

Exhibit AA

FILED

JAN 24 2002

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EASTERN DISTRICT OF CALIFORNIA

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NO. CIV. S-01-1389 LKK/DAD

V.

SILVIA BURLEY; TIGER BURLEY; and
RASHEL REZNOR,

Plaintiffs sue defendants for fraud and RICO violations based on the admission of two of the defendants as members of plaintiffs' tribe, their subsequent election to leadership positions, and use of tribal funds received from the U.S. government. Plaintiffs seek damages, an accounting, and declaratory relief. This case is before the court on defendants' motion to dismiss.

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1 I.

2 DISMISSAL STANDARDS UNDER FED. R. CIV. P. 12(b)(6)

3 On a motion to dismiss, the allegations of the complaint must
4 be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322 (1972).
5 The court is bound to give the plaintiff the benefit of every
6 reasonable inference to be drawn from the "well-pleaded"
7 allegations of the complaint. See Retail Clerks Intern. Ass'n,
8 Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963).
9 Thus, the plaintiff need not necessarily plead a particular fact
10 if that fact is a reasonable inference from facts properly alleged.
11 See id.; see also Wheeldin v. Wheeler, 373 U.S. 647, 648 (1963)
12 (inferring fact from allegations of complaint).

13 In general, the complaint is construed favorably to the
14 pleader. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). So
15 construed, the court may not dismiss the complaint for failure to
16 state a claim unless it appears beyond doubt that the plaintiff can
17 prove no set of facts in support of the claim which would entitle
18 him or her to relief. See Hishon v. King & Spalding, 467 U.S. 69,
19 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).
20 In spite of the deference the court is bound to pay to the
21 plaintiff's allegations, however, it is not proper for the court
22 to assume that "the [plaintiff] can prove facts which [he or she]
23 has not alleged, or that the defendants have violated the . . .
24 laws in ways that have not been alleged." Associated General
25 Contractors of California, Inc. v. California State Council of
26 Carpenters, 459 U.S. 519, 526 (1983).

1 In deciding whether to dismiss the court may consider only the
2 facts alleged in the pleadings, documents attached as exhibits or
3 incorporated by reference in the pleadings, and matters of which
4 the judge may take judicial notice. See Mullis v. United States
5 Bankr. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987). The court has
6 discretion to consider extrinsic materials offered in conjunction
7 with a 12(b)(6) motion, however, in considering such materials the
8 court must treat the motion as one for summary judgment. See
9 Rosales v. United States, 824 F.2d 799, 802 (1987).

10 **II.**

11 **DEFENDANTS' MOTION TO DISMISS**

12 As an initial matter, the court may take judicial notice of
13 evidence that defendants Silvia Burley and Rashel Reznor are
14 recognized by the BIA as the sole members of the governing body of
15 the Sheep Ranch Rancheria of Me-Wuk Indians. See BIA July 12, 2000
16 Letter of Recognition, Burley Decl. Exh. C. The court may also
17 take judicial notice of evidence that there is no federally
18 recognized tribe known as the Sheep Ranch Rancheria of Miwok
19 Indians, which is alleged to be plaintiff here. See 65 Federal
20 Register 49 at 13301. Plaintiffs appear to argue that, given their
21 chosen spelling of their name, they are not a federally recognized
22 tribe and the court need not be concerned with issues of tribal
23 sovereignty that would otherwise defeat jurisdiction here. I
24 cannot agree.

25 Plaintiffs clearly allege in their complaint that they allowed
26 defendants Burley and Reznor to become members of their tribe, and

1 that defendants conspired to place Burley and Reznor in leadership
2 positions and to take the federal funds directed to plaintiffs'
3 tribe. Moreover, if plaintiffs did not belong to a tribe that was
4 federally recognized, they would have no claim to the federal funds
5 that defendants allegedly fraudulently obtained. Thus, it appears
6 that this is a dispute regarding the proper leadership, membership,
7 and use of funds in an Indian tribe.

8 "Indian tribes retain elements of sovereign status, including
9 the power to protect tribal self government and to control internal
10 relations." Smith v. Babbitt, 100 F.3d 556, 558 (8th Cir. 1996)
11 (citing Montana v. United States, 450 U.S. 544, 564 (1981)).
12 Although Indian tribes have been divested of some sovereignty,
13 divestiture has occurred only in areas "involving the relations
14 between an Indian tribe and nonmembers of the tribe"
15 Montana, 450 U.S. at 564. That is not to say that the court has
16 jurisdiction here simply because plaintiffs allege that defendants
17 belong to a different tribe. Rather, "Indian tribes retain their
18 inherent power to determine tribal membership, to regulate domestic
19 relations among members, and to prescribe rules of inheritance for
20 members." Montana, 450 U.S. at 564. Nor can plaintiffs avoid the
21 issue of tribal sovereignty simply by couching their fraud
22 allegations in RICO terms. See Smith v. Babbitt, 100 F.3d 556, 558
23 (8th Cir. 1997) (RICO allegations were attempt to move dispute,
24 over which court would not otherwise have jurisdiction because of
25 tribal sovereignty, to federal court).

26 ////

1 On a final note, plaintiffs have already taken their complaint
2 regarding defendants' alleged fraud to the Bureau of Indian
3 Affairs, which directed plaintiffs to first exhaust their tribal
4 remedies. See BIA letter of February 4, 2000, Burley Decl. Exh.
5 D. Plaintiffs had the option of obtaining review of this agency
6 decision. See 25 C.F.R. § 2.8. However, by coming to court
7 instead, plaintiffs essentially seek judicial review of the
8 agency's action or inaction. BIA decisions are not "final so as
9 to constitute agency action subject to judicial review under
10 5 U.S.C. § 704, unless made effective pending decision on appeal
11 by order of the Board." 43 C.F.R. § 4.314.

12 Thus, by virtue of tribal sovereignty and the fact that
13 plaintiffs did not exhaust their administrative remedies, it
14 appears that this court lacks jurisdiction over plaintiffs'
15 claims.¹

16 Accordingly, the court hereby ORDERS as follows:

17 1. Defendants' motion to dismiss is GRANTED;

18 2. Plaintiffs' claims are dismissed with leave to file an
19 amended complaint not later than thirty (30) days from the date of
20 this order; and

21 ////


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24 ¹ The court is in receipt of the Declaration of James Askew
25 filed by plaintiffs on Friday, January 11, 2002. However, this
26 declaration and the attached documents do not demonstrate that
there is no tribal sovereignty nor that plaintiffs have exhausted
their administrative remedies with the BIA.

3. The Status Conference, currently set for January 28, 2002 is CONTINUED to March 25, 2002 at 4:00 p.m.

IT IS SO ORDERED.

DATED: January 23, 2002.


LAWRENCE R. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
January 24, 2002

* * CERTIFICATE OF SERVICE * *

2:01-cv-01389

Sheep Ranch Miwok

v.

Burley

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on January 24, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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SJ/LKK

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Jack L. Wagner, Clerk

BY: 

Deputy Clerk