

IN THE NOOKSACK TRIBAL COURT

SONIA LOMELI, et al.,

Plaintiffs,

v.

ROBERT KELLY, et al.,

Defendants.

NO. 2013-CI-CL-001

REPLY ON PLAINTIFFS’ MOTION
FOR ORDER TO SHOW CAUSE RE:
CONTEMPT

I. INTRODUCTION

Plaintiffs respectfully reiterate their request that this Court direct Defendants to appear personally and show cause why an order should not be entered holding them in contempt for failure to comply with an Order of this Court.¹

¹ In the alternative, Plaintiffs request that the Court issue an order holding Defendants in contempt and restoring the *status quo* for any Nooksack who has been summarily disenrolled. The procedural posture of this proceeding is unusual. Plaintiffs have unquestionably met the requirements for the court to issue a show cause order, yet it is unclear as to whether a show cause order has issued.

Civil contempt proceedings are initiated when, as in this case, a plaintiff files a motion for an order to show cause why the defendant should not be held in civil contempt. In this motion, the plaintiff cites the provision(s) of the [order] he wishes to be enforced, alleges that the defendant has not complied with such provision(s), and asks the court, on the basis of his representation, to order the defendant to show cause why he should not be adjudged in contempt and sanctioned. . . . If the plaintiff meets this initial requirement and the court issues a show-cause order, the defendant must then respond to the order in the form of an answer, followed by a show-cause hearing set by the court. . . . If the plaintiff meets this burden and thus makes out a *prima facie* case, the burden of production then shifts to the defendant to demonstrate why she should not be held in contempt.

1 Defendants have once again acted “with haste” by “fast-tracking the disenrollment
2 process at every turn” – this time by summarily disenrolling at least four persons in clear
3 violation of the Parties’ March 20, 2013 Stipulation and this Court’s March 28, 2013 Order From
4 Scheduling Hearing. *Lomeli v. Kelly*, Order Extending Stay at 8 n.7 (Nooksack Ct. App. Aug.
5 27, 2013). Defendants must be forced to respect the authority of this Court and honor the
6 Nooksack rule of law.

7 **II. LAW AND ANALYSIS**

8 **A. This Court Has Inherent Power And Authority To Hold Defendants In Contempt.**

9 Defendants argue that upon the Court of Appeals’ acceptance of appeal, this Court lost all
10 jurisdiction to enforce its orders. Opposition to Motion for Order to Show Cause Re: Contempt
11 (“Opp. Motion”) at 5. This is not the case. While it is true that when a litigant files a notice of
12 appeal a trial court loses most jurisdiction over the case, a trial court retains jurisdiction to
13 “enforce its orders or judgments through contempt proceedings following the filing of an
14 appeal.” *Avendano v. Smith*, No. 11-0556, 2011 WL 5223041, at *5 (D.N.M. Oct. 6, 2011); *see*
15 *also generally McKissick v. Yuen*, 618 F.3d 1177, 1196 (10th Cir. 2010); *City of Cookeville v.*
16 *Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 394 (6th Cir. 2007); *Chaganti &*
17 *Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006); *Blue Cross & Blue Shield Assn v.*
18 *Am. Express Co.*, 467 F.3d 634, 638 (7th Cir. 2006). Indeed, the Nooksack Court of Appeals has
19 specifically ruled as much in this matter:

20 *Wyatt ex rel. Rawlins v. Sawyer*, 80 F.Supp.2d 1275, 1277-78 (M.D. Ala. 1999) (quotation and citation omitted). If
21 the Court’s October 24th Order for Briefing and Setting a Hearing Date (“Scheduling Order”) was a show cause
22 order, the burden is now upon Defendants to demonstrate why they should not be held in contempt, “by
23 demonstrating either that [they have] in fact complied with the court’s order, that [they were] unable to comply, that
24 [they were] otherwise excused from compliance, or that sanctions would be inappropriate despite [the]
noncompliance.” *Id.* at 1278. If the Scheduling Order was not a show cause order, Plaintiffs must do nothing more
here than allege, without providing evidence, that Defendants have violated a Court Order – as Plaintiffs have
already done. *Id.* At any rate, Plaintiffs hereby reply to Defendants’ Opposition, but object to the unorthodox track
that this contempt action has now taken here. *See also* fn. 2, *infra* (indicia of the previous track in *Roberts*).

1 [T]he § 80.06.010 stay revives each order of the trial court that was in effect at
2 the time of the dismissal of the underlying suit. Here, that includes the trial
3 court's March 2[8], 2013 Order from Scheduling Hearing, which expressly
4 approved and incorporated by reference the March 20, 2013 stipulation between
5 the parties. **Thus, pending further ruling by this Court, the March 20, 2013
6 stipulation remains in full force and effect.**

7 *Lomeli*, Order Extending Stay, at 5 (emphasis added). Accordingly, it is the law of this case that
8 Paragraph 2 to the Stipulation and Order remains in full force and effect pending appeal. As
9 such, Defendants were at all times restrained from disenrolling any "person . . . prior to the
10 completion of the meetings before the Tribal Council, regardless of whether that individual has
11 requested a meeting with the Tribal Council." Galanda Decl., Ex. D (emphasis added).
12 Defendants have undeniably violated this provision of the Stipulation and Order.

13 Defendants argue, however, that this rule is preempted by the "jurisdictional transfer
14 principle," under which "a federal district court and a federal court of appeals should not attempt
15 to assert jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Discount Co.*,
16 459 U.S. 56, 58 (1982). But Defendants fail to note that "[t]he jurisdictional transfer principle is
17 not absolute, and therefore there are distinct situations in which the principle does not apply."
18 *Knutson v. AG Processing, Inc.*, 302 F.Supp.2d 1023, 1031 (N.D. Iowa 2004).

19 Most notably, this Court is **not** divested from its authority to supervise its orders through
20 civil contempt proceedings. *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536
21 F.2d 1268, 1276 (9th Cir. 1976); *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d
22 437, 439 (6th Cir.), *cert. denied*, 474 U.S. 948 (1985); *Farmhand, Inc. v. Anel Engineering*
23 *Industries, Inc.*, 693 F.2d 1140, 1146 (5th Cir. 1982); *Brown v. Braddick*, 595 F.2d 961, 965 (5th
24 Cir. 1979); Paul Ulrich, et al., *Jurisdiction of the District Court After Appeal is Filed*, 1 Fed.
25 Appellate Prac. Guide Ninth Cir. 2d § 5:38 (2013).

1 The law is clear. Where the trial court “is attempting to . . . enforce its order through
2 civil contempt proceedings, pendency of appeal **does not** deprive it of jurisdiction for these
3 purposes.” *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (emphasis
4 added). The March 28, 2013 Stipulation and Order remains in full force and effect pending
5 Plaintiffs’ appeal. Here, Defendants stand in clear breach of that Order.

6 **B. Plaintiffs Have Standing.**

7 Defendants make the bold statement that “Plaintiffs’ counsel knows [sic] the plaintiffs
8 lack standing to bring this claim.” Opp. Motion at 7. Defendants are wrong. In fact, Plaintiffs
9 heeded this Court’s specific advice to bring this exact Motion in this matter.²

10 In any event, a motion for order to show cause in an already instituted lawsuit is a
11 contested matter — **it is not a “claim” in a new matter**, as defendants style it. *In re Nelson*,
12 234 B.R. 528, 534 (M.D. Fla. 1999). Plaintiffs, as parties to litigation in which the Order was
13 issued and as signatories to the Stipulation, have standing to bring the contempt action, even
14 though other enrolled Nooksack members also stand to benefit from its enforcement. *Chambers*
15 *v. Ratcliff*, 309 S.W.3d 224, 226 (Ark. Ct. App. 2009). Plaintiffs are simply seeking to enforce
16 the benefits that they secured through that Stipulation and Order. A “stipulation of the parties is
17 to be regarded and construed as a contract,” and there is no one more harmed by a breach of
18 stipulation than those parties that have agreed to be bound by it and reap its benefits. *Omega*
19 *Engineering, Inc. v. Omega, S.A.*, 432 F.3d 437, 444 (2nd Cir. 2005).

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22 ² In *Roberts v. Kelly*, the Court “found that the Motion for Order To Show Cause Re: Contempt arises from the
23 *Lomeli* case and the Motion should be filed under the appropriate caption.” *id.*, Order Denying Motion for Order To
24 Show Cause Re: Contempt, at 2; *see also id.*, Order Granting Defendant’s [sic] Motion To Dismiss, at 14 (“filing a
motion [for contempt] regarding matters in *Lomeli* should be filed under the *Lomeli* caption.”); *id.*, Order Denying
Motion For Reconsideration, at 1 (advising that Plaintiffs “should proceed on th[e] issue” of contempt in *Lomeli*). If
Plaintiffs cannot now bring this motion here, as Defendants contend, where can they bring this motion for
enforcement of a Tribal Court Order? This Court’s Order must be enforceable somewhere.

1 Regardless of whether those four Nooksacks who have been summarily disenrolled are
2 Plaintiffs, the named Plaintiffs have undoubtedly (1) entered into a binding Stipulation with
3 Defendants that was incorporated into an Order of the Court, and (2) alleged that Defendants
4 breached that Stipulation and Order.³ Plaintiffs, as signatories to the Stipulation, have standing
5 to remedy Defendants' breach. *See System Fuels Inc. v. U.S.*, 66 Fed.Cl. 722, 727 (Fed. Cl.
6 2005) (holding that a signatory to a contract always has standing to allege a breach thereof);
7 *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002) (same).

8 **C. Defendants Are, In Fact, In Contempt of Court.**

9 The Stipulation and Order expressly and unequivocally mandate that Defendants shall not
10 disenroll **any person** prior to completion of the meetings before the Tribal Council:

11 **No person will be disenrolled prior to completion of the meetings before the**
12 **Tribal Council, regardless of whether that individual has requested a**
meeting with the Tribal Council.

13 Galanda Decl., Ex. D (emphasis added). The language could not be clearer. Yet on August 13,
14 2013, Defendants summarily disenrolled four Nooksacks prior to completion of disenrollment
15 meetings before the Tribal Council.

16 Defendants argue that the highlighted portion of the Stipulation and Order should be read
17 as follows: “no person will be disenrolled before completion of the timely requested hearings’
18 for persons properly submitting said request.” Opp. Motion at 3 (quoting Galanda Decl., Ex. B).
19 But Defendants’ addition of the phrase “for persons properly submitting said request” in briefing
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22 ³ Although an extraneous issue in relation to the motion at bar, Plaintiffs do maintain that those four Nooksacks who
23 have been summarily disenrolled are Plaintiffs in this matter. Plaintiffs have appealed, and the Nooksack Court of
24 Appeals has accepted review of, this Court’s Findings of Fact and Conclusions of Law in Answer to Court of
Appeals’ Order Extending Stay in that regard. *Lomeli v. Roberts*, September 30, 2013 Notice of Appeal; Opening
Brief at 65-66 (“The Stipulation is clear and unambiguous – there was no reason to look beyond the text of the
Stipulation. . . . The Trial Court’s looking beyond the clear text of the Stipulation was in error.”).

1 directly contradicts the terms of the Stipulation and Order. Defendants argue the Stipulation and
2 Order should be read as follows:

3 No person will be disenrolled prior to completion of the meetings before the
4 Tribal Council, regardless of whether that individual has requested a meeting with
the Tribal Council[, **for persons properly submitting said request**].

5 Galanda Decl., Ex. D (alteration by Defendants in Opp. Motion at 3). This makes no sense.
6 Defendants no doubt now desire the Stipulation and Order to allow them to disenroll members of
7 the Nooksack 306 at will. But that is not what they agreed to.⁴ Plaintiffs relied on this
8 agreement in ordering their affairs and prosecuting their challenges to Defendants' behavior.
9 Defendants clearly agreed to, and in turn this Court ordered them to, refrain from disenrolling
10 **anybody** "prior to completion of the meetings before the Tribal Council."⁵ It is undisputed that
11 these meetings have not commenced. Defendants attempt to add language into the Stipulation
12 and Order that simply does not exist must be rejected.⁶

14 ⁴ In determining the meaning of the stipulation's provisions, the court "looks to the four corners of the stipulation
15 applying established rules of contract construction to the face of the document" and interprets the stipulation "using
plain and prevailing meanings for its terms, giving effect to all of its terms, and looking for reasonable rather [than]
unreasonable readings." *Brinkman v. Dept. of Corrections of the State of Kansas*, No. 91-4208, 1992 WL 371658 at
16 *1 (D.Kan. Nov. 4, 1992) (citing *Washington Hosp. v. White*, 889 F.2d 1294, 1300 (3rd Cir. 1989)).

⁵ Defendants also urge the Court to read the Stipulation and Order as follows:

17 No person [**"identified by the Galanda Broadman letter of April 13, 2013"**] will be disenrolled
prior to completion of the meetings before the Tribal Council, regardless of whether that
18 individual has requested a meeting with the Tribal Council.

19 Galanda Contempt Decl., Ex. D (alteration by Defendants in Opp. Motion at 12). But, again, this is not what the
Stipulation and Order says. If Defendants desired this language to be included in the Stipulation and Order, they
20 should have included it. Plaintiffs would not have, and did not, agree to this language. "No person" means no
person, not merely those 275 Nooksacks listed on a representation list(s). See Galanda Contempt Decl., Ex. B;
21 Audio Recording of Hearing (Mar. 18, 2013) (Mr. Schlosser: "whether a person has requested a hearing or not, they
are not going to be removed from the rolls until the hearings have been held."). Defendants carefully fail to indicate
22 whether any of the 31 Nooksacks who have not engaged Galanda Broadman to represent them "in this matter and in
the related proceedings regarding disenrollment," have been automatically disenrolled. See Opp. Motion at 13.
Defendants also confess that at least Cody Narte requested reconsideration of his summary disenrollment, but fail to
23 append his request to the Declaration of Charity Bernard or otherwise advise the Court as to the status of his request.
Id. at 5; Declaration of Anthony S. Broadman in Support of Motion for Order to Show Cause Re: Contempt, Exhibit
A (Cody Narte Reconsideration Request).

24 ⁶ Plaintiffs are puzzled as to what portions of the factual record it is that Defendants are alleging were falsified.
Opp. Motion at 12-13. Nowhere in Plaintiffs' motion do they allege that there was any extension of an agreed
deadline, and Defendants do not cite to any portion of Plaintiffs' motion or "the factual record" to back up their bold

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DATED this 4th day of November, 2013.

Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
Attorneys for Plaintiffs

⁷ It bears repeating: alternatively, Plaintiffs request that the Court issue an order holding Defendants in contempt and restoring the *status quo* for any Nooksack who has been automatically disenrolled prior to the completion of the yet-scheduled meetings.

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I, Gabriel S. Galanda, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am employed with Galanda Broadman, PLLC, counsel of record for Plaintiffs.

2. Today, I caused the attached documents to be delivered to the following:

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A copy was emailed to:

Thomas Schlosser
Morisset, Schlosser, Jozwiak & Somerville
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

The foregoing statement is made under penalty of perjury under the laws of the Nooksack Tribe and the State of Washington and is true and correct.

DATED this 4th day of November, 2013.

At Hand

GABRIEL S. GALANDA