

Case No. 13-35759

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

KURT KANAM and ORBIE MULLINS,

Defendants-Appellants.

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

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**APPELLEES' RESPONSE TO APPELLANTS' "NOTICE OF AMENDED  
APPEAL – ANSWER TO SHOW CAUSE"**

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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

## I. INTRODUCTION

On September 12, 2013, this Court issued an order instructing the *pro se* Defendants-Appellants Kurt Kanam (Kanam) and Orbie Mullins (Mullins) to show cause as to why their appeal should not be dismissed. Dkt. 3.<sup>1</sup> The order noted that Kanam and Mullins’s notice of appeal does not “challenge any final or appealable orders of the district court.” *Id.* at 2. The order instructed Kanam and Mullins to either voluntarily dismiss their appeal or show a jurisdictional basis. *Id.* Kanam and Mullins did not comply with either of these options. Instead, Kanam and Mullins filed a “Notice of Amended Appeal,” which changed the order being appealed and the parties seeking appeal.

Plaintiffs-Appellees Koniag, Inc. and Michael P. O’Connell (collectively “Koniag”) respectfully request dismissal of this appeal for two reasons. First, Kanam and Mullins have not complied with this Court’s show cause order. Second, even if the Notice of Amended Appeal could be deemed compliant with the order, Kanam and Mullins have not sought leave to file an amended appeal and, even if they had, the circumstances do not warrant amendment. Moreover, the record demonstrates that any such amendment would be futile.

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<sup>1</sup> As cited herein, “Dkt.” refers to Ninth Circuit Docket, case number 13-35759, and “Dist. Ct. Dkt.” refers to District Court of Alaska Docket, case number 3:12-cv-0077-SLG.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Koniag initiated this lawsuit in federal district court in Alaska seeking injunctive and other prospective relief against Kanam, a tribal attorney for the Native Village of Karluk, and Mullins, a Village of Karluk Tribal Court Judge. *See* Dist. Ct. Dkt. 60 at 1. Specifically, Koniag sought a permanent injunction precluding the tribal court from exercising jurisdiction over it in certain matters. *Id.* at 2.

On July 3, 2012, the district court granted Koniag's motion for a preliminary injunction, prohibiting Kanam and Mullins from retaining, exercising, or threatening to exercise jurisdiction in tribal court. Dist. Ct. Dkt. 31 at 15. Kanam and Mullins did not comply with the injunction, and continued to attempt to retain jurisdiction. On May 16, 2013, Koniag filed a motion for contempt and sanctions, and for a permanent injunction against Kanam and Mullins. Dist. Ct. Dkt. 66. Kanam and Mullins did not file an opposition to the motion.

On July 29, 2013, the district court granted Koniag's request for a permanent injunction, explaining that "[n]o opposition to the motion has been filed" and that there was "no genuine question of material fact as to [Koniag's] claim against Defendants that under federal common law Defendants do not have the legal right to exercise, retain, or threaten tribal court jurisdiction over the Plaintiffs" in any of the identified actions. Dist. Ct. Dkt. 78 at 2. Further, the court found that Koniag

had suffered and would suffer irreparable harm, and the balance of equities weighed in favor of a permanent injunction. *Id.* at 4.

The court then ordered Kanam and Mullins to dismiss the tribal court actions within 10 days. *Id.* Kanam and Mullins did not comply with that order either. The Court also set a hearing on contempt and sanctions for August 26, 2013. Dist. Ct. Dkt. 77.

On August 19, 2013, Kanam and Mullins filed a notice of appeal in the district court. The notice was filed on behalf of a non-party (Alicia Reft)<sup>2</sup> and did not identify a specific order. 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.

Dist. Ct. Dkt. 86 at 1. The district court reviewed that notice of appeal and found it deficient on its face because the court's jurisdictional determination is not immediately appealable. Dist. Ct. Dkt. 89. Accordingly, the district court disregarded the notice of appeal and proceeded to adjudicate the case.

On September 12, 2013, Mullins filed a "Notice of Securities Fraud" and "Affidavit of Prejudice" against the presiding district court judge, the Honorable Sharon L. Gleason, accusing the judge of wrongdoing in this case. Dist. Ct. Dkt.

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<sup>2</sup> Reft is a defendant in a separate action, *Koniag, Inc. v. Reft*, 3:13-cv-00051-SLG.

95 & 96. Judge Gleason referred the matter to another district court judge as a request for disqualification. On September 24, 2013, the Honorable Ralph R. Beistline denied the motion finding “absolutely no evidence to suggest that Judge Gleason has engaged in securities fraud within the context of this case or elsewhere,” and that there was no basis for the bias claim. Dist. Ct. Dkt. 99 at 2-3.

Meanwhile, Kanam and Mullins filed their “Notice of Amended Appeal and Answer to Show Cause” in this Court. 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. The Notice of Amended Appeal provides no response to the jurisdictional issues identified in the show cause order.

On September 25, 2013, the district court issued an order finding Kanam and Mullins in civil contempt. Dist. Ct. Dkt. 100. Kanam and Mullins were again ordered to dismiss pending tribal actions against Koniag, and file proof of that dismissal within 21 days. No such notice has yet been received in the docket.

### III. ARGUMENT

#### A. **Kanam and Mullins' Appeal Should Be Dismissed Under Rule 42-1 for Failure to Comply with the Show Cause Order.**

Under Ninth Circuit Rule 42-1, failure to comply with the court's rules or orders is grounds for dismissal. The Court's show cause order gave Kanam and Mullins only two options: either voluntarily dismiss their appeal or explain why it should not be dismissed. "Within 21 days after the date of this order, appellants shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction." Dkt. 3. The order further warned that "[i]f appellants do not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1." *Id.*

As has been their repeated pattern with respect to the orders and injunctions issued by the district court, Kanam and Mullins did not comply with this Court's show cause order either. Kanam and Mullins have not voluntarily dismissed their appeal. Nor have they explained why the Court has jurisdiction over their Notice of Amended Appeal, filed on behalf of a non-party (Alicia Reft), challenging a non-final jurisdictional determination. Because Kanam and Mullins have made no effort to comply with the show cause order, their appeal should be dismissed.

Rather than complying with the order and explaining the basis for jurisdiction, Kanam and Mullins chose a different route and filed their "Notice of Amended Appeal." Regardless of whether such an amendment could be proper

under certain circumstances (and as explained below those circumstances are not present here), filing an amendment was simply not one of the options provided in the show cause order. As such, the Notice of Amended Appeal is not compliant with the show cause order and the appeal should be dismissed.

**B. Amendment of the Notice of Appeal Is Not Proper Under the Circumstances.**

Even if the Notice of Amended Appeal could be deemed compliant with the show cause order, Kanam and Mullins have failed to demonstrate that an amendment is appropriate in this case for three reasons.

*First*, while this Court “possesses the inherent power to allow a party to amend a notice of appeal,” *Pope v. Sav. Bank of Puget Sound*, 850 F.2d 1345, 1347 (9th Cir. 1988), Kanam and Mullins have neither sought nor received leave to file such an amended notice.

*Second*, this 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. *Id.* (internal quotation marks and citation omitted). That test is not met here, as there is no possible way to infer that Kanam and Mullins were attempting to appeal the July 29, 2013 permanent injunction from their notice of appeal. Indeed, the show cause order itself explains that “[t]he notice of appeal, however, does not challenge the district court’s July 29, 2013 order.” Dkt. 3 at 1.

*Third*, it is equally clear that any such amendment would be futile in this case. As the district court explained in its July 29, 2013 order, Kanam and Mullins filed no opposition to Koniag's summary judgment motion requesting a preliminary injunction. Dist. Ct. Dkt. 78 at 1 n.1. Having raised no defense to the motion in the proceedings below, Kanam and Mullins have waived challenges to the order on appeal. *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). Because Kanam and Mullins have waived their challenge to this order, any amendment would be futile.

Moreover, although Kanam and Mullins cite the July 29, 2013 in their Notice of Amended Appeal (no doubt because the show cause order identified this particular order as immediately appealable), a review of the materials attached to that notice shows that the issue Kanam and Mullins intend to appeal relates to baseless allegations of improprieties and "securities fraud" against Judge Gleason. Dkt. 5 at 5 (STATEMENT OF THE ISSUES). These issues were not raised in briefing in opposition to the July 29, 2013 order.

Rather, as discussed above, that issue was disposed of by Judge Beistline, in a separate order *after* the Notice of Amended Appeal was filed. Dist. Ct. Dkt. 99. It is well-settled that orders denying disqualification are not final orders subject to appeal, and thus even if the notice of appeal (or the Notice of Amended Appeal)



could be construed as covering that decision, the appeal must still be dismissed. *United States v. Washington*, 573 F.2d 1121, 1122 (9th Cir. 1978) (“[D]enial of a motion to disqualify is not a final order nor one that should be treated as such . . . .”). Appeal of those issues must wait, if they are to be appealed at all, until final resolution of this case by the district court.

#### IV. CONCLUSION

For the foregoing reasons, Koniag respectfully requests that the Court dismiss this appeal for failure to comply with the show cause order and because no amendment is authorized or appropriate in these circumstances.

DATED: October 7, 2013.

Respectfully submitted,

STOEL RIVES LLP

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

Attorneys for Plaintiffs-Appellees

**CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on the 7th day of October , 2013, I electronically filed the foregoing **Appellees’ Response to Appellants’ “Notice of Amended Appeal – Answer to Show Cause”** 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 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

/s/ James E. Torgerson  
James E. Torgerson

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