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 DEFENDANTS' JOINT REPLY IN SUPPORT OF MOTION TO DISMISS ACTION Noted for Motion: July 16, 2010

INTRODUCTION

Defendants Elizabeth "Betty" Taaffe, Margaret "Margo" Gilmore, Tracy Kelly, Mary Hoppa and Mary Sherwood hereby jointly make this reply in support of their motion to dismiss this action pursuant to Rules 12(b)(1), 19, and 40(b) of the Federal Rules of Civil Procedure. Plaintiffs filed no formal opposition to defendants' motion to dismiss.

On June 30, 2010, plaintiffs filed the following documents: Motion for Ex parte Young for Federal Case that Allows Federal Court to Circumvent Tribal Sovereign Immunity, Dkt. 18 (hereafter Young Motion); Motion for Restraining Order Against Dr. Joseph Jensen Having Contact and Mental Health Counseling of J.B., Dkt. 19; Complaint: Quileute Tribe and It's [sic] Employees Have Conspired and Broken Laws to Illegaly [sic] Remove Children from Their Homes for Their Personal Gain , Dkt. 20

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(hereafter Conspiracy Complaint); Motion for Restraining Order Against Mary Hoppa Having Contact and Mental Health Counseling of J.B., Dkt. 21; and Complaint: Violation of the (HIPAA) Laws, Dkt. 22 (hereafter HIPAA Complaint). Defendants refer to these documents collectively as the June 30 filings and, solely for purposes of argument, defendants read these documents broadly as a response to the motion to dismiss.

The docket herein indicates that plaintiffs have not served process or otherwise perfected the filing of their "complaints" filed June 30, 2010. By referencing or addressing any of the June 30 filings, defendants do not waive any argument, objection, defense or counterclaim to the "complaints" or any of the other June 30 filings. For the reasons discussed below, defendants respectfully request that their motion to dismiss be granted, and this action be dismissed with prejudice.

ARGUMENT

I. UNDER RULE 12(b)(1) THIS ACTION SHOULD BE DISMISSED BECAUSE COMPLETE DIVERSITY IS LACKING.

Plaintiffs have failed to carry their burden under 28 U.S.C. § 1332 to establish complete diversity among the parties to the Complaint. *Lee v. American Nat'l Ins. Co.*, 260 F.3d 997 (9th Cir. 2001), *cert. denied*, 535 U.S. 928 (2002). This failure is demonstrated by the face of the Complaint, Dkt. 1, and the June 30 filings. Plaintiff Eric Brewer's contact information shows an address within the State of Washington. *Id.* at 1. The Complaint shows an address for each named defendant within the State of Washington. *E.g.*, Dkt. 1 at 1, 2.[1] 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. Therefore, because the face of the Complaint and plaintiffs' other filings demonstrate a lack of complete diversity, this action should be dismissed for lack of subject matter jurisdiction.

[1] 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.

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Defendants' motion to dismiss for lack of complete diversity and thus lack of subject matter jurisdiction is dispositive. Under a broad reading of plaintiffs' filings, the Federal Rules of Civil Procedure, and this Court's Local Rules, plaintiffs have sought to amend the Complaint, Dkt. 1, to invoke the *Ex parte Young* fiction to avoid the Quileute Tribe's sovereign immunity. Young Mot., Dkt. 18. While the bar of sovereign immunity is jurisdictional,[2] the bar is in the nature of an affirmative defense. Avoiding the bar, as plaintiffs unsuccessfully seek to do in their Young Motion, would not affirmatively establish this Court's subject matter jurisdiction.

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

The Quileute Tribe and its officers and employees acting within their authority possess inherent sovereign immunity from this 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); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir.), *cert. denied*, 536 U.S. 939 (2002). It is undisputed that plaintiffs' requested relief, Dkt. 1 at 6-10, 12-13, directly impacts the sovereign interests of the Quileute Tribe. The Complaint seeks specific relief against the Quileute Tribal Court and the Quileute ICW Office. *Id.*, 12-13. Under a broad reading of the June 30 filings and the Rules, plaintiffs seek to add as defendants every Quileute Tribal Council Member, the Tribe's executive director, the tribal police officer responsible for investigating Quileute dependency matters, and the psychologist evaluating J.B. for the ongoing dependency action in Quileute Tribal Court to the already named dependency case workers and supervisor, school counselor, and guardian ad litem. Dkts. 20 at 1-2; Dkt. 22 at 1-2; *see also* Dkt. 19.[3]

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[2] *E.g., Chemehuevi Tribe v. California St. Bd. Equalization*, 757 F.2d 1047 (9th Cir.) (noting that question of tribal sovereign immunity is jurisdictional in nature), *rev'd in part on other grounds*,474 U.S. 9 (1985).

[3] Dkt. 20 seeks to add four plaintiffs and Dkt. 22 seeks to add three additional plaintiffs.

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If plaintiffs' Young Motion, Dkt. 18, is read as a response to the Quileute Tribe's sovereign immunity, it fails. That motion is an obvious ploy to circumvent the Quileute Tribe's sovereign immunity, which the Ninth Circuit has repeatedly rejected. *E.g., Shermoen v. United States*, 982 F.2d 1312, 1319-20 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993) (characterizing second amended complaint naming individual Hoopa Valley Tribal Council Members as defendants as "an attempt to circumvent the Hoopa Valley Tribe's sovereign immunity" and dismissing under Rule 19); *see also Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir.) (denying plaintiff's attempt to avoid Navajo Nation's sovereign immunity by naming individual officials as defendants because his real claim was against Nation itself and dismissing under Rule 19), *cert. denied*, 537 U.S. 820 (2002).

The Ninth Circuit's reasoning in *Shermoen* is applicable here. In *Shermoen*, the Ninth Circuit recognized that, even where an amended complaint[4] named individual tribal council members as defendants, it was clear from "the essential nature and effect" of the relief sought that the tribe was the "real, substantial party in interest." *Shermoen*, 982 F.2d at 1320 (citation omitted). The Ninth Circuit noted that:

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act.

[4] Plaintiffs' June 30 filings contain two "complaints." While plaintiffs have a one-time right to amend their complaint "as a matter of course" within 21 days of service of a motion to dismiss, Fed. R. Civ. P. 15(a)(1)(A)-(B), neither adds a viable claim for relief. *Compare* Dkt. 20 at 4 (alleging past violation of Pub. L. 100-606) *with* Pub. L. 100-606, § 1092, 102 Stat. 3045, 3046 (Nov. 4, 1988) (". . . . nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding."). *Compare also* Dkt. 22 (alleging a past violation of the Health Insurance and Portability and Accountability Act (HIPAA) and the HIPAA Privacy Rule) *with Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007) ("Under HIPAA, individuals do not have a right to court action."). Thus these purported amendments of the Complaint, Dkt. 1, to avoid the Quileute Tribe's sovereign immunity fail.

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Id. (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted). And, although the *Shermoen* court acknowledged the availability of officer suits under *Ex parte Young*, it stated:

> [A] suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Id. (citation omitted).

No one expects payment of plaintiffs' requested $50 million to be paid from the pockets of dependency case workers, their supervisor, a school counselor, and a volunteer guardian ad litem. *See, e.g.*, Dkt. 20 at 2 ll. 8-13. More importantly, plaintiffs' core requested relief--return of legal custody of Eric Brewer's children placed in foster care by order of the Quileute Tribal Court--requires this Court to compel affirmative discretionary action of the Quileute Tribe and would directly interfere with the Tribe's judicial and executive administration. Plaintiffs' requested relief of an investigation and prosecution would also require this Court to compel affirmative discretionary action of the Quileute Tribe. The Quileute Tribe has a significant sovereign interest in the autonomous operation of its sovereign functions and public administration, including the operation of its Tribal Court and ICW Office. The Quileute Tribe's interests in self-government and sovereignty will be severely impacted if plaintiffs' requested relief were granted.

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

Given the nature of the relief sought and its impact upon the sovereign interests of the Quileute Tribe, the Tribe is a required party under the Rule 19(a). Given that the core relief sought is against the Tribe, a judgment would not provide complete relief among the existing parties, or even among the persons sought to be added by the June 30 filings. Fed. R. Civ. P. 19(a)(1)(A). The Quileute Tribe's undisputed sovereign immunity bars any action directly against it and makes it unfeasible to join the

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Tribe as a party. Under Rule 19(b), where it is not feasible to join a required party, the Court will determine "whether in equity and good conscience the action should proceed among the existing parties or be dismissed." Fed. R. Civ. P. 19(b). Under the circumstances presented here, this case should not proceed.

A judgment rendered in the Quileute Tribe's absence will significantly prejudice the Tribe's sovereign authority in performing its essential governmental functions of adjudicating an ongoing dependency action 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); *see also Republic of the Philippines v. Pimentel,* 553 U.S. 851, 128 S. Ct. 2180, 2190 (2008) ("The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause.").

Since any relief awarded to plaintiffs cannot be shaped to lessen the prejudice to the Quileute Tribe, the second Rule 19(b) factor 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 and state statutory violations, *e.g.,* Dkt. 1 at 5-7, 9-10, and the June 30 filings allege conflicts of interest and conspiracies, *e.g.,* Dkt. 20 at 3, that may put named and potential defendants' interests in conflict with that of the Tribe or one another. Plaintiff Eric Brewer is currently before the Quileute Tribal Court on dependency issues, *see* Dkt. 1 at 5, thus tipping the last Rule 19(b) factor in favor of dismissal. Accordingly, this action should be dismissed under Rule 19.

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IV. UNDER RULE 40(b), THIS ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAIL TO RESPECT THIS COURT'S RULES AND SEEK TO EXPLOIT THEIR PRO SE STATUS.

Defendants hereby reaffirm their arguments under Rule 40(b). *See, e.g.,* Attachment to Dkt. 19 (identifying claimed costs and expenses for Judge Rudy Al James).

Dated July 9, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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To the person(s) who are non CM/ECF participants, service will be made via U.S. postal service, first-class mail with all costs of delivery prepaid, addressed as follows:

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DATED this 9th day of July, 2010.

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