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6 **IN THE TULALIP TRIBAL COURT**
7 **TULALIP INDIAN RESERVATION**
8 **TULALIP, WASHINGTON**

9 HAZEN GRAHAM SHOPBELL,
enrolled Tulalip Tribal member, et ux.,

10 Plaintiffs,

11 v.

12 STATE OF WASHINGTON
13 DEPARTMENT OF FISH AND
14 WILDLIFE; JIM UNSWORTH,
Director, State of Washington
15 Department of Fish and Wildlife;
16 WENDY WILLETTE, Detective, State
of Washington Department of Fish and
17 Wildlife; JOHN DOES 1-6, Law
Enforcement Officers, State of
18 Washington Department of Fish and
Wildlife,

19 Defendants.
20

No. TUL-CV-GC-2016-0278

DEFENDANTS' REPLY IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT

21 Defendants, the Washington Department of Fish and Wildlife (WDFW),
22 Jim Unsworth, Wendy Willette, and John Does 1-6, reply as follow in support of their Motion
23 for Summary Judgment:

24 **A. Introduction**

25 The declarations filed with Defendants' Motion for Summary Judgment establish that
26 WDFW is not in possession of the only property left at issue in this case: a black Samsung

1 tablet allegedly seized from Plaintiffs but not returned. In response, Plaintiffs provide only
2 accusations and speculation, but no facts, refuting Defendants' declarants' assertions that
3 WDFW is not in possession of the tablet in question. Without any such facts, Plaintiffs cannot
4 demonstrate the existence of a genuine issue of material fact as to whether WDFW is in
5 possession of the tablet in question. And because WDFW is not in possession of the tablet,
6 their claim for return of property necessarily fails and this Court cannot provide any redress.
7 Plaintiffs' arguments to the contrary are unavailing. WDFW is therefore entitled to summary
8 judgment dismissing Plaintiffs' only remaining claim.

9 **B. Plaintiffs' Response Fails to Demonstrate the Existence of Any Genuine Issue of**
10 **Material Fact as to Whether WDFW Is in Possession of the Samsung Tablet**

11 As discussed in Defendants' Motion for Summary Judgment, the declarations of those
12 who are in a position to know (the WDFW staff persons involved in seizing evidence from the
13 Shopbell residence and the handling, processing, storing, and returning of that evidence)
14 establish that WDFW is not in possession of the Samsung tablet. *See* Willette Decl. at 5;
15 Maurstad Decl. at 3; Peters Decl. at 3; Vincent Decl. at 3; Jaros Decl. at 2; Clementson Decl.
16 at 3; Dutton Decl. at 5. To successfully oppose summary judgment, it is incumbent on
17 Plaintiffs to produce specific facts, and not merely accusations and speculation, to refute the
18 factual assertions of Defendants and establish the existence of a genuine factual issue for trial.
19 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus.*
20 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986); *Triton Energy Corp. v.*
21 *Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); *Overton v. Consol. Ins. Co.*, 145 Wn.2d
22 417, 430, 38 P.3d 322 (2002); *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736,
23 150 P.3d 633 (2007).

24 In response to Defendants' Motion for Summary Judgment, Plaintiffs provide no
25 contrary facts as to whether WDFW is in possession of the tablet. Instead, Plaintiffs accuse
26 WDFW of various "gaffes" in the criminal investigation of Hazen Shopbell, Anthony Paul, and

1 their company, Puget Sound Seafood Dist. *See, e.g.*, Plaintiff's [sic] Response in Opposition to
2 Defendants' Motion for Summary Judgment at 9. WDFW disputes Plaintiffs' characterization
3 of WDFW investigation, but even if those characterizations were accurate, none refute the
4 facts demonstrated in the declarations of WDFW staff filed with Defendants' Motion for
5 Summary Judgment. None of those accusations have anything to do with whether WDFW is in
6 possession of the tablet in question. Plaintiffs have not, and cannot, refute the fact that WDFW
7 is not in possession of the tablet, a fact established by the declarations filed with Defendants'
8 Motion for Summary Judgment.¹

9 **C. Because WDFW Is Not in Possession of the Samsung Tablet, This Case Must Be**
10 **Dismissed**

11 Again, the declarations of the WDFW staff members filed with Defendants' Motion for
12 Summary Judgment demonstrate that WDFW is not in possession of the Samsung tablet and
13 Plaintiffs have not proffered anything more than speculation and accusations to refute those
14 facts. Because WDFW is not in possession of the Samsung Tablet, this case must be dismissed
15 because Plaintiffs cannot establish an essential element of their replevin/return of property
16 claim (i.e., that Defendants are in possession of their property) and because this Court cannot
17 provide any redress.

18 In response, Plaintiffs appear to argue that even if WDFW is not in possession of the
19 Samsung tablet, their replevin/return of property claim survives because this Court can
20 "adequately address Mr. Shopbell's claim." Plaintiff's Response at 8. Plaintiffs do not identify
21 *how* this Court could address Plaintiffs' claim, but they appear to be arguing that this Court
22 could require Defendants to provide substitute property to Plaintiffs, or pay money damages. In
23 so arguing, Plaintiffs point to a Washington State case, *White v. Miley*, 137 Wash. 80, 84, 241

24 ¹ In particular, Plaintiffs have not attempted to answer the obvious question: why would WDFW retain
25 possession of the Shopbell children's Samsung Tablet when it returned all other seized property? It defies all
26 reason that WDFW staff would fail to return the tablet under these circumstances. Plaintiffs have provided no
explanation for why WDFW would continue to possess this one piece of evidence when it voluntarily returned all
other evidence.

1 P. 670 (1925), in which the State Supreme Court recognized that under Washington law in
2 effect at the time, a replevin claim could be maintained, even if the defendant was not in
3 possession of the claimed property. But under then-applicable Washington law, a plaintiff,
4 could, in some circumstances, be awarded money damages via the replevin action. *See, e.g.,*
5 *Hoff v. Lester*, 25 Wn.2d 86, 93, 168 P.2d 409 (1946). Thus, it stands to reason that under
6 Washington law, a plaintiff could maintain a replevin action, even if the defendant was not in
7 possession of the subject property, because the plaintiff stood to be awarded damages to be
8 paid by the defendant.

9 Plaintiffs also point to *United States v. Martinson*, 809 F.2d 1364 (9th Cir. 1987), a
10 federal case under federal law that involved return of seized property. There the court held that
11 the destruction of seized property did not render a motion for its return moot because the court
12 could exercise its equitable powers to award damages to the movant for the wrongful seizure
13 and destruction of his property. *Id.* at 1368. But in that case, the defendant, the federal
14 government, was held to be subject to the equitable jurisdiction of the federal district court
15 such that the court could award money damages to the movant. *Id.*

16 Contrary to what Plaintiffs suggest, damages (whether an award of money damages or
17 some substitute property purchased by the state) are not available to them in this case.² First of
18 all, the case is not proceeding under Washington law or federal law, which might allow for
19 damages in a case such as this one, and Plaintiffs point to no Tulalip Tribal Code provision or
20 court case that allows for an award of damages in a replevin/return of property action under
21 Tulalip Tribal Law.³ Furthermore, any argument that Plaintiffs may obtain damages in this

22 ² As mentioned in Defendants' Motion for Summary Judgment, Plaintiffs have a clear remedy for the
23 loss or deprivation of the Samsung tablet (should such loss or deprivation be proved): Plaintiffs may seek
24 damages under Washington State law by following the tort claim procedures set forth in RCW 4.92. And, in fact,
25 Plaintiffs have availed themselves of this process, filing tort claims pursuant to RCW 4.92 in which they
26 specifically seek damages for the loss of the Samsung Tablet. Second Declaration of Michael Young in Support of
Defendants' Motion for Summary Judgment, Exhibit A at 7.

³ In fact, Plaintiffs have not cited any provision of Tulalip Tribal law that allows for a replevin action at
all.

1 case is clearly foreclosed by this Court's Ruling on Defendants' Motion to Dismiss for Lack of
2 Jurisdiction, which is the law of this case. That Ruling makes clear that this Court's
3 jurisdiction in this matter is limited to ordering return of the actual property seized from the
4 Shopbell residence pursuant to the warrant obtained from the Tulalip Tribal Court. Ruling
5 at 3-5. This Court expressly stated that exercise of such jurisdiction to order return of seized
6 property would not implicate "the protective purposes of sovereign immunity," Ruling at 5,
7 including "protect[ion] of public funds and services from liability," *id.* at 5-6, because
8 "*Plaintiff is not seeking monetary damages from the State.*" *Id.* at 6 (emphasis added). Clearly,
9 under this Court Ruling, damages of any kind are not available.

10 **D. Because WDFW Does Not Possess the Tablet, This Court Cannot Redress**
11 **Plaintiffs' Claimed Harm and So Plaintiffs Lack Standing; Standing Can Be**
12 **Raised at Any Time**

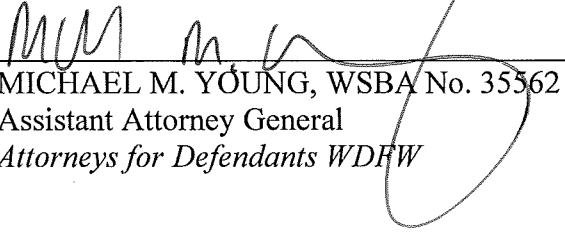
13 Defendants are entitled to summary judgment dismissing Plaintiffs' remaining claim
14 because this Court cannot redress Plaintiffs' claimed harm. This is so because the only relief
15 this Court could provide under its Ruling is return of the Samsung tablet, Ruling at 3-5, but
16 WDFW is not in possession of that tablet. And because this Court cannot redress Plaintiffs'
17 claimed harm, Plaintiffs do not present a redressable claim and therefore lack standing. *See,*
18 *e.g., Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982); *Friends of the Earth, Inc. v.*
19 *Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000); *High Tide Seafoods v.*
20 *State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). In response, Plaintiffs claim that Defendants
21 should have raised this standing defense at an earlier juncture of this case. Plaintiff's Reply
22 at 10. But a lack of standing implicates a court's jurisdiction to properly decide the case and
23 may be raised at any stage in litigation. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 133
24 S. Ct. 817, 824 (2013); *Stevens Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 163 Wn. App.
25 680, 686, 262 P.3d 507 (2011). Plaintiffs' argument that Defendants did not timely assert a
26 lack of standing is without merit.

1 **E. Conclusion**

2 For the reasons discussed above and in Defendants' Motion for Summary Judgment,
3 this Court should dismiss Plaintiffs' only remaining claim because there is no genuine issue of
4 material fact as to whether WDFW is in possession of the only piece of property at issue in
5 this case: the Samsung tablet. WDFW does not possess the tablet. Therefore, this case should
6 be dismissed because Plaintiffs cannot establish an essential element of their replevin/return
7 of property claim and because this Court cannot redress the injury Plaintiffs claim by ordering
8 the return of the property.

9 Dated this 12th day of May, 2017.

10 ROBERT W. FERGUSON
11 Attorney General

12 
13 MICHAEL M. YOUNG, WSBA No. 35562
14 Assistant Attorney General
15 *Attorneys for Defendants WDFW*
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1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their counsel of record
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13 bree@galandabroadman.com
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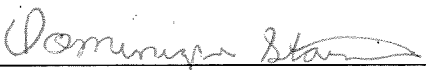
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15 foregoing is true and correct.

16 DATED this 12th day of May, 2017, at Olympia, Washington.

17
18 
19 _____
20 Dominique Starnes
21 Legal Assistant