

The Honorable Richard A. Jones
Note for Consideration: August 24, 2012

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

THE STILLAGUAMISH TRIBE OF
INDIANS, a Federally-recognized Indian
tribe,

Plaintiff,

v.

DAVID L. NELSON et al.

Defendants.

NO. 10-00327-RAJ

**DEFENDANT NATHAN
CHAPMAN'S RULE 56 MOTION
FOR SUMMARY JUDGMENT
AND DISMISSAL OF ALL
CLAIMS PENDING AGAINST
NATHAN CHAPMAN**

ORAL ARGUMENT REQUESTED

I. INTRODUCTION & RELIEF REQUESTED

Defendant Nathan Chapman ("Chapman") move the court for summary judgment of dismissal of the Stillaguamish Tribe of Indians' ("STOI" or the "Tribe") claims contained in the Third Amended Complaint. This motion is based on the grounds that there are no issues of material fact with respect to the RICO Claims. Further, the undisputed facts which justify dismissal of the RICO claims also justify dismissal of the Tribe's seventh, ninth, tenth and eleventh claims.

The Tribe's claims are fundamentally flawed, having no foundation in fact or law, as (1) the Tribe lacks standing to bring the RICO claims, and (2) the Tribe has failed to prove the proximate causation requirement of RICO. The RICO claims are intertwined elements of all of the remaining claims—so when the RICO claims fail, all of the Tribe's other claims against Chapman also fail.

II. EVIDENCE

In support of this Motion, Chapman relies on the declarations of the following individuals; Martin Robinett, Donna Marie MacWhyte, Kenneth and Barbara Leder, Robert Leatherman, Robert Henken, Stephen Hayes, Dominique Ruybal, Darlene Strotz, Joyce Morehouse, Tim Herdt, Grace Barlund, and Chris Cramer, with the supporting exhibits attached thereto, and on the pleadings and files therein.

III. ARGUMENT

The Tribe's claims against Defendant Chapman fall into two broad categories: (1) The "Smoke Shop" claims, which are related to the Native American Ventures LLC ("NAV") RICO Conspiracy;¹ and (2) The "Real Estate" claims, which are related to the Real Property and Economic Opportunity RICO Conspiracy.² The Smoke Shop claims encompass the Tribe's First Claim (RICO)³ and Second Claim (RICO). The Real Estate claims encompass the Third Claim (RICO), Fourth Claim (RICO), and Seventh Claim (Breaches of Fiduciary Duties and Violations of Statutory Obligations to the Tribe), Ninth Claim (Fraud and/or Negligent Misrepresentation), the Tenth Claim (Civil Conspiracy) and Eleventh Claim (Unjust Enrichment). The Fifth and Sixth Claims under the Washington Criminal Profiteering Act claims are a derivation of the Smoke Shop RICO and Real Estate RICO claims and have been dismissed by the Court's recent Order.⁴ All of the claims against Chapman should be dismissed.

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). A defendant

¹ Hereafter called "Smoke Shop Claims" or "Smoke Shop RICO."

² Hereafter called the "Real Estate RICO" claims or the "Real Estate Claims."

³ The First Claim (RICO), Eighth Claim (Conversion), and Thirteenth Claim (Usurpation of Corporate Opportunity) are not asserted against Chapman. Further, the Twelfth Claim (Declaratory Relief) has since been abandoned by the Tribe. But note the allegations in the First Claim are incorporated by reference in all of the claims in the Third Amended Complaint.

1 who moves for summary judgment bears the initial burden of proving the absence of any triable
 2 issue of fact but need not produce evidence negating elements of a claim for which the plaintiff
 3 bears the burden of proof at trial. *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*,
 4 515 F.3d 1019, 1029 (9th Cir. 2008). When a motion for summary judgment is made, the
 5 adverse party's response, by affidavits or as otherwise provided by the rule, must set forth
 6 specific facts showing that there is genuine issue for trial. Fed. R. Civ. P. 56(e). Where the
 7 nonmoving party will bear the burden of proof at trial, Rule 56(e) "requires the nonmoving
 8 party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to
 9 interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine
 10 issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). The nonmoving party
 11 cannot defeat summary judgment with unsupported conjecture or conclusory, self-serving
 12 statements. *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003); *see*
 13 *also Celotex*, 477 U.S. at 322-23 (conclusory allegations unsupported by any documents or
 14 other evidence fails to create a triable issue of fact). Affidavits submitted in opposition must set
 15 forth specific facts that would be "admissible in evidence." Fed R. Civ. P. 56(e).

16 **B. THE TRIBE DOES NOT HAVE STANDING UNDER RICO TO ASSERT**
 17 **EITHER THE REAL ESTATE CLAIMS OR THE SMOKE SHOP CLAIMS**
 18 **AGAINST CHAPMAN**

19 **1. Basic RICO Standing Rules.**

20 A plaintiff must satisfy RICO's standing requirements of: (1) a violation of section
 21 1962; (2) injury to business or property; and (3) causation of the injury by the violation." *Oscar*
 22 *v. University Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992). Not all injuries are
 23 compensable under RICO; recovery is limited to those cases in which the plaintiff suffers a
 24 demonstrable financial loss due to a pattern of racketeering activity which violates 18 U.S.C.

25
 26 ⁴ See Docket Number ("Dkt. #") 281; Order Granting in Part and Denying in Part Nelsons and Chapman
 Motions to Dismiss.

1 1961(1). It does not apply where there is merely an “injury to a valuable intangible property
2 interest.” *Oscar v. University Students Co-op Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992).

3 When a plaintiff fails to establish that it suffered an injury (i.e., economic loss) as a
4 result of defendants’ conduct (as defined and limited by conduct arising under 18 U.S.C.
5 1961(1)), plaintiff is without standing to recover civil damages under RICO and summary
6 judgment is then proper. *University Students Co-op Ass’n*, 965 F.2d at 785 (9th Cir. 1992).
7 Speculative and unrealized damages are not recoverable in a RICO claim. *Associated General*
8 *Contractors v. Carpenters*, 459 U.S. 519, 542 (1983) (finding that damages were speculative
9 because the injury was indirect and it may have been produced by independent intervening
10 factors). A RICO claim cannot proceed when damages are speculative and cannot be directly
11 attributable to defendants. *Sheperd v. American Honda Motor Co. Inc.*, 822 F.Supp. 625, 630
12 (N.D.Cal. 1993) (“Although courts may be willing to permit such speculation in other contexts,
13 Supreme Court and Ninth Circuit precedent indicate that it is not tolerable in the context of
14 RICO with its provision for treble damages”).

15 Further, in determining whether a plaintiff has standing to bring RICO claims, courts
16 must consider: (1) the directness of the injury – the less direct an injury becomes, “the more
17 difficult it becomes to ascertain the amount of plaintiff’s damages attributable to [defendant’s
18 wrongdoing], as distinct from other, independent factors;” (2) the difficulty of apportioning
19 damages among potential plaintiffs – “allowing recovery by indirectly injured parties would
20 require complicated rules for apportioning damages;” and (3) the possibility of other plaintiffs
21 vindicating the goals of RICO as “direct victims” rather than indirect victims. *Holmes v. Sec.*
22 *Investor Prot. Corp.*, 503 U.S. 258, 268-69, (1992).

23 The Ninth Circuit frequently dismisses RICO claims for failure to satisfy these standing
24 and proximate causation requirements, with most cases being dismissed on either or both
25 grounds. *See e.g., Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1141, 1149 (9th Cir.
26 2008) (affirming dismissal for lack of standing and failure to satisfy the proximate causation

1 requirement in competitive injury claim); *Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir. 2001)
 2 (RICO claim properly dismissed for failure to allege any financial loss and for failure to allege
 3 causal connections between injury and illegal activity); *Imagineering, Inc. v. Kiewit Pacific*
 4 *Co.*, 976 F.2d 1303, 1311-1312 (9th Cir. 1992) (finding dismissal proper on either lack of
 5 standing or lack of proximate cause).

6 **2. The Real Estate Claims (Claim 3 and 4): The Tribe Lacks Standing Because**
 7 **It Cannot Prove Sale Prices were Directly Attributable to any RICO**
 8 **Predicate Acts by Chapman.**

9 **a. The Tribe has No RICO Standing Because a Multitude of**
 10 **Independent Factors Set the Sale Prices of Individual Properties**

11 The Tribe lacks standing to bring its Real Estate RICO claims because the Tribe cannot
 12 attribute the pled damages *with any specificity* to Chapman's pled RICO predicate acts, versus
 13 the multitude of independent intervening factors which are present in the real estate market.⁵

14 The Tribe would like the court to assume that but for the conspiracy between Chapman
 15 and the other Defendants, the Tribe would have purchased the 23 identified properties at prices
 16 far less than the actual purchase prices.⁶ This assumption ignores numerous uncertainties
 17 inherently present in consumer markets. All of the Tribe's pled damages in the RICO Real
 18 Estate claims rely on the sale prices of individual pieces of real property—but those sale prices
 19 are influenced by both the individual sellers which set the listing price and the actual sales
 20 price, as well as the larger consumer real estate market. *See e.g., Anza v. Ideal Steal Supply*
 21 *Corp.*, 547 U.S. 451, 459 (2006) (finding RICO damages alleged could have resulted from
 22 various market considerations of why businesses lose customers); *Canyon County v. Sygenta*
 23 *Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008) (rejecting in a RICO case inquiry into an
 24 alternate scenario dependent on consumption of county services between two groups of
 25 consumers, documented and undocumented workers); *Ass'n of Wash. Public Hosp. Dists. v.*

26 ⁵ Dkt. # 281: Third Amended Complaint at ¶ 3.40

1 *Philip Morris, Inc.*, 79 F.Supp.2d 1219, 1224-25 (W.D. Wash. 1999) (rejecting speculative
2 damages in RICO which are dependent in part on consumer preferences for less dangerous
3 cigarette products).

4 The sale price the sellers were willing to accept for each individual property dictates at
5 what price the Tribe could have purchased each property. But the Tribe has not named any of
6 these individual sellers as RICO co-conspirators—making the individual sellers completely
7 independent actors. The Tribe has failed to connect Chapman’s pled RICO predicate acts to the
8 “inflated prices” paid by the Tribe for the properties. Even if the Court determined that
9 Chapman was directly responsible for the prices paid, the Tribe would still have to prove the
10 individual sellers of the twenty three (23) properties *would actually have sold the properties to*
11 *the Tribe at a sale price significantly less than the actual price.* However, declarations from
12 eleven (11) sellers of the 23 properties at issue in this case state the majority of these sellers
13 would **not have sold the properties** to the Tribe at **any price less than the actual sale price.**⁷
14 This in itself defeats all of the remaining real property claims (claims 3, 4, and 7-11) regarding
15 these parcels.

16 Finally, at least six (6) of the 23 properties identified by the Tribe in the Third Amended
17 Complaint were purchased by the Tribe at a sale *price below the listing price* selected by the
18 independent sellers—which further highlights intervening factors such as each independent
19 seller’s judgment (and their listing broker’s judgment) of the fair market price of each property,
20 regardless of any pled RICO predicate acts by Chapman. Those properties are identified below:
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22
23
24

25 ⁶ Dkt. # 281: Third Amended Complaint at ¶¶ 3.49-3.54

26 ⁷ See the declarations of Martin Robinett, Donna Marie MacWhyte, Kenneth and Barbara Leder, Robert Leatherman, Robert Henken, Stephen Hayes, Dominique Ruybal, Darlene Strotz, Tim Herdt, Grace Barlund, and Joyce Morehouse, submitted in support of this Motion.

Property Description	List Price ⁸	Sale Price to Tribe ⁹
Victoria Ranch	\$4,000,000	\$3,800,000
Purdy (Buffalo Farm Property)	\$2,968,000	\$1,800,000
Nortep	\$3,350,000	\$2,568,000
White	\$570,000	\$507,000
Lind	\$1,500,000	\$1,300,000
Henault	\$349,950	\$330,000

Multiple independent factors which set the price of each property preclude the Tribe from having standing to pursue the Real Estate RICO claims against Chapman and these claims should be dismissed.

b. The Methadone Clinic: No Evidence of Causation

Plaintiff alleges that Chapman induced it to borrow funds for the clinic from a private lender at rates far above commercial rates otherwise available to it.¹⁰ The Tribe bases its methadone clinic “damages” on the assumption it could have obtained “more conventional financing” than that provided by Chapman and other Defendants. The additional cost of borrowing is alleged to be the damages suffered.¹¹

The Tribe cannot merely assert it could have obtained more conventional financing to maintain damages related to the Methadone clinic—it has to present actual non-speculative, competent, evidence alternative conventional financing existed at the time. *McGinest v. GTE Services Corp.*, 360 F.3d 1103, 1126 (9th Cir. 2004) (Claims that amount to mere conclusory allegations are insufficient to merit consideration at summary judgment); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (“A summary judgment motion cannot be defeated by relying

⁸ See the Declaration of Martin Robinett, at page 2 and Exhibit A, identifying the sale price of the Victoria Ranch property to the Tribe as \$3,800,000, with an initial list price of \$4,000,000. See also Declaration of Chris Cramer (“Cramer Decl.”) at Exh. A; MLS listing reports for Purdy, Nortep, White, Lind, and Henault properties.

⁹ Dkt. # 190; Third Amended Complaint, at pgs. 22-24, for the Tribe’s purchase prices of these properties.

¹⁰ Dkt. # 190; Third Amended Complaint, at ¶¶ 3.68, 3.81.

solely on conclusory allegations unsupported by factual data.”). The highly speculative analysis associated with calculating this portion of RICO damages further defeats the Tribe’s standing on these claims. *See Ass’n of Wash. Pub. Hosp.*, 79 F.Supp.2d 1219, 1224-25 (W.D. Wash. 1999) (RICO damages are not recoverable when they are speculative).

The Court would have to consider and quantify the financing available to the Tribe relative to the methadone clinic, what alternate financing the Tribal Board would actually select, and how that financing ultimately would have affected the Tribe’s profits. All of these considerations and independent variables are too speculative to support RICO damage calculation, thereby preventing Tribe from having standing to pursue its methadone clinic RICO claims.

Further defeating the Tribe’s claims it could obtain alternate favorable methadone clinic financing is deposition testimony from the Tribe’s own then-Executive Director, Eddie Goodridge, Jr., about his experience in trying to obtain financing for the methadone clinic from a ‘conventional’ lender like Frontier Bank:

A. That Frontier Bank basically wouldn't be interested in financing something like that because of the -- all the issues that surround methadone clinics.

And Frontier Bank, she just basically flat out told me they wouldn't want to put their name on anything like that, so it really wasn't an option; plus no way to secure it really. They couldn't seize it from the tribe, so she basically said financing wasn't available. So we looked at grants and stuff like that, but -- I mean, even the stuff that we might have qualified for had, you know, year and a half plus time lines to just get told yes or no. And more than likely the answer would be no because we went into, you know, and talked with them. And pretty much every granting agency told us we were wasting our time filling out an application because they weren't going to grant money for something like that.¹²

¹¹ See Dkt. # 190; Third Amended Complaint, at ¶ 3.69-3.70; See also Cramer Decl. at Exh. B: Tribe’s Supplemental Responses to Nelson’s Second Discovery Requests, dated July 6, 2012, at Interrogatory No. 16.

¹² Cramer Decl. at Exh. C; Goodridge Jr. Deposition, dated May 2, 2012, at page 112:25 to 113:18.

Then there is also the March 13, 2012 letter filed by *pro se* defendant Edward Goodridge Sr., noting the Tribe "...had no credibility for credit..."¹³ All of this testimony is un rebutted. Finally, note the Tribe has designated no expert witness(es) to assist the Court in this highly speculative analysis to determine what credit the Tribe could have obtained but for Chapman's pled bad acts, should the Court wish to engage in such an exploratory analysis even if it could do so to sustain the Tribe's pled RICO damages.¹⁴ Any claims related to financing the methadone clinic should be dismissed.

3. The Smoke Shop Claims: No Proximate Causation.

With its Smoke Shop claims, the Tribe is claiming injury because Defendants "deprived the Tribe of the opportunity to profit by operating the smoke shop and to utilize and/or invest the funds generated therefrom."¹⁵ As with the Real Estate claims, these types of speculative, unrealized damages are insufficient to provide the Tribe standing. *See Associated General Contractors*, 459 U.S. at 542 (1983).

The Smoke Shop claims are similar to the Ninth Circuit's inquiry in *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1148 (9th Cir. 2008) where the court dismissed a RICO claim because the court would need to engage in a complicated analysis to determine whether the plaintiff's alleged damages were attributable to the defendants' actions of lowering

¹³ Dkt. # 201, at page 2.

¹⁴ When asked in discovery to state all facts about any "conventional financing" investigated by the Tribe for the Methadone clinic, the Tribe had no substantive response, even after supplementation following a FRCP 37 discovery conference. See Cramer Decl. at Exh D; Tribe's Supplemental Response to Chapman's Interrogatory No. 15, dated May 4, 2012. On July 10, 2012, months after the discovery cutoff of May 14, 2012, and *over two years* after filing its complaint, the Tribe for the first time identified \$1,175,000 as the amount it claims as "excessive finance charges." See Cramer Decl. at Exh. B; Tribe's Supplemental Responses to Nelson's Second Discovery Requests, dated July 6, 2012. The Tribe has named no expert witness to guide the Court through any complex and highly speculative retrospective analysis of methadone clinic financing on Tribal lands. The Tribe cannot as a matter of law prove causation between Chapman's actions and the Tribe's failure to obtain "conventional financing," and this claim should be dismissed. If necessary, Defendants will be filing a motion in limine to exclude the entirety of the Tribe's late supplemental responses.

¹⁵ Dkt. # 190; Third Amended Complaint, at ¶ 5.8.

1 prices or to customer preferences for a competitor's products. The court, in determining
 2 standing and whether the RICO proximate causation requirement has been met, considered
 3 "whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to
 4 defendant's wrongful conduct." *Id.* Because it would have been difficult, if not impossible, the
 5 RICO claim was dismissed. *Id.*

6 Here, the speculative and complicated analysis for the Smoke Shop damages, if even
 7 feasible, requires the claim be dismissed. As this Court has opined, there is no way the Tribe
 8 can determine what its profits would have been had it entered into a compact with the State and
 9 there was no alleged wrongful conduct by Chapman. Issues of pricing and consumer
 10 preferences inherently affect volume of sales and other variables indeterminable of the Tribe in
 11 seeking damages.¹⁶ This type of intricate analysis was not intended by RICO and such harm is
 12 "highly speculative in light of the multitude of factors that might affect damages." *Ass'n of*
 13 *Wash. Public Hosp.*, 79 F. Supp. 2d at 1224 (speculative nature of plaintiff's damages barred
 14 action where calculating damages would require proving how more information would have
 15 affected number of smokers, changes in their health, and how much less unreimbursed care
 16 would have been incurred as a result).

17 Further complicating any analysis of damages attributable to Chapman's wrongful acts
 18 for the Smoke Shop claims is testimony by the Tribe's Controller, Eric White, who stated the
 19 Tribe has been using funds from the Methadone Clinic to subsidize the purchase of cigarettes
 20 by shifting funds to its tribal owned tobacco wholesale business, thereby allowing Smoke
 21 Signals to purchase cigarettes at a lower cost than competitors, and sell them below market
 22 price.¹⁷ The Tribe's practice of taking Methadone Clinic funds to subsidize cigarette purchases
 23 and sales is yet another uncertain factor in the complicated analysis the Tribe is asking the
 24 Court to complete in an attempt to determine whether the Tribe's alleged damages were

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 26 ¹⁶ Dkt. # 65, at page. 14.

¹⁷ Cramer Decl. at Exh E; Eric White Deposition transcript, April 10, 2012, at pages 125:10 -126:8.

1 attributable to Chapman's pled RICO wrongdoings.¹⁸ The speculative nature of any pled
2 damages related to the Smoke Shop RICO requires that the Smoke Shop claims be dismissed.

3 **C. THE TRIBE FAILS TO MEET THE PROXIMATE CAUSATION**
4 **REQUIREMENT UNDER RICO AS AGAINST CHAPMAN**

5 To prevail on a civil RICO claim, a plaintiff must prove that Defendant Chapman
6 engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity
7 which pattern of racketeering activity (5) caused injury to plaintiff's business or property. 18
8 U.S.C. §§ 1962(c), 1964(c). The fifth element includes two related components, including that
9 a civil RICO plaintiff must show his injury was proximately caused by conduct prohibited
10 under 18 U.S.C. 1961(1). *Fireman's Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1021 (9th Cir.
11 2001).

12 **1. The Proximate Cause "Directness" Requirement under RICO Cannot Be**
13 **Satisfied Against Chapman**

14 RICO § 1964(c) provides a civil cause of action to persons injured "by reason of" a
15 defendant's pattern of racketeering activity (the enumerated activities stated in 1961(1)). A
16 plaintiff's right to sue under RICO requires a showing that the defendant's unlawful conduct
17 was not only a "but for" cause of the plaintiff's injury, but was the proximate cause as well.
18 *Holmes*, 503 U.S. 258, 268 (1992). (dismissing the plaintiff's civil RICO claim because the
19 plaintiff's alleged injuries were not proximately caused by the defendants). Proximate
20 causation requires proof of "some direct relation between the injury asserted and the injurious
21 conduct alleged." *Holmes*, 503 U.S. at 265-66 (1992). "When a court evaluates a RICO claim
22 for proximate causation, the central question it must ask is whether the alleged violation led
23 directly to the plaintiff's injuries." *Anza*, 547 U.S. 451, 460 (2006).

24 ¹⁸ As with the Tribe's failure to obtain "conventional financing" damage claims, the Tribe has identified no
25 expert witnesses and provided no expert report to either substantiate the Tribe's complicated damage claims
26 related to the operation of the Smoke Shop or assist the Court or the Defendants even understand the pled claim.
The Tribe has also failed to provide an expert report on the viability, practicality, or legality of using the
Methadone clinic to subsidize cigarette sales.

Here, the Tribe cannot prove the proximate causation element of its RICO claims because the damages it alleges are not a direct result of Chapman's alleged wrongdoing—the predicate acts of wire and mail fraud. For the Smoke Shop claims, the Tribe states Chapman "facilitated NAV's purchase of property in the proximity of Blue Stilly."¹⁹ These allegedly "wrongful acts" of Chapman are a far cry from the claimed injury that "the Tribe was deprived by the Director and Officer Defendants (other than Thomas Ashley) of the opportunity to profitable (and legally) operate the smoke shop..." *Id.* at ¶ 3.39. Note also Chapman is not an officer or director of the Tribe. A court cannot find the directness requirement is satisfied when the harm is so attenuated from the alleged RICO violation in this way. *See e.g., Anza*, 547 U.S. at 458 ("The cause of [plaintiff's] asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State).").

2. Independent or Intervening Factors Cut Off Any Causation of Chapman for the RICO Real Estate Claims

One of the underlying premises for the proximate cause directness requirement to sustain a RICO claim is the futility that can arise when a court attempts to ascertain the damages caused by some remote action or independent contributing or intervening factors. *See Anza*, 547 U.S. at 458, *citing Holmes*, 503 U.S. at 269. When it is difficult to determine what harm is directly attributable to defendants, versus attributable to independent actors, the court should dismiss the RICO claim. *Sybersound Records*, 517 F.3d 1137, 1148, (9th Cir. 2008).

Here, the sellers for each of the 23 properties referred to in the Third Amended Complaint, ¶ 3.53, are the independent actors cutting off proximate causation from the harm alleged under the Real Estate claims. The harm the Tribe alleges, that it paid more than the fair market value of the properties (which also drive higher commission payments), and the specific damages attributable to Chapman, are in fact entirely contingent on the price the sellers were willing to accept for their respective properties. This independent inquiry prevents a

¹⁹ Dkt. # 190; Third Amended Complaint, at ¶ 3.34.

1 finding of proximate cause against Chapman. *See Anza*, 547 U.S. at 458-59 (Court found
 2 damages of lost sales attributable to RICO violation could not be determined due to role of
 3 customer decision-making and affect of pricing); *see also Sheperd v. American Honda Motor*
 4 *Co. Inc.*, 822 F.Supp. 625, 630 (N.D. Cal. 1993) (requiring the court or a jury “to assess what
 5 portion of [plaintiff’s] diminished profitability was attributable to defendants’ wrongful RICO
 6 conduct, apart from other factors, would be an exercise in sheer speculation). The Tribe could
 7 not have purchased any of the properties without the sellers both being necessary for the
 8 transaction and also setting the sale prices, yet the Tribe has never alleged the individual sellers
 9 were RICO co-conspirators, despite three substantive amendments to the Complaint over the
 10 course of two years. Further, several of the sellers have indicated they would not have sold
 11 their property for less than the actual sale price, and other properties were listed by their sellers
 12 at prices that were higher than the actual sale price paid by the Tribe.²⁰ Put simply, the role of
 13 the sellers prevents any finding of proximate causation between Chapman’s pled RICO bad acts
 14 and the Tribe’s alleged injuries from “inflated prices.”

15 **3. The Tribe is Unable to Determine Damages Directly Attributable to** 16 **Chapman Without Engaging in an “Intricate, Uncertain” Inquiry**

17 Congress never intended RICO to be used in a case like this where the court is required
 18 to attribute harm and perform intricate calculations of damages allocated to various defendants
 19 and third parties. *See Holmes*, 503 U.S. 258, 269 (1992). Instead, the U.S. Supreme Court has
 20 instructed the lower courts not to apportion damages among acts violative of RICO and other
 21 independent factors. *Id.* The Court has refused to engage in complicated, intricate, and
 22 uncertain calculations to determine damages and instead has dismissed RICO claims on this
 23 basis. *See e.g., Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008)
 24 (dismissing RICO claim seeking damages where, given the causal chain, it would be difficult to

25 ²⁰ See the declarations of Martin Robinett, Donna Marie MacWhyte, Kenneth and Barbara Leder, Robert
 26 Leatherman, Robert Henken, Stephen Hayes, Dominique Ruybal, Darlene Strotz, Grace Barlund, Tim Herdt,
 and Joyce Morehouse, submitted in support of this Motion.

ascertain damages because there were numerous alternate causes that might be the actual source of sources of the alleged harm); *see also Anza*, 547 U.S. at 460 (plaintiff's decreased sales (the injury alleged) could not be determined to be the direct result of the defendants' alleged fraud because businesses gain and lose customers for various reasons and of the requirement of "proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.")

The Tribe's pled RICO damages of paying "inflated prices" for the properties arose from the plethora of decisions each separate and distinct seller made in determining what price to sell their individual properties. Allowing the Tribe's damages claim to go forward would necessarily require the court to engage in a highly speculative analysis of each individual seller and their individual sales requirements to determine that all of the sale criteria, including price, were entirely influenced by Chapman's pled RICO wrongdoing, and not the result of any other free market factors such as:

1. A seller's emotional attachment to the property;
2. A seller's bias (or lack thereof) when the seller learned the Tribe was interested in their property;
3. A seller's understanding of what the Tribe intended to use their property for after the sale;
4. A seller's desire to sell more property to the Tribe (the "volume discount" sales argument);
5. A seller's desire to sell this one and only piece of property to the Tribe (the "one and done" sales argument);
6. A seller's equity in a specific piece of property relative to the sales price offered by the Tribe;
7. The price the seller paid for the property relative to the Tribe's offer to purchase;
8. The seller's perception of the general real estate market for the specific piece of property;

1 9. The actual market for the specific piece of property as defined by a
2 professional appraiser;

3 10. The seller's understanding of any restrictions for development of the
4 property (i.e. zoning, environmental, infrastructure, etc.);

5 11. Any actual restrictions on development of the property;

6 12. The Tribe's desired end use for each individual property; and

7 13. The proximity of each property to other land owned by the Tribe.

8 Further complicating the analysis is the Tribe's assertion that it would only have paid
9 "fair market value" (as defined by the Tribe's Expert Report) for each individual property—
10 adding another layer of uncertainty as to whether the Tribe would have *actually been able to*
11 *purchase any of the properties.*²¹ These types of elaborate inquiries and indefinite calculations
12 are exactly what the proximate cause requirement seeks to prohibit in RICO cases. *Anza*, at
13 459.

14 The same can be said for any speculation into the damages related to the financing and
15 operation of methadone clinic: inquiry into whether "more conventional financing" is or was
16 available, what financing the Tribal Board would actually select absent any alleged
17 wrongdoing, and what effects that financing chosen would have on the Tribe's ultimate
18 revenues is impossibly speculative and uncertain, requiring consideration of numerous
19 indeterminable factors and repercussions.²² The same goes for the Tribe's 'general damages'
20 claim: the Tribe admits it is speculating and cannot even provide a definite amount of the claim
21 itself, despite two years of discovery.²³ The Tribe offers no expert opinion, expert witness, or

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23 ²¹ Cramer Decl. at Exh F; Tribe's letter dated April 9, 2012.

24 ²² Any inquiry into the Tribe's pled damages based on the methadone clinic financing "ignores numerous
uncertainties" much like the uncertainties found in the Tribe's damage claim related to the Tribe's failure to
enter into a cigarette sales compact with the State of Washington which were dismissed by this Court.

25 ²³ Cramer Decl. at Exh. B: Tribe's Supplemental Responses to Nelson's Second Discovery Requests, at pgs. 2-
3; "General damages arising from Nelson's misuse of the Tribe's employees, intellectual property, goodwill and
good name. These damages are ongoing, and the precise amounts unknown. The Tribe, a non lawyer-
26 completely untrained and unqualified to evaluate "general" or non-economic damages that the Tribe may be
entitled to recover in this action, currently estimates these general damages to be in the range of \$250,000 to

1 even basic explanation to define the “general damage claim,” and fails to link the claim to any
 2 RICO actions of any Defendants. Stated another way—and assuming the Tribe has even
 3 sustained ‘general damages’—there is no way for the Court to determine whether the Tribe has
 4 lost any “good will and good name” as a result of Defendants’ RICO predicate acts or if such
 5 loss, or a portion of the loss, is the result of independent factors like the Tribe’s own business
 6 practices in the methadone clinic community. This division and apportionment of damages is
 7 exactly what the courts cannot do in RICO cases. *See Holmes*, 503 U.S. 258, 269 (1992).

8 A similar intricate apportionment calculation would be required for the Smoke Shop
 9 Claims. It would be pure speculation to attempt to determine what profits the Tribe may or
 10 may not have made in the smoke shop absent the pled wrongful acts, even if the Tribe signed a
 11 compact. There is no way to even guess if the Tribe would have made more money, and, if so,
 12 what increased amount could be attributed to the absence of any wrongful acts versus normal
 13 business and consumer considerations. In fact, this Court has already acknowledged that
 14 assuming the Tribe would have entered a compact with the State and could have increased its
 15 revenues “ignores numerous uncertainties.”²⁴ The Tribe claims it was injured by Chapman
 16 because it was deprived of the opportunity to profitably operate the smoke shop, yet there is no
 17 certainty that, absent any wrongful conduct, the Tribe would even profit.²⁵ With all these
 18 uncertainties, it is not possible to even determine the amount of damages the Tribe may be
 19 entitled to; attempting to do so would be an indirect, massive, and complex calculation that the
 20 Supreme Court sought to preclude in *Holmes* and should not be allowed here. Just as this court
 21 stated in *Association of Washington Public Hospital Districts*, “[t]he difficulty of ascertaining
 22 the damages attributable to defendants’ alleged wrongful conduct and the complexity involved

23
 24
 25 \$500,000. The foregoing estimates are based upon the documents produced in this litigation (including those
 26 referenced above), and the testimony provided in the course of discovery during this litigation.”

²⁴ Dkt. # 65, Order Denying Schroedl’s Motion to Dismiss, page 14.

²⁵ Dkt. # 65, page 14 (observing, “it is uncertain where the Tribal Board would have voted to enter a compact”;
 “it is uncertain whether other members of the Tribal Board would have voted to enter a compact”; “it is

1 in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiff's
2 actions." 79 F. Supp. 2d at 1225.

3 **D. THE TRIBE'S REMAINING CLAIMS ALSO SHOULD BE DISMISSED**

4 **1. Breach of Fiduciary duty claim**

5 Breach of fiduciary duty requires the plaintiff prove (1) existence of a duty owed, (2)
6 breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the
7 injury. *Micro Enhancement v. Coopers & Lybrand, LLP*, 110 Wash.App. 412, 40 P.3d 1206,
8 1217 (2002), citing *Miller v. U.S. Bank of Wash.*, 72 Wash.App. 416, 426, 865 P.2d 536 (1994).
9 Thus, the proximate cause and injury requirements under the RICO claims also apply to the
10 Tribe's pled breach of fiduciary duty against Chapman—requirements the Tribe cannot meet.

11 The Tribe ties the breach of fiduciary duty claim to Chapman's role as agent for the
12 Tribe and claims Chapman inflated the price of the properties for their own benefit. However,
13 this claim has insurmountable problems, including the Tribe cannot establish that any breaches
14 of duties owed by Defendant Chapman proximately caused the "inflated prices." Eleven (11)
15 sellers of the properties have stated that they would not have sold their properties to the Tribe
16 for anything less than the actual sale price—which completely negates the Tribe's argument
17 Chapman inflated the prices of these properties to boost commissions. Because the Tribe could
18 not have purchased the properties for any price less than what was actually paid, the Tribe
19 cannot sustain its claim that Chapman "greatly inflated prices" or wrongly increased
20 commissions or profits for himself.²⁶

21 Still other properties were purchased at prices below the seller-set listing price, further
22 calling into question the validity of the breach of fiduciary duty claim against Chapman.²⁷

23
24 uncertain whether a higher tax rate could have resulted in higher tax revenue"; and "higher taxes may decrease
25 sales so much that tax revenue decreased rather than increases").

26 ²⁶ Third Amended Complaint ¶ 10.4.

27 ²⁷ See the Declaration of Martin Robinett, dated April 23, 2012, at page 2 and Exhibit A, identifying the sale
28 price of the Victoria Ranch property to the Tribe as \$3,800,000, with an initial list price of \$4,000,000; Cramer

1 Additionally, the Tribe has now taken the position that the maximum price they would
 2 have paid for each property in the Third Amended Complaint is the “fair market value” as
 3 defined by the Tribe’s Expert Report—but the claimed “fair market value” is significantly
 4 below *the actual listing prices for many of these properties*.²⁸ Therefore the Court and
 5 Chapman are left wondering if the Tribe would have been able to purchase any of the properties
 6 regardless of any alleged breaches of fiduciary duties by Chapman. This wonderment
 7 continues because the Tribe, despite pleading it purchased these properties at “greatly inflated
 8 prices,” has failed to sell or otherwise divest themselves of any of the 23 properties—and has
 9 no intention to ever sell these properties.²⁹ Stated another way: The Tribe wants to *purchase*
 10 *the 23 properties at prices well below their sellers bottom line price*, get the benefit and use of
 11 the property (for years in some instances), and then look to Chapman to pay the difference
 12 between the hypothetical purchase price (the Tribe’s Expert’s “fair market value”) and the
 13 “greatly inflated price” that was the actual sale price on the properties—all under the pled
 14 theory of breach of fiduciary duty.

15 Chapman respectfully submits that the Tribe’s position is wholly unsustainable under
 16 any legal theory, let alone a breach of fiduciary duty claim where many of the properties were
 17 purchased at less than the seller’s asking prices and for the actual seller’s bottom line price.

18 Further, the Tribe has recently purchased twelve (12) additional properties after the
 19 commencement of this case *at prices significantly higher than assessed value*, including the
 20 following properties: (1) The “Anderson” Property, which was purchased by the Tribe for
 21 \$1,400,000, a price which is *five times* the tax assessed value of \$292,100³⁰; (2) the “Nursery 2”

22
 23 Decl. at Exh. A; MLS listing reports for Purdy, Nortep, White, Lind, and Henault properties; and Dkt. # 190;
 24 Third Amended Complaint at pgs. 22-24 for the Tribe’s purchase prices of these properties.

25 ²⁸ See Cramer Decl. at Exh. F; Tribe’s letter dated April 9, 2012.

26 ²⁹ Cramer Decl. at Exh. G; Shawn Yanity Deposition, dated April 20, 2012, at page 179:18-23.

³⁰ These assessed values are at the date of purchase as identified by the Tribe in the Tribe’s Supplemental
 Responses to Chapman’s First Set of Discovery, dated May 4, 2012, at pg. 10-11, attached as Exh. D to the
 Cramer Decl.

Property, which was purchased by the Tribe for \$2,300,000, a price which is *four times* the tax assessed value of \$538,600; (3) the “Brenner” Property, which was purchased by the Tribe for \$675,000, a price which is *three times* the tax assessed value of \$214,300, and; (4) the “Debastani AAD” Property, also called the “Contractors Office,” which was purchased by the Tribe for \$200,000, a price which is *three times* the tax assessed value of \$63,300.³¹ However, on all of these properties the Tribe is not claiming a breach of fiduciary duty (or RICO wrongdoing, for that matter) as a result of their real estate broker or agent, despite paying purchase prices well in excess of the tax assessed value.

Finally, the breach of fiduciary claim appears to be, on balance, little more than a buyer’s remorse claim. Hindsight is 20/20 when it comes to recent events in the real estate market, but the Tribe’s buyer’s remorse does not give rise to an automatic claim for breach of fiduciary duties. The Tribe told Chapman to purchase the properties identified in the Third Amended Complaint, and Chapman followed the Tribe’s orders, oftentimes purchasing the properties at less than the seller’s asking price and/or at the seller’s bottom line price. The Tribe’s buyer’s remorse just does not equal a breach of fiduciary duty claim.

2. Fraud and/or Negligent Misrepresentation

The fraud and/or negligent misrepresentation claims fail for the same causation and consequential damages issues that doom the RICO claims. The Tribe cannot prove causation, nor “consequent damage” or “pecuniary loss” in relation to its claim of fraud and/or negligent misrepresentation. *See Kirkham v. Smith*, 106 Wash.App. 177, 183 (2001) (a necessary element of fraud is proof of “consequent damage” as a result of reliance on the representation); *Lawyers Title Ins. Corp. v. Baik*, 147 Wash.2d 536, 545 (2002) (negligent misrepresentation imposes “liability for pecuniary loss caused to them by their justifiable reliance”). In order to maintain a claim for relief grounded in fraud, “the plaintiff must have suffered substantial actual damages,

³¹ Cramer Decl. at Exh D; Tribe’s Supplemental Responses to Chapman’s First Set of Discovery, dated May 4, 2012, at pg. 10-11.

1 not nominal or speculative.” *Living Designs Inc. v. Ei Dupont De Nemours and Co.*, 431 F.3d
 2 353, 366 (9th Cir. 2005), *quoting* Prosser, Law of Torts at 648 (3d ed. 1964). “Plaintiffs suing
 3 in fraud are required to show both that they suffered actual pecuniary loss and that such
 4 damages are definite and ascertainable, rather than speculative.” *Id.* The aim of compensation is
 5 to place the plaintiffs in the same position they would have occupied had they not been
 6 defrauded. *Id.*

7 Here the Tribe is unable to prove any actual, non-speculative damages as a result of
 8 Defendants’ alleged fraud because the Tribe has not sold, nor has any intention of ever selling,
 9 any of the properties identified in the Third Amended Complaint.³²

10 In addition, losses do “not afford any basis for recovery” if “brought about by business
 11 conditions or other factors.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton
 12 on Law of Torts §110, p. 767 (5th ed. 1984). An essential element of any claim for fraud in
 13 Washington is proximate cause. *Ass’n of Wash. Public Hosp.*, 79 F. Supp. Ed 1219, 1228,
 14 *citing Amtruck Factors v. International Forest Products*, 59 Wash.App. 8, 14, 795 P.2d 742
 15 (1990). The alleged losses of the Tribe in relation to the real estate were brought about by the
 16 prices set by the independent sellers, a “business condition or other factor” that Chapman
 17 cannot be held liable for. Indeed, none of the independent sellers are defendants in this
 18 litigation nor have they been subject to discovery or depositions in this case by the Tribe—it is
 19 as if the Tribe believes every single real estate transaction identified in the Third Amended
 20 Complaint was orchestrated entirely by Chapman and other Defendants acting alone.

21 For the reasons heretofore stated in relation to the RICO claims, the Tribe cannot
 22 establish its pled fraud damages are not the result of business conditions or other factors or
 23 meet the fraud proximate cause element as a matter of law and the fraud and negligent
 24 misrepresentation claims should be dismissed.

25 _____
 26 ³² Cramer Decl. at Exh. G; Shawn Yanity Deposition, dated April 20, 2012, at page 179:18-23.

1 **3. Civil Conspiracy Necessarily Rests on Conduct Alleged in Other Claims.**

2 Based on the above, the Tribe's civil conspiracy claim also must fail because there are
 3 no underlying illegal acts that can be proven against Chapman. In Washington, a civil
 4 conspiracy claim must be based on underlying "actionable wrongs," "overt acts," or a "tort
 5 working damage to the plaintiffs." *Ass'n of Wash. Public Hosp. v. Philip Morris Inc.*, 79 F.
 6 Supp. 2d 1219, 1229 (W.D. Wash. 1999), *citing W.G. Platts, Inc. v. Platts*, 73 Wash.2d 434,
 7 438-40, 438 P.2d 867 (1968). A conspiracy claim fails if the underlying act or claim is not
 8 actionable. *Id.* Here, with the failure of the RICO claims and related claims, the Tribe's claim
 9 for civil conspiracy cannot be sustained and should be dismissed.

10 **4. Defendants Were Not Unjustly Enriched "At the Expense of the Tribe"**

11 The Tribe's claim of unjust enrichment is founded on the theory that Defendants
 12 received benefits "at the expense of the Tribe."³³ As with the Smoke Shop Claims and the Real
 13 Estate Claims, the Tribe has failed to prove with any specificity Chapman has been enriched
 14 with itemized benefits that justly belong to the Tribe. Therefore this claim should be dismissed.

15 **IV. CONCLUSION**

16 The Tribe's claims against Chapman are not supported by facts and have no basis in
 17 law. Because the Tribe has no standing to bring its RICO claims, cannot prove the causation
 18 connection between the pled wrongful acts and the claimed damages, and all of the Tribe's
 19 other claims hinge on the failed RICO claims, there is no genuine dispute of material fact, and
 20 no need for a trial. This Court should therefore dismiss all claims against Chapman as a matter
 21 of law.

22 ///

23 //

24 /

25 _____
 26 ³³ Dkt. # 190; Third Amended Complaint, at ¶ 14.3.

Respectfully submitted this 30th day of July, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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