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2
3 IN THE NOOKSACK TRIBAL COURT
4 NOOKSACK INDIAN TRIBE
5 DEMING, WASHINGTON

6 MICHELLE JOAN ROBERTS, et al.,

7 Plaintiffs and Counterclaim
8 Defendants,

9 v.

10 ROBERT KELLY, Chairman of the Nooksack
11 Tribal Council, et al.,

12 Defendants and
13 Counterclaimants.

NO. 2014 -CI-CL-007

REPLY TO RESPONSE TO MOTION
FOR JUDICIAL NOTICE FILED BY
PRO SE PLAINTIFF MICHELLE JOAN
ROBERTS¹

14 I. INTRODUCTION

15 Plaintiff Michelle Roberts filed her Motion for Judicial Notice ("Motion") because that
16 appears to be the only way for her to obtain a copy of Resolution #16-28 that disbars her
17 chosen counsel of record in this case and the other Resolutions that prohibit Galanda Broadman
18 from representing them. According to this Court's "Case Management Order Re Motion for
19 Judicial Notice" ("Order"), Resolution #16-28 leaves Ms. Roberts and the other plaintiffs
20 without representation and forces them to proceed on a *pro se* basis.² This resolution produces
21 dire consequences for the Plaintiffs because it denies them of the right to legal representation of
22 their choice, in violation of the due process and equal protection clauses of the Indian Civil
Rights Act ("ICRA"), 25 U.S.C. §1302(a)(8) and NTC §10.02.010.³

23
24 ¹ This reply was prepared by the undersigned counsel who have moved for admission to appear before this Court
and represent Ms. Roberts. They appear solely for the purpose of assisting Ms. Roberts in this unique situation
25 with her reply. She is in dire circumstances due to the alleged disbarment of her counsel of choice due to
Resolution #16-28. The undersigned cannot and will not substitute for Galanda Broadman.

26 ² The Order only allows Ms. Roberts to represent herself *pro se*.

³ These refer to resolutions regarding the need for Galanda Broadman to obtain a business license under an
amended Title 60.

II. ARGUMENT

This Court must have a copy of Resolution #16-28 or it could not have written the Order. Yet the Tribal Council, the Tribe and Defendants' counsel refuse to provide this Resolution to the parties most impacted by it. The two Declarations from Ms. Roberts establish that she has tried to get the Resolutions and amended ordinances that impact her chosen counsel's ability to continue to represent her. The Tribe refuses to do so even though its Tribal Records Policy⁴ states, "It is the official policy of the Nooksack Indian Tribe that all Nooksack tribal members shall have access to the following tribal records: resolutions and ordinances." The Defendants' Response to Motion for Judicial Notice ("Response") relies on the technical argument that Ms. Roberts has not asked for the resolutions in writing, which is ridiculous because the Motion asks the Court to make "those laws available to Plaintiffs."

It is disingenuous for the Defendants to argue that the Motion should be denied because "she has not proffered any document from which the Court may take judicial notice" when Ms. Roberts cannot get the requested documents.⁵ The Response itself is evidence that Ms. Roberts cannot get the requested resolutions and ordinances without the help of this Court⁶. However, as the Order cogently notes, what is really at issue is the legality of Resolution #16-28, adopted without affording any due process to Ms. Roberts or Mr. Broadman or Mr. Galanda. The Order (p. 5) directed the Defendants to "submit an affidavit describing the due process afforded" Mr. Broadman and Mr. Galanda ... "in connection with enactment by the Tribal Council of Resolution #16-28." The defendants did not do so. The Gearhart Declaration provides no evidence regarding notice to Galdna Broadman about Resolution #16-28 but provides numerous irrelevant exhibits relating to "ethical concerns" about Mr. Galanda. The real issue raised by the Motion is the legality of Resolution #16-28. This Resolution is procedurally and

⁴ Third Declaration of Charity Bernard, Exhibit A

⁵ Further, the Response is wrong in arguing that the requested resolutions and ordinances cannot be judicially noticed. They can be. *See Newcomb v. Brennan*, 558 F.2d 825, 827 (7th Cir. 1977).

⁶ *See* Third Declaration of Raymond Dodge which proves the Nooksack Tribal Council will not release what Ms. Roberts requests to her.

1 substantively unlawful and cannot be used to deprive Ms. Roberts of her right to be represented
2 by the counsel of her choice.

3 1. Resolution #16-28 Deprives Ms. Roberts and the Plaintiffs to Legal
4 Representation of Their Choice.

5 Ms. Roberts and the other Plaintiffs chose Galanda Broadman to represent them in this
6 litigation. They have done so for several years and have deep, irreplaceable knowledge of the
7 facts about this case. The Tribal Council, fiercely adverse to the Plaintiffs, clearly developed a
8 targeted two-step scheme to gain a strategic litigation advantage to remove lawyers who have
9 represented the Plaintiffs for many years. First, they amended Title 10 to add language to NTC
10 §10.02.070 that allows the Tribal Council to disbar an advocate for “behavior and/or practices
11 [that] reflect so poorly upon the proper administration of justice.” Resolution #16-27 (February
12 27, 2016). Then, the next day, the Tribal Council exercised its alleged authority under
13 Resolution #16-27 to disbar Galanda Broadman [although Ms. Roberts has not seen Resolution
14 #16-28 which is the act of disbarment according to the Order].

15 These Resolutions directly violate Ms. Roberts’ due process rights. According to the
16 Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), the “fundamental requisite of
17 due process of law is the opportunity to be heard.” This right to be heard, “would be, in many
18 cases, of little avail if it did not comprehend the right to be heard by counsel.” The Court in
19 *Goldberg* held that an individual “must be allowed to retain an attorney if he so desires.”
20 (emphasis supplied). In short, when a litigant chooses an attorney to be her voice, that due
21 process right cannot be taken away by arbitrary government action.

22 This right is mirrored in NTC §10.02.010: “Right to be represented by an Advocate.
23 Any person appearing as a party in any civil or criminal action shall have the right to be
24 represented by an advocate of his/her own choice and at his/her own expense.” (Emphasis
25 supplied.)
26

1 Courts view seriously attempts by litigants to deprive opposing parties of their chosen
2 counsel because of the serious prejudice that would occur to them. This prejudice involves
3 more expense to retain new counsel and to bring them up to speed. For instance, motions to
4 disqualify opposing counsel are viewed "with extreme caution for they can be used as a
5 technique of harassment" to deprive an opponent of counsel of its choice. *U.S. for Use and*
6 *Benefit of Lord Elec. Co., Inc. v. Titan*, 637 F. Supp. 1556, 1562 (W.D.W.A. 1986) (citing
7 *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982). In *Titan*, the
8 Court the court refused to disqualify a law firm, noting:

9 Where a litigant uses a motion to disqualify as a tool to deprive
10 its opponent of counsel of its choice, especially after substantial
11 preparation of the case for trial has occurred, the court may
12 properly find that the balance of the parties' interests tips sharply
13 in favor of the nonmoving party. *Cf. Central Milk Producers*
14 *Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th
15 Cir. 1978) (court denies motion to disqualify where unreasonable
16 delay in filing motion indicates purpose is to deprive party of
counsel of choice). If the Court were to grant defendants'
motion, it would impose upon plaintiff substantial prejudice and
additional legal expenses. The most pernicious effect would be
to reward a continuing pattern aimed at frustrating adjudication
of the case in district court. The district courts possess inherent
power to protect the integrity of their processes.

17 In sum, courts do not allow an attorney to be removed from a case without substantial good
18 cause, which does not exist here.

19 So, too, courts are reluctant to even let attorneys withdraw from a case if to do so would
20 prejudice a party, such as leaving the party in a *pro se* situation. Local Rule 83.2 for the
21 Western District of Washington will not let an attorney withdraw "except by leave of court."
22 In evaluating motions to withdraw, courts consider factors such as (1) the reasons why
23 withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm
24 withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal
25 will delay the resolution of the case. *Curtis v. Illumination Arts, Inc.*, 2014 WL 556010
26 (W.D.W.A 2014) at *4. In addition, Rule 10(b) of the Nooksack Advocates Code of Conduct

1 will not allow withdrawing if it adversely affects the client's interests. As this Court
2 recognized in this case, "the right to representation is crucial." *Roberts, et al. v. Kelly, et al.*,
3 No. 20134-CI-CL-003, Nooksack Court of Appeals, March 18, 2014, at p.8.

4 Most important, however, is the impact on the plaintiffs' due process right to be heard
5 through chosen counsel.

6 The Court has full jurisdiction to set aside Resolution #16-28 which is the equivalent of
7 a Defendants' Motion to Disqualify or Motion to Withdraw except that the Defendants – Tribal
8 Council members – chose to do an end-run around the Court to *sua sponte* get rid of a law firm
9 benefiting the Plaintiffs. The Plaintiffs remain Tribal members and are entitled to have their
10 individual rights, guaranteed by ICRA and the Nooksack Constitution, protected by this Court.
11 "There can be no doubt that the Nooksack Constitution grants Nooksack Tribal Members a
12 constitutional right to challenge the constitutionality of Tribal laws and policies." *Lomeli v.*
13 *Kelly*, No. 2013-CI-APL-002 (2014) at p.12. *Lomeli* clarifies that the court has jurisdiction to
14 determine the constitutionality of Resolution #16-28.

15 The power of the Tribal Council to enact resolutions and ordinances is limited by the
16 Nooksack Constitution and any federal laws that may be applicable. Const. Art. VI §1. This
17 includes Article IX of the Nooksack Constitution that guarantees the plaintiffs "equal rights
18 pursuant to Tribal law" and ICRA.

19 Resolution #16-28 deprives Ms. Roberts of a constitutional right with an enormously
20 prejudicial import. Because it is clearly targeted at her and the other plaintiffs, it also violates
21 their equal protection rights.

22 This Court should protect the plaintiffs' rights and restore to them the counsel of their
23 choice.

24 2. Resolution #16-28 Should Not Even be Applied in this Case.

25 It is hard to provide additional straightforward legal reasons as to why Resolution #16-
26 28 is illegal without actually seeing it. Nonetheless, from its characterization in the Order,

1 Resolution #16-28 appears illegal as an *ex post facto* law because it punishes conduct that
2 occurred before the effective date of the revised ordinance, which is February 24, 2016.

3 The language added to NTC §10.02.070 does not state that it applies retroactively.
4 Courts are to presume that a statute operates prospectively unless (1) the legislature explicitly
5 provides that it applies retroactively; (2) the amendment is curative, or (3) the statute is
6 remedial. *Aecon v. Zurich North America*, 2008 WL 895978 (W.D.W.A. 2008) at *2. None of
7 those factors exist here. This is not a remedial or curative statute which cannot be applied if it
8 would affect a substantive or vested right. *Id.*

9 Therefore, the statute would only apply to future actions of Mr. Galanda and Mr.
10 Broadman – after February 24, 2016. It is clear from the Gearhart Declaration that the Tribal
11 Council based Resolution #16-28 on actions occurring before the Ordinance’s effective date.

12 In addition, read in conjunction, Resolutions #16-27 and -28 create an *ex post facto* law
13 prohibited by IRCA 25 U.S. C. §1302(a)(9). As the Order p.4 notes, disbarment is a
14 “punishment or penalty imposed on the lawyer.” Resolution #16-28 applies the new language
15 of NTC §10.02.070 as an *ex post facto* penal law.

16 [T]wo critical elements must be present for a criminal or penal
17 law to be *ex post facto*: it must be retrospective, that is, it must
18 apply to events occurring before its enactment, and it must
19 disadvantage the offender affected by it. Critical to relief
20 under the *Ex Post Facto* Clause is not an individual’s right to less
21 punishment, but the lack of fair notice and governmental restraint
22 when the legislature increases punishment beyond what was
23 prescribed when the crime was consummated.

24 *Weaver v. Graham*, 450 U.S. 24, 27 (1981).

25 Here, the Tribal Council provided **no notice** before it adopted the new language that led
26 to Resolution #16-28 and it clearly is directed at conduct occurring well before the passage of
the amendment. As such, Resolution #16-28 is an illegal *ex post facto* law.


1 Finally, Ms. Roberts will leave to Galanda Broadman the arguments as to why they
2 should be disbarred. However, it is clear Galanda. Broadman was afforded no notice as
3 demonstrated by the non-response despite the Order's direction.

4 **III. CONCLUSION**

5 Ms. Roberts maintains that Resolution #16-28 should never have been applied against
6 the plaintiffs. The NTC §10.00.80 directs the Court to liberally construe Title 10, treat all
7 parties fairly and without prejudice and to protect **individual** rights presented by ICRA and the
8 Nooksack Constitution. Yet, Ms. Roberts was denied the benefits of NTC §10.00.80 because
9 she is denied her chosen voice within a rapid period of time, without notice, and has been left
10 defenseless.

11 DATED this 14th day of March, 2016.

12 GARVEY SCHUBERT BARER

13
14 By 
15 Judith A. Endejan, WSBA #11016
16 David H. Smith, WSBA #10721

17
18 By _____
19 Michelle Roberts, *pro se*

20
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