UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EFRIM RENTERIA, TALISHA RENTERIA,

Plaintiffs,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al.,

Defendants.

No. 2:16-cv-1685-MCE-AC

MEMORANDUM AND ORDER

Plaintiffs Efrim and Talisha Renteria ("Plaintiffs") bring this action against the Shingle Springs Band of Miwok Indians ("Tribe"), its Tribal Council, its Tribal Court, Christine Williams in her official capacity as the Tribal Court judge, Regina Cuellar in both her official capacity as a member of the Tribal Council (collectively, the "Tribal Defendants") and her individual capacity as the appointed guardian of Plaintiffs' three minor nieces ("Minors"), all of whom are under seven years old. They seek to prevent the enforcement of Tribal Court's June 3, 2017 Order ("June 3 Order") appointing Defendant Regina Cuellar as the legal guardian of the Minors. Their Complaint attacks the Tribal Court's jurisdiction over the custody proceedings, and further alleges that the June 3 Order is unenforceable in courts subject to the 14th Amendment of the United States Constitution because the underlying proceedings violated Plaintiffs' due process

rights.

Plaintiffs' Motion for Preliminary Injunction (ECF No. 8) is presently before the Court. That Motion is GRANTED with respect to Defendant Regina Cuellar in her individual capacity. All defendants with the exception of Regina Cuellar in her individual capacity are DISMISSED for lack of jurisdiction.

BACKGROUND[1]

Plaintiffs are the maternal great aunt and uncle of the Minors.[2] The Minors' parents were killed in a car accident on December 17, 2015. Their late father was a member of the Tribe, but the Minors resided and were domiciled with their parents in Visalia, California. They have never resided or been domiciled on tribal lands.

Plaintiffs cared for the Minors in the weeks following the accident. On January 5, 2016, members of the children's paternal family appeared at Plaintiffs' house in Visalia, presented a copy of an emergency order issued by the Tribal Court of the Shingle Springs Band of Miwok Indians ("Tribal Court") to Plaintiffs', and forcibly removed the two youngest Minors (the eldest Minor remained hospitalized from injuries sustained in the car accident that killed her parents). On January 22, 2016, the Tribal Court held a review hearing regarding guardianship, appointed Plaintiffs as temporary guardians for the Minors, and established a schedule of visitations for the paternal family.

Beginning in February 2016, the two older children repeatedly reported that their paternal step-grandfather ("Joseph") sexually abused them during their visits. Plaintiffs reported the abuse to the Visalia Police Department and the Tulare County Health & Human Services Agency. In the days that followed Plaintiffs' initial police report, the children were interviewed outside of Plaintiffs' presence on three separate occasions by

[1] The following recitation of facts is taken, sometimes verbatim, from the Complaint and the papers filed on the docket in connection with Plaintiffs' Motion for Preliminary Injunction.

[2] In an effort to be cognizant of the best interests of the Minors, details that could lead to their identification and allegations are not included in this Order.

social workers with no connection to the family. The two older children continued to report instances of sexual abuse by Joseph to these social workers. After Plaintiffs made these reports, the Tribal Court modified the visitation order such that Joseph was not to have access to the Minors.

On June 3, 2016, the Tribal Court appointed Defendant Regina Cuellar as the Minors' permanent guardian over Plaintiffs' competing petition and objections. Defendant Cuellar's appointment became effective June 12, 2016. At the same time, the Tribal Court issued a visitation order that failed to restrict Joseph's access to the Minors. The Minors then went for visitation with Defendant Regina Cuellar on June 4 and 5.

The failure to restrict Joseph's access to the Minors during this visit resulted in yet another instance of alleged sexual abuse. Plaintiffs declined to give custody of the Minors to the paternal family on June 12, and caused a "Good Cause" Report to be filed with the Tulare County District Attorney. Plaintiffs then filed this action on July 21, 2016. They seek a declaration that the Tribal Court lacked jurisdiction to appoint a guardian for the Minors in the first instance, a declaration that the proceedings that led to the appointment of Regina Cuellar violated Plaintiffs' due process rights, and an injunction preventing the enforcement of the June 3 Order outside of tribal lands. .

The Court issued a Temporary Restraining Order ("TRO") enjoining enforcement of the Tribal Court's June 3 Order pending a hearing on Plaintiffs' Motion for Preliminary Injunction. ECF No. 19. After the Court issued the TRO, the Tribal Court ordered Plaintiffs to appear at another hearing to discuss visitation for an important tribal cultural event known as the "Big Time." As a result of that order, Plaintiffs requested a supplemental TRO enjoining the enforcement of any additional Tribal Court orders in the custody proceeding pending the resolution of Plaintiffs' Motion. The Court denied Plaintiffs' application for a supplemental TRO for failure to comply with Local Rule 231. ECF No. 49.

Defendants oppose Plaintiffs' Motion. They contend that the Court lacks

jurisdiction over the Tribal Defendants, and that Plaintiffs' action cannot proceed solely against Defendant Cuellar in her individual capacity under Rule 19(b).

STANDARDS

A. Jurisdiction

Federal courts are courts of limited jurisdiction, and are presumptively without jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. Id. Because subject matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at any point during the litigation. Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also Int'l Union of Operating Eng'rs v. Cnty. of Plumas, 559 F.3d 1041, 1043-44 (9th Cir. 2009). Lack of subject matter jurisdiction may also be raised by the district court sua sponte. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999). Indeed, "courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party." Id.; see Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss the action if subject matter jurisdiction is lacking).

There are two types of motions to dismiss for lack of subject matter jurisdiction: a facial attack, and a factual attack. Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the allegations of jurisdiction contained in the nonmoving party's complaint, or may challenge the existence of subject matter jurisdiction in fact, despite the formal sufficiency of the pleadings. Id.

When a party makes a facial attack on a complaint, the attack is unaccompanied by supporting evidence, and it challenges jurisdiction based solely on the pleadings. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to

dismiss constitutes a facial attack, the Court must consider the factual allegations of the complaint to be true, and determine whether they establish subject matter jurisdiction. Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003). In the case of a facial attack, dismissal is warranted only if the nonmoving party fails to allege an element necessary for subject matter jurisdiction. Id. However, in the case of a facial attack, district courts "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." Safe Air for Everyone, 373 F.3d at 1039.

In the case of a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations." Thornill, 594 F.2d at 733 (internal citation omitted). The party opposing the motion has the burden of proving that subject matter jurisdiction does exist, and must present any necessary evidence to satisfy this burden. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff's allegations of jurisdictional facts are challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the mere assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind., Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat'l Bank of Chi. v. Touche Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may review any evidence necessary, including affidavits and testimony, in order to determine whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its burden and the court determines that it lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3).

A court dismissing a complaint for lack of jurisdiction must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment . . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to

be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005)); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility . . . .")).

B. Preliminary Injunction

"A preliminary injunction is an extraordinary and drastic remedy." Munaf v. Geren, 553 U.S. 674, 690 (2008). "[T]he purpose of a preliminary injunction is to preserve the status quo between the parties pending a resolution of a case on the merits." McCormack v. Hiedeman, 694 F.3d 1004, 1019 (9th Cir. 2012). A plaintiff seeking a preliminary injunction must establish that he is (1) "likely to succeed on the merits;" (2) "likely to suffer irreparable harm in the absence of preliminary relief;" (3) "the balance of equities tips in his favor;" and (4) "an injunction is in the public interest." Winter v. Natural Res. Defense Council, 555 U.S. 7, 20 (2008) "If a plaintiff fails to meet its burden on any of the four requirements for injunctive relief, its request must be denied." Sierra Forest Legacy v. Rey, 691 F. Supp. 2d 1204, 1207 (E.D. Cal. 2010) (citing Winter, 555 U.S. at 22). "In each case, 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.'" Winter, 555 U.S. at 24 (quoting Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)). A district court should enter a preliminary injunction only "upon a clear showing that the plaintiff is entitled to such relief." Winter, 555 U.S. at 22 (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).

Alternatively, under the so-called sliding scale approach, as long as the plaintiff demonstrates the requisite likelihood of irreparable harm and shows that an injunction is

in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in the plaintiffs' favor. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (concluding that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after Winter).

ANALYSIS

Defendants' sovereign immunity argument, while not entirely convincing, raises serious questions about the Court's jurisdiction over the Tribal Defendants. The Court, however, can provide Plaintiffs with the relief they seek by dismissing the Tribal Defendants and allowing this action to go forward against Regina Cuellar in her individual capacity. As explained more fully below, the Court dismisses the Tribal Defendants, finds that Federal Rule of Civil Procedure 19[1] does not mandate joinder, and proceeds to the merits of Plaintiffs' Motion solely with respect to Defendant Cuellar. As to their due process claim, the Court finds that Plaintiffs are entitled to preliminary injunctive relief and GRANTS Plaintiffs' Motion with respect to Defendant Cuellar in her individual capacity.[3]

A. The Court Declines To Exercise Jurisdiction Over The Tribal Defendants

Defendants challenge the Court's jurisdiction to hear Plaintiffs' due process claim on two grounds. First, Defendants argue that the Tribal Defendants are immune from suits for declaratory and injunctive relief under the doctrine of sovereign immunity. Second, Defendants contend that to the extent that Plaintiffs' due process claim is predicated on the Indian Civil Rights Act ("ICRA"), they can assert their due process rights against the Tribal Defendants only by way of a habeas petition.

[1] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

[3] Given the non-viability of Plaintiffs' challenge to the Tribal Court's jurisdiction, the Court refers only to their due process claim in discussing its jurisdiction.

Tribal sovereign immunity presents a jurisdictional question. See Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 722 (9th Cir. 2008). Generally, a plaintiff cannot bring a lawsuit in federal court against a tribe absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. Arizona Public Service Co. v. Aspaas, 77 F.3d 1128, 1133. Tribal sovereign immunity extends to agencies of the tribe, Hagen v. Sisseston-Wahpeton Community College, 205 F.3d 1040, 1043 (8th Cir. 2000), and to tribal officials acting in their official capacity within the scope of their authority.[4] Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir. 2002). Based on these principles and the Supreme Court's reasoning in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), Defendants assert that Plaintiffs can only bring their due process challenge to the Tribal Court proceedings by way of a habeas petition pursuant to the Indian Civil Rights Act ("ICRA"). See id. at 56-61 (observing that the Fourteenth Amendment of the Constitution has not historically applied to Indian tribes and that habeas corpus is the only vehicle by which to challenge a claim covered by the ICRA).

Defendants' argument is not entirely persuasive. Plaintiffs' due process claim does not seek an order enjoining the Tribe or its officials from governing its members, nor do they seek an order preventing the enforcement of the Tribal Court's June 3 Order on tribal lands. Rather, Plaintiffs ask the Court to hold that the June 3 Order is not entitled to recognition by the state and federal governments. ECF No. 51 at 7:4-8; ECF No. 7 at 14, ¶ D.

In light of Plaintiffs' requested relief, Santa Clara Pueblo is distinguishable. That case dealt with a dispute between tribal members wherein female tribal members challenged sexist tribal policies that excluded them from tribal membership. Santa Clara

[4] Although the Ex Parte Young doctrine carves out an exception to tribal sovereign immunity when a plaintiff brings a suit for prospective relief against tribal officers allegedly acting in violation of federal law, Plaintiffs have failed to allege that Judge Wiliams or Regina Cuellar are engaged in an ongoing violation of federal law. See Burlington Northern & Santa Fe Railway Co. v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007). Plaintiffs' due process claim does not allege a violation of federal law because "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

Pueblo, 436 U.S. at 52-53 (1978). The plaintiffs sought to enjoin the enforcement of a tribal ordinance. Id. In pertinent part, the Supreme Court noted that "even in matters involving commercial disputes and domestic relations, we have recognized that subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves may "undermine the authority of the tribal court . . . [and hence] . . . [in]fringe on the right of the [I]ndians to govern themselves." Id. at 59 (internal quotation marks and citations omitted).

Here, in contrast, Plaintiffs do not seek to force the Tribe, tribal officials, or the Tribal Court to do anything or refrain from doing anything. Instead, they seek a declaration that the June 3 Order is unenforceable by non-tribal governmental entities. Furthermore, there is no danger that hearing a dispute about the enforceability of a tribal court order would undermine the authority of the tribal court to address internal disputes about matters of tribal governance. See id. Rather, the focus of Plaintiffs' lawsuit is whether the June 3 Order is enforceable against them by state, federal, or local governments off of the reservation. The relief Plaintiffs seek does not compel the Tribe to act in a particular way, nor does it prevent the June 3 Order from remaining in effect on the reservation. Instead, granting a preliminary injunction will only prevent the June 3 Order from being enforced in state or federal courts. Accordingly, the reasoning in Santa Clara Pueblo does not support Defendants' sovereign immunity argument particularly well.

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) seems to provide a better framework for the Court's understanding of its jurisdiction here. In that case, a Crow Indian minor was struck by a motor cycle in the parking lot of the Lodge Grass Elementary school located on land owned by the state of Montana. Id. at 847. The minor, through his guardian, filed suit in tribal court and obtained a default judgment for $153,000. The school district and its insurer then filed suit in federal district court, alleging that the enforcement of the tribal court judgment would impair their constitutional and statutory rights. Id. at 848. The complaint named as defendants the

Crow Tribe of Indians, the tribal council, the tribal court, judges of the tribal court, and the chairman of the tribal council. It described the entry of the default judgment, alleged that a writ of execution might issue on the following day, and asserted that a seizure of school property would cause irreparable injury to the School District and would violate the petitioners' constitutional and statutory rights. The District Court entered an order restraining all the defendants "from attempting to assert jurisdiction over plaintiffs or issuing writs of execution out of Cause No. Civ. 82–287 of the Crow Tribal Court until this court orders otherwise." Id. Eventually, the district court entered a permanent injunction, the basis of which was its finding that the tribal court lacked jurisdiction over the tort that was the basis of the tribal court suit and default judgment. Id. at 848-49.

The Supreme Court ultimately decided the case in favor of the Crow Tribe on exhaustion grounds. Id. at 857. The Court implied, however, that if the plaintiffs in the federal action had exhausted their tribal court remedies, the district court could have granted injunctive and declaratory relief preventing enforcement of the judgment for lack of jurisdiction. See id. ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief."). It follows that if a federal court could issue declaratory and injunctive relief against a Tribe, a Tribal Council, and a Tribal Court preventing enforcement of a judgment obtained in excess of jurisdiction, it could issue the same relief against the same defendants with respect to a judgment that violated non-tribal members' due process rights. This must be the case because foreign judgments are not entitled to be enforced with full faith and credit if they are obtained either in excess of jurisdiction or due to a failure to comport with due process. See Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) ("A federal court must also reject a tribal judgment if the defendant was not afforded due process of law.").

Indeed, Wilson v. Marchington provides additional support for Plaintiffs' position that the court has jurisdiction to enter declaratory and injunctive relief against the enforcement or recognition of the June 3 Order outside Defendants' reservation. In

Wilson, the Ninth Circuit examined the question of "whether, and under what circumstances, a tribal court tort judgment is enforceable in the United States courts." Id. at 807. The plaintiff in Wilson was a member of the Blackfeet Tribe. She sued the defendant in tribal court after a car accident, and obtained a judgment in her favor. Claiming her judgment was entitled to full faith and credit, she filed suit in the U.S. District Court for District of Montana to register her judgment in the federal court system. The Ninth Circuit affirmed the District Court's holding that the judgment was not entitled to recognition. It noted that federal courts may not enforce tribal judgments under the comity doctrine if they were obtained in excess of the tribal court's jurisdiction or after a denial of due process. Id. at 811 ("A federal court must also reject a tribal judgment if the defendant was not afforded due process of law . . . . We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes."). It further observed that the due process requirement was equally applicable where a plaintiff seeks to enforce a judgment entitled to full faith and credit, as is required by the Indian Child Welfare Act ("ICWA"). See id.; see also Kremer v. Chemical Const. Corp., 456 U.S. 461, 482 (1982) ("The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.")

Plaintiffs' argument based on Wilson and National Farmers, however, is an inferential one. The Court is not convinced that those inferences, logical though they may be, satisfy Plaintiffs' burden of establishing jurisdiction in the face of the clear statement of controlling authority that Indian tribes and their agents are immune from civil suit in federal court. Arizona Public Service Co. v. Aspaas, 77 F.3d 1128, 1133. Given the limited nature of federal court jurisdiction, the Court's reluctance to potentially expand that jurisdiction by accepting Plaintiffs' arguments, and the fact that effective relief can be fashioned without the Tribal Defendants' participation, the Court declines to

exercise jurisdiction over them. The Tribal Defendants are therefore DISMISSED from this action for lack of jurisdiction. Accordingly, the Court DENIES Plaintiffs' Motion as moot with respect to the Tribal Defendants.

B. Plaintiffs' Due Process Claim Can Proceed Against Regina Cuellar In Her Individual Capacity

There is no genuine dispute that the doctrine of tribal sovereign immunity does not apply to Defendant Cuellar in her individual capacity, and that the Court possesses jurisdiction over her. ECF No. 30 at 22:26-28. Nevertheless, Defendants argue that Cuellar should also be dismissed because the Tribal Defendants are indispensable parties under Rule 19. Id. at 22-23; ECF No. 32 at 27:15-32:10. The Court finds Defendants' argument unpersuasive.

More specifically, the Court agrees that the Tribal Defendants are required parties under Rule 19(a)(1)(A).[5] Plaintiffs have not provided the Court with any authority that would limit the Tribal Defendants' ability to themselves seek enforcement of the June 3 Order in state or federal court. Assuming that they can do so, an injunction issued against Cuellar alone would be insufficient to afford complete relief because the Tribal Defendants could "possibly initiate further action to enforce" June 3 Order even if that order were held unenforceable in this action. E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, 780 (9th Cir. 2005). Furthermore, the Court agrees that joinder of the Tribal Defendants would be infeasible given its reluctant decision that they are immune from suit here.

The Court disagrees, however, with Defendants' assertion that this action cannot proceed against Defendant Cuellar as an individual in equity and good conscience. See Fed. R. Civ. P. 19(b). In determining whether an action can proceed against a party despite the infeasibility of joining required parties, courts apply a four-factor test:

[5] The Court rejects any suggestion that the Tribal Defendants are also required parties under Rule 19(a)(1)(B)(i). The Tribal Defendants cannot have any interest in the enforceability of an order against non-tribal members in state or federal court if that order violates the non-members' due process rights. Furthermore, if such an interest is legitimate, Defendant Cuellar is more than capable of sufficiently defending it in her individual capacity.

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.; Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990).

The first factor favors Plaintiffs. Defendants appear to contend that the Tribe's interest in regulating the custody of its minor members would be prejudiced without its participation in this action. But Plaintiffs' requested relief on their due process claim would do nothing to imperil the ability of the Tribal Court to continue issuing custody orders in cases where, as here, it properly asserts jurisdiction. Nor would Plaintiffs' requested relief compel the Tribal Defendants to do anything in regards to their ability to regulate its members on tribal lands. See Santa Clara Pueblo, 436 U.S. at 59. Second, to the extent Defendants contend they have an interest in the enforcement of a custody order against non-tribal members residing off tribal lands, the Court disagrees. No tribe has a legitimate interest in enforcing an order in state or federal courts if it was obtained in tribal court without regard for the due process rights of such persons. If such an interest exists, the time for the Tribal Defendants to protect it was during the custody proceedings themselves. Third, if any of the Tribal Defendants' interests are implicated by this action, Defendant Cuellar is well-positioned to defend them given her status as a tribal member, a member of the Tribal Council, and the appointed guardian of the Minors. Finally, Defendant Cuellar does not contend her own interests would be prejudiced if the Tribal Defendants are not joined in this action. The prejudice factor

therefore favors Plaintiffs.[6]

The adequacy of the remedy factor also favors Plaintiffs. Under this factor of the Rule 19(b) test, a remedy can be adequate even if it is not complete. Makah Indian Tribe, 910 F.2d at 560. Here, Plaintiffs' remedy against Cuellar would be adequate in that it would prevent her from attempting to seek recognition of the June 3 Order in state or federal court. While that remedy would presumably not prevent the Tribal Defendants from attempting to enforce the June 3 Order, it would complicate their ability to do so in at least two ways. First, a judgment from this Court holding that the June 3 Order is unenforceable for failure to comport with Plaintiffs' due process rights would likely have at least some persuasive effect on another judge assigned to determine the enforceability of that Order. Second, if the Tribal Defendants sought to have the June 3 Order recognized in the Superior Court for Tulare or El Dorado County, Plaintiffs would likely be able to remove that proceeding to this Court under 28 U.S.C. § 1331 and relate it to this case pursuant to Local Rule 123 for adjudication by the undersigned. See Local Rules of E.D. Cal., Rule 123; see generally Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). The same relation procedure would hold true if the Tribal Defendants sought recognition of the June 3 Order in this Court in the first instance. Accordingly, the Court finds that while a judgment against Defendant Cuellar alone would not immediately provide a complete remedy, the remedy would be more than adequate for Plaintiffs' purposes.

Finally, Plaintiffs would lack an adequate remedy if this suit were dismissed against Defendant Cuellar for nonjoinder. Fed. R. Civ. P. 19(b)(4). If Plaintiffs are unable to litigate their meritorious due process claim here, they face two options. The first would be to sacrifice their right not to have an infirm foreign judgment enforced against them by the state or federal governments by voluntarily returning the Minors to

[6] The Court's finding that the prejudice factor favors Plaintiffs makes it unnecessary to consider the second factor of the Rule 19(b) test.

an allegedly harmful environment. Their second option, as defense counsel intimated at the hearing on this Motion, would be to wait for the Tulare County Sheriff's Department to collect the children (and possibly arrest Plaintiffs for kidnapping) pursuant to the June 3 Order. See Cal. Penal Code § 278. Both "remedies" are plainly inadequate.

Because all three relevant factors of the Rule 19(b) test favor Plaintiffs, the Court concludes that this action may proceed solely against Defendant Cuellar in her individual capacity. Accordingly, the Court proceeds to the merits of Plaintiffs' Motion for Preliminary Injunction.

C. Plaintiffs Are Entitled To A Preliminary Injunction On Their Due Process Claim

Although Defendants have failed to argue the merits of Plaintiffs' entitlement to a preliminary injunction, the Court must independently determine whether it should exercise its discretion to provide Plaintiffs with preliminary relief. See Fed. R. Civ. P. 65(d)(1). Concluding that the Plaintiffs are entitled to preliminary relief, the Court ENJOINS Defendant Cuellar from seeking recognition or enforcement of the June 3 Order in state or federal court.

1. Plaintiffs are likely to succeed on the merits of their due process claim.

The Indian Child Welfare Act ("ICWA") requires the United States and every state to "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to . . . the judicial proceedings of any other entity."[7] 25 U.S.C. § 1911(d). Enforcing a foreign judgment entitled to full faith and credit requires that the proceedings that led to the judgment comported with due process. Kremer v. Chemical Const. Corp., 456 U.S. 461, 482 (1982). Furthermore, the California Family Code requires a child custody determination made by a tribe to comply with due process

[7] Although there is a dispute as to whether the Tribal Court's June 3 Order is a child custody determination entitled to full faith and credit under ICWA, the comity doctrine that would otherwise apply also requires due process.

in order to be enforced in state court. Cal. Fam. Code § 3404(b)-(c); id. at §§ 3443, 3446; In re Marriage of Nurie, 176 Cal. App. 4th 478, 493 (Cal. Ct. App. 2009) ("The requirements of due process of law are met in a child custody proceeding when, in a court having subject matter jurisdiction over the dispute, the out-of-state parent is given notice and an opportunity to be heard."); see also ECF No. 30-3 at 59 (citing California Family Code). At the federal constitutional level, the Supreme Court has endorsed the existence of a significant liberty interest in extended family members' relationships with children. See Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 504 (1977) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition"); Troxel v. Granville, 530 U.S. 57, 65–66 (2000) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

The core of the constitutional right to due process is a meaningful opportunity to be heard before a person is deprived of a significant liberty interest. LaChance v. Erickson, 522 U.S. 262, 266 (1998); see also Wilson v. Marchington, 127 F.3d 805, 811 (1997) (due process requires an "opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings...and that there is no showing of prejudice in the tribal court or in the system of governing laws."). In this case, Plaintiffs allege that they did not receive a fair opportunity to be heard because:

(1) The Tribal Court did not fully consider Plaintiffs' position in the guardianship proceedings, and had no incentive to do so, because Judge Williams serves at the pleasure of the Tribal Council, on which Defendant Cuellar serves as a member;

(2) During the underlying proceedings, the Tribal Council passed an ordinance specifically intended to benefit Regina Cuellar's guardianship petition;

(3) Judge Williams was biased in favor of the Tribe, as evidenced by: (a) her

statement that "Native Americans have felt that way about state court proceedings for years and now you know how they felt" in response to Plaintiffs claims of bias; and (b) her statement that she would not consider a report by a therapist involved in the molestation accusations and that she only wanted to hear from Tribal services;

(4) The law firm that represented Regina Cuellar in the guardianship proceedings (Fredericks Peebles & Morgan) was also retained by the Tribe, the Tribal Council, and the Tribal Court to assist and advise in legal matters affecting them, thereby creating a conflict of interest; and

(5) Judge Williams refused to consider and rule upon several of Plaintiffs' legal arguments, including that Regina Cuellar does not qualify as a foster parent under California law due to evidence of domestic abuse in her home and alcohol-related criminal convictions.

These allegations if true, would likely lead to a ruling that Plaintiffs were denied a meaningful opportunity to be heard in Tribal Court. Indeed, the multiple conflicts of interest inherent in the custody proceeding, combined with Plaintiffs' as-yet unrefuted allegations of Defendant Williams' expressions of bias, lead the Court to question whether Plaintiffs can ever receive a meaningful opportunity to be heard in the Tribal Court.[8] The Court further doubts whether the Tribal Court is capable of considering the best interests of the Minors given the aforementioned issues in the underlying proceedings. Accordingly, Plaintiffs have established a likelihood of success on the

[8] The Court further observes that Defendants could have potentially refuted some of the questions surrounding the hearing that led to the June 3 Order by providing audiotapes of the hearing to either this Court or Plaintiffs. They refused to do either, and Defendant Williams' refusal to release them to Plaintiffs appears to have violated the Tribal Court's own Rules of Court. See Shingle Springs Band of Miwok Indians Tribal Court Rules of Court, Rule 1.5.B (available at shinglespringsrancheria.com/ssr/wp-content/uploads/documents/tribal-court/Tribal%20Court%20Rules.pdf); ECF No. 47-1 at 4, ¶ 6. The adverse inference the Court may draw as a result of Defendants' refusal to provide these tapes further supports the Court's finding that Plaintiffs are likely to succeed on the merits of their due process claim. See London v. Standard Oil Co. of California, 417 F.2d 820, 824 (9th Cir. 1969) ("The rule upon which he relies is that an unfavorable inference may result from the unexplained failure of a party to produce documentary or other real evidence." (citing Evis Manufacturing Company v. F.T.C., 287 F.2d 831, 847 (9th Cir. 1961); 2 Wigmore, Evidence, 285, 291 (3d Ed. 1940))).

merits of their due process claim.

On the other hand, Plaintiffs' jurisdictional claim is unlikely to succeed. The ICWA's jurisdictional scheme is relatively simple. A tribal court has exclusive jurisdiction over child custody proceedings concerning Indian children who are domiciled on the reservation. 25 USC § 1911(a). "Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction by the tribal court." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

Plaintiffs argue that ICWA does not provide the Tribal Court here with jurisdiction for two reasons. First, Plaintiffs argue that the Minors are not Indians. They suggest that because the Minors have only 1.2 percent Maidu blood, they cannot meet the ICWA's definition of an Indian. This argument is meritless. The ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4). A tribe's determination that a child is a member of, or is eligible for membership in, a tribe is conclusive evidence that a child is an Indian child within the meaning of the ICWA. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). Neither enrollment nor blood quantum is required as long as the child is recognized as a member of the tribe or as eligible for membership. In re Riffle (Riffle II), 922 P.2d 510, 512-13 (Mont. 1996).

There is no dispute that the Minors are members of the Tribe. The Tribe's determination that they are members is conclusive. The fact that they are do not have a large amount of Indian genetic heritage is irrelevant. Under the ICWA, tribal membership is a political affiliation rather than a matter of blood quantum. Plaintiffs'

blood quantum argument therefore fails.

Second, Plaintiffs argue that the proceedings in the Tribal Court are not "child custody proceedings" within the meaning of the ICWA. See 25 U.S.C. § 1911. They may be correct, but their argument misses the point. First, the ICWA is a federal statute that applies to state courts when an Indian child is subjected to child custody proceedings in state court. It does not govern Indian tribes' ability to exercise jurisdiction over its minor members. Second, and regardless of whether the state has concurrent jurisdiction over these guardianship proceedings, the Tribe's Family Code provides the Tribal Court with jurisdiction over the Minors. See ECF No. 30-3 at 90 (the Tribal Court has "authority to appoint a guardian for a tribal member minor . . . whenever it is in the best interests of the minor."). The Superior Court for Tulare County accordingly declined to exercise its concurrent jurisdiction over the Minors' custody, citing the Tribal Court's pre-existing exercise of jurisdiction.[9] It is thus clear that the Tribal Court had jurisdiction to issue the June 3 Order appointing Regina Cuellar as the Minors' guardian.

2. Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

Plaintiffs easily establish the requisite level of harm to obtain a preliminary injunction. If Plaintiffs' allegations are true, three young children have been sexually abused by a tribal family member in the recent past. The instances of sexual abuse are not isolated incidents. The Minors' reports of sexually abusive conduct span the course of nearly half a year.

Defendants have submitted a report, purportedly emanating from the El Dorado County Health and Human Services agency, which they claim contradicts Plaintiffs' allegations and affidavits of abuse. ECF No. 30-3 at 68-83. Plaintiffs' have objected to the admissibility of that report. ECF No. 51-1. The Court has serious doubts about the admissibility of the report, but declines to address Plaintiffs' objections at this time. Instead, the Court finds that the report is not entitled to any weight whatsoever in

[9] In light of this Order, the Superior Court for Tulare County may wish to reconsider whether there is good cause for it to assert jurisdiction over the Minors' guardianship proceedings.

determining whether Plaintiffs will suffer irreparable harm if an injunction does not issue. The authors of the report based their finding that the Minors' accusations of abuse are unfounded solely upon uncritical interviews with the accused abuser and his family. The authors never interviewed the Minors in connection with their investigation. The inadequacies of the authors' investigation are astounding, and the Court declines to afford any consideration to their conclusions.[10]

Permitting enforcement of the Tribal Court's custody order would re-expose the Minors to their alleged abuser. The sexual exploitation of children is not only morally repugnant, but results in long-lasting and serious harm for the rest of their lives. See U.S. v. Baker, 672 F. Supp. 2d 771, 773 (E.D. Tex. December 7, 2009). Furthermore, Plaintiffs have cared for the Minors and served as their guardians for an extended period of time, and they have a close familial relationship. ECF No. 7 at ¶ 12; ECF No. 11 at ¶ 3. The fact that the Minors will be re-exposed to their alleged abuser is emotionally devastating for Plaintiffs as well as the Minors. See ECF No. 11 at ¶ 22. Accordingly, Plaintiffs have met their burden of demonstrating that both they and the Minors will suffer irreparable harm in the absence of preliminary relief. Winter, 555 U.S. at 20 (2008).

3. The balance of harms and the public interest favor the issuance of a preliminary injunction.

The balance of hardships tips sharply in Plaintiffs' favor. Plaintiffs' Motion seeks to maintain the status quo. The Minors have apparently never lived on tribal lands, and they have a close relationship with Plaintiffs. They will suffer little, if any, harm from the maintenance of the status quo. Conversely, the Minors may be subjected to further abuse if the Tribal Court's order is not enjoined from enforcement. Furthermore, Plaintiffs' right to due process will be jeopardized if an injunction does not issue, while Defendant Cuellar cannot claim hardship because the Court enjoins her from attempting

[10] Plaintiffs' submitted their own expert report in conjunction with their Reply brief. ECF No. 51-2. Defendants' objection to that report is well-taken, and accordingly SUSTAINED. ECF No. 55 at 2-3. Plaintiffs have made numerous allegations and submitted numerous declarations in conjunction with their moving papers. Those allegations and affidavits are sufficient to establish a likelihood of irreparable harm without the Court's consideration of Plaintiffs' expert's declaration.

to enforce an apparently unenforceable order in state or federal court. Finally, while the public interest may favor the placement of tribal member minors with tribal member guardians, it favors the prevention of child sexual abuse even more strongly. Plaintiffs' Motion is therefore GRANTED with respect to Defendant Cuellar in her individual capacity.

CONCLUSION

Defendants Shingle Springs Band of Miwok Indians, the Shingle Springs Band of Miwok Indians Tribal Council, the Shingle Springs Band of Miwok Indians Tribal Court, Christine Williams, and Regina Cuellar in her official capacity as a member of the Tribal Council are DISMISSED for lack of jurisdiction. Plaintiffs' action may proceed against Defendant Regina Cuellar in her individual capacity, and their Motion for Preliminary Injunction (ECF No. 8) is GRANTED as to Defendant Regina Cuellar in her individual capacity. Defendant Cuellar is hereby ENJOINED from attempting to seek recognition or enforcement of the Tribal Court's June 3 Order appointing her as permanent guardian of the Minors outside of the Tribal Court pending a final disposition of this action on the merits.

IT IS SO ORDERED.

Dated: September 2, 2016

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE