THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGRETTY RABANG, OLIVE OSHIRO, DOMINADOR AURE, CHRISTINA PEATO, and ELIZABETH OSHIRO, Plaintiffs, v. ROBERT KELLY, JR., RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, LONA JOHNSON, KATHERINE CANETE, RAYMOND DODGE, ELIZABETH KING GEORGE, KATRICE ROMERO, DONIA EDWARDS, and RICKIE ARMSTRONG, Defendants.	Case No. 2:17-cv-00088-JCC DEFENDANTS' REPLY IN SUPPORT OF KELLY DEFENDANTS' RULE 12(B)(1) AND 12(B)(6) MOTION TO DISMISS **NOTED FOR HEARING: MARCH 24, 2017**

I. INTRODUCTION

The Court should deny Plaintiffs' Rule 56(d) Motion to Continue (Doc. 43) for the reasons set forth in the Kelly Defendants' Response in Opposition (Doc. 51). The Court should consider the Kelly Defendants' motion, and the motion of Raymond Dodge, as noted.

A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears, and Plaintiffs have the burden of establishing subject matter jurisdiction in opposing the motion because the plaintiffs are the party invoking the Court's jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Plaintiffs have failed to meet their burden, and the presumption that the Court lacks

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jurisdiction has not been overcome. The Court must dismiss Plaintiffs' claims under Rule 12(b)(1). *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011).

A plaintiff alleging a fraud-based RICO claim bears a significant burden to plead facts with sufficient specificity to satisfy Rule 9(b). Plaintiffs here have utterly failed to meet that burden. Moreover, to survive a motion to dismiss, a plaintiff must cite facts supporting a "plausible" cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007). Because Plaintiffs have failed to plead a claim that moves "across the line from conceivable to plausible," their claims should be dismissed. *Twombly*, at 570.

II. AUTHORITY AND ARGUMENT

A. Dismissal is Warranted Under Rule 12(b)(1).

At its core, this lawsuit, like the 26 other proceedings initiated by the Plaintiffs and their counsel related to the Nooksack Tribe's disenrollment of individuals failing to satisfy the constitutional requirements for membership, is an inter-tribal dispute that affects matters of self-government and sovereignty, over which this Court lacks jurisdiction. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). The analysis of the Eighth Circuit in *Runs After v. United States* is applicable and instructive:

> [T]o the extent that appellants' complaint can be characterized as one seeking federal judicial review of the two Tribal Council resolutions at issue, a characterization with which appellants do not agree, the district court correctly dismissed the complaint for lack of jurisdiction. Appellants essentially argue that the Tribal Council resolutions banning appellants Joan LeBeau, Gib LeBeau and Walter Woods from holding tribal office "forever" and disqualifying Bertha Chasing Hawk and Grady Claymore from running for tribal office in the 1984 tribal general election were politically motivated because appellants opposed the manner in which the

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> Tribal Council was conducting tribal affairs, particularly the handling of tribal funds. **Appellants alleged that the tribal council resolutions were clearly inconsistent with the tribal constitution, bylaws and election ordinance. Such an action would necessarily require the district court to interpret the tribal constitution and tribal law is not within the jurisdiction of the district court**. . . Appellants may seek review in tribal court or pursue alternative, political remedies.

Runs After, 766 F.2d 347, 352 (8th Cir. 1985) (emphasis added, citations omitted).

None of the cases cited by Plaintiffs at page 3 of their response warrant a conclusion that this Court lacks jurisdiction to proceed.

Paskenta Band of Nomlaki Indians v. Crosby, 122 F. Supp.3d 982 (E.D. Cal. 2015) involved claims brought by a tribe against former employees of the tribe (the treasurer, environmental director, tribal administrator, economic development director, and other employees of the tribe's casino) along with numerous non-tribal financial services entities and individuals (Umpqua Bank, Umpqua Holdings Corporation, Cornerstone Community Bank, Cornerstone Community Bancorp, Jeffery Finck, Garth Moore, Garth Moore Insurance and Financial Services, Inc., Associated Pension Consultants, Inc., Haness & Associates, LLC, Robert M. Haness, Patriot Gold & Silver Exchange, Inc.). Complaint, Case No. 15-00538 (E.D. Cal.) Doc. 1, at 13 – 18 (3/10/2015). Exhibit 1, Declaration of Connie Sue Martin in Support of Reply ("Martin Decl.").

Unlike the Kelly Defendants, who are the current governing body of the Nooksack Tribe and directors of Tribal departments, the *Paskenta* defendants were overwhelmingly non-tribal financial services individuals and entities. The court there was not required, as it would be here, to resolve issues of tribal law in order to determine the RICO claim. Here, before the Court could even reach the RICO claims, it would have to determine that (1)

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under Nooksack law, there is no provision for holdover of Council positions in the absence of an election; (2) the delay of the Nooksack elections was a violation of Nooksack law; (3) the Tribal Council lacked a quorum after March 24, 2016 and thus its actions thereafter were void under Nooksack law; (4) the January 2017 Nooksack elections that seated the current Council were void under Nooksack law; (5) the disenrollments of the Plaintiffs violated Nooksack law; (6) the eviction of certain of the Plaintiffs violated Nooksack law; and (7) the Kelly Defendants lacked authority under Nooksack law to deny benefits to the Plaintiffs. Each issue is one that is outside the jurisdiction of this Court.

And, finally, unlike the Kelly Defendants, the *Paskenta* defendants made a facial challenge to the federal court's subject matter jurisdiction, not a factual challenge. *Paskenta*, 122 F. Supp.3d at 988. For that reason, the court applied a different standard than must be applied here, accepting all of the plaintiffs' allegations to be true and drawing all reasonable inferences in their favor. *Id, citing Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

Similarly, *Stillaguamish Tribe of Indians v. Nelson*, the case involved (as alleged by the tribe) a suit brought by the Tribe against "non-Native real estate developers, investors, business owners, Tribal employees and other persons conspire[ing] with the leadership of an Indian Tribe to (a) defraud the Tribe of the honest services of its tribal leaders and those with fiduciary duties to the Tribe, (b) defraud the Tribe of millions of dollars in money and other assets, and (c) personally enrich themselves through a web of real property transactions, investment deals and business entities, all at the expense of the Tribe." Amended Complaint, Case No. 10-0327 (W.D. Wash.) Doc. 73 at ¶ 3.2 (4/5/2011), Exhibit 2, Martin Decl.

Plaintiffs rely on a trial court order from *Stillaguamish*, Doc. 407, to as support for

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their argument that the Court has subject matter jurisdiction even though this is an intra-tribal dispute. But, Doc. 407 did not address that issue. The basis of the motion was that the tribe lacked standing, and in the absence of standing, the court lacked subject matter jurisdiction:

> Nelson argues that the Tribe lacks standing because, although a "person" for purposes of RICO, it is acting in its sovereign capacity. The court has already held that "the Tribe does not seek to vindicate its sovereign rights, but rather seeks to assert a right available that RICO makes available to every 'person,' the right to recover damages caused by an injury to business or property." Dkt. # 65 at 12; see also 18 U.S.C. § 1961(3) ("Person" includes "any individual or entity capable of holding a legal or beneficial interest in property."). Canyon County v. Syngenta Seeds, Inc., on which Nelson relies, is therefore distinguishable. 519 F.3d 969 (9th Cir. 2008) (a sovereign acting in a parens patriae capacity lacks RICO standing).

4/17/2013 Order, Doc. 407, at 9, Exhibit 3, Martin Decl.

Under Article III of the U.S. Constitution, the court has subject matter jurisdiction only if the party bringing the action has standing, an inquiry which addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). That is not the basis of the Kelly Defendants' Rule 12(b)(1) motion.

Like the *Paskenta* case, the plaintiff in the *Stillaguamish* case was the tribe. Resolving the issues there did not require the court to interpret and apply tribal law. That is inapposite to the case at bar, where the Court would have to resolve numerous issues of Nooksack law before even reaching the RICO allegations.

The trial court order in *S.W. Casino and Hotel Corp. v. Flyingman*, No. 07-0949 Doc. 43 (W.D. Okla. October 27, 2008)[1] also offers no support for Plaintiffs' argument. In that

[1] Exhibit 4, Martin Decl.

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case, a non-tribal management company of a tribal casino sued the former casino surveillance manager (who was a tribal member) and the tribe's governor allegedly copying casino surveillance videos and then posting them on YouTube and selling copies on DVD. Complaint, Doc. 1, at 3 – 5, Exhibit 5, Martin Decl. The plaintiff sued for conversion, copyright infringement, tortious interference with contract, defamation, conspiracy, and RICO conspiracy. *SW Casino & Hotel Corp. v. Flyingman*, 2008 U.S. Dist. LEXIS 86727, at *1 (W.D. Okla. Oct. 27, 2008). The defendants were not members of the governing body of the tribe.

The *SW Casino* decision cited by Plaintiffs says nothing at all regarding subject matter jurisdiction. Rather, it resolves the issue of whether a plaintiff can avoid an adverse determination on a defense motion for summary judgment, by filing a voluntary motion to dismiss. The court concluded that plaintiff could not, and denied its motion. *SW Casino & Hotel Corp.*, 2008 U.S. Dist. LEXIS 86727 at ** 6-7. Thereafter, the court granted the defendants' motion for summary judgment and dismissed the copyright infringement and RICO claims on subject matter jurisdiction grounds. Memorandum Opinion and Order, Doc. 48 (12/2/2008), Exhibit 6, Martin Decl.

The contention that the alleged illegitimacy of the Kelly Defendants as the current governing body is not, as Plaintiffs assert, resolved.[2] The Roberts letters do not bind the Court because, like the Court, the federal government has no power to interfere in an intra-tribal governance dispute. *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 939 n. 7 (8th Cir. 2010). Because tribal governance disputes are controlled by

[2] As an initial matter, as the Court has been advised, the arbitrary and capricious opinion letters of former Principle Deputy Assistant Secretary Roberts are the subject of a lawsuit filed by the Tribe against the United States that is now pending in this court.

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tribal law, they fall within the exclusive jurisdiction of tribal institutions and **the BIA's recognition of a member or faction is not binding on a tribe**. *Id.* at 943, *citing Goodface*, 708 F.2d at 339.

While the BIA may at times be obliged to recognize one side or another in a dispute as part of its responsibility for carrying on government relations with the Tribe, as the *Goodface* court noted, **once the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself**. *Id.*; *see also Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549, 552-53 (10th Cir. 1987). In situations of federal-tribal government interaction where the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination. *See Wheeler*, 811 F.2d 549 at 552.

"As the BIA itself notes and indeed focuses on in its pleadings, it is not for the federal government to adjudicate disputed tribal leadership according to tribal law." *Winnemucca Indian Colony v. United States ex rel. DOI*, 837 F. Supp. 2d 1184, 1192 (D. Nev. 2011), *citing* Cohen's Handbook of Federal Indian Law § 5.03[3][c], at 411 (2005 ed.); *Wheeler*, 811 F.2d at 551-52.

"Tribal Council elections are recognized as sovereign tribal processes. *Garcia v. Western Regional Director*, 61 IBIA 45 (2015). Absent any constitutional authority specifically instructing the Secretary to conduct a tribal election, it is up to the Nooksack Tribe through its own internal processes and operating through its own internal forums to carry out this inherently sovereign function." August 8, 2016 Letter from BIA Regional

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Director Speaks, at 1-2, Exhibit 7 to Decl. of Martin. The United States does not dictate to the Tribe who its members, or its leaders, are. The Roberts letters are not binding.

Plaintiffs allege in their FAC that six of the Kelly Defendants constitute the "Holdover NITC [Nooksack Indian Tribal Council]"[3] and that in the course of the alleged scheme to defraud the Plaintiffs, these defendants "amended Tribal law,"[4] and passed NITC Resolutions disenrolling Plaintiffs.[5] Plaintiffs further allege that the "NITC exists separate and apart from the pattern of racketeering activity for the legitimate governmental purpose of operating as the governing body of the Tribe. RICO Defendants have had and do have legitimate governmental business plans. . ."[6] Each of the alleged acts that Plaintiffs contend were predicate acts in a RICO conspiracy were acts of the governing body of the Tribe, and Plaintiffs' claims are barred by the Tribe's sovereign immunity. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (plaintiffs' complaint against tribal officials barred by sovereign immunity because "the [officials'] votes individually [had] no legal effect" and it was "the official action of the Band, following the [officials'] votes, that caused [plaintiff's] injuries").

B. Dismissal is Warranted Under Rule 12(b)(6).

Dismissal under Rule 12(b)(6) is appropriate where, as here, a plaintiff failed to allege "enough facts to state a claim to relief that is plausible on its face." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962–63 (9th Cir. 2016) (*quoting Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015)). Legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted

[3] FAC, ¶ 10-16.
[4] FAC ¶ 35.
[5] FAC ¶¶ 41, 59.
[6] FAC 77.

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inferences are not sufficient to defeat a motion to dismiss." *SEC v. Reys*, 712 F. Supp. 2d 1170, 1172-73 (W.D. Wash. 2010); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). Similarly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

RICO claims must satisfy Rule 9(b), which requires plaintiffs to "state with particularity the circumstances constituting" their claims. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989). This particularity requirement requires a plaintiff to "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Perkumpulan Investor Crisis Ctr. Dressel-WBG v. Regal Fin. Bancorp, Inc.*, 781 F. Supp. 2d 1098, 1108 (W.D. Wash. 2011), *citing Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007). Furthermore, the complaint must detail "what is false or misleading about a statement, and why it is false." *In re Glenfed, Inc. Secs. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc). General or conclusory assertions of fraud are insufficient to defeat a motion to dismiss. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

Where a complaint alleges that several defendants participated in a fraudulent scheme, "Rule 9(b) does not allow a complaint merely to lump multiple defendants together but require[s] plaintiffs to differentiate their allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (quotations omitted). The Plaintiffs in their responsive brief point to no other factual allegations in the FAC that could supply the necessary plausibility. Accordingly, the Kelly Defendants are entitled to dismissal.

"A conspiracy is defined as an agreement between two or more people to commit an unlawful act. It requires some form of a "meeting of the minds." *United States v. Yarbrough*, 852 F.2d 1522, 1542 (9th Cir. 1988). Inferences of the existence of an agreement may be drawn if there is "concert of action, all the parties working together understandingly, with a

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single design for the accomplishment of a common purpose." *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980)(citation omitted).

"[W]holly conclusory allegations of conspiracy" must be disregarded, including such assertions as that the defendants acted "as part of a common scheme and conspiracy" or that the defendants "agreed to the overall objective of the conspiracy." *American Dental Association v. Cigna Corp.*, 605 F.3d 1283, 1293 (11th Cir. 2010). "These are the kinds of 'formulaic recitations' of a conspiracy claim that the Court in *Twombly* and *Iqbal* said were insufficient." *Id.* at 1294.

Allegations regarding certain "representatives" of defendant is too vague to sufficiently identify the alleged perpetrators. *Segal Co. v. Amazon*, 280 F. Supp. 2d 1229, 1231 (W.D. Wash. 2003); *see Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1315 (N.D. Cal. 1997) (general allegation against all defendants insufficient to satisfy particularity requirement); *cf. Cable & Computer Tech. Inc. v. Lockheed Sanders Inc.*, 214 F.3d 1030, 1038 (9th Cir. 2000). Plaintiffs fail to meet their burden of alleging conspiracy with particularity. FAC, ¶¶ 126 – 132.

The allegations of wire fraud contained in the FAC [¶¶ 43, 45, 52, 57, 86, 87a, 87b, 87d, 88a, 88b, 88e, 88f, 88j, 88o, 88p, 88q, and 89 fail as a matter of law because none of the alleged wire communications were interstate. It is not sufficient to allege that the defendants made use of the telephone, one must also allege that telephone calls crossed state lines. *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988) (purely intrastate communication is beyond the statute's reach, dismissal of RICO claim is appropriate). The Kelly Defendants are entitled to dismissal of this claim.

C. Further Amendment Would be Futile, and Should be Denied

The Kelly Defendants asked the Court to dismiss Plaintiffs' complaint with prejudice and without leave to amend. Plaintiffs did not, in their Response, seek leave to amend in the event the Court found their First Amended Complaint lacking. A district court ordinarily

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must grant leave to amend when it dismisses claims under Rule 12(b)(6), but the district court need not grant leave if it "determines that the pleading could not possibly be cured by the allegation of other facts." *Ebner*, 838 F.3d at 963 (*quoting Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

Here, the allegation of other facts consistent with the Plaintiffs' theory of the case could not possibly cure the inadequacies in the FAC. The Plaintiffs' theory of the case is that the members of the Tribal Council – Chairman Kelly, Vice-Chairman George, Treasurer Smith, and Councilmembers Solomon, Johnson, and Canete - conspired together to (1) delay elections so as to hold onto power; (2) disenroll the Plaintiffs from the Tribe; and (3) deny the Plaintiffs benefits to which they allege they would be entitled if they had not been disenrolled. But, "the individual members of the Tribal Council, acting in their official capacity as tribal council members, cannot conspire when they act together with other tribal council members in taking official action on behalf of the Tribal Council." *Runs After*, 766 F.2d at 354.

Plaintiffs urges the Court to accept the proposition that the Tribal Council has been delegitimized by virtue of the letters authored by former Principle Deputy Assistant Secretary Roberts, and thus the actions of the "Holdover Council" are acts of individuals and not the official actions of the Tribal Council. That is nonsensical. The acts complained of (elections, disenrollment, eviction, and the denial of benefits afforded to enrolled Tribal members) could not have been carried out but for the fact that the Defendants were acting in their official capacity and carrying out the ***Tribe's*** power and authority. As the Ninth Circuit held in *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) "the [officials'] votes individually [had] no legal effect" and it was "the official action of the Band, following the [officials'] votes, that caused [plaintiff's] injuries."

Moreover, it is a misstatement of law and fact to suggest that the three Roberts letters constitute an adjudication that the Tribal Council has, at any time, been "invalid." As both

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the BIA and the federal courts have recognized, "the determination of tribal leadership is quintessentially an intra-tribal matter raising issues of tribal sovereignty." *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1138 (E.D. Cal. 2015), *quoting Hamilton v. Acting Sacramento Area Dir.*, 29 I.B.I.A. 122, 123, 1996 WL 165057, at *2 (Mar. 12, 1996); *see also In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763-64 (8th Cir. 2003) (holding that the district court lacked jurisdiction to resolve an internal tribal election dispute); *see Timbisha*, 687 F. Supp. 2d at 1185 (considering elections to be among the internal affairs of the tribe that do not come within the purview of review by federal courts).

Because plaintiffs seek "a form of relief that the federal courts cannot provide, namely, resolution of [an] internal tribal leadership dispute," the court lacks jurisdiction over their claims. *In re Sac & Fox Tribe*, 340 F.3d at 763.

III. CONCLUSION

The Kelly Defendants have demonstrated that they are entitled to relief. Their Motion to Dismiss should be granted, and Plaintiffs' claims should be dismissed with prejudice and without leave to amend.

Dated this 24th day of March, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 24th day of March, 2017, I electronically filed the foregoing DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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