

The Honorable John C. Coughenour

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

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

**DEFENDANT CHIEF JUDGE
RAYMOND DODGE’S REPLY IN
SUPPORT OF MOTION TO DISMISS**

**NOTE ON MOTION CALENDAR:
MARCH 24, 2017**

Defendant Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr. (“Judge Dodge”) hereby respectfully replies in support of his motion to dismiss this action with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiffs’ response only serves to highlight their blatant misuse of the Racketeer Influenced and Corrupt Organizations Act (“RICO”). Dkt. No. 46. Dismissal with prejudice is appropriate because (1) Judge Dodge is entitled to judicial immunity and (2) plaintiffs have failed to state a RICO claim against Judge Dodge.

ARGUMENT

A. Plaintiffs Have Not Pleaded Facts Sufficient to Overcome Judge Dodge’s Absolute Judicial Immunity

Tribal court judges such as Judge Dodge are entitled to the same absolute judicial immunity that shields state and federal court judges. *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003). There are only two exceptions to judicial immunity. The first is where a judge acts outside the scope of his judicial capacity and the second is when judge takes an action in the complete absence of jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Plaintiffs’ response relies on neither exception. Instead they argue that Defendant “is not [] a ‘judge’ entitled to invoke the defense of judicial immunity.” Resp. at 4.

Plaintiffs misunderstand—and consequently misapply—the legal standard for application of judicial immunity. Plaintiffs refer to Judge Dodge as a so-called judge because they allege that the Department of Interior’s (“Interior”) letters declining to recognize actions by the Tribal Council after March 24, 2016 as lawful cast doubt on Judge Dodge’s ability to act as a jurist. Resp. at 2, 4–5. Interior’s decision not to recognize actions by the Tribal Council is not sufficient to abrogate Judge Dodge’s absolute immunity. As explained below, plaintiffs have failed to plead any facts which would establish that either of the two narrow exceptions to judicial immunity exist. As such, Judge Dodge remains immune from suit.

1. *The Pleadings Support That Judge Dodge Was Acting Within His Judicial Capacity When He Performed the Actions at Issue*

In evaluating whether an act occurs within judicial capacity, courts do not rely strictly on whether the actor is in fact a judge. Rather, courts look to the nature of the act itself (i.e., whether it is a function normally performed by a judge), and to the expectations of parties (whether they dealt with judge in his judicial capacity). *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Absolute judicial immunity is, therefore, not reserved solely for judges but also extends to non-judicial officers (such as bankruptcy trustees and prosecutors) for all claims relating to the exercise of judicial functions. *Burton v. Infinity Capital Mgmt.*, 753 F.3d 954, 959, 960–61 (9th

1 Cir. 2014). Thus, the actor's title alone is not dispositive as to whether or not he is entitled to
2 judicial immunity.

3 Plaintiffs' amended complaint makes plain that the nature of the complained-of-acts were
4 functions normally performed by a judge, and that the parties dealt with Judge Dodge in his role
5 as Chief Judge of Nooksack Tribal Court and treated him as such. Dkt. No. 7 ¶ 88. It is only
6 because Judge Dodge was acting in a judicial capacity that he was able to issue orders with the
7 force and effect of law in the eviction proceedings involving Ms. Rabang. Further, it is apparent
8 from the amended complaint that Ms. Rabang understood that she was dealing with Judge Dodge
9 in his judicial capacity, as she alleges wrongdoing for his failure to convene her *pro se* lawsuit,
10 an action which only a person acting in a judicial capacity could do. *Id.* at ¶ 40.

11 Thus, as pleaded, the plaintiffs' facts establish that Judge Dodge was acting within his
12 judicial capacity at the time of the alleged unlawful actions, and is entitled to immunity.

13 **2. Interior's Findings Did Not Create a "Complete Absence of Jurisdiction" for Judge**
14 **Dodge**

15 Jude Dodge also did not act in the "complete absence of jurisdiction." *Mireles*, 502 U.S.
16 at 12. This exception is satisfied only where a judicial officer acts with the knowledge that he
17 lacks jurisdiction, or despite a "clearly valid statute or case law expressly depriving him of
18 jurisdiction." *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985) (citing *Rankin v. Howard*, 633
19 F.2d 844, 849 (9th Cir. 1980)). No such allegations exist here.

20 Plaintiffs do not, in either the amended complaint or their Response, allege that Judge
21 Dodge knew he lacked jurisdiction, or that a statute or case law expressly deprived him of
22 jurisdiction. Instead, they rely on the allegation that Interior's communications stripped him of
23 any judicial authority and, on that basis alone, Judge Dodge "cannot be afforded the cloak of the
24 judiciary." Resp. at 5. However, there is no factual basis in the amended complaint to support
25 that Judge Dodge acted in the clear absence of jurisdiction, either with or without that
26 knowledge.
27

1 **a. The Letters from Interior Were Issued to and Relate to Actions by Tribal**
2 **Council, not Judge Dodge**

3 Plaintiffs cite to three paragraphs in the amended complaint which reference
4 communications with Interior to support their argument that Interior does not recognize orders
5 issued by Judge Dodge as valid and lawful. Resp. at 4. None of these communications mention
6 Judge Dodge. Dkt. No. 7 ¶¶ 50, 56, 69. Importantly, nowhere in the amended complaint do
7 plaintiffs reference any communication from Interior which states that Judge Dodge will not be
8 recognized as a judge. It is only the Tribal Council which is admonished. *See id.* at ¶¶ 50, 56, 69
9 (“[P]ursuant to [the Tribe’s] constitution and laws, as of April 2016, the Tribal Council is no
10 longer operating with a quorum and therefore lacks authority to conduct business on behalf of
11 the Tribe.”).

12 The only communication cited in the amended complaint which ostensibly even relates to
13 Judge Dodge is the portion of the December 23, 2016 “decision,” in which AS-IA Roberts
14 indicates that Interior had learned of “orders of eviction [which] may have been recently issued
15 to be served by the Nooksack Chief of Police or could be issued and served in the near future.”
16 *Id.* at ¶ 69. AS-IA Roberts concluded that because “such orders are based on actions taken by the
17 Tribal Council after March 24, 2016 . . . those orders are invalid and the Department does not
18 recognize them as lawful . . .” *Id.* However, this communication does not speak to Judge
19 Dodge’s jurisdictional authority at the time he issued the orders.

20 Importantly, Interior’s communications were issued to the Tribal Council, not Judge
21 Dodge. There are no facts pled by plaintiffs to establish that Judge Dodge had any knowledge or
22 awareness of the communications, let alone that he lacked jurisdiction, as required to overcome
23 immunity on the basis of acting in the clear absence of jurisdiction. Moreover, this
24 communication was not issued until December 23, 2016—one day *after* Judge Dodge had issued
25 the last allegedly unlawful order in the eviction proceeding. *Id.* at ¶¶ 67–69 (alleging that the
26 Eviction Order and Order Following Show Cause were sent on December 15, 2016 and
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1 December 22, 2016 respectively). Judge Dodge thus could not have reasonably known that the
2 orders were invalid—if they were invalid—until after he had already issued them.

3 Plaintiffs have failed to plead facts which would create an exception to Judge Dodge’s
4 absolute judicial immunity. Judge Dodge acted within his judicial capacity and without a clear
5 absence of jurisdiction when he performed the actions of which Plaintiffs complain. Plaintiffs
6 have alleged wrongdoing by Judge Dodge for actions stemming from his role as Chief Judge;
7 they cannot have it both ways by simultaneously denying him the benefit of immunity which
8 arises from that role on the simplistic assertion that he is “not a judge.” Judge Dodge is immune
9 from suit, and this lawsuit should be dismissed with prejudice.

10 **B. Plaintiffs’ Civil RICO Claims Fail and Should Be Dismissed With Prejudice**

11 Plaintiffs’ response offers more generalized conclusions, as opposed to the necessary
12 well-plead facts, to establish standing to bring a RICO claim and to establish the necessary
13 “pattern of racketeering activity”. For the reasons explained below, the RICO claims should be
14 dismissed with prejudice.

15 **1. Plaintiffs Have Not Pled Facts Supporting A Concrete Injury**

16 Plaintiffs argue they have sufficient plead facts supporting a concrete injury because “Ms.
17 Rabang has “invested at least \$9326.68 in her home” and Ms. Oshiro “has similarly invested in
18 her home.” Resp. at 7 (citing Dkt. No. 7 ¶¶ 4, 8, 45-46, 49). There are two problems with this
19 argument.

20 First, plaintiffs misrepresent the amended complaint. As to Ms. Rabang, the amended
21 complaint states that “[a]s of October 1, 2016, Ms. Rabang needed to pay off only \$9326.68
22 before she owned her home outright...” Dkt. No. 7 ¶ 4. As to Ms. Oshiro, the amended
23 complaint states that “Ms. Oshiro needed to make only one more payment before owned the
24 property outright.” *Id.* ¶ 8. Pleading with specificity how much money only one of the plaintiffs
25 still needs to pay is not the same as arguing the amount of the investment lost. Resp. at 7. In
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1 fact, it's the opposite. There is no allegation of financial loss anywhere in the amended
2 complaint.

3 Second, even if the briefing was consistent with the allegations, plaintiffs have not shown
4 “concrete financial loss.” *Portfolio Invs., LLC v. First Svgs. Bank*, No. C12-104-RAJ, 2013 WL
5 1187622, at *4 (W.D. Wash., Mar. 20, 2013). There remains no allegation that either Ms.
6 Rabang or Ms. Oshiro has actually lost their homes or their investments therein. Dkt. No. 7
7 ¶¶ 45-46, 71 (alleging that “efforts to defraud Ms. Rabang of her HUD MHOP home remain
8 ongoing”). And, there is no amount of damages alleged by Ms. Oshiro at all. *Id.* ¶ 8. Plaintiffs
9 have failed to allege the concrete loss required under RICO because they have failed to
10 document the amount of damages to which each plaintiff claims to be entitled and have alleged
11 no out-of-pocket losses. *Fireman’s Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1021 (9th Cir. 2001)
12 (requiring documentation of damages). Accordingly, plaintiffs lack standing to bring this RICO
13 claim.

14 **2. Plaintiffs Have Failed to Allege Causation**

15 Plaintiffs argue they have alleged direct causation as to Judge Dodge because “no
16 alternative cause exists that might be the actual harm to Plaintiffs other than Defendant Dodge’s
17 invalid orders.” Resp. at 8. This argument is not compelling.¹

18 Plaintiffs cannot point to any facts showing how the alleged injury of loss of investment
19 in the homes was directly and proximately caused by any of the purported predicate acts by
20 Judge Dodge. *See, e.g.*, Dkt. No. 7 ¶¶ 71, 85-92. Judge Dodge’s eviction orders are not self-
21 executing. Although Judge Dodge may have issued orders, he neither filed the eviction action
22 (the Tribe’s Housing Authority filed the action) nor is he responsible for enforcing the eviction
23 order (which is the responsibility of the Chief of Police). *Id.* ¶ 88. As such, he is neither the “but
24 for” nor the proximate cause of any alleged injury. *See Hemi Grp., LLC v. City of New York*, 559
25 U.S. 1, 9 (2010); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

26
27 ¹ The argument that only Judge Dodge is possibly to blame ignores the fact that he is one of 11
defendants named in this action. *Compare* Resp. at 8 *with* Dkt. No. 7 ¶¶ 10-21.

1 The case of *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 773-74 (9th Cir.
2 2002), cited by plaintiffs, highlights the fundamental flaw in their causation logic. Resp. at 8. In
3 *Oki Semiconductor*, the Ninth Circuit refused to find the required RICO causation where,
4 although defendant “may have packed sandwiches to feed the thieves”, her actions did not
5 directly cause the alleged theft. *Oki Semiconductor*, 298 F.3d at 774. So too here, while Judge
6 Dodge may have indirectly provided support for the alleged eviction scheme by serving as the
7 jurist, plaintiffs cannot demonstrate that Judge Dodge “falsely represent[ing] himself as NTC
8 ‘Chief Judge’” proximately caused any injury. Resp. at 9. Plaintiffs have not and cannot plead
9 RICO standing and the RICO claims should be dismissed with prejudice as to Judge Dodge.

10 **3. *Plaintiffs Have Not Pled (And Cannot Plausibly Plead) Mail and Wire Fraud by***
11 ***Judge Dodge***

12 Plaintiffs use one page of their response to argue that they have sufficiently alleged
13 federal criminal mail and wire fraud because Judge Dodge “falsely represented himself as NTC
14 ‘Chief Judge.’” Resp. at 9; Dkt. No. 7 ¶¶ 88(h), (i), (j) and (v). Even if this were a false
15 representation, which it is not, plaintiffs’ bare “because we said so” argument fails to meet Rule
16 9(b)’s heightened pleading requirements.

17 The amended complaint remains woefully inadequate for RICO purposes. Plaintiffs fail
18 to meet the pleading requirements for mail and wire fraud in the following ways: (1) plaintiffs
19 fail to allege any specific intent to deceive by Judge Dodge; (2) plaintiffs fail to allege whether
20 and how they, or third parties, were somehow deceived by Judge Dodge’s actions; (3) plaintiffs
21 do not allege that Judge Dodge’s transmittals were made to third parties so as to further some
22 fraudulent scheme; in fact, they allege Judge Dodge only communicated with the plaintiffs (Dkt.
23 No. 7 ¶ 88); (4) plaintiffs fail to allege that anyone was deceived by these communications – in
24 fact, plaintiffs seem to believe that he was merely “masquerading” as a judge the whole time
25 (Resp. at 9); (5) plaintiffs fail to allege any reliance on Judge Dodge’s alleged
26 misrepresentations; and (6) plaintiffs have not shown the necessary continuity for a pattern of
27 racketeering activity because the acts took place in a definite period of time and do not have the

1 potential to continue – after all, the eviction actions, like all cases, will end. *See Bridge v.*
 2 *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008) (stating that wire and mail fraud cases
 3 require establishing that someone relied on the defendant’s misrepresentation); *Sun Sav. and*
 4 *Loan Assoc. v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987) (requiring specific intent to deceive). For
 5 any of these reasons, the mail and wire fraud claim is not sufficiently pled.

6 **4. Plaintiffs Fail to Sufficiently Plead Money Laundering**

7 Plaintiffs fail to respond to Judge Dodge’s argument that they have failed to state a claim
 8 for the predicate act of money laundering, thereby conceding that there are simply no facts
 9 supporting the existence of any money laundering claim. *See generally* Resp.; Dkt. No. 7 ¶ 92.
 10 This scandalous claim appears to be based on absolutely nothing.²

11 The amended complaint fails to state a viable RICO claim and Judge Dodge’s motion to
 12 dismiss with prejudice should be granted.

13 **CONCLUSION**

14 For the foregoing reasons, Judge Dodge respectfully requests that this case be dismissed
 15 with prejudice.

16 DATED this 24th day of March, 2017.

17 **Kilpatrick, Townsend & Stockton LLP**

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23 ² The Court should consider Rule 11 sanctions *sua sponte* as related to the money laundering
 24 claim. “A claim is frivolous if it is both baseless and made without a reasonable and competent
 25 inquiry. A frivolous claim is one that is legally unreasonable, or without legal foundation.” *In re*
 26 *Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir. 1991) (citations and internal quotation marks
 27 omitted). “Rule 11’s deterrence value is particularly important in the RICO context, as the
 commencement of a civil RICO action has an almost inevitable stigmatizing effect on
 those named as defendants.” *Katzman v. Victoria’s Secret Catalogue*, 167 F.R.D. 649,
 660 (S.D.N.Y. 1996). The money laundering claim is clearly not well-grounded in fact.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing
**DEFENDANT CHIEF JUDGE RAYMOND DODGE’S REPLY IN SUPPORT OF
MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will
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DATED this 24th day of March, 2017.

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