The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT R. COMENOUT, SR.,

Plaintiff,

v.

ROBERT W. WHITENER JR., an individual, dba as WHITENER GROUP,

Defendant.

Case No.: 3:15-cv-05054-BHS

DEFENDANT'S MOTION TO DISMISS

NOTE ON MOTION CALENDAR: FEBRUARY 27, 2015

INTRODUCTION

Defendant Robert W. Whitener, Jr. ("Whitener") hereby respectfully moves the Court to dismiss this action with prejudice pursuant to Fed. R. Civ. P. 12(b)(7) and, in the alternative, 12(b)(6).

Plaintiff Robert R. Comenout, Sr.'s ("Comenout") Complaint is nothing more than a creative effort to obtain relief from this Court that is not otherwise available to him through either the ongoing Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") litigation brought against him by the Quinault Indian Nation ("Nation"), *Quinault Indian Nation v. Estate of Edward Comenout Jr., et al.,* 3:10-cv-05345-BHS, or his pending administrative appeal of the United States Bureau of Indian Affairs' decision to grant a business lease to the

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600

Nation to operate a store on the property that Plaintiff currently uses without a Federally-approved lease. *See* Compl. ¶ 16 (Dkt. No. 1) (discussing lease appeal); 25 C.F.R. § 162.442 (a business lease is effective on the date of approval "even if an appeal is filed…."). Comenout's Complaint should be dismissed with prejudice because his claims implicate the interests of the Nation, which cannot be joined because the Nation has not waived its inherent sovereign immunity to suit. In the alternative, Comenout's Complaint should be dismissed because he has failed to plead sufficient facts to support his claims for relief against Whitener.

The Motion is supported by evidence in the record relating to Comenout's effort to obtain a temporary restraining order/ preliminary injunction, including specifically, the Business Lease for the property filed at Ex. A at 20-47 to Smith Decl. in Support of Whitener's Opposition to the Motion (Dkt. No. 12),[1] the Memorandum of Points and Law that follows, and the [Proposed] Order filed herewith.

STANDARDS OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(7)

On Rule 12(b)(7) motion to dismiss for failure to join an indispensable party, "[t]he moving party has the burden of persuasion in arguing for dismissal." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990). The court "accept[s] as true the allegations in [p]laintiff's complaint and draw[s] all reasonable inferences in [p]laintiff's favor." *Paiute-Shoshone Indians of the Bishop Cmty. v. Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011).

[1] Generally, the scope of review on a motion to dismiss is limited to the contents of the complaint. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n. 5 (9th Cir. 2003). However, a court may consider evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Business Lease is referenced throughout the Complaint. Compl. ¶¶ 9-13. The Business Lease should be considered by the Court in the context of this Motion.

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1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600

B. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions devoid of factual enhancement will not pass muster under Rule 12(b)(6). *Id.* at 555, 557.

ARGUMENT

A. Comenout's Claims Are Against the Nation, Which is a Required Party That Cannot Be Joined Because of Its Sovereign Immunity

Although Whitener is nominally the defendant based on his action in posting a sign on the property on or about January 9, 2015,[2] the real party in interest here is the Nation. Compl. ¶¶ 9-13 (discussing business lease for Nation as lessee to use the property for business purposes, approved by the U.S. Bureau of Indian Affairs on November 20, 2014 under 25 C.F.R. pt. 162); *id.* ¶ 3 ("The Quinault Indian Nation has no jurisdiction [over] the site."); *id.* ¶ 32 (alleging civil conspiracy involving "members of the [Q]uinault Indian Nation, their attorneys and others…."); *id.* ¶ 35 (alleging Whitener was engaged in a conspiracy with "the [Q]uinault Indian Nation, to create an economic development enterprise."). However, the Nation is not subject to suit because of its sovereign immunity; as a result, because the Nation is a required party under Fed. R. Civ. P. 19, but it cannot be joined, the case cannot be heard and must be dismissed.

[2] Comenout claims that Whitener was acting on his own behalf and that "[h]e has no authority to act for the Quinault Indian Nation." Compl. ¶ 4. However, Comenout claims elsewhere in the Complaint that Whitener is working with the Nation. Compl. ¶¶ 32, 35. Thus, there is a legitimate question as to whether, on the face of the Complaint, Whitener can be held personally liable. After all, a tribe, like any government, can only act through its authorized agents; someone had to post the sign; and that act does not render the agent personally liable in lieu of the principal who directed the conduct. Where, as here, an individual acts as an agent for a disclosed principal, the general rule is that the agent is not subject to personal liability. *E.g., Wright v. Merritt Realty Co.*, 148 Wash. 380, 268 P. 873 (1928).

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1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600

Rule 19(a) requires joinder of a person where disposing of the action in a person's absence would not afford complete relief to existing parties, where doing so would impair or impede the person's protected interest, or would subject an existing party to substantial risk of inconsistent obligations. Rule 19(a)(1)(A). All of these factors are implicated here. Whitener is sued for taking action at the Nation's behest, specifically, the Nation's right under the federally-approved Business Lease to use the property for a business purpose. Compl. ¶¶ 16, 20; *see also* Motion for TRO at 4 (Dkt. No. 2). Any ruling in favor of Comenout would not afford him complete relief, as it would not bind the Nation who has a significant legal interest in these proceedings. *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1156 (9th Cir. 2002) (holding that tribal sovereign immunity bars joinder, and noting "[i]f the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as 'one of those interests "compelling by themselves,"' which requires dismissing the suit"). Indeed, a judgment against Whitener would not stop the Nation from continuing to assert its sovereign powers and management responsibilities over the property as lessee. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (affirming the district court's dismissal of the case for failure to join the Nation as an indispensable party). The Nation can simply send some other person out to do exactly what Whitener is accused of doing.

The Business Lease for the property became effective on November 20, 2014, which was the date that the BIA approved the Lease. Ex. A at 26 to Smith Decl. (Dkt. No. 12). The Business Lease is by and between the individual owners of property as lessors and the Nation as lessee. *Id.* at 20. The lease was consented to by more than 60% of the landowners. *Id.* at 10; 25 C.F.R. § 162.012(a). Comenout did not consent; however, because more than 60% of those owners of the allottees did so, his withheld consent is legally irrelevant and he is considered a lessor under the Business Lease. Ex. A to Smith Decl. at 43; 25 C.F.R. § 162.012(a)(4)(i) ("the lease documents bind all non-consenting landowners to the same extent as if those owners also consented to the lease document."). The Business Lease enables the Nation to "use the Premises

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1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600

for the following specific purposes: retail sales of cigarettes and retail sales of other convenience store products, but specifically excluding the sale of marijuana and the sale of fireworks." Ex. A to Smith Decl. at 21 (Dkt. No. 12). It is a fundamental principle that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005) (internal quotation omitted).

Thus, the Nation is a required party. However, its joinder is not feasible because the Nation is immune to Comenout's unconsented suit. There can be no credible dispute that the Nation retains its inherent sovereign immunity, similar to the immunity from suit traditionally enjoyed by other sovereign powers. Tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). It shields Indian tribes, and tribal corporations acting as an arm of the tribe, for both on- and off-reservation conduct, from suit absent express authorization by Congress or clear waiver by the tribe. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). "It is settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotes omitted).

Comenout's Complaint is silent as to the Nation's sovereign immunity and there is no allegation that the Nation has expressly consented to this suit through waiver. There is also no allegation that Congress has taken action to waive the Nation's immunity to this suit. In the absence of these allegations, on the face of the Complaint, the Court cannot exercise jurisdiction over the Nation. *Santa Clara Pueblo*, 436 U.S. at 59; *see also Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983) (concluding in tax dispute that sovereign immunity bars action because "The Quinault Tribe has not consented to be sued or waived sovereign immunity in this action; nor has the Tribe been divested of its immunity by Congress.").

Where, as here, "sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the

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1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600

interests of the absent sovereign." *Republic of the Phillippines v. Pimentel*, 553 U.S. 851, 867 (2008) (under Rule 19(b), *see also Shermoen v. United States*, 982 F.2d 1312, 1318-1319 (9th Cir. 1992) (holding joinder of tribes not feasible due to sovereign immunity)); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) (holding Nation is necessary and indispensable party that cannot be joined due to sovereign immunity in seeking to overturn the Department of Interior's decision that certain fractional property interests within the Nation's Reservation escheat to the Nation). Rule 19(b) requires complete dismissal of Comenout's claims as to Whitener.[3]

B. No Facts Support Comenout's RICO Claim Against Whitener

In the alternative, the Court should dismiss the Complaint because Comenout fails to alleged facts supporting standing under RICO and also fails to state a RICO claim. His Complaint is nothing more than a bald effort to manufacture federal jurisdiction where none exists.[4]

1. Comenout Has Not Alleged RICO Standing

"To have standing under § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was 'by reason of' the RICO violation, which requires the plaintiff to establish proximate causation." *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008).

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[3] The United States, because it holds the property in trust for the individual owners, including Comenout, and approved the Business Lease that is the focus of this lawsuit, is arguably also a required party to this action that cannot be joined because of its unwaived sovereign immunity. Compl. ¶ 1; *See, e.g., Minnesota v. United States*, 305 U.S. 382, 386 (1939) ("A proceeding against property in which the United States has an interest is a suit against the United States").

[4] If Comenout's RICO claim is dismissed under Rule 12(b)(6), the Court should decline jurisdiction over the remaining state law claims advanced by Comenout. Compl. ¶¶ 28-42; *see Ove v. Gwinn*, 264 F.3d 817, 821, 826 (9th Cir. 2001) (explaining that "[a] court may decline to exercise supplemental jurisdiction over related state-law claims once it has dismissed all claims over which it has original jurisdiction") (citation and internal quotation marks omitted)). If the only claim over which the Court had original jurisdiction is dismissed, it is not an abuse of discretion to dismiss the remaining state claims. 28 U.S.C. § 1367(c)(3).

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(206) 467-9600

Under the first requirement, "[a] civil RICO 'plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.'" *Canyon Cnty.*, 519 F.3d at 975 (emphasis added) (quoting *Sedima, S.P.R.I. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). The second requirement, causation, arises from the "by reason of" language of section 1964(c). A RICO predicate act must be not only the "but for" cause of a plaintiff's injury, but the proximate cause as well. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010). Importantly, RICO demands "a direct causal connection' between the predicate offense and the alleged harm, not a connection that is 'too remote,' 'purely contingent,' or 'indirec[t].' [T]he central question [a court] must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (internal citations and quotation marks omitted). That the alleged harm was foreseeable is not enough; there must also be a direct relationship between the RICO violation and the alleged harm. *Hemi*, 559 U.S. at 12.

Comenout devotes less than two pages of his Complaint to allegations of civil RICO violations allegedly committed by Whitener. Compl. ¶ 26. Comenout's allegations badly fail the mandatory standing requirement under RICO because he has not plead ***any*** injury resulting from the alleged RICO violations, much less that a property injury flows directly from Whitener's alleged racketeering activity. *See United Brotherhood of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't*, 911 F. Supp. 2d 1118, 1125 (E.D. Wash. 2012) ("[G]eneralized statements of harm do not suffice. The property injury must flow directly from the substantive racketeering activity."). There is nothing in the Complaint that shows any property injury, especially since Comenout alleges that he is still in possession of the property and is using it for his business purpose. Compl. ¶ 13.

In addition, Comenout fails to allege any causation. The causation requirement functions as a central limitation on the harsh remedies available under RICO. *See Hemi*, 559 U.S. at 17 (noting Supreme Court holding that RICO's "reach is limited by the 'requirement of a direct causal connection' between the predicate wrong and the harm."). A conclusory allegation such

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600

as Comenout's claim that "Defendant Whitener has committed RICO violations over a sustained period" and as a result "Defendant will profit from the eviction" is insufficient. Compl. ¶ 26. At best, giving the most liberal interpretation possible to the Complaint, Comenout's alleged injury is his inability to continue to operate his business on the property into the future. *Id.* ¶¶ 2, 9, 26. However, this injury is not caused by any act of Whitener. In fact, the harm, if any, is caused by non-parties: the Nation as lessee, the other landowners as lessor, and the United States for its role in approving the Business Lease that granted the Nation to right to use the property. The connection to Whitener is too attenuated and indirect for RICO. RICO's direct causal connection between the predicate criminal acts allegedly committed and the injury do not appear on the face of the Complaint. Comenout lacks standing to bring this RICO claim.

2. Comenout Has Not Sufficiently Plead Predicate Acts

Even if the Court were to find that Comenout alleged facts to support standing, he has nonetheless failed to allege a RICO claim because of the absence of sufficient facts to plead a predicate act. A civil RICO complaint "must set forth facts alleging that the [ ] defendants (1) conducted (2) an enterprise (3) through a pattern (4) of racketeering activity." *Portfolio Invs., LLC v. First Sav. Bank*, No. C12-104 RAJ, 2013 WL 1187622, at *4 (W.D. Wash. Mar. 20, 2013); *see also* 18 U.S.C. § 1962(c).

To state a claim under 18 U.S.C. § 1962(c), a plaintiff must demonstrate a RICO "enterprise" that is "separate and apart from the pattern of racketeering activity engaged in by the RICO persons." *Matsuura v. E.I. du Pont de Nemours & Co.*, 330 F. Supp. 2d 1101, 1130 (D. Haw. 2004) (citations omitted) (internal quotation marks omitted). A plaintiff must also adequately set forth a pattern of racketeering activity, requiring "at least two predicate acts, which include 'any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in [narcotics],' that is an offense under state law 'and punishable by imprisonment for more than one year.'" *United States v. Fernandez*, 388 F.3d 1199, 1221 (9th Cir. 2004) (quoting 18 U.S.C. §§ 1961(1), 1961(5)). As explained below, Comenout's allegations completely fail to state a claim.

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SEATTLE, WA 98101
(206) 467-9600

Here, Comenout alleges no enterprise at all, let alone one that is separate and distinct from Whitener. Compl. ¶ 26. Rather, Comenout broadly states that "Defendant Whitener engaged in a pattern of racketeering activity by repeatedly threatening criminal and civil remedies against plaintiff". *Id*. Comenout further argues that the "threats", "made by telephone call", constitute predicate acts. *Id*. However, these allegations assume their own conclusions, and are inadequate to plead federal mail and wire fraud. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557-58 (9th Cir. 2010) (the federal felonies if mail and wire fraud are subject to Fed. R. Civ P. 9(b)'s heightened pleading standard, and require a plaintiff to show: (1) formation of a scheme or artifice to defraud; (2) use of the United States mails or wires, or causing such a use, in furtherance of the scheme; and (3) specific intent to deceive or defraud).

Comenout's RICO allegations do not come close to meeting these stringent evidentiary requirements, and cannot succeed. *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85 (2d Cir. 1999) (affirming dismissal of RICO claim for failure to plead how the statements were fraudulent). Nothing about a "threatening" telephone call itself indicates a scheme or intent to defraud. Compl. ¶ 26; *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (affirming dismissal of RICO claim where plaintiff had failed to identify specific content of alleged misrepresentation). Moreover, given that the facts demonstrate that the actions Whitener is accused of taking illegally are, in fact, perfectly legal because the Nation has the ability to use the property pursuant to its Business Lease, there is no ability for Comenout to show an unlawful underlying predicate act. *See* Ex. A to Smith Decl. at 21 (Dkt. No. 12). Simply put, there has been no crime committed by Whitener. The RICO claim lacks merit.

C. Dismissal With Prejudice and Without Leave to Amend is Warranted

Comenout's RICO claim, as framed, cannot succeed on the merits and should be dismissed with prejudice and without leave to amend. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir.1988) (holding that if "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency, then . . . dismissal without leave to amend is proper.") (internal quotation, citation omitted).

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600

It would not be an abuse of discretion to deny leave to amend, where, as here, any amendment would be futile. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (stating, in RICO case, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency"); *Reddy v. Litton Industries, Inc.*, 912 F. 2d 291, 296-97 (9th Cir. 1990) (affirming dismissal of RICO claim with prejudice where "[i]t would not be possible for Reddy to amend his complaint to allege a completely new injury that would confer standing to sue without contradicting any of the allegations of his original complaint."); *Silva v. Di Vittorio*, 658 F. 3d 1090, 1105-06 (9th Cir. 2011) (affirming dismissal of RICO claim with prejudice and without amendment where deficiencies could not be cured).

CONCLUSION

For the foregoing reasons, Whitener respectfully requests that the Court dismiss the Complaint with prejudice and enter Whitener's [Proposed] Order.

DATED this 5th day of February, 2015.

Kilpatrick, Townsend & Stockton LLP

By: *s/ Rob Roy Smith*
Rob Roy Smith, WSBA No. 33798
Email: rrsmith@kilpatricktownsend.com
1420 Fifth Avenue, Suite 4400
Seattle, WA 98101
Telephone: (206) 467-9600
Facsimile: (206) 623-6793

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2015, I electronically filed the foregoing **DEFENDANT'S MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Randal B. Brown
Randal Brown Law Office
25913 163rd Ave SE
Covington, WA 98042
Email: brownees2@msn.com

Robert E. Kovacevich
Robert E. Kovacevich, PLLC
W 818 Riverside Ave, Ste. 525
Spokane, WA 99201
Email: kovacevichrobert@qwestoffice.net

Aaron L. Lowe
1403 W. Broadway Avenue
Spokane, WA 99201
Email: aaronllowe@yahoo.com

Counsel for Plaintiff

DATED this 5th day of February, 2015.

Kilpatrick, Townsend & Stockton LLP

By: *s/ Rob Roy Smith*
Rob Roy Smith, WSBA No. 33798
Email: rrsmith@kilpatricktownsend.com
Attorneys for Defendant

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 4400
SEATTLE, WA 98101
(206) 467-9600