The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Eric Jason BREWER and Rudy Al JAMES,
Plaintiffs,

vs.

Mary HOPPA, Mary SHERWOOD, Betty TAAFFE, Margo GILMORE, and Tracy KELLY,

Defendants.

Case No.:CV-10-5234 BHS

JOINT MOTION OF DEFENDANTS TO DISMISS ACTION

Note on Motion Calendar:
Friday, July 9, 2010

INTRODUCTION

Defendants Elizabeth "Betty" Taaffe, Margaret "Margo" Gilmore, Tracy Kelly, Mary Hoppa and Mary Sherwood hereby jointly move to dismiss this action pursuant to Rules 12(b)(1), 19, and 41(b) of the Federal Rules of Civil Procedure. The basis for this motion is that: (1) plaintiffs have failed to establish this Court's subject matter jurisdiction under 28 U.S.C. §1332; (2) plaintiffs' requested relief runs directly against the Quileute Tribe, a sovereign Indian tribe that has not waived its sovereign immunity from suit; (3) the Tribe is a required party to this action that cannot be joined; and (4) plaintiff Rudy James seeks to exploit

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

his pro se status. For these reasons, defendants respectfully request that this action be dismissed with prejudice.

ARGUMENT

I. UNDER RULE 12(b)(1) THIS ACTION SHOULD BE DISMISSED BECAUSE THE FACE OF THE COMPLAINT DOES NOT SATISFY THE REQUIREMENTS OF THE DIVERSITY STATUTE.

The Complaint alleges this Court possesses subject matter through "Diversity=Foreign Nation." Dkt. 1 at 3, 4. A federal district court has subject matter jurisdiction over a civil action where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between either: (1) citizens of different states; (2) citizens of a state and citizens of a foreign state; (3) citizens of different states and in which citizens of a foreign state are additional parties; and (4) a foreign state, as plaintiff, and citizens of a state or of different states. *See* 28 U.S.C. § 1332(a). Here, the face of the Complaint demonstrates a failure to meet these requirements.[1]

A. The Complaint Shows a Lack of Complete Diversity.

Diversity jurisdiction requires "complete diversity of citizenship." *E.g., Caterpiller v. Lewis,* 519 U.S. 61, 68 (1996). Section 1332 requires that, to bring a diversity case in federal court against multiple defendants, each plaintiff must be diverse from each defendant. *Lee v. American Nat'l Ins. Co.,* 260 F.3d 997 (9th Cir. 2001), *cert. denied,* 535 U.S. 928 (2002). As

[1] The Complaint repeatedly states "We want the return of my son and daughter." Dkt. 1 at 6-10. Federal courts generally do not exercise diversity jurisdiction when the claim involves determinations of child custody. *E.g., Ankenbrandt v. Richards,* 504 U.S. 689 (1992); *Ex parte Burrus,* 136 U.S. 586 (1890). Our research cannot locate an instance where the domestic relations exception to diversity jurisdiction has been applied to a governmental dependency action as opposed to a private custody dispute. *See Atwood v. Fort Peck Tribal Court,* 513 F.3d 943 (9th Cir. 2007) (limiting domestic relations exception to § 1332 and applying requirement of exhaustion of tribal court remedies in private child custody dispute). Because the face of the Complaint does not establish the complete diversity and amount in controversy requirements of § 1332, we focus our arguments there and on other well-settled and dispositive points.

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

the parties asserting jurisdiction, plaintiffs have the burden of proving that diversity exists. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

Complete diversity is lacking here because the Complaint shows all parties on both sides of the controversy are within the State of Washington. Plaintiff Eric Brewer's contact information shows an address within the State of Washington, *id.* at 1, which, for want of information, the Clerk's office has attributed to plaintiff Rudy James.[2] The Complaint shows an address for each named defendant within the State of Washington. *E.g.*, Dkt. 1 at 1, 2.[3] There is no allegation that any defendant is a citizen of any state other than the State of Washington, and there is no allegation that any named party is a foreign citizen or subject. To achieve complete diversity, no defendant can be a citizen of the State of Washington. The face of the Complaint demonstrates that such is not the case.

B. The Complaint Demonstrates, with Legal Certainty, That Plaintiffs' Claim Is Really for Less Than the Jurisdictional Amount.

A plaintiff must also establish that the amount in controversy exceeds $75,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(a). Where, as here, the plaintiffs file originally in federal court, the amount in controversy is normally determined from the face of the pleadings. *E.g., St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938). The legal test for determining whether a plaintiff has established the amount in controversy is this:

> [T]he sum claimed by the plaintiff controls <u>if the claim is apparently made in good faith</u>. It must appear to a legal certainty that the claim is really for less than

---

[2] The Complaint does not provide any contact information to the Court or the parties for plaintiff Rudy James; the Clerk's office shows his address to be the same as plaintiff Eric Brewer's.

[3] At the time the Complaint was filed, the stated addresses for defendants Gilmore and Taaffe were correct; those defendants now reside in the State of Alaska.

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

> the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.

Id. at 288-89 (emphasis added; footnotes omitted). If, however, the face of the pleadings makes it apparent to a legal certainty that the plaintiff cannot recover the amount claimed, [4] the suit will be dismissed. *Id.*

The Complaint requests restitution of $50,000,000. Dkt. 1 at 6-10, 12-13. A claim for restitution can lie in law or in equity. At law, a claim for restitution is premised on a claim of breach of contract. *Great West Life & Annuity Co. v. Knudsen,* 534 U.S. 204, 213 (2002) (citing, inter alia, Restatement of Restitution § 160). For restitution to lie in equity, the action generally must seek, not to impose personal liability on the defendants, but to restore to the plaintiff particular funds or property. *Id.* at 213-14. To be entitled to the equitable remedy of restitution, a claim for unjust enrichment must be made against the defendants. The Complaint here makes no unjust enrichment claim. Nor does any allegation in the Complaint, however broadly read, support plaintiffs' claim for $50 million in restitution, whether in law or in equity.

The Complaint also requests prospective injunctive relief. The Complaint requests "immediate return of my son and daughter" and prosecution of unnamed persons by unnamed sovereigns, Dkt. 1 at 6-10, 12-13, as well as "1) complete judicial review of the Quileute Tribal Court and personel [sic] including the conduct of the department [and] 2) full investigation of the Quileute tribal ICWA department and personel [sic] for the malicious conduct of case management and the misappropriation of federal and state monies." Dkt. 1 at 12, 13.

---

[4] Plaintiffs Eric Brewer and Rudy James may be liable for the entire costs of this action if recovery is for an amount far below the jurisdictional floor. *See* 28 U.S.C. §1332(b).

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

In a single-plaintiff case,[5] the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce. *See Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944). The face of the Complaint fails to establish any pecuniary result to any of the parties if the injunctive relief were rewarded. Therefore, because the face of the Complaint fails to establish the requisite amount in controversy, this action should be dismissed for lack of subject matter jurisdiction.

II. THE REQUESTED RELIEF RUNS DIRECTLY AGAINST A SOVEREIGN INDIAN TRIBE THAT HAS NOT WAIVED ITS SOVEREIGN IMMUNITY.

As noted above, the Complaint requests, inter alia, return of plaintiff Eric Brewer's children[6] and a full investigation of the Quileute Tribe's Court and Indian Child Welfare Office. Dkt. 1 at 6-10, 12-13. This requested relief directly impacts the sovereign interests of the Quileute Tribe. The Complaint specifically seeks relief against the Quileute Tribal Court and the Quileute ICW Office, including specific personnel in that office who are named as defendants. *Id.*, 12-13.

It is well settled law that tribes inherently possess sovereign immunity from unconsented suit. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754-55, 760 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity extends to tribal employees acting in their official capacity and within the scope of their employment. *Linneen*

---

[5] This case should be considered a single-plaintiff case because no allegation in the Complaint establishes plaintiff Rudy James' standing to sue here. U.S. Const., art. III, § 2, cl. 1; *see also* Part IV herein.

[6] To the extent the Complaint can be read as alleging a cause of action under 25 U.S.C. § 1303, the Complaint fails to plead a detention sufficient to invoke jurisdiction under that statute. Furthermore, the Complaint fails to plead that plaintiffs have exhausted their tribal court remedies. *See, e.g., Boozer v. Wilder*, 381 F.3d 931, 934 n.2 (9th Cir. 2004) (affirming dismissal of challenge under § 1331 of tribal court's exercise of jurisdiction in child custody matter for failure to exhaust tribal court remedies and questioning, at note 2, whether tribal court's exercise of jurisdiction in child custody matter is "detention" within the meaning of § 1303).

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.), *cert. denied*, 536 U.S. 939 (2002); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984).

The essential object sought by the Complaint—return of children to Mr. Brewer's legal custody and investigations of the Tribal Court and ICW Office—can be granted only by judgment against the Quileute Tribe, not against any of the named defendants. Thus, the real party in interest is the Quileute Tribe, which, as a federally recognized and sovereign Indian tribe, possesses immunity from unconsented suit.

The Complaint attempts to avoid the reach of sovereign immunity by the simple expedient of naming individuals. However, where a tribal sovereign is the "real, substantial party in interest," the sovereign is entitled to invoke its immunity from suit, "even though individual officials are nominal defendants." *See, e.g., Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997).[7] In the Ninth Circuit, the fact that a tribal employee is sued in her individual capacity does not, without more, establish that she lacks the protection of tribal sovereign immunity. *See, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985).

III. UNDER RULE 19, THIS ACTION MUST BE DISMISSED BECAUSE THE COMPLAINT FAILS TO JOIN A REQUIRED PARTY.

As discussed above, the primary relief requested in the Complaint runs directly against the Quileute Tribe. Rule 19 of the Federal Rules of Civil Procedure requires that the Court determine: (a) whether an absent party is required for the action to proceed: and (b) if the

[7] "The common law immunity of [Indian tribes] is coextensive with that of the United States. . . ." *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

required party cannot be joined, whether the action can proceed among the existing parties or should be dismissed. *See* Fed. R. Civ. P. 19(a), (b).[8]

Under the Rule 19(a) analysis, the Quileute Tribe is a required party. Given that the core relief sought is against the Tribe, any judgment would not provide complete relief among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). Furthermore, the Quileute Tribe has a significant sovereign interest in the operation of its Tribal Court and ICW Office, and that interest would be severely impaired by plaintiffs' suit. Fed. R. Civ. P. 19(a)(1)(B). Thus, the Quileute Tribe is a required party to this action.

The Rule 19(b) analysis requires that, where it is not feasible to join a required party, the Court determine "whether in equity and good conscience the action should proceed among the existing parties or be dismissed." Fed. R. Civ. P. 19(b) (as amended 2007). The Rule provides four factors for the Court to consider:

First, analysis of the Rule 19(b)(1) mirrors the analysis under Rule 19(a). A judgment rendered in the Tribe's absence will significantly prejudice the Tribe's sovereignty in performing its essential governmental functions of maintaining its judicial system and addressing the needs of dependent children. *See, e.g., United States v. Oregon,* 657 F.2d 1009, 1013 (9th Cir. 1981) (stating tribal sovereign immunity necessary to preserve the autonomous political existence of the tribes). In the context of a foreign nation's sovereign immunity, the U.S. Supreme Court has addressed the 2007 amendment of this Rule 19(b) factor as follows:

---

[8] Rule 19(a), as amended in 2007, specifically states "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as party. . . ." While the wording may vary, "the substance and operation of the Rule both pre- and post-2007 are unchanged." *Republic of the Philippines v. Pimentel,* 553 U.S. 851, 128 S. Ct. 2180, 2184 (2008).

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

> There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause.

Republic of the Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 2190 (2008) (applying 2007 amendment of Rule 19(b)); *see also Atwood v. Fort Peck Tribal Court,* 513 F.3d 943 (9th Cir. 2007) (requiring, as a matter of comity, exhaustion of tribal court remedies in private child custody dispute).

Since any relief awarded to plaintiffs cannot be shaped to lessen the prejudice to the Quileute Tribe, Rule 19(b)(2) weighs in favor of dismissal. Since the core relief requested can be granted against only the Quileute Tribe, no judgment awarded in the Tribe's absence will be adequate. The named defendants cannot adequately represent the interests of the Quileute Tribe because the Complaint alleges a series of tribal, state and federal statutory violations, *e.g.*, Dkt. 1 at 5-7, 9-10, that may put named defendants' interests in conflict with that of the Tribe. Plaintiff Eric Brewer is currently before the Quileute Tribal Court on dependency issues, *see id.* at 5, thus tipping the last Rule 19(b) factor in favor of dismissal. Accordingly, this action should be dismissed under Rule 19. *Accord Republic of the Philippines,* 553 U.S. 851, 128 S. Ct. at 2191 (citing cases and stating, "A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.").

IV. UNDER RULE 41(b), THIS ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAIL TO RESPECT THIS COURT'S RULES AND SEEK TO EXPLOIT THEIR PRO SE STATUS.

Federal Rule of Civil Procedure 41(b) provides that a defendant may move for dismissal "for failure of the plaintiff to prosecute or to comply with these rules or any order of court." No

LAW OFFICES OF
KYME A.M. McGAW PLLC
1700 SEVENTH AVENUE, STE 2100
SEATTLE, WASHINGTON 98101-1360
(206) 357-8450

allegation in the Complaint references plaintiff Rudy James, let alone establishes his standing in this action, and Mr. James has not provided the Court or the parties with a valid address for service. *Cf.* Local Rule 41(b)(2); *see also Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) (pro se litigants are bound by the same rules of procedure that govern other litigants). Federal courts, including the Ninth Circuit, recognize that the important goals served by lenient treatment of pro se litigants must necessarily yield to the prejudice suffered by the courts and other parties.[9] Mr. James's participation in this case seeks to exploit his pro se status and to circumvent prohibitions on the unauthorized practice of law.[10] This exploitation prejudices this Court and the parties before it. Therefore, this action should be dismissed.

In the alternative, Mr. James should be required to comply with Rule 41(b) and to show cause why he should not be dismissed from this action for lack of standing.

Dated June 14, 2010.

Respectfully submitted,

By: /s/ Kyme A.M. McGaw

Kyme A.M. McGaw, WSBA #21432
Law Offices of Kyme A.M. McGaw PLLC
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101-1360
T: (206) 357-8450
F: (206) 784-5780
E: KAMcgaw@kmcgaw.com
Attorney for Defendants Gilmore, Taaffe, and Kelly

[9] *Ferdick v. Bonzelet*, 963 F.2d 1258 (9th Cir. 1992); *Vongrabe v. Sprint PCS*, 312 F. Supp. 2d 1313 (S.D. Cal. 2004).

[10] *See, e.g.*,Timothy Egan, *Indian Boys' Exile Turns Out to Be a Hoax,* The New York Times (Aug. 31, 1994), reprinted at http://www.nytimes.com/1994/08/31/us/indian-boys-exile-turns-out-to-be-hoax.html?pagewanted=all (last accessed June 3, 2010); David Von Biema & David S. Jackson, *The Banishing Judge*, Time (Sept. 12, 1994), reprinted at http://www.time.com/time/magazine/article/0,9171,981427,00.html (last accessed June 3, 2010).

By: /s/ Mark A. Wheeler
Mark A. Wheeler, WSBA #31492
900 Washington Street, Ste 1020
Vancouver, WA 98660
T: (360) 699-1201
F: (360) 693-2911
E: mwheeler@dsw-law.com

Attorney for Defendant Hoppa

By: /s/ Thomas B. Nedderman
Thomas B. Nedderman, WSBA #28944
Floyd Pflueger & Ringer, PS
2505 Third Avenue, Ste 300
Seattle, WA 98121
T: (206) 441-4455
F: (206) 441-8484
E: tnedderman@floyd-ringer.com

Attorney for Defendant Sherwood

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2010 I electronically filed the foregoing with the Clerk of the Court via the CM/ECF System, which will send notification of such filing to the following via US Mail:

Counsel for Margo Gilmore, Betty Taafe, Tracy Kelley
K. Allison McGaw
LAW OFFICES OF KYME A.M. MCGAW, PLLC
1700 Seventh Avenue
Suite 2100
Seattle, WA 98101-1360
206-357-8450
kamcgaw@kmcgaw.com

Counsel for Mary Hoppa
Mark A. Wheeler
DUGGAN SCHLOTFELDT & WELCH, PLLC
PO Box 570
900 Washington Street, Suite 1020
Vancouver, WA 98660-0570
360-699-1201
Fax 360-2911
mwheeler@dsw-law.com

Copy of this document was delivered via US Mail to the following:

Plaintiff Pro Se
Eric J Brewer
PO Box 2154
Forks, WA 98331

Plaintiff Pro Se
Rudy Al James
PO Box 2154
Forks, WA 98331

s/Tracy Carey
Tracy Carey, Legal Assistant