THE HONORABLE RICHARD A JONES
Note for Consideration: August 24, 2012

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE STILLAGUAMISH TRIBE OF INDIANS, a Federally-recognized Indian Tribe, Plaintiff, v. DAVID L. NELSON, et al, Defendants.	No. 2:10-cv-00327 RAJ ASHLEYS' REPLY RE: SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED

1. UNJUST ENRICHMENT

Plaintiff made no response to the Ashley's challenge to the 11th Claim for unjust enrichment. Apparently, Plaintiff has chosen to abandon the claim. It did not respond to Defendants' evidence that the workmen were paid by Tom Ashley and that the work was performed more than three years before the filing of this lawsuit. Nor has Plaintiff addressed the issue of the statute of limitations in response to the Motion for Summary Judgment

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(hereafter "Motion").[1] Plaintiff has also failed to justify its wrongful withholding of time records that might have better informed the issue of the statute of limitations. Summary judgment should be entered.

2. CONVERSION

Plaintiff accused Tom Ashley of being a thief. Tom Ashley filed a sworn declaration that he had not stolen anything. The Motion identified multiple deficiencies in the conversion claim, not the least of which was that there was no evidence of any loss of money. It was incumbent upon Plaintiff to provide proof of its prima facie case; to establish the elements of conversion, namely proof that money was wrongfully taken and that it was taken by Tom Ashley. No bank records, deposit slips or any other proof of an actual loss of money has been submitted. Nor has Plaintiff submitted testimony from its financial officers that there was a shortfall in the receipts of the methadone clinic. Plaintiff has failed to submit such proof to the Court because no such proof exists.

When a defendant denies an accusation of theft, the party with the burden of proof must come forward with evidence to create an issue for trial. The Supreme Court removed any doubt on that point in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986) (emphasis added below):

> In our view, the plain language of Rule 56(c) **mandates the entry of summary judgment . . . against a party who fails to make a showing** sufficient to establish the existence **of an element essential** to that party's case, and **on which that party will bear the burden of proof at trial**. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof

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[1] In response to the Nelson/ Chapman motions, Plaintiff argued that it "was unaware" of a case specifically saying that the discovery rule did not apply to unjust enrichment claims. Consolidated Opposition [Docket # 341] at 37, fn. 93. By responding to Nelson's motion instead of this one it avoided responding to the discovery rule analysis contained in Ashleys' Motion at 19.

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> concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Plaintiff ignores that authority, arguing that Tom Ashley has the burden of proving his innocence in order to obtain summary judgment. (Mr. Ashley's direct sworn denial of theft was "insufficient to prove the absence of a genuine issue. . . ."). Plaintiff's Opposition (hereafter "Opposition") at 13, lines 3-4 (emphasis added). That is just backwards. The Ashleys' burden was to identify the issue and his denial of the accusation puts the burden where it belongs; on the accuser. The Supreme Court expressly held that the moving party did not have the burden of negating the opponent's claims.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion . . . . [W]**e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim**. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement . . . . The import . . . is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. **One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses**, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Id at 323-24 (emphasis added).

In order to prove conversion, Plaintiff has the burden of proving the elements of that tort: that money was wrongfully received, and that the defendant took it.[2] In the language of

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[2] A conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. [citation omitted] Money, under certain circumstances, may become the subject of conversion. However, **there can be no conversion of money unless it was wrongfully received by the party charged with conversion** . . . .
Pub. Util. Dist. No. 1 of Lewis County v. WPPSS, 104 Wn. 2d 353, 378, 705 P.2d 1195, 1211 (1985) *modified*, 713 P.2d 1109 (1986) (emphasis added).

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Celotex Corp. those are "elements essential" to the claim . Absent a sufficient showing by Plaintiff establishing those elements, summary judgment should be entered because it is a "factually unsupported claim." Ashleys' Motion put Plaintiff to its proof. Plaintiff has failed to meet its burden.

Plaintiff's theory of conversion has been reconstructed over the last two years. As noted in the Motion, Plaintiff first contended that there was no pro bono program hence all such entries were a mechanism of theft. Plaintiff has repudiated its earlier position, when faced with its own records and the testimony of its financial officers and leaders, and has admitted the existence of the pro bono program. See Motion at 13 (and citations in fn. 15). Despite this shift in position, Plaintiff continues to campaign on the notion that only Tom Ashley had "control" over pro bono.[3] In point of fact, it doesn't matter who entered the pro bono awards into the methware software program if pro bono was a valid part of the operation of the clinic. However, it should be noted that Kelly Campbell, the business manager of the clinic, testified at deposition that the "Administrative Pro Bono" entry was in a drop down box in the methware program. Anyone with access to a computer at the clinic could have made an entry of Administrative Pro Bono, albeit without authorization.[4] To the extent that Plaintiff still urges that pro bono entries were a mechanism of theft, the lack of authorization to use the code is meaningless, because any theft is by definition unauthorized.

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[3] Plaintiff asserts that the Ashleys have "conceded" that Tom Ashley "had exclusive **control** over the pro bono billing code." Opposition p. 15, line 4. That is a gloss on the actual testimony which was that Tom Ashley had not "authorized" others to award pro bono. Opposition memo at 16, line 15. There is no testimony that Tom Ashley had control over the ability to make such an entry in the Methware records. Despite that distinction, Plaintiff repeatedly shades the testimony in its Opposition and repeats it three more times. See Opposition at p. 19, line 13, p. 21, line 3 and p. 21, line 18.

[4] See Reply Declaration of Tom Ashley at ¶2.

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Since Plaintiff has conceded that pro bono was authorized by the Executive Director of the Tribe and reported regularly to the Tribal Council, the argument about Tom Ashley making entries of pro bono is a make weight. It does not establish an element of theft or quantify a loss.

The latest version of the conversion theory is set forth in Opposition at 14-15 and is summarized in the testimony of Kelly Campbell that "Tom didn't come to me, **we didn't request refunds** for this particular patient." (Emphasis added). Refunds, however, have never been shown to be a part of the pro bono program. Plaintiff's notion is that if pro bono was awarded resulting in a credit balance on a patient's account then the patient should have received a refund. This is novel since no witness has ever suggested that refunds were a part of the pro bono program. No depositions are referenced by Plaintiff and no declarations have been submitted that support the concept that the pro bono program involved refunds. Rather, an award of pro bono created a credit on a patient's account, not a right to have past payments refunded.[5] It gave the patient either the ability to have future administrations of methadone or a reduction of an existing indebtedness, not a refund.

Plaintiff extends its argument claiming that two patients have asserted that they did not receive any pro bono services. This evidence is incompetent and should be stricken.[6] Even if it was properly in the record, there is insufficient evidence to accord it any weight. Plaintiff has not offered proof to the Court that those patients were beneficiaries of the pro

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[5] See Reply Declaration of Tom Ashley at ¶3.

[6] Plaintiff has included as exhibits preprinted statements from two patients who say they didn't get pro bono services. The statements are unsworn. See Plaintiff's exhibits G & H [Docket # 340-1]. The preprinted form statements are neither declarations nor affidavits and are not proper evidence on summary judgment. FRCP 56 (c)(1)(A) & (c)(4). Pursuant to FRCP 56 (c)(2) and W.D. Wash. LR 7(g), Defendants objects and requests that they be stricken.

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bono program. Nor has it offered proof that they were informed of an award by clinic employees. For all that can be told from the record, they might have received awards and simply been unaware of them. Plaintiff has not offered the payment records of these two patients, leaving the Court without a means to consider the statements in the context of payment history. In Exhibit F Plaintiff has submitted what is claimed to be the pro bono entries at the clinic from 2003-2009 for all the patients. See Declaration of Gabriel Baker at ¶7 [Docket # 340]. That document, too, lacks an evidentiary foundation sufficient for its consideration.[7] Even if it were to be considered, there is no way to determine which awards of pro bono are being questioned. Plaintiff has admitted that the pro bono program existed and Exhibit 35 to the deposition of Eric White shows that the Tribe accounted for and tracked pro bono. See Docket # 325-7 at p.6. Thus Exhibit F tells us nothing about whether the alleged allocations of pro bono are admitted by Plaintiff to be valid or are contested.

Even if pro bono entries were made in the wrong patients' records and the books of the clinic are a mess, that does not provide proof that cash was pilfered. It would establish only sloppy record keeping. To prove the loss of money, Plaintiff either needs a witness who saw it taken or, at a minimum, records of receipt of money by the clinic in excess of the amounts that were deposited into Plaintiff's bank account. No such records have been

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[7] The only accounting records submitted by Plaintiff in opposition to summary judgment is Exhibit F to the Baker Declaration [Docket 340-1]. That record is without foundation for authenticity and is hearsay. For the reasons stated in footnote 6, Defendant objects and requests that it be stricken. Exhibit F was Exhibit 13 to the Kelley Campbell Deposition. She testified that all she did was print it out and that it was actually prepared by Brian Roach, who was never deposed. ["so somebody had to go in and send these to me, and then I printed it out essentially. They emailed me the documents and that's how we got this document."] Campbell Deposition at 30, lns 5-7. See Reply Declaration of Robert J. Wayne at ¶2. Plaintiff has not provided a foundation to establish how the Exhibit was prepared, that it was within the business records exception, or that it was reliable. At this juncture it is a printout of numbers and words without an evidentiary foundation.

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supplied to the Court by Plaintiff. The Court is left without any means of determining whether a taking of money occurred. That essential element of conversion is missing and under *Celotex Corp.* the absence of such a showing in response to a motion for summary judgment requires dismissal of the claim as being "factually unsupported."

The Motion also raised the issue of the statute of limitations. Plaintiff has provided evidence that Eric White was unsure of the date on which Kelley Campbell spoke to him ("I don't recall the exact time. I am thinking it was 2007, 2008."). See Opposition at 20. He testified to a lack of recollection about conversations. Ms. Campbell had no such failing of memory. But, the Motion did not rest just on Ms. Campbell's report to Mr. White.

In 2003-2004 Kelly Campbell made a report of account irregularity to her supervisor, Brenda Tatro. See Motion at 17. That report was sufficient to put Plaintiff on inquiry notice and to start the running of the discovery rule. What has Plaintiff said in response to that important evidence? Not a word. Plaintiff has failed to respond to this evidence, completely ignoring it as if it wasn't a part of Ashley's Motion. The conversion claim is time barred.

3. RICO [3rd & 4th Claims].

Plaintiff's argument is primarily one of guilt by association. One might see that as unfair. Plaintiff contracted with NHS, giving NHS the right to use Tom Ashley as a consultant. The association that Plaintiff complains about was a product of its own attempt to profit off NHS's plan to provide treatment centers for other tribes. Tom Ashley was "hired out" to NHS by Plaintiff. It is disingenuous to now argue that that association evidences RICO level guilt. Similarly, Tom Ashley was directed by the Executive Director of the Tribe to work with David Nelson and Nathan Chapman to locate property that would be used for his department's needs. He had no choice. Nelson and Chapman were the

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exclusive real estate agents for the Plaintiff. He did what the Executive Director of the Tribe told him to do, nothing more. Of course, the Tribe has changed administrations and the new administration has repudiated the decisions of the old.

Plaintiff's Opposition suggests RICO violations in 1) opening methadone clinics for NHS; 2) The funding of Plaintiff's methadone clinic, ICCS, by investors; and 3) Nelson and Chapman's real estate commissions.

1) NHS Clinics. As stated in the Motion, Plaintiff's claim is not about a wrongful taking of intellectual property without permission; it is about NHS' alleged breach of the payment obligation. Ashley was directed by Plaintiff to assist NHS. Plaintiff's contractual relationship with NHS under the Memorandum of Understanding permitted broad sharing of information ("maximum extent permitted"). There is no showing that Plaintiff ever told Tom Ashley to stop performing his work because of NHS' non-payment. In the absence of such a directive, Ashley had the duty to obey the Tribe's instruction to him to consult with NHS and develop the clinic. There is no reasonable explanation as to how he could become liable for doing so. After he was terminated by the Tribe in April, 2009 he went to work for NHS. He was not a principal in the firm. The fact that part of his compensation was a percentage based upon profits no more makes him an owner than does a lawyer' contingent fee provide ownership in a client's tort claim. See Plaintiff's argument at Opposition at 6. Plaintiff has not produced any evidence of Tom Ashley conspiring to do anything that the Tribe had not expressly authorized. Plaintiff's claim is a breach of contract claim against NHS, a party it has failed to join. It falls short of being a RICO claim because there is no showing of fraud, let alone mail or wire fraud.

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Plaintiff also faults Tom Ashley for writing letters to the two Goodridges' parole officer. That cannot possibly be in furtherance of a RICO conspiracy as the two Goodridges were in prison and were not involved in NHS. When a person goes to prison his involvement, if any, in a conspiracy is at end. The letters were to help them get into work release. The letters in no way impacted Plaintiff and were not in furtherance of a conspiracy.

2) Investors Funding of Plaintiff's Methadone. Plaintiff's Opposition complains that Ashley communicated with the investors who funded the clinic, citing to Tom Ashley's deposition. The deposition in Docket 340-1, Ex A at 31, lines 10-14 make it clear that the communication was at the direction of Plaintiff's Executive Director, who was Tom Ashley's direct superior. Plaintiff cannot turn that on its ear and call it a RICO violation. The timing of the communications is relevant to the analysis. They occurred after Plaintiff had already contracted for a loan with the investors. They did not entice Plaintiff to enter into the loan.

3) Nelson and Chapman's Real Estate Commissions. The 30(b)(6) deposition of the Chairman of the Tribal Council, Shawn Yanity, established that Tom Ashley had nothing to do with the negotiations over price.[8] The Executive Director testified that Tom Ashley had no role in price negotiations. ("Price in general was my final say.")[9] Both confirmed that Tom Ashley's duties required that he be involved in helping to select

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[8] Deposition of Shawn Yanity (Exhibit A to Wayne Declaration - Docket # 325-1) at 51, lns 7-12, 58, lns 16-17, 59, lns 21-25, 60, lns 1-3, 63, lns 11-14.

[9] Deposition of Eddie Goodridge, Jr. (Exhibit C to Wayne Declaration - Docket # 325-3) at 243, lns 21-23.

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properties for his Department's projects.[10] [11] Plaintiff responds by arguing that property acquisition wasn't written into Tom Ashley's job description. Plaintiff should not be heard to contradict the 30(b)(6) testimony of its Council Chair testifying as the designated representative of Plaintiff. Clearly, the practice in the Tribe under the former administration required program directors to review the adequacy of property for the intended use of a department. The Declarations of Nelson and Chapman establish, without contradiction by Plaintiff, that Tom Ashley did not receive any portion of the real estate commissions.

Plaintiff has not made a showing that properties were recommended by Tom Ashley without having a purpose for use by his Department. Nor has Plaintiff produced evidence that any particular property was selected over an alternative candidate for the purpose of escalating the price and hence the commission. There is a dearth of any proof of wrong doing by Ashley in performing the duties of his job as directed by Plaintiff's Executive Director. Plaintiff has not established a prima facie case of Tom Ashley's involvement in any purported RICO scheme. This claim should be dismissed as to the Ashleys.

4. CONCLUSION

Plaintiff has failed to respond to Ashleys' Motion with evidence that would create a triable issue of fact. Plaintiff bears the burden of proof on the issues and under *Celotex Corp.* that failure makes its claims subject to summary judgment.

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[10] Deposition of Shawn Yanity at 52, lns 17-20, 53, lns 4-6, 56-57, lns 19-3,, 53, lns 12-20, 57, lns 9-12, 59, lns 11-16, 60-61, lns 24-2.

[11] Deposition of Eddie Goodridge, Jr. at 249, ln 1, - page 250, ln 22.

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Respectfully submitted this 23rd day of August, 2012.

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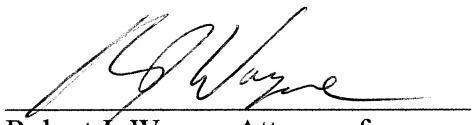

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the above document with the Clerk of the Court through the ECF system which will then transmit notice of the 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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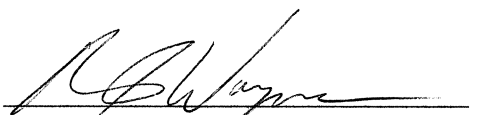

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