Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGRETTY RABANG, et al.,

Plaintiffs,

v.

ROBERT KELLY, JR., et al.,

Defendants.

Case No.: 2:17-CV-00088-JCC

DEFENDANT CHIEF JUDGE RAYMOND DODGE'S OPPOSITION TO RULE 56(D) MOTION

NOTE ON MOTION CALENDAR: JUNE 23, 2017

Roughly 16 hours after filing a full-throated response on the merits in opposition to Defendant Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr. ("Judge Dodge")'s motion for summary judgment, complete with three declarations and more than 60 exhibits in excess of 500 pages (*See* Dkt. ## 71-73, 77), Plaintiffs seek a second bite at Judge Dodge's summary judgment by filing an untimely motion to deny or continue summary judgment to allow discovery to enable a supplemental response even though the summary judgment motion has already been fully briefed. Dkt. ## 75-76.

Plaintiffs' Rule 56(d) motion should be denied as moot. Plaintiffs are precluded from both responding on the merits to a summary judgment filing **and** then, one day later, seeking a continuance for discovery to oppose the same summary judgment motion again. Plaintiffs

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

cannot have it both ways in two separate motions. Plaintiffs filed their substantive response to summary judgment; the later in time Rule 56(d) motion should be denied. In the context of the present motion, the Plaintiffs have already defended against Judge Dodge's motion for summary judgment, and the additional evidence sought would have no effect on the Court's findings. In the alternative, even if the Rule 56(d) motion was properly made, discovery should not be granted because the information sought is not essential to opposing Judge Dodge's summary judgment.

ARGUMENT

Plaintiffs' failure to create an issue of fact for trial to defeat summary judgment does not justify their next day attempt to re-open the opposition by seeking discovery. There is no justification for seeking to supplement their original summary judgment response.

A. A Rule 56(d) Motion is Improper as a Separate, Post-Summary Judgment Response

The Federal Rules are clear that a summary judgment motion may be filed "at any time," including with the complaint. Fed. R. Civ. P. 56(b); *Skiba v. Jacobs Entm't Inc.*, 587 Fed. Appx. 136, 138 (5th Cir. 2014) (per curiam) ("[d]iscovery is not a prerequisite to the disposition of a motion for summary judgment") (internal citation omitted). If the nonmoving party believes the motion is premature, the only remedy is Rule 56(d). *Atigeo LLC v. Offshore Ltd.*, 2014 WL 1494062, at *3 (W.D. Wash. Apr. 16, 2014) ("Rule 56(d) 'provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence.'") (internal quotation omitted). However, Plaintiffs cannot **both** file a response to summary judgment on the merits and then separately, one day later, file a Rule 56(d) motion. *Tatum v. City & Cty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006) ("when the movant has met the initial burden required for the granting of a summary judgment, the opposing party **either** must establish a genuine issue for trial under Rule 56(e) **or** explain why he cannot yet do so

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

under Rule 56(f)") (citing and quoting 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2740 (3d ed.1998) (emphasis added)).

That a Rule 56(d) motion is to be filed in lieu of a response on the merits logically makes sense. Rule 56(d) exists to allow a party a reprieve if it believes it cannot effectively oppose a motion for summary judgment. However, where, as here, a party clearly believes it has sufficient facts to oppose a summary judgment on the merits—and does so—it should not be allowed to get a second bite at opposition and engender more briefing with a separate note date by filing a Rule 56(d) motion after the fact. *See, e.g.,* Dkt. # 71 at 24 ("Because questions of material fact as to his knowledge abound at this early stage—even as presented in Defendant Dodge's own filings—his summary judgment motion must be denied and he must stand trial.").

It defies common sense for Plaintiffs to vigorously oppose summary judgment on the merits on Monday and then on Tuesday[1] claim that without discovery, they "cannot gather and present evidence essential to prove their claims against Defendant Dodge and justify their opposition to his summary judgment motion." Dkt. # 75 at 1; *Keebler Company v. Murray Bakery Products*, 866 F.2d 1386, 1389 (Fed. Cir. 1989) (noting that "Rule 56([c]) requires an affiant to set forth admissible facts establishing a genuine issue of material fact requiring trial. Rule 56([d]) requires an affiant to state reasons why he cannot present by affidavit facts essential to justify his opposition to the motion for summary judgment" based on "a genuine issue of material fact."). Plaintiffs have not argued in the alternative,[2] and both cannot be true.

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[1] The Rule 56(d) Motion is untimely. Responses were due on June 5, 2017. LCR 7(b)(2); 7(d)(3). The Local Rules are clear that filing deadlines are requirements, not suggestions. The Rule 56(d) Motion, filed on June 6, can be denied on that ground as well.

[2] Plaintiffs' counsel Mr. Galanda and Mr. Dreveskracht know the right way to file a Rule 56(d) Motion as evidenced by other cases, but chose not to do so here. *See Villegas v. United States,* No. 2:12-cv-00001-EFS (E.D. Wash.), *Response In Opposition To Defendants' Motion To Dismiss And For Summary Judgment Or Alternatively, Plaintiff's Rule 56(D) Motion To Deny Or Continue Defendants' Motion For Summary Judgmen*t (Dkt. No. 161, filed May 8, 2013). The Court ultimately rejected Mr. Galanda's arguments, as it should here, denying the 56(d) request. *Villegas v. United States*, 963 F.Supp.2d 1145, 1160 (E.D. Wash. 2013).

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

B. Plaintiffs' Prior Substantive Response Belies the Need for Discovery

The purpose of Rule 56(d) is being violated. "If a nonmovant shows by affidavit or declaration that, for specified reasons***, it cannot present facts essential to justify its opposition***…" courts may grant relief. Fed. R. Civ. P. 56(d) (emphasis added). Plaintiffs' initial filing of a complete response on the merits in opposition to the summary judgment motion, with over 500 pages of exhibits, makes it impossible for them to credibly argue that they need discovery because they "cannot present facts essential to justify its opposition." They already have. A Rule 56(d) motion is not appropriate after Plaintiffs have already used their own existing evidence (more than 60 exhibits) to substantively respond and claim to raise disputes of fact. *See* Dkt. # 71 at 17 ("The Court must deny Defendant Dodge's motion for summary judgment because issues of material fact exist . . . These genuine issues of material fact preclude summary judgment. Fed. R. Civ. P. 56(a)".)

In fact, Plaintiffs seem to misunderstand the Court's role on summary judgment. In their response to summary judgment, Plaintiffs argue that: "***should the Court wish to scrutinize the facts*** presented by Defendant Dodge, Plaintiffs respectfully request that Defendant Dodge's motion be denied or deferred so that they may conduct discovery on the issues identified above." Dkt. # 71 at 24 n. 19 (emphasis added). But scrutinizing the facts is not what the Court does on summary judgment, and it is fundamentally inconsistent with the purpose of a Rule 56(d) motion. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when she or] he is ruling on a motion for summary judgment . . . ."). The Rule 56(d) motion should be denied.

C. Even if the 56(d) Motion Was Properly Made, No Additional Discovery Is Needed

Even if Plaintiffs' Rule 56(d) relief request was appropriate, they fail to meet the requirements for this Court to permit discovery. To obtain relief under Rule 56(d), a party must

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

show "(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *State of California v. Campbell,* 138 F.3d 772, 779 (9th Cir. 1998). In making a Rule 56(d) motion, a party opposing summary judgment "must make clear what information is sought and how it would preclude summary judgment." *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (quoting *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). The party seeking to conduct additional discovery has the burden of setting forth sufficient facts to show that the evidence sought exists. *Volk v. D.A. Davidson & Co.,* 816 F.2d 1406, 1416 (9th Cir. 1987).

Here, what Plaintiffs' counsel wants is needless broad discovery on topics that have already been addressed in their substantive response, and their generic representations fail to establish that obtaining discovery on these topics would change the outcome of this case.

1. It is Unclear What or How Much Discovery is Sought

The declaration of Mr. Galanda fails to identify what "discovery" he actually wants. Dkt. # 76 at 1. There is no indication as to whether he seeks depositions and/or written discovery, nor from whom he intends to seek that discovery (*e.g.,* Judge Dodge, other defendants, or third parties such as the United States, the Tribe, and their employees). The particular means through which Plaintiffs plan to uncover their facts should have been made clear. As constructed, the request is far too open-ended, widespread, and potentially harassing[3] as to Judge Dodge. Rule 56(d) cannot be used to justify a fishing expedition as to Judge Dodge or to bolster Plaintiffs' case as to other Defendants. *See* Dkt. # 76 ¶¶ 2(b), (d)-(f).

[3] Mr. Galanda's declaration contains more argument of counsel than it does information as to the facts sought. Dkt. # 76 ¶ 2(b) ("In fact, they act in concert—here, to defraud Plaintiffs."). Other facts sought are simply not relevant to the alleged predicate acts when he was a Judge, such as information relating to Judge Dodge's role as Senior Tribal Attorney. *Id.* ¶ 2(d).

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

2. The Facts Sought Are Not Essential

The declaration also fails to show how the information sought would defeat summary judgment as to the two arguments advanced by Judge Dodge: (1) judicial immunity; and (2) that the four predicate acts do not constitute a RICO violation. Rather, Plaintiffs appear to seek facts which, even if acquired, would not change the outcome of the motion.

First, Plaintiffs seek to discover "subjective knowledge" of Judge Dodge as to the communications by AS-IA Roberts to the Tribal Chairman in an effort to defeat the judicial immunity defense. Dkt. # 76 ¶¶ 2(a) & (c).[4] While it is not clear what Plaintiffs mean by "subjective knowledge," discerning Judge Dodge's "subjective knowledge" will also not help the Plaintiffs defeat summary judgment. AS-IA Roberts' letters, upon which they primarily rely to defeat judicial immunity, were sent ***after*** the allegedly fraudulent orders issued and, as a matter of law, Plaintiffs cannot impute knowledge to Judge Dodge based on blog posts or an alleged (and refuted) relationship between Judge Dodge and other Defendants. Thus, eliciting these facts will not defeat Judge Dodge's summary judgment on judicial immunity.

Second, Plaintiffs seek various facts generally related to the purportedly fraudulent scheme to save their RICO claim. Dkt. # 76 ¶¶ 2 (b), (d)-(f). However, facts relating to the alleged lack of separation between the Tribal Court and the Tribal Council, whether Judge Dodge had advance notice of rejected pleadings, and alleged acts in furtherance of the scheme will not change the summary judgment outcome as Judge Dodge's motion does not require the Court to consider these facts. *Id.* Rather, Judge Dodge's motion is targeted to whether the issuance of the eviction orders was fraudulent and, relatedly, whether the four predicate acts caused the alleged injury.

[4] Item (c) sought by Plaintiffs is not a fact. It is a question of law as to whether "Holdover Council Defendants had no authority to make any appointments after March 24, 2016." Dkt. # 76 ¶ 2(c). In any event, Judge Dodge would not be able to testify as to the authority of the so-called "Holdover Council."

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
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The very nature of Plaintiffs' claimed scheme to defraud excludes Judge Dodge on its face as a matter of law. None of the alleged four predicate acts as to Judge Dodge – the issuance and mailing of eviction orders – relate to disenrollment or the deprivation of Tribal membership benefits. Dkt. #64 ¶¶113(h)–(j), (v). In addition, no set of facts can address the fundamental problem that none of Judge's Dodge's alleged predicate acts could have "led directly" to Plaintiffs' alleged injury of loss of business or property. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004) ("It is well settled that, to maintain a civil RICO claim predicated on mail [or wire] fraud, a plaintiff must show that the defendants' alleged misconduct proximately caused the injury."). The sought-after facts would not address this causation shortcoming as to the eviction orders issued by Judge Dodge and are, therefore, not "essential" to resist the summary judgment motion.

3. There is No Indication the Facts Sought Exist

Merely stating that "facts exist because all of the evidence that Plaintiffs have thus far been able to obtain provides that these facts exist" and citing to the 60 largely immaterial exhibits filed in opposition to Judge Dodge's summary judgment fails to make the case for discovery. Dkt. # 76 at 2. In fact, this circular argument militates against allowing open-ended, expensive and time-consuming discovery. Mr. Galanda does not discuss why he believes these facts might exist or provide any real support for his assertion that they do exist. *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991) ("Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.").

A court "does not abuse its discretion by denying further discovery if ... the movant fails to show how the information sought would preclude summary judgment." *Cal. Union Ins. v. Am. Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990) (citations omitted). Plaintiffs' request fails to inform the Court whether—and ***how***—additional discovery would prevent summary

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1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

judgment, especially in light of the prior detailed response in opposition on the merits to summary judgment filed by Plaintiffs. Dkt. No. 71-73. Accordingly, the Rule 56(d) motion should be "denied as moot inasmuch as [Plaintiffs have] responded to the motion for summary judgment on its merits." *See Bad Boys Bail Bonds, Inc. v. Yowell, Concurrent Use No. 94002552,* 2015 WL 5895959, at *5 (Trademark Tr. & App. Bd. Aug. 21, 2015).

CONCLUSION

For the foregoing reasons, Judge Dodge respectfully requests that the Court enter the [Proposed] Order denying the Rule 56(d) motion.

DATED this 19th day of June, 2017.

Kilpatrick, Townsend & Stockton LLP

By: */s/ Rob Roy Smith*

Rob Roy Smith, WSBA # 33798
Email: RRSmith@kilpatricktownsend.com
Rachel B. Saimons, WSBA # 46553
Email: RSaimons@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP
1420 Fifth Ave, Suite 3700
Seattle, WA 98101
Telephone: (206) 467-9600
Fax: (206) 623-6793
Attorneys for Defendant Chief Judge Raymond G. Dodge, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, I electronically filed the foregoing **DEFENDANT CHIEF JUDGE RAYMOND DODGE'S OPPOSITION TO RULE 56(D) MOTION** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Gabe Galanda
gabe@galandabroadman.com
Bree R. Black Horse
bree@galandabroadman.com
Galanda Broadman, PLLC
8606 35th Ave NE, Suite L1
PO Box 15146
Seattle, WA 98115

Attorney for Plaintiffs

Connie Sue Martin
csmartin@schwabe.com
Schwabe Williamson & Wyatt
1420 5th Ave, Suite 3400
Seattle, WA 98101

Attorneys for Defendants Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete, Elizabeth King George, Katrice Romero, Donia Edwards, Rickie Armstrong

DATED this 19th day of June, 2017.

Kilpatrick Townsend & Stockton LLP

By: */s/ Rob Roy Smith*
Rob Roy Smith, WSBA # 33798
rrsmith@kilpatricktownsend.com
Attorneys for Defendant Chief Judge Raymond G. Dodge, Jr.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600