S. at 214.

2. Plaintiffs failed to show that the balance of equities favors the asset freeze they seek.

Because plaintiffs have failed to establish any claim for equitable relief, they have not shown any equities in their favor. Plaintiffs certainly have not shown that the balance of equities tips their way with such force that the district court abused its discretion in denying the asset freeze. On the contrary, the equities here weigh against the asset freeze, which, as plaintiffs' own cases recognize, would result in

"real and difficult consequences for each Defendant." *Johnson*, 572 F.3d at 1081; *see also*, *e.g.*, *Evans*, 775 F.2d at 1089 (balance of hardships favored party whose assets FTC sought to freeze and thus supported district court's denial of freeze).

Defendants have suffered, and continue to suffer, significant harms as a result of plaintiffs' coup and the lawsuit that followed. *See* 2-ER-136 ¶¶ 10-11; 2-ER-146 ¶ 3; 2-ER-150-51 ¶¶ 12, 17-20; 2-ER-155 ¶ 8; SER8-9 ¶¶ 19-20; SER29-34; SER40-41 ¶¶ 12-13; SER49-54. The Elected Council's efforts to regain lawful control cost a great deal of money, some of which the Tribe provided, but much of which the Tribe borrowed from defendants, who were forced to liquidate their retirement accounts. *See* 2-ER-136 ¶¶ 10-11; 2-ER-146 ¶ 3; 2-ER-150-51 ¶¶ 12, 17-20; 2-ER-154-55 ¶¶ 7-8; SER7-9 ¶¶ 12-20; SER29-34; SER40-41 ¶¶ 12-13; SER49-54. That money has not been repaid. 2-ER-136 ¶ 10; 2-ER-150 ¶ 12. Defendants' hardships would be made much worse if their assets were frozen.

For example, John Crosby and his wife, faced with the prospect of no job, no income, no tribal benefits, and having just loaned the Tribe $1 million from his retirement accounts, decided to try to sell their house and buy something smaller, which also made sense because his two daughters would soon be leaving for college. 2-ER-151 ¶ 17. But they pulled the house off the market when they learned of a lawsuit plaintiffs filed in state court claiming an interest in the house. *Id.* ¶ 18. The asset freeze plaintiffs seek would cause even further hardship to Mr.

Crosby and his family, putting his retail business at risk, and forcing his daughters to forego college if they are unable to find scholarships or some other source of funding. *Id.* ¶¶ 19-20.

Thus, plaintiffs have not shown that the balance of equities tips in favor of an asset freeze, and they certainly have not shown that the district court abused its discretion in finding that plaintiffs failed to carry their burden.

3. The only public interest plaintiffs cite—the interest in tribal self-government—*forbids*, and certainly *disfavors*, the asset freeze.

Finally, plaintiffs failed to show that the public interest favors the asset freeze they seek. Plaintiffs' only argument with respect to the public interest is that "[f]ederal policy strongly encourages self-government and self-determination by Indian tribes." AOB at 60 (citing *Alvarez v. Tracy*, 773 F.3d 1011, 1013 (9th Cir. 2014)). But that is exactly why this Court lacks jurisdiction over this intra-tribal dispute. *See generally* § II.A, *supra*. Indeed, in the very case on which plaintiffs rely, this Court declined, *sua sponte*, to exercise jurisdiction over an intra-tribal dispute. *See Alvarez*, 773 F.3d at 1013-24. Here, the same policy of encouraging tribal self-government mandates the dismissal of plaintiffs' claims, all of which are fundamentally based on plaintiffs' allegations that defendants exceeded their authority under the laws of the Paskenta Band. *See* 6-ER-1000-119 ¶¶ 3, 61-64, 75, 82-98, 110-33, 413-18. Under federal law, California law, and as a matter of established public policy, "it is for the Band to determine what that law is

and whether or not it has been violated." *Lamere*, 131 Cal. App. 4th at 1067; *see also*, *e.g.*, *Lewis*, 424 F.3d at 960-63; *Sac & Fox*, 340 F.3d at 752; *Miccosukee*, 975 F. Supp. 2d at 1300-09.

VIII. CONCLUSION

For all of the foregoing reasons, the Court should affirm the district court's denial of the preliminary injunction. Further, because federal jurisdiction is lacking, the Court should terminate the litigation and remand the case for immediate dismissal. *See Munaf*, 553 U.S. at 691-92, 705.

DATED: October 13, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,243 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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STATEMENT REGARDING RELATED CASES

As far as the undersigned is aware, there are no related cases pending before this Court.

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ADDENDUM

Rule 64. Seizing a Person or Property

(a) Remedies Under State Law--In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following--however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

18 U.S.C. § 1030. Fraud and related activity in connection with computers

(a) Whoever--

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained

in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period;

(5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if--

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;

(7) with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any--

(A) threat to cause damage to a protected computer;

(B) threat to obtain information from a protected computer without authorization or in excess of authorization or to impair the confidentiality of information obtained from a protected computer without authorization or by exceeding authorized access; or

(C) demand or request for money or other thing of value in relation to damage to a protected computer, where such damage was caused to facilitate the extortion;

shall be punished as provided in subsection (c) of this section.

(b) Whoever conspires to commit or attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is--

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(2)(A) except as provided in subparagraph (B), a fine under this

title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if--

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds $5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(7) of this

section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4),or (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(4)(A) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 5 years, or both, in the case of--

(i) an offense under subsection (a)(5)(B), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused)--

(I) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;

(II) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(III) physical injury to any person;

(IV) a threat to public health or safety;

(V) damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; or

(VI) damage affecting 10 or more protected computers during any 1-year period; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(B) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 10 years, or both, in the case of--

(i) an offense under subsection (a)(5)(A), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused) a harm provided in subclauses (I) through (VI) of subparagraph (A)(i); or

(ii) an attempt to commit an offense punishable under this subparagraph;

(C) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 20 years, or both, in the case of--

(i) an offense or an attempt to commit an offense under subparagraphs (A) or (B) of subsection (a)(5) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(D) a fine under this title, imprisonment for not more than 10 years, or both, in the case of--

(i) an offense or an attempt to commit an offense under subsection (a) (5)(C) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(E) if the offender attempts to cause or knowingly or recklessly causes serious bodily injury from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for not more than 20 years, or both;

(F) if the offender attempts to cause or knowingly or recklessly causes death from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for any term of years or for life, or both; or

(G) a fine under this title, imprisonment for not more than 1 year, or both, for--

(i) any other offense under subsection (a)(5); or

(ii) an attempt to commit an offense punishable under this subparagraph.

[**(5)** Repealed. Pub.L. 110-326, Title II, § 204(a)(2)(D), Sept. 26, 2008, 122 Stat. 3562]

(d)(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)), except for offenses affecting the duties of the United States Secret Service pursuant to section 3056(a) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section--

(1) the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "protected computer" means a computer--

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) the term "financial institution" means--

(A) an institution, with deposits insured by the Federal Deposit Insurance Corporation;

(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(C) a credit union with accounts insured by the National Credit Union Administration;

(D) a member of the Federal home loan bank system and any home loan bank;

(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;

(G) the Securities Investor Protection Corporation;

(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and

(I) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(5) the term "financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) the term "department of the United States" means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5;

(8) the term "damage" means any impairment to the integrity or availability of data, a program, a system, or information;

(9) the term "government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) the term "conviction" shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; and

(12) the term "person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of

the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

(h) The Attorney General and the Secretary of the Treasury shall report to the Congress annually, during the first 3 years following the date of the enactment of this subsection, concerning investigations and prosecutions under subsection (a)(5).

(i)(1) The court, in imposing sentence on any person convicted of a violation of this section, or convicted of conspiracy to violate this section, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person forfeit to the United States--

(A) such person's interest in any personal property that was used or intended to be used to commit or to facilitate the commission of such violation; and

(B) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(2) The criminal forfeiture of property under this subsection, any seizure and disposition thereof, and any judicial proceeding in relation thereto, shall be governed by the provisions of section 413 of the Comprehensive Drug

Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except subsection (d) of that section.

(j) For purposes of subsection (i), the following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) Any personal property used or intended to be used to commit or to facilitate the commission of any violation of this section, or a conspiracy to violate this section.

(2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this section, or a conspiracy to violate this section

9th Circuit Case Number(s) 15-16654

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) [ ]

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [Oct 13, 2015].

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

John Henry McCardle
Department of Veteran's Affairs
P.O. Box 942895
1227 0 Street, Suite 324
Sacramento, CA 95814-0001

Signature (use "s/" format) s/ Daniel E. Jackson