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4	UNITED STATES DISTRICT COURT	
5	EASTERN DISTRICT OF CALIFORNIA	
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7	PASKENTA BAND OF NOMLAKI	No. 2:15-cv-00538-GEB-CMK
	INDIANS; and PASKENTA ENTERPRISES CORPORATION,	
9	Plaintiffs,	ORDER DENYING DEFENDANTS' REQUEST FOR CERTIFICATION OF
10	V.	RULING IN ORDER FOR INTERLOCUTORY APPEAL
11	INES CROSBY; JOHN CROSBY; LESLIE LOHSE; LARRY LOHSE;	INIENDOCOTORI AFFERD
12	TED PATA; JUAN PATA; CHRIS PATA; SHERRY MYERS; FRANK JAMES; UMPQUA BANK; UMPQUA HOLDINGS CORPORATION; CORNERSTONE COMMUNITY BANK; CONERSTONE COMMUNITY BANCORP; JEFFERY FINCK; GARTH MOORE; GARTH MOORE INSURANCE AND FINANCIAL SERVICES, INC.; ASSOCIATED PENSION CONSULTANTS, INC.; HANESS & ASSOCIATES, LLC; ROBERT M.	
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18	HANESS; THE PATRIOT GOLD & SILVER EXCHANGE, INC.; and	
19	NORMAN R. RYAN,	
20	Defendants.	
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22	Defendants request certification for immediate appeal,	
23	under U.S.C. §1292(b), of the ruling in the Court's August 14,	
24	2015 order ("Order"), that denied Defendants' motion to dismiss	
25	this action for lack of subject matter jurisdiction. (Order re	
26	Defs. Mot. To Dismiss, ECF 101.) Defendants also seek an order	
27	staying this action pending decision on the interlocutory appeal	
28	they seek to have certified.	1
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Defendants argue in their certification motion that 1 2 "federal court subject matter jurisdiction does not extend to 3 cases in which the court must resolve contested issues of tribal 4 law." (Def.'s Req. for Cert. of Order for Inter. App. ("Req.") 1: 16-17, ECF 109-1.) Specifically, Defendants contend: "It is only 5 after this Court determines that [D]efendants contravened tribal 6 7 law that it could reach the broader question of whether in so doing [D]efendants also violated federal and state law." (Req. 8 9 8:4-6.) However, Defendants fail to state what "tribal law" has 10 to be determined in this action; nor why whatever "tribal law" is 11 referenced has to be decided in connection with Plaintiffs' 12 claims.

## LEGAL STANDARD

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"Section 1292(b) provides a mechanism by which litigants can 14 15 bring an immediate appeal of a non-final order upon the consent 16 of both the district court and the court of appeals." In re 17 Cement Antitrust Litig., 673 F.2d 1020, 1025-26 (9th Cir. 1982). 18 The district court may certify a ruling for interlocutory appeal 19 only if three requirements are met: (1) "the order involves a 20 controlling question of law," (2) there is "substantial ground 21 for difference of opinion" on that controlling question of law, 22 and (3) "immediate appeal of the order may materially advance the 23 ultimate termination of the litigation." 28 U.S.C. §1292(b). "As 24 Section 1292(b) is a departure from the general rule that only 25 final judgments are appealable, it 'therefore must be construed 26 narrowly.'" Zone Sports Ctr., LLC v. Rodriquez, No. 1:11-cv-00622-SKO, 2013 WL 3766749, at \*4 (E.D. Cal July 16, 2013) 27 28 (quoting James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068

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n.6 (9th Cir. 2002)). The Ninth Circuit states that the provision 1 in Section 1292(b) is "to be used only in exceptional situations 2 3 in which allowing an interlocutory appeal would avoid protracted and expensive litigation." In re Cement Antitrust Litig., 673 4 5 F.2d at 1026. Further, the Supreme Court states "the appellant still 'has the burden of persuading the court of appeals that 6 7 exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a 8 final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 9 10 (1978) (quoting Fisons, Ltd. V. United States, 458 F.2d 1241, 1248 11 (7th Cir. 1972), rev'd on other grounds, Tidewater Oil Co. v. 12 United States, 409 U.S. 151 (1972)).

## DISCUSSION

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14 Defendants have not shown that what they reference as 15 "tribal law" in their motion for certification raises an actual 16 issue of tribal governance necessary to adjudicate Plaintiffs' 17 claims nor that any alleged involvement generates "a controlling 18 question of law" as required by Section 1292(b). 28 U.S.C. § 1292(b). See Couch v. Telescope, Inc., 611 F.3d 629, 633 (9th 19 20 Cir. 2011) (requiring that all of the requirements stated in 21 \$1292(b) be met in order to grant certification). However, 22 Defendants make the following argument in their Reply Brief, "the 23 controlling issue in this case is... whether a federal court has subject matter jurisdiction over federal claims that are premised 24 25 intra-tribal disputes." (Pls'. Reply 2:5-7, ECF 125.) on 26 Plaintiffs move to strike this stated basis for the motion, 27 arguing it is raised for the first time in Defendants' Reply 28 Brief, and if it is not stricken, they seek leave to file another

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1	responsive brief. (ECF 126.) The Court need not consider an issue	
2	raised for the first time in a reply brief. Int'l Union of	
3	Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir.	
4	1985). Further, it is unclear to what Plaintiffs' refer as	
5	"intra-tribal disputes" and Plaintiffs have not shown that the	
6	referenced disputes involve a "controlling question of law"	
7	concerning subject matter jurisdiction. Therefore, Defendants'	
8	request to certify for interlocutory appeal the August 14, 2015	
9	ruling, denying Defendants' motion to dismiss for lack of subject	
10	matter jurisdiction, is DENIED.	
11	Dated: October 13, 2015	
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13	Jub E. Fundly	
14	GARLAND E. BURRELL, JR. Senior United States District Judge	
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