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

PLAINTIFF'S BRIEF OPPOSING DISMISSAL OF DEFENDANTS NISQUALLY, SIMMONS and TIAM

Noted for consideration: 5/10/2019

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I. FACTS

Nisqually Indian Tribe (the "Tribe") and the tribal business officers, Simmons and Tiam, conspired in a human trafficking scheme that resulted in Plainiff (not himself a Native American) spending 19 days unlawfully seized, during which Plaintiff's medical needs were disregarded, causing him to suffer a stroke in tribal custody and leaving him substantially paralyzed and wheelchair-bound. Now the foregoing defendants ask this Court to let them abscond with their illegal ploy and profits intact on the basis that the victims, although physically captured and mistreated by the sovereign, cannot seek justice against the same.

Plaintiff and Otto Warmbier were both accused of petty crimes and neglected in sovereign detention facilities without Constitutional protections, their broken bodies eventually spat back into the Homeland. North Korea may be able to avoid justice, but Nisqually is a domestic dependent sovereign whose conduct is statutorily actionable, and whose contractual immunity waiver reaches Plaintiff.

II. AUTHORITIES

The Defendants mainly invoke tribal sovereign immunity, adding some ancillary misstatements and arguments based upon tribal administrative laws and statutes of limitation that do not apply to Plaintiff. These ancillary arguments will be addressed last. Under Rule 12(c) judgment on the pleadings "is properly granted when, taking all the allegations in the pleadings as true, a party is entitled to judgment as a matter of law." Lyon v. Chase Bank USA, N.A., 656 F.3d 877, 883 (9th Cir. 2011). Plaintiff's strongest argument is that he is a party to the Nisqually Jail Service Agreement (subsection "c" below).

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a. The Motion is premature.

The Motion was filed the day after the scheduling conference, during which the imminence of filing was never mentioned.[1] Though the Nisqually Jail Service Agreement contains an express waiver of sovereign immunity that reaches Plaintiff, discovery may reveal additional waivers. The Indian Self-Determination and Education Assistance Act and the later Self-Governance amendments gave the Tribe the ability to operate its own police and jail, rather than relying on the Department of the Interior. 25 U.S.C. §§ 5321 et seq.

However, these self-governance compacts require insurance policies containing sovereign immunity waivers (though such waivers do not expose tribes to state law claims, pre-judgment interest, or punitives). See 25 § U.S.C. 5321(c)(3). Without discovery, Plaintiff cannot ascertain whether the Tribe has expressly waived sovereign immunity in an insurance policy or elsewhere,[2] in addition to the unequivocal waiver appearing in the Agreement (addressed below). The motion should be denied or continued pending further discovery and resolution of the habeas considerations discussed in the next section.

b. Plaintiff's injunctive claim sounds in habeas.

Plaintiff was interred in the tribal jail, suffered a stroke, was placed on warrant status during his convalescence, and now must face the certainty that service of the warrant or any resolution of

[1] The surprise filing is apparently coordinated with an effort by Nisqually to embed a motion for protective order into the Joint Scheduling Report as a mechanism to hold back discovery. Plaintiff might have stipulated to such a protective order, except that the defendants desire a joinder deadline that will occur before or too soon after entry of an Order on the instant motion, leaving Plaintiff no time to review discovery for any additional claims and defendants. Nisqually's furtive gambit violates F.R.C.P. 26(c) and may result in a motion to compel.

[2] Though neither the City nor our state legislature has the authority to approve the tribal jailing of non-Indians, RCW 10.92.020 also requires a waiver in insurance policies for tribal police acting as general authority officers. If logic were at play, it would stand to reason that at least one general authority officer would be involved in exerting general authority over non-Indians. Only discovery can shed light on this possibility.

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his criminal matters that includes confinement will land him back in the tribal jail. Though this case was indeed brought as a civil rights action to remedy a systemic wrong, it also challenges the fact of Plaintiff's captivity in a sovereign tribal jail.

The Indian Civil Rights Act contains an express waiver of sovereign immunity permitting federal courts to adjudicate petitions for habeas corpus. 25 U.S.C. § 1303 states "habeas corpus shall be available to **any person**, in a court of the United States, to test the legality of his detention by order of an Indian tribe." (Emphasis added).

> During deliberations in the House of Representatives, House Minority Leader Gerald Ford submitted a memorandum from the House Committee on the Judiciary…: under § 1303, the "habeas corpus **application for release from tribal detention shall be made in the Federal courts** (under present Constitutional practice**, non-Indian citizens**, if imprisoned under state law, must first seek habeas corpus by exhausting available state court remedies before applying to Federal courts.)."

Tavares v. Whitehouse, 851 F.3d 863, 873 (9th Cir. 2017) (quoting 114 Cong. Rec. 9611 (1968) (Emphasis added to show the legislative intent was to reach non-Indian citizens and provide direct federal judicial review).

Therefore, because of "two foundational principles in the Indian law canon -tribal sovereignty and congressional primacy in Indian affairs"- no state law or court can provide the necessary relief as against the Tribe. Id. at 869. This leaves the question whether Plaintiff's claims sound in habeas.

"[C]ivil rights damages actions…fall at the margins of habeas." Nelson v. Campbell, 541 U.S. 637, 646 (2004). In fact, the portion of this case seeking relief from tribal detention may sound exclusively in habeas at this liminal stage because "a prisoner in state custody cannot use a §1983 action to challenge 'the fact or duration of his confinement.'" Wilkinson v. Dotson, 544 U.S. 74, 78 (2005) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)). Of course, whether Plaintiff

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is subject to state, tribal, or state/tribal custody while captive of a tribe is a question of first impression.[3]

> Federal Rule of Civil Procedure 3 explains that "[a] civil action is commenced by filing a complaint." The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules. …Nothing in the Habeas Corpus Rules contradicts Rule 3. The logical conclusion, therefore, is that a habeas suit begins with the filing of an application for habeas corpus relief -- the equivalent of a complaint in an ordinary civil case.

Woodford v. Garceau, 538 U.S. 202, 208 (2003) (discussing commencement dates for other purposes, though the logic is applicable) (citing Pitchess v. Davis, 421 U.S. 482, 489 (1975) (per curiam)).

Plaintiff has indeed filed such a complaint in an 'ordinary civil case,' except that one defendant happens to be an Indian tribe, subject only to federal oversight. Congress created 25 U.S.C. § 1303 for this very purpose. Congress has provided no authority for the state judiciary to relive non-tribal citizens of tribal captivity. Therefore, this Court is both the intended and only possible forum for the injunctive claims to be adjudicated.

Though habeas relief is not expressly pleaded, the Complaint requests an injunction "enjoining tribal detention of non-tribal citizens arrested outside tribal jurisdiction," which functionally equates to an application for habeas relief as defined in 28 U.S.C. § 2242. Dkt. # 9 at 14. The constitutionality of Plaintiff's detention in tribal jail is, has been, and will continue to be,

[3] Defendants, of course, argue that despite being forced into a sovereign tribal jail surrounded by tribal concrete, tribal concertina wire and tribal armed guards, Plaintiff was nonetheless at all times in Lacey's custody. For this proposition, they invoke no statutory authority. Instead, they rely on the venerable decree of Associate Lacey City Attorney, Joseph Svoboda, who has divined that "[a] person housed at the Nisqually Jail remains under the jurisdiction of the City. The Criminal Rules for Courts of Limited Jurisdiction…, the Washington State Constitution, and federal laws provide a defendant/inmate housed at the Nisqually Jail the same procedural due process protections as a defendant/inmate that is housed at a non-tribal facility." Dkt. # 24, pg. 2. If Svoboda's words were the law of the land, Plaintiff would have immediately dismissed Nisqually upon receiving them.

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before this Court until a final ruling on the merits, which satisfies all requirements of 28 U.S.C. § 2241 et seq. See also Pl.'s Mot. for TRO, Dkt. # 20. Express habeas language was omitted form the Complaint because Counsel, having defended many misdemeanor clients in state court, presumed the City would have offered a plea agreement not involving a return to tribal captivity. Especially after 19 days and a stroke.

Plaintiff's present convalescence outside Nisqually Jail is also not a bar to habeas relief. The Supreme Court's rulings "make clear that 'the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody.'" Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 300 (1984) (quoting Jones v. Cunningham, 371 U.S. 236, 239 (1963)). The Supreme Court heard the seminal case, Oliphant v. Suquamish Indian Tribe even though neither plaintiff was in custody at the time. 435 U.S. 191, 194 (1978) ("Oliphant was released on his own recognizance" and "Belgarde posted bail and was released.").[4]

Plaintiff is currently out of Nisqually Jail because he was transported to the emergency room after his stroke. Though Plaintiff can no longer enjoy walking on his own feet, he does enjoy the exact same legal status as did Oliphant and Belgarde -detained and charged but not yet tried. The only difference between Oliphant and the instant case is that the Suquamish Tribe had exercised judicial jurisdiction over the plaintiffs, whereas Nisqually Tribe is asserting territorial and carceral jurisdiction over Plaintiff's body -even to the extent of leaving his body in a state of destruction.[5]

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[4] One Ninth Circuit case has construed the word "detention" in 25 U.S.C. § 1303 more narrowly than the word "custody" found in the general habeas statutes. However, that court was deciding whether a tribe's exile of its members constituted detention. Oliphant is undisturbed. See Tavares v. Whitehouse, 851 F.3d 863, 871-73 (9th Cir. 2017).

[5] The transcript of oral argument in Oliphant begins with the Court asking counsel, "What particular statutory grants of jurisdiction to the Federal District Court do you rely on?" Counsel responded, "The Indian Civil Rights Act…but there is [also] the right under the United States Constitution for Petition of Writ of Habeas Corpus…." The Court then asked, "don't you have to be in custody…to rely on this?" Tr. at 4-5. Eventually the Court also asked, "Where do they [(the tribe)] incarcerate?" to which Counsel responded, "they held Mr. Oliphant in the local office, a tribal office in the back

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Because the City lacks its own jail, any further incarceration of Plaintiff is certain to be in Nisqually Jail. Dkt. # 9, pg. 22 ("No…alternative is currently available in Thurston County"). It would be an absurd result if the fictional legal fiction proffered by the conspirators -namely that Plaintiff simply never has been under tribal jurisdiction despite 19 days and a severe stroke in a tribal jail- operated to subvert the unequivocal Congressional waiver created for the narrow purpose of habeas.

Therefore, under 28 U.S.C. § 2255(e), Plaintiff seeks to enforce the rule from the federal Oliphant case -that the Tribe has no lawful jurisdiction over him- in federal court on the basis of the federal Constitution and federal statutes. If this Court does not already consider habeas relief to be in issue, then Plaintiff alternatively seeks leave to amend under the liberal standards of both F.R.C.P. 15(a) and 28 U.S.C. § 2242.

c. Plaintiff is a third-party beneficiary to the Nisqually Jail Services Agreement.

Paragraph 15 of The Nisqually Jail Service Agreement contains the following unequivocal waiver of sovereign immunity:

> **Venue and Choice of Law**
>
> 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 [sic] of Washington.

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room." Tr. at 10-11. Counsel also revealed that the "petitioners were jailed in state facilities, city jails, in Bremerton and Port Angeles pursuant to contracts between those cities and the Federal Government." Tr. at 19. *Available at* https://www.supremecourt.gov/pdfs/transcripts/1977/76-5729_01-09-1978.pdf.

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Dkt. # 9, pg. 26.

Paragraph 15's bold, capitalized language unequivocally expresses that what follows is an "**EXCEPTION**" to the sovereign immunity claimed in the previous sentence. Venue in Washington is also expressly granted, and no exception is taken to the federal forum. The subject matter is broadly prescribed as "any legal dispute," and the laws of the State of Washington clearly govern. Because contract law is state law, Plaintiff's breach of contract claim is expressly approved. The same goes for negligence.

The federal claims may be a closer question, however much of the Bill of Rights has equal force in the several states under the Doctrine of Incorporation through the Fourteenth Amendment. The Fourth Amendment was long ago incorporated into state law. See e.g. Mapp v. Ohio, 367 U.S. 643, 650 (1961). Plaintiff has invoked the Fourth Amendment because of his unlawful seizure in a sovereign jail. Dkt. # 9, pg. 13. Plaintiff has also invoked the Fourteenth Amendment, which was originally drafted with the express intention of binding states. See e.g. Sec. I. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States…).

In C & L Enterprises, Inc v. Citizen Band Potawatomi Indian Tribe of Okla., the Court's reasoning traced a progression from an arbitration clause to the American Arbitration Association Rules calling for judicial enforcement of arbitration awards, then back to the choice of law clause in the contract, and finally to the state's uniform arbitration act. 532 U.S. 411, 417-20 (2001). The Court held that this chain of contractual and statutory provisions amounted to an immunity waiver of "sufficient clarity." Id. at 418. The Nisqually waiver is far less equivocal and requires no such application of transitive logic.

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The Court also considered the fact that "the Tribe itself tendered the contract." Id. at 420. This appears to be consistent with the doctrine of contra preferentem, whereby contractual ambiguities are construed against the drafter. See e.g. Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317, 1324 (9th Cir. 1995). Given that the Agreement is identical to those between the Tribe and several other municipalities, it is very likely that the Tribe is the drafter in this instance. Therefore, if under Washington State contract law Plaintiff is a party to the Agreement then sovereign immunity has been unequivocally waived as to each claim.

> The creation of a third-party beneficiary agreement requires that the parties intend, at the time they enter into the agreement, that the promisor assume a direct obligation to the beneficiary. **If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person.**

Tacoma Auto Mall, Inc. v. Nissan North America, Inc., 169 Wn.App. 111, 130 (2012) (Emphasis added.) (quoting Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wash.App. 229, 255 (2009) (Internal citation omitted.) and Lonsdale v. Chesterfield, 99 Wash.2d 353, 361 (1983) (Internal citation omitted.)).

Under this objective intent requirement, the parties cannot deny the Agreement objectively intends Plaintiff be a beneficiary. The Agreement necessarily requires Nisqually to provide "care [which] shall mean room and board [for] prisoners housed pursuant to th[e] agreement." Dkt. # 9, pg. 23. "Prisoner" is defined to "include any person arrested, sentenced…or held under authority of any law or ordinance of Lacey." Dkt. # 9, pg. 23. Plaintiff was arrested by the City of Lacey and delivered into sovereign captivity under the City's authority. Dkt. # 29-1, pg. 12. The Tribe, therefore, cannot be heard to argue that it was not necessarily obligated by the terms of the

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Agreement to confer beneficial care upon Plaintiff (Plaintiff does not contest that the Tribe's *subjective* intent was solely to earn income on Plaintiff's captivity, irrespective of his wellbeing).

The Tribe couches the Agreement as a "government contract" and Plaintiff as an "incidental beneficiary." Dkt. # 36, pg. 7. To this end, the Tribe invokes a service contract between the United States and a river dam operator. Klamath Water Users v. Patterson, is inapposite for several reasons beyond the obvious fact that those benefitting from a dammed river were not themselves dammed by contract. 204 F.3d 1206 (9th Cir. 1999).

When the United States is a party and the contract is entered "pursuant to federal law," then the contract will be governed by federal contract law. Id. at 1210. The Nisqually Jail Services Agreement is not only governed by state law -it is *prohibited* by federal law. The federal third-party beneficiary analysis does not include the objective intent analysis of Washington State law. Even if the Tribe's absurd invocation of the federal "incidental beneficiary" doctrine were appropriate, Plaintiff would prevail because he is literally depicted in the black letter of the Agreement and, under federal contract law, the "intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit…." Id. at 1211.

Under Washington State law, the intent requirement has been analyzed objectively since 1955. See Vikingstad v. Baggott, 46 Wash.2d 494, 496-97 (1955). Even under the cautious requirement "that the promisor assume a direct obligation to the intended beneficiary," the Tribe clearly assumed such direct obligation when it took Plaintiff captive. Lonsdale, 99 Wn.2d 353, 361 (1983). Even under the theory advanced by all defendants -that Plaintiff is mere chattel held in bailment by the Tribe for the benefit of the City, never having left the long and benevolent

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jurisdictional arms of Joseph Svoboda- the direct obligation was set forth in the black and white letter of the Agreement and would be evident anyway if merely implied by the defendants' conduct.

d. Sovereign power does not reach Plaintiff, therefore nor does immunity.

The inherent conflict between domestic dependency and sovereignty results in some divestiture of the latter.

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.
>
> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana v. United States, 450 U.S. 544, 564 (1981) (quoting United States v. Wheeler, 435 U.S. 313, 322-26 (1978); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148; Williams v. Lee, 358 U.S. 217, 219-220; United States v. Kagama, 118 U.S. 375, 381-382; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171)).

That sovereign dominion over Plaintiff has been divested is settled law. Sovereign immunity depends upon sovereignty. Without sovereignty, there is no sovereign immunity. By keeping the non-native Plaintiff in tribal captivity, the Tribe acted outside the scope of its sovereignty. Sovereign immunity is waived by operation of law.

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e. Simmons and Tiam may not invoke tribal sovereignty in any case.

Assuming without agreeing that tribal immunity has not been waived, Simmons and Tiam could not invoke it in any case. "[I]n a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." Lewis v. Clarke, 137 S.Ct. 1285, 1289 (2017). Defendants' claim that immunity is automatic when "tribal officials act in their official capacity and within the scope of their authority" is patently false. Dkt. # 36, pg. 9.

The threshold issue is whether the individual official is only "nominally" sued and the claims are "in fact [prosecuted] against the official's office and thus the sovereign itself." Id. at 1292. One test is whether a claim seeks to recover for "personal actions" of the individual and does "not require action by the sovereign or disturb the sovereign's property." Id. at 1292 (quoting Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 687 (1949)). "As a general matter, individual or '[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law,' and that were taken in the course of his official duties." Pistor v. Garcia, 791 F.3d 1104, 1112 (9th Cir. 2015) (quoting Kentucky v. Graham, 473 U.S. 159, 165 (1985)).

Defendants Simmons and Tiam are named as individuals. Dkt. #9, pg. 4. Tiam personally executed the 2013 Agreement/conspiracy as "Chief Executive Officer." Dkt. # 9, pg. 27. In 2016, when Plaintiff suffered his injuries, Simmons was the Chief Executive Officer personally administering the unlawful Agreement/conspiracy (Simmons is believed to have later taken the role of Chief Financial Officer). It is quite plausible to infer that Simmons was the C.E.O. during the administration of the Agreement/conspiracy precisely because -and not *despite* as he alleges- only

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"six weeks *after* Bell's…stroke," it was Simmons (and no longer Tiam) who executed the renewal. Dkt. # 36, pg. 11. It is less plausible to infer that Simmons was suddenly appointed C.E.O. at the moment he signed the renewal. Simmons was additionally the Director of Community Service which, on information and plausible belief, implicates him in the jail's medical services also bound up in the facts of the deliberate indifference case.

Though there may be a question of fact as to their exact titles, Defendants Simmons and Tiam were at all relevant times quasi-corporate officers participating in a human trafficking conspiracy. As to either defendant, a grant of immunity would be "extended…beyond what common-law sovereign immunity principles would recognize for either state or federal employees." Lewis v. Clarke, 137 S.Ct. at 1293. An individual state employee personally signing or administering an unconstitutional conspiracy would be personally liable.

Courts express "caution about masked official capacity suits," however the policy rationale is to avoid interference with a "tribe's internal governance." Pistor, 791 F.3d at 1113. Nisqually 's governance has nothing to do with Simmons and Tiam. Article VI of the Constitution of the Nisqually Indian Tribe places relations with federal, state and local governments, legislation, and law enforcement in the hands of the Tribal Council. The Tribal Council consists of seven enumerated members, none of whom bear the title C.E.O. or C.F.O. Id. at Art. III, Sec. 6.[6] The "strict separation of policy-making and management functions" is fundamental to the job description of the Nisqually C.E.O. *Available at* http://www.nisqually-nsn.gov/index.php/administration/.

> In the context of a § 1983 claim against a tribal officer in his or her individual capacity, the plaintiff still has the burden of demonstrating § 1983's dual requirements that: (1) the

[6] Available at http://www.nisqually-nsn.gov/index.php/council/constitution/.

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> allegedly unlawful conduct was committed by a person acting under the color of state law, and (2) such conduct deprived the plaintiff of constitutionally-protected rights, privileges, or immunities.
>
> Regarding the first element, an action is under color of state law when the state's role in the action is "significant." The degree of state involvement is a question of fact. Generally speaking, tribal officers "who act in concert with officers of the state are acting under the color of state law within the meaning of section 1983."

Black v. United States, C13-5415 RBL (citing Evans v. McKay, 869 F.2d 1341, 1347 (9th Cir. 1989); quoting Lopez v. Dept. of Health Services, 939 F.2d 881, 883 (9th Cir. 1991) and quoting Evans, supra at 1348)).

Tiam executed the 2013 Agreement and Simmons continued to administer it throughout 2016, during the time Plaintiff suffered his captivity and stroke. At all times, the Agreement was performed in concert with the officers of the city, the latter arresting non-native Americans and depositing them in tribal jail. The acts and omissions of both individual officers give rise to Plaintiff's claims. The Agreement, moreover, explicitly invokes state law and was also executed by Lacey, a state municipal corporation. Dkt. # 9, pg. 23 ("…pursuant to Chapters 39.34 and 70.48 RCW.").

Plaintiff has made clear to counsel that, should discovery reveal mis-pleaded defendants, Plaintiff will amend accordingly. However, Defendants have chosen to force this motion the day after the scheduling conference, embed language in the Joint Scheduling Report to justify withholding discovery, and now move this Court for dismissal on the basis that Plaintiff cannot be absolutely certain as to the roles of those conspirators who administered the conspiracy while enshrouded behind the veil of sovereignty. At the very least, the motion should be struck pending further discovery.

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f. Conspiracy is well pleaded.

Plaintiff has not alleged any claim under 42 U.S.C. § 1985, so this brief will not waste time countering Defendants' argument in this regard. Defendants' motion also supposes that the Complaint does not properly state a claim of conspiracy under §1983. In light of Defendants' extensive treatment of the never pleaded § 1985 non-issue, it is clear that Defendants have not thoroughly read the Complaint.

Defendants even got the law correct:

> 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) (citing Avalos v. Baca, 596 F. 3d 583, 592 (9th Cir. 2010) (citations omitted)); Dkt. # 36, pg. 12. .

The Complaint states in short and plain yet plausible terms that (i) "[the Lacey defendants] conspired to and did unlawfully contract with Nisqually, certain DOE defendants, Tiam, and Simmons, under the Nisqually Jail Service Agreement…" to deprive Plaintiff of his Fourth and Fourteenth Amendment rights, (ii) committed the overt acts of "participating in the illegal exportation, trafficking, banishment, exile, extradition, and detention of United States citizens for profit and convenience," and that in so doing (iii) "all defendants" deprived Plaintiff of the foregoing rights by holding Plaintiff and "[a]ll non-tribal captives in Nisqually…without legal authority…." Dkt. # 9, pp. 6, 7, 11-13, and 16.

"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.

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(citing Crowe v. County of San Diego, 608 F.3d 406, 440 (9th Cir. 2010)). Yet Plaintiff need not ask this Court to make any inference whatsoever because the meeting of the minds is so overt as to have been memorialized indelibly in black ink and appended to the Complaint as a signed, dated and countersigned conspiracy and confession thereto. Dkt. # 9, pp. 21-27.

g. Tribal tort remedies are not applicable.

Like the notion that cities and tribes may intern non-tribal Americans into sovereign tribal captivity, the argument that these Americans must exhaust tribal remedies before vindicating their United States Constitutional birth right is mindboggling and dangerous. § 1983 claims have never required exhaustion of state remedies:

> Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language, and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence, the fact that Illinois, by its constitution and laws, outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.
>
> Monroe v. Pape, 365 U.S. 167 (1961).

Furthermore, civil jurisdiction over non-tribal Americans is limited to that which is "necessary to protect tribal self-government or to control internal relations…." Montana v. United States, 450 U.S. 544, 564 (1981). "On tribal lands, a tribe generally retains the inherent sovereign 'right to exclude,' together with regulatory and adjudicative authority that flows from that right." Wilson v. Horton's Towing, 906 F.3d 773, 779 (9th Cir. 2018) (quoting Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 898, 899 (9th Cir. 2017)). Thus the Tribe could previously have exercised its sovereign jurisdictional authority to transport Plaintiff from Nisqually Jail back onto non-tribal soil.

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Plaintiff is now precariously back in the United States Proper where "a tribe generally lacks [civil] authority…[except] a tribe may exercise control over 'the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" Id. at 779 (quoting Montana, 450 U.S. at 556). Plaintiff's past and potential future captivity in the Nisqually Jail is most assuredly nonconsensual.

Plaintiff has pleaded no claims against the tribal defendants grounded in tribal law, nor did he cast a vote for any tribal lawmaker or otherwise invite imposition of tribal jurisdiction. There is no legal or factual basis for Defendants to argue Plaintiff, by virtue of his having been captured by a sovereign, must also adjudicate his claims in that sovereign's court. In fact, the nontribal defendants have argued that Plaintiff never was under the Tribe's jurisdiction, even while having a stroke on the floor of the Tribe's jail. Therefore, no exhaustion of tribal remedies is required, though Rule 11 sanctions may be.

h. Statute of limitations is three years.

Defendants falsely and frivolously argue that the Fourth Amendment claim is time-barred. Dkt. # 36, pg. 13. For this proposition, they invoke the inapposite RCW 4.16.100. Plaintiff has pleaded no state claim that would fall under this two-year statute of limitation.

> §1983 contains no statute of limitations. Federal (and state, for that matter) courts instead "borrow" §1983 limitations periods from analogous state law. Specifically, they borrow the state's "general or residual statute for personal injury actions." In Washington, that statute is RCW 4.16.080(2), which is a three-year limitations period.

Boston v. Kitsap County, C14-5205 RBL (2015) (quoting Owens v. Okure, 488 U.S. 235. 250 (1989); citing Bagley v. CMC Realty Corp., 923 F.2d 758, 760 (9th Cir. 1991)).

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III. CONCLUSION

The Tribe has adopted self-governance -the most sovereign status achievable under domestic dependency. Yet they permit their sovereign veil to be pierced by a fictional legal fiction whereby the several jurisdictions of many non-native captives are said to penetrate inside the jail along with their respective captives. Stranger still, they claim that this stalwart yet admittedly perforated sovereign veil filters out the captives' Constitutional rights even as their residual jurisdictional essences penetrate.

Fortunately we need not unravel the Tribe's tangled theory of sovereign immunity, because Plaintiff is a party to the Nisqually Tribal Jail Agreement, upon which he may prosecute "any legal dispute," and in any case he may challenge his captivity under federal statute as Congress intended. Sovereign immunity should be denied.

Respectfully Submitted,

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I, Jackson Millikan, certify under penalty of perjury by the laws of the United States, but of no other sovereign, that I electronically served this brief on all counsel of record via ECF on or before 5/6/2020.

By, /s/Jackson Millikan
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