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 and MICHELE NELSON, et. al. Defendants.	NO. 2:10-cv-00327 RAJ **DEFENDANTS NELSON'S MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION: RELIEF REQUESTED

Defendants David and Michele Nelson ("Nelsons") move for summary judgment dismissing the Third Amended Complaint ("TAC") for the reasons stated below. Nelson incorporates by reference the arguments made in their Fed.R.Civ.P 12(b)(6) motion to dismiss.[1] Throughout this motion, Plaintiff is referred to as "STOI" or "Tribe."

II. EVIDENCE ON WHICH THE MOTION IS BASED

Nelsons base their motion on the attached declarations of Andrew D. Shafer and David Nelson, and the exhibits attached to the declarations.

[1] Dkt. Nos. 196 and 212. However, Defendants Nelson concede that Plaintiff is a "person" under 18 U.S.C. 1961(3).

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III. ARGUMENT IN SUPPORT OF MOTION

A. Summary Judgment Standards.

Summary judgment is appropriate where there is no genuine issue of material fact. The moving party must initially show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must then show a genuine issue of fact requiring a trial. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must present probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). The court defers to neither party in resolving purely legal questions. *See Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999). For the reasons stated below, this matter is ripe for summary judgment dismissing the TAC.

B. The Court Should Dismiss the RICO Claims Against Nelson. In addition to the reasons contained in Dkts 196 and 212, Nelson offers the following:

1. The Second Claim is Time Barred. A civil RICO action must be filed within four years after the date of *an* act giving rise to the claim. *Rotella v. Wood*, 528 U.S. 549 at 553, 120 S.Ct 1075 at 1079, __ L.Ed.2d __ (2000). In *Rotella*, the court expressly rejected a limitations period that began to run when the last act of a "pattern of racketeering activity" was discovered. *Id* at 1082. Instead, the period begins to run when a defendant commits *an act* actionable under RICO. *Id* 1083-1084.

STOI's Second claim alleges Nelson's involvement in the Blue Stilly smoke shop violates RICO. Nelson provided financing to Ed Goodridge, Sr. for the smoke shop in 2003.[2] The "wrong" on which the second claim is predicated is Nelson's financing. Goodridge's

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ownership interest in the shop was a well known fact to members of the Tribe.[3] That conduct occurred eight years before STOI filed this action. Since the second claim arises from Nelson's loan to Goodridge, which facilitated Goodridge's ability to operate his business to the Tribe's alleged detriment, it is time barred. The court should dismiss the second claim.

2. Failure of Proof-The Second Cause of Action. While STOI alleges patterns of "racketeering" activity in TAC ¶¶5.5, 5.6 and 5.8, no evidence ties that alleged conduct to harm suffered. Instead, STOI alleges that because of the unlawful conduct of the Blue Stilly by Goodridge and Schroedl, STOI was deprived of the ability to operate the shop for its benefit.

Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S. Ct. 1991, 1993, 164 L. Ed. 2d 720 (2006) requires a direct nexus between the predicate acts and damages. There, Anza and Ideal were competitors. To gain a price advantage, Anza did not charge sales tax. It falsely reported its activities to the state. Ideal claimed RICO injury due to Anza's false reporting. In relying on *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311 (1992), the Court stated at 547 U.S. at 452,

> Ideal cannot maintain its § 1962(c) claim. Under *Holmes*, proximate cause for § 1964(c) purposes requires "some direct relation between the injury asserted and the injurious conduct alleged." [citation omitted] The *direct victim of the alleged RICO violation is the State of New York, not Ideal. Ideal's claim is too attenuated to satisfy Holmes' requirement of directness*…Ideal claims lost sales because of National's decreased prices, but National could have lowered prices for reasons unrelated to the asserted tax fraud, and Ideal's lost sales could have resulted from other factors as well. (Emphasis supplied)

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[2] David Nelson Declaration ¶ 29.
[3] Soholt 30(b)(6) Dep 38:13-19 (Shafer Declaration, Exhibit 3).

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Nowhere does the evidence connect the predicate acts alleged in ¶4.6 and 5.5—5.8 and the harm suffered (¶5.8). The harm alleged in ¶5.8 stemmed from the Tribe being, "deprived…of the opportunity to profit by operating the smoke shop and to utilize and/or invest the funds generated therefrom." This allegation is the essence of STOI's usurpation claim (12th Cause of Action). Usurpation of opportunity is not a racketeering activity defined in 18 U.S.C. §1961(1). Nor would any evidence submitted to support the claim satisfy the Supreme Court's direct injury requirements as articulated in *Holmes* and *Anza*. STOI cannot prove any direct cause between the "racketeering activity" and its lost profits. The harm suffered (as alleged in ¶5.8) was not from the tobacco trafficking and money laundering. It was from Goodridge and Schroedl's very operation of the business.[4] STOI's claimed loss would have occurred even in the of the alleged racketeering activity. As such, STOI cannot prove causation. Accordingly, the court should dismiss the second claim on this alternative ground.

3. Failure of Proof-the Third and Fourth Causes of Action. STOI's third and fourth claims allege RICO violations pertaining to the real property purchases and funding the methadone clinic. STOI bases these claims on allegations of mail and wire fraud.

(a) Mail Fraud. 18 U.S.C. §1341 prohibits the use of United States mail or the use of an interstate motor carrier, for the purpose of furthering any scheme to defraud. David Nelson has testified that he *never* mailed any documentation on property transactions or funding the methadone clinic (Nelson Declaration ¶24). Absent proof that Nelson or

[4] The Tribe initially alleged damage arising from the loss of tax revenue. STOI has since abandoned that theory, instead alleging that it was deprived of the profits from the shop due to Goodridge and Schroedl's usurpation of opportunity, as set forth in the first and twelfth causes of action.

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Chapman used the facilities defined in 18 U.S.C. §1341, the court must dismiss the third and fourth claims with respect to the mail fraud allegations.

(b) Wire Fraud. 18 U.S.C. §1343 prohibits the use of interstate wire communications to further any scheme to defraud. As stated in *U.S. v.* Woods, 335 F.3d 993 at 997, wire fraud has four elements as follows,

> (1) that the defendant knowingly devised or knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations or promises; (2) that the statements made or the facts omitted as part of the scheme were material; (3) that the defendant acted with the intent to defraud; and (4) that in advancing or furthering or carrying out the scheme, the defendant used the mails/wires or caused the mails/wires to be used.

The law is clear. Wire fraud exists only if there is an interstate communication. *United States v. Cusino,* 694 F.2d 185, 186 (9th Cir. 1982) [wiring funds between banks in California and Nevada satisfies interstate wire communication element]; *United States v. Van Cauwenberghe,* 827 F.2d 424, 430 (9th Cir. 1987) [indictment that alleges international communication by wire originating in Los Angeles and transmitted Dallas and San Antonio, Texas, to Mexico City satisfies interstate communication requirement].

As David Nelson testified at ¶24 of his declaration, he regularly communicated by fax and email between his Arlington, Washington office and Frontier Bank's Arlington office as well as with the title companies in Everett, and the tribal office in Arlington. None of the fax communications were interstate. Hence summary judgment of dismissal is warranted.

The circuits are split on whether e-mail communications are intrastate communications. No published decision in the 9th Circuit has squarely addressed this issue. However, *United States v. Selby*, 557 F.3d 968, 979 (9th Cir. 2009), indicates that the communication must be interstate. There, Selby, a federal employee, forwarded a

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confidential, internal email from her office in Oregon to her husband, who worked in Vancouver, Washington.

One unpublished case in this district has addressed the question. See, *U.S. v. Gouin*, 2008 WL 1886158 (2008) [the internet is inherently interstate in nature]. *Gouin* relied on *U.S. v. MacEwan*, 445 F.2d 237 (3rd Cir. 2006) [child pornography statute violated by mere transmittal of child pornography by the internet]. In *Gouin*, the trial evidence proved that Gouin had obtained materials depicting children, who resided in six other states, being sexually exploited. Gouin's possession of these unlawful images proved he had received them in an interstate transaction which satisfied the law's requirements.

The Tenth Circuit reached a contrary decision in *U.S. v. Schaefer*, 501 F.3d 1197 (10th Cir 2007) [child pornography statute involving Internet transmissions]. The Tenth Circuit held that merely using the internet is not proof of an interstate wire communication. Because the Tenth Circuit analogized the pornography trafficking statute to the wire fraud statute, this decision is particularly useful here. At 1201-1202, the *Schaefer* court reasoned,

> Congress elected not to reach all conduct it could have regulated under § 2252(a). Congress's use of the 'in commerce' language, as opposed to phrasing such as 'affecting commerce' or a 'facility of interstate commerce,' *signals its decision to limit federal jurisdiction and require actual movement between states to satisfy the interstate nexus*…The language of 18 U.S.C. § 1343 (the wire fraud statute), which uses 'in commerce' language very similar to that found in § 2252(a), supports this view. *Section 1343's 'in commerce' terminology has been repeatedly held to require that communications actually cross state lines to support a conviction.* (Emphasis added)

The court's rationale in *U.S. v. Schaefer* is compelling here. The wire fraud statute does not impose liability for merely using instrumentalities of interstate commerce. It requires an actual interstate communication. Absent proof of an interstate email or fax, there is no wire fraud. *CoFacredit, S.A. v. Windsor Plumbing, Supply Co. Inc.* 187 F.3d. 229 (2d

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Cir 2007). As in *Schaefer*, merely sending e-mails does not prove interstate communication. In fact, even the complaint does not allege interstate communications by wire (¶6.7(c)(i)-(iv)). In summary, none of the 23 real property transactions involved interstate wire communications. The court should dismiss the third and fourth claims as they pertain to the property transactions.

4. No Proof of Materiality. In denying Nelson's 12(b)(6) motion, the court relied on *U.S. v. Woods*, 335 F.3d 993 (9th Cir. 2003) to hold that the communications themselves do not have to be false to satisfy the elements of mail and wire fraud so long as the scheme of communications is materially false. However, the facts in Woods are distinguishable from the facts here. In *Woods*, the defendants concocted an elaborate scheme to sell magazines to senior citizens, in substantial part by omitting to disclose material facts of the transaction and by evading questions raised by the victims. The totality of the omissions and diversions created the material falsity of the communication. No analogous facts exist here. Here, the recipients of the alleged mail and wire frauds were not victims as was the case in *Woods*. They were the banks, escrow and title offices involved in the property transactions.

The Tribe was not harmed by any of the wire communications because those communications were sent after STOI had acted. Irrespective of whether the communications contained any falsehoods, they are not material because they did not induce any action by anyone which caused STOI's alleged harm. For these reasons, *Woods* is not controlling.

Nelson urges the court to adhere to *U.S. v. Neder*, 527 U.S. 1, 25, 119 S.Ct. 1827, 1841 (1999) and hold that, "materiality of falsehood is an element of the federal mail fraud,

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wire fraud, and bank fraud statutes." On this additional basis, the court should dismiss the third and fourth RICO claims predicated on wire and mail fraud.[5]

5. Third and Fourth Claims are Time Barred. To the extent STOI contends that any of Nelson's actions in dealing with the real property constitute wire fraud, any aspect of the claim arising from conduct that occurred before February 25, 2006, is time barred.[6] *Rotella v. Wood, supra* at 553. Even if the court otherwise rejects the arguments above, the third and fourth claims should, at the least, be dismissed with respect to any pre February 25, 2006 transactions. In like fashion, the allegations pertaining to the funding of the methadone clinic all occurred in 2003, well outside the four year statute of limitations that *Rotella* mandates be followed. As such, the court should dismiss the third and fourth claims based on the passage of time.

Finally, STOI contends that Nelson engaged in wire and mail fraud in his efforts to develop clinics in Oklahoma by trading on the Tribe's "good office." This claim too fails for several reasons. First, STOI knew of Nelson's efforts through NHS because it was promised a 5% commission from revenue NHS generated through the use of STOI's "good office." NHS' failure to pay what it owes is not at issue here. Second, NHS is not a party to this action. It is a necessary party. Fed.R.Civ.P 19(a). As such, this is truly a "red herring" issue in this case.

6. The Plaintiff is a Sovereign-It Lacks Standing. While STOI is a "person" as defined in 18 U.S.C. 1961(3), its status does not automatically confer standing to sue

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[5] *Bridge v. Phoenix Bonding and Indemnity Co.*, 553 U.S. 638, 128 S.Ct. 2131 (2008) does not require a different conclusion because STOI cannot overcome its burden of proving materiality.

[6] Those transactions are summarized in ¶3.53(a) through (k) of the TAC.

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under RICO. In fact, based on STOI's own description of itself, it lacks standing to bring this claim.

In ¶1.1 of its Third Amended Complaint ("TAC"), STOI describes itself as a recognized Indian tribe that,

> "exercises all the inherent powers of a sovereign government, including…regulating the conduct of business on the Tribe's and, and imposing Tribal taxes on those doing business…within the Tribe's jurisdiction *to protect and preserve the political integrity, economic security and health and welfare of the Tribe and its members*.…The Tribe expressly reserves its inherent sovereign immunity."

RICO claims arising under 18 U.S.C. §1964(c) are only available to persons harmed by patterns of *racketeering activity* which *cause direct damages to their business or property*. The question raised is whether STOI, as a sovereign, is a person who has been injured in its business or property by *reason of a racketeering activity* as defined in 18 U.S.C. 1961(1).

The 9th Circuit addressed this issue in *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 976 (9th Cir. 2008). There, the county brought a RICO action against employers who had used undocumented foreign farm laborers. The county sought recovery of costs associated with providing social services to these workers. Those costs were the alleged "injury to property or enterprise." The court rejected this argument. The court ruled that a sovereign acting in its *parens patriae* capacity lacks RICO standing. At 976 the court stated,

> [T]he law commonly distinguishes between the status of a governmental entity acting to enforce the laws or promote the general welfare and that of a governmental entity acting as a consumer or other type of market participant. [citation omitted] *When a governmental body acts in its sovereign or quasi-sovereign capacity*, seeking to enforce the laws or promote the public well-being, *it cannot claim to have been "injured in [its] ... property" for RICO purposes* based solely on the fact that it has spent money in order to act governmentally. (emphasis added).

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Here, STOI has asserted its sovereignty. Like Canyon County, STOI is acting in its *parens patriae* capacity, "*to protect and preserve the political integrity, economic security and health and welfare of the Tribe and its members.*" (TAC 2:19-22). *Canyon County* instructs that when a governmental entity is acting as sovereign, seeking to protect its general economic interest, it lacks RICO standing. The court should follow *Canyon County* and dismiss the RICO claims against Defendants Nelson.

C. The Court Should Dismiss the Seventh Claim.

The Seventh claim alleges Nelson and Chapman breached their fiduciary and statutory duties to the Plaintiff. Even assuming the court concludes that Nelson was in a fiduciary relationship with STOI,[7] dismissal is warranted for the reasons stated below.

1. Period of Limitations is Three Years. The statute of limitations for a breach of fiduciary duty claim is three years. *Hudson v. Condon*, 101 Wn.App.866 at 874 (2000). The claim accrues, and the statute of limitations begins to run, when the breach of duty is discovered, or reasonably should have been discovered. *August v. U.S. Bancorp*, 146 Wn. App. 328 at 342 (2008). Unless the evidence is undisputed, or unless reasonable minds cannot differ, what a person knew or should have known at a given time is ordinarily a question of fact. *Gillespie v. Seattle–First Nat'l Bank*, 70 Wn. App. 150, 170, 855 P.2d 680 (1993). The issue of whether a plaintiff has suffered actual damages triggering the statute of limitations can be decided as a matter of law if reasonable minds could reach but one conclusion. *Hudson v. Condon, supra* at 875. As explained below, STOI knew all the details on which it has based its seventh cause of action before it made any purchase commitments.

[7] Whether the fiduciary relationship exists is an issue of law for the court to decide. *Moon v. Phipps*, 67 Wn.2d 948, 411 P.2d 157, 161 (1966).

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As such, claims accruing before February 25, 2007 (this suit was filed February 25, 2010) are time barred. Claims based on ¶3.53(a) through 3.53 (k) should be dismissed.

2. The Tribe Had Actual Knowledge of Facts to Put it on Notice. The Tribe contends that in each of the twenty three transactions identified in the Seventh Cause of Action, Nelson or Chapman induced the Tribe to purchase the parcels at inflated prices to inflate commissions. Paragraphs 3.53(a) through 3.53(w) of the complaint allege that the properties sold for multiples of the "market value" set by the Snohomish County Assessor. The evidence demonstrates STOI knew this fact at the time of each transaction.

The chart in Paragraph 4, and Exhibit 24, to Dave Nelson's declaration summarizes the documents STOI received before closing. Copies of those documents are included in Exhibits 1-23 to Nelson's Declaration. The exhibits demonstrate that STOI always received preliminary commitments for title insurance, which disclosed the assessor's valuation. It received the assessor's web pages in all transactions, and with valuation in all but Herdt and Oberg. In the fifteen bank-financed transactions, it also received copies of the bank's appraisals. Thus, well before closing, STOI had actual knowledge of the Snohomish County Assessor's "Market value." The Assessor's market values provide the basis for the claims in paragraphs 3.53(a) through 3.53(w). The evidence shows that STOI had this information *before* it made any commitment to buy these parcels.

More significantly, when Frontier Bank financed a purchase, as it did in 15 of these 23 transactions, STOI received a copy of the bank's appraisal before closing. Each financed transaction required the bank to obtain an appraisal. Of the eleven pre-February 25, 2007

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transactions, Frontier Bank financed seven of them.[8] The bank sent the appraisals to Eddie Goodridge, Jr.[9] In 9 of the 23 transactions, including five which were signed before February 25, 2007,[10] the sellers had listed the property with their own selling agents. In those instances, the seller set the price ceiling, not Mr. Nelson or Mr. Chapman.

There was no deception. In each instance, STOI was informed of values from multiple, independent, sources. In fact, on one transaction, Dreyer, (3.53(g)), Shawn Yanity, the Tribe's current Chairman, signed the purchase agreement and initialed each of the two Assessor's web pages which disclosed the "Market value" values for the two parcels involved in that transaction.[11] Yanity admitted having information that the purchase price of Dreyer was twice the "market value."[12] In another transaction, Henault, Shana Swanson, STECO's president, signed the purchase offer on the Tribe's behalf.

As shown by Exhibits 1 through 11 to the Nelson Declaration, STOI had the very information on which it bases the allegations in paragraphs 3.53(a) through 3.53(k), which allegations are the factual nucleus of the Seventh Cause of Action. Where as here, the evidence is undisputed, and where reasonable minds cannot differ, the court may decide this issue as a matter of law. *Gillespie v. Seattle–First Nat'l Bank*, *supra* at 170 (1993).

STOI knew what it was doing in each of these 23 transactions.[13] STOI entered into each of the pre-February 25, 2007 transactions more than three years before Plaintiff filed

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[8] Nelson Declaration, Exhibit 24.
[9] Nelson Declaration, ¶10.
[10] See Nelson Declaration, Exhibit 24.
[11] Yanity 4/20/12 Deposition 167:13-167:25 (attached as Exhibit 1 to Shafer Declaration); Nelson Declaration, Exhibit 7.
[12] Yanity Dep. 168:1-168:23 (Shafer Declaration, Exhibit 1).
[13] The testimony of STOI's former Executive Director, Eddie Goodridge, Jr. demonstrates he knew exactly what he was doing with respect to each transaction. See, Goodridge Dep. PP 152-154; 155:19-20; 164:8-24; 166:13-19; 168:15-170:10; 179:18-23; 183:23-184:21; 193:11-14; 198:25-199:12; 215:3-18; 216:8:24; 217-218; 220; 222-226;16; 228:23-229:24; 236:17-25 (Shafer Declaration, Exhibit 2).

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this suit. STOI could have asked questions about why prices were so much higher than the Assessor's valuations. For its own reasons it chose not to.[14] On the record before it, the court can, and should, conclude as a matter of law that the statute of limitations began to run when Plaintiff acquired the assessor's information, the title reports and the appraisals on the bank financed transactions. To the extent any of the seventh, ninth, tenth and eleventh claims stem from that knowledge, they are time barred.

3. No Evidence Supports the Breach of Fiduciary Duty Claim. During her 30(b)(6) deposition, Jody Soholt, a long time member of the STOI board of Directors and the witness designated by STOI to testify about real property transactions, was asked if STOI had any evidence, apart from its expert opinion report, to establish the values of the twenty three properties. She said no.[15] She also confirmed that the board voted unanimously in favor of all twenty-two transactions in which she participated.[16] Most telling, in her May 11, 2012 deposition[17] she was asked whether, knowing everything she now knows about the alleged relationship between Nelson and former Executive Director, Eddie Goodridge, Jr., she would have voted against any of the 22 transactions in which she cast an affirmative vote. She identified only one – the Purdy property because it was not well suited for its intended purpose as a buffalo ranch.[18]

Shawn Yanity, who at all relevant times was either the Tribe's Chairman and Vice Chairman, and a board member since 1998, also testified in this case. He testified that many factors affected what the Tribe was willing to pay for land. Often it had more to do with

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[14] In fact, Goodridge answered this question. *Supra*, footnote 13.
[15] Shafer Declaration, Exhibit 3 (Soholt 30(b)(6) Dep., 34:5-11).
[16] Soholt 30(b)(6) Dep, 41:10-14 and 49:10-17(Shafer Declaration, Exhibit 3).
[17] Ms. Soholt was deposed at the request of Nelson. The Tribe produced her as one of its two 30(b)(6) witnesses.
[18] Soholt Dep 77:8-78:11 (Shafer Decl., Exhibit 3).

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historical and cultural significance than with the pure economics of what the land was worth at its "highest and best use."[19]

Soholt and Yanity's testimony shows that in each instance, the Tribe received information about the valuation of the properties it acquired, before it made any binding commitments. Yanity also admitted that economic "value" was not what drove his decision making as Chairman.[20]

For that reason, Yanity testified, STOI continued to pay multiples of assessed value when it closed two transactions long after it had terminated its relationship with Nelson and Chapman. In 2010, STOI bought a parcel from a seller named Anderson for $1.4 million even though the Snohomish County Assessor's "Market value" was $236,000.[21] In a 2011 transaction, STOI paid $2.3 million to Dabestani for a parcel with a "Market value" of $580,000. [22] The excerpts from Yanity's deposition, identified in footnotes 24 through 27, explain why STOI paid four times the assessed value of these properties. Moreover, Brian Collins, STOI's in-house general counsel was involved in these processes.[23]

Paragraphs 3.56 through 3.59 identify transactions which STOI elected to forfeit rather than complete. The earnest money and option fees they paid are part of their damages claim regarding the real property. As STOI's seventh claim lacks merit regarding the 23 completed transactions identified in ¶ 3.53(a) through (w), so too do the accusations regarding the transactions which STOI refused to close, identified in ¶¶3.56-3.59.

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[19] Yanity Dep, 152:25-154:11 (Shafer Declaration, Exhibit 1).
[20] Yanity Dep. 153:2-25—154:11 and 154:16-22 (Shafer Dec., Exhibit 1).
[21] Yanity Dep., 143:6-10 (Shafer Dec., Exhibit 1).
[22] Yanity Dep. 147:12-15, (Shafer Dec., Exhibit 1).
[23] Nelson Declaration, Exhibit 26 is a compilation of e-mails between Collins and the seller's attorney on the Victoria Ranch purchase (3.53(v)).

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The supposed pretext for Nelson inducing the Tribe to purchase properties at inflated prices was his desire to earn higher commissions than he would have otherwise. This allegation is fantasy, not reality. Both Goodridge, Jr. and Yanity, the two primary decision makers during the relevant period, testified that price was only one factor they considered; and it was trumped by cultural, historical and economic development needs.

Paragraph 3.61 of the TAC alleges that the market rate for real estate commissions is anywhere from 5% to 7%. Nelson agrees with this allegation. Exhibit 27 to Nelson's Declaration demonstrates that his and Chapman's commissions, when averaged over the 23 transactions at issue, fall within the alleged range *even when measured against the opinions of fair market value on which STOI bases its case*. In fact, even using STOI's so-called, "appraisal values," on many transactions, the commissions were well within this industry range.[24] Finally, Exhibit 27 shows that even assuming that the Tribe's opinion evidence is competent and will withstand cross examination, the total of commissions paid was in the 7% range of the total *plaintiff's appraised value*. Measured against the actual, bargained for, market prices paid by STOI, Nelson and Chapman shared commissions that averaged 3.52% of prices paid. This percentage is well within industry standards, and in fact, was low by industry standards. [25]

In summary, the undisputed record demonstrates the following indisputable facts:

(a) In 22 of the 23 transactions, Chapman and Nelson attached copies of the then

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[24] Nelson Declaration, Exhibit 24 – White (3%); Hinds (3.1%); Lind (2.2%); Brenner (1.5%); Togstad (2.6). Eight other transactions were under 6%: Leatherman (5.3%); Henault (5.2%); RAD (5.5%); and MacWhyte, McCormack and McCormack 2, Putnam and Morehouse collectively (5.7%).

[25] Nelson Declaration, Exhibit 28 shows how significantly he discounted his commissions, agreeing to a discounted commission in five parcels only in the event all five closed.

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current tax reports from the Snohomish County Assessor.[26] Each copy of the assessor's report from the Assessor's website contained a summary of recent sales of the property, a statement of assessed values accompanied every purchase agreement the Tribe signed, or in the case of Herdt and Oberg, provided the Tribe with information with which the Tribe could have easily looked up the full assessor's reports on the Assessor's web site.

(b) In every case, the Tribe purchased title insurance, which showed the assessed value, and annual taxes due, on the endorsement page.

(c) Goodridge, Jr. had actual authority to purchase property for STOI.[27]

(d) 15 of the 23 transactions were financed by Frontier Bank. In each instance of bank financing, Frontier obtained independent appraisals, copies of which were delivered to the Tribe before closing. Mr. Goodridge received these documents.[28] In fact, the Tribe's copies of the appraisals are attached to Nelson Exhibits 3-5, 7-10, 12-14, 16-18 and 21 as evidenced by the Bates numbers indicating these documents came from STOI. Goodridge, as the Tribe's Executive Director, had actual authority to engage in these purchase transactions on behalf of STOI. As such, the Tribe had actual notice of appraised values before closing.

(e) While STOI knew of the appraised and assessed valuations, it did not use either of those data points to benchmark the prices it paid. (Goodridge Dep 196:16—197:6) In responding to STOI's hypothetical question regarding the White property, Mr. Goodridge testified about appraisals as follows, beginning at 196:24 and continuing through197:6,

Q: Did anyone on the tribe's behalf review the appraisals on the property?

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[26] Nelson Declaration, Exhibits 1-21 and 23.
[27] Yanity Dep, 163:3-5 (Shafer Dec., Exhibit 1).
[28] See Footnote 11 *supra* for a summary of Goodridge's testimony about his knowledge of appraised values as well as the Tribe's copies of the appraisals attached to Nelson Declaration Exhibits 1, through 23.

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A: Not typically. None of us are really experts, you know, in the tribal's leadership were experts in appraisals and I know Dave and Nathan looked at them, but again, they were—in some cases they were just a formality. The bank required it for financing. *We knew we were going to buy it regardless, so.*.

At 198:2—198:8, he further testified in response to STOI's hypothetical question about the White parcel as follows,

Q: Sir, if there would have been a second appraisal in 2006 for $290,000 and a first appraisal of $490,000, do you have an opinion as to whether or not the tribe would have gone ahead and purchased that property?

A: *I would have still purchased it*. It was one of the target properties along the front there that connected to the casino property.

(f) Goodridge presented these transactions to the Board for its approval (Goodridge, Jr. Dep 170:11-25)[29] and (Soholt 30(b)(6) Dep 43:14-25).[30]

(g) Of the 23 transactions at issue in this claim, the Board of Directors unanimously approved each transaction. (Soholt 30(b)(6) Dep, 41:10-14 and 49:10-17).[31]

(h) Of the 22 transactions on which Soholt voted, with everything she now knows, there was only one she would have voted against, the Buffalo Ranch (Purdy) because the land was not well suited for raising buffalo.[32] Her testimony is wholly consistent with the summary of Goodridge's testimony in paragraph (e) above.

(i) Of the 23 transactions, 11 were signed before February 25, 2007.[33] Assessor webpages were attached to the purchase and sale agreements for each of these transactions.

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[29] Goodridge, Jr. Dep 170:11-25 (Shafer Dec., Exhibit 2).
[30] Shafer Dec., Exhibit 3.
[31] Shafer Dec., Exhibit 3.
[32] Soholt Dep 77:8-78:11 (Shafer Dec., Exhibit 3).
[33] Nelson Declaration, Exhibits 1through 11.

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Additionally, the Tribe received copies of Frontier Bank's appraisals on the seven transactions that the bank financed.

(j) The commissions paid to Nelson and Chapman were below market rate commissions. Based on actual prices paid, they collectively received roughly 3.5% of price. Even accepting STOI's expert "valuation" of $11,310,000, Nelson and Chapman collectively received 7.2% of the total mythical, fanciful, "fair market value" opinion which the Plaintiff offers as "fact." Neither the record nor the math supports Plaintiff's theory.

Not only is the seventh claim time barred as to the transactions that were signed before February 25, 2007, but on the irrefutable evidence presented by STOI itself, Nelson did not breach his fiduciary duty to the Plaintiff. For this reason, the court should dismiss the seventh claim in its entirety.

D. The Eighth Claim. The Eighth Cause of action is not against Nelson. It accuses Ashley of theft. The record shows Nelson neither received anything from Ashley nor paid anything to him.[34] This accusation of conspiracy is meritless.

E. The Ninth Claim is Time Barred.

The Ninth Cause of Action alleges fraud and/or negligent misrepresentation by Nelson and Chapman. Fraud has nine elements as follows: (1) a representation of an existing fact; (2) the fact is material; (3) the fact is false; (4) the defendant knew the fact was false or was ignorant of its truth; (5) the defendant intended the plaintiff to act on the fact; (6) the *plaintiff did not know the fact was false*; (7) the *plaintiff relied* on the truth of the fact; (8) the plaintiff had a *right to rely* on it; and (9) damages. *Baertschi v. Jordan*, 68 Wn.2d 478, 482, 413 P.2d 657 (1966). The plaintiff must show every element by clear, cogent, and

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convincing evidence. *Id.* at 483, 413 P.2d 657. A failure of proof of any of the nine elements, defeats the claim. See, *Baddeley v. Seek*, 138 Wn. App. 333, 338-39 (2007).

1. The Undisputed Record Demonstrates a Failure of Proof. The gist of the fraud claim is set forth in Paragraph 12.2 of the TAC. STOI alleges Nelson and Chapman induced it to act based on four misrepresentations: (a) misrepresenting the true value of the properties; (b) misrepresenting that the methadone clinic was a high risk venture for which conventional financing was unavailable; (c) failing to disclosure personal financial interests or conflicts of interests the defendants had in many of these transactions and (d) concealing the identity of the true owners of the properties the defendants influenced the Tribe to buy.

As set forth in Part III(C) above, STOI had abundant information, from multiple, independent, sources which informed it of property values. The record demonstrates that it had actual knowledge of these facts. This unrebuttable fact defeats part (a) of the fraud claim. Nelson is entitled to summary judgment dismissing the fraud claim with respect to the real estate.

Even assuming, *arguendo*, that Nelson concealed true ownership and his so-called conflicting self interests, no evidence indicates that those concealments, even if proven, impacted the Tribe's decision making. In short, STOI cannot satisfy the reliance and causation elements. Jody Soholt, a 30(b)(6) witness for STOI, admitted that even if she knew everything then that she now knows, the only transaction she would have voted against was Purdy because the land was unsuitable for its intended purpose as a buffalo farm. Soholt Dep. 77:8-14[35] As such, the fraud claim based on concealment should be dismissed.

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[34] Nelson Declaration ¶ 28.
[35] Shafer Dec, Exhibit 3.

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The statement about the methadone clinic financing is sheer speculation. During the course of discovery, STOI has not presented any evidence to demonstrate that it would have been able to obtain "conventional" financing for this project. In fact, Goodridge Jr.'s deposition testimony demonstrates that he sought financing from Frontier Bank and grants from other entities.[36] Because of the federal and state licensing issues surrounding a controlled substance clinic, the bank was unwilling to lend on a venture that might never be licensed. On page 113:7 to 113:18 of his deposition, Goodridge Jr. testified about the tribe's difficulty in finding conventional financing for the clinic. He testified,

> 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.

Plaintiff has no evidence to rebut Goodridge. Absent such competent rebuttal evidence, the Plaintiff cannot satisfy the third element of proof of fraud - falsity. Moreover, there is no evidence that Nelson advised the Tribe of the difficulty of financing. That was Goodridge's conclusion based on his investigation of funding sources. For the foregoing reasons, the ninth claim must be dismissed with respect to the clinic funding.

2. There is No Competent Evidence of Negligent Misrepresentation. To establish negligent misrepresentation, a plaintiff must show by clear, cogent, and convincing evidence that the defendant negligently supplied *false information* the defendant knew, or

[36] Goodridge Jr. Dep., 109:1-11 and 112:22 through 113:18 (Shafer Dec., Exhibit 2).

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should have known, would guide the plaintiff in making a business decision, and that the *plaintiff justifiably relied on the false information*. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); Restatement (Second) of Torts § 552(1) (1977). In addition, the plaintiff must show that the false information was the proximate cause of the claimed damages. *Baddeley v. Seek*, *supra* at 340. For the same reasons that the court should dismiss the fraud claim, it should dismiss the alternative negligent misrepresentation claim regarding the real property transactions. In truth, the record abounds with proof that Nelson advised STOI of values from every publicly available source.

Finally, even if Plaintiff can present competent evidence that Nelson negligently failed to disclose true ownership and interest in property, that allegation fails to state a claim. Washington does not recognize the tort of negligent omission to disclose a material fact. An omission of a material fact does not constitute negligent misrepresentation, *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 180–81, 876 P.2d 435 (1994); *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 97–98, 993 P.2d 259 (2000), because the party claiming injury must demonstrate justifiable reliance on the misrepresentation. *Ross v. Kirner*, 162 Wn.2d 493, 499-500 (2007). This claim fails as a matter of law. It too must be jettisoned.

3. The Ninth Claim is Also Time Barred. This claim incorporates by reference the allegations about the real property purchases. Claims for fraud are governed by a three year statute of limitations from the date when the fraud was discovered, or in the exercise of reasonable diligence, should have been discovered. RCW 4.16.080. Here too, since STOI had actual information in hand on which it has based its fraud claim, any claim arising from pre-February 25, 2007 actions and transactions are time barred for the same reason the Breach of Fiduciary Duty claim is time barred.

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F. The Tenth Claim is Time Barred.

The Tenth Cause of Action alleges civil conspiracy arising from Nelson's facilitating the alleged racketeering activities alleged in claims 1 through 4. A claim for civil conspiracy requires two or more actors either agreeing to engage in an unlawful act or agreeing to engage in a lawful act through unlawful means. See, *Sterling Business Forms v. Thorpe*, 82Wn.App. 446 at 451 (1996). The claim requires proof by clear, cogent and convincing evidence. *Id.* at 450-451.

A claim for civil conspiracy is measured by the three year statute of limitations set forth in RCW4.16.080(4). As with the fraud and fiduciary duty claims, the clock starts ticking when the plaintiff learns of the conspiracy, or in the exercise of reasonable care, is put on notice of facts supporting the claim. As shown above, the Tribe knew about the smoke shop and methadone clinic funding when both occurred in 2003. Claims based on these transactions are time barred. STOI had valuation information regarding all of the real property transactions before it signed purchase offers. The statute has run on claims arising from eleven of those transactions (3.53(a) through 3.53(k).

Finally, once this case is stripped of its substantive claims against Nelson (claims 1-4, 7-9), there is nothing left to conspire about. Once the court dismisses these claims it must dismiss this ancillary claim as well.

G. The Eleventh Claim for Unjust Enrichment is Time Barred.

A claim for unjust enrichment accrues when a party has a right to seek relief. The claim is governed by RCW 4.16.080(3)'s three year statute of limitations. *Eckert v. Skagit Corp*, 20 Wn. App. 849 (1978) [claim for unjust enrichment accrues and three year statute begins to run from the date of the action giving rise to the claim, not discovery].

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The tribe contends that Nelson and Chapman earned their commissions through improper conduct and, therefore, in equity and good conscience, ought not to be permitted to retain what they have earned. As with the seventh, ninth, tenth and eleventh claims, this claim is time barred with regard to any transaction that occurred before February 25, 2007.

H. The Twelfth Claim. This claim is not against Nelson.

IV. CONCLUSION

STOI has built its case on accusations, speculation and innuendo, but not on competent evidence. Above all else, STOI seeks redress for things done long before it filed this suit.

The Smoke Shop and Methadone Clinic RICO claims accrued in 2003, well outside RICO's four year statute of limitations. All RICO claims related to these two enterprises should be dismissed with prejudice. So too should the mail and wire fraud claims regarding real property transactions that occurred before February 25, 2006.

The tort claims related to real estate transactions are fatally flawed for several reasons. First, in every instance, STOI received appraisal and assessment information before it acted. It knew all of the facts it needed surrounding each transaction. Yanity, Soholt and Goodridge's testimony all show that STOI based its decision to buy on many factors, only one of which was price. Second, even if the court concludes there are issues here requiring trial, there is no issue that STOI should be charged with knowledge of the eleven transactions occurring before February 25, 2007 (transactions 3.53(a) through 3.53(k)). The seventh, ninth, tenth and eleventh claims should be dismissed with respect to these transactions because of STOI's knowledge.

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Given the real estate market collapse of 2007-2008, this case is little more than a case of the remorse of a buyer whose market timing was not good. For all of these reasons, the court should dismiss this action as to Defendants Nelson.

Respectfully submitted this 30th day of July 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the foregoing MOTION FOR SUMMARY JUDGMENT AND SUPPORTING DECLARATIONS OF ANDREW D. SHAFER AND DAVID NELSON 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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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

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