Consolidated Appeal Nos. 15-35261; 15-35268

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT R. COMENOUT, SR. Plaintiff-Appellant, and MARY LINDA PEARSON, Plaintiffs-Appellant, v. ROBERT W. WHITENER, JR., Defendant-Appellee.	District Court No. 3-15-cv-05054-BHS U.S. District Court for Western Washington, Tacoma

APPELLEE'S ANSWERING BRIEF

Kilpatrick Townsend & Stockton LLP
Rob Roy Smith, WSBA #33798
1420 Fifth Avenue, Suite 3700
Seattle, WA 98101
Telephone: (206) 467-9600
Facsimile: (206) 623-6793

Attorneys for Appellee Robert W. Whitener

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Robert W. Whitener, Jr. ("Whitener") is an independent contractor of the Quinault Indian Nation ("Nation"), a federally recognized sovereign Indian tribe. In his capacity as an agent and representative of the Nation, and at the direction of the Nation, Whitener posted a no trespass sign on a telephone pole "on or near" Allotment No. 130-1027, in Puyallup, Washington, which is land currently held in trust by the United States for thirteen owners of the allotment, one of whom is Appellant Robert R. Comenout Sr. ("Comenout"). Opening Br at 8. The language of the sign Whitener posted states, among other things, "This property is leased to the Quinault Indian Nation." ER 11 at 249. For this act – posting a sign – Whitener was sued by Comenout in the United States District Court for the Western District of Washington for alleged violations of civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as violations of Washington State law. ER 8.

Although Whitener is nominally the Appellee, the real party in interest and the primary focus of the dispute is the Nation. For that reason, Comenout's claims cannot lie against Whitener in his personal capacity because Whitener cannot be held personally liable for acts he was undertaking at the direction of the Nation. Thus, the Nation is a required party. However, its joinder is not feasible because the Nation is immune to Comenout's unconsented suit. The primary question for

this Court to consider—whether the District Court correctly dismissed Comenout's case against Whitener under Federal Rules of Civil Procedure 12(b)(7) and 19—must be answered in the affirmative.

JURISDICTION STATEMENT

This is an appeal from the final orders and judgment of the U.S. District Court for the District of Washington dated March 3, 2015 dismissing Comenout's complaint and dated March 16, 2015 denying Comenout's motion for reconsideration and Comenout's motion for leave to file a First Amended and Supplemental Complaint. ER 4 and 5. The basis for jurisdiction in the district court was federal question jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The issues properly before this Court are:

1. Whether Mary Linda Pearson as Personal Representative of the Estate of Edward A. Comenout Jr. ("Estate"), which was not a party to the case before the District Court, may join this appeal.

2. Whether dismissal was appropriate because the Nation is a required party under Fed. R. Civ. P. 19 that cannot be joined because of its sovereign immunity.

3. Whether dismissal was required under Fed. R. Civ. P. 12(b)(6) because Comenout fails to allege facts supporting a claim under civil RICO.

4. Whether dismissal was required because the District Court would have lacked subject matter jurisdiction over his Washington state law claims and, in any event, Comenout fails to allege facts supporting such claims.

STATEMENT OF THE CASE

I. COMENOUT'S USE OF THE PROPERTY

The property which is the subject of this dispute is Allotment No. 130-1027, further identified as Pierce County Parcel No. 4920200100, with a physical address of 920 River Road, Puyallup, WA 98371. ER 11 at 119. The property is currently held in trust by the United States for the thirteen owners of the allotment, one of whom is Comenout. *Id.* at 163-64. Comenout's interest in the property is only 6.6%. *Id.* at 124-25. Yet, it is Comenout who is currently occupying the property for a business purpose and receiving 100% of the profits of an illegal business operated on the property without a validly approved Federal lease to conduct that business. *Id.*

Comenout is one of the current operators of the business located on the property, the Indian Country Store. *Id.* at 183. The Indian Country Store is selling cigarettes but is not remitting the applicable cigarette taxes to either the state or the Nation, as it has been doing for some time. *Id.*; *State v. Comenout*, 173 Wash.2d

235, 240, 267 P.3d 355 (2011) (holding that "[i]n sum, the Comenouts are not exempt from Washington's cigarette tax."); *see also State v. Comenout*, 85 Wash. App. 1099 (1997) (barring the Comenouts from engaging in the sale of fireworks). On May 26, 2015, the State of Washington filed a criminal information against Comenout and three co-defendants in Superior Court in Pierce County alleging, among other things: unlawful sale of cigarettes, unlawful possession of unstamped cigarettes, and criminal conspiracy to commit theft. *State v. Comenout, Sr., et al.*, Case No. 15-1-02002-3 (Pierce Co. Sup. Ct).[1] The criminal action remains pending.[2]

Comenout has never had a lease approved by the United States Bureau of Indian Affairs ("BIA") to use the property for business purposes. ER 11 at 190. Such a lease is required by Federal law. *See generally* 25 C.F.R. pt. 162 (leasing regulations); *see also* 25 C.F.R. §§ 162.401-.474 (business leases).

[1] Comenout boldly states, somewhat apropos of nothing, that "At this juncture, it appears the Comenouts were entirely lawful in not collecting any cigarette taxes." Opening Br. at 28. The State of Washington would, apparently, disagree.

[2] The Court should take judicial notice of this action. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (concluding that the court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'").

II. THE BIA BUSINESS LEASE FOR THE PROPERTY

Various parties, and representatives of those parties, were actively engaged in exploring and negotiating a proposed BIA approved ground lease for use of the property owned in part by Comenout starting in October 2012. ER 11 at 122. An initial draft was circulated among the attorneys for the parties on March 19, 2013. *Id.* at 123. That draft was specifically provided to counsel for Comenout. *Id.* In addition, Comenout and his counsel, as well as various representatives of the Nation, held a series of meetings in Olympia to discuss and further refine the issues related to the lease. *Id.* By November 2014, the proposed lease had gone through more than 17 different revisions. *Id.* Whitener was listed as a Consultant for the Nation in the lease proceeding. *Id.* at 169. Ultimately, a lease form was agreed to by the parties, except by Comenout and his counsel. *Id.* at 123.

A Business Lease for the property became effective on November 20, 2014, which was the date that the BIA approved the Lease. *Id.*; *see also Id.* at 140. The Business Lease is by and between the individual owners of property as lessors and the Nation as lessee. *Id.* at 134. The lease was consented to by more than 60% of the landowners. *Id.* at 10. Comenout did not consent; however, because more than 60% of those owners of the allottees did so, his withheld consent is legally irrelevant. *Id.*; *see also Id.* at 212-36. Comenout would have benefitted from the Business Lease as one of the landowners; however, the Business Lease authorized

the Nation to operate the retail business on the property, not Comenout – and that is ultimately the problem for Comenout and the reason for this case.

The Business Lease that was in effect at the time of the actions complained of by Comenout enables the Nation to "use the Premises 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." ER 11 at 135. Under the terms of the Business Lease, Base Rent in the amount of $10,000.00 per month is due and payable from the Nation to the individual owners of the property, as well as a Percentage Rent due and payable under the Business Lease in the sum of forty percent (40%) of the gross profit generated by business conducted upon the premises being rented. *Id*. at 135-37. As a result, the Business Lease cures Comenout's unlawful use of the property by giving the Nation, as of the effective date, the legal right to occupy the property, promote the legal sales of retail products, and provide increased enforcement and interaction with local law enforcement. *See generally* ER 11.

On June 17, 2015, the United States Bureau of Indian Affairs Regional Director, considering Comenout's appeal of the Business Lease, rescinded the Business Lease "because the appraisal of the fair market rental erroneously relied on acreage listed in the Pierce County Assessor's office in determining the rental value of the property." SER 19 at 308. In addition, on August 12, 2015, the

Acting Superintendent for the Puget Sound Agency of the United States Bureau of Indian Affairs wrote to Appellee Comenout notifying him that he is in trespass on the real property and that he must "immediately cease [his] use of and occupancy of the Property." SER 20. On August 31, 2015, Appellee Comenout filed suit against the United States Bureau of Indians Affairs in the United States District Court for the Western District of Washington in Seattle seeking injunctive and declaratory relief. SER 21. Among other things, even though the Nation is not named as a party, the complaint seeks a declaration as to the jurisdiction of the Nation over the real property and alleges that the United States is engaged in a "conspiracy" with the Nation and its agents to remove Comenout from the property. *Id*. at 331, 336. Comenout mentions Whitener and this case twice in the complaint. *Id*. at 321, 331. This case is pending before the Honorable Judge Jones.[3]

III. WHITENER ACTS AS THE NATION'S AGENT WITH RESPECT TO THE PROPERTY

The Nation entered into a Contract for Personal Services with Whitener and the Whitener Group LLC ("Contract"). ER 11 at 237-44. The purpose of the Contract is to "provide specific and general consulting for the Quinault Nation enterprises, overseen by its CEO and Board." *Id*. at 237. The Contract provides that the primary consultant provided by the Whitener Group LLC for the work with

[3] The Court may take judicial notice of this action as well. *See* fn.2 *supra.*

the Nation is Whitener. *Id*. at 238. Specifically, the Contract authorizes Whitener to "complete a related enterprise project on land held in trust commonly known as the 'Comenout' property." *Id*. at 237. The Contract was approved by Quinault Nation Business Committee Resolution 12-143-91. *Id*. at 241-42. The Contract expired by its terms on September 30, 2014, but was extended by a consent vote of the Nation's Business Committee. SER 16.

On or about January 9, 2015, Whitener posted a sign on a telephone pole "on or near" the property partially owned by Comenout that said among other things, "This property is leased to the Quinault Indian Nation." ER 10 at 101-02; Opening Br. at 8. The decision to post the sign was made in consultation with the Nation's counsel and at the direction of the Nation. ER 11 at 245-49. Comenout sued Whitener shortly thereafter on January 22, 2015 alleging RICO violations; malicious harassment, outrage, and intended trespass; civil conspiracy; and civil trespass. ER 8.

IV. THE DISTRICT COURT'S ORDER DISMISSING THE CASE

On March 3, 2015, the District Court granted Whitener's Motion to Dismiss under Rule 12(b)(7) and held that the Nation is a necessary party under Rule 19(a) and that "[b]ecause the Nation has not waived its sovereign immunity to be sued by Comenout in federal court, the Court concludes that the Nation cannot be joined

in this action." ER 5 at 50. The Court further concluded that the Nation is an indispensible party under Rule 19(b). *Id*.

On March 13, 2015, Comenout filed a motion for reconsideration and a motion for leave to file a second amended complaint. SER 18; ER 7. On March 16, 2015, the District Court denied the motion for reconsideration and the motion for leave to file an amended complaint. ER 4.

SUMMARY OF THE ARGUMENT

Comenout's Opening Brief attempts to obscure the simple fact that Whitener was sued for acts he took as an agent of the Nation and, as such, the Nation is the real party in interest who cannot be joined to this case because of its unwaived inherent sovereign immunity from suit. As a result, Comenout's claims cannot succeed because Whitener was, at all times relevant, acting as the agent of the Nation, and he cannot be personally liable for acts he was undertaking at the direction of the Nation. Comenout's claims are directed at the Nation, which is not sued and cannot be sued because the Nation's inherent sovereign immunity has not been waived. In addition, Comenout has not alleged sufficient facts to show a violation of RICO and he cannot demonstrate a violation of the various Washington state law torts he alleges. Comenout has offered no justification for this Court to exercise jurisdiction over his claims. The District Court did not abuse

its discretion and the Order granting Whitener's Motion to Dismiss should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The trial court's decision to dismiss an action for failure to join an indispensable party is reviewed for an abuse of discretion. *See Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1154 (9th Cir. 2002). "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted). To the extent that the determination whether the movant's interest is impaired by failure to join an allegedly indispensable party involves an interpretation of law, review is de novo. *Dawavendewa*, 276 F.3d at 1154.

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. *See Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002).

II. THE ESTATE IS NOT A PROPER PARTY TO THIS APPEAL

As a threshold matter, the Court must deny the standing to the Estate to prosecute this appeal. The Estate was not a party to the case before the District

Court. ER 8. In fact, Comenout and the Estate blatantly misrepresent the proceedings below in the Statement of Jurisdiction. The Estate was never a party at any time, especially when the action was commenced as is misrepresented to this Court. *Compare* ER 8 and 9 *with* Opening Br. at 2. The first and only reference to the Estate is found in the Motion for Leave to file a Supplemental Amended Compliant that was filed after the District Court granted Whitener's motion to dismiss on March 3, 2015. ER 7 at 54. The Estate should not be allowed to pursue this appeal as to the merits of the District Court's decision dismissing the case brought by Comenout under Rule 19 – a decision that the Estate was not a party to.

III. THE DISTRICT COURT CORRECTLY DISMISSED THE CASE UNDER RULE 19

Comenout fundamentally misunderstands why the District Court dismissed his Complaint. While it is true that the "Quinault Nation is not a Defendant", that fact does not somehow mean that his case can go forward against Whitener. Opening Br. at 11. Moreover, it is simply not true as a matter of law that "The Quinault Nation was never sued, hence its tribal immunity from suit is not an issue." *Id.* at 17. To the contrary, the Nation's immunity is exactly what this case is about.

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

1. Whitener Cannot Be Personally Liable

Comenout claims that Whitener was acting on his own behalf and that "[h]e has no authority to act for the Quinault Indian Nation." ER 8 at 61. However, this fact, repeated in the Opening Brief, is not true. Opening Br. at 7-8, 15.

Whitener has a contract to work with the Nation. ER 11 at 237-40. In that capacity, he acts as the Nation's agent with respect to this property and the Nation's efforts to run a lawful business on the property under the Business Lease. *Id*. at 237. This was clear from the language of the sign Whitener posted, which states specifically, "This property is leased to the Quinault Indian Nation." Opening Br. at 9.[4] The language was specifically discussed between Whitener and the Nation before it was posted. ER 11 at 245-49. In fact, despite Comenout's claims, Comenout acknowledges that Whitener was working with and on behalf of the Nation elsewhere in the Complaint and in the Opening Brief.[5] ER 8 at 72; *compare* Opening Br. at 18 ("Whitener was not an employee of anyone") *with id.*

---

[4] Inexplicably, after quoting the language from the sign, Comenout later states: "The posting of the notice did not refer to the Quinault Nation." Opening Br. at 38. Comenout's brief is at best inconsistent and at worst intentionally misleading.

[5] Given Comenout's lengthy involvement with the Business Lease negotiation process, and his familiarity with the role of Whitener, it strains credulity to believe that Comenout did not know that, at the time Whitener posted the sign on the property to try to secure the Nation's legal right to use the property under the Business Lease, that Whitener was acting at the direction of the Nation. ER 11 at 233.

at 18 ("Robert W. Whitener Jr.'s LLC was obviously an independent contractor…"). Comenout cannot have it both ways.

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, in a contractual setting, is that the agent is not subject to personal liability. *E.g., Wright v. Merritt Realty Co.*, 148 Wash. 380, 268 P. 873 (1928). Thus, as a matter of law, Comenout's claim cannot lie against Whitener in his personal capacity because Whitener cannot be held personally liable for acts he was undertaking at the direction of the Nation, pursuant to the federally approved Business Lease.

2. Comenout's Claims Are Against the Nation

At bottom, although Whitener is nominally the defendant, the real party in interest here is the Nation. ER 10 at 102 ("The Quinault Indian Nation has no right to govern [the] property."); ER 8 at 71 (alleging civil conspiracy involving "members of the [Q]uinault Indian Nation, their attorneys and others…."); *Id*. at 72 (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.

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, enforcing the Nation's right under the BIA approved Business Lease to use the property for a business purpose.[6] Opening Br. at 28 ("The Quinault Nation and Whitener have attempted to take action against the Comenouts . . . ."); ER 10 at 102; ER 8 at 67; ER 11 at 134-61 (recognizing the Nation as the lessee under the approved Business Lease). Any ruling in favor of Comenout would not afford Comenout complete relief, as it would not bind the Nation who has a significant legal interest in these proceedings. *Dawavendewa*, 276 F.3d at 1156 (holding that tribal sovereign immunity bars joinder, and noting "[i]f the necessary party enjoys sovereign immunity from suit, some courts have

[6] The fact that the Nation could not give removal authority to Whitener, even if true, is of no moment. Opening Br. at 21. Likewise, the government that has jurisdiction over the underlying real property owned in part by Comenout is of no moment. *Id.* at 28. All that matters is that the Nation is the real party in interest under the allegations made by Comenout. The fact that the United States has authority over the land, and Comenout's appeal of the Business Lease, has no bearing on the Court's Rule 19 analysis as to the Nation. *Id*. at 23, 25-29.

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).

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. In the absence of these allegations, on the face of the Complaint, the District Court correctly decided that it could 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.").

There has been no waiver of the Nation's sovereign immunity to Comenout's claims. Comenout never even asserts one. Accordingly, Rule 19(b) requires complete dismissal of Comenout's claims as to Whitener. 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 interests of the absent sovereign." *Republic of the Philippines 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.[7]

a. Comenout's *Maxwell* and *Pistor* Arguments Are Irrelevant

For the first time in this case, Comenout appears to argue that, although he states Whitener is "not an employee of anyone", Whitener can be sued under the principles of *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), because "[t]he officers in Maxwell, similar to Robert W. Whitener Jr., tried to control the area and order the person to stay on the property for interrogation." Opening Br. at 18. Not only is it unclear how posting a sign is remotely related to the conduct of the first responders in *Maxwell* that lead to death, this entire argument is completely beside the point as a personal tribal immunity claim was not the argument advanced by Whitener below. Whitener has never claimed to be

[7] The United States, because it holds the property in trust for the individual owners and approved the Business Lease, is also a required party to this action that cannot be joined because of its unwaived sovereign immunity. *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"). In fact, Comenout appears to agree, as evidenced by his lengthy discussion of the BIA's alleged sole authority over the real property in question. Opening Br. at 23, 25-27, *see also* SER 21.

cloaked by the Nation's unwaived sovereign immunity. Rather, Whitener's Rule 19 argument turns solely on the Nation's immunity.

As a threshold matter, these sovereign immunity legal arguments were not made to the District Court. ER 1 at 5-13, 15-17; ER 8. Therefore, the Court should decline to address this argument, raised for the first time on appeal. *See El Paso v. Am. W. Airlines, Inc.* (*In re Am. W. Airlines, Inc.*), 217 F.3d 1161, 1166 (9th Cir. 2000) ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal . . . .").[8] However, even if the Court were to consider Comenout's new arguments, they do nothing to advance his cause or undermine the Nation's immunity for purposes of the District Court's Rule 19 analysis.

Maxwell and *Pistor* are completely inapposite to the case on appeal. *Maxwell* dealt with a situation where Tribal officials – which throughout the Opening Brief Comenout concedes Whitener is not – sought to cloak themselves in tribal sovereign immunity. Whitener makes no tribal official immunity argument. In fact, this is not and never has been a tribal official immunity case. Whitener is

[8] In response to Whitener's arguments concerning the Nation's immunity before the District Court, Comenout's response was: "No case has ever held that a non Indian member of the tribe who works for an LLC not owned by the tribe has tribal immunity . . . ." SER 17 at 286; *see also id.* at 285 ("Even if Whitener is a tribal official . . . [he] is not clothed with tribal immunity . . .."). This irrelevant argument now appears to have been abandoned for a new equally irrelevant argument.

not seeking to use the Nation's sovereign immunity to shield his action as an independent contractor of the Nation – sovereign immunity is relevant only under Rule 19, as the Nation is a required party that cannot be joined because of its admitted unwaived immunity. Because the analysis involves the sovereign immunity of the Tribal government itself, not that of its officials, *Maxwell* and *Pistor* are inapplicable. Comenout's recitation of case law, without actually tying that case law to the facts of this case, does not a successful appeal make. Opening Br. at 19-20.

IV. THE DISTRICT COURT CAN BE AFFIRMED ON OTHER GROUNDS IN THE RECORD

The District Court, because it dismissed Comenout's case on Rule 19 grounds, never reached the merits of Comenout's alleged substantive causes of action against Whitener. Whitener had also moved to dismiss the claims under Rule 12(b)(6) for failure to state a claim for which relief can be granted. ER 5. The Court should affirm dismissal on any basis in the record, including Comenout's failure to plead the elements of his substantive claims. *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007) (the court of appeals "'may affirm on any basis supported by the record, whether or not relied upon by the district court.'").

A. Comenout's RICO Claim Cannot be Demonstrated

1. Comenout Has Not Alleged RICO Standing

Comenout never addresses the RICO issue in his Opening Brief. The silence is telling. "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).

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)); *see also Portfolio Invs., LLC v. First Svgs. Bank*, No. C12-104-RAJ, 2013 WL 1187622, at *4 (W.D. Wash. Mar. 20, 2013) ("To satisfy the first prong, a plaintiff must identify both a concrete financial loss and a specific business or property interest.") (citing *Canyon Cnty.*)). 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. *Couch v. Cate*, 379 F. App'x 560, 566 (9th Cir. 2010) (noting that the Supreme Court in Hemi "definitively foreclosed RICO liability for consequences that are only foreseeable without some direct relationship."); *see also 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. ER 8 at 69-70. 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."). Indeed, there can be no cognizable injury because Comenout has no property interest that he can assert,

given his unlawful occupancy of the property for a business purpose in the absence of a federally-approved Business Lease. SER 20.

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 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. ER 8 at 69. RICO's direct causal connection between the predicate criminal acts allegedly committed and the injury do not appear on the face of the Complaint.

This is nothing more than a bald attempt to invoke RICO for fundamentally state-law claims, representing a misuse and abuse of RICO. Comenout lacks standing to bring this RICO claim.

2. Comenout Has Not Sufficiently Plead Predicate Acts

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" and 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.

Here, Comenout alleges no enterprise at all. ER 8 at69-70. Rather, Comenout broadly states that "Defendant Whitener engaged in a pattern of racketeering activity by repeatedly threatening criminal and civil remedies against plaintiff" on three dates. *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 of 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. Moreover, given that the facts demonstrate that the actions Whitener is accused of taking illegally are, in fact, perfectly legal because he was acting on behalf of the Nation to ensure the Nation's ability to use the property pursuant to its Business Lease, there is no ability for Comenout to show an unlawful underlying predicate act.

The RICO claim, as framed, cannot succeed on the merits. *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).

B. Comenout's State Law Claims Fail

Comenout never addresses the State law claims in his Opening Brief. Much like the RICO issue, Comenout's silence tells this Court all it needs to know about the merits, or lack thereof, of Comenout's case.

Comenout's complaint vaguely alleges three Washington State law torts: outrage, trespass, and civil conspiracy. ER 8 at 70-74.[9] These claims all fail for lack of standing and the inability to hold Whitener personally liable for acts that he

[9] Without the federal RICO claim, the Court lacks subject matter jurisdiction to hear the remaining state law claims against Whitener under 28 U.S.C. § 1331. However, Whitener addresses the state law claims out of an abundance of caution.

took on behalf of the Nation, as discussed above. The tort claims also fail because Comenout cannot prove all elements of the causes of action. *See, e.g., Western Wash. Laborers-Employers Health & Sec. Trust Fund v. Merlino*, 29 Wash. App. 251, 255, 627 P.2d 1346 (1981).

1. Comenout Cannot Show Civil Conspiracy

To establish a civil conspiracy, a plaintiff must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. *Wilson v. State*, 84 Wash. App. 332, 350-51, 929 P.2d 448, *review denied*, 131 Wash.2d 1022 (1996). Importantly, civil conspiracy is not, by itself, an actionable claim. *W.G. Platts, Inc. v. Platts*, 73 Wash.2d 434, 439, 438 P.2d 867 (1968). A plaintiff must be able to show an underlying actionable claim which was accomplished by the conspiracy for the civil claim of conspiracy to be valid. *Id.* at 439.

Comenout's civil conspiracy claim fails. First, Comenout neither sues all of the parties allegedly engaged in the conspiracy nor does he specially identify who those alleged co-conspirators may be other than to note they include "members of the [Q]uinault Indian Nation, their attorneys, and others." ER 8 at 71-72 (emphasis added). In addition, Comenout can show no underlying actionable unlawful

purpose of the alleged conspiracy. The purpose is entirely lawful – facilitating the Nation's ability to operate as retail establishment on the property pursuant to a then federally-approved Business Lease. Comenout's claim of conspiracy fails because he can present no set of facts to show that Whitener's actions, on behalf of the Nation, are illegal. The civil conspiracy claim lacks merit.

2. Comenout Cannot Show Outrage

"Outrage" and "intentional infliction of emotional distress" are synonyms for the same tort. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wash.2d 233, 250, 35 P.3d 1158 (2001) (applying elements of outrage to claim for intentional infliction of emotional distress). To recover for intentional infliction of emotional distress, a plaintiff must prove (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual severe emotional distress on the plaintiff's part. *Id.* at 242. Liability for intentional infliction of emotional distress exists when conduct is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Grimsby v. Samson*, 85 Wash.2d 52, 59, 530 P.2d 291 (1975). Consequently, the torts "'do[] not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' In this area plaintiffs must necessarily be hardened to a certain degree

of rough language, unkindness and lack of consideration." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d).

Comenout's claim fails for two reasons. First, none of the actions described in the Complaint reach the required extreme or outrageous conduct. ER 8 at 71. Whitener's action in posting a sign that "list[s] Defendant's business phone" on property that Comenout lacks legal authority to use for his business enterprise is not close to sufficient. *Id*. No reasonable person could conclude from the allegations that Whitener's conduct was "outrageous." Second, simply alleging vague "emotional distress" is insufficient for the damages element. *Id*. Emotional distress includes "'all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.'" *Kloepfel v. Bokor*, 149 Wash.2d 192, 197-98, 66 P.3d 630 (2003). None of these emotional harms are alleged. The claim, as framed, cannot succeed on the merits.

3. Comenout Cannot Show Trespass

Lastly, Comenout alleges civil trespass as a result of the sign posting. ER 8 at 73-74. This claim too fails because the underlying premise that Comenout "has a right to exclusive possession of the property" is only partially true. *Id*. at 73. Again, as explained above, while Comenout owns a share of the allotment he has no legal interest in operating the business. To the contrary, the only federally-

recognized right to use the property for a business purpose rests in the Nation under the BIA Business Lease. Moreover, Comenout does not allege any harm from the alleged trespass—the posting of the sign by Whitener. Rather, all of Comenout's alleged injuries, if any, flow from actions that the sign Whitener posted references as possibly happening in the future that Comenout admits did not actually happen. Opening Br. at 24-25. The claim cannot succeed on the merits.

V. THE DISTRICT COURT'S REJECTION OF THE "FIRST AMENDED AND SUPPLEMENTAL COMPLAINT" WAS NOT IN ERROR

Lastly, Comenout urges this Court to review, de novo, the District Court's refusal to grant a motion for reconsideration and permit a self-styled "First Amended And Supplemental Complaint" filed March 31, 2015. Opening Br. at 30-35. The District Court correctly denied the motion for reconsideration and the motion for leave to file an amended complaint filed by Comenout and the Estate on March 13, 2015. This Court reviews the denial of a motion for reconsideration for abuse of discretion. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009). Likewise, the District Court's denial of a motion to

amend a complaint is reviewed for an abuse of discretion. *See Ordonez v. Johnson*, 254 F.3d 814, 815–16 (9th Cir. 2001).[10]

Comenout's last ditch effort to salvage this case on March 13, 2015, attempted to fundamentally change the nature of the case. Comenout's motion for reconsideration focused on whether complete relief could be obtained in the Nation's absence. SER 18. However, in so doing, Comenout ignored all of the other factors of Rule 19. *Id.* Thus, the District Court did not abuse its discretion in denying the motion as, even of Comenout was correct on this one factor, the remainder of the Rule 19 factors were uncontested. *See* Fed. R. Civ. P. 19(a)(1)(A). The Court had already determined that all of the factors—not just the one briefed again by Comenout—lead to the inescapable conclusion that the Nation was a required party.

Because the District Court denied reconsideration, it denied as moot Comenout's motion for leave to file the "First Amended And Supplemental Complaint." ER 4. This decision was also not an abuse of discretion because Comenout's motion for leave was premised on the same argument as the failed motion for reconsideration, namely: "Defendant's relationship with the Quinault

[10] Comenout's statement that review of this decision is conducted de novo is erroneous. Opening Br. at 30. The citation to *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) does not address this issue at all, referring only to the standard of review concerning trial court decision applying tribal sovereign immunity. *Id.*

Indian Nation." ER 7 at 55. Since this singular focus was insufficient for a grant of reconsideration, the same singular focus failed to make the proposed amended complaint anything but futile. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) ("[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense."); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998) (holding proposed amendment to add United States futile because of unwaived immunity).

CONCLUSION

For all of the foregoing reasons, Defendant Whitener respectfully requests that the Ninth Circuit affirm the District Court's determination that the Nation's sovereign immunity mandates dismissal of this case.

RESPECTFULLY SUBMITTED this 7th day of October, 2015.

Kilpatrick Townsend & Stockton LLP

By: *s/ Rob Roy Smith*
Rob Roy Smith, WSBA #33798
Attorneys for Appellee Robert W. Whitener

STATEMENT OF RELATED CASES

This case is related to Quinault Indian Nation (Plaintiff-Appellee) v. Mary Linda Pearson (Defendant-Appellant) and Robert R. Comenout, Sr., Ninth Cir. Appeal Nos. 15-35263 and 15-35267 (consolidated). The appeal is currently pending before this Court.

DATED this 7th day of October, 2015.

Kilpatrick Townsend & Stockton LLP

By: *s/ Rob Roy Smith*
Rob Roy Smith, WSBA #33798
1420 Fifth Avenue, Suite 3700
Seattle, WA 98101
Telephone: (206) 467-9600
Facsimile: (206) 623-6793
Attorneys for Appellee Robert W. Whitener

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,142 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 and is 14-point font, Times New Roman.

DATED this 7th day of October, 2015.

Kilpatrick Townsend & Stockton LLP

By: *s/ Rob Roy Smith*
Rob Roy Smith, WSBA #33798
1420 Fifth Avenue, Suite 3700
Seattle, WA 98101
Telephone: (206) 467-9600
Facsimile: (206) 623-6793
Attorneys for Appellee Robert W. Whitener