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IN THE NOOKSACK TRIBAL COURT

FRANCINE ADAMS; et al., individually and on behalf of their minor children, enrolled members of the Nooksack Indian Tribe, Plaintiffs, v. ROBERT KELLY, et al., in their personal and official capacities, Defendants.	NO. 2014-CI-CL-006 REPLY RE: MOTION FOR PRELIMINARY INJUNCTION – WRIT OF MANDAMUS

Plaintiffs respectfully reiterate their request that the Court enjoin Defendants from acting in furtherance Resolution Nos. 14-03 and 14-04, until a final hearing can be held and disposition of the rights of the parties can be finally determined.

I. STANDARD

The standard for determining the "threshold" showing of unconstitutionality required by the Court of Appeals' decision in *Lomeli v. Kelly*[1] is currently on appeal, and the parties are presently briefing issue.[2] Pursuant to this Court's Order Denying Motion for Order to Show Cause in *Lomeli*, the Court is prohibited from construing orders that would "confuse the issues now on appeal with the Nooksack Court of Appeals" or "potentially lead to further complications regarding the appeal."[3] Thus, when the Court is forced to rule on these issues, it "appl[ies] the

[1] No. 2013-CI-APL-002, at 14 (Nooksack Ct. App. Jan. 15, 2014).
[2] *Roberts v. Kelly*, No. 2013-CI-APL-003 (Jan. 22, 2014).
[3] *Lomeli v. Kelly*, No. 2013-CI-CL-001, at 2 (Nov. 13, 2013).

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sets of rules it has previously used in similar suits."[4] Although it is not yet clear what standard the Court was applying in the *St. Germain* matter—an action that was identical, procedurally, to the action at bar[5]—it is clear that the Court was not applying Fed. R. Civ. Proc. 9(b); a rule that explicitly "applies only to averments of fraud."[6] Defendants, however—after unsuccessfully urging the Court of Appeals to adopt the Federal Tort Claims Act standard in *Lomeli*[7]—now request that this Court apply Rule 9(b).[8] No court, anywhere, ever, has applied Rule 9(b) to injunctive actions against government officers, employees, or agents. Defendants' proposal to do so here, while the very issue is pending before the Court of Appeals, should be rejected.

II. ARGUMENT

The constitutional language at issue reads as follows, in relevant part:

> If any officer or member of the tribal council shall be absent from any three (3) consecutive regular or special meetings **without sufficient reason**, the other members may declare the council position vacant by a four-seventh (4/7) vote of the tribal council.[9]

According to Defendants, the removal of Secretary St. Germain and Councilwoman Roberts ("Plaintiffs") was proper under this provision because they did not "attend" three consecutive meetings and did not "provide[] sufficient reasons for their absences."[10] This argument fails for at least two reasons, which are detailed in depth below.

Some perspective is in order: On three occasions over the Martin Luther King, Jr., three-day weekend, Defendant Kelly called the first in-person Special Meetings of the Tribal Council in

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[4] *St. Germain v. Kelly*, No. 2013-CI-CL-005, at 4 (Nooksack Tribal Ct. Dec. 18, 2013).
[5] *See generally id.*
[6] Charles A. Wright, *et al.*, *Pleading Fraud With Particularity*, 5A Fed. Prac. & Proc. Civ. § 1297 (3d ed. 2013).
[7] Response Brief of Appellees, *Lomeli v. Kelly*, No. 2013-CI-CL-001, at 16 n.12 (Nooksack Ct. App. Nov. 1, 2013) (citing 28 U.S.C. §§ 1346, *et seq.*). The Federal Tort Claims Act essentially converts a Rule 12(b)(1) motion into a motion for summary judgment, whereunder dismissal should be granted only "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Evert v. U.S.*, 900 F.Supp.2d 1280, 1282 (D. Wyo. 2012) (quotation omitted). This standard is consistent with the Court of Appeals' ruling that the parties must be "given the opportunity to make a record" prior to dismissal. *Lomeli*, No. 2013-CI-APL-002, at 14.
[8] Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction ("Response"), at 5.
[9] Const., art. V, §1 (emphasis added).
[10] Response, at 6.

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months.[11] On each occasion, Defendant Kelly called the meeting, on an emergency basis, for the next day, 24 hours and five minutes before each meeting was to be scheduled; but on each occasion he neither provided any reason nor provided any agenda for the meeting the next day.[12]

The meetings were called for Friday the 17th, at 3:15 PM, Saturday the 18th, at 3:15 PM, and Monday the 20th (MLK Day), at 10:40 AM.[13] One might expect that for in-person Special Meetings to be called in such an urgent way—from a late Friday afternoon to a Monday holiday morning—the Tribal Council would need to tend to some emergency tribal business. Instead, the Special Meetings were called over the course of the three-day weekend to address a "youth basketball tournament," "budgets for the canoe journey" during the *summer of 2014*, and "the need for additional tribal cemetery space."[14] Defendants do not even explain why the third Special Meeting was called for MLK Day.[15]

The truth of the matter is that the meetings were called so that Plaintiffs would "come and get served [their] disenrollment," after the Court of Appeals temporarily lifted a stay of disenrollment on January 15, 2014.[16] And it was not enough that both Secretary St. Germain and Councilwoman Roberts communicated to Defendant Kelly directly or through the Tribal Police that they would each be back to Deming or otherwise make themselves available for service by the Nooksack Tribal Police very soon, if not by Tuesday, January 21st.[17] Defendants could not even wait one more day to recommence disenrollment against Plaintiffs. Their pretext for the

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[11] Declaration of Chairman Robert Kelly, Jr. ("Kelly Decl."), Exs. A-J.
[12] *Id.*
[13] *Id.*
[14] *Id.*, at ¶¶5.f,; 6.f.
[15] *Id.*, at ¶8.
[16] Declaration of Nooksack Tribal Councilwoman Michelle Roberts ("Roberts Decl."), at ¶ 10; Ex. A.
[17] *See id.*, at ¶ 4 ("I called Rory after the first time they stopped by and told him I would let him know when I was back in town to arrange for them to come over"); Declaration of Tribal Council Secretary Rudy St. Germain ("St. Germain Decl."), at ¶9 ("If I was to be served with disenrollment papers by the Tribal Police, or if I needed to attend a Council meeting in person, though, it needed to wait until Tuesday, when the holiday weekend was over and I knew my son was safe and stable.").

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three-day weekend Special Meetings should be seen as just that: pretext.[18] Regardless, Defendant Councilmembers' attempted removal of Plaintiffs plainly violates the Constitution.

First, Plaintiffs were not "absent from . . . three (3) consecutive regular or special meetings."[19] Plaintiffs attended the meetings telephonically, as is Tribal Council procedure, but they were ignored.[20] Defendants admit: "During the past year, Council identified public safety concerns that made teleconferencing, rather than in-person meetings, necessary."[21] Nothing has changed to alleviate these supposed "safety concerns." In fact, just the opposite has occurred.

On Friday, January 17, Councilwoman Roberts' family was harassed "at all hours of the day and night," at Defendant Kelly's directive.[22] Unsurprisingly, Councilwoman Roberts felt rather uncomfortable show up to Defendant Kelly's office and therefore could not attend personally.[23] Generally, if a Councilmember is out of the office, he or she attends the meeting telephonically.[24] This has been the practice and procedure of the Tribal Council for at least the past two years.[25] Telephonic attendance has *never* been reason to deem a Councilmember "absent" in the past.[26] As has been the subject of related litigation before this Court, Defendant Kelly himself has recently convened and attended several special meetings over the phone.[27]

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[18] Defendants' attempted removal of Plaintiffs, and appointment of two allies (including Defendant Roy Bailey), was also designed to render moot the forthcoming Nooksack Tribal Council election—i.e., "to maintain a four-person voting majority on the Tribal Council no matter what happens during the election." St. Germain Decl., at ¶12.

[19] Const., art. V, §1.

[20] Kelly Decl., Ex. F; *id.*, Ex. G (Plaintiff ignored to the point that she assumed that the meetings had been canceled); Roberts Decl., at ¶ 5 ("I did not see any replies to Bob Kelly from any other Councilperson. I took that to mean that we could not get quorum for the Special Meeting that day. Still, I tried calling the Chairman's office that Friday afternoon at 3:40 PM. There was no answer.").

[21] Kelly Decl., at ¶4.c.

[22] *Id.*, Ex. F.

[23] *Id.* Councilwoman Roberts had right to be suspicious, considering that, the day after being harassed, the first in-person meeting in *over a year* was called, on a three-day weekend, in order to discuss the trivial matter of a "basketball tournament." *Id.* at ¶5.f.

[24] Roberts Decl., at ¶9; St. Germain Decl., at ¶10.

[25] St. Germain Decl., at ¶10.

[26] *Id.*

[27] *Id.*; Roberts Decl., at ¶9; *see e.g.* Declaration of Chairman Robert Kelly, Jr. In Support of Motion to Dismiss, *Roberts*, No. 2013-CI-CL-003, at 2 (Sept. 4, 2013). (describing telephonic attendance protocols and logistics for those

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Here, Plaintiffs attempted to likewise attend the special meetings telephonically, but they were ignored. Telephonic attendance does *not* constitute an "absence" under Article V, Section 1 of the Constitution or Tribal Council procedures.

Second, even if telephonic appearance did constitute an "absence"—clearly, it does not, according to Defendants' own actions—Plaintiffs had "sufficient reason" for the in-person absence.[28] While Defendants argue that "this Court lacks jurisdiction to determine whether Plaintiffs' reasons for failing to attend three consecutive special meetings were sufficient," they ignore the constitutional requirement that a Councilmember subject to removal be given, at minimum, an opportunity to present their reason for absence. Without this meaningful opportunity to present evidence, the "sufficient reason" clause is meaningless surplusage.[29] As the Court of Appeals has recently held, the Constitution should not be read in a manner that renders the Judiciary's power "to determine the constitutionality of acts and omissions of the Tribal Council and its members . . . meaningless."[30]

Here, Plaintiffs had a "sufficient reason" to appear telephonically, but were not given an opportunity to present it. Resolution Nos. 14-03 and 14-04 were approved on January 20, 2014, *at the very same meeting that Plaintiffs were not allowed to attend*.[31] This was the third meeting that Plaintiffs were purportedly "absent" from.[32] Councilwoman Roberts could not attend the meetings in person because she was out of town, as she told Defendant Kelly, and because she felt uncomfortable returning for the meeting, having had her family harassed at "all hours of the day

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special meetings he sees fit to call); Declaration of Charity Bernard In Support of Motion to Dismiss, id., at 2 (Aug. 29, 2013) (discussing an August 27, 2013 special meeting "held via conference call").

[28] Const., art. V, §1.

[29] *U.S. v. Gurrola-Garcia*, 547 F.2d 1075, 1077 (9th Cir. 1976) (courts should "interpret [a] statute so that all its parts have meaning and operative effect" and to avoid "meaningless surplusage"); see also ("[T]he Tribal Council's general powers to . . . adopt resolutions are subject the constraints of the Constitution . . . .")

[30] *Roberts*, No. 2013-CI-APL-003, at 2.

[31] Kelly Decl., Exs. K-L.

[32] *Id.*

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and night" at Defendant Kelly's behest.[33] Secretary St. Germain could not attend the meetings in person because of, as he made clear to Defendant Kelly, a family emergency—his son went missing on January 12, 2014, and was not located until the afternoon of Saturday, January 18, 2014.[34] Not to mention, it was a three-day weekend. But Plaintiffs were not given an opportunity to present this evidence to their colleagues. In fact, because they were purportedly "absent" from the January 20, 2014, meeting, it was impossible for Plaintiffs to present this evidence.

Because Resolution Nos. 14-03 and 14-04 were adopted without affording Plaintiffs *any* opportunity to present the "sufficient reason" for their purported "absence," Resolution Nos. 14-03 and 14-04 violate Article V, Section 1 of the Constitution.

Defendants' failure to allow Plaintiffs to present their "sufficient reason" for telephonic attendance also violates Article IX of the Constitution. While Defendants are correct that "Due Process protections attach only to entitlements," it does not follow that Plaintiffs "have no property interests in their positions."[35] Indeed, the authority cited by Defendants stands for the exact opposite proposition. In *E. St. Louis Fed'n of Teachers, Local 1220 v. E. St. Louis Sch. Dist. No. 189*, it was held that "an elected official may have a property right in his office if such an interest is given to him."[36] In determining whether such an interest is given to an elected official, the court must determine whether there exists "a formal understanding that supports a . . . claim of entitlement to continued [office] unless sufficient 'cause' is shown."[37] Such a formal

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[33] Kelly Decl., Ex. F; *see also* Roberts Decl., at ¶6, Ex. A ("Tribal police have been instructed to go to my house all hours if the day and night . . . As late as 10p. I have asked Bob K to stop harassing my family as I would let them Know when I was back in town, but he continues to have them around.").

[34] *See generally* St. Germain Decl.

[35] Response, at 7-8.

[36] 687 N.E.2d 1050, 1060 (Ill. 1997).

[37] *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *see also E. St. Louis Fed'n of Teachers*, 687 N.E.2d at 1061 ("Statutes providing that an elected officer shall serve for a certain number of years and shall be removed only upon certain events . . . [grant] a property right in his office and [that requires] procedural due process protections.").

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understanding exists where, as here,[38] law provides that the elected official remain "in the office for the given length of time."[39]

Here, while Article V, Section 1, of the Constitution provides the standards of what "sufficient 'cause'" must be shown,[40] it does not divest an elected official of his or her due process right to "notice of the . . . pending decision to remove them from office" and an "opportunity to be heard at a meaningful time and in a meaningful manner"[41]—which requires "a full and meaningful opportunity to present evidence."[42] In fact, it compels it.

Plaintiffs were not (and still have not been)[43] given notice of the pending decision to remove them from office. Nor were they given a full and meaningful opportunity to present evidence. Resolution Nos. 14-03 and 14-04 thus violate Article IX of the Constitution.

III. CONCLUSION

Plaintiffs were elected to their respective Nooksack offices by majority vote of the Nooksack People. They deserve to maintain their seats, despite having been ostracized from the Tribal Council in countless ways by Defendants since February 12, 2013, and now "removed." Plaintiffs respectfully reiterate their request that the Court enjoin Defendants from acting in furtherance Resolution Nos. 14-03 and 14-04, until a final hearing can be held and disposition of the rights of the parties can be finally determined.

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[38] Const., art. V, § 4 ("[A]ll members of council shall run for four-year terms.").
[39] *E. St. Louis Fed'n of Teachers*, 687 N.E.2d at 1060 (citing *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979); *Collins v. Morris*, 438 S.E.2d 896, 897 (1994); and *Foley v. Kennedy*, 885 P.2d 583, 589 (1994)).
[40] *Perry*, 408 U.S. at 601.
[41] *E. St. Louis Fed'n of Teachers*, 687 N.E.2d at 1062.
[42] *In re Hansen*, 24 Wash.App. 27, 36, 599 P.2d 1304 (1979).
[43] St. Germain Decl., at ¶11.

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DATED this 30th day of January, 2014.

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DECLARATION OF SERVICE

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 30th day of January, 2014.

GABRIEL S. GALANDA

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