NO. 17-35427

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGRETTY RABANG, et al.
Plaintiffs-Appellees,

v.

ROBERT KELLY, JR., et al.
Defendants-Appellants,

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
No. 2:17-cv-00088-JCC

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES

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JURISDICTIONAL STATEMENT

Appellees are satisfied with the Appellants' jurisdictional statement. Fed. R. App. P. 28(b)(1).

STATEMENT OF THE ISSUES

Whether the District Court erred when it denied Defendants' Fed. R. Civ. Proc. 12(b)(1) Motion to Dismiss.

STATEMENT OF THE CASE

This case arises from Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete, Elizabeth King George, Katrice Romero, Donia Edwards, and Rickie Armstrong's (collectively, "Defendants") numerous violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c)-(d). This case is not a so-called intra-tribal dispute, or one regarding tribal disenrollment. ER 2.[1] This is a dispute about whether a group of individuals should be allowed to engage in mail fraud, wire fraud, and conspiracy, in violation of RICO while masquerading as a "tribal government."

The answer is "no." In 2016, the United States Department of the Interior ("DOI") repeatedly determined that the Defendants were not, and are not,

[1] The District Court expressed "no opinion on the validity of the disenrollments" collateral to Plaintiffs' RICO claims. ER 2, n.2.

permitted to conduct Tribal government business. Unhappy with DOI's three determinations, Defendants simply ignored them, and persisted with their scheme to defraud Plaintiffs.

Regardless of Defendants' claimed legitimacy as a governmental body, nobody—whether properly seated in government or not—is allowed to use the government to violate RICO. *See, e.g., United States v. Cianci*, 210 F. Supp. 2d 71, 72 (D.R.I. 2002). The Nooksack Tribal government is no exception. The District Court was correct in asserting jurisdiction over this personal-capacity RICO action against Defendants for pretending to be a tribal government in order to deprive Plaintiffs of money and property.

STATEMENT OF FACTS

Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete (collectively, "holdover council Defendants"[2]) purport to act as an Indian tribal government, although the United States has repeatedly determined that those six individuals have acted illegally and without authority. ER 352, 362-64, 366, 401-06. Since at least March of 2016, holdover council Defendants have falsely represented themselves as the Nooksack Indian Tribe ("Tribe") or Nooksack Indian Tribal Council ("NITC"). ER 352-53. As a result,

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[2] ER 2, n.3.

the Tribe of over 2,000 members has lacked a governing body that is recognized by the Federal Government, for the last eighteen months and counting. ER 357.

Defendants are part of an elaborate scheme to defraud Plaintiffs Margretty Rabang, Olive Oshiro, Dominador Aure, Christina Peato, and Elizabeth Oshiro (collectively, "Rabang Plaintiffs") of money and property, such as their investments in federally-subsidized homes, and to personally enrich themselves with hundreds of thousands of dollars in salaries, stipends, and other benefits funded through federal contracts and grants.[3] ER 3, 353, 358. Defendants carried out their scheme by masquerading as officials within Tribal governmental agencies and instrumentalities. *Id.*

A. Holdover Council Defendants Prevent Tribal Elections And Commence A Scheme To Defraud Plaintiffs.

The United States acknowledged the Tribe in 1973. ER 357. The NITC is chiefly responsible for carrying out Tribal governance. *Id*. The NITC consists of one chairman, one vice-chairman, one secretary, one treasurer, and four councilpersons. *Id.* Each of these positions consists of a four-year term of office. *Id.* Five members constitute a quorum, which is required for the NITC to transact any business on behalf of the Tribe. *Id*.

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[3] According to 2015 financial figures, Defendant Kelly, for example, has received at least $216,399 in compensation as NITC Chairman in the eighteen months since the NITC became defunct. ER 358. Over 50% of that was federal dollars, specifically "indirect" or administrative costs charged to the United States pursuant to federal-tribal contracts. *Id*.

In December of 2015, holdover council Defendants realized that the four-year terms of Defendant George's vice chairmanship, Defendant Smith's treasurer position, and Defendants Canete and Johnson's respective councilmember positions were all set to expire on March 24, 2016, and they were at risk of losing an election. *Id*. In an attempt to maintain control of the Tribe and execute their scheme to defraud Plaintiffs, holdover council Defendants conspired to—and did successfully—prevent those four NITC seats from being subjected to an election that was required to commence that December. ER 358-59.

On March 24, 2016, those four NITC positions lapsed, but Defendants George, Smith, Canete, and Johnson refused to vacate their seats. ER 359. Since that date, holdover council Defendants, despite lacking an ability to conduct Tribal governmental affairs, have masqueraded as the governing body of the Tribe; and in some instances "the Tribe" itself.[4] ER 353, 357-58.

[4] The holdover council Defendants, masquerading as the "Nooksack Indian Tribe," filed a Complaint against the United States, challenging DOI's determinations three determinations that they, acting as the NITC, were illegitimate. ER 130 (citing *Nooksack Indian Tribe v. Zinke*, No. 2:17-cv-0219, Dkt. # 1 (W.D. Wash. Feb. 13, 2017). In according deference to the DOI determinations, the District Court dismissed the action for lack of standing because the "holdover Council does not have authority to bring this case against the federal government in the interim period where the tribal leadership is considered inadequate by the DOI." *Zinke*, 2017 WL 1957076, at *6 (W.D. Wash. May 11, 2017).

B. Holdover Council Defendants Overthrow The Nooksack Tribal Court In Furtherance Of Their Scheme To Defraud Plaintiffs.

On March 28, 2016, while former Nooksack Tribal Court Chief Judge Susan Alexander was in the final stage of preparing a ruling to compel holdover council Defendants to call the election for the four seats, they fired her. ER 360. Holdover council Defendants replaced her with their lawyer, Senior Tribal Attorney Raymond Dodge—a primary architect of Defendants' entire scheme to defraud Plaintiffs.[5] *Id*. As discussed below, the United States later refused to recognize actions and orders of Dodge or the Tribal Court after Judge Alexander's termination, invalidating Dodge's purported appointment by the holdover council Defendants. ER 401-06.

In the months that followed, holdover council Defendants refused to issue "business licenses" to the lawyers Plaintiffs hired to defend their civil liberties in the now-defunct Tribal Court, and otherwise excluded those lawyers from practicing law at Nooksack—rendering Plaintiffs *pro se*. ER 360. Meanwhile, Dodge first rejected, and then accepted but never convened, two *pro se* lawsuits brought by Plaintiff Rabang in which she sought to challenge the authority and purported actions by holdover council, King George, and Romero Defendants to evict her from her federal housing and take her money and property. ER 360, 362.

[5] Dodge is a Defendant in this action, but not an Appellant here. Appellants' Opening Brief p. 1, n.1. As such, he will simply be referred to as "Dodge" in this brief.

Dodge evicted Elizabeth Oshiro from her home that summer and later ordered Margretty Rabang evicted from her home days before Christmas. ER 361, 366. Defendants, in other words, were successful in utilizing the "non-functioning" Tribal Court, as both sword and shield, to evict Plaintiffs Elizabeth Oshiro and Margretty Rabang from their federal housing.[6] ER 360-62, 366-67.

By late 2016, holdover council Defendants destroyed the entire Nooksack judiciary as part of their scheme to defraud Plaintiffs. *See* ER 9.

C. The United States Officially Invalidates The Holdover Defendants, Who In Turn Expand Their Scheme To Defraud Plaintiffs.

By fall 2016, the Federal Government had seen enough from Defendants. On October 17, 2016, the highest-ranking federal Indian affairs official, DOI Principal Deputy Assistant Secretary-Indian Affairs Lawrence S. Roberts ("PDAS Roberts") took agency action by issuing a decision to Defendant Kelly, which in pertinent part provided:

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[6] Ms. Oshiro participated in the U.S. Department of Housing and Urban Development's ("HUD") Mutual Help Occupancy Program ("MHOP"), which is a federal lease-to-own program administered by the Nooksack Indian Housing Authority ("NIHA"). ER 353-355. Prior to her illegal eviction from her home, Ms. Oshiro only needed to make **one** more payment before she owned the property outright under the terms of her HUD MHOP agreement. ER 354-55. She made this payment—and thought she owned her home outright, having paid over $90,000 throughout the years—but Defendant Katrice Romero stopped payment while Ms. Oshiro was out of town. ER 354-55, 361. Ms. Oshiro came home to padlocks on her doors, defrauded of over $90,000 that she put into her home. *Id.* Defendant Romero is the twin sister of holdover council Defendant Katherine Canete and is the Director of the NIHA. ER 356.

> As you know, the Nooksack Tribal Council (Council) lacks a quorum to conduct tribal business as required by the Nooksack Tribe's (Tribe) Constitution and Bylaws. Four Council members' terms expired in March 2016, and an election was never held to fill their seats. The Council currently consists of four members . . . . [T]he Council must have five duly elected officers to take any official action."

25 U.S.C. § 2; ER 7, 362, 401-02. Calling the situation caused by holdover council Defendants "exceedingly rare," PDAS Roberts advised Defendant Kelly "and the remaining Council members that the Department will only recognize those actions taken by the Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time because of a lack of quorum." ER 362, 401-02. In rendering this decision, PDAS Roberts explained the United States' "duty to ensure that tribal trust finds, Federal funds for the benefit of the Tribe, and [DOI's] day-to-day government-to-government relationship is with a full quorum of the Council . . . ." *Id*.

Undeterred by what would prove to be DOI's first of three determinations to not recognize holdover council Defendants' authority, they and Defendant King George nonetheless moved forward with their scheme to defraud Plaintiffs of money and property by purportedly initiating "involuntary" proceedings to terminate the Tribal citizenships of Plaintiffs and over 275 other Tribal members; and, for good measure, also conducting a "referendum election" to accomplish the same goal. ER 362-63. DOI soon rejected both efforts. ER 363-64, 403-04.

D. The United States Reiterates Its Refusal To Recognize The Holdover Defendants, Who Persist With Their Scheme To Defraud Plaintiffs.

By November 14, 2016, holdover council Defendants had forced DOI's hand, causing the agency to render a second decision, reiterating to Defendant Kelly that DOI "will not recognize actions by you and the current Tribal Council members without a quorum . . . ." ER 363, 403-04. DOI spelled out the need to have a NITC "seated through an election consistent with tribal law" and rejected holdover council Defendants' purported termination of "current tribal citizens" through a "'referendum election.'" *Id.* DOI also preempted holdover council Defendants' efforts to finally convene elections for the four expired seats. *Id.*

But, in continued disregard for federal agency action, Defendants:

- Purported to terminate the Tribal citizenships of Plaintiffs and over 275 other Tribal members. ER 364;
- Denied federal healthcare and Temporary Assistance for Needy Families ("TANF") services to Plaintiffs Aure, Peato, and Elizabeth Oshiro, ER 364-66;
- Caused Dodge to order Plaintiff Rabang's eviction from her federally subsidized home, ER 366;

- Caused a hand-picked "Judge Pro Tem" to issue an *ex parte* injunction against the Tribe's own Nooksack Court of Appeals,[7] for all intent and purpose terminating the Appeals Court's operations, ER 302-11; and

- Created a "Nooksack Supreme Court" consisting of the holdover council Defendants, and purported to "vacate" twelve prior adverse rulings from the Nooksack Court of Appeals, ER 7.

Not only did DOI reject these exploits out of hand, so did both HUD and the United States Department of Health and Human Services ("HHS"), in deference to DOI's agency action. ER 366, 405-06; ER 364-65.

E. The United States Once Again Rejects The Holdover Council.

On December 23, 2016, DOI issued its third and final decision against the holdover council Defendants, reiterating the first two determinations and again invalidating the actions by Defendant Kelly and those "who have exceeded their term of office to anoint [them]selves as the Tribe's Supreme Court . . . without a quorum and without holding a valid election . . . ." ER 366, 405-06. DOI invalidated holdover council Defendants' purported acts to appoint Dodge as "Chief Judge," to terminate the Court of Appeals, and to "establish an alternative" Supreme Court, explaining: "Any actions taken by the Tribal Council after March

[7] The Tribal Court of Appeals was then operated by the Northwest Intertribal Court System under a fee-for-service arrangement. ER 144-48, 156-62, 166-71.

24, 2016, including so-called tribal court actions and orders, and not valid for purposes of Federal services and funding." *Id*. DOI's latest determination specifically invalidated "orders of eviction" Dodge issued against Plaintiff Rabang. ER 366, 405-06.

But that third determination *still* did not deter holdover council Defendants, who continued with their eviction of Plaintiff Rabang from her home over the holidays, and proceeded to deny Plaintiff Elizabeth Oshiro's young son federal Johnson O'Malley education assistance. ER 367.

Defendants' RICO violations continue to this day. *Id*.

F. Plaintiffs Initiate Civil RICO Action And District Court Affirms Jurisdiction Over Defendants.

On February 2, 2017, Plaintiffs filed their First Amended Complaint. ER 393. On March 3, 2017, Defendants moved to dismiss the First Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6). ER 395.

On April 26, 2017, the District Court denied Defendants' motion to dismiss, concluding that Plaintiffs adequately pled RICO claims against Defendants. ER 12-18. The District Court also rejected Defendants' claim that the District Court lacked subject matter jurisdiction. ER 7-12. First, the District Court determined "deference is owed to the DOI decisions[,]" which "refuse[] to recognize the actions taken by the holdover council Defendants since March 24, 2016." ER 10-11. The District Court, therefore, concluded that holdover council Defendants and

other Defendants' "decisions taken after March 24, 2016, are not valid . . . because there is no recognized tribal leadership." ER 11.

Second, the District Court concluded that "sovereign immunity is not a jurisdictional bar in this case" based on the U.S. Supreme Court's recent decision in *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285 (2017). *Id.* Like DOI, the District Court acknowledged, for purposes of its jurisdiction, the "very rare circumstances" created by holdover council Defendants:

> The DOI has found such disenrollment decisions to be invalid due to a lack of quorum, and the DOI decision stand during the interim until the DOI and BIA recognize a newly elected Tribal Council or the DOI decisions are invalidated. Under these set of facts, this Court has jurisdiction.

ER 11-12. Defendants appealed the District Court's denial of their motion to dismiss for lack of subject matter jurisdiction to this Court. ER 398.

SUMMARY OF ARGUMENT

This Court should reject Defendants' attempt to lure it into the murk. This is a civil RICO case. It does not involve an intra-tribal dispute or an attempt by Rabang Plaintiffs to have a federal court make membership decisions. It is about whether individuals who were once officeholders became too emboldened, took it too far, and, as a result of their coup d'état of an entire tribal government, violated federal law. The District Court has ruled that, at least as alleged on the face of Rabang Plaintiffs' First Amended Complaint, Defendants acted in violation of the

federal RICO statute. ER 12-18. Sovereign immunity is not a bar to this finding, particularly where, as here: (1) Defendants have been sued in their personal capacities, and (2) as there was no recognized tribal leadership, Defendants cannot act as a sovereign. The District Court did not err.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the District Court's ruling on subject matter jurisdiction *de novo*. *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995). The Court also reviews issues of tribal sovereign immunity *de novo*. *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015). This Court must accept "all allegations of material fact as true and construe them in the light most favorable" to Rabang Plaintiffs. *N. Cty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 741-42 (9th Cir. 2009).

II. THIS CASE DOES NOT INVOLVE AN "INTRA-TRIBAL DISPUTE."

The District Court held that Rabang Plaintiffs sufficiently alleged RICO mail fraud, wire fraud, and conspiracy claims. ER 17-18. Defendants did not appeal this holding. Instead, Defendants argue on appeal, "the lawsuit seeks to continue an intra-tribal dispute regarding membership in the Tribe, disenrollment, and [Rabang Plaintiffs'] disagreement with the leadership of Chairman Kelly and the Nooksack Tribal Council." Appellants' Opening Brief p. 48. Not so. The lawsuit seeks to redress Defendants' RICO violations. The District Court held that

Plaintiffs have properly styled these claims. ER 12-18. Again, Defendants did not appeal that particular ruling.

Through sleight of hand, Defendants attempt to bootstrap an appeal of DOI's three determinations to their personal defense against the RICO suit. Appellants' Opening Brief p. 61. Defendants argue that DOI "lack[ed] the authority" to issue those determinations—an issue that was not before the District Court. ER 2 n.1 ("The Court expresses no opinion as to the validity of the DOI decisions at this time."). But Defendants confessed below that although they believed each DOI's three decisions were "arbitrary and capricious," no such challenge was ever before the District Court in this case. ER 119, n.2.

Further, contrary to Defendants' misrepresentations, at no time did the District Court interpret, or even refer to, Nooksack Tribal law. The District Court made clear that Tribal membership determinations, in particular, were not before it. ER 2, n.2. Nor was the issue of whether Defendants "properly constituted" a tribal government "according to the governing documents of the Tribe" before the District Court. Appellants' Opening Brief p. 54. DOI had already rendered that determination, three times over. ER 362, 401-02; ER 363-64, 403-06. Although Defendants now argue that DOI "lack[ed] authority" to render its determinations, they declined to appeal DOI's decisions under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 704, 706, or to make their "arbitrary and capricious"

argument to the District Court.[8] ER 119, n.2. The District Court was not "enforce[ing the] tribe's own laws." Appellants' Opening Brief p. 49. It was giving requisite deference to final and binding determination by the DOI, the validity of which was not even before the District Court. 25 C.F.R. § 2.6(c); *see also Mem'l, Inc. v. Harris*, 655 F.2d 905, 912 (9th Cir. 1980) ("[A] reviewing court may not substitute its judgment for that of the agency.") (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, (1971)). Defendants' "spaghetti at the wall" intra-tribal argument, designed only to confuse matters before the Court, should be ignored.

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[8] Plaintiffs agree that the District Court's tribal court exhaustion analysis is somewhat of a red herring. ER 8-9. Again, whether DOI had authority to issue its determinations was not before the District Court. But even were it, the remedy would have been an APA suit in District Court, not a challenge before whatever semblance of the Nooksack Tribal Judiciary existed at the time. *See S. Miami Holdings v. F.D.I.C.*, 533 F. App'x 898, 903 (11th Cir. 2013) ("[F]inal agency action [is] subject to challenge only pursuant to the [APA].") (citing 5 U.S.C. § 701; *Santopadre v. Pelican Homestead & Sav. Assoc.*, 937 F.2d 268, 272 (5th Cir. 1991); *Adams v. Resolution Trust Corp.*, 927 F.2d 348, 354 (8th Cir. 1991)). Indeed, even a legitimate Nooksack Tribal Court would likely not have subject matter jurisdiction over Plaintiffs' claims under federal RICO statutes, because Congress has not conferred such adjudicatory power to tribal governments by those statutes. 18 U.S.C. §§ 1962(c)-(d); *see also Nevada v. Hicks*, 533 U.S. 353, 366-67 (2001) (while it is "presumed by Article III of the U.S. Constitution" that state courts can enforce federal statute, there is no federal constitutional presumption of tribal court jurisdiction over federal-law cases); *cf. Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 944 (9th Cir. 2009) ("Nothing in the Lanham Act suggests that it was intended by Congress to expand tribal jurisdiction.").

III. DEFENDANTS ARE NOT ENTITLED TO THE DEFENSE OF TRIBAL SOVEREIGN IMMUNITY.

A. Defendants Have Been Sued In Their Personal Capacities, Only.

A suit against a government official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). As such, it is no different from a suit against the government itself and is barred by sovereign immunity. *Lewis*, 137 S. Ct. at 1291; *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

Personal capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of the sovereign. *Hafer v. Melo,* 502 U.S. 21, 25 (1991). "'Officers sued in their personal capacity come to court as individuals,' and the real party in interest is the individual, not the sovereign." *Lewis*, 137 S. Ct. at 1291 (2017) (quoting *Hafer*, 502 U.S., at 27).

Of course, plaintiffs are not allowed to circumvent sovereign immunity "by a mere pleading device." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). But in this Circuit, a plaintiff's "addition of the words 'in his individual capacity' to the complaint" is not considered mere pleading device. *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003). Both this Court and the U.S. Supreme Court have expressly rejected argument that such words constitute pleading device. *Id.* (citing *Hafer*, 502 U.S. at 27).

By explicitly naming a defendant "in his individual capacity," a plaintiff discharges the right to obtain *any* relief that might run against the sovereign or the defendant in his official capacity. *See Graham*, 473 U.S. at 165-67; *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543, n.6 (1986) ("Acts performed by the same person in two different capacities 'are generally treated as the transactions of two different legal personages.'") (quoting F. James & G. Hazard, CIVIL PROCEDURE § 11.6, p. 594 (3d ed. 1985)). As Chief Judge Wiseman helpfully explained in *Chaudhuri v. State of Tennessee*:

> The decision to proceed against a person in his individual capacity is far more than a mere pleading device. It states an intention to seek recovery from an individual defendant's personal assets, not from the public fisc. It also identifies the defendant official as the real party in interest, relieves the [sovereign] of any obligation to defend the claim, opens up the possibility of punitive damages, and entails personal, rather than sovereign, immunity defenses. . . . [T]he demonstrated intent of the plaintiff, not the actions underlying the complaint, determines the nature of a particular suit.

767 F. Supp. 860, 864 (M.D. Tenn. 1991) (citing *Graham*, 473 U.S. at 165-67).

Here, Rabang Plaintiffs made express in their First Amended Complaint and demonstrated their intent that "[a]ll Defendants are sued in their personal capacities." ER 356. In addition, Rabang Plaintiffs have alleged that Defendants' RICO violations have resulted in "hundreds of thousands of dollars in salaries, stipends, and other benefits funded through federal contracts and grants" that Defendants have used "to **personally** enrich **themselves**." ER 353, 358 (emphasis

added). Rabang Plaintiffs seek restitution for the "money, property, and benefits" that Defendants attained vis-à-vis their RICO violations, and to enjoin Defendants, in their personal capacities, from further violating RICO. ER 386-87. By naming Defendants in their personal capacities, any damages or injunctive relief rewarded will necessarily only affect the Defendants in their personal capacities.[9] Rabang Plaintiffs have, in other words, voluntarily surrendered any ability that they may have had to be awarded tribal assets or to obtain injunctive relief against the Tribe.

Thus, if it is the case that, as Defendants submit, they "did not abscond with these resources," then there will be no restitution for Plaintiffs to collect. Appellants' Opening Brief p. 21. And if Rabang Plaintiffs are awarded damages, but Defendants' personal bank accounts are empty and they have no assets, there will be nothing for Rabang Plaintiffs to collect. "Needless to say, an award of damages from a judgment-proof defendant is not much of a remedy at all," but this is the risk that Rabang Plaintiffs took when they sued Defendants in their personal

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[9] Indeed, this has already occurred. On September 21, 2016, the Nooksack Court of Appeals awarded counsel for Plaintiffs $2,790.15 against Rory Gilliland, the Nooksack Tribe's Chief of Police, in his personal capacity. *In re: Gabriel S. Galanda, et al.*, No. 2016-CI-CL-002 (Nooksack Ct. App. Sept. 21, 2016). This Order was then domesticated in the Whatcom County Superior Court for Washington State, and a Break and Enter Order was issued against Mr. Gilliland, granting the Sheriff of Whatcom County the authority to "take into possession and execute on the personal properties" of Mr. Gilliland. *In re: Gabriel S. Galanda, et al.*, No. 16-2-01663-1 (Whatcom Cty. Super. Ct. Nov. 14, 2016). The Tribe itself was unaffected by this collection proceeding.

capacities only.[10] *CQS ABS Master Fund Ltd. v. MBIA Inc.*, No. 12-6840, 2014 WL 11089340, at *1 (S.D.N.Y. Jan. 29, 2014).

B. The Nooksack Indian Tribe Is Not The Real Party In Interest.

When the intent of the plaintiff is unclear as to whether the defendants have been sued in their personal or official capacities, the Ninth Circuit employs a "remedy-focused analysis." *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). Under this test, "individual officers are liable . . . [s]o long as any remedy will operate against the officers individually, and not against the sovereign." *Pistor*, 791 F.3d at 1113 (quotation omitted).

Again, Rabang Plaintiffs have voluntarily surrendered any ability that to be awarded tribal assets or to obtain injunctive relief against the Tribe. This is a RICO suit. Rabang Plaintiffs seek to impose personal RICO penalties upon Defendants and to enjoin Defendants, in their personal capacities, from their continued violations of RICO. ER 386-87. This relief would have no effect on the Tribe. Defendants have used their Tribal offices and affiliations to defraud Rabang Plaintiffs of money and property, in a rather outlandish manner. Rabang Plaintiffs

[10] As DOI alluded, Rabang Plaintiffs could have styled a suit against Dodge, Mr. Gilliland, and other purported Nooksack officers or agents "in their official capacities" for certain malfeasance, pursuant to the Federal Tort Claims Act ("FTCA"). *See* ER 366, 401-02 ("Enforcement of invalid or unlawful orders is outside the scope of law enforcement officer's duties, and, therefore, would not fall under the FTCA's protections."); *see also generally* 28 U.S.C. §§ 1346(b)(1), 2671-2680; 25 U.S.C. § 450(f). But they chose to sue Defendants in their personal capacities, for civil RICO violation, as is their right.

seek to hold them personally accountable. The fact that Defendants are officeholders, who used their offices to violate RICO, does not make them immune from judgment; it simply makes their misdeeds that much more deplorable. *See, e.g., United States v. Dischner*, 974 F.2d 1502 (9th Cir. 1992) (RICO enterprise consisting of municipal officials, office of mayor, and department of public works); *United States v. McDade*, 28 F.3d 283 (3rd Cir. 1994) (RICO enterprise consisting of congressman, his two offices, and congressional subcommittees); *Cianci*, 210 F. Supp. 2d at 75 (noting that a RICO enterprise "may consist of both a group of individuals who join together for a common criminal purpose and otherwise legitimate entities, including governmental entities, that are controlled and used by those individuals to achieve that purpose"). But that fact does not convert Rabang Plaintiffs' suit against Defendants into one against the Tribe, as Defendants would have this Court believe. *Cf.* Appellants' Opening Brief p. 23.

C. At All Material Times, The Nooksack Indian Tribe Was Defunct—Defendants Were Not Conducting Governmental Affairs.

There is no "alternative[]" test to employ. Appellants' Opening Brief p. 34. Courts have flatly rejected Defendants' argument that individuals "acting in their official capacity and within the scope of their authority" are categorically immune. *Id.* at 34-35. In *Pistor v. Garcia*, for instance, this Court held:

> The question whether defendants were acting in their official capacities under color of state or under color of tribal law is wholly irrelevant to the tribal sovereign immunity analysis. By its essential

> nature, an individual or personal capacity suit against an officer seeks to hold the officer personally liable for wrongful conduct taken *in the course of her official duties.*

791 F.3d 1104, 1114 (9th Cir. 2015) (emphasis in original); *see also Hafer*, 502 U.S. at 28 (noting that blanket immunity for officials acting in their official capacity and within the scope of their authority "cannot be reconciled with our decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties.").

Defendants' reliance on *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), and out-of-Circuit authority, to demonstrate an alternative "scope of authority" test, fail; in fact that exact approach has been rejected by this Court. *See Maxwell*, 708 F.3d at 1088 (noting that *Cook* "conflated the 'scope of authority' and 'remedy sought' principles").

But even were the Court to indulge Defendants' "scope of authority" analysis, the DOI determinations unambiguously hold that as of March of 2016, Defendants were prohibited from "tak[ing] any official action." ER 362, 363-64, 366, 401-06. As noted by Defendants themselves:

> [Plaintiffs] seek to challenge and undermine official acts of Tribal officials and employees (that are clearly within the scope of their authority **if the Tribal government is legitimate**) . . . . But the legitimacy of the government and whether Tribal law has been followed is not a subject for determination in federal court.

Appellants' Opening Brief p. 37 (emphasis added). Assuming for the sake of argument that committing RICO violations could possibly be within the scope of Defendants' authority, Defendants would be correct. If—*and only if*—the Tribal government was legitimate when the RICO violations occurred *might* Defendants be able to assert that they were taking official acts on behalf of the Tribe. But, to quote Defendants, "the legitimacy of the government" is an issue not before the Court at this juncture. *Id.* It has already been determined by the DOI that Defendants were prohibited from "tak[ing] any official action" on behalf of the Tribe. ER 362, 363-64, 366, 401-06. Again Defendants did not challenge DOI's determinations; their validity was not put before the District Court. *Id.*

D. Defendants Lack Authority To Assert The Tribe's Sovereign Immunity.

"The doctrine of sovereign immunity . . . does not immunize the individual members of the Tribe." *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171-72 (1977); *see also United States v. Marcyes*, 557 F.2d 1361, 1368 n.5 (9th Cir. 1977) (same); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 89 (S.D.N.Y. 2002) ("[T]ribal members enjoy no sovereign immunity as individuals."). The fact that Defendants were sued in their personal capacities is dispositive. This is an action against individuals, who, yes, are members of the Tribe, but who do not enjoy *the Tribe's* sovereign immunity. *Id.*

Nor may Defendants assert the Tribe's sovereign immunity. As the same District Court held in a related action, under the DOI determinations "no Nooksack tribal leadership group is currently federally recognized." *Zinke*, 2017 WL 1957076, at *4. As such, the District Court ruled that "the holdover Council" lacked standing to assert any rights "on the Tribe's behalf." *Id.* at *7; *see also id.* at *6 (any "decisions taken and the leadership in place after March 24, 2016, are not valid at this time . . . because the DOI or BIA have not recognized *any* Nooksack tribal leadership") (emphasis in original). It thus follows that Defendants do not possess standing to assert immunity on behalf of the Tribe. *Id.* Indeed, even were Defendants able to represent the Tribal government in Rabang Plaintiffs' case—they do not—they would lack standing to at all assert *the Tribe*'s immunity in defense of the alleged RICO violations. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1986) ("Generally speaking, members of collegial bodies do not have standing to [act on behalf of] the body itself.").

Defendants lack standing to assert the Tribe's immunity in any manner.

CONCLUSION

The District Court did not error in denying dismissal. This matter, therefore, should be remanded to the District Court, for adjudication and fact-finding.

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DATED this 25th day of September, 2017.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees state that they know of no related case pending in this Court.

CERTIFICATE OF COMPLIANCE

See appended Form 8. Certificate of Complaint Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35427.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number ____________

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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The brief is ☐ words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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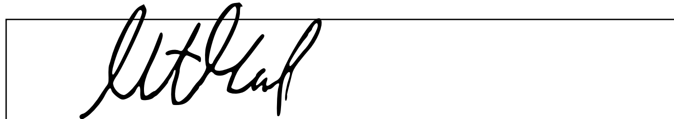
Signature of Attorney or Unrepresented Litigant



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("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, **OPENING BRIEF OF PLAINTIFFS-APPELLEES,** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 25, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following parties:

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