

Honorable John C. Coughenour

**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 MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT
THEREOF**

**NOTE ON MOTION CALENDAR:
JUNE 9, 2017**

Defendant Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr. ("Judge Dodge"), pursuant to Fed. R. Civ. P. 56, respectfully moves the Court to enter judgment in his favor on all claims made in the Second Amended Complaint (Dkt. #64). Summary judgment is warranted as there are no genuine material facts in dispute that Judge Dodge: (1) is entitled to judicial immunity and (2) did not commit a violation of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). This Motion is supported by the Memorandum in Support below,

as well as the Declarations of Raymond G. Dodge, Jr. and Betty Leathers, and the [Proposed] Order filed herewith.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Second Amended Complaint tells an incredible tale of a holdover government and a vast conspiracy involving numerous Tribal departments to disenroll Plaintiffs from the Nooksack Indian Tribe. But the truth—and Plaintiffs’ claims for relief—tell a very different story that is far less worthy of a media sound bite.

When Plaintiffs’ fantastic allegations are reduced to just the facts which support their legal claims, it becomes clear that the only allegedly “fraudulent” activities by Judge Dodge were sending four legal orders to Plaintiffs arising from unlawful detainer actions. These eviction orders, which Plaintiffs use to sweep Judge Dodge into the alleged conspiracy, simply represent a judicial officer following Tribal law. In fact, as recently as April 2017, the U.S. Bureau of Indian Affairs (“BIA”) recognized the independent and legitimate functioning of the Nooksack Tribal Court. As Chief Judge of the Court, with jurisdiction over matters before it, Judge Dodge retains judicial immunity for the eviction orders targeted by Plaintiffs.

Even in the absence of immunity, there is nothing fraudulent about the eviction orders, as required for Plaintiffs’ RICO claims. Judge Dodge had nothing to do with any of the disenrollment decisions that lie at the heart of Plaintiffs’ claimed conspiracy. And, he had no intent to defraud Plaintiffs. This case is nothing but a misuse of RICO – “RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff.” *Oscar v. Univ. Students Co-Op. Assoc.*, 965 F.2d 783, 786 (9th Cir. 1992) (abrogated on other grounds by *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005). In the absence of evidence of fraud in support of RICO, and as explained more fully below, summary judgment is warranted for Judge Dodge.

FACTS

A. Judge Dodge's Service as Chief Judge

Raymond Dodge is the current Chief Judge of the Nooksack Tribal Court. Decl. of Raymond Dodge in Supp. of Mot. for Summ. J., ¶ 1 ("Dodge Decl."). The Nooksack Tribal Court was established in 1980 by the Nooksack Tribal Council in accordance with the authority vested in it by the Constitution and Bylaws of the Nooksack Indian Tribe. Although the Chief Judge is appointed by the Nooksack Tribal Council, the Nooksack Tribal Court exists and functions separate and apart from the Tribal Council. Dodge Decl., ¶ 4.

Judge Dodge was appointed as Chief Judge effective June 27, 2016 by Tribal Resolution #16-92. *Id.*, ¶ 3. As Chief Judge, his duties and responsibilities include presiding over assigned cases, analyzing facts and legal issues, and preparing and issuing written orders, judgments, search and arrest warrants. *Id.*, ¶ 5. Consistent with these duties, Judge Dodge has heard and decided an estimated 200 cases in Nooksack Tribal Court, including both civil and criminal matters. *Id.* Many of these orders have been granted full faith and credit by the Whatcom County Superior Court. *Id.*

Judge Dodge does not have and has never had the authority to direct the Nooksack Tribal Court Clerks to accept or decline to accept any pleadings or other documents filed in Nooksack Tribal Court. *Id.*, ¶ 8; *see also* Decl. of Betty Leathers, ¶ 5 (filed herewith). The Tribal Court Clerks report to the General Manager of the Tribe, and accept or reject pleadings based on compliance with Nooksack Tribal law. *Id.* Judge Dodge has no advance notice of which pleadings or other documents are rejected. *Id.*

Prior to being appointed Chief Judge, Judge Dodge was employed by the Tribe as its Senior Tribal Attorney from August 2015 to April 29, 2016. *Id.*, ¶ 6. As the Senior Tribal Attorney, he was responsible for providing general legal advice to the Nooksack Tribal Council, as well as representing the Tribe in Tribal, state, and federal courts and hearings. *Id.*, ¶ 7. Prior

1 to employment with the Tribe, Judge Dodge acted as an Attorney General for the Quinault Indian
2 Nation. *Id.*, ¶ 2. He has been a licensed attorney since 1986. *Id.*, ¶ 1.

3 **B. Enrollment Dispute**

4 The Tribe has been embroiled in a dispute over Tribal enrollment since approximately
5 2012, three years before Judge Dodge was employed by the Tribe. *Id.*, ¶ 9. As a long-time
6 attorney for Indian tribes, Judge Dodge has come to understand that intratribal political discord
7 may, at times, be expected. *Id.*, ¶ 10. Although Judge Dodge has been generally aware of the
8 membership dispute since beginning his employment, he has tried to avoid becoming involved,
9 except as required by his role representing the Tribe as one of its attorneys. *Id.*, ¶ 11. In his time
10 as Chief Judge, and as is relevant to the claims against him, Judge Dodge has not issued any
11 decision or order which denies Nooksack Tribal membership to any person, nor did he rely on
12 enrollment status as a basis for the eviction orders issued pertaining to Plaintiffs Rabang and
13 Oshiro. *Id.*

14 **C. Oshiro Eviction Action**

15 In January and February 2016, respectively, the Nooksack Tribe's Indian Housing
16 Authority ("NIHA") provided two notices of delinquency to Plaintiff Elizabeth Oshiro ("Plaintiff
17 Oshiro") *Id.*, ¶ 12, Ex. A. By March 15, 2016, NIHA issued a Notice of Eviction to Plaintiff
18 Oshiro, notifying her that she would have 14 days to either cure the balance or vacate the
19 premises. *Id.*, ¶ 14, Ex. B.

20 On June 9, 2016—after Judge Dodge had resigned as Senior Tribal Attorney and before
21 his appointment to the Court—the NIHA served a proposed Writ of Restitution and Order of
22 Eviction against Plaintiff Oshiro in Tribal Court. *Id.*, ¶ 16, Ex. C. On July 8, 2016, the
23 Nooksack Tribal Court issued a Notice of Hearing to Plaintiff Oshiro. *Id.*, ¶ 18. The Notice
24 indicated that a hearing would be held on July 18, 2016, and instructed Plaintiff Oshiro to "bring
25 any information you may want to present to the court on your behalf." *Id.* The hearing was
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subsequently rescheduled for July 20, 2016, and Plaintiff Oshiro was notified of this change. *Id.*; Dkt. #31-1, Decl. Dodge in Supp. Mot. to Dismiss, Feb. 27, 2017.¹

On July 20, 2016, although the hearing was held as scheduled, Plaintiff Oshiro did not appear. *Id.*, ¶ 19. Further, the NIHA presented evidence that Plaintiff Oshiro was in arrears on rent in the amount of \$1,329.00, owed \$360.10 in other outstanding amounts plus \$252.34 in late fees. *Id.*, ¶ 20. NIHA also presented evidence that despite proper notification, Plaintiff Oshiro had failed to keep or perform certain conditions or covenants of the lease under which the property was held. *Id.* In light of this evidence and her failure to appear, Judge Dodge had little choice but to enter judgment against her, as is standard practice when a party fails to appear. *Id.*, ¶ 21. Judge Dodge accordingly issued a notice for Plaintiff Oshiro's eviction on July 20, 2016. *Id.*; Dkt. #31-2, Decl. Dodge, Feb. 27, 2017.

D. Rabang Eviction Action

On August 19, 2016, NIHA issued a Notice of Termination/ Notice to Vacate to Plaintiff Rabang, indicating her Mutual Help Occupancy Agreement and participation in the Mutual Help Program would be terminated effective September 18, 2016. *Id.*, ¶ 22, Ex. D.

When she failed to vacate the premises, a 14 Day Notice to Vacate was issued to Plaintiff Rabang on October 3, 2016. *Id.*, ¶ 24, Ex. E. Subsequently, on November 2, 2016, Nooksack Tribal Attorney (Defendant Armstrong) filed a Complaint for Unlawful Detainer. *Id.*, ¶ 26, Ex. F. Although a trial was scheduled to be held on November 9, 2016, Plaintiff Rabang appeared pro se. Judge Dodge granted Plaintiff Rabang a continuance to obtain counsel. *Id.*, ¶ 28. He also provided her with the names of two attorneys at the Northwest Justice Project who had recently successfully defended a Nooksack Tribal member in an eviction proceeding. *Id.* However, as of December 14, 2016, Plaintiff Rabang had not retained counsel. *Id.* Due to the Tribe's Unlawful Detainer procedural rules requiring a trial date to be held "not less than, nor

¹ Defendant Judge Dodge hereby respectfully provides reference to materials previously submitted to the Court, so as to avoid duplication in the record. LCR 10(e)(6).

1 more than 45 days from the date of service of the summons and complaint,” and counsel for
2 NIHA objecting to additional continuances, Judge Dodge conducted an unlawful detainer
3 hearing on December 14, 2016. *Id.*, ¶ 29.

4 During the trial, the Court inquired as to whether either party possessed a copy of the
5 executed rental agreement. *Id.*, ¶ 30. Plaintiff Rabang stated she did not have a signed copy, and
6 the agreement submitted to the Court by NIHA was not signed. *Id.* Without evidence of a
7 signed lease, the Court found that NIHA could require Plaintiff Rabang to vacate upon notice.
8 *Id.*, ¶ 31. As Plaintiff Rabang had failed to vacate the premises, the Court found her guilty of
9 unlawful detainer and issued a writ of restitution. *Id.*, ¶ 32, Ex. G.

10 **E. Communications with the Department of the Interior**

11 Beginning in or around April 2016, the Tribe expressed interest in participating in an
12 assessment of the Nooksack Tribal Court by the BIA Office of Justice Services. *Id.*, ¶ 35, Ex. H.
13 The assessment included document gathering, an initial visit, an on-site assessment, and
14 presentation of findings and recommendations by the BIA Court Consultant. *Id.*, ¶ 36. On
15 April 18, 2016, the Tribe passed Resolution #16-49, authorizing participation in the court
16 assessment. *Id.*, ¶ 37, Ex. I. The BIA Office of Justice Services began its assessment in
17 June 2016. *Id.*, ¶ 38.

18 On October 17, 2016, the Assistant Secretary of Indian Affairs (“AS-IA Roberts”) issued
19 a letter to Tribal Chairman Robert Kelly, Jr., notifying him that the Tribal Council “lack[ed] a
20 quorum to conduct tribal business as required by the Nooksack Tribe’s [] Constitution and
21 Bylaws” and that “the Department [would] only recognize those actions taken by the Council
22 prior to March 24, 2016 . . .” *Id.*, ¶ 39; Dkt. #64, ¶ 69. Although the letter noted that “recent
23 actions . . . to enjoin the authority of the Northwest Intertribal Court System” would not be
24 recognized by the Department, the letter did not address the Nooksack Tribal Court, Judge
25 Dodge, or either of the eviction actions. Dkt. #64, ¶ 69. Judge Dodge was not an addressee of
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1 the letter, nor was he provided a copy of the letter by the Nooksack Tribal Court Clerk or any
2 other person. Dodge Decl., ¶ 40; Leathers Decl. ¶ 11.

3 On November 14, 2016, AS-IA Roberts issued a second letter to Chairman Kelly. *Id.*,
4 ¶ 41. This letter pertained specifically to the BIA's directive to the Tribal Council to carry out
5 elections. *Id.*, ¶ 42; Dkt. #64, ¶ 76. Again, this letter made no mention of Judge Dodge, the
6 Tribal Court (other than with regard to Tribal elections), or Plaintiffs' eviction matters. Dodge
7 Decl., ¶ 42. Again, Judge Dodge was not an addressee of the letter. *Id.*

8 On December 1, 2016, the BIA sent a letter to the Nooksack Chief of Staff, approving the
9 Nooksack Tribal Court with "one time funding" to be used for the Tribal Court Clerk's training,
10 in light of its ongoing court assessment. *Id.*, ¶ 43, Ex. J.

11 On December 23, 2016, AS-IA Roberts issued a third letter to Chairman Kelly. Dkt. #64,
12 ¶ 91. Unlike the previous two notices, in this letter AS-IA Roberts addressed the eviction
13 matters, noting that "[i]t has come to the Department's attention that orders of eviction may have
14 been recently issued to be served by the Nooksack Chief of Police or could be issued and served
15 in the near future. It appears that such orders are based on actions taken by the Tribal Council
16 after March 24, 2016. Therefore . . . those orders are invalid and the Department does not
17 recognize them as lawful . . ." *Id.* However, when Judge Dodge eventually learned of and read
18 this letter, he assumed it did not apply to him, because it referred only to actions taken "*by the*
19 *Tribal Council.*" *Id.*; Dodge Decl., ¶ 46 (emphasis added).

20 More importantly, by December 23, 2016, when the letter was issued, Judge Dodge had
21 already issued the Order Following Show Cause Hearing, the final order in Plaintiff Rabang's
22 case. *Id.*, ¶ 45. Similarly, the default order against Plaintiff Oshiro had been issued months
23 earlier, before any of the letters from AS-IA Roberts had been written or received. *Id.*, ¶ 48.
24 Although Plaintiff Oshiro had already been evicted, in light of the dispute, the eviction order
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1 against Plaintiff Rabang was not executed. *Id.*, ¶ 49. Plaintiff Rabang has never been evicted
 2 from her home and is believed to reside there at this time. *Id.*, ¶ 50.

3 On January 25, 2017, BIA Court Consultant Karen Gottlieb sent an e-mail to Judge
 4 Dodge, explaining that “[t]he Nooksack report is finished except for some gaps,” and providing a
 5 list of questions for response. *Id.*, ¶ 51, Ex. K. Ms. Gottlieb noted that although “[i]t might look
 6 from the questions that we found a lot of problems, that wasn’t true, I think the report is very
 7 positive about the Tribal Court’s operations.” *Id.*, ¶ 52, Ex. K. She also stated that although she
 8 was aware of them, “[e]xcept for one sentence, the enrollment issues aren’t in the report at
 9 all . . .” *Id.* On April 4, 2017, the BIA notified the Tribe that it had completed the assessment of
 10 the Nooksack Indian Tribe Tribal Court system and would present them with findings,
 11 recommendations, and strategic action steps in a future meeting. *Id.*, ¶ 54, Ex. L. The BIA noted
 12 that the Tribal Justice Support Directorate “look[ed] forward to the discussions and stand[s]
 13 ready to work with you.” *Id.*, Ex. L. Among others, the BIA Regional Director was copied on
 14 this communication. *Id.*

15 **F. Plaintiffs’ Lawsuit Against Dodge and Other Defendants**

16 On February 2, 2017, Plaintiffs in this case filed an amended complaint against multiple
 17 Nooksack government officials and employees, including Judge Dodge. Dkt. #7. On
 18 February 2, 2017, Judge Dodge moved to dismiss the action against him. Dkt. #30. On March 2,
 19 2017, the remaining defendants also moved to dismiss the claims against them. Dkt. #34. On
 20 April 26, 2017, this Court dismissed plaintiffs’ money laundering claim and all claims against
 21 Defendant Armstrong. Dkt. #62. On May 2, 2017, this Court granted Judge Dodge’s motion to
 22 dismiss all claims against him on the basis of judicial immunity. Following that dismissal,
 23 Plaintiffs immediately filed a second amended complaint, again alleging violations of RICO
 24 against multiple defendants including Judge Dodge. Dkt. #64. Judge Dodge is also a named
 25 defendant in a state court action alleging tort claims arising out of the same eviction orders at
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1 issue in this case. *Rabang, et al. v. Gilliland, et al.*, No. 17-2-00163-1 (Whatcom County
2 Superior Court). Judge Dodge now moves for summary judgment on all claims against him.

3 STANDARD OF REVIEW

4 Summary judgment is appropriate when “there is no genuine issue as to any material fact
5 and . . . the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2). An issue
6 is “genuine” if “a reasonable jury could return a verdict for the nonmoving party” and a fact is
7 material if it “might affect the outcome of the suit under the governing law.” *Anderson v.*
8 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The evidence is viewed in the light most
9 favorable to the non-moving party. *Id.* “[S]ummary judgment should be granted where the
10 nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its
11 favor.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). It should also
12 be granted where there is a “complete failure of proof concerning an essential element of the
13 non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “The mere
14 existence of a scintilla of evidence in support of the non-moving party’s position is not
15 sufficient” to prevent summary judgment. *Triton Energy Corp.*, 68 F.3d at 1221.

16 ARGUMENT

17 **A. Judge Dodge Retains Judicial Immunity From Suit**

18 Judges have long enjoyed absolute immunity from personal capacity claims and liability
19 in damages for their judicial or adjudicatory acts. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d
20 1140, 1156 (10th Cir. 2011); *Forrester v. White*, 484 U.S. 219, 219 (1988) (judges have absolute
21 immunity in order to protect judicial independence). Like other forms of official immunity,
22 judicial immunity is an immunity from suit, not just from ultimate assessment of damages.
23 *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Tribal court judges are entitled to the same absolute
24 judicial immunity that shields state and federal court judges. *Penn v. United States*, 335 F.3d
25 786, 789 (8th Cir. 2003). There are two limited exceptions to judicial immunity. *Mireles*, 502

1 U.S. at 11. First, a judge is not immune from liability for nonjudicial actions (i.e., actions not
2 taken in a judicial capacity). Second, a judge is not immune from actions, though judicial in
3 nature, where they are taken in the “complete absence of all jurisdiction.” *Mireles*, 502 U.S.
4 at 12.

5 In granting Judge Dodge’s motion to dismiss, this Court held that Plaintiffs failed to
6 sufficiently plead facts which would create either of the two exceptions necessary to abrogate
7 Judge Dodge’s judicial immunity for lack of jurisdiction. Dkt. #63. First, because Plaintiffs
8 failed to plead that Judge Dodge had actual knowledge that he lacked jurisdiction; and second,
9 because Plaintiff could provide no authority to support that the decisions from AS-IA Roberts
10 rose to the level of a “clearly valid statute or case law,” as required to create an exception to
11 judicial immunity. Dkt. #63 at 2–3.

12 In an attempt at quick-fix, Plaintiffs hastily amended their complaint again to include a
13 number of additional allegations. These allegations include that Judge Dodge acted in
14 furtherance of the RICO violations prior to his appointment as Chief Judge, and that he had
15 actual knowledge of AS-IA Roberts’ decisions before issuing the disputed orders in the eviction
16 actions. Dkt. #64, ¶¶ 35, 71, 77, 92, 93. While these supplemental allegations may be sufficient
17 to withstand a motion to dismiss under Rule 12(b), they are baseless claims which do not survive
18 summary judgment. There is no dispute of material fact that Judge Dodge acted in a judicial
19 capacity and that he did not act in the clear absence of jurisdiction. Judge Dodge remains
20 immune from suit.

21 **1. Judge Dodge Was Acting in His Judicial Capacity When He Issued the**
22 **Disputed Eviction Orders**

23 Among Plaintiffs’ new allegations are that Judge Dodge, “in concert with Holdover
24 Council Defendants, commenced their scheme to defraud Plaintiffs and personally enrich
25 themselves” as early as December 2015. Dkt. #64, ¶ 35. This is a transparent effort to allege
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wrongdoing against Judge Dodge for “nonjudicial” actions—i.e., actions taken while he was acting as Senior Tribal Attorney—so that judicial immunity will not apply. However, Plaintiffs’ attempt to expand the timing of the allegedly unlawful activity to include acts which occurred prior to his judicial appointment fails for two reasons. First, Plaintiffs are constrained by the heightened pleading standards of Rule 9(b) to the specific circumstances listed in the Second Amended Complaint alleged to constituted fraud. When Plaintiffs are so constrained, there are only four instances of alleged mail and/or wire fraud which Judge Dodge is alleged to have engaged in, each of which occurred while Dodge was acting as Chief Judge. Second, each alleged act of fraud is a routine judicial task well within the scope of Judge Dodge’s judicial capacity. Plaintiffs, therefore, cannot establish that Judge Dodge was acting in a nonjudicial capacity sufficient to abrogate the protections of judicial immunity.

a. Plaintiffs Are Limited by Rule 9(b) to the Actions Specifically Alleged Against Judge Dodge, All of Which Occurred After Dodge Was Appointed as Judge

Plaintiffs make a series of new factual allegations in their Second Amended Complaint about actions taken by Judge Dodge prior to June 2016, when he was appointed as Chief Judge. Dkt. #64, *passim*. These allegations purport to show that Judge Dodge was part of an ongoing fraudulent scheme to defraud Plaintiffs of their Tribal membership while employed as Senior Tribal Attorney, continuing into his role as Chief Judge. Plaintiffs then allege three claims for relief under three sub-sections of RICO: acquiring control of an enterprise; conducting an enterprise’s affairs; and conspiring to conduct an enterprise’s affairs, each through a pattern of racketeering activity. Each of these alleged RICO violations depends on the same predicate criminal acts: mail and wire fraud. Dkt. #64, ¶¶ 98–157.

The heightened pleading requirement of Rule 9(b) applies to fraud-based predicate acts alleged as the basis of a RICO claim. *Perkumpulan Investor Crisis Ctr. Dressel-WBG v. Regal Fin. Bancorp, Inc.*, 781 F. Supp. 2d 1098, 1108 (W.D. Wash. 2011) (Coughenour, J.). Rule 9(b)

mandates that a party alleging fraud “must state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). A plaintiff must “state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.” *Perkumpulan*, 781 F. Supp. 2d at 1108. Courts have been particularly sensitive to Rule 9(b)’s pleading requirements in RICO cases in which the predicate acts are mail fraud and wire fraud, and have further required specific allegations as to which defendant caused what to be mailed (or made which telephone calls), and when and how each mailing (or telephone call) furthered the fraudulent scheme. *Gotham Print, Inc. v. Am. Speedy Printing Centers, Inc.*, 863 F. Supp. 447, 458 (E.D. Mich. 1994)) (emphasis original).

Here, Plaintiffs allege that defendants, including Judge Dodge, “used wire and mail communications in furtherance of their scheme to defraud Plaintiffs, in violation of 18 U.S.C. §§ 1341 and 1343, including but not limited to,” 23 enumerated instances. Dkt. #64, ¶ 113. Of those instances, only four allege wrongdoing by Judge Dodge. He is specifically alleged to have committed mail and/or wire fraud by: (1) mailing an “Amended Notice of Hearing” to Plaintiff Oshiro on July 11, 2016; (2) mailing an “eviction order” to Plaintiff Oshiro on July 20, 2016; (3) mailing or wiring Defendant Romero a copy of an eviction order for Plaintiff Oshiro on July 27, 2016; and (4) mailing an “Order Following Show Cause Hearing” to Plaintiff Rabang on December 23, 2016. Dkt. #64, ¶¶ 113(h)–(j), (v). Each of these acts occurred, by Plaintiffs’ own allegations, between July 11, 2016 and December 23, 2016—*after* Judge Dodge’s June 27, 2016 appointment as Chief Judge. In other words, while he was acting as a judge.

Plaintiffs allege no other acts against Judge Dodge with the requisite specificity to meet the Rule 9(b) pleading standard. Contrary to their stated caveat, they are in fact “limited to” the predicate acts alleged, and may not rely on other acts which are not alleged with particularity therein. Accordingly, in analyzing the application of judicial immunity to the RICO claims, the

1 Court should examine only whether the four instances of alleged mail and wire fraud outlined
2 above occurred within the scope of Judge Dodge's judicial capacity.

3 ***b. The Alleged Mail and Wire Fraud Were Judicial in Nature***

4 To determine whether an act taken by a judge is "judicial" for purposes of conferring
5 judicial immunity, courts look at factors which relate to the nature of the act itself (whether it is a
6 function normally performed by a judge) and the expectation of the parties (whether they dealt
7 with the judge in his judicial capacity). *Stump*, 435 U.S. at 350. The court must look beyond
8 whether the action he took was in error, was done maliciously, or was in excess of his authority.
9 *Gross v. Rell*, 585 F.3d 72, 83 (2d Cir. 2009). Courts have found conduct to be nonjudicial in
10 nature and declined to find judicial immunity in only rare circumstances. *Archie v. Lanier*, 95
11 F.3d 438 (6th Cir. 1996) (no judicial immunity where a judge stalked and sexually assaulted a
12 litigant); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (justice of the peace accused of
13 forcibly removing a man from his courtroom and physically assaulting him not absolutely
14 immune).

15 Each of the acts Judge Dodge is alleged to have taken is an objectively unremarkable,
16 commonly executed judicial task well within the scope of a Tribal Court Judge's authority.
17 Dodge Decl., ¶ 5. Indeed, there are few actions more routinely judicial than issuing orders. *See*
18 *Jenkins v. Kerry*, 928 F.Supp.2d 122, 134 (D.D.C. 2013) ("[A] judge acting in his or her judicial
19 capacity— i.e., performing a function normally performed by a judge—is immune from suit on
20 all judicial acts.") (citations and quotations omitted). Not only is issuing orders one of Judge
21 Dodge's primary responsibilities as Chief Judge, but issuing orders and legal decisions is in fact
22 an *exclusively* judicial function within the Tribal Court. Thus, there is no dispute of material fact
23 that Judge Dodge was acting in a judicial capacity when he issued the four orders at issue.

2. **Judge Dodge Did Not Act in the Clear Absence of Jurisdiction Because He Did Not Knowingly Act Without Jurisdiction**

A judicial officer acts in the clear absence of jurisdiction only if he “knows that he lacks jurisdiction, or acts despite a clearly valid statute or case law expressly depriving him of jurisdiction.” *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985) (citing *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980)). The scope of a judge’s jurisdiction is construed broadly where judicial immunity is at stake. *Penn*, 335 F.3d at 789–90. Thus, courts have held that judges enjoy judicial immunity even when there are procedural defects in their appointment where they are “discharging the duties of that position under the color of authority.” *White by Swafford v. Gerbitz*, 892 F.2d 457, 462 (6th Cir. 1989); *see also Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994).

Plaintiffs newly allege that Judge Dodge had “actual knowledge” of each of the three letters from AS-IA Roberts shortly after they were each issued, such that he knew he lacked jurisdiction before issuing the disputed orders in the eviction matters. Dkt. #64 ¶¶ 71, 77, 92, 93. However, Plaintiffs can offer no support for the proposition that Judge Dodge knew of the letters before issuing the orders, other than implying that knowledge should be imputed to him through other sources. There is no support for Plaintiffs’ assertion that they provided AS-IA Roberts’ letter to the Court Clerk, and even if they had, that does not establish that Judge Dodge had **actual knowledge** of the letter. Nor does the existence of an internet blog concerning a non-final communication of a Department of Interior Official establish actual knowledge.

Plaintiffs cannot show that Judge Dodge knew of the communications from AS-IA Roberts simply by alleging that he may have, or should have, known of them. Instead, “to deprive a judicial officer of absolute immunity, he or she must *know* facts which place him or her on notice of the clear absence of subject matter jurisdiction.” *Fleming v. Dowdell*, 434 F. Supp. 2d 1138, 1157 (M.D. Ala. 2005) (citing *Dykes v. Hosemann*, 743 F.2d 1488, 1497 (11th

1 Cir.1984) (emphasis original). Judge Dodge had no notice of any such facts, and did not act in
 2 the clear absence of jurisdiction. Additionally, as previously found by this Court, the decisions
 3 do not rise to the level of a clearly valid statute or case law.²

4 Judge Dodge attests that when he finally learned of AS-IA Roberts' letters, he assumed
 5 that they did not apply to him. Dodge Decl., ¶ 46. After all, the BIA was in the process of
 6 conducting an assessment of the Tribal Court, during which the BIA continually recognized the
 7 legitimacy of the Tribal Court. *Id.*, ¶¶ 35–38, 51–54; Exs. J, K, L.

8 There is no material factual dispute that Judge Dodge did not knowingly act in the
 9 absence of jurisdiction as required to create an exception to the absolute judicial immunity
 10 enjoyed by Judge Dodge. Summary judgment in Judge Dodge's favor is warranted.

11 ***a. Judge Dodge Did Not Have Actual Knowledge of BIA's Letters Until After***
 12 ***Issuing the Orders in Question***

13 Plaintiffs allege that Judge Dodge had actual knowledge of each of the three letters from
 14 the BIA at the time or shortly after they were issued, and that he therefore issued the orders when
 15 he knowingly lacked jurisdiction. Dkt. #64, ¶¶ 71, 77, 92–93. But there are simply no facts
 16 which support these assertions.

17 First, Plaintiffs contend that they provided a copy of AS-IA Roberts's letter to Judge
 18 Dodge "via the Nooksack Tribal Court Clerk" on October 18, 2016. Dkt. #64, ¶ 71. But the
 19 Tribal Court Clerk never received the letter, nor did she provide a copy of it to Judge Dodge.
 20 (Dodge Decl., ¶ 40; Leathers Decl., ¶11). In fact, three of the allegedly fraudulent activities (the
 21 two orders in Plaintiff Oshiro's case and the mailing or wiring Defendant Romero a copy of an
 22 eviction order for Plaintiff Oshiro) supposedly occurred in July 2016, nearly *three months*
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24 ² In granting Judge Dodge's earlier motion to dismiss, this Court declined to adopt the analogy that a final agency
 25 action rises to the level of clearly established case law and statutes for the purpose of creating an exception to
 26 absolute judicial immunity. (Dkt. #63 at 3). As the allegations surrounding the BIA communications have not
 27 changed, the Court's holding remains applicable and Judge Dodge maintains that the communications did not
 function as established case law or statute sufficient to except his judicial immunity.

1 *before* AS-IA Roberts' first letter was even issued. Dkt. #64, ¶¶ 71, 113(h)–(j). And, even if
 2 Plaintiffs had submitted a copy of the letter to the Tribal Court Clerk, it would at most establish
 3 implied or constructive knowledge, which is not the standard.³ Plaintiffs must show that Judge
 4 Dodge actually knew that he lacked jurisdiction – or had such knowledge by way of case law or
 5 statute—which they cannot do. *Rankin*, 633 F.2d at 849.

6 Plaintiffs also assert that Judge Dodge had actual knowledge of the November 14, 2016
 7 letter, but provide no facts to support this allegation. (Dkt. #64, ¶ 77). Plaintiffs finally contend
 8 that Judge Dodge had actual knowledge of AS-IA Roberts' third letter, which was issued on
 9 December 23, 2016. Dkt. #64, ¶ 92. Although Judge Dodge recalls learning of this letter
 10 sometime after it was issued, it was dated December 23, 2016: the day *after* he had issued the
 11 Order Following Show Cause Hearing in Plaintiff Rabang's eviction action. (Dkt. #31-3). Thus,
 12 even if he had understood AS-IA Roberts' letter to strip him of jurisdiction, he had already
 13 issued every one of the collaterally attacked orders. Dkt. #64, ¶¶ 113(h)–(j), (v).

14 ***b. As Recently as April 2017, the BIA Has Recognized the Tribal Court as***
 15 ***Legitimate***

16 When he eventually learned of the letters, Judge Dodge did not interpret any of them to
 17 apply to him. Dodge Decl., ¶ 46. The first two letters did not expressly deprive Judge Dodge or
 18 the Tribal Court of jurisdiction, but merely indicated that BIA would “only recognize those
 19 actions taken by the [Tribal] Council prior to March 24, 2016.” Dkt. #64, ¶¶ 69, 76. Only the
 20 December 23, 2016 letter specifically mentions the eviction orders, stating that the orders appear
 21 to be “based on actions taken by the Tribal Council after March 24, 2016.” *Id.*, ¶ 91. By that
 22 time, the last of the eviction orders had issued and, when Judge Dodge read the December 23
 23 letter, because the Nooksack Tribal Court was not discussed, he assumed the AS-IA's letters

24
 25 ³ Similarly, Plaintiffs allege that Judge Dodge had actual knowledge of all three letters from AS-IA Roberts as “an
 26 avid reader of the Michigan State University College of Law's Turtle Talk Blog.” (Dkt. #64, ¶ 93). In reality, since
 27 resigning as Senior Tribal Attorney, he rarely reads the blog, and is not on the mailing list to receive regular updates.
 Dodge Decl., ¶ 47.

1 related to the dispute surrounding disenrollment, with which he had never been involved. Dodge
2 Decl., ¶ 46.

3 Judge Dodge's understanding is further supported by other contemporaneous
4 communications with the BIA in relation to the Tribal Court Assessment, including the
5 December 1, 2016 letter from the BIA which approved funding for the Court. *Id.* ¶ 43; Ex. J.
6 Further, even *after* the December 23 letter was issued, the BIA Court Consultant finalized a
7 report which was, in her own words, "*very positive* about the Tribal Court's operations." *Id.*,
8 ¶ 52, Ex. K at 3 (emphasis added). Finally, Ms. Gottlieb addressed the enrollment dispute, but
9 appeared to dismiss any concerns by noting that "enrollment issues aren't in the report at all."
10 *Id.*, ¶ 52, Ex. K at 2. It was therefore reasonable for Judge Dodge to conclude that, because the
11 BIA was authorizing funding for the Court and issuing a favorable report as to its operations, it
12 acknowledged the legitimacy of the Court. *Id.*, Ex. J. Even as recently as April 4, 2017, the BIA
13 seemingly acknowledged the Court and Judge Dodge as the legitimate judicial entity of the
14 Nooksack Indian Tribe. *Id.*, Ex. L.

15 There is no material dispute of fact that Judge Dodge did not knowingly act in the
16 absence of jurisdiction. Judge Dodge retains absolute judicial immunity, and summary judgment
17 should issue in his favor.

18 **B. The RICO Claims Against Judge Dodge Must Be Dismissed Because There is No**
19 **Evidence of Fraud.**

20 The elements of a RICO violation require that a defendant "must participate in (1) the
21 conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of
22 racketeering activity or collection of unlawful debt." *Eclectic Properties East, LLC v. Marcus &*
23 *Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). "In addition, the conduct must be the
24 proximate cause of harm to the victim." *Id.* Further, "[t]he requirements of § 1962(c) must be
25 established as to each individual defendant." *Prime Partners IPA of Temecula v. Chaudhuri*,

2012 WL 1669726, *11 (C.D. Cal. 2012). Plaintiffs' claims fall under three subsections of RICO – acquiring control of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(b); conducting an enterprise's affairs through a pattern of racketeering activity, 18 U.S.C. § 1962(c); and conspiring to conduct an enterprise's affairs through a pattern of racketeering activity, 18 U.S.C. § 1962(d). To prove the existence of “a pattern of racketeering activity,” Plaintiffs must demonstrate multiple predicate criminal acts. *See* 18 U.S.C. § 1961(1). Although, as discussed above, Plaintiffs make a number of allegations against Judge Dodge, the only criminal acts alleged against him are the federal felonies of mail and wire fraud. Thus, Plaintiffs have the burden of showing that Judge Dodge committed acts “indictable” as these federal felonies. *See id.* Plaintiffs cannot meet their burden as a matter of law.

1. Judge Dodge Did Not Commit Mail or Wire Fraud

Mail and wire fraud are alleged as predicate acts in a “high percentage” of civil RICO claims. *Kiehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997). “The language of the mail-fraud statute is very broad, and concern has repeatedly been expressed that it not be given too vague and encompassing a scope by judicial interpretation.” *Emery v. Am. Gen. Finance, Inc.*, 71 F.3d 1343, 1346 (7th Cir. 1995). “Since it is a purely criminal statute . . . if a narrow interpretation is appropriate to meet the concern with breadth and vagueness it would have to apply to the invocation of the statute in this civil [RICO] suit.” *Id.* The language of the wire fraud statute is similarly broad.

The elements of felony mail and wire fraud are “(A) the formation of a scheme to defraud, (B) the use of the mails or wires in furtherance of that scheme, and (C) the specific intent to defraud.” *Eclectic Properties East, LLC*, 751 F.3d at 997. Proving the crimes requires demonstrating the existence of a scheme which was “reasonably calculated to deceive persons of ordinary prudence and comprehension.” *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir.

1 1984). There is no credible factual dispute that Judge Dodge did not commit acts “indictable” as
 2 these federal felonies.

3 Judge Dodge has never been part of a scheme to defraud Plaintiffs, and the only
 4 allegation of this alleged scheme relates to the underlying enrollment dispute. Dodge Decl.,
 5 ¶ 34; Dkt. #64, ¶ 152. However, the predicate acts alleged against Judge Dodge relate only to
 6 the eviction actions against Plaintiffs, the outcomes of which were not based on their enrollment
 7 status. Dodge Decl., ¶ 11. Second, Judge Dodge has never had the required specific intent to
 8 defraud Plaintiffs. Judge Dodge has merely fulfilled his role as Chief Judge, with his eviction
 9 rulings being used to falsely sweep him into the larger disenrollment dispute. *Id.*, ¶ 11.
 10 Importantly, the process leading to the eviction decisions and the decisions themselves were
 11 dictated by Tribal law and Plaintiffs’ own actions. *Id.*, ¶ 34. Plaintiffs’ displeasure with Judge
 12 Dodge’s rulings in their unlawful detainer actions does not create fraudulent acts. Summary
 13 judgment in favor of Judge Dodge is warranted.

14 *a. Judge Dodge Has Never Been Part of a Scheme to Defraud Plaintiffs, As He*
 15 *Has Had No Involvement in the Underlying Enrollment Dispute*

16 Plaintiffs allege that the so-called RICO Defendants committed mail and wire fraud
 17 because they “devised or intended to devise a scheme to defraud Plaintiffs of money, property,
 18 and other tribal, state, and federal benefits of monetary value *by depriving Plaintiffs of their*
 19 *Tribal membership* by means of false or fraudulent pretenses and representations.” Dkt. #64,
 20 ¶ 110 (emphasis added). But despite Plaintiffs’ best storytelling efforts, there was no grand
 21 scheme to defraud involving Judge Dodge. NIHA served the proposed Writ of Restitution and
 22 Order of Eviction against Plaintiff Oshiro three weeks before Judge Dodge was even appointed
 23 to the Nooksack Tribal Court. Dodge Decl., ¶¶ 3, 16 Ex. C. In fact, at the time NIHA began the
 24 eviction proceedings against Plaintiff Oshiro, Judge Dodge was not even employed by the
 25
 26
 27

1 Tribe.⁴ *Id.*, ¶ 6; Ex. A. The facts simply do not corroborate Plaintiffs' allegations of an elaborate,
 2 coordinated effort involving Judge Dodge to defraud them of anything.

3 Moreover, the very nature of Plaintiffs' claimed scheme to defraud excludes Judge
 4 Dodge on its face. None of the alleged predicate acts as to Judge Dodge relate to disenrollment.
 5 Dkt. #64, ¶ 113(h)–(j), (v). Judge Dodge never involved himself in a disenrollment decision
 6 made by the Tribal Council. Dodge Decl., ¶¶ 8, 11. And, the enrollment status of the Plaintiffs
 7 in the unlawful detainer cases was not the reason they did not prevail in those cases.
 8 *Id.*, ¶¶ 21; 32; 34.

9 As a cursory review of the case files of the Rabang and Oshiro evictions makes clear,
 10 Judge Dodge was left with only the evidence presented by the NIHA of non-payment of rent
 11 (Oshiro) and the absence of any executed lease (Rabang). *Id.*, ¶¶ 20-21; 30-32; Dkt. ## 31-2;
 12 31-3. That Judge Dodge would issue eviction orders in those circumstances is unremarkable.
 13 Similarly unremarkable is the procedural posture of both cases which reflect a deliberative
 14 judicial officer, not a kangaroo-style court scheming to defraud Plaintiffs. Dodge Decl., ¶¶ 20-
 15 21; 30-32. A judge's decision to deny a party's motions or issue a ruling is an action routinely
 16 performed by a judge in the course of litigation and do not open Judge Dodge to RICO liability.
 17 There is nothing that ties Judge Dodge's four acts related to *eviction* to the scheme to allegedly
 18 defraud *Tribal membership*. Where, as here, RICO claims simply constitute another way of
 19 attacking a judge's rulings, they must be denied.

20 ***b. Judge Dodge Has Never Had a Specific Intent to Defraud.***

21 Not only did Judge Dodge not participate in the alleged scheme to defraud Plaintiffs of
 22 their Tribal membership, the mailing of the eviction orders and notices lacks any specific intent
 23 to defraud. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008) (stating that
 24

25 ⁴ Judge Dodge resigned as Senior Tribal Attorney on April 29, 2016. He was not appointed as Chief Judge until
 26 June 27, 2016. Thus, there was an approximately two month span in which he was not employed by the Tribe in any
 27 capacity. Dodge Decl., ¶ 6.

1 wire and mail fraud cases require establishing that someone relied on the defendant's
2 misrepresentation); *Sun Sav. and Loan Assoc. v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987)
3 (requiring specific intent to deceive). What were the false statements made by Judge Dodge?
4 Who was deceived by these statements? What is the evidence that Judge Dodge intended to trick
5 anyone? What is the evidence that Judge Dodge sought to benefit from property belonging to
6 others? Nothing Judge Dodge did—issuing a hearing notice and orders on an eviction action
7 before his court—is fraudulent on its face nor do they demonstrate the requisite intent to defraud.
8 Judge Dodge specifically attests that he had no intent to defraud the Plaintiffs of anything, let
9 alone the Tribal membership. Dodge Decl., ¶ 34. That Plaintiffs appear to dispute the outcome
10 of the eviction cases does not mean that routine communications are acts of conspiracy or fraud.
11 Routine judicial conduct cannot become a basis for a RICO suit without specificity. *See Efron v.*
12 *Embassy Suites (Puerto Rico) Inc.*, 223 F.3d 12, 20-21 (1st Cir. 2000) *cert. denied*, 532 U.S. 905
13 (2001).

14 The Court is presented with a long-running tribal enrollment dispute, which Plaintiffs
15 have cleverly but misleadingly re-cast as an alleged failure to maintain a quorum on the Tribal
16 Council so as to vest this Court with jurisdiction and collaterally attack Judge Dodge's eviction
17 orders. At least one district court has refused to address RICO mail fraud allegations in the
18 context of such a dispute, on jurisdictional grounds. *See Smith v. Babbitt*, 875 F.Supp. 1353,
19 1366 (D. Minn. 1995) (dismissing RICO claims against defendants, including individuals sued in
20 their individual capacities). Because Plaintiffs cannot raised a material issue of fact with respect
21 to their substantive RICO claims, their conspiracy claim under 18 U.S.C. § 1962(d) fails as well.
22 *See Sanford v. Memberworks, Inc.*, 625 F.3d 550, 559 (9th Cir. 2010).

23 ///

24 ///

25 ///

CONCLUSION

For the foregoing reasons, Judge Dodge respectfully requests that summary judgment be granted in his favor.

DATED this 17th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, I electronically filed the foregoing **DEFENDANT CHIEF JUDGE RAYMOND DODGE'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF** 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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