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IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

LOMELI, *et al.*, Plaintiffs, v. KELLY, *et al.*, Defendants.	Case No. 2013-CI-CL-001 DEFENDANTS' STRICT REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS Date: June 25, 2013 Time: 10:00 am

COMES NOW, Defendants in the above-entitled action, by and through the Office of Tribal Attorney, without waiving other defenses and objections, and hereby submits this Strict Reply to Plaintiffs' Response in Opposition to the Defendant's Motion to Dismiss.

I. INTRODUCTION

The Defendants have moved for judgment on the pleadings in their favor because, this Court lacks jurisdiction, the Plaintiffs failed to join indispensable parties, and Plaintiffs' Claims are unripe. The Plaintiffs' Response in Opposition offers nothing new in law or facts to overcome the jurisdictional hurdles presented by the Defendants, and accepted by this Court in

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its orders denying Plaintiffs' first and second emergency motions for temporary restraining orders. "The Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit. This is one of the fundamental policy reasons behind sovereign immunity." *Cline v Cunanan*, NOO-CIV-02/008 at 7 (January 12, 2009). The Defendants are requesting this Court dismiss with prejudice the Plaintiffs' Second Amended Complaint so that the Nooksack Tribal Government be allowed to move forward with its official duties as authorized under the Constitution and Bylaws of the Nooksack Indian Tribe.

II. RELEVANT PROCEDURAL HISTORY

On May 29, 2013, the Defendants filed a Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Jurisdiction, Failure to Join Indispensable Parties, and Unripe Claims. ("Motion to Dismiss"). Prior to the date of the filing of the Motion to Dismiss, the Nooksack Tribal Court ("Court") issued its May 20, 2013 Order Denying Motion for Preliminary Injunction whereby Plaintiffs sought to enjoin Defendants from moving forward with disenrollment proceedings. ("First Order"). On or about May 31, 2013, the Plaintiffs filed a Notice of Appeal and Permission to File an Interlocutory Appeal. After the filing of the Motion to Dismiss, on June 3, 2013, the Nooksack Tribal Court issued a Decision and Order Denying Plaintiffs' Emergency Motion for Stay Pending Appeal, affirming the First Orders' holding. ("Second Order"). Plaintiffs filed a Response in Opposition to Defendants' Motion to Dismiss on or about June 13, 2013. ("Response to MTD"). On June 17, 2013, the Nooksack Tribal Court issued its Decision and Order Denying the Plaintiffs' Motion for Temporary Restraining Order As to Issues Related to Resolution 13-38, upholding the Council's approval and actions

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related to the Secretarial Election. ("Third Order"). On June 17, 2013, the Nooksack Court of Appeals issued an Order Denying Permission for Interlocutory Appeal, rejecting Plaintiffs claims and upholding this Court's decisions in the First Order. *Lomeli v Kelly*, Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 (Nooksack Court of Appeals June 17, 2013). On June 19, 2013, the Nooksack Tribal Court issued an Order Denying Plaintiffs' Second Emergency Motion for Temporary Restraining Order as to Issues Relating to Tribal Council Meetings. ("Fourth Order").

III. ARGUMENT

A. THE NOOKSACK INDIAN TRIBE AND THE UNITED STATES GOVERNMENT ARE INDISPENSABLE PARTIES

If Plaintiffs seek relief related to enrollment decisions or seek to stop a federal Secretarial Election, the Nooksack Indian Tribe, through its governing body the Nooksack Tribal Council ("Council") and the United States are necessary parties in this litigation. Plaintiffs' argue that the only parties needed in this litigation to provide the relief they request are the Defendants and not the Council or the United States Government, because Plaintiffs allege that "actions taken by the Defendants fundamentally implicate an underlying Tribal membership determination." (Response to MTD at 27:4-24.) Plaintiffs support their argument with selected ambiguous passages from distinguishable. (*Id.* at 27:16-24; 17:1-3).

For example, in *Sweet v. Hinzman*, the petitioners sued members of the Snoqualmie Tribal Council in their official capacities seeking writs of habeas corpus in federal court under the Indian Civil Rights Act ("ICRA"). *Sweet v Hinzman*, 634 F.Supp.2d 1169, 1198 (W.D. Wash. 2008). The Court determined that Tribe was not an indispensable party because "a petition for a writ of habeas corpus is not properly a suit against the sovereign, the tribe is not a

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proper respondent." *Id.* at 1201. Plaintiffs also cite *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2nd Cir. 1996) and *Quair v. Sisco*, 359 F.Supp2d 948 (E.D. Cal 2004) both distinguishable from this case, because they are also federal habeas corpus cases. Similar to Sweet, the *Poodry* Court held that the Tonawanda Band was not a proper party, because the habeas petitions were directed at tribal officials allegedly acting in violation of a federal law and outside of tribal authority. *Poodry v Tonawanda Band of Seneca Indians*, 85 F.3d 874, 901(2nd Cir. 1996). The Indian Civil Rights Act does not allow habeas actions against the tribe. *Id.*

Plaintiffs have not sought a writ of habeas in this Court. Habeas requires a petitioner to be "in custody" and to exhaust tribal remedies before bringing a petition. *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010), cert. denied 130 S.Ct. 3327 (2010). Actions challenging disenrollment alone, do not properly fall within habeas corpus proceedings. *Id.* at 920. This is not a habeas proceeding and even if it was, disenrollment alone does not meet the "in custody" requirement for relief. See *Id.*

Other than in the heading of Plaintiffs' Response, Plaintiffs do not provide any legal or factual support for why the United States is not an indispensable party when seeking relief for claims related to the federal Secretarial Election.[1] Clearly, secretarial elections are a federal function and if the Tribal Court is going to make a decision that would challenge a secretarial election, the Federal Government is a necessary and indispensable party.

This Court has held that the Constitution and Title 63 reserved to the Tribal Council, the

[1] Plaintiffs know that they cannot join the Secretary of Interior in Tribal Court because on June 17, 2013, Plaintiffs' counsel on behalf of Rudy St. Germain and Michelle Roberts, filed a Motion for Temporary Restraining Order and Request for Expedited Decision Before June 21, 2013 and an Amended Complaint for Injunctive Relief, Declaratory Judgment and Mandamus against the United States seeking to stop the Secretarial Election set for June 21, 2013 in the United States District Court for the Western District of Washington. Honorable Richard A. Jones denied the motion for a temporary restraining order on June 19, 2013. *See Rudy St. Germain, Michelle Roberts v. U.S. Dept. of Interior*, Case NO. C13-945RAJ, ORDER (June 19, 2013).

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authority to determine both enrollment and loss of membership. (First Order at 12:22-24). Decisions about enrollment and membership fall within the Tribal Government's power and authority. (Third Order at 6:18-24; 7:1-3.) Plaintiffs conceded these facts. (First Order at 1:21-22; 2:1). Defendants did not act outside the scope of their authority, which means the Ex Parte Young exception to sovereign immunity does not apply. (First Order at 13). The Nooksack Court of Appeals upheld that decision stating that the Nooksack Tribal Court's "ruling that [Defendants] did not act contrary to Title 63 is reasonable." *Lomeli v. Kelly*, Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 at 5. (June 17, 2013).

This Court found that the Secretarial Election is organized under federal law, and it is clear that the Tribal Court does not have authority to direct the Secretary of the Interior to do anything with respect to the Secretarial Election. (Third Order at 5:9-12). This Court determined that the only potential it could enjoin would be to prevent Defendants from actively supporting the Constitutional Amendment requested in Resolution 13-38. (*Id.* at 5:9-10). The Court held there is no equal protection violation or discrimination by Defendants in supporting Resolution 13-38, and Defendants' actions are within the scope of their authority and protected by sovereign immunity. (*Id.* at 8: 1-6).

The Court should dismiss Plaintiffs' claims against Defendants, because the true party in interest is the Council, which has the sole authority over disenrollment matters, the authority to internally regulate the procedures as to meetings, conflicts of interest and executive sessions,[2] and the authority to request secretarial elections.[3] The Council has not waived its immunity and therefore cannot be joined.

[2] Motion to Dismiss at 19:14-23; 20-25:1-3.
[3] *Id.* at 25:4-23; 26-27:1-13

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Plaintiffs seem to continue to seek relief from the Secretarial Election. However, this Court decided that is does not have authority over the Secretarial Election and the Defendants are protected by sovereign immunity as it relates to actions on Resolution 13-38 and the Secretarial Election. Therefore, Defendants are a necessary party and cannot be joined in this litigation. Plaintiffs' Second Amended Complaint must be dismissed for failure to join necessary and indispensable parties.

B. PLAINTIFFS HAVE NOT ESTABLISHED THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THEIR CLAIMS

This Court should dismiss the Plaintiffs' most recent complaint with prejudice for lack of subject matter jurisdiction. The Court has previously issued several orders outlining what is clear from the face of the Constitution and prior appellate cases, the limited nature of the Nooksack Tribal Court's subject matter jurisdiction. "This court shall have jurisdiction ...over all matters concerning the establishment and functions of the tribal government, provided that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government...." Constitution and Bylaws of the Nooksack Tribe of Indians of Washington ("Const."), art. VI, § 2(a)(3). As the Court previously found, the Tribal Council did not waive Defendants' sovereign immunity and Plaintiffs failed to set forth the facts necessary to establish that the Defendants violated tribal. (First Order at 13). As such, this Court lacks subject matter jurisdiction over all of the Plaintiffs' causes of action, and the Court should issue an Order of Dismissal with Prejudice.

Plaintiffs spend numerous pages attempting to illustrate what should be a plain and simple statement of their causes of action, typically identified under the heading by the same name in a complaint. (Response to MTD at 28-29.) Regardless of what were termed causes of

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action in Plaintiffs' Complaint, Plaintiffs' argument outlines five general categories of complaints: (1) Tribal Council meeting procedures; (2) the disenrollment process; (3) the Secretarial Election process; (4) vague, unidentified due process violations ; and (5) a vague, unidentified facially discriminatory resolution . (*Id.*) For each of these categorical complaints, Plaintiffs fail to identify a waiver of sovereign immunity and/or facts establishing that the *Ex parte Young* exception, if any, should apply.

With respect to the first category of Plaintiffs' "causes of action" against Tribal Council meetings and procedures, each of Plaintiffs' individual allegations fails for lack of subject matter jurisdiction. Plaintiffs claim the following actionable violations: (1) obstructing and/or failing to call regular monthly meetings; (2) excluding two members from an executive session for a conflict of interest ; (3) approving a resolution wherein two councilmembers did not vote due to a conflict of interest ; and (4) allowing the attendance of staff, Roy Bailey, during an executive session . All of these claims fail for lack of subject matter jurisdiction, as the underlying actions were lawful, appropriate and within the powers granted to Council. Further, pursuant to Article VI, § 1(j), the Constitution reserves the authority to "adopt resolutions regulating the procedure of the tribal council itself" to the Tribal Council alone. The legislature has complete control and discretion over whether it should observe, enforce, waive, suspend, or disregard its own rules of procedure. See *Hughes v. Speaker of the New Hampshire House of Representatives*, 876 A.2d 736, 744-45 (N.H. 2005) (noting that statutes relating to the internal proceedings of the legislature are not binding, and it is free to disregard or supersede such statutes).

Regarding the disenrollment process, this Court previously held that Defendants acted within the confines of existing law, including the Constitution and Title 63, and the Nooksack

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Court of Appeals upheld that determination in its decision to deny Plaintiffs' appeal request. *Lomeli v Kelly*, Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 at 5 (Nooksack Court of Appeals June 17, 2013) ("The court's ruling that the Appellees did not act contrary to Title 63 is reasonable.").

The plain state of the law is that the Council has the authority to commence disenrollment proceedings, and the Council does not need to make a preliminary showing of proof prior to doing so. This Court made findings that the Council did indeed commence the disenrollment and also utilized staff. (First Order at 4:1-10; 11-12:1-2). Although Plaintiffs provide numerous exhibits in their response, not one exhibit evidences that a different party commenced the disenrollment process. Plaintiffs' argument that Enrollment Officer Bailey commenced the disenrollment proceedings on his own volition is misguided and unsupported. Plaintiffs' remaining argument that Council divested itself of the power to disenroll by enacting the current membership ordinance was discarded as well. (First Order at 12:10-21). Since no issue of material fact exists that tends to show that Defendants acted contrary to the law the *Ex parte Young* exception does not apply and does not permit judicial review. This Court should dismiss Plaintiffs' claims regarding disenrollment process, because it lacks jurisdiction over the claims.

Finally, with respect to Plaintiffs' challenges to the Secretarial Election process, this Court again lacks subject matter jurisdiction, because the Council did not waive Defendants' sovereign immunity and they have acted well within the confines of the law. The Court has recently found that "[t]he Plaintiffs have not established a likelihood of prevailing on the merits because the Defendants' actions are protected by sovereign immunity as they are actions taken within the scope of their official duties." (Third Order at 8:3-5). Plaintiffs have not provided

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any further support for their arguments in this regard, and as such, no issue of material fact exists that tends to show that Defendants acted contrary to the law. Thus, the *Ex parte Young* exception does not apply to allow for judicial review. Plaintiffs' many motions and amended complaints do not add the requisite facts and law to establish this Court's jurisdiction. This Court should dismiss Plaintiffs' claims regarding the Secretarial Election process with prejudice.

C. DEFENDANTS ARE IMMUNE FROM SUIT

Plaintiffs agree with the Nooksack Tribal Court's decision that if Defendants are acting within the scope of their authority, then they are protected by sovereign immunity. (Response to MTD at 30:18-24). Plaintiffs allege that Defendants are not immune from suit for two reasons. First, Plaintiffs make conclusory and hyperbolic statements about unspecified "egregious" conduct by the Defendants. For example, Plaintiffs seek to apply the *Ex parte Young* exception by stating that "tribal officers may violate the statutory rights of Nooksack citizens at will, with no repercussion". (*Id.* at 32:1-10). Plaintiffs offer no facts or law to support these statements.

Second, Plaintiffs allege that Defendants waived their immunity by filing "counterclaims" against Plaintiffs and that Defendants failed to assert the defense of sovereign immunity at the start of this case. (*Id.* at 32:9-22; 33:1-14.) As explained below neither of Plaintiffs' arguments has any merit and do not support finding a waiver based on the rulings of this Court and the Nooksack Court of Appeals.

The Plaintiffs' requests for a writ of mandamus and injunctive and declaratory relief must fail, because the Nooksack Indian Tribe is immune from suit. This Court has made clear that "[a] sovereign cannot be sued without expressly consenting to suit, unless Congress or the tribe has waived the tribe's sovereign immunity." *Cline v Cunanan*, Case No. NOO-CIV-02/08-5, at

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6. This Court further found that the Nooksack Tribal Council intends to assert its sovereign immunity to the fullest extent possible in the Tribal Code or otherwise. (First Order at 5: 5-6, 6:8-9).

The Nooksack Tribal Court held that "when combined with the assertion of sovereign immunity, the Court finds that it can only act to grant prospective, injunctive relief in this matter should the actions taken by Defendants clearly and unambiguously violate their official duties in ways more egregious than an error of law." (First Order at 9:18-20). The Court found that Defendants are protected by sovereign immunity, because they did not act outside the scope of their official duties under the Nooksack Constitution and Title 63 as it related to the initiation of disenrollment and subsequent actions. (*Id.* at 12-13). The Nooksack Court of Appeals agreed with this Court's decision finding it reasonable to conclude that Defendants' did not act contrary to Title 63. *Lomeli v Kelly,* Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 at 5 (June 17, 2013). This Court held that with respect to Plaintiffs' claims related to Resolution 13-38 and the Secretarial Election, the actions taken by Defendants were within the scope of their official duties and protected by sovereign immunity. (Third Order at 8:3-6). This Court has further established that the Council has not waived its sovereign immunity and Defendants have acted within the scope of their authority when rescheduling regular monthly Council meetings. (Fourth Order at 7:1-6).

1. <u>Defendants Have Acted Within The Scope Of Their Authority Under The Nooksack Constitution Article II, Section 4 And Title 63, § 63.04.001(B).</u>

Plaintiffs' Response specifically alleges that Defendants have violated Article II, Section 4 of the Nooksack Constitution, because Resolution 13-02 identifies that the disenrollees did not meet the constitutional criteria under which they were enrolled. (Response to Motion to Dismiss

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at 33-21:24; 34:3-6). Plaintiffs allege that Title 63, § 63.04.001(B) does not allow the Tribal Council to initiate disenrollment proceedings without first providing evidence that members subject to proceedings do not meet the membership requirements, and Plaintiffs support this statement with federal denaturalization cases.[4] (Response to Motion to Dismiss at 34:2,7-23.) Plaintiffs mistakenly believe that because an individual tribal member requesting a loss of membership must produce written documentation, the ordinance must also require the Tribal Council to do the same when it has made a determination to initiate disenrollment. (*Id.*) Plaintiffs also continue in their misguided belief that the Tribal Council has no authority to initiate disenrollment because § 63.04.001(B) allows a tribal member to request a loss of membership.

Defendants have briefed these arguments in their Motion to Dismiss as well as other pleadings and Plaintiffs have taken these same arguments to the Nooksack Court of Appeals.[5] This Court and the Nooksack Court of Appeals have soundly rejected Plaintiffs' arguments. The Tribal Court disposed of Plaintiffs' arguments, and held that the Constitution and Title 63 reserve to the Tribal Council the authority to determine both enrollment and loss of membership and that Defendants did not act outside the scope of their authority. (First Order at 12-13.) The Nooksack Court of Appeals held that the First Order's ruling, that Defendants "did not act contrary to Title 63[,] is reasonable." *Lomeli v. Kelly*, Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 at 5 (June 17, 2013). The Court of Appeals stated that § 63.04.001(B) "does not prohibit the Tribal Council itself from initiating the disenrollment

[4] Plaintiff filed the same arguments and denaturalization cases in their brief with the Nooksack Court of Appeals which rejected those arguments. *See Lomeli v Kelly*, Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 at 4-5 (Nooksack Court of Appeals June 17, 2013).

[5] *Motion to Dismiss* at 10:11-22; 11-17:1-8 and *Defs.' Br. in Opp. to Pls.' First Emer. Mot. for TRO* at 19:18-25, 20-22:1-18.

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proceedings[,]" and that same section "does not require the Tribal Council to provide documentation evidence prior to initiating disenrollment proceedings." (*Id.* at 4-5.).

There is no question that Defendants acted within the scope of their authority under the Constitution and Title 63 as it relates to the Tribal Council, and Defendants' actions in the disenrollment process are protected by sovereign immunity.

2. Article IX Of The Nooksack Constitution Has Not Been Violated.

Plaintiffs' Response argues that the equal protection provision of ICRA (incorporated into the Nooksack Constitution by Article IX) is being violated, because Resolution 13-38 discriminates against an identifiable group and the Council's actions in support targets persons of "Filipino" descent. (Response to Motion to Dismiss at 35-37). Resolution 13-38 requests the Secretary of the Interior to hold a Secretarial Election on a proposed amendment to the Tribal Constitution, Article II- Membership, to delete Section 1(H) and direct the Chairman or Vice Chairman to execute documents connected with the Resolution. (Third Order at 3:1-4).

This Court has no authority over the Secretary of the Interior or a Secretarial Election, and the only relief that Plaintiffs may be seeking is to prevent Defendants from supporting the Constitutional Amendment. (*Id.* at 5:9-10). The Court decided that Plaintiffs have failed to meet the burden of an equal protection claim, because enrollment decisions are strictly within the Tribal Council's authority, and an Indian Tribe has the power to define its own membership. (*Id.* at 6:18-23). The Court stated:

> The proposed Constitutional Amendment does not disenroll anyone, including the Plaintiffs. The amendment should it pass, will but change the basis for the enrollment of the Nooksack Tribe for future applicants. The authority to make such determinations lies squarely within the Tribal Council's purview, as laid out in the Nooksack Constitution, the Nooksack Tribal Code, and the Constitutional Amendment Process. The Tribal Council followed the simple process of seeking a

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> Secretarial Election. The Court finds no basis for a claim that the election request and the actions taken by the Defendants to advocate for the Amendment's passage is based upon racial animus towards those with Filipino ancestry. (*Id.* at 7:10-17).

The Court found that Defendants' actions are protected by sovereign immunity, because the actions fit within the scope of Defendants' official duties. (*Id.* at 8:4-5.).

3. The Defendants Have Acted Within The Scope Of Their Authority Under The Bylaws Of The Nooksack Tribe

The law of the case is that Defendants have not acted outside the scope of their authority as it relates to the disenrollment matters, the Secretarial Election, and in general, there is no waiver of sovereign immunity for violations of the Bylaws of the Nooksack Tribe. The remainder of Plaintiffs' claims relate to the Tribal Council violating the Bylaws of the Nooksack Indian Tribe. This Court decided that the Council has not waived its sovereign immunity as to the Bylaws and that the Defendants acted within the scope of their authority by rescheduling the regular monthly Council meeting. (Fourth Order at 7:1-6).

Plaintiffs raise other allegations about violations of the Bylaws of the Nooksack Indian Tribe: (1) the Councils' rescheduling of the regular monthly meeting due to safety concerns;[6] (2) more than one Councilmember getting together to discuss personal or business matters for social gatherings;[7](3) the Chairman scheduling a meeting at the request of two Councilmembers to discuss matters already decided or maters for which the two Councilmembers are conflicted out;[8] (4) the Council excusing persons with conflicts of interest from discussions either in

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[6] *Motion to Dismiss* at 24:1-13 and *Defs.' Brief in Opp. To Pls.' Second Emer. Mot. for TRO* at 11:6-21; 12:1-23; 13:1-19.
[7] *Defs.'Brief in Opp. To Pls.' Second Emer. Mot. for TRO* at 13:20-24; 14:1-8.
[8] *Id.* at 14:9-24; 15:1-23; 16:1-10.

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executive session or a regular meeting;[9] (5) the Council's procedures associated with "designation" of persons who are allowed to participate in executive session;[10] and (6) the Council making decisions when the Secretary is excused for conflicts or in general.[11] Defendants have briefed all of these allegations in detail in their prior pleadings. Because the Tribal Council has not waived its immunity and all of Defendants' actions are within the scope of their authority, Defendants are protected by sovereign immunity.

Even if there was a waiver of sovereign immunity, and there is not, Plaintiffs clearly do not have standing because they have not been injured as it relates to Secretary St. Germain's and Councilmember Roberts' request for a special meeting. (Fourth Order at 9:7-9). This Court aptly quoted *Allen v. Wright*, in that "[t]he Court has repeatedly held that an asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on the federal court . . . assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of standing." (Fourth Order at 8:13-18 quoting *Allen v. Wright*, 468 U.S. 737, 754). Defendants submit that it is not just the special meeting request that Plaintiffs do not have standing to raise but all the claims they have put forth as to the Council Bylaws, because they have not been injured except by claiming "generalized grievances more appropriately addressed by in the representative branches." (Fourth Order at 8 citing *Wright* at 751). Furthermore, this Court does not have jurisdiction to determine internal procedural matters of the Tribal Council (the representative branch), because it is a non-justiciable political question as discussed further

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[9] *Motion to Dismiss* at 22:1-7, 23:1-14 and *Defs.' Br. in Opp. to Pls.' First Emer. Mot. for TRO* at 22:19-24; 23:1-21.
[10] *Motion to Dismiss* at 23:15-19 and *Defs.' Br. in Opp. to Pls.' First Emer. Mot. for TRO* at 24:25, 25-26:1-15.
[11] *Defs.' Br. in Opp. to Pls.' First Emer. Mot. for TRO* at 24:2-23.

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in this brief. *Infra.* Section III D. Sovereign immunity remains intact.

4. Defendants Have Not Plead Any Counterclaims And Raised Sovereign Immunity from the Start of this Litigation

Plaintiffs' "counterclaim" argument seeking to find a waiver of sovereign immunity at minimu borders on frivolous. The Plaintiffs claim that because the Defendants left the word "counterclaim" in two places in the Defendants' Answer and Defenses to First Amended Complaint for Equitable Relief filed on April 19, 2013 that the Defendants have waived their immunity. Plaintiffs are correct that the Defendants had the word "counterclaim" in a boilerplate heading title and a lead off sentence as follows: "AFFIRMATIVE DEFENSES, DEFENSES, AND COUNTERCLAIMS. The Defendants further provided affirmative defenses, other defenses, and counterclaims." (Defendants' Answer and Defenses to First Amended Complaint for Equitable Relief at 9:19-22). Below that boilerplate title are only defenses and not a single counterclaim. (*Id.* at 10-11:1-4). The word "counterclaim" was simply left in a header and an introductory sentence for boilerplate answers. Plaintiffs can point to no counterclaims and they acknowledge that Defendants did not allege any counterclaims calling it "unspecified counterclaims". (Plaintiffs' Answer and Affirmative Defenses to Defendants' "Counterclaims" at 1:25; 2:3).

The Nooksack Tribal Court has already held that the Defendants' request for "affirmative relief" from this court in defending against Plaintiffs' attacks does not constitute a waiver of sovereign immunity, and the Court declined to find a waiver by Defendants in their responses to the Plaintiffs' suit. (First Order at 6:1-9). To avoid further confusion by the Plaintiffs' counsel, the Defendants simply deleted the two instances of the word "counterclaim" when it answered the Plaintiffs' Second Amended Complaint for Equitable Relief, and there was no need to delete

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any counterclaims in the body because there were none. (Defendant's Answer and Defenses to Second Amended Complaint for Equitable Relief at 11:18-19). Plaintiffs' counsel did not find it necessary to file another answer and affirmative defenses to the Defendants' second answer, even though it was nearly the same as the first answer and the Defendants did not delete any counterclaims because there were none.

Unfortunately, despite this Court's ruling and the fact that there are absolutely no counterclaims, the Plaintiffs' counsel filed a frivolous objection with the Tribal Court alleging that Defendants' deletion of two instances of "counterclaim" in a header was a clever attempt to withdraw the nonexistent counterclaims. (Plaintiffs' Objection Re: Defendants Attempt to Improperly Withdraw "Counterclaims" dated June 13, 2013). Plaintiffs believe F.R.C.P Rule 41 applies to the Nooksack Tribal Court and requires this Court to approve the Defendants' removal of two instances of the word "counterclaim" in the Defendants' second answer.

Any application of case law related to whether a tribal waiver exists requires the counterclaim to be in existence in order to be analyzed to determine whether there is a waiver and the extent of the waiver. *McClendon v. U.S.* 885 F.2d 627, 630 (9th Cir. 1989)(finding "a tribe's waiver of sovereign immunity is limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass unrelated matters, even if those matters arise from the same set of underlying facts."). There is no counterclaim, and the Defendants have not waived their sovereign immunity.

Like the "counterclaim" argument, the Plaintiffs' next argument also borders on frivolous. Plaintiffs allege that Defendants waived their immunity by not asserting it at the beginning of this litigation. (Response to MTD at 33:8-14). Plaintiffs cite the case of *United*

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States v. Snowden, for the position that a Tribe must immediately raise sovereign immunity or it is waived. In *Snowden*, the Court found a Tribe's compliance with a court order for production cannot be construed as a waiver, but the Tribe did waive its sovereign immunity by appearing and arguing compliance with a subpoena was controlled by federal statutes, not by the fact that it later raised sovereign immunity. *U.S. v Snowden*, 879 F.Supp.1054, 1056-1057 (D. Or. 1995). It does not stand for the Plaintiffs' position.

Here, as the Plaintiffs clearly understand and this Court has already recognized, the Defendants' sovereign immunity has been properly raised since March 18, 2013. In the "Findings From Teleconference", the Court stated, "although Defendants agreed to participate in the teleconference they preserved any and all objections including jurisdictional objections." (Findings From Teleconference at 1:17-19, March 18, 2013). All subsequent pleadings submitted by Defendants have contained preservations of all defenses including jurisdiction. Whether the Defendants filed a motion to dismiss before or after defending against multiple "emergency" restraining orders seeking immediate relief from the Court is not relevant to finding a waiver. This is especially so, when the Defendants have raised sovereign immunity at every turn as this Court has acknowledged by stating "[t]he Tribal Council has vehemently and repeatedly asserted its sovereign immunity in this case." (Fourth Order at 3:13-14).

The Court has recognized that Defendants have raised sovereign immunity and are protected by sovereign immunity in all of its orders denying the Plaintiffs' request for preliminary injunctive relief. Most recently, the Nooksack Court of Appeals reviewed this Court's First Order and found that it was not immediately appealable. *Lomeli v Kelly*, Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 (June 17, 2013). Plaintiffs'

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argument is without merit, the Defendants remain protected by sovereign immunity, and the Court should grant the Defendants' motion to dismiss with prejudice.

D. POLITICAL QUESTIONS AND BYLAWS

This Court should refrain from reviewing matters concerning the Tribal Council's rules (whether informal or formal) of internal procedure, as such matters are nonjusticiable political questions. As stated in *Baker v. Carr*, the seminal case regarding the political question doctrine, the Supreme Court stated "prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department...." *Baker v. Carr* 369 U.S. 186, 217 (emphasis added). In the present case, the Nooksack Constitution, Article VI, § 1(j), reserves to the Council alone, the authority to adopt internal procedures; as such, questions concerning what procedures exists and whether they were violated are nonjusticiable political questions.

In *U.S. v. Ballin*, the Supreme Court had occasion to review the rules of the House of Representatives to determine whether a valid vote occurred. *U.S. v. Ballin* 144 U.S. 1 (1892). In reviewing the power of the House of Representatives, the Court found that pursuant to the Constitution, "each House may determine the Rules of its Proceedings" so long as there is not an obvious violation of fundamental rights in the process. *Id.* at 5. See, e.g. *In re Application of Lamb*, 169 A.2d 822, 832-34 (N.J. 1961) (holding that unless there is "an obvious violation of fundamental rights," we owe no duty or obligation to intervene). Regardless of the wisdom or usefulness of the rule the House adopted, the Court held that "[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any

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other body or tribunal." *Id.* See, e.g. *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 349-40 (Alaska 1987) (holding it is the legislature's prerogative to make, interpret, and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative). Not only can the legislature make internal rules of procedure not subject to judicial review, but the legislature can also disregard said rules and still avoid judicial review. See, e.g. *State ex rel. City Loan & Sav. Co. v. Moore*, 177 N.E. 910, 911 (Ohio 1931)("[h]aving made the rule, it should be regarded, but a failure to regard it is not the subject-matter of judicial inquiry").

Plaintiffs' claim for equitable relief regarding the numerous alleged procedural irregularities should be dismissed with prejudice as Plaintiffs fail to cite any law supporting their factually weak claims of violations of the Bylaws. Plaintiffs' claims include (1) obstructing and/or failing to call regular monthly meetings ; (2) excluding two members from an executive session for a conflict of interest ; (3) approving a resolution wherein two councilmembers did not vote due to a conflict of interest ; (4) allowing the attendance of staff, Roy Bailey, during an executive session ; (5) excluding the Secretary from a meeting when the Secretary had a duty to attend all meetings ; (6) more than one Councilmember meeting for social gatherings and not calling a formal Council meeting with a quorum and notice; and (7) failing to call a special meeting at the request of two councilpersons. Plaintiffs' request for judicial intervention should be denied, as they seek determination of nonjusticiable political questions.

Article VI, § 1(j), reserves to the Tribal Council alone, the authority to "adopt resolutions regulating the procedure of the tribal council itself." The provision regarding legislative procedures in the Nooksack Constitution is very similar to provisions regarding the legislative

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body's power to enact internal procedures contained in the U.S. Constitution and most state constitutions. See, e.g. *U.S. v. Ballin*, 144 U.S. 1. A quick review of a few of the state cases concerning judicial review of state legislative rules (whether by statute, rule, or informal procedure), demonstrates with overwhelming support that this Court should dismiss these claims as nonjusticiable political questions. For example, in *Dintzis v. Hayden*, the Court declined to review the issue of whether a valid vote was cast on a spending bill wherein the allegation consisted of a representative mechanically manipulating his electronic roll call device to allow his vote to be recorded when he was absent from the vote. *Dintzis v. Hayden* 606 A.2d 660, 663 (Penn. 1992). The Court reviewed the constitutional grant of power for the house "to determine the rules of its proceeding" and the internal procedural rule that prohibited manipulation of roll call machines, and it held that the constitutional grant of power was a textually demonstrable constitutional commitment … to a coordinate political department. *Id.* Similarly, in *Hughes v. Speaker of the New Hampshire House of Representatives*, the Court held that legislative body's determination to close a meeting and exclude a member of the house, contrary to state law was a matter of the legislature's adherence to its own rules and a matter entirely within the legislative control and discretion. *Hughes v. Speaker of the New Hampshire House of Representatives* 876 A.2d 736, 746 (N.H. 2005). Further, in *Brady v. Dean*, the Court held that the legislature is the sole judge of whether a member should be disqualified for a potential conflict of interest. *Brady v. Dean* 790 A.2d 428, 432 (Vt. 2001). As yet one additional example, in *Abood*, the Court held that the "question whether legislative business should be conducted in open or in closed sessions, allegedly in violation of the Open Meeting Act, is a procedural question which has traditionally been the subject of legislative rules." *Abood v. League of Women Voters of Alaska*, 743 P.2d at

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337.

The Nooksack Constitution reserves to the Tribal Council the power to determine its own rules of procedure, which includes when to hold meetings, how to hold meetings, who is conflicted from attending discussion on a topic, what staff and public may attend discussion on a topic, and who may vote on a topic. This power includes formalizing rules, such as the enactment of Title 65, agreeing on a method of procedure during a meeting, and disregarding an old, informal procedure, such as the prior Chairman's permitting blatant conflicts of interest. Given the historical legal support on this topic and the explicit constitutional commitment of this power to the Tribal Council, this Court should dismiss the Plaintiffs' complaint with prejudice.

E. PLAINTIFFS CLAIMS ARE UNRIPE

This Court should grant the Defendants' Motion to Dismiss because the Plaintiffs' claims are unripe. The Plaintiffs' individual claims of "due process violations" concerning the disenrollment process are similar to their claims regarding "constitutional violations" related to tribal council meeting procedures; the claims are vague, change with the wind, and lack factual and legal support. Furthermore, regarding challenges to the disenrollment process, the Plaintiffs' claims are unripe for judicial review because they are unfit for a judicial decision, and judicial restraint will not result in direct and immediate harm. The Defendants have briefed this extensively but further analysis is warranted.[12]

The doctrine of ripeness is similar to the doctrine of standing; the application of either aims at denying judicial review of cases that are not ready, or capable of being ready, for judicial review. See generally *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803 (2003).

[12] Defendants Motion to Dismiss at 27-28 and Defs. Brief in Opps to Pls.' Second Emer. Mot. for TRO at 29:14-24; 30-33:1-11:

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Through ripeness, courts evaluate whether they should decline or exercise jurisdiction on the basis of two interrelated factors: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 808 (quoting *Abbot Labs v. Gardner*, 387 U.S. 136, 149 (1967).

Here, Plaintiffs' exaggerations of rampant constitutional violations include the allegations that the Defendants' burden of proof in the pending disenrollment proceedings is to demonstrate that the Plaintiffs are unenrollable under any section of Article II of the Constitution, and not solely the section they applied and were enrolled under, as stated in Title 63, §63.04.001(B)(1)(a). (Emerg. Mot. for T.R.O. at 12-14). See also (Third Am. Compl. for Equitable Relief at 11-13). Setting aside the issue of the Court's jurisdiction to hear cases under Title 63, the issue of the appropriate burden and timing of that burden in disenrollment proceedings is for the trier of fact, the Tribal Council, to determine. Title 63, § 63.04.001(B) states "[t]he Tribal Council will have the final say on loss of membership." The Tribal Council has the burden to establish erroneous enrollment based upon the Constitutional provision under which the Plaintiffs were originally erroneously enrolled under and, not to establish that a disenrollee does not meet all other enrollment criteria listed in Article II, Section 1 of the Constitution in a disenrollment hearing. Persons seeking enrollment under provisions of the Nooksack Constitution for which they are not enrolled are applying for membership, and an applicant has the burden of proof under Title 63. Title 63, § 63.02.001(D). Given the fact that the Tribal Council has yet to commence a disenrollment meeting pursuant to Title 63, and exchange and receive evidence, or formally identify what burden exists, Plaintiffs' allegation that a due process violation by the Tribal Council already occurred and is ripe for review is nonsense.

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Addressing the ripeness factors, Plaintiffs cannot demonstrate that their current allegation regarding the burden of proof is fit for decision. "A question is fit for decision when it can be decided without considering 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'" *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010)(quoting *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002)). Plaintiffs' counsel, throughout the course of this litigation, has attempted to insert additional "evidence" on the issue of his Plaintiffs' alleged enrollability many years after the initial enrollment decision occurred. This evidence is irrelevant to the Court's determination. The fact is, and has been conceded by Plaintiffs' counsel in open court, the Tribal Council has the sole authority to enroll and make membership decisions. The Plaintiffs only provide their "evidence" to this Court through the litigation, which is not the proper forum for providing evidence to the Council in disenrollment proceedings. Further, as Plaintiffs' counsel demonstrated throughout the course of the litigation, Plaintiffs plan to offer documents at the last possible second and only when they desire to produce such documentation. Given the endless number of items Plaintiffs' counsel, or Plaintiffs individually, could furnish to the Tribal Council, and the true unknown- the Tribal Council's use of such information - an unlimited number of contingencies could occur that may affect the outcome of any disenrollment process rendering this matter unripe and not fit for judicial determination. It is simply unknown what the Tribal Council will determine with respect to any disenrollment proceeding, and the Plaintiffs' constant litigation has not been helpful in seeing the disenrollment process to its conclusion, whatever that may be.

Next, Plaintiffs cannot demonstrate that judicial restraint in this matter will result in real harm. "To meet the hardship requirement, a litigant must show that withholding review would

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result in 'direct and immediate' hardship and would entail more than possible financial loss." *Addington*, 660 F.3d at 1180 (quoting *Winter v. Cal. Med. Review Bd., Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990). Plaintiffs filed a great number of exhibits on an issue that is strictly legal; that is, what is the burden of proof in a disenrollment proceeding. The burden on the Tribe in disenrollment is exactly that which is stated in Title 63, § 63.04.001(B)(1)(B), and the burden is reverse when a person is applying to be a member, because § 63.02.001(D) requires the applicant to bear the burden of proof to establish that they meet the membership criteria. In the event that a court having jurisdiction declared a different burden, there still is no direct and immediate hardship to the Plaintiffs. The Plaintiffs will still be subject to disenrollment proceedings based on the preliminary finding of inadequate documentation to support their current enrollability. Given that the Plaintiffs' true request is for the Court to declare the burden in a disenrollment proceeding, the Court cannot fashion an award that ensures that Plaintiffs maintain their enrollment status and thus, the Plaintiffs have not met the hardship requirement under the ripeness doctrine.

The Plaintiffs failed to establish ripeness for judicial review in this matter because they cannot demonstrate that the case is either fit for a decision or that judicial restraint will result in direct and immediate harm. As such, this Court should dismiss the Plaintiffs' claims.

F. OBJECTION TO PLAINTIFFS CONTINUED USE OF ATTORNEY CLIENT PRIVILEGED MATERIAL

On April 23, 2013, the Nooksack Tribal Court held that Exhibit A from the Declaration of Diantha Doucette was prepared for the purpose of providing legal advice to the Nooksack Enrollment Department, it is protected by the attorney client privilege and may not be used by the Plaintiffs in this case. (Decision and Order Denying Defendants' Motion to Strike in Part

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and Granting in Part at 24). Exhibit A and the Declaration of Ms. Doucette were stricken in the sections in which it refers to the letter. (*Id.*) Despite this Courts' clear order, the Plaintiffs continue to reference the privileged document found in Exhibit A and make up statements about what it does or does not say as they have done on three occasions since the Court's order.

First, the Second Declaration of Gabriel Galanda dated May 29, 2013 attached Exhibit C a Recall Petition Rebuttal Statement of Tribal Councilperson Michelle Roberts. Plaintiffs' counsel quotes a section from Exhibit C containing a statement by Michelle Roberts citing the stricken document and presenting alleged quotes from it. (Second Declaration of Gabriel Galanda at 2:9-16 and Exhibit C at 1, Paragraph 4). Second, the Plaintiffs' Reply in Support of Second Emergency Motion for Temporary Restraining Order contained the statement found in the Second Declaration of Gabriel Galanda and Exhibit C. (Plaintiffs Reply in Support of Second Emergency Motion for Temporary Restraining Order at 7:8-14). The Defendants objected to these two violations at the June 6, 2013 hearing on the Plaintiffs' Motion. Finally, despite the Court's Order and the Plaintiffs' objection, Plaintiffs again violated this Court's order and placed the same statement found in the Second Declaration of Gabriel Galanda and Exhibit C into the Plaintiffs' Response in Opposition to the Defendants' Motion to dismiss filed on June 13, 2013. (Plaintiffs' Response in Opposition to the Defendants' Motion to Dismiss at 7:9-15).

Plaintiffs violate this Courts' order not to use this document even though they are not using the document itself. Plaintiffs clearly identify the document, date, and they point out that the author the author is an attorney for the Tribe. Then they proceed to recreate what was allegedly, but no one can verify the accuracy of these allegations because the actual document is privileged and not available. The Defendants request that this Court require the Plaintiffs to

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show cause as to why they should not be held in contempt for their three separate violations of this Court's April 23, 2013 order prohibiting the use of a privileged document.

IV. CONCLUSION

Plaintiffs' Response does not offer any new facts or law to this Court that prevents it from dismissing all of Plaintiff's claims in its Second Amended Complaint with prejudice. This Court has issued four orders denying Plaintiff's requests for preliminary injunctive relief, and these requests contain the same claims and facts as the Second Amended Complaint. Plaintiffs' interlocutory appeal of this Court's First Order seeking injunctive relief was rejected by the Nooksack Court of Appeals, which upheld the Nooksack Tribal Court's review of the law as reasonable.

The Plaintiffs' conclusion provides this Court with two reasons not to dismiss this case. First, Plaintiffs allege that people may die. (Response to Motion to Dismiss at 39:11-18). Second, Plaintiffs exploit a tragic event involving Plaintiff Lee Carr by accusing Defendants' Vice Chairman Rick George and Chairman Kelly of "culpability" in the event; Plaintiffs also fabricate an "enrollment promise" and mistake the constitutional provision under which Plaintiff Lee Carr is enrolled.[13] (*Id.* at 39:19-25;

[13] Exhibit U from the Fourth Declaration of Gabriel Galanda explicitly contradicts Plaintiffs statements. Plaintiffs' Counsel does not identify each exhibit or how he has personal knowledge but just declares that Exhibits A through X are "true and correct". Defendants are left to guess where they came from and what they truly are. However, a simple review of Plaintiffs' Exhibit U does not contain an "enrollment promise" but it does establish that Plaintiff Lee Carr applied for enrollment on July 30, 2000 claiming to be a descendant of an original Nooksack Public Domain Allottee named "JOBE", which is Article II, § 1(A) of the Nooksack Constitution. (Fourth Declaration of Gabriel Galanda, Ex. U at 4). Moreover, Exhibit U's alleged documents contain a Council resolution enrolling Plaintiff Lee Carr on Tuesday, August 1, 2000, but the incident Plaintiffs' reference is reported to have occurred two months later on Monday, October 2, 2000. (*Id.* Exhibit U at 1-2 and Exhibit V). Plaintiff Lee Carr is not enrolled under Article II, § 1(H) and he was enrolled two months before his injuries were reported to have occurred. Exhibit U also contains sensitive information about Plaintiff Lee Carr that Plaintiffs' counsel neglected to remove such as a social security number on a form, a social security card and two birth certificates. (Fourth Declaration of Gabriel Galanda Exhibit U at 4, 7-8 and 9).

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20:1-2). Plaintiffs' use of hyperbole rather than legal argument with factual support to preserve their claims is not sufficient to defeat the Defendants' Motion to Dismiss.[14]

Based on all of the Defendants' filings in this litigation and this Court's and the Nooksack Court of Appeals' decisions, the Defendants request that the Plaintiffs' Second Amended Complaint for Equitable Relief be dismissed with prejudice.

Respectfully submitted this 20th, day of June, 2013.

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[14] The Nooksack Court of Appeals reviewed similar statements and noted that "[h]perbole and histrionics are no substitute for legal analysis." *Lomeli v Kelly*, Order Denying Permission for Interlocutory Appeal, No. 2013-CI-CL-001 at 5 fn. 9 (Nooksack Court of Appeals June 17, 2013).

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06-20-13 P03
Francis

IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

LOMELI, et al., Plaintiffs, and KELLY, et al., Defendants.	Case No. 2013-CI-CL-001 DECLARATION OF SERVICE COPY

I Declare:

That I am over the age of 18 years, competent to be a witness, and not a party to this action.

On June 20, 2013, I duly mailed by first class mail, a copy of the following:

1. Defendants' Strict Reply to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss
2. CD containing supporting authorities to Defendants' Strict Reply to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss

to Galanda Broadman PLLC, Attn: Gabriel S. Galanda, P.O. Box 15146, Seattle, Washington 98115.

Also, on June 20, 2013, I emailed Gabriel S. Galanda at gabe@galandabroadman.com a courtesy copy of Defendants' Strict Reply to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss.

I declare under the penalty of perjury, under the laws of Nooksack Indian Tribe, that the foregoing is true and correct.

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Signed at Deming, Washington on June 20, 2013.

C Bernard

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