

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM**

MARGRETTY RABANG, and ROBERT
RABANG,

Plaintiffs,

v.

RORY GILLIAND, MICHAEL ASHBY,
ANDY GARCIA, RAYMOND DODGE, and
JOHN DOES 1-10,

Defendants.

Case No.: 17-2-00163-1

**DEFENDANT CHIEF JUDGE
RAYMOND G. DODGE JR.'S MOTION
TO STAY DISCOVERY PENDING
RESOLUTION OF MOTION TO
DISMISS**

I. RELIEF REQUESTED

COMES NOW, Defendant Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr. ("Judge Dodge"), and hereby respectfully moves the Court to stay discovery pending resolution of Judge Dodge's motion to dismiss (filed Mar. 9, 2017).

II. STATEMENT OF FACTS

Plaintiffs filed a lawsuit against Judge Dodge and other defendants on January 31, 2017, alleging intentional and negligent infliction of emotion distress. Compl., ¶¶ 38-46. On February 2, 2017, Plaintiffs also filed an action in the Western District of Washington against Judge Dodge and other defendants, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Declaration of Rob Roy Smith in Support of Motion to Stay

1 Discovery (“Smith Decl.”), ¶2; *see also* Decl. Dodge in Supp. of Mot. to Dismiss, Ex. D (Mar. 9,
2 2017). The factual allegations of the state and federal cases are similar. *Id.*; *compare* Compl.,
3 ¶¶ 12-37 with Ex. D to Dodge Decl.

4 On March 9, 2017, Judge Dodge moved to dismiss Plaintiffs’ claims under CR 12(b)(1)
5 or 12(b)(6), alleging that the claims were barred by the doctrine of judicial immunity, that the
6 Court lacked subject matter jurisdiction, and that Plaintiffs had failed to state a claim on which
7 relief could be granted for each of the asserted claims. Judge Dodge filed a similar motion to
8 dismiss in the federal case. Smith Decl., ¶ 3. On April 7, 2017, after oral argument on Judge
9 Dodge’s motion, this Court took the matter under advisement. Court’s Order on Defendants’
10 Respective Motions to Dismiss Heard April 7, 2017 at 2 (Apr. 21, 2017). A decision on the
11 motion to dismiss in this case is pending. Smith Decl., Ex. C at 4.

12 On May 2, 2017, the District Court granted Judge Dodge’s motion to dismiss on the basis
13 of judicial immunity. *See* Dodge Notice of Decision (May 3, 2017). Plaintiffs filed a second
14 amended complaint the next day. *See* Pltf’s Resp. to Dodge’s Notice of Decision, Second
15 Amended Complaint (May 3, 2017). On May 17, 2017, Judge Dodge filed a motion for
16 summary judgment in the federal case, which is currently pending. Smith Decl., Ex. A. The
17 next day, Plaintiffs filed discovery requests in this case. *Id.*, Ex. B.

18 Judge Dodge now seeks to stay discovery in this case, pending resolution of the motion to
19 dismiss before this Court.

20 III. EVIDENCE RELIED UPON

21 This motion is based upon the Declaration of Rob Roy Smith and exhibits attached
22 thereto, and the [Proposed] Order filed herewith; and the pleadings and files referenced herein.

23 IV. AUTHORITY AND ARGUMENT

24 This Court has broad discretion to stay discovery pending a motion to dismiss, and doing
25 so in this case would be consistent with prior rulings of Washington courts. *See King v. Olympic*
26 *Pipeline Co.*, 104 Wash. App. 338, 350, 16 P.3d 45 (2000) (finding that, with respect to
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1 discovery, “[t]he court has inherent power to stay its proceedings where the interest of justice so
2 requires”); *Kramer v. J.I. Case Mfg. Co.*, 62 Wash. App. 544, 556, 815 P.2d 798 (1991) (trial
3 courts have “broad discretion to manage the discovery process”); *Harris v. Wolfe, M.A.*, No. 15-
4 2-27368-0 SEA, 2016 WL 2941510 (Wash.Super. Ct., Jan. 26, 2016) (finding discovery to
5 “unduly burden defendant” and ordering discovery stayed until 14 days after Court’s order on
6 motion to dismiss); *Quinn Const. Co., L.L.C. v. King Cty. Fire Prot. Dist. No. 26*, 111 Wash.
7 App. 19, 33, 44 P.3d 865, 872 (2002) (finding that trial court “clearly had the discretion to stay
8 discovery until after the CR 12(b)(6) hearing.”).

9 While there is no statutory automatic stay of discovery in Washington during the
10 pendency of a motion to dismiss, because of the “unique character of the discovery process,”
11 courts in Washington are given “substantial latitude to fashion protective orders” that balance the
12 plaintiff’s desire for disclosure against the “harmful side effects” of discovery, including the
13 potential for “undue burden or expense.” *Kramer*, 62 Wash. App. at 556; *see also* Civil Rule
14 26(c) (a court “may make any order which justice requires to protect a party. . . from annoyance,
15 embarrassment, oppression, or undue burden or expense”). Accordingly, this Court has broad
16 discretion to stay discovery in this case.

17 Discovery in this case is premature. Additionally, Plaintiffs are attempting to use
18 discovery in this case to avoid having to wait for discovery to start in the federal case. As there
19 is no need for discovery in this case before the motion to dismiss is resolved, and in light of the
20 undue burden and expense the proposed discovery would impose on Judge Dodge at this stage in
21 the litigation, the Court should stay discovery pending resolution of the motion to dismiss.

22 **A. Discovery is Premature Because This Court Has Not Yet Ruled on the**
23 **Pending Motion to Dismiss.**

24 “It is sounder practice to determine whether there is any reasonable likelihood that
25 plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.”
26 *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987); *see also Williams*

1 v. *Sampson*, C17-0092-JCC, 2017 WL 1330502, slip op. at *2 (W.D. Wash. Apr. 11, 2017)
2 (finding it “appropriate to stay discovery, [g]iven the early stage of this case, the nature of the
3 arguments raised in the dispositive motions, and the fact that the dispositive motions have
4 already noted”); *Karen L. v. State Dep’t of Health & Soc. Servs., Div. of Family & Youth Servs.*,
5 953 P.2d 871, 879 (Alaska 1998) (trial court did not abuse its discretion in granting government
6 officials’ motions to stay discovery pending resolution of their motion for summary judgment
7 based on quasi-judicial immunity).

8 Plaintiffs have served Judge Dodge with very broad and burdensome discovery in the
9 form of 26 requests for production and 2 interrogatories. Meanwhile, there is a motion to
10 dismiss pending in this Court. As the Court acknowledged during the motion to dismiss hearing,
11 Judge Dodge’s pending motion to dismiss depends largely on the issue of jurisdiction. Smith
12 Decl., Ex. C at 4 (“In this case my decision will be . . . based on whether or not the Court has
13 authority to hear these matters or whether judicial immunity deprives the Court of that
14 authority.”)). As judicial immunity is an absolute bar to liability, if granted, Plaintiffs’ claims
15 will be dismissed in their entirety. *Lallas v. Skagit Cty.*, 144 Wash. App. 114, 117, 182 P.3d 443,
16 445 (2008), *aff’d*, 167 Wash.2d 861, 225 P.3d 910 (2009).

17 Discovery should therefore not proceed until the Court has the opportunity to resolve the
18 question of whether judicial immunity bars the claims against Judge Dodge. To require
19 otherwise would impose the burdens of litigation on an individual that this Court may determine
20 should not have been a party to this action in the first place. The Court should stay discovery
21 pending resolution of Judge Dodge’s motion to dismiss.

22 **B. Plaintiffs Are Using This Case to Circumvent the Limitations Imposed in the**
23 **Federal Case by FRCP 26.**

24 Pursuant to FRCP 26(d), “[a] party may not seek discovery from any source before the
25 parties have conferred as required by Rule 26(f).” A status conference is currently scheduled in
26 the federal case for June 13, 2017 to satisfy this requirement. Smith Decl., ¶4. Thus, the parties
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1 are not permitted to propound discovery in the federal case until after June 13, 2017. In an
2 attempt at an end-run around this rule, Plaintiffs have served discovery in *this* case, transparently
3 seeking information to use in the federal case. Plaintiffs should not be permitted to evade the
4 limitations that Federal Rule 26 was designed to impose by issuing discovery in this case.

5 Plaintiffs are clearly hoping to glean information in this case for use in the federal case.
6 This is evident from the content of the interrogatories and requests for production. For example,
7 in Judge Dodge's motion for summary judgment, he argues that he did not knowingly act
8 without jurisdiction, as required to abrogate judicial immunity. *Id.*, Ex. A at 14-17. In support
9 of this, Judge Dodge notes that as recently as April 2017, the Office of Justice Services division
10 of the Bureau of Indian Affairs, through Court Consultant Karen Gottlieb, had acknowledged the
11 Nooksack Tribal Court as legitimate. *Id.* at 16-17. Plaintiffs did not mention the Office of
12 Justice Services or Ms. Gottlieb in their Complaint for either case, nor was it discussed in Judge
13 Dodge's earlier motions to dismiss. *See generally* Complaint; Ex. D to Decl. Dodge in Supp. of
14 Mot. to Dismiss (Mar. 9, 2017); Pltf's Resp. to Dodge's Notice of Decision, Second Amended
15 Complaint (May 3, 2017). The motion for summary judgment in the federal case is the first time
16 this argument was made and these persons were named.

17 Yet, when Plaintiffs served their discovery requests in this case, the day after Judge
18 Dodge's motion for summary judgment was filed in the federal case, they included the following
19 requests for production:

20 **Request for Production No. 18:** Produce any and all documents that you sent,
21 received or created after April 29, 2016, which in any way pertain to, mention, or
22 discuss the Tribal Court review conducted by the Bureau of Indian Affairs Office
of Justice Services in 2016 and 2017.

23 **Request for Production No. 24:** Produce any and all correspondence, including
24 emails, text messages and letters, you sent to or received from Bureau of Indian
Affairs Court Consultant Karen Gottlieb after April 29, 2016.

25 Smith Decl., Ex. B at 8-9. These requests have nothing to do with *this* case. Similarly, Plaintiffs
26 amended their complaint in the federal case to allege that Judge Dodge knew that he lacked
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jurisdiction by having read the Indian law blog “Turtle Talk”, which purportedly published communications from AS-IA Roberts pertaining to the Nooksack Tribal Council. *See* Pltf’s Resp. to Dodge’s Notice of Decision, Second Amended Complaint, ¶ 93 (May 3, 2017). Judge Dodge has disputed any knowledge—and his readership of the blog—in his motion for summary judgment. Smith Decl., Ex. A at 16, n. 3. Despite Turtle Talk not being mentioned in Plaintiffs’ complaint in this case, they issued the following request for production:

Request for Production No. 25: Produce any and all documents that you sent, received, created or printed by way of Michigan State University College of Law’s Turtle Talk Blog after April 29, 2016, which in any way pertain to, mention, or discuss the Nooksack Tribe.

Id., Ex. B at 9. It is no coincidence that Plaintiffs’ discovery requests seek documents which directly relate to issues of dispute in the federal case—issues which only surfaced as of May 17, 2017. Plaintiffs should not be allowed to use this Court to end-run the Federal discovery rules.

Plaintiffs are impatient to find facts to support their legal claims and, in the process, are attempting to use this Court to bypass the Federal Court’s scheduling order. This Court should not countenance this disregard for procedure and should not reward it by allowing Plaintiffs to sidestep the restrictions outlined in Federal Rule 26. If their claims are not dismissed, Plaintiffs will have the opportunity to engage in discovery just as every party to a lawsuit has. They made their decision to split their claims in two forums, and now they must live with that choice. They should not be permitted a shortcut. Accordingly, this Court should stay discovery pending the resolution of Judge Dodge’s motion to dismiss.

V. CONCLUSION

For the foregoing reasons, Judge Dodge respectfully requests that the Court enter his [Proposed] Order and stay discovery until resolution of Judge Dodge’s pending motion to dismiss is decided.

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1 DATED this 25th day of May, 2017.

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14 *Raymond G. Dodge, Jr.*

CERTIFICATE OF SERVICE

I certify that on May 25, 2017, I caused to have served a true and correct copy of
DEFENDANT CHIEF JUDGE RAYMOND G. DODGE JR.'S MOTION TO STAY
DISCOVERY PENDING RESOLUTION OF MOTION TO DISMISS, on the following by
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DATED this 25 day of May, 2017.

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By: _____

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_____ E-Service (via the Clerk)
_____ Hand-Delivery
X U.S. Mail, Postage Prepaid
X Email
_____ Facsimile

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_____ Hand-Delivery
X U.S. Mail, Postage Prepaid
X Email
_____ Facsimile