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3 **UNITED STATES DISTRICT COURT**
4 **WESTERN DISTRICT OF WASHINGTON**
5 **AT TACOMA**

6 ROBERT REGINALD COMENOUT)
7 SR., EDWARD AMOS COMENOUT)
8 III, ROBERT REGINALD)
9 COMENOUT JR., MARLENE) No. 3:16-cv-05464-RJB
10 COMENOUT, and LEE A.)
11 COMENOUT SR.,) PLAINTIFFS RESPONSE TO STATE AND
12) JUDICIAL DEFENDANTS' JOINT
13 Plaintiffs,) RESPONSE FOR SANCTIONS
14)
15 v.)
16)
17 J. MARK KELLER, Employee of the)
18 Washington State Liquor and Cannabis)
19 Control Board, LEE BOLING,)
20 Employee of the Washington State)
21 Liquor and Cannabis Control Board,)
22 AL ANDERSON, a Lieutenant of)
23 Washington State Liquor and Cannabis)
24 Control Board, Washington State)
25 Liquor Board Officer RAJ)
26 VELUPPILLAI, BOYD)
27 GOODPASTER, Acting State Agent,)
28 TOM WALSH, Acting State Liquor)
Board Agent, DOUGLAS SMYTHE,)
Employee of the Quinault Indian)
Nation, Pro Tem, THOMAS J.)
FELNAGLE, Judge Pro Tem Pierce)
County Superior Court, DENNIS)
O'BRIAN, Pierce County Probation)
Officer in charge of Plaintiffs Robert)
Reginald Comenout Sr., Robert)
Reginald Comenout Jr., Marlene)
Comenout, and Lee A. Comenout Sr.,)

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28 Response to Joint Response For Sanctions- 1

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2 Administrative Law Judge TERRY)
3 A. SCHUH, Administrative Law)
4 Judge of the State of Washington)
5 Office of Administrative Hearings)
6 now presiding over State of)
7 Washington Office of Administrative)
8 Hearings forfeiture Proceedings on)
9 property owned by Plaintiffs and)
10 seized from the public domain)
11 allotment, JOHN AND JANE DOES,)
12 1-10, fictitious names of employees)
13 of the Washington State Liquor and)
14 Cannabis Board who participated in)
15 raids on Plaintiffs' Allotment and)
16 property at 908/920 River Road,)
17 Puyallup, Washington, or who may)
18 participate in the future, JOHN AND)
19 JANE DOES, 11 and 12, Post Falls,)
20 Idaho Police Officers who acted as)
21 Agents of the Washington State)
22 Liquor and Cannabis Board in raids)
23 on Plaintiffs' Allotment and property)
24 at 908/920 River Road, Puyallup,)
25 Washington, or who may participate)
26 in the future,)
27)
28 Defendants.)

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20 The state Defendants apparently seek sanctions against Plaintiffs and their attorneys. The
21 attorneys have not been personally served nor given an independent right to respond. Due
22 process requires independent prior notice "to present reasons not to proceed." *Washington v.*
23 *Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). Perhaps it makes no difference, but this case is
24 a David and Goliath case in which the state and federal governments have seized all the
25 Plaintiffs' money from their bank accounts (see Federal Defendants' Opposition, Dkt 54, page
26 10 of 14), closed down the store on the premises and are litigating against an elder Indian who

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28 Response to Joint Response For Sanctions- 2

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2 is over 85 years old, in a wheelchair and has had two heart attacks. The head of the state's law
3 firm has just defeated the President of the United States in the Ninth Circuit. The Governor
4 is appearing on national news programs and is pictured with a movie star, actress Jennifer
5 Garner (Spokesman Review, 2/26/2017, page 3). The state, on March 16, 2017, lost a gas tax
6 case against a Yakama Indian distributor in the state Supreme Court. *Cougar Den Inc., v.*
7 *Washington State Department of Licensing*, No 92289-6. The case follows the cigarette tax
8 cases. The State Supreme Court stated "We also note that this case does not present the
9 'parade of horrors' concern raised by the state..." "If the State has concerns about this treaty
10 provision, only Congress can revise or restrict the provisions, not this court." (p. 16). The state
11 attaches pleadings from other case attempting to disparage the Comenout's counsel. They cite
12 one Tonasket case but omit *Brigman, Tonasket, Cook*, 874 F.Supp 1125 (E.D. WN 1946) a
13 case now reinvigorated by recent Ninth Circuit cases and the 2006 amendment to 18 U.S.C.
14 2346. If the attorneys are sought personally and also the client, the client may need
15 independent representation as a conflict may exist. "It may be necessary to defer the decision
16 until the litigation on the motion is considered." See William W. Schwarzer "*Sanctions Under*
17 *the New Federal Rule 11 - A Closer Look*" 104 F.R.D. 181, 199 (1985). If the Motion is
18 denied the frivolous assertion is moot. *Rawe v. Bosnar*, 167 Wash.App. 509, 512 (Ct. App.
19 Wash. 2012). Since the litigation is pending the attorneys are protected by absolute privilege.
20 "All the challenged conduct giving rise to the Plaintiffs' claims was absolutely privileged
21 because it was carried out by attorneys during the course of the litigation." *Kimmel &*
22 *Silverman v. Porro*, 53 F.Supp.3d 325, 342 (U.S. D.C. Mass. 2014). Absolute immunity
23 presents "a chilling effect on litigants" *Zuccarelli v. Barfield*, 165 So.3d 830, 831 (Ct. App.
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Circuit applies to the litigation privilege to attorneys in court proceedings. *Graham -Sult v. Clainos*, 756 F.3d 724, 741 (9th Cir 2013). The rules of professional conduct, R.P.C. 3.1, require that the arguments of attorneys must have a basis in law.

Here there are five Plaintiffs and three attorneys. There is no record before the court where the sanctions are imposed on an attorney. Bad faith must have detailed findings. *Primus Automotive Financial Services v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). Further, the findings must allocate responsibility where the sanctions are levied against both attorneys and clients. *Ibid.* at 648. The only relief sought here are a declaratory judgment and injunction. The penalty would be to chastise the Plaintiffs for trying to find out what rights they have to the allotment and to determine who has jurisdiction, whether BIA, city, state or federal and of what type of action. If answers are obtained, both parties would benefit. This would deter further litigation. The Plaintiffs are essentially penalized for trying to clarify the law. *City of Seattle v. Egan*, 2014 WL 645381 (Div. 1, Wash.App. 2014) applies. The declaratory judgment in the case gave an advantage as it had more favorable facts than another case that was pending. The public interest was involved. The sanctions were reversed. *Id.* at *4. In *Elf-man LLC v. Lamberson*, 2014 WL 11513119 (D.C.E.D.Wash. 2014) references were made on a Rule 11 Motion to other cases not before the court. *Christian v. Mattel*, 286 F.3d 1118 (9th Cir. 2002) states "Conduct in depositions, discovery meetings of counsel, oral representations at hearings and behavior in prior proceedings do not fall within the ambit of Rule 11." *Id.* at 1131. The court declined to consider them due to lack of relevancy. *Id.* at *8. The court also held that advance notice of the grounds of the objection must be given. *Golden Eagle Distributing Corporation v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986) applies

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2 here. "It is not always easy to decide whether an argument is based on established law or is
3 on for the extension of existing law. Whether the case being litigated is or is not materially the
4 same as earlier precedent is frequently the very issue which prompted the litigation in the first
5 place." *Id.* at 1540. "Litigation on the issue of sanctions, like any litigation, is experience."
6 *Id.* at 1541. The facts are not complicated. The Defendants claim the law is well settled. Here
7 the case of *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of*
8 *Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013) applied the supremacy clause over state law.
9 *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078,
10 1087-8 (9th Cir. 2013) held that the 1995 and 2003 changes in the cigarette tax law removed
11 the *Colville* (447 U.S. 151) requirement that Indians in Indian Country have to comply with
12 the cigarette tax law. Now most Indian tribes in Washington have cigarette tax compacts and
13 do not collect state cigarette tax or put state cigarette tax stamps on the packages. There is no
14 law on cannabis as the state law has allowed cannabis sales. The new cases unsettle the law.
15 "An attorney" need not advance a winning argument to avoid Rule 11 sanctions. *Brubacker*
16 *v. City of Richmond*, 943 F.2d 1363, 1378 (4th Cir. 1991); *LaSalle National Bank of Chicago*
17 *v. County of DuPage*, 10 F.3d 1333, 1338 (7th Cir. 1993). "As a shorthand test, we use the
18 word 'frivolous' to denote a filing that is both *baseless* and made without a reasonable and
19 competent inquiry." *Moore v. Keegan Management*, 78 F.3d 431, 434 (9th Cir. 1996) where
20 amended complaints are the issue 28 U.S.C. § 1927 requires bad faith. There is no bad faith
21 here. Lack of jurisdiction for removal from small claims court to federal court did not result
22 in sanctions. *McGill v. Pacific Bell Telephone Co.*, 139 F.Supp.3d 1109, 1121 (D.C.Cal.
23 2015). *Petrella v. Metro Goldwyn-Mayer, Inc.*, 695 F.3d 946 (9th Cir. 2012) is a good example

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2 of overzealous use of Rule 11. The Ninth Circuit denied Rule 11 sanctions brought by the
3 Defendant contending unjustified prosecution filing and prosecution of the action. The court
4 upheld the denial on the grounds that "Petrella had a reasonable belief that she could overcome
5 the Laches defense." *Id.* at 957. Petrella was right. She got a reversal in the U.S. Supreme
6 Court. *Petrella v. Metro-Goldwyn-Mayer Inc.*, ___ U.S. ___, 134 S.Ct. 1962, 188 L.Ed.2d 979
7 (2014).
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9 The request for sanctions is an unjustified attack. The amended complaint is warranted.
10 In any event, sanctions do not apply.

11 DATED this 20th day of March, 2017
12

13 s/ Robert E. Kovacevich
14 ROBERT E. KOVACEVICH, #2723
15 Attorney for Plaintiffs

16 s/ Aaron L. Lowe
17 AARON L. LOWE #15120
18 Attorney for Plaintiffs

19 s/ Randal B. Brown
20 RANDAL B. BROWN #24181
21 Attorney for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2017, I electronically filed the foregoing Plaintiffs' Response to State and Judicial Defendants' Joint Response for Sanctions with the Clerk of the Court using the CM/ECF System.

s/ Robert E. Kovacevich
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Attorney for Plaintiffs

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