HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

KEVIN MICHAEL BELL

Plaintiff,

v.

CITY OF LACEY; Police Chief DUSTY PIERPOINT individually; Police Commander JOE UPTON individually; City Attorney DAVID SCHNEIDER individually; Mayor ANDY RYDER individually; City Manager SCOTT SPENCE individually; DOEs 1-25 individually; NISQUALLY TRIBE, Nisqually CEO JOHN SIMMONS, individually and Nisqually CFO ELETTA TIAM individually.

Defendants.

NO. 3:18-cv-05918-RBL

DEFENDANTS NISQUALLY TRIBE, CEO JOHN SIMMONS, AND CFO ELETTA TIAM'S MOTION FOR JUDGMENT ON THE PLEADINGS

Noting Date: May 10, 2019

I. INTRODUCTION AND RELIEF REQUESTED

Defendants Nisqually Tribe,[1] John Simmons, and Eletta Tiam respectfully request the Court grant judgment on the pleadings dismissing Plaintiff Kevin Michael Bell's claims against them. Bell's claims against these defendants are barred by Nisqually's sovereign immunity, and Bell's Complaint fails to make adequate factual allegations against them in any event. Bell's

[1] The Nisqually Indian Tribe is a federally recognized tribe. *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5021 (Jan. 29, 2016).

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false imprisonment claim is moreover time-barred, and he has failed to exhaust tribal remedies under the Nisqually Tribal Code.

II. STATEMENT OF FACTS

This case arises from injuries Bell allegedly suffered while incarcerated at the Nisqually's jail in August 2016.

A. Factual background.[2]

On or about August 7, 2016, Bell was arrested for shoplifting in Lacey, Washington. (Dkt. #1-2 at 7). Lacey police transported Bell to the Nisqually Jail pursuant to a jail service agreement it maintained with Nisqually. Under the agreement, Lacey agreed to pay Nisqually for a minimum number of guaranteed beds for pre-trial and misdemeanor inmates. (*See* Dkt. #1-2 at 23-27). According to Lacey documents filed by Bell, Lacey has noted that "available jail facilities in Thurston County are limited" and the agreement "is the best solution for housing misdemeanor inmates locally at this time." (Dkt. #1-2 at 21). The agreement contains the following "Venue and Choice of Law" provision:

> The Nisqually Indian Tribe is a Sovereign Nation with all immunities attendant thereto **WITH THE FOLLOWING EXCEPTION THAT THE PARTIES TO THIS AGREEMENT HAVE SPECIFICALLY NEGOTIATED:**
>
> The Nisqually Indian Tribe does hereby expressly consent to venue in the courts of the State of Washington for any legal dispute by and between the parties to this agreement and further agrees that any such dispute shall be interpreted pursuant to the laws of the state of Washington.

(Dkt. #1-2 at 26).

Bell claims that he suffered "a severe stroke while he slept" on or about August 25, 2016. (Dkt. #1-2 at 8). He received aid the next morning and was admitted to a local hospital. (Dkt. #1-2 at 8-9). He claims substantial paralysis as a result of this incident. (Dkt. #1-2 at 9).

On October 3, 2016, almost six weeks after Bell's alleged injury and release from Nisqually custody, Lacey and Nisqually extended the agreement with substantially the same

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terms for years 2017-2020.[3] (Declaration of Thomas B. Nedderman, Ex. 1). Nisqually's then-Chief Executive Officer Simmons executed this agreement; Tiam, on the other hand, was the CEO and Nisqually-designee for the 2014-2016 agreement that covered Bell's incarceration. Simmons was not mentioned in the prior agreement, and Tiam was not mentioned in the subsequent agreement. (*Compare* Dkt. #1-2 at 23-27 *with* Nedderman Decl., Ex. 1).

B. This lawsuit.

Bell filed this action on November 9, 2018. In it, he refers to Nisqually as "sovereign" 26 times over 18 pages, often while alleging injustice to Bell. (*See* Dkt. #1-2). But Bell conversely claims that Nisqually's sovereign immunity "has been expressly waived and is waived by operation of its conduct under color of Washington State law." (Dkt. #1-2 at 3). Bell states that the above "Venue and Choice of Law" provision "may, as Mr. Bell asserts, or may not functionally equate to such waiver" of such immunity. (Dkt. #1-2 at 6). Bell has moreover claimed he is a third-party beneficiary to the agreement (Dkt. #1-2 at 2), and that any express waiver of sovereign immunity therein "reaches Mr. Bell." (Dkt. #1-2 at 11).

Bell also specifically alleges that Tiam and Simmons "did and conspired to craft, implement, supervise and enforce the unconstitutional and negligent policies embodied in the [jail services] Agreement." (Dkt. #1-2 at 4). Both are purportedly sued in their "individual capacities." (Dkt. #1-2 at 4). Bell brings the following causes of action against them: (1) false imprisonment; (2) declaratory judgment/injunctive relief "enjoining tribal detention of non-tribal citizens arrested outside tribal jurisdiction"; (3) conspiracy to violate Bell's constitutional rights; (4) infliction of emotional distress; and (5) negligence.[4] (Dkt. #1-2 at 11-16). He brings

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[2] Because this is a motion for judgment on the pleadings, defendants will treat Bell's facts as true for purposes of this motion only. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

[3] Because this agreement is referenced in Plaintiff's Complaint (*see* Dkt. #1-2 at 9, ¶ 39), defendants believe the Court should not convert the instant motion into one for summary judgment. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("A court may … consider certain materials -- documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice -- without converting the motion to dismiss into a motion for summary judgment.").

[4] Defendants understand that Plaintiff chose not to pursue negligence claims under the Federal Tort Claims Act ("FTCA"); the United States apparently denied his claim in March 2018 and which he did not timely appeal. *See* 28 U.S.C. § 2401(b).

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the same allegations against Nisqually, other than conspiracy, and sues the tribe for breach of contract "as third-party beneficiary to the Agreement." (Dkt. #1-2 at 11-18).

Tiam, Simmons, and Nisqually were purportedly served in January 2019. (*See* Dkt. ##13, 17, 18). These defendants answered denying Plaintiff's claims and asserting numerous affirmative defenses, including sovereign immunity and the failure to exhaust tribal remedies. (Dkt. #19). This motion follows.

III. ISSUES PRESENTED

1. Are Bell's claims against Nisqually barred under tribal sovereign immunity because he cannot prove an "unequivocal waiver" of immunity?

2. Are Simmons and Tiam, two former Nisqually executives sued because they signed a contract in their official capacities, covered by Nisqually's sovereign immunity notwithstanding Bell's attempt to brand his claims as those seeking "individual capacity" relief?

3. Sovereign immunity issues aside, can Simmons be held liable if his only involvement in this case was executing a contract six weeks after the injury Bell alleges?

4. Sovereign immunity issues aside, can Simmons and Tiam be liable for civil conspiracy when Bell has alleged no specific facts in support of the same?

5. Should Bell's false imprisonment claim be dismissed when he failed to file this case within the two-year statute of limitations?

6. If the Court does not otherwise dismiss Bell's claims, should it stay tort proceedings against Nisqually and any of its personnel until Bell exhausts his tribal remedies?

IV. EVIDENCE RELIED UPON

Defendants rely upon the declaration of their attorney Thomas B. Nedderman in bringing this motion.

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V. AUTHORITY AND ARGUMENT

A. Standard of review.

Under Federal Rule 12(c), "[a]fter the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." Analysis under Rule 12(c) is "substantially identical" to analysis under Rule 12(b)(6) because, under both rules, "a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff must provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L.Ed.2d 209 (1986).

B. Primer on tribal sovereign immunity.

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Id.* (citations omitted). Sovereign immunity "extends to suits for declaratory and injunctive relief," and "is not defeated by an allegation that [the tribe] acted beyond its powers." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). The plaintiff bears the burden of proving waiver of tribal sovereign immunity. *See Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). Tribal sovereign

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immunity is an immunity from suit rather than a mere defense to liability; and it is effectively lost if a case is erroneously permitted to go to trial. *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (citation omitted). Additionally, "Tribal sovereign immunity is a quasi-jurisdictional issue that, if invoked at the Rule 12(b)(1) stage, must be addressed and decided." *Pistor*, 791 F.3d at 1115.

Ninth Circuit precedent demonstrates the high burden of proving an "unequivocal waiver" of tribal sovereign immunity. *See, e.g.*, *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1022 (9th Cir. 2016) (tribe did not waive immunity via removal to federal court because doing so was not an "unequivocal expression" of waiver); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (tribe's participation in administrative proceeding did not waive immunity in action filed by another party seeking review of agency's decision). The Ninth Circuit has also refused, for example, to permit a counterclaim against a tribe, holding that suing alone did not waive its immunity and that permitting a counterclaim would "hold the Nation hostage in its own litigation [and] is a direct affront to the Nation's sovereign immunity when there has been no unequivocal waiver." *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1099 (9th Cir. 2017). The Ninth Circuit has recognized the "harsh consequence[s]" that can sometimes result from application of sovereign immunity, but has nevertheless recognized that federal courts "cannot waive sovereign immunity where Congress has not." *See Hajro v. United States Citizenship & Immigration Servs.*, 811 F.3d 1086, 1099 (9th Cir. 2016).

C. Bell is not a third-party beneficiary under the jail services agreement.

Bell contends that he is a third-party beneficiary to the Lacey-Nisqually jail services agreement and that Nisqually's explicit, limited waiver therefore "reaches him." But this theory fails because Bell is not an intended beneficiary of that agreement.

The creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract. *Postlewait Constr. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986)

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(citations omitted). An incidental, indirect, or inconsequential benefit to a third party is insufficient to demonstrate an intent to create a contract directly obligating the promisor to perform a duty to a third party. *Kim v. Moffett*, 156 Wn. App. 689, 701, 234 P.3d 279 (2010).

Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) (citing Restatement § 313(2)). Indeed, proving to be an intended beneficiary of a government contract "is a comparatively difficult task." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1160 (9th Cir. 2016). In *Klamath*, the Ninth Circuit held that a contract between a dam operator and the United States was "undoubtedly entered into with the irrigators in mind," but that nothing demonstrated a clear intention to provide irrigators third party beneficiary rights. *See Klamath*, 204 F.3d at 1211. In a Washington case, plaintiffs asserted they were third party beneficiaries to a contract between a cancer research center and the U.S. government when the former agreed to follow ethical guidelines for research involving human subjects. *Wright v. Fred Hutchinson Cancer Research Ctr.*, 269 F. Supp. 2d 1286, 1290 (W.D. Wash. 2002) (Lasnik, J.). The *Wright* Court, citing *Klamath*, held that while these subjects of research "would clearly benefit from defendants' compliance with the Assurance Agreement, plaintiffs have not identified any language in or provision of the Agreement that provides subjects with an actionable right, a fact which is sufficient to rebut the contention that plaintiffs are intended beneficiaries." *Id.* The Court dismissed that claim on defendant's Rule 12(c) motion for judgment on the pleadings. *See id.* at 1296.

Here, Bell cannot plausibly assert that he was an intended beneficiary of the Lacey-Nisqually jail services agreement. *Even if* the contract had future inmates like him in mind, Bell was at most an incidental beneficiary, and he falls well short of the "comparatively difficult" threshold of proving he was an intended beneficiary. As in *Klamath*, there is nothing in the jail services agreement that purports to give any third parties beneficiary rights to Bell. *Cf. Klamath*, 204 F.3d at 1212. In fact, Bell is no more an intended beneficiary to the jail services

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agreement than are his law-abiding neighbors, who have an interest in the effective and economical operation of Lacey's criminal justice system. Bell lacks cognizable rights under the jail services agreement because he is not an intended beneficiary, and therefore certainly cannot invoke any waiver of sovereign immunity as a purported party to the agreement. Accordingly, the court should dismiss Bell's claims against Nisqually as barred by sovereign immunity.

D. Even assuming Bell qualifies as a third-party beneficiary to the jail services agreement, said agreement does not expressly waive sovereign immunity as to Bell's claim.

Notwithstanding the foregoing, even if the Court concluded Bell was an intended beneficiary under the jail services agreement, this contract does not explicitly waive Nisqually's sovereign immunity as to third-party beneficiary claims such as Bell's.

One Ninth Circuit case provides a similar factual posture. In *Latham v. Gold Country Casino,* two plaintiffs brought tort claims against a tribe, arguing they were third party beneficiaries under a tribal-state gaming compact. *See Latham v. Gold Country Casino*, 154 F. App'x 675 (9th Cir. 2005) (unpublished). The court held that while the district court "has jurisdiction to enforce the Compact's terms as between the State and the Tribe, without the Tribe's express waiver of sovereign immunity, it does not have jurisdiction to hear the Lathams' private third-party beneficiary claims arising under the Compact." *Id.* at 676. The Ninth Circuit held that dismissal under Rule 12 was therefore proper. *Id.* at 677.

In another case, an Oregon District Court found that a plaintiff failed to meet the high bar of sovereign immunity waiver, dismissing in part her apparent reliance on a similar waiver provision in a gaming compact. *See Wilson v. Umpqua Indian Dev. Corp.*, 2017 U.S. Dist. LEXIS 101808, at *12 (D. Or. June 29, 2017). In that case, the court held the tribe "waived its immunity 'in courts of competent jurisdiction for the limited purpose of enforcing this Compact,'" but also held that because the plaintiff was not a party to the contract nor an intended beneficiary named therein, she lacked standing to enforce it. *See id.* at *12-16.

In this case, Nisqually has not waived its sovereign immunity with respect to third-party suits such as Bell's. Indeed, the subject agreement specifically reserves Nisqually's status as

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"Sovereign Nation with all immunities attendant thereto," making a limited exception for "legal disputes by and between the parties to this agreement." (Dkt. #1-2 at 26). The "parties"—Lacey and Nisqually—are enumerated on the following page. (Dkt. #1-2 at 27) ("IN WITNESS WHEREOF, the parties have executed this Agreement…).

The lack of an express waiver is fatal to Bell's argument that he can invoke the limited sovereign immunity waiver. Such a construction would allow for waiver by implication rather than clear expression, an approach courts have repeatedly rejected. *See Santa Clara Pueblo*, 436 U.S. at 58. In fact, Bell's Complaint tacitly acknowledges the questionable merit of his claim of waiver, admitting that the jail services agreement "may, as Mr. Bell asserts, *or may not* functionally equate to such waiver." (Dkt. #1-2 at 6) (emphasis added). Because Bell is not an intended beneficiary of the jail services agreement, and because the agreement does not expressly waive sovereign immunity as to third-party claims like Bell's, the Court should dismiss Nisqually on sovereign immunity grounds.

E. Simmons and Tiam are also covered under Nisqually's sovereign immunity.

When tribal officials act in their official capacity and within the scope of their authority, they are immune. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981). When tribal officials are sued in their individual capacities, the court must determine whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1291, 197 L.Ed.2d 631 (2017). If the action is against a tribal official in his official capacity, rather than against a tribal official in his personal capacity, such suit is barred by sovereign immunity. *See id.* at 1292. "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." *Id.* (citations omitted). But, a plaintiff cannot circumvent tribal immunity "by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Snow v. Quinalt Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983); *see also Lewis*, 137 S. Ct. at 1292 (noting the concern that "Plaintiffs not circumvent tribal sovereign immunity").

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Although Bell has stylized his claims as against Simmons and Tiam individually, these defendants are named solely because they were allegedly the officials which executed the jail services agreement at issue in this case. There is no allegation either defendant had any involvement or knowledge of Bell personally, nor evidence that took any action other than signing the agreement in their high-ranking official capacities. Indeed, Bell's suit against Simmons—who did not execute the relevant agreement until after Bell's release from custody—is indicative of his true motives in filing against these individuals.

This is a substantially different situation than in *Lewis*, where the Supreme Court disallowed a tribal employee to claim sovereign immunity after a motor vehicle accident on state land. It is instead more akin to *Hardin v. White Mountain Apache Tribe*, in which a plaintiff sued tribal officials "in their individual capacities" after being forcibly excluded from a reservation. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). In that case, the Ninth Circuit held that because "all the individual defendants … were acting within the scope of their delegated authority, Hardin's suit against them is also barred by the Tribe's sovereign immunity." *Id*. at 479-80. The Ninth Circuit later noted that holding high-ranking tribal council members liable in *Hardin* "for their legislative functions would … have attacked 'the very core of tribal sovereignty.'" *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013). The plaintiff in *Hardin* furthermore sought injunctive and declaratory relief against the tribal officials, as Bell does here. *See Hardin*, 779 F.2d at 478.

Thus, although pleaded to evade sovereign immunity, Bell's claims against Simmons and Tiam are merely official capacity suits based on their alleged acts as Nisqually officials. The Court should therefore afford them the same sovereign immunity Nisqually possesses, and should likewise dismiss them from this case.

F. Simmons and Tiam cannot be liable to Bell in any event.

Beyond the sovereign immunity defenses, many or all of Bell's claims against Tiam and Simmons fail both factually and legally.

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1. Simmons did not even execute the contract with which Bell takes issue.

The absence of proximate cause precludes tort liability. *Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465, 471, 303 P.2d 659 (1956). A plaintiff must also establish proximate or legal causation to succeed in a civil rights action under sections 1983 and 1985. *Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Bell's claims against Simmons must fail because he cannot prove Simmons caused him any injury. The only substantive factual allegation made against him is that he and others "conspired to and did unlawfully" enter into the jail services contract. (Dkt. #1-2 at 5). While expressly denying wrongdoing, Simmons does not dispute that on October 3, 2016—nearly six weeks *after* Bell's alleged stroke—he executed a jail services agreement covering years 2017-2020 while serving as Nisqually's CEO. But Tiam executed the Nisqually-Lacey jail services agreement in effect when Bell was confined, and Simmons' name is nowhere to be found on that document. Because Bell has not and cannot allege any wrongdoing by Simmons that caused him injury, any claims against Simmons should be dismissed.

2. Bell's Complaint fails to state a claim for conspiracy to violate his civil rights under 42 U.S.C. § 1985 by Simmons or Tiam.[5]

A civil rights conspiracy claim may be brought under either 42 U.S.C. § 1983 or § 1985. *See Klingele v. Eikenberry*, 849 F.2d 409, 413 (9th Cir. 1988). In order to state a claim under § 1985, there must be an allegation of racial or class animus. *See id.* (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971)).

Here, there is no plausible allegation of such animus—Bell alleges no specific instances of animus, instead asserting broadly that he previously suffered "racial animus". (Dkt. #1-2 at 6, 13). This is insufficient to support a claim for conspiracy under § 1985. *See A & A Concrete, Inc. v. White Mountain Apache Tribe*, 676 F.2d 1330, 1333 (9th Cir. 1982) (affirming dismissal of "bare conclusory allegation of animus directed toward the class of 'non-Indian Defendants

[5] Bell does not specify which civil rights conspiracy statute he claims Simmons and Tiam violated. Defendants therefore will address both 42 U.S.C. § 1985 and § 1983.

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sued in the tribal court.'"); *Siu Man Wu v. Pearce*, 2012 U.S. Dist. LEXIS 59270, at *11 (W.D. Wash. Apr. 27, 2012) (Lasnik, J.) (rejecting bare allegations of conspiracy and animus not supported "by additional, more concrete, factual allegations."). The Court should dismiss § 1985 conspiracy claim, to the extent Bell brings one, because Bell has not plausibly alleged class or race-based animus directed at him by either Simmons or Tiam.

3. Bell's Complaint fails to state a claim for conspiracy to violate his civil rights under 42 U.S.C. § 1983 by Simmons or Tiam.

A conspiracy in violation of § 1983 requires proof of: (1) an agreement between the defendants to deprive the plaintiff of a constitutional right; (2) an overt act in furtherance of the conspiracy; and (3) an actual deprivation of constitutional rights resulting from the agreement. *Spencer v. Peters*, 966 F. Supp. 2d 1146, 1166 (W.D. Wash. 2013). Although the agreement or meeting of the minds need not be overt but can be based upon circumstantial evidence, some admissible evidence as opposed to speculation is required to support the conspiracy claim and each participant must share the common objective of the conspiracy. *Id.*; *see also Powell v. Workmen's Comp. Bd.*, 327 F.2d 131, 137 (2d Cir. 1964) (a plaintiff is "bound to do more than merely state vague and conclusionary allegations respecting the existence of a conspiracy," and must instead "allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy").

Courts around the Ninth Circuit have repeatedly rejected civil conspiracy complaints when inadequate factual support is alleged. *See, e.g., E.F. v. Survine v. Cottle*, 2013 U.S. Dist. LEXIS 3057, at *34 (E.D. Cal. Jan. 8, 2013) (rejecting complaint alleging conspiracy that merely used labels of "conspiracy" and "acted in concert" with no supporting facts); *Walters v. Seattle Sch. Dist. No. 1*, 578 F. Supp. 2d 1310, 1313 (W.D. Wash. 2008) (Robart, J.) (granting motion to dismiss when, besides using conspiracy buzzwords, complaint "does nothing to inform the court regarding any agreement or meeting of the minds between the School District and the Seattle Times or any of the other defendants to violate plaintiffs' constitutional rights").

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Bell's Complaint does not plausibly allege a meeting of the minds to violate any person's rights—much less Bell's rights—by executing the jail services agreement. His claims of "unconstitutional unity of purpose and common design," a shared "common objective" of "illegal exportation," and the like are not specific allegations of conspiracy on which a claim can be based. They are, instead, conclusory assertions that fail to meet federal pleading standards. At most, Bell's complaint plausibly asserts that Tiam agreed to enact the jail services agreement in 2013—three years prior to his detention—and Simmons did the same six weeks after his detention. This is insufficient to state a claim for civil conspiracy under § 1983, and the Court should dismiss any such claim.

G. Bell's false imprisonment claim is barred by the statute of limitations.

The Court should dismiss also Bell's false imprisonment against all defendants as time-barred. Because the Civil Rights Act of 1871 does not contain a provision limiting the time within which a claim under the Act may be brought, federal courts apply the applicable period of limitations under state law for the jurisdiction in which the claim arose. *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981). In Washington, acts for false imprisonment must be brought within two years of the alleged imprisonment. *See* RCW 4.16.100; *Heckart v. Yakima*, 42 Wn. App. 38, 39, 708 P.2d 407 (1985).

Bell claims he was falsely imprisoned when he was "lawfully seized with probable cause in the United States proper then unlawfully deposited into the Nisqually Indian Reservation Jail." (Dkt. #1-2 at 13). But Bell was only incarcerated for 19 days, beginning on August 7, 2016 and ending on or about August 25, 2016. (Dkt. #1-2 at 7-9). He filed this case, however, on November 9, 2018. (*See* Dkt. #1-2). Because more than two years passed between the date he was released from Nisqually's jail and when he filed this action, Bell's false imprisonment claim should be dismissed with prejudice.

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H. If not otherwise dismissed, Bell's tort claims against Nisqually, Simmons, and Tiam's claims should be stayed pending exhaustion of his tribal remedies.

Although not a bar to federal jurisdiction, exhaustion of tribal court remedies "functions as a prerequisite to a federal court's exercise of its jurisdiction." *Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 n.3 (9th Cir. 1991). Where a plaintiff has failed to exhaust his tribal remedies, the appropriate response is to stay the federal action pending such exhaustion. *See Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003). Exhaustion of tribal remedies is "mandatory" for claims where tribal court jurisdiction is "colorable," and the absence of ongoing litigation over the same matter in tribal courts does not defeat the exhaustion requirement. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920-21 (9th Cir. 2008) (citations omitted).

Title 43 of the Nisqually Tribal Code, entitled "Tort Claims Act," provides for a "limited waiver of sovereign immunity so that persons who are injured because of the negligent action or inaction of the Tribe or its enterprises be allowed to receive the compensation available from any insurance maintained by the Tribe for that purpose." Nisqually Tribal Code ("NTC") 43.01.01(e).[6] Nisqually explicitly "consents to suit in the Tribal Court for suits based on tort claims under [the Tort Claims Act]," but "does not consent to suit in any other forum for such claims and specifically preserves and retains its sovereign immunity to any tort suit in any other forum." NTC 43.02.01(b). The Tribal Code moreover holds that its Tort Claims Act "shall be the exclusive remedy available to any person who suffers an injury caused by an agent, employee or officer of the Tribe." NTC 43.04.04(a).

Here, Bell's claims against Nisqually, Simmons, and Tiam fail for the foregoing reasons and should be dismissed with prejudice. But even if the Court concludes otherwise, it should nevertheless stay or dismiss without prejudice any negligence claims against these tribal defendants until Bell exhausts his tribal court remedies.

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[6] For the Court and Parties' convenience, Title 43 of the NTC is attached to the Nedderman Decl. as **Exhibit 2.** The NTC can also be accessed at http://www.nisqually-nsn.gov/index.php/council/tribal-code/.

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VI. CONCLUSION

Bell's claims against Nisqually, Simmons, and Tiam all fail factually and legally and should be dismissed. First, Bell's claims against Nisqually fail because he cannot prove an unequivocal waiver of sovereign immunity. He is not a third-party beneficiary to the jail services agreement, and cannot establish an unequivocal waiver of sovereign immunity to his claims even if he was. Nisqually's sovereign immunity should also apply to Simmons and Tiam, who have been sued solely because they signed the agreement in their official capacity.

Sovereign immunity issues aside, Bell has pleaded insufficient facts to support his claims against Simmons and his conspiracy claims. His false imprisonment claim is time-barred, and he has failed to exhaust available tribal tort remedies in any event. The Court should therefore dismiss his claims against Nisqually, Simmons, and Tiam for the foregoing reasons. A proposed order accompanies this Motion.

DATED 18th day of April, 2019.

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DECLARATION OF SERVICE

Pursuant to RCW 9A.72.085, I declare under penalty of perjury and the laws of the State of Washington that on the below date, I delivered a true and correct copy of DEFENDANTS NISQUALLY TRIBE, CEO JOHN SIMMONS, AND CFO ELETTA TIAM'S MOTION FOR JUDGMENT ON THE PLEADINGS via the method indicated below to the following parties:

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DATED this 18th day of April, 2019 at Seattle, Washington.

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