Case No. 13-35759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KONIAG, INC. and MICHAEL P. O'CONNELL,

Plaintiffs-Appellees,

v.

KURT KANAM and ORBIE MULLINS,

Defendants-Appellants.

Appeal from the United States District Court, District of Alaska,
District Court No. 3:12-cv-00077-SLG

RESPONSE BRIEF BY KONIAG INC.

James E. Torgerson, Alaska Bar No. 8509120
Renea I. Saade, Alaska Bar No. 0911060
STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, Alaska 99501
Phone: (907) 277-1900
Facsimile: (907) 277-1920

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Koniag, Inc. hereby certifies it is an Alaska corporation that has no parent corporation, and that no publically traded company owns 10% or more of Koniag's stock.

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I. INTRODUCTION

This appeal stems from a federal district court order issuing a permanent injunction against *pro se* defendants Orbie Mullins and Kurt Kanam regarding actions filed in tribal court for the Native Village of Karluk, a small village located on Kodiak Island, Alaska. Defendant-Appellant Kanam was acting as a tribal attorney for the Native Village of Karluk. Defendant-Appellant Mullins was acting as the tribal court judge for the Native Village of Karluk.[1] To Koniag's knowledge, Mullins and Kanam are not members of the Native Village of Karluk, and reside in either Toledo or Olympia, Washington. SER 151-52 (showing addresses). The Karluk Tribal Court, as operated by Kanam and Mullins, appears to located in Toledo, Washington as well. SER 151 (showing Court address in Toledo).[2]

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[1] To Koniag's knowledge, Kanam and Mullins are not licensed members of any state or federal bar. *See Kanam v. Tingle*, No. 3:13-cv-05194-RJB (W.D. Wash. Mar. 19, 2013) (summary dismissal explaining that Kanam is not a licensed attorney and that "Mr. Kanam may not appear in this court on behalf of the Native Village of Karluk and/or the Karluk Tribal Court"). Under a settlement agreement entered in another matter, members of the Karluk Tribal Council represented that Kanam and Mullins no longer represent the Karluk Tribal Court. *See* Dkt. 16 at 8.

[2] Kanam and Mullins also have created a supposed tribal court in Toledo, Washington for the "Kikiallus Nation" (not a federally recognized tribe) and were permanently enjoined by the District Court for the Western District of Oklahoma when they tried to use tribal court authority to transfer the ownership of oil and gas leases in Oklahoma to a Washington corporation. *See Unit Corp. v. TMI Ministries*, No. 5:14-cv-00070R (W.D. Okla.) (Order and Permanent Injunction, June 13, 2014). In addition, Kanam and Mullins have attempted to use the "Karluk Tribal Court" to declare the rights of the Pilchuck tribe in Washington (also not a federally recognized tribe) including establishing Kanam's "complete control of

The injunction on appeal centers around several actions initiated by Kanam in Tribal Court in the name of the Native Village of Karluk, and presided over by Mullins, purporting to affect the legal rights of Plaintiff-Appellee Koniag Inc. (Koniag). Koniag is an Alaska Native Regional Corporation established pursuant to section 7 of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1606(d), with its principal place of business in Kodiak, Alaska. Koniag is not a member of the Native Village of Karluk, and has never consented to its jurisdiction. Koniag therefore filed suit in federal district court to restrain the tribal court actions.

Koniag's federal lawsuit apparently prompted Kanam and Mullins to file more tribal court actions (in contempt of the federal district court's orders), including actions against various state bar associations and against Koniag's attorney (Michael O'Connell) alleging criminal actions (SER 188), and even included a (failed) effort by Kanam and Mullins to name the presiding federal district court judge as a defendant in the action she was presiding over.[3] On July 29, 2013, the district court entered a permanent injunction, which is the subject of this appeal (SER 16-20), and ultimately issued contempt sanctions against Kanam and Mullins on September 25, 2013 (SER 7-10).

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the Pilchuck government and its members." *See Kanam v. All Active Parties*, No. 3:12-mc-05019 (W.D. Wash.).

[3] SER 119. Kanam also filed a separate lawsuit against the presiding judge in the Western District of Washington. *See Kanam v. Gould*, No. 3:13-cv-05885-BHS (W.D. Wash.). That case was dismissed *sua sponte* by the court.

While the factual and procedural background in this case is complicated by multiple tribal court filings (and the associated need to file amended complaints and requests for relief in federal court), the legal issues before the Court are not complicated. This Court's order dated May 14, 2014 (Dkt. 13) limits the scope of appeal to two issues: (1) whether Kanam and Mullins' appeal of the July 29, 2013 permanent injunction was timely filed; and (2) whether the district court's July 29, 2013 permanent injunction order was proper.[4]

As to the first issue, the Court lacks jurisdiction over the appeal because it was not filed within the 30-day deadline. As discussed below, the applicable deadline for Kanam and Mullins' appeal is the 30-day deadline under 28 U.S.C. § 2107(a), not the 60-day deadline in 28 U.S.C. § 2107(b). Although Kanam and Mullins filed untimely cross-complaints against the presiding district court judge and a regional director of the U.S. Fish and Wildlife Service, those cross-complaints were never accepted by the district court and do not pull this appeal within the ambit of 28 U.S.C. § 2107(b). For this reason alone, the appeal should be summarily dismissed.

As to the second issue, Kanam and Mullins have not presented any reasons why the district court's analysis was wrong. Indeed, Kanam and Mullins did not even oppose the motion for a permanent injunction below, and their opening brief provides no reason as to why the district court's analysis was wrong. On the

[4] The Court's order at Dkt. 13 incorrectly describes the July 29, 2013 order as one "denying a permanent injunction." The referenced order actually grants a permanent injunction. SER 16.

contrary, the district court properly granted summary judgment to Koniag because there were no issues of material fact as to the scope and limits of the Native Village of Karluk's jurisdiction, and properly granted a permanent injunction based on the appropriate legal standard. The decision was reasoned, consistent with the law, and Kanam and Mullins provide no reason to reach a different result. Accordingly, the appeal should be denied.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Koniag's cause of action is based on questions of federal law, including federal common law regarding tribal jurisdiction over non-members. This Court has jurisdiction over the district court's July 29, 2013 permanent injunction order under 28 U.S.C. § 1292(a)(1). *See* Dkt. 13. However, this appeal is not timely under 28 U.S.C. § 2107(a) because it was filed (as amended) on September 26, 2013, more than 30 days after the July 29, 2013 order. Moreover, as discussed below, the 60-day period under 28 U.S.C. § 2107(b) is not applicable, because there is no federal party in this case.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the appeal should be dismissed as untimely because it was filed outside the 30-day deadline required by 28 U.S.C. § 2107(a).[5]

2. Assuming that this case is properly before the Court at this time, whether the district court properly granted a permanent injunction to prevent

[5] The relevant text of 28 U.S.C. § 2107 is provided in the attached Addendum.

Kanam and Mullins from exercising tribal court jurisdiction over Koniag and Michael O'Connell.

IV. STATEMENT OF FACTS

A. Kanam Initiated Suit In The Karluk Tribal Court Purporting To Declare Rights With Respect To Koniag.

On March 19, 2012, Kanam filed an "Original Complaint for Declaratory Judgment" with the Karluk Tribal Court, on behalf of the Native Village of Karluk. SER 401. Kanam requested a declaration that the Native Village of Karluk "decided to de-mergered [sic] from the Koniag Corporation" and unspecified damages based on litigation concluded in Alaska Superior Court approximately 30 years ago, in 1984. SER 402, 404. On that same day, Mullins issued an Order to Show Cause, requiring Koniag to respond by sometime between April 8 and April 20, 2012 as to why the tribal court should not grant the requested relief. SER 398.

Koniag learned of the tribal court action on March 27, 2012. SER 433. On March 28, 2012, Koniag through its counsel attempted to contact the Karluk Tribal Court to obtain the rules of practice and requirements for admission to practice. SER 433-34. The clerk of the Karluk Tribal Court issued a "response" explaining that "local council [sic] will be required" and directed Koniag to a person named Kurt Riggin in Colorado, who the clerk asserted is a "tribal attorney barred [sic] with the Native Village of Karluk Tribal Court." SER 429-430. Mr. Riggin is banned from the practice of law in Colorado.[6]

[6] *See People v. Riggin*, Report re: Unauthorized Practice of Law Pursuant to C.R.C.P. 236(a) (O.P.D.J. Nov. 21, 2007).

One of Koniag's attorneys, Michael O'Connell, made several calls to Kanam, and sent two letters (one addressed to Kanam, and one addressed to Kanam and Mullins) requesting an extension of time, and explaining that if no such extension was granted by 5:00 p.m. on Friday, April 6, Koniag would seek an injunction in federal court (as the 20-day show cause period was arguably set to expire on Sunday, April 8). SER 434-35, 438, 446-47. O'Connell spoke to Kanam twice, but did not receive consent to an extension. SER 435-36.

B. Koniag Files Suit In Federal District Court To Enjoin The Tribal Court Action.

Koniag filed suit in federal district court on Monday, April 9. SER 456. Koniag's complaint sought "injunctive and other prospective relief" to prevent Kanam and Mullins "from violating federal law by unlawfully exercising jurisdiction in the Karluk Tribal Court over Koniag" in the identified Karluk Tribal Court case. SER 456. Koniag explained that the Karluk Tribal Court lacked jurisdiction over it, because, among other reasons, Koniag was not a member of the Karluk Tribe, the Karluk Tribe has no territorial jurisdiction, Koniag business operations do not have a nexus with the tribe, and Koniag has not otherwise consented to tribal jurisdiction. SER 463. On that same day, Koniag filed a motion for a temporary restraining order and a preliminary injunction. SER 467.

C. Kanam And Mullins Respond To The Litigation By Filing Additional Tribal Court Actions.

Although Koniag was not aware of it at the time, Kanam and Mullins took a number of actions on April 9, 2012, in response to the federal suit. Specifically, Kanam filed another action against O'Connell and the bar associations of seven

states. SER 374. Kanam's complaint alleged that O'Connell was criminally liable under 18 U.S.C. § 1503, which imposes criminal sanctions for threats or acts of intimidation against judicial officers. SER 377. Specifically, the complaint claimed that Koniag's letter expressing intent to seek a federal injunction was judicial intimidation. SER 377, 381. Mullins signed a new show cause order to O'Connell on April 10, 2012. SER 386.

Also on April 9, 2012, Mullins entered an "Order Assigning Counsel," finding that O'Connell had "threatened the judge of this court" by seeking a federal injunction. SER 287-89. Mullins' order further "appoints Tribal Attorney Kurt Riggin . . . to represent Koniag Inc." SER 289. Riggin, for his part, immediately proceeded to give an interview where he identified himself as Koniag's counsel, and stated that Koniag "made certain threats to the tribal court and their officials" and that "[p]eople are jailed for things like that." SER 299. Koniag sent a letter to Riggin declining his representation in this matter. SER 296.

Koniag proceeded to file special appearances in the pending tribal actions, for the limited purpose of challenging the tribal court jurisdiction, and filed motions to dismiss on that ground. SER 301, 347. In addition, on April 11, 2012, Koniag amended its complaint in federal court to include O'Connell as a plaintiff. SER 26. On April 17, 2012, Koniag filed a second motion for preliminary injunction in federal court. SER 27. The second motion sought the same preliminary injunctive relief for O'Connell as was sought by Koniag in its initial motion. SER 27.

D. The District Court Grants Preliminary Injunctive Relief.

On July 3, 2012, the district court granted preliminary injunctive relief to Koniag and O'Connell. SER 39. The district court applied the traditional four-factor test that applies to preliminary injunctions as set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008), and found that both Koniag and O'Connell were entitled to injunctive relief. SER 31-38. The court then enjoined Kanam and Mullins from retaining, exercising, or threatening to retain or exercise jurisdiction with respect to the two tribal court actions. SER 38-39.

Despite the district court's order, Kanam and Mullins did not dismiss the two pending tribal court actions against Koniag and O'Connell. SER 17. In addition, they proceeded to initiate new tribal court actions against Koniag on August 24, 2012, and against O'Connell on November 6, 2012. SER 18. In addition, Kanam and Mullins attempted to use orders from the Karluk Tribal Court to "remove" another action filed by Koniag in federal district court (*Koniag, Inc. v. Andrew Airways* (Case No. 3:13-cv-00051-SLG)) to the Karluk Tribal Court. SER 18-19.

E. The District Court Grants Permanent Injunctive Relief.

In response to Kanam and Mullins' continued exercise of jurisdiction, Koniag again amended its complaint and filed a motion for partial summary judgment, permanent injunction, and contempt. SER 470. Kanam and Mullins did not file a response. Instead, Kanam and Mullins filed a "Cross Complaint," making allegations under the False Claims Act, that named the "Office of Sharon Gleason" (the presiding district court judge) and the "Office of Geoffrey Haskett,

USFW Regional Director" as parties and alleged that these parties had "a duty to protect the American people from a violation of the False Claim Act." SER 119-121. The district court took no action on the "Cross Complaint" and instead instructed Kanam and Mullins that they needed to seek leave to amend the pleadings. SER 16.[7]

On July 29, 2013, the district court judge proceeded to grant summary judgment in favor of Koniag and issue a permanent injunction. SER 16-20. The district court concluded that there was no issue of material fact as to jurisdiction, and that the Native Village of Karluk lacked jurisdiction over Koniag and O'Connell. SER 17. The district court then applied the four-factor test applicable to granting a permanent injunction (*W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013)), and concluded that a permanent injunction was warranted. SER 17. The district court issued an injunction requiring Kanam and Mullins to dismiss with prejudice all tribal court actions against Koniag and O'Connell, and further enjoined Kanam and Mullins from taking similar actions against Koniag and O'Connell in the future. SER 19-20. On that same day, the court issued a show cause order against Kanam and Mullins to appear at a hearing regarding contempt sanctions for violating the preliminary injunction. SER 21.

[7] Kanam and Mullins subsequently attempted (twice) to use this "Cross Complaint" to recuse the presiding district court judge, along with allegations that the district court judge was "mentally disabled." SER 47, 106. The presiding judge referred these disqualification motions to Judge Ralph Beistline, who found them to be baseless. SER 1-2, 11-13.

F. Kanam And Mullins File Two Different Notices of Appeal.

On August 19, 2013, Kanam and Mullins filed a notice of appeal in the district court. SER 110. The notice was filed on behalf of a non-party (Alicia Reft)[8] and did not identify a specific order of the district court. Instead, the notice provides:

> Notice is her[e]by given that Alicia Reft defendant in the above action is her[e]by affirming an order upholding the Jurisdiction and removal Act of 1874 and the Indian Self-Determination Act entered in this action on the 8 of August 2013.

SER 110. Although not entirely clear, the notice of appeal and supporting documents appear to be appealing the district court's refusal to remove the separate action *Koniag, Inc. v. Andrew Airways* to the Karluk Tribal Court. *See* SER 113. The district court reviewed that notice of appeal and found it deficient on its face because the court's jurisdictional determination and transfer decisions are not immediately appealable. SER 14. Accordingly, the district court disregarded the notice of appeal. SER 15.

On September 12, 2013, this Court issued an order to show cause as to why this appeal should not be dismissed. Dkt. 3. As the Court explained, "the district court's July 29, 2013 order granting a permanent injunction would be immediately appealable," but the August 19, 2013 notice of appeal "does not challenge the district Court's July 29, 2013 order." Dkt. 3 at 1. Rather, the notice of appeal appeared to challenge a jurisdictional ruling that is not immediately appealable. *Id.* at 2.

[8] Reft is a defendant in a separate action, *Koniag, Inc. v. Andrew Airways*, No. 3:13-cv-00051-SLG.

In response to the order to show cause, Kanam and Mullins filed their "Notice of Amended Appeal and Answer to Show Cause" in this Court. Dkt. 5. No such Notice of Amended Appeal was filed in the district court. The Notice of Amended Appeal changed the order appealed – from some unidentified jurisdictional decision to the July 29, 2013 permanent injunction – and the party appealing – from Reft to Mullins and Kanam – as follows:

> Notice is hereby given that Orbie Mullins and Kurt Kanam defendant[s] in above action is her[e]by appeal the district court order of July 29, 2013 Dct. #79. [sic]

Dkt. 5. Kanam and Mullins did not seek leave to file the amended appeal, provide grounds for an amended appeal, or otherwise address the show cause order.

Koniag responded to the show cause order (Dkt. 6) by providing the Court with a host of reasons why the Notice of Amended Appeal was deficient, including: (1) Kanam and Mullins did not seek leave to amend their notice of appeal; (2) even if they had sought such leave, the test for allowing an amendment of a notice of appeal – whether the intent to appeal the specific judgment can be fairly inferred from the original appeal – is not met here; and (3) any such amendment would be futile because Kanam and Mullins filed no opposition to Koniag's summary judgment motion requesting a permanent injunction, and therefore they have waived all challenges to the July 29, 2013 order on appeal. Dkt. 6.

On January 24, 2014, the Appellate Commissioner discharged the show cause order. Dkt. 8. The order did not address any of the arguments presented by Koniag regarding the requirements for amending a notice of appeal. Instead, the

order concluded that the amended notice of appeal was itself timely because it was filed within the 60-day deadline set forth in 28 U.S.C. § 2107(b) for appeals involving a federal party. Dkt. 8.

Koniag timely moved for reconsideration because the Commissioner's order was based on an issue (the application of 28 U.S.C. § 2107(b)) that no party raised or addressed in response to the show cause order. Dkt. 9. Koniag explained that there was controlling case law demonstrating that Kanam and Mullins' cross-complaint naming the presiding district court judge and others was insufficient to make 28 U.S.C. § 2107(b) applicable. *Id*. On May 14, 2014, the court denied the motion for reconsideration without prejudice to raise the issue in this brief. Dkt. 13.

G. The District Court Issues Contempt Sanctions Against Kanam And Mullins.

In the interim period before the Commissioner discharged the show cause order, the district court proceeded to find Kanam and Mullins in civil contempt for violating the July 3, 2012 preliminary injunction. SER 7-10. The district court again ordered Kanam and Mullins to discharge the tribal court actions, and imposed a fine of $200 per day until Kanam and Mullins file documentation of compliance. SER 9.[9] Kanam and Mullins have not taken steps to purge themselves of contempt. Instead, they have continued to file cross-complaints in

[9] The district court also awarded attorneys' fees and instructed Koniag to file a declaration related to fees. The district court ultimately suspended a ruling on fees (as well as further action in the case) after the Commissioner discharged the show cause order. SER 6.

the district court against the Comptroller of the United States, the Alaska Commissioner of the Department of Commerce, the Director of the U.S. Fish and Wildlife Service, and an accounting firm that does work for Koniag. SER 476.

V. STATEMENT OF THE CASE

This case is an interlocutory appeal from a permanent injunction issued against *pro se* defendants Kanam and Mullins. The permanent injunction was issued in conjunction with the district court's grant of partial summary judgment on July 29, 2013. SER 16-20. The district court has also issued civil contempt sanctions that are not at issue in this appeal. SER 7-10. The district court has not yet issued final judgment in this case.

VI. SUMMARY OF ARGUMENT

This appeal should be dismissed for two reasons. *First*, as detailed in Section VII.B below, the appeal is not timely, as it was not filed within 30 days after the district court's July 29, 2013 order issuing a permanent injunction. *Second*, as detailed in Section VII.C below, the district court properly granted summary judgment on the jurisdictional issue, correctly identified the legal framework applicable to a permanent injunction, and appropriately granted injunctive relief. Kanam and Mullins provided no argument to the contrary below, and they provide none now in their Opening Brief. The appeal, therefore, should be denied.

VII. ARGUMENT

A. Standard Of Review.

The district court's decision to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004) (reviewing summary judgment). The district court's decision to grant summary judgment is otherwise reviewed de novo. *Midgett v. Tri–Cnty. Metro. Transp. Dist.*, 254 F.3d 846, 849 (9th Cir. 2001). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. Kanam And Mullin's Appeal Is Untimely.

Under 28 U.S.C. § 2107(a), appeals of a permanent injunction order must be filed within 30 days after the entry of that order. The district court issued its partial summary judgment and permanent injunction order on July 29, 2013. Although Kanam and Mullins filed an appeal with 30 days of that order, that appeal "does not challenge the district Court's July 29, 2013 order." Dkt. 3 at 1. Instead, Kanam and Mullins did not file a notice of appeal challenging the July 29, 2013 order until September 26, 2013. The appeal was therefore outside the 30-day requirement of 28 U.S.C. § 2107(a), and should be dismissed for this reason alone.

Furthermore, there are no grounds for treating the September 26, 2013 appeal as a timely amendment to the original notice of appeal. Although the Court has inherent power to allow a party to amend a notice of appeal, as detailed in Koniag's prior briefing (Dkt. 6), amendment is not proper in this case. Kanam and

Mullins neither sought nor received leave to file an amendment to their notice of appeal.

Moreover, the Court only allows an amendment that would alter the designation of the judgment appealed from if "the intent to appeal [that] specific judgment can be fairly inferred" in the original appeal. *Pope v. Sav. Bank of Puget Sound,* 850 F.2d 1345, 1347 (9th Cir. 1988) (internal quotation marks and citation omitted). That test is not met here, as there is no possible way to infer that Kanam and Mullins' original notice (identifying a different party and a different order) was an attempt to appeal the July 29, 2013 order; as this Court's prior order explained, "[t]he notice of appeal, however, does not challenge the district court's July 29, 2013 order." Dkt. 3 at 1.

In addition, this case is not properly subject to the extended timeframes set forth in 28 U.S.C. § 2107(b). That provision extends the appeal deadline from 30 days to 60 days, provided that

> one of the parties is --
>
> (1) the United States;
>
> (2) a United States agency;
>
> (3) a United States officer or employee sued in an official capacity; or
>
> (4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Thus, in order for 28 U.S.C. § 2107(b) to apply at all, "one of the parties" to the case must be the United States, or an officer or employee of the United States.

The Supreme Court in *United States ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928 (2009), addressed the meaning of "party" as set forth in 28 U.S.C. § 2107(b).[10] In that case, the Court addressed whether the government was a party in a civil action brought by private plaintiffs on behalf of the federal government under the False Claims Act. The federal government was a nominal party in that case, and was in fact the "real party in interest" because the purpose of the False Claims Act is to recover damages for the United States. 556 U.S. at 934.

The Court concluded that, despite being the real party in interest, the federal government was not a "party" under 28 U.S.C. § 2107(b). *Id*. at 935. As the Court explained, "[a] person or entity can be named in the caption of a complaint without necessarily becoming a party to the action." *Id*. (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1321, at 388 (3d ed. 2004) ("[T]he caption is not determinative as to the identity of the parties to the action[.]")). Instead, "[a] 'party' to litigation is '[o]ne by or against whom a lawsuit is brought.'" *Id*. at 933 (second brackets in original) (quoting *Black's Law Dictionary,* 1154 (8th ed. 2004)). In addition, "[a]n individual may also become a 'party' to a lawsuit by intervening in the action." *Id*. (citation omitted). The Court held that the government was not the actual party bringing the action under the False Claims Act, did not choose to intervene in the case, and therefore was not an actual "party" to the case. *Id*.

[10] In 2011, Congress amended 28 U.S.C. § 2107(b) to provide greater clarity on the types of employees and former employees covered by the provision. In so doing, the nomenclature in the act shifted from "a party" to "one of the parties." The Supreme Court's decision in *Eisenstein* therefore refers to "party" rather than "parties."

Applying this standard, it is readily apparent that the presiding district court judge and the Regional Director are not parties in this case either. Federal Rule of Civil Procedure 21 provides that the district court may, "[o]n motion or on its own, . . . add or drop a party." (Emphasis added; brackets in original.) As this Court has explained, "[w]hen a party is added in an on-going lawsuit, the approval of the court is required by Rule 21." *Hoffman for & on Behalf of N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 536 F.2d 1268, 1272 (9th Cir. 1976) (emphases added). Rule 21 thus governs the process for "adding new parties to an action and this can only be accomplished upon *motion* by any party and *order of the Court* or on the Court's own initiative." *Perry v. Snyder*, 33 F.R.D. 361, 362 (E.D. Pa. 1963). A pleading that is submitted purporting to add new parties without compliance with Rule 21's motion and order requirements "is ineffective insofar as it attempts to add additional parties." *Spencer v. Dixon*, 290 F. Supp. 531, 535 (W.D. La. 1968).

Kanam did not seek leave to add either the presiding district court judge or the Regional Director as a "party" as required by Rule 21. Absent such a motion, the cross-complaint was therefore legally "ineffective" as a means of adding additional parties. Moreover, the district court below did not, on its own initiative, add those federal parties to the case; to the contrary, it explained that it was taking no action with respect to Kanam's cross-complaint because he failed to seek leave of the court. *See* SER 4, 16; *see also Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) ("Although we construe pleadings liberally in their favor, *pro se* litigants

are bound by the rules of procedure."); *United States v. Stinson*, 923 F.2d 864 (9th Cir. 1991) ("*Pro se* status does not excuse a criminal defendant from complying with the procedural rules of the court."). Therefore, pursuant to Rule 21, the presiding district court judge and Regional Director are not parties to the underlying case, and accordingly cannot be "parties" under 28 U.S.C. § 2107(b).

In any event, even if leave of the court were not required before a defendant unilaterally added another party to the case (and it is), a review of the cross-complaint shows that the putative federal defendants are, at best, only nominal parties to the cross-complaint. Although difficult to comprehend, the cross-complaint appears to allege that Koniag violated the False Claims Act. SER 120. The cross-complaint makes no allegations against the federal employees other than to state that they "have a duty to take action [to] protect the American people from a violation of the False Claim[s] Act." SER 120-121. But the Supreme Court in *Eisenstein* has already made clear that the United States cannot be made a "party," as contemplated in 28 U.S.C. § 2107(b), in an action under the False Claims Act "unless it has exercised its right to intervene in the case." 556 U.S. at 931. That, of course, has not happened here, and Kanam and Mullins cannot circumvent that holding by filing an unauthorized pleading seeking a declaration that federal parties have a "duty" under the False Claims Act.

In short, Kanam and Mullins' appeal was untimely and their appeal should be dismissed for this reason alone.

C. The District Court's Permanent Injunction Was Properly Issued.

1. The District Court Identified The Correct Legal Standard And Correctly Applied That Standard To The Undisputed Facts.

Even if the appeal is deemed timely, Kanam and Mullins' appeal has no merit. The district court correctly granted summary judgment to Koniag on the scope of Karluk Tribal Court authority, and did not abuse its discretion in granting a preliminary injunction to restrain improper exercise of that authority.

Starting with summary judgment, the district court identified the proper legal framework for deciding the scope of tribal court jurisdiction in *Montana v. United States*, 450 U.S. 544 (1981). SER 33. The Supreme Court in *Montana* established the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The Court recognized two exceptions for civil jurisdiction over "non-Indians on their reservations": (1) a tribe may regulate the activities of non-members who enter consensual relationships with the tribe or its members; and (2) the tribe may regulate the conduct of non-Indians of fee land within the reservation in specified circumstances. *Id*. (citations omitted). As the district court explained, both of these *Montana* exceptions are limited to nonmember activities *on the reservation*. SER 33.

The district court further correctly explained that tribal jurisdiction is even further limited in Alaska under ANCSA. SER 34. In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 532 (1998), the Supreme Court held that ANCSA extinguished "Indian country" in nearly all of Alaska. Accordingly, the jurisdiction of the Alaska Native tribal courts extends only to "their members and

other internal affairs." SER 34 (quoting David Case, *Alaska Natives and American Laws* 437 (2d ed. 2002)).

In response to Koniag's motion for a preliminary injunction, the district court properly applied this standard to the Native Village of Karluk. The district court explained that the Native Village of Karluk is a federally recognized tribe, but that it was undisputed that the Karluk Reservation was revoked by ANCSA. SER 35. It was similarly undisputed that Koniag and O'Connell are not members of the Native Village of Karluk. SER 36. Accordingly, the district court appropriately concluded that the tribal court cannot exercise jurisdiction over Koniag and O'Connell under *Venetie*. SER 36.

Tellingly, when Koniag filed for summary judgment on that same ground, Kanam and Mullins filed no response at all, and thus provided no grounds then (or now) to dispute the district court's grant of summary judgment in the July 29, 2013 order. *See USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1280 (9th Cir. 1994) (failure to present evidence to oppose summary judgment waives issue on appeal). Accordingly, the district court reached the same result in response to Koniag's motion for summary judgment. SER 17. Because the district court applied the correct legal standard, and because there were no material facts in dispute, the district court properly granted summary judgment on the scope of the tribal court's jurisdiction.

With respect to the permanent injunction, the district court also correctly identified the correct legal standard as set forth by this Court:

> Before a court may issue a permanent injunction, a party must show (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of the hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

SER 17-18 (quoting *W. Watersheds Project,* 719 F.3d at 1054). Applying that standard the Court concluded that (1) Koniag and O'Connell were suffering irreparable harm based on the costs of defending against multiple tribal court actions and the risk of adverse judgment entered by the tribal court (SER 19, 36-37); (2) legal remedies were inadequate to compensate for these injuries because the harm suffered by an adverse judgment without due process would be irremediable (SER 18-19, 36-37); (3) the balance of hardships favored an injunction because the tribal court was plainly without jurisdiction, and the Native Village of Karluk could pursue its claims in state or federal court (SER 19, 37-38); and (4) the public interest was served by halting proceedings that were clearly in excess of tribal court jurisdiction (SER 19, 38).

Here too, Kanam and Mullins filed no opposition regarding Koniag's motion for a permanent injunction. Accordingly, Kanam and Mullins have no grounds for arguing that the district court abused its discretion in issuing the permanent injunction.

2. Kanam and Mullins' Brief Provides No Credible Grounds For Reversing The District Court's Decision.

Kanam and Mullins' brief identifies the following issue:

> 1. Did the district court lack jurisdiction to issue the oder [sic] granting a permanent injunction due to a conflict of interest in being a cross compliant [sic] defendant to the action Dct #71 and #72 and did the court err in ignoring the mandatory judicial notice of securities fraud at Dct61.

Liberally construed, Kanam and Mullins appear to argue that the cross-complaint that they filed listing the presiding district court judge as a defendant in the above-discussed False Claims Act action either (a) deprived the court of jurisdiction; or (b) put the presiding judge in a conflict of interest so that she should not have issued the permanent injunction. Alternatively, this issue appears to argue that the district court improperly ignored the "mandatory judicial notice of securities fraud" at Docket 61.

None of these claims has any merit. As to the jurisdiction of the district court, it is "well settled" that the issue of "whether a tribal court has adjudicative authority over nonmembers is a federal question" subject to jurisdiction under 28 U.S.C. § 1331. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008); SER 31 (citing same). Had the district court accepted Kanam and Mullin's cross-complaint, it would have had jurisdiction over those claims as well. *U.S. ex rel. Sutton v. Double Day Office Servs., Inc.*, 121 F.3d 531, 532 (9th Cir. 1997) (district court has jurisdiction over False Claims Act complaint under 28 U.S.C. § 1331)). Kanam and Mullins provide no explanation (and there is none) as to how their filing deprives the district court of jurisdiction over these federal questions. As such, this claim fails.

As to claims of conflict of interest based on the filing of the cross-complaint and associated materials naming the district court judge in a False Claims Act

action, the district court judge properly regarded that filing as a nullity because it was filed without leave of the court. SER 16. As the district court explained, Kanam and Mullins were required to seek leave to add parties. *Id*. Kanam and Mullins did not do so. Nor did they ask the district court to refrain from ruling on the motion for summary judgment and permanent injunctive relief based on those filings. Having failed to do so, they cannot present those claims on appeal. *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (as a general rule, the court of appeals "does not consider an issue not passed upon below" (internal quotation marks and citation omitted)).

To be clear, Kanam and Mullins did subsequently ask the district court judge to recuse herself because she allegedly participated in a "securities fraud" with Koniag and because she is not paid enough to "keep her honest and without basis [sic] or she is mentally disabled." SER 100. But that request was not filed until September 23, nearly two months after the July 29, 2013 permanent injunction order issued, and therefore is not part of this appeal. *See* Dkt. 13 ("The scope of this appeal is limited to the district court's July 29, 2013 order[.]"). In any event, that motion was properly referred to Judge Beistline, who found the motion to be baseless. SER 11-13.

Even if this issue is not waived, Kanam and Mullins have no legitimate claim of conflict of interest based on their putative cross-complaint. The cross-complaint makes no actual allegations of wrongdoing against the presiding district court judge. Instead, Kanam and Mullins generically aver that the district court judge and the other federal defendant "have a duty to take action [to] protect the

American people from a violation of the False Claim[s] Act." SER 120-21. This appears to be nothing more than a misguided attempt to force federal involvement in a claim under the False Claims Act, something that is not permitted without government consent. *Eisenstein,* 556 U.S. at 931. Accordingly, Kanam and Mullins' late-conceived concerns over conflict of interest have no merit.

Similarly, Kanam and Mullins' claim that the district court erred in ignoring "the mandatory judicial notice of securities fraud" is misguided. The document referenced (Dkt. 61) is not a "mandatory judicial notice of securities fraud," but something titled, "Mandatory Judicial Notice with Affidavit in Support/ Motion to Dismiss for Lack of Controversy/Answer to Third Amended Complaint, *in pari materia* with Rule 201(d), 28 U.S.C. § 2072(a)." SER 122. The district court in a separate order dated April 22, 2013 (not appealed here) treated the filing as an answer that generally denies the allegations in the complaint. SER 24. The district court further decided that "[t]o the extent the document at Docket 61 also purports to be a renewed Motion to Dismiss for Lack of Controversy, that motion is DENIED for the same reasons that the prior motions to dismiss have been denied." SER 24. Kanam and Mullins provide no explanation as to why this decision was in error. In any event, the district court's order denying the motion to dismiss is simply beyond the scope of the present appeal. *See* Dkt. 13 ("The scope of this appeal is limited to the district court's July 29, 2013 order[.]"). Either way, the materials provided at Docket 61 provide no grounds for reversing the district court's decision.

Lastly, without otherwise addressing the merits of the permanent injunction, Kanan and Mullins state in passing that the tribal court had jurisdiction over Koniag and O'Connell by virtue of "the Indian Child Welfare Act, the Indian Self Determination Act, Tribal Law And Order Act, Uniform Foreign Judgments Act, Declaratory Judgments Act, and the Executive Order 13175." Br. at 6. Kanam and Mullins do not explain how these provisions grant the Karluk Tribal Court jurisdiction over Koniag and O'Connell, and a cursory review shows each provision is inapposite.

The Indian Child Welfare Act is clearly inapplicable as it applies only where there is an "Indian child" involved in a "child custody proceeding." *See Cohen's Handbook on Federal Indian Law* § 11.02 (Nell Jessup Newton, ed. 2005). The Indian Self-Determination and Education Assistance Act is also inapplicable as it allows tribes to enter into contracts with the federal government to take over the administration of certain programs and to develop self-governance compacts; the jurisdictional provisions of the act provide for *federal court* enforcement of such contracts. *Id*. § 22.02. The Uniform Foreign Judgments Act, to the extent enacted in a particular state, speaks only to the ability of courts to enforce foreign court judgments; it does not expand the scope of tribal jurisdiction over non-members. *Id*. § 7.07. The Tribal Law and Order Act provides no help either because Section 205 makes clear that "[n]othing in this Act limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in that State." *See* Pub. L. No. 111-211, § 205, 124 Stat. 2258 (2010). The Declaratory Judgment Act does not purport to confer

jurisdiction on any tribe, and Executive Order 13175 does not speak to jurisdiction either. *See* 65 Fed. Reg. 67,249, 67252 (Nov. 9, 2000) ("This order is intended to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.").

In short, Kanam and Mullins have provided no reasonable grounds (and there are no such grounds) for reversing the district court's permanent injunction, and their appeal should be denied.

VIII. CONCLUSION

For the foregoing reasons, this appeal should be dismissed and the case remanded back to the district court for further proceedings.

DATED: July 21, 2014.

Respectfully submitted,

STOEL RIVES LLP

By: s/ James E. Torgerson
JAMES E. TORGERSON
(AK BAR NO. 8509120)
RENEA I. SAADE
(AK BAR NO. 0911060)

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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STOEL RIVES LLP

By: s/ James E. Torgerson
JAMES E. TORGERSON

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiff-Appellees state that they are not aware of any related cases pending before this Court.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 21st day of July, 2014, I electronically filed the foregoing **RESPONSE BRIEF BY KONIAG INC** for Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that Defendants-Appellants were served on the same date via U.S. First Class Mail as follows:

Mr. Kurt Kanam
Tribal Attorney
Karluk Tribe
2103 Harrison Street, #143
Olympia, WA 98502

Honorable Orbie Mullins
Village of Karluk Tribal Judge
Native Village of Karluk
PO Box 237
Toledo, WA 98591

Dated: July 21, 2014

s/ James E. Torgerson

James E. Torgerson

Addendum

ADDENDUM

Koniag Inc., et al. v. Kanam, et al.

No. 13-35759

28 U.S.C. § 2107

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is—
(1) the United States;

(2)a United States agency;

(3)a United States officer or employee sued in an official capacity; or

(4)a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

* * * *