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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Kyle Welsh, Estate of Jill Welsh, and WW Young Money, LLC d/b/a Flame on Indian Smoke Shop, Plaintiffs, v. Rebecca Loudbear, Amelia Flores, and John Yackley, Defendants.	No. 2:25-cv-001159-SPL DEFENDANTS REBECCA LOUDBEAR, AMELIA FLORES AND JOHN YACKLEY'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS COMPLAINT

Plaintiffs' Response collapses under a fundamental flaw: they cannot reconcile their claim that this is an individual-capacity suit with their factual allegations that unmistakably describe official Tribal conduct. Forcing Defendants Rebecca Loudbear, Amelia Flores, and John Yackley ("Tribal Defendants") to submit to litigation for actions taken in their official roles is precisely what Tribal sovereign immunity forbids. Moreover, Plaintiffs Response relies almost exclusively on factual assertions and theories that are not pled in the Complaint. These statements of counsel

cannot cure the defects in Plaintiffs' Complaint or serve as a basis for denying the Tribal Defendants' Motion to Dismiss. It is well-settled that a plaintiff may not amend their complaint through arguments in opposition to a motion to dismiss. *See*, *e.g.*, *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.").

The Court should dismiss Plaintiffs' Complaint in its entirety because Plaintiffs have failed to meet their burden of establishing federal subject matter jurisdiction; Plaintiffs have failed to join the Colorado River Indian Tribes ("Tribe" or "CRIT"), which is a required party that cannot be joined due to its sovereign immunity; and Plaintiffs have failed to state a claim under the Racketeer Influence and Corrupt Organizations Act ("RICO").

ARGUMENT

I. The Tribal Defendants did not act outside the scope of their authority and are protected by CRIT's sovereign immunity

Tribal sovereign immunity extends to tribal officers when "the sovereign is the real party in interest." *Lewis v. Clarke*, 581 U.S. 155, 161 (2017). "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 162; *see also Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013). The critical question is whether "any remedy will operate . . . against the sovereign." *See Pistor v. Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015). Plaintiffs' argument fails to reconcile the inconsistency between their characterization of this lawsuit as an ***individual*** capacity suit and their factual allegations describing ***official*** Tribal conduct. *Bassett v. Mashantucket Pequot Museum and Research Center*

Inc., 221 F.Supp.2d 271, 280 (D. Conn. 2002) ("Claimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity.").

Plaintiffs argue the Tribal Defendants acted outside the scope of their authority because the Tribal Defendants did so for their own "pecuniary gain," "individual greed," and "individual jealously," three new separate and distinct purposes for the so-called RICO enterprise. Plaintiffs' Response at 2 ("Response"). But nowhere in the Complaint did Plaintiffs allege facts supporting any of these new contentions. To the contrary, the pleaded facts show this case turns on *official*—not *personal*—actions, taken under color of Tribal law. *See* Compl. at Exs. 1-4.; *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) ("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.'")

Plaintiffs further argue, for the first time, the CRIT Tribal Council did not authorize Chairwoman Flores to sign the lease termination letter and thus she acted for unknown "personal reasons." Response at 2-3. Again, the Complaint contains no such factual allegation. Plaintiffs may not supplement their Complaint with new facts or theories in a response brief. *See Schneider*, 151 F.3d at 1197 n.1. Similarly, Plaintiffs contend their attempts to seek remedies through tribal avenues were "met with violence by the CRIT tribal police at Defendant Loudbear's involvement." Response at 3. But Plaintiffs' Complaint contains no allegations of violence by tribal police.

Plaintiffs signed their lease with the Tribe—not the individual Tribal Defendants. Compl. at Ex. 1 (lease signed by Chairman); Ex. 2 (renewal option letter on Tribal letterhead signed by Mr. Yackley in his official capacity); Ex. 3 (letter on Tribal letterhead signed by Chairwoman Flores in her official capacity). And the damages Plaintiffs seek would interfere with the Tribe's self-governance because the Tribe terminated the lease under Tribal law on Tribal letterhead by

officials using their titles. Compl. at ¶ 26; *see also* CRIT Property Code Section 1-301(a)(b)(d). Any judgment would therefore interfere with the Tribe's ability to administer its laws and would chill the ability of Tribal officials to execute documents on behalf of the Tribal government for fear of being sued personally. *See Maxwell*, 708 F.3d at 1089 ("[A] suit challenging tribal governance functions 'attack[s] 'the very core of tribal sovereignty.'" (quoting *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995))).

Accordingly, the Tribe is the real party in interest and the Tribe's sovereign immunity protects the Tribal Defendants from suit. Forcing Tribal officials to submit to litigation from which they would otherwise be immune is exactly what Tribal sovereign immunity seeks to prevent. *See Lanuza v. Love*, 899 F.3d 1019, 1029 (9th Cir. 2018) ("actions against high-ranking executive officers . . . are disfavored because such suits 'would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties.'"). Plaintiffs have failed to meet their burden of establishing federal subject matter jurisdiction and the Court should dismiss Plaintiffs' Complaint.

II. The Tribe is a Required Party that Cannot be Joined

Plaintiffs assert CRIT is not a required party because its "sovereign authority and powers of government are not being questioned." Response at 4. This cannot be. Plaintiffs do not deny that their lease was terminated under Tribal law. It therefore follows that Plaintiffs are fundamentally challenging CRIT's powers of government and the Tribal Defendants' ability to lawfully carry out Tribal law. Under the standard for dismissal of a complaint under Rule 12(b)(7) for "failure to join a party under Rule 19," CRIT is a required party that cannot be joined and without which the action cannot proceed in equity and good conscience. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 943 (9th Cir. 2022). Dismissal is therefore required.

A. The Tribe is a Required Party under Rule 19(a) and Joinder is not Feasible

Plaintiffs argue CRIT's joinder is not required because Plaintiffs seek no relief from CRIT and complete relief may be awarded without any official action by CRIT. Response at 4. This argument misunderstands Rule 19. CRIT is a required party under Rule 19(a)(1)(B)(i) because the Tribe has a legally protected interest that may be impaired or impeded in the Tribe's absence. Plaintiffs entered into a lease agreement with CRIT under Tribal law. Compl. ¶ 10. CRIT terminated the lease under Tribal law. Compl. at Ex. 3. CRIT is thus a required party. *See E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010) (noting the Ninth Circuit has "repeatedly held that '[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.'").

Although the Tribe is a required party, it cannot be joined because Indian tribes have sovereign immunity from suit unless the tribes' consent to be sued, or Congress has expressly abrogated immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). CRIT has not consented to the suit, and Congress has not acted. Joinder is therefore infeasible, and dismissal follows. *See*, *e.g.*, *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 857 (9th Cir. 2019) ("[T]here is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity . . . .").

B. This action cannot proceed in equity and good conscience without the Tribe

Because the Tribe is a required party that cannot be joined due to sovereign immunity, the Court need proceed no further to order dismissal under Rule 19. Even so, should the Court apply the Rule 19(b) factors, the result is the same.

The first Rule 19(b)(1) factor considers possible prejudice to the absent parties as well as to the current parties. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 980 (9th Cir. 2024). This factor involves the same considerations discussed in concluding that the Tribe is a required party under Rule 19(a). *See Am. Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1024–25 (9th Cir. 2002) ("[T]he first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a)"). Even though Plaintiffs say they seek no relief from CRIT and that CRIT's absence will not prejudice the Tribal Defendants, the fact remains that any judgment will prejudice the Tribe's sovereign interests in enacting its own laws, negotiating contracts under those laws, and will interfere with the public administration of those laws. Response at 4. The first factor therefore favors dismissal.

As to the second factor, this is not a case where the prejudice caused by a party's absence can be mitigated by the presence of a party capable of representing the absent party's interest. Plaintiffs claim the Complaint limits relief to the individual Defendants only and, therefore, the relief can be shaped to lessen prejudice. Response at 4. Again, Plaintiffs miss the mark. As an elected body responsible for representing the Tribe, only the CRIT Tribal Council retains authority to represent the Tribe's interests. None of the individual Tribal Defendants in their named personal capacities possess the authority to unilaterally enact or modify CRIT Tribal law or Tribal contracts. The second factor favors dismissal.

The third Rule 19(b)(3) factor considers whether any judgment rendered in the Tribe's absence would be adequate. It would not. Plaintiffs once again say they seek to hold only the individual Defendants accountable. Response at 5. But the concern underlying Rule 19(b)(3) is that "of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968). This case stems

from the Tribe's termination of Plaintiffs' lease. A judgment rendered in the Tribe's absence would not be binding on the Tribe and would not address the underlying alleged tribal government activity. The third factor favors dismissal.

Last, Plaintiffs argue no alternative forum exists because CRIT could assert sovereign immunity in a state or tribal court proceeding. Response at 5. But a lack of remedy is an inevitable result of sovereign immunity, and courts have uniformly held that "the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Maverick Gaming LLC*, 123 F.4th at 981.

The Tribe is a required party that cannot be joined due to its sovereign immunity and Plaintiffs have failed to prove otherwise. The Court should therefore dismiss the Complaint for failure to join a required party under Rule 19.

III. The Complaint fails to state a claim against the Tribal Defendants

A. 18 U.S.C. § 1962(c)

A RICO claim under § 1962(c) requires Plaintiffs to allege that the Tribal Defendants participated, directly or indirectly, in the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." *Living Designs, Inc. v. E.I. DuPont de Nemours Co.,* 431 F.3d 353, 361 (9th Cir. 2005).

In response to the argument that the Complaint's barebone allegations fail to meet the pleading standards required for a civil RICO claim, Plaintiffs complain about the Tribal Defendants' "hyper-focus[] on factual pleading technicalities." Response at 5. However, Federal Rule of Civil Procedure 9(b) requires fraud to be pled with particularity. The fraud allegations must be "specific enough to give defendants notice of the particular misconduct so that they can

defend against the charge." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). Plaintiffs do not come close to meeting this burden.

1. Plaintiffs should be deemed to have conceded dismissal

Plaintiffs' Response fails to address numerous RICO deficiencies raised in Tribal Defendants' Motion. With respect to three of the five predicate acts, Plaintiffs' bare conclusion that they "are sufficiently plead for present purposes," without more, despite having several pages available to brief the issue, completely fails to refute the Tribal Defendants' arguments. Response at 7. Nor do Plaintiffs respond to the Tribal Defendants' arguments about Plaintiffs' failure to adequately allege the existence of a RICO enterprise, the lack of plausible support that each Tribal Defendant participated in the enterprise's affairs, or that Plaintiffs' Section 1962(d) also fails. *See* Tribal Defendants' Motion at 13-16. Plaintiffs' failure to respond to arguments about the required elements of a RICO claim is fatal.

The Court should find Plaintiffs failure to respond to certain arguments as consent to granting the Tribal Defendants' Motion to Dismiss on those grounds. *Garcia v. GMAC Mortgage*, LLC, 2009 WL 2782791, at * 1 (D. Ariz. 2009) ("If an argument is not properly argued and explained, the argument is waived."); *Doe v. Dickenson*, 2008 WL 4933964 at *5 (D. Ariz. 2008) ("[T]he Court is entitled to treat Plaintiffs' failure to respond as waiver of the issue and consent to Defendants argument"); *Currie v. Maricopa County Cmty. Coll. Dist.*, 2008 WL 2512841, at *2 n.1 (D. Ariz. June 20, 2008) (finding plaintiff's failure to respond to an argument serves as an independent basis on which the court can grant defendant's motion to dismiss).

2. This is an intrastate contract dispute, not a RICO action

Plaintiffs argue this is a RICO dispute because, even though the case centers around a business lease, they seek no contractual remedies and the Tribal Defendants' conduct resulted in

Plaintiff Welsh's incarceration.[1] Response at 5. Plaintiffs further claim there is no rule that intrastate conduct cannot result in RICO liability, citing *Marshall v. Goguen*, 604 F. Supp. 3d 980, 993 (D. Mont. 2022). *Id.* This argument and citation are erroneous. The court in *Marshall* dismissed that plaintiff's RICO complaint with prejudice, noting the absence of "an interstate facility," and the case by no means endorses Plaintiffs' creative recasting of his federal felony—served in a federal detention facility also in Arizona—as interstate commerce. Moreover, argument aside, nothing in the Complaint alleges that the actions of the purported enterprise, or even the predicate acts as pleaded, had the necessary effect on interstate commerce for jurisdiction under the RICO statute. *See United States v. Bagnariol*, 665 F.2d 877, 892-94 (9th Cir. 1981). That's because there was none, as the dispute concerns property located in Arizona and involves parties that were based in Arizona. *Musick v. Burke*, 913 F.2d 1390, 1398-99 (9th Cir. 1990) (a core element of RICO is that the purported RICO enterprise is "engaged in, or having an effect on, interstate commerce").

3. Plaintiffs fail to adequately plead predicate acts that meet the pattern of racketeering activity as required under RICO

Racketeering activity requires predicate acts. *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014); 18 U.S.C. § 1961(1). Plaintiffs deficiently allege five predicate acts but, in their Response, argue about only two: (1) mail and wire fraud (18 U.S.C. §§ 1341 and 1343) and (2) obstruction of justice (18 U.S.C. § 1503). Response at 6-7. The Complaint fails to allege any legally sufficient predicate acts for purposes of the RICO claims.

[1] Plaintiffs' repeated references to his incarceration suggest that this case may also be an improper collateral attack on the criminal case against him brought by the United States, as success on the RICO obstruction claims would necessarily imply that the prosecution was invalid. Judgment was entered against Plaintiff Welsh after he pled guilty for violating Title 18, U.S.C. §1153 and § 113(a)(2), Flight with Intent to Commit Flight to Avoid Prosecution, a Class C Felony offense. *See* Judgment, *United States v. Welsh*, CR-21-00316-001-PHX-SPL (July 19, 2023).

i. Failure to allege mail and wire fraud

"The mail and wire fraud statutes are identical except for the particular method used to disseminate the fraud, and contain three elements: (A) the formation of a scheme to defraud, (B) the use of the mails or wires in furtherance of that scheme, and (C) the specific intent to defraud." *Eclectic*, 751 F.3d at 997. The "scheme to defraud" element is "treated like conspiracy in several respects." *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002) (quoting *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992)).

Plaintiffs must identify "the who, what, when, where, and how" of the alleged misconduct. *Vess,* 317 F.3d at 1106. Instead, Plaintiffs, generally citing to swaths of the Complaint, argue their allegations of mail and wire fraud sufficiently identify the individual Defendants who mailed the false and fraudulent communications. Response at 6. Not so. A broad, conclusory argument about two broad, conclusory allegations is hardly sufficient, especially where Plaintiffs fail to address that paragraph 21 clearly and impermissibly lumps "Defendants" together. *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (internal quotation marks omitted) ("In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme."). Moreover, Plaintiffs do not respond to the fact that the single paragraph of the Complaint that supposedly shows "false and fraudulent" conduct does not show fraud, much less with the specificity required by Rule 9(b). Compl. at ¶ 30.

ii. Failure to allege obstruction of justice

Plaintiffs argue the Complaint sufficiently alleges at paragraph 28 that Defendant Loudbear communicated false information to the FBI during the investigation process so Mr. Welsh would be arrested and imprisoned. Response at 7. Fatally, Plaintiffs make no attempt to show how this would be obstruction of justice under 18 U.S.C. § 1503, which generally requires the manipulation

of a tribunal be done "corruptly." *See* 18 U.S.C. § 1503; *see*, *e.g.*, *United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 1986) ("In a case involving interference or tampering with a witness, it must also be shown that the defendants knew that the person was 'expect[ed] to be called to testify.'") (internal citation omitted). Even assuming § 1503 had been properly implicated—and Plaintiffs can allege a direct "by reason of" causal link to harm from the communication—Plaintiffs single, broad assertion of "[a]mong the false statements" is insufficient to avoid dismissal for failure to state a claim. Compl. at ¶ 28.

4. Leave to Amend Should Be Denied

The Court should deny Plaintiffs' request for leave to amend. Leave to amend should be denied if amendment would be futile. *See Airs Aromatics, LLC v. Op. Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014). Amendment is futile when a plaintiff's claims are based on threadbare allegations and legal conclusions, the plaintiff fails to rebut any of the defendant's arguments in the motion to dismiss, and there is an applicable defense to the claim plaintiff alleges. *See Aguiar v. Cal. Sierra Express, Inc.*, 2012 WL 1593202, at *2 (E.D. Cal. May 4, 2012). As shown, Plaintiffs' Response is as flawed and deficient as their Complaint. This case boils down to a factually and legally flawed attempt to repudiate the Tribe's lawful termination of Plaintiffs' lease agreement in federal court. Plaintiffs' claims are based threadbare allegations and legal conclusions, and Plaintiffs plainly failed to rebut several of the Tribal Defendants' arguments in the Motion to Dismiss. Amendment is futile and not warranted.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety, with prejudice and without leave to amend.

DATED this 17th day of July, 2025.

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