Case No.: 17-35427

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGRETTY RABANG; OLIVE OSHIRO; DOMINADOR AURE; CHRISTINA PEATO; ELIZABETH OSHIRO,

Appellees,

v.

ROBERT KELLY, JR.; RICK D. GEORGE; AGRIPINA SMITH; BOB SOLOMON; LONA JOHNSON; KATHERINE CANETE; RAYMOND DODGE; ELIZABETH KING GEORGE; KATRICE ROMERO; DONIA EDWARDS; RICKIE WAYNE ARMSTRONG,

Appellants.

Appeal from the United States District Court for the Western District of Washington
No. 2:17-cv-00088-JCC

APPELLANTS' OPENING BRIEF

Connie Sue Martin, WSBA #26525
Christopher H. Howard, WSBA #11074
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711
Facsimile: 206.292.0460
Attorneys for Appellants

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I. INTRODUCTION

This case arises from an intra-tribal dispute over membership in the Nooksack Indian Tribe. After the Tribe in 2016 disenrolled the five Appellees (collectively referred to as "Rabang"), they and other disenrollees initiated multiple lawsuits, administrative appeals, public campaigns and private efforts to discredit and reverse their disenrollment. As part of that effort, Rabang asserted in the District Court RICO claims against the ten Appellants (collectively "Kelly")[1] who had each served in various official capacities for the Nooksack Indian Tribe during the disenrollment and its implementation. A lynchpin of Rabang's allegations—repeated throughout the First Amended Complaint—is that Kelly acted in their official capacities on behalf of the Tribe to deny them Tribal membership and benefits that flow from the privilege of membership in the Tribe. The relief Rabang seek would operate against the Tribe. It follows that Kelly must possess tribal sovereign immunity from this lawsuit.

Kelly asserted tribal sovereign immunity in a Rule 12(b)(1)

[1] The ten Kelly Appellants are Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete, Elizabeth King George, Katrice Romero, Donia Edwards, and Rickie Armstrong. Defendant Robert Kelly, Jr., is separately referred to as Chairman Kelly. Defendant Raymond Dodge is not an appellant.

motion. The District Court rejected the defense. Kelly appeal to obtain the benefit of sovereign immunity, i.e., a complete defense to proceeding with the litigation. Rabang's allegations demonstrate that the RICO claims are premised on Kelly's official acts on behalf of the Tribe and relief would operate against the Tribe. Dismissal is proper. This Court should reverse.

Kelly also sought dismissal because the acts concern an intra-tribal dispute not within the federal court's subject matter jurisdiction. For this additional and independent reason, the Court should reverse the denial of the Rule 12 motion to dismiss.

The District Court made a series of legal mistakes, including

(1) failing to apply the proper analysis set forth in *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285 (April 25, 2017) (decided by the U.S. Supreme Court the day before the District Court ruled);

(2) improperly relying on and giving deference to Bureau of Indian Affairs ("BIA") letters that are irrelevant to the jurisdictional issues; and

(3) applying an inapposite legal analysis related to tribal court jurisdiction and exhaustion.

A correct analysis supports reversal.

II. STATEMENT OF JURISDICTION

The District Court purported to have federal question jurisdiction pursuant to 28 U.S.C. § 1331 over claims alleged pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964. On April 26, 2017, the District Court denied Kelly's Rule 12 motion to dismiss on grounds including tribal sovereign immunity and lack of subject matter jurisdiction. ER 1-19.

Kelly timely filed their notice of appeal on May 17, 2017. ER 20-22; ER 398 (Dkt. #69). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and the collateral order doctrine to review whether tribal sovereign immunity bars the claims. *See Burlington Northern & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1088 (9th Cir. 2007) (denial of a claim of tribal sovereign immunity is immediately appealable as a collateral order); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1015 (9th Cir. 2016) (same).

This Court may also review inextricably intertwined issues and issues necessary for meaningful review. *Vaughn*, 509 F.3d at 1093.

This appeal challenges the District Court's jurisdiction, which challenges also apply to this Court's jurisdiction.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred when it denied Kelly's Rule 12(b)(1) motion to dismiss the claims based on tribal sovereign immunity when Rabang alleged official conduct on behalf of the Tribal government and seek relief operating against the Tribe.

B. Whether the District Court and this Court have subject matter jurisdiction when the dispute centers around intra-tribal conflicts concerning tribal governance, membership and governing documents, issues that are never appropriately resolved in federal courts but are exclusively for tribes to resolve.

IV. STATEMENT OF THE CASE

Rabang alleged RICO claims against Kelly. The allegations specify that Kelly all held positions in Tribal governance or were actors of the Tribe based on employment or leadership positions, and that the acts underlying the claims were taken in their official capacities. Rabang attempt to use this conduct performed on behalf of the Tribe—the conduct through which the Tribe conducted its governmental affairs—to support RICO claims. Kelly moved under Rule 12(b) for dismissal because, among other grounds, tribal sovereign immunity bars the claims. The District Court denied the motion.

This appeal presents two legal issues for *de novo* determination.

First, whether tribal sovereign immunity bars the claims because the acts allegedly committed by Kelly were allegedly performed in Kelly's official capacity as officials of, or employees of, the Nooksack Indian Tribe. The allegations in the First Amended Complaint ("FAC") (ER 352-87) put at issue the official acts of persons through whom the Tribe or Tribal entities and subdivisions conducted governmental activities. The FAC uses the officials and employees as a stand-in for the Tribe, alleging that the Tribe acted improperly in disenrolling Rabang and others, in implementing that disenrollment, and in denying them the benefits that inure to membership. Rabang may not avoid the Tribe's sovereign immunity by suing the individual actors through whom the Tribe necessarily acted. That is what Rabang seek to do in the FAC. Tribal sovereign immunity bars the claims.

Second, federal courts lack subject matter jurisdiction to resolve an intra-tribal dispute like this one, i.e., a dispute concerning tribal governance and interpretation of tribal governing documents. The disenrollment and its enforcement, and the validity of these actions based on tribal law, is exclusively a Reservation affair. Whether the actions were authorized by, and complied with, Trial law the

governing documents of the Tribe is up to the Tribe, not the federal courts. Rabang may not, by filing a RICO complaint, interject the federal judiciary into the intra-tribal dispute. The action should not proceed.

The District Court erred when it allowed the RICO claims to go forward notwithstanding the defenses of tribal sovereign immunity and the intra-tribal nature of the dispute.

V. STATEMENT OF FACTS

This case arises from an intra-tribal conflict regarding membership in the Nooksack Indian Tribe.

A. Rabang Premise Their RICO Lawsuit Upon Acts Allegedly Performed on Behalf of the Tribe in Kelly's Official Capacities.

The FAC's thirty-six pages of allegations assert that every act the Tribe has taken to disenroll Rabang and to enforce that disenrollment underlies Rabang's RICO claims. Rabang never alleges one act by a Kelly Appellant in a personal capacity, although Rabang state—contradicted by every factual allegation—that the Defendants "are sued in their personal capacities." ER 356-57 ¶¶ 22, 25. Instead, the allegations rest on official conduct undertaken on behalf of the Tribe and Tribal entities or departments of government.

For example, Rabang begin by alleging that Kelly are each employees or government officials of the Nooksack Indian Tribe. ER 355-56 ¶¶ 10-16, 18-21. Rabang allege that Chairman Kelly, Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, and Katherine Canete are all members of the Tribal Council, the governing body of the Tribe. ER 355-56 ¶¶ 11-16. *See* ER 240. Ms. Canete is alleged the General Manager of the Tribe. ER 356 ¶ 16. Defendant Elizabeth King George is alleged the Director of the Nooksack Enrollment Department (NED), which Rabang alleges is "a subordinate body of the [Tribal Council]." ER 356 ¶ 18. Defendant Katrice Romero is alleged the Director of the Nooksack Indian Housing Authority (NIHA), which Rabang allege is "a subordinate body of the [Tribal Council]." ER 356 ¶ 19. Defendant Donia Edwards is alleged the Director of the Nooksack Education Department (NEdD), which Rabang allege is "a subordinate body of the [Tribal Council]." ER 356 ¶ 20. Defendant Rickie Armstrong is alleged the Tribe's in-house attorney, whom Rabang allege was "purporting to serve as legal counsel for the Tribe, and all other named subordinate departments of the Tribe." ER 356 ¶ 21. *See* ER 227 ¶ 1.

Rabang affirmatively allege that all acts and omissions by Kelly

were done in the course and scope of Tribal governance or employment by the Tribe, including the global allegation that Kelly used their official positions to carry out a scheme, as follows:

> RICO Defendants carried out their scheme to defraud Plaintiffs, through their official positions in or other affiliations with the Tribe, NITC ["Nooksack Indian Tribal Council"], Nooksack Enrollment Department ("NED"), Nooksack Indian Housing Authority ("NIHA"), Nooksack Tribal Court ("NTC"), Nooksack Indian Health Department ("NIHD"), Nooksack Social Service Department ("NSSD"), and Nooksack Education Department ("NEdD").

ER 353 ¶ 3. Rabang further allege that "[a]t all times relevant here, RICO Defendants each held a position in or were otherwise affiliated with the Tribe as well as participated in the operation, management, [sic] and directed the affairs of the Tribe." ER 377 ¶ 100. Rabang repeat this allegation as to all subordinate departments of the Tribe. ER 378 ¶ 104, ER 379 ¶¶ 106, 108, ER 380 ¶ 110, ER 380 ¶ 112. Rabang allege that "[b]y controlling the Tribe, NITC, NIHA, NTC, NED, NIHD, and NEdD, [Kelly] were able to cause these Enterprises to take actions to defraud Plaintiffs of money, property and benefits of monetary value." ER 381 ¶ 114. These allegations are repeated to support Rabang's Third Claim for Relief. ER 381-86.

After alleging each Appellant's official role with the Tribe, ER 355-56 ¶¶ 10-21, Rabang assert dissatisfaction with the governmental

acts of the Tribe. For example, Rabang allege that six Appellants Chairman Kelly, George, Smith, Solomon, Johnson and Canete held their positions on the Tribal Council inconsistently with the governing documents of the Tribe, characterizing them as "Holdover Council Defendants." ER 358-59 ¶¶ 31-38. Rabang allege that these Appellants, acting on behalf of the Council, cancelled elections. *Id*. at ¶¶ 36-38. Rabang allege that *acting as the Council* these Appellants terminated a Tribal judge and disenrolled certain Appellees. ER 360 ¶¶ 39, 41. The allegations continue with descriptions of acts that Kelly took as members of the Council or employees in departments subordinate to the Council to officially effectuate the disenrollment. ER 360-67 ¶¶ 41-48, 51-55, 57, 59-62, 65-68, 70-72.

Rabang allege that Kelly defrauded Rabang by depriving Rabang "of their Tribal membership." ER 371 ¶ 85. Rabang allege that Kelly "injured" Rabang "in their monies, property and benefits of monetary value" by "taking control of the Tribe, the NITC, the NIHA, the NTC, the NED, the NIHD, and the NEdD." ER 381¶ 115.

Rabang's focus on conduct performed on behalf of the Tribe is reiterated by Rabang's allegation that "the Tribe constitutes an 'Enterprise' within the meaning of 18 U.S.C. § 1961(3) and 1962(2)."

ER 367 ¶ 76. Rabang go on to allege that each subordinate department of the Tribe for whom individual Kelly Appellants worked or served is an "Enterprise" under RICO, including the Council, the Nooksack Tribal Court, the Nooksack Indian Housing Authority, the Nooksack Enrollment Department, the Nooksack Indian Health Department, the Nooksack Education Department. ER 368-71 ¶¶ 77-83.

Apart from Rabang's self-serving characterization of the lawsuit as a personal capacity suit, the factual allegations do not show personal acts. The allegations repeatedly demonstrate that Rabang premise their claims on official acts by Kelly taken as agents of the Tribe to further Tribal governance and, more specifically, disenroll Rabang and implement that disenrollment.

B. Rabang Seek Relief That Will Operate Against the Tribe.

Rabang seek a remedy to the acts taken by the Tribe relating to the disenrollment and the consequences of the disenrollment. Rabang do not seek a remedy to individual acts by Kelly. For example, Rabang seek "[r]estitution…of all money, property, and benefits Plaintiffs were unlawfully defrauded and deprived of," ER 387 ¶ 5. Kelly did not abscond with these resources. Tribal resources are

controlled by the Tribe and can only be delivered to Rabang by the Tribe.

Rabang further seek relief designed to stop and reverse acts of the Tribe, including "equitable injunctive and ancillary relief as may be necessary to avert the likelihood of Plaintiffs' irreparable injury or prohibit the illicit conduct described herein during the pendency of this action and to preserve the possibility of effective relief, including but not limited to a temporary restraining order and a preliminary injunctions [sic]." ER 386 ¶ 1, a declaratory judgment, ER 386 ¶ 2, an order to cease and desist, ER 386 ¶ 3, in addition to treble damages and civil penalties premised on the alleged official acts. ER 386 ¶ 4. This relief will operate against the Tribe.

Rabang use the FAC to seek recompense for Tribal acts with which Rabang disagree, and to discredit, stop and reverse those tribal actions.

C. The Tribe's Disenrollment of Rabang and the Consequences of Disenrollment Are Part of an Intra-Tribal Dispute.

In November 2016, the Tribe disenrolled 289 individuals, including the majority of the Plaintiffs/Respondents, who failed to demonstrate legally sufficient blood connections to the Tribe to satisfy

the criteria established under the Tribe's amended Constitution and enrollment code. ER 230 ¶ 9, ER 206-11.[2]

The Tribe disenrolled Rabang, so Rabang are no longer entitled to the benefits of Tribal membership. They do not qualify for services provided by Tribal departments and agencies, including but not limited to housing, social services, health care, and educational services. The Tribe has taken steps to effectuate their disenrollment by ending their participation in various programs available to Tribal members by virtue of their membership.

The Tribe also has taken steps to evict two of the Respondents from residences on Nooksack Tribal trust property for failure to pay rent. NIHA is a division of the Nooksack Tribal Administration. NIHA was empowered by the Tribe to manage the Nooksack public housing stock, including to enter into lease agreements and pursue evictions. NIHA obtained writs to evict Elizabeth Oshiro, who complied, and Margretty Rabang, who contested an enforcement action. ER 230 ¶ 10, ER 213-26, ER 361-75 ¶¶ 43-49, 53, 67-68, 71,

[2] Those disenrolled on November 22, 2016 include Plaintiffs/Respondents Dominador Aure, Christina Peato, Elizabeth Oshiro, Olive Oshiro, and Michelle Roberts (Plaintiff and Relator in Plaintiffs' original Complaint). ER 355 ¶ 9; ER 206-11. Plaintiff/Respondent Margretty Rabang was disenrolled on June 3, 2016. ER 355 ¶ 9.

87a, 88e-k, 88v. Ms. Rabang did not appeal the orders resulting from the enforcement action. ER 230 ¶ 10. Ms. Rabang instead filed two collateral attack actions in Whatcom County Superior Court, alleging claims of trespass and seeking a writ of restitution restoring her to her residence in Tribal housing stock. The Whatcom County Superior Court properly dismissed the latter for lack of subject matter jurisdiction, and Ms. Rabang did not appeal that dismissal. *Id*.

Since the Tribe began the disenrollment process, individuals subject to disenrollment including Rabang have pursued twenty-seven lawsuits, appeals, objections and administrative appeals involving Tribal, state, and federal courts, and the BIA and its Interior Board of Indian Appeals (IBIA). ER 228 ¶ 2 ER 234-38. These individuals also filed complaints with the Washington State Bar Association against attorneys alleged to be involved in the disenrollment matters. *Id*. The Bar dismissed these grievances. *Id*.

This RICO suit similarly pursues this intra-tribal dispute in the wrong forum, pursuing RICO claims that tribal sovereign immunity bars to resolve disputes that have no place in federal courts.

VI. SUMMARY OF ARGUMENT

Immediate review of the sovereign immunity and subject matter

jurisdiction rulings is proper and well supported by precedent.

On *de novo* review, this Court should reverse the denial of Kelly's Rule 12 motion on two legal grounds. First, the action may not proceed based on sovereign immunity. Sovereign immunity prevents a lawsuit against Kelly for their acts specifically alleged as acts on behalf of the Tribe or when the relief sought would operate against the Tribe, as here. Second, federal courts have no jurisdiction to judge or resolve disputes regarding Tribal self-governance, such as who is a legitimate Council member and who is a member of the Tribe. Whether the Tribe complied with its governing documents, whether its government is legitimate and whether its laws have been followed is for the Tribe to decide. This dispute is not within the province of federal courts, which lack subject matter jurisdiction.

Rabang may not avoid the sovereign immunity doctrine simply by asserting in the FAC that Rabang sue the Defendants personally. The substance of the allegations in the FAC control, not Rabang's unsupported characterization of the nature of the suit. The allegations show that Rabang put at issue the official acts of Kelly as actors for the Tribe. Kelly are the arms and instrumentalities of the Tribe that took the action on its behalf. Rabang sue Kelly "because of" their

official capacities. By initiating this RICO action, Rabang seek to stop, discredit and reverse the Tribal acts of disenrollment and denial of membership benefits with which they disagree. Rabang may not hail these individuals to federal court in a RICO action to accomplish this.

Both the allegations premised on Kelly's official conduct and the relief sought show that sovereign immunity applies to these claims. Rabang seek a remedy against the Tribe. Dismissal is proper as shown by cases that include *Cook v. AVI Casino Enters.*, 548 F.3d 718, 722 (9th Cir. 2008), *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), *Fletcher v. United States*, 116 F.3d 1315, 1323-26 (10th Cir. 1997), *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). The Court should hold that sovereign immunity bars the suit.

The District Court went astray when it concluded that *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285 (April 25, 2017), supports rejection of sovereign immunity in these circumstances. The U.S. Supreme Court decided *Lewis* the day before the District Court denied the motion to dismiss. Rabang cited the case as supplemental authority on the day the District Court issued its decision. ER 398

Dkt. #61. No party had briefed the District Court on the import of *Lewis*. The District Court referenced the case in conclusory fashion but provided no analysis and did not perform the tests identified in *Lewis*. The principles and tests identified in *Lewis* support reversal, while the result is distinguishable based on the different factual allegations in this case.

In addition to the impediment of sovereign immunity, federal courts lack subject matter jurisdiction over the gravamen of the dispute: intra-tribal conflicts concerning Tribal governance. The U.S. Supreme Court established this rule in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53, 62-63 (1978), and it applies here. A string of decisions since, including *Williams v. Gover*, 490 F.3d 785 (9th Cir. 2007) and cases dismissing RICO claims such as *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996) and *Sac & Fox Tribe of Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003), demonstrate that the federal courts may not resolve issues concerning which factions properly control a tribal government and whether provisions of tribal governing documents were satisfied. This precedent supports dismissal.

The District Court improperly relied on and gave deference to

letters from the BIA purporting to "decide" the intra-tribal dispute, *see* ER 9-11, which was reversible error. Just as federal courts have no jurisdiction to resolve intra-tribal disputes, neither does the BIA. The BIA letters relate to the relationship between the Tribe and the BIA. That is all. The BIA may not "invalidate" the Council action, as the District Court incorrectly believed. *See* ER 9-11. Those letters are not binding on the Tribe, nor may they be bootstrapped into a federal ruling as the District Court did here. Nor do they convey jurisdiction. The letters, purporting to reach the merits of the intra-tribal dispute, are irrelevant to the issues before the Court.

The District Court also erred as a matter of law when it justified assertion of jurisdiction on inapposite case law that addresses the different issues of tribal subject matter jurisdiction and exhaustion. The correct analysis of subject matter jurisdiction of federal courts leads to the conclusion that federal courts have no subject matter jurisdiction over the issues raised in this lawsuit, regardless of exhaustion principles.

VII. ARGUMENT

A. Review Is Proper.

An immediate appeal is proper. Otherwise, the benefit of the

tribal immunity defense would be lost. This Court should immediately determine the validity of the District Court's holding that tribal sovereign immunity does not bar the RICO claims. This Court also must examine its own subject matter jurisdiction for this claim. Because the issues concern an intra-tribal dispute, it has none. Precedent supports immediate review of both issues.

1. This Court should review the tribal immunity ruling pursuant to the collateral order doctrine.

Precedent supports an interlocutory appeal of the tribal sovereign immunity ruling in these circumstances where a District Court has rejected the defense. Denial of a claim of tribal sovereign immunity is immediately appealable as a collateral order. *Burlington Northern & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1088 (9th Cir. 2007). *See also Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1015 (9th Cir. 2016) (same).

2. This Court also should review whether federal courts possess subject matter jurisdiction over the intra-tribal issues in dispute to provide meaningful review and because the issues are inextricably intertwined with the sovereign immunity issue.

The Court also should review subject matter jurisdiction and

Kelly's objection that this dispute is intra-tribal and not subject to resolution by the federal courts. This Court ordinarily will decide only the immunity issue during interlocutory appeal of collateral order unless a related issue is "inextricably intertwined" with, or "necessary to ensure meaningful review" of, the immunity issue. *Vaughn*, 509 F.3d at 1093. Here, both grounds support review of subject matter jurisdiction.

This Court has found that "meaningful review" requires review of a subject matter jurisdiction issue when reviewing qualified immunity. *Wong v. INS*, 373 F.3d 952, 960-61 (9th Cir. 2004). In *Wong*, the Court reasoned that "[r]esolution of subject matter jurisdiction . . . is 'necessary to ensure meaningful review of' the district court's interlocutory rulings because if the appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings." *Id*. This rationale supports review here.

Whether the District Court lacked subject matter jurisdiction because the action concerns an intra-tribal dispute relates to this Court's own jurisdiction. "An appellate court is under a 'special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties

are prepared to concede it. . . . [or] make no contention concerning it.'" *California v. United States*, 215 F.3d 1005, 1009 (9th Cir. 2000), citing *Axess Int'l, Ltd. v. Intercargo Ins. Co.*, 183 F.3d 935, 943 (9th Cir. 1999) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)) (internal quotations omitted). "If the district court lacked jurisdiction, we have jurisdiction on appeal to correct the jurisdictional error, but not to entertain the merits of the dispute." *Id*. This Court has a duty to establish its subject matter jurisdiction *sua sponte*. *See United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 967 (9th Cir. 2004).

Further, the subject matter jurisdiction issue is intertwined with the sovereignty issues. The underlying principles are the same and both involve examination of the nature of the allegations and the role of federal courts where sovereign tribes are concerned.

B. The Standard of Review Is *De Novo*.

Motions to dismiss for lack of subject matter jurisdiction based on the sovereign immunity of an Indian Tribe, or because the case involves an intra-tribal dispute, are Rule 12(b)(1) matters reviewed *de novo*. *Fletcher v. United States*, 116 F.3d 1315, 1323-26 (10th Cir.

1997) (sovereign immunity); *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 917 (D. Wyo. 1997) (sovereign immunity); *Miccosukee Tribe of Indians v. Cypress*, 975 F. Supp. 2d 1298, 1307 (S.D. Fla. 2013) (intra-tribal dispute).

Courts review *de novo* questions of sovereign immunity. *Cook v. AVI Casino Enters.*, 548 F.3d 718, 722 (9th Cir. 2008); *Fletcher v. United States*, 116 F.3d 1315, 1323-24 (10th Cir. 1997).

Courts review subject matter jurisdiction determinations *de novo*. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011); *Cook*, *supra*, 548 F.3d at 722; *Fletcher*, *supra*, 116 F.3d at 1324. A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). The plaintiff has the burden of establishing jurisdiction. *Id*.

Motions to dismiss for lack of subject matter jurisdiction can challenge the sufficiency of a complaint's allegations, accepting them as true, or may go beyond the allegations to consider affidavits and documents to resolve disputed jurisdictional facts, which does not convert the motion to a Rule 56 motion. *Gemtel Corp. v. Community Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994). *See*

also Americopters, LLC v. F.A.A., 441 F.3d 726, 732 n.4 (9th Cir. 2006) (to resolve subject matter jurisdiction, district court may consider facts outside four corners of complaint). Here, Kelly submitted additional affidavits and documents to resolve the jurisdictional issues on the merits rather than facially, particularly as to their claim that the dispute concerns intra-tribal governmental matters inappropriate for resolution in federal courts.

C. Tribal Sovereign Immunity Bars the RICO Claims because—as Rabang Alleged—Kelly Undertook the Alleged Conduct in Their Official Capacities on Behalf of the Tribe and Relief Would Operate against the Tribe.

This Court should hold as a matter of law that the District Court erred when it denied the Rule 12(b)(1) motion to dismiss because tribal sovereign immunity bars the claims against the individuals. The allegations demonstrate—many times over—that the individuals acted for the Tribe in their official capacities or as members of the Tribal government. Rabang sue these individuals to examine their acts on behalf of the Tribal government and force a determination in federal court whether the Tribal government itself is legitimate according to Tribal law. Federal courts have no jurisdiction to do that. Here, the individuals are no more subject to suit for the alleged conduct than the

Tribe itself.

1. Sovereign immunity bars lawsuits like this seeking to interfere with tribal self-government by suing tribal officials for their official acts in place of the tribe.

Suits against tribes are barred by sovereign immunity in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978). The Tribe's sovereign immunity can only be meaningful if this Court enforces the bar of sovereign immunity to Rabang's claims against those individuals through whom the Tribe acted. This remains true despite Rabang's critique of the legitimacy of the government. Rabang sue the individual members and officials who carried out the acts of Tribal government, but Rabang seek to prevail by requiring scrutiny of the acts—which on their face are legitimately within the scope of the individuals' authority on behalf of the Tribe—to determine whether the government is legitimate according to Tribal law. The conduct at issue is inherently official and has been alleged to be part of and on behalf of the Tribe.

This Court judges sovereign immunity in two ways. First, it examines whether the allegations concern official acts taken by

individuals in their official capacities, in which case the claims are barred. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087-90 (9th Cir. 2013), citing *Cook*, *supra*. Alternatively, the Court will bar the claims when the relief would operate against the tribe itself. *Id*. Rabang's claims do not surmount the sovereign immunity defense under either test.

a. Tribal officers are protected by tribal sovereign immunity when acting in their official capacities on behalf of the tribe to implement government business, like here.

Kelly are entitled to sovereign immunity because the acts alleged are plainly official acts on behalf of the Tribe. "Tribal sovereign immunity extends to individual tribal officers where… they are acting in their representative capacity and within the scope of their authority." *Maxwell v. County of San Diego*, 708 F.3d at 1088, citing *Cook*, *supra*, 548 F.3d at 727 (quoting *Linneen*, 276 F.3d at 492). In *Cook*, this Court articulated the concern plaintiffs not be allowed to "circumvent" tribal immunity through a pleading device. 548 F.3d at 727. It noted that tribal sovereign immunity protects officials where a plaintiff sues individuals "in name" to establish vicarious liability of the tribe where these individuals were acting in their official capacity

and within the scope of their authority. *Id.* The Court noted that the principle that recognizes tribal immunity of individuals acting in their official capacity applies to officials and tribal employees. *Id.* ("The principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official—apply just as much to tribal employees when they are sued in their official capacity.") In *Cook* this Court affirmed the dismissal of claims against two employees of a tribal corporation who undertook actions within their official capacity and, thus, were immune from suit. *Id.*

"The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities . . . ." *Maxwell* at 1088, citing *Native Am. Distrib. Co. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) (emphasis in original). "Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Id.* (emphasis in original). Here, Rabang sue the individuals

because they were the ones through whom the tribal government acted. They are sued based on their official acts as part of Rabang's effort to challenge *the Tribe's* government and actions. Rabang complains not that the individuals exceeded the scope of their individual authority and duties as officers or employees of the Tribe government, which would subject them to individual liability, but that their official acts should not be recognized for various reasons of Tribal law. For example, Rabang complains about:

- disenrollment of Rabang and others (FAC ¶¶ 9, 31, 41-43, 51, 54-55, 57, 59-60, 70, 87a, 88a-d, 88l-q),
- eviction of certain Rabang Plaintiffs/Respondents (FAC¶¶ 43-49, 53, 67-68, 71, 87a, 88e-k, 88v), and
- denial of benefits afforded to enrolled Tribal members (FAC¶ 60-62, 65-66, 70, 88p-u, 88w).

These acts were performed by the Tribe through Kelly. They are official acts, not individual acts that happened to arise when the individuals were attending to Tribal business. They are acts that could not be carried out except as an exercise of Tribal governmental authority. Rabang specifically attacks the acts accomplishing Tribal business.

Attacking tribal officials for legislative functions also is an attack on "the very core of tribal sovereignty." *Maxwell*, 708 F.3d at 1089, citing *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995).[3]

Here, Kelly are sued because they are the officials and representatives of the Tribe who acted for the Tribe and implemented its decisions. Rabang cannot circumvent the Tribe's sovereign immunity by suing the individuals when the gravamen of Rabang's complaint plainly is not particular individual action but the governmental conduct and the legitimacy of that government.

Rabang 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), and then accuse the government of illegitimacy. But the legitimacy of the government and whether Tribal law has been followed is not a subject for determination in federal court.

The District Court recognized as much, saying that the "heart of this case is the legitimacy of the internal tribal actions taken by the

[3] This approach applies to legislators generally, who have immunity from liability for legislative acts. *See Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998).

Nooksack tribal leadership." ER 7:22-24. The District Court also acknowledged that it "has no place deciding how the Nooksack Indian Tribe determines tribal membership and the benefits that derive from such membership." ER 11:24-25. These blunt and accurate conclusions required dismissal of the lawsuit because federal courts may not decide these issues. As in *Cook*, the District Court should have dismissed the claims.

The Tenth Circuit in *Fletcher* applied sovereign immunity to bar a suit where the Osage Tribe itself was not named as a defendant, but where the Tribal Council and its individual members and officials of the Tribe were named. 116 F.3d at 1324. The Tenth Court observed that the relief requested concerning "rights to vote in future tribal elections and hold tribal office" would, if granted, "run against the Tribe itself," demonstrating that sovereign immunity prevented the lawsuit. 116 F.3d at 1324, citing *Kenai Oil and Gas, Inc. v. Department of the Interior*, 522 F. Supp. 521, 531 (D. Utah 1981) ("Tribal immunity may not be evaded by suing tribal officers . . . ."), *aff'd*, 671 F.2d 383 (10th Cir. 1982). "[T]ribal immunity protects tribal officials against claims in their official capacity." *Id*. The same is true here. The injuries alleged by Rabang

all arise out of the inherently sovereign action of disenrolling Rabang from the Tribe and discontinuing benefits and services tied to membership As in *Fletcher*, dismissal is the proper result.

This Court previously has applied tribal sovereign immunity in similar circumstances. In *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991), this Court held that sovereign immunity barred a complaint against tribal officials because "the [officials'] votes individually [had] no legal effect" and it was "the official action of the Band, following the [officials'] votes, that caused [plaintiff's] injuries." The same is true here. Each alleged act only allegedly damaged Rabang because it was the official action of the Tribe. As individuals, Kelly did nothing of consequence to Rabang. The FAC put at issue only actions on behalf of the Tribe.

In *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 670-71 (8th Cir. 1986), the Eighth Circuit reiterated that a tribal housing authority is "an arm of tribal government" and that suits against it were barred by sovereign immunity. Here, the Tribal Council is an arm of Tribal government, and as such is presumptively immune from suit. The same is true for each of the other Tribal departments Rabang have identified as "RICO enterprises:" the Tribal

Court, NIHA, Enrollment Department, Indian Health Department, and Education Department.

These cases show that, when scrutinized, Rabang's allegations demonstrate official capacity claims against Kelly. This requires dismissal on grounds of sovereign immunity.

> b. Rabang seek remedies to discredit and reverse governmental action that denied their membership, benefits and housing, showing that sovereign immunity applies because the relief sought would operate against the Tribe.

This Court's remedy-focused analysis separately supports reversal on grounds of sovereign immunity. This analysis requires evaluation whether due to "the essential nature and effect" of the relief sought, the sovereign is or is not "the real, substantial party in interest." *Maxwell*, *supra*, at 1088. "In any suit against tribal officers, we must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" *Id*. at 1088.

The Court need not strain to answer this question, as Rabang seek a judgment that would accomplish all of these. Rabang seek

relief designed to undo that which the Tribe has done and restrain the Tribe's conduct. This is shown by Rabang's request for "equitable injunctive and ancillary relief as may be necessary to avert the likelihood of Plaintiffs' irreparable injury or prohibit the illicit conduct described herein during the pendency of this action and to preserve the possibility of effective relief, including but not limited to a temporary restraining order and a preliminary injunctions [sic]." ER 386 at 1, a declaratory judgment, ER 386 at 2, an order to cease and desist, ER 386 at 3, in addition to treble damages and civil penalties premised on the alleged official acts. ER 386 at 4. This requested relief would necessarily operate against the Tribe.

Rabang also seek "restitution" of Rabang's benefits and entitlements as enrolled Nooksack members. ER 381 ¶¶ 114-16, 386 ¶¶ 1-5 ("Restitution to Plaintiffs of all money, property, and benefits Plaintiffs were unlawfully defrauded and deprived of by RICO Defendants."). This is emphasized in Rabang's Response opposing dismissal, where Rabang describe their injury as loss of "their investments in their homes and federal funds" related to Nooksack housing, loss of "healthcare benefits," loss of "TANF monies, healthcare and educational monies for children," and continuing harm

"to their intervening legal entitlement to benefits." ER 137:3-13. These are all rights or benefits of enrolled members that the Tribe denied Rabang as a result of Rabang's disenrollment. None of these amounts are alleged to be personally converted by Kelly. Tribal resources available for distribution to Tribal members remain in control of the Tribe. Participation in Tribal programs is necessarily achieved through the Tribe. This Court should conclude that the relief would operate against the Tribe. This is not only the pragmatic conclusion as exemplified in *Edelman v. Jordan*, 415 U.S. 651 (1974) (court recognized that relief would operate against the government), but is conclusively shown by the allegations and prayer for relief.

In *Maxwell v. County of San Diego*, *supra*, this Court recognized that "in any suit against tribal officers, we must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" 708 F.3d at 1088 citing *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) (internal citations and quotation marks omitted). *See also Stock West Corp. v. Taylor*, 942 F.2d 655, 664 (9th Cir. 1991); *Hardin v.*

White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985); *accord Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994); *Smith v. Babbitt*, 875 F. Supp. 1353, 1363 (Minn. D.C. 1995). Here, the lawsuit would interfere with the administration and acts of the sovereign Tribe and potentially reverse official acts regarding status and benefits.[4]

The FAC seeks to impose a remedy on the Tribe for those acts. As such, dismissal is proper.

2. The principles and tests advanced by the U.S. Supreme Court in *Lewis v. Clarke* support dismissal.

The District Court incorrectly asserted that *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285 (April 25, 2017), "is dispositive" and supports the conclusion that "sovereign immunity is not a jurisdictional bar in this case." ER 11:15-23. The District Court confined its discussion of *Lewis* to one conclusory paragraph and failed to apply the tests set forth in *Lewis*. *Id*. The principles and tests in *Lewis* support reversal.

Lewis arose from a tort committed by individual defendant

[4] When Rabang turned to Whatcom County Superior Court, that court properly recognized its lack of jurisdiction to address Margretty Rabang's eviction by the Tribal government. ER 230 ¶ 10.

Clarke on a Connecticut interstate, i.e., a negligent automobile collision. *Id*. at 1292. The U.S. Supreme Court characterized the issue presented as "whether the sovereign immunity of an Indian tribe bars individual-capacity damages against tribal employees for torts committed within the scope of their employment." *Id*. at 1291. The Court had no trouble concluding, "This is not a suit against Clarke in his official capacity." *Id*. at 1292. The Court reasoned that the suit seeks recovery from Clarke "for his personal actions," and "will not require action by the sovereign or disturb the sovereign's property." *Id*. at 1292-93. Nothing suggested to the Court that tribal immunity was being circumvented. *Id*.

In *Lewis*, the U.S. Supreme Court reiterated that when the sovereign is the real party in interest, sovereign immunity bars the suit. 137 S. Ct. at 1291. Justice Sotomayor, writing for a majority of six, explained that the plaintiff's characterization in a complaint of official or personal capacity is not controlling, but rather courts must examine "the remedy sought." *Id*. "If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke [immunity]." *Id*. "Similarly, lawsuits brought against employees in their official

capacity represent only another way of pleading an action against an entity of which an officer is an agent, and they may also be barred by sovereign immunity." *Id.* at 1291-92. Thus, a court must determine whether the action is brought against employees in their official capacity, i.e., as an agent of the government, and whether the government is the real party in interest. This requires a court disregard characterizations in the complaint and focus on whether the individuals are merely arms or instrumentalities of the government and the remedy sought. *Id.*

These tests are not different than this Circuit's existing case law. Applying these tests, this Court should conclude that the action as pleaded and as shown by the factual record is in essence against the Tribe. Kelly are merely arms or instrumentalities of the Tribal government. Rabang sued the individuals based on their official acts, i.e., the Tribal action to disenroll Rabang and deny Rabang the benefits of Tribal membership. The essence of Rabang's action is alleged fault with the actions of the Tribe for whom the individuals are agents. Rabang seek remedies that will operate against the Tribe and bind the Tribe, and provide "restitution" for the Tribal benefits denied.

This is similar to the allegations in *Edelman v. Jordan*, *supra*, where the plaintiff sought an award of retroactive benefits wrongly denied by the federal government. In *Edelman*, the U.S. Supreme Court determined that this remedy would operate against the government, not the individual officers who administered the federal program, and therefore governmental immunity applied. *See also Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949) (a lawsuit for the recovery of specific property or monies, including an injunction against the officers administering a government contract, was really a suit against the sovereign that sovereign immunity barred).

Rabang are not seeking a remedy for injury that arose from an actor's personal negligent conduct while coincidentally on government business, like the driver in *Lewis* who negligently caused an accident while employed by a tribe. Rabang seek a remedy for the governmental acts of disenrollment and withdrawal of Tribal benefits. Rabang request "equitable, injunctive and ancillary relief" to "prohibit the illicit conduct" and "restitution" of the "money, property, and benefits" deprived by the Tribe. These are remedies to the actions of the Tribal government. Rabang cannot hail the Nooksack Tribe into

federal court for this relief, and neither can Rabang hail its representatives, agents and actors into court for this relief.

The principles of *Lewis v. Clarke* support reversal, even where the outcome of the case is factually distinguishable. Rabang allege no individual tort but seek relief to undo the actions of the Tribe, declare its government actions invalid, restore Rabang's membership and recompense Rabang for assets and benefits not that the individuals allegedly stole or possess but that the Tribe maintained in its accounts because the Tribe declined to provide the benefits to Rabang. These circumstances contrast sharply with the circumstances of *Lewis*. The circumstances also indicate an attempt to evade the Tribe's own sovereign immunity.

In sum, correct application of *Lewis* supports reversal.

3. No waiver has been alleged or exists.

RICO contains no language to suggest that Congress "unequivocally" waived Indian tribes' sovereign immunity. Rabang have never argued either congressional or tribal waiver. Absent a congressional or tribal waiver, the Tribe is immune from suit for alleged RICO violations. See *Smith*, 875 F. Supp. at 1365, citing *Bair v. Krug*, 853 F.2d 672, 674-75 (9th Cir. 1988) (holding that State of

Nevada was immune from RICO suit absent a waiver or its sovereign immunity); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1440-41 (D. Idaho 1987) (allowing RICO suit to proceed only after concluding that "sue and be sued" clause in tribal ordinance "unequivocally expressed" waiver of sovereign immunity); *see also McMaster v. State of Minnesota*, 819 F. Supp. 1429, 1434 (D. Minn. 1993), *aff'd*, 30 F.3d 976 (8th Cir. 1994) (holding that State of Minnesota was immune from RICO suit absent a waiver of its sovereign immunity).

No waiver exists in this case. Sovereign immunity for the acts complained of bars the claims.

D. The District Court and This Court Lack Subject Matter Jurisdiction to Decide the Intra-Tribal Dispute Concerning the Legitimacy of the Tribal Government.

Neither this Court nor the District Court has subject matter jurisdiction over this intra-tribal dispute. The Court should dismiss this lawsuit for lack of jurisdiction because the lawsuit seeks to continue an intra-tribal dispute regarding membership in the Tribe, disenrollment, and Rabang's disagreement with the leadership of Chairman Kelly and the Nooksack Tribal Council. The dispute is not subject to resolution in the federal courts.

1. Intra-tribal disputes like this are not subject to resolution in the federal courts.

Tribal disputes like this have no place in federal courts. Federal courts lack jurisdiction over disputes about tribal government and membership. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53, 62-63 (1978). An intra-tribal dispute is one that affects matters of tribal self-government and sovereignty. *Id*. This includes the power to regulate their internal and social relations, including their form of government and tribal membership. *Id*. at 62-63. *See also Cherokee Intermarriage Cases*, 203 U.S. 76 (1906) (unless limited by treaty or statute, a tribe has the power to determine tribe membership); *Roff v Burney*, 168 U.S. 218, 222-23 (1897).

a. Tribes have inherent power to determine issues of tribal government.

Tribes have inherent power to determine tribal membership, to regulate domestic relations among members, to prescribe rules of inheritance for members, and to punish tribal offenders. *Montana v. U.S.*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership"). The enforcement of a tribe's own laws—such as the Tribe's Constitution, its Enrollment Ordinance, its Election Ordinance, and its Unlawful Detainer

Ordinance—is within the scope of its sovereignty. *Boney v. Valline*, 597 F. Supp. 2d 1167, 1175 (D. Nev. 2009). "Federal courts have consistently affirmed the principle that it is important to guard 'the authority of Indian governments over their reservations.'" *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir. 2005) (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

The seminal case *Santa Clara Pueblo* is instructive. A female member of the Santa Clara Pueblo sought declaratory and injunctive relief against the Pueblo and its governor because the tribe's membership ordinance treated female and male children differently, allegedly violating equal protection under the Indian Civil Rights Act, 25 U.S.C. § 1302(8). The U.S. Supreme Court held that although Congress could abrogate the tribe's sovereign immunity from such a suit, Congress had not. 436 U.S. at 56-60. The Court expressly held that the tribe's sovereign immunity from suit applied to the tribe and its officers. *Id*. at 60, 72.

A tribe's right to determine who is, and is not, a member is immune from review by a federal court. *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Williams v. Gover*, 490 F.3d at 790 ("Under *Santa Clara Pueblo*, Mooretown Rancheria had the power to squeeze the

plaintiffs out, because it has the power to define its own membership. It did not need the BIA's permission and did not ask for it, and the BIA never purported to tell it how to define its membership."). *See also Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) ("[U]nless limited by treaty or statute, a Tribe has the power to determine tribal membership."), *accord*, *Apodaca v. Silvas*, 19 F.3d 1015 (5th Cir. 1994) (per curiam); *Fletcher*, *supra* (federal courts cannot determine voting rights in tribal elections nor who may hold tribal office); *Ordinance 59 Ass'n. v. United States Dept. of the Interior*, 163 F.3d 1150 (10th Cir. 1998) (same).

This Circuit has recognized these well-defined principles. *See Williams v. Gover*, *supra*, 490 F.3d at 789-90. In rejecting a claim alleged under federal statutes but premised on a tribal membership dispute, this Court recognized that sovereign immunity presents the would-be plaintiffs "an insuperable problem with their case." *Id*. at 789. In *Gover*, the plaintiffs had attempted to avoid this problem by suing the BIA. In this case, Rabang attempt to avoid the problem by suing Tribal officials. In both cases, pleading strategy cannot overcome the fundamental problem that federal courts do not decide tribal membership disputes.

b. Federal courts do not allow would-be litigants to plead around their lack of jurisdiction.

This Court also has recognized that "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership . . . from the general rule that otherwise applicable federal statutes apply to Indian tribes." *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). Plaintiffs cannot use otherwise applicable federal statutes "to force tribes to comply with their membership provisions" or "to change their membership provisions." *Id*. In *Lewis v. Norton*, the plaintiffs similarly attempted to avoid tribal sovereign immunity by suing federal agencies who interact with tribes, as here Rabang try to sue the individuals through whom the Tribe's government acts. This Court soundly rejected "an end run around tribal immunity." *Id*. at 962.

This Court should be further persuaded by the outcome in *Smith v Babbitt, supra*, 100 F.3d at 558, where the Eighth Circuit rejected an attempt to bring an intra-tribal dispute to federal court through artful use of federal statutes. Members and nonmembers of the Mdewakanton Sioux Tribe sued the tribe and the federal government disputing payments of gaming profits to certain members whose status

within the tribe was disputed. The alleged violations of RICO and other federal statutes were insufficient to establish jurisdiction over what the Eight Circuit determined was—at its core—an intra-tribal dispute over membership. *Id*. at 559. The Eight Circuit was clear that the attempt to challenge the membership determinations in federal court could not be sustained, stating,

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of IGRA, ICRA, IRA, RICO, and the Tribe's Constitution. However, upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.

Id. Although the plaintiffs had alleged claims under IGRA, ICRA, IRA, RICO, and the tribe's Constitution, the complaint overtly concerned acts of tribal government that could not be resolved in federal court. *Id*. ("The facts of this case further show that this dispute needs to be resolved at the tribal level."). The same is true here. This Court has cited *Smith v. Babbitt* favorably. *See Williams v. Gover*, 490 F.3d at 789 n. 6; *Lewis v. Norton*, 424 F.3d at 961.

In *Sac & Fox Tribe of Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003), the District Court held it lacked subject matter jurisdiction because resolution of the case would require it to

determine whether the defendants unlawfully took control of the Tribe, stating,

> With the exception of the two predicate acts based on state law, which the Court finds inapplicable in this case, each of the predicate acts alleged above requires a finding that defendants' acts in taking control of the Tribal Council are unlawful. If the Appointed Tribal Council is properly in place, their actions would not constitute predicate offenses. Therefore, in order to rule on plaintiffs' RICO claims, this Court would have to first determine whether defendants are unlawfully in control of the Tribe. As previously discussed, this Court does not have jurisdiction to determine which Tribal Council is properly in place under the Tribal Constitution. This is [an] intra-tribal dispute over which this Court has no subject matter jurisdiction.

Id. at 944. *See also Miccosukee Tribe of Indians v. Cypress*, 975 F. Supp. 2d 1298, 1306 (S.D. Fl. 2013) ("The Miccosukee Tribe is bootstrapping what is discontent with the prior leadership onto alleged federal claims that are better resolved in another venue.").

Rabang pursue the same impermissible strategy through this lawsuit: scrutiny of an intra-tribal dispute and relief from Tribal governmental decisions concerning membership and self-government including a determination whether the Tribal Council is properly constituted according to the governing documents of the Tribe. The federal courts have no place making this decision. Rabang cannot create jurisdiction to force the dispute into federal court in the guise of RICO claims.

Rabang's RICO claims require determinations, for example,

regarding whether (1) Nooksack law provides for holdover of Council positions in the absence of an election; (2) the delay of the Nooksack elections violated Nooksack law; (3) the Tribal Council lacked a quorum after March 24, 2016 and thus its actions thereafter were void under Nooksack law; (4) the January 2017 Nooksack elections seating the current Council were void under Nooksack law; (5) the disenrollment of Rabang violated Nooksack law; (6) the eviction of certain Respondents violated Nooksack law; and (7) the denial of benefits to Rabang was without authority or in violation of Nooksack law. Each issue is outside the jurisdiction of the District Court and this Court. The answers to these disputes also cannot be supplied by the BIA, which is addressed in the next section.

"Federal courts do not have jurisdiction to resolve tribal law disputes. . . These disputes are within the exclusive jurisdiction of the Community's tribal court." *Smith*, 875 F. Supp. at 1362; *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (holding that federal courts do not have jurisdiction to interpret a tribal constitution or tribal laws). In *Runs After*, the Eighth Circuit examined allegations including that tribal council resolutions were inconsistent with the tribal constitution, bylaws and election ordinance. *Id*. at 352. The

Eighth Circuit reasoned that federal courts could not resolve the action because resolution "would necessarily require the district court to interpret the tribal constitution and tribal law is not within the jurisdiction of the district court." *Id*. Appellants were left with "review in tribal court or . . . alternative, political remedies." *Id*.

In addition to judging the Tribe's disenrollment decisions, resolution of Rabang's RICO claims would require adjudication whether the Tribal Council and the Tribal departments were authorized to act to revoke member benefits from disenrolled Plaintiffs/Respondents, or to evict Margretty Rabang and Elizabeth Oshiro. Those issues have already been appropriately adjudicated by Tribal authorities under Nooksack law in the Nooksack Tribal Court. As explained in multiple authorities including *Santa Clara Pueblo v. Martinez*, *supra*, *Montana v. U.S.*, 450 U.S. 544, 564, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), *Gover*, *supra*, and *Miccosukee Tribe of Indians*, *supra*, such intra-tribal disputes should not be entertained by the federal courts.

Consistent with these authorities, federal courts have dismissed for lack of subject matter jurisdiction a RICO claim centering on a dispute (like the case at bar) concerning the authority of a tribal

council to act on behalf of the tribe. *In re Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003). Similarly, in *Smith v. Babbitt*, *supra*, the district court concluded it had no basis to assert jurisdiction over a claim arising from an intra-tribal dispute regarding membership—a subject matter governed by tribal code—despite the reference to RICO and mail fraud. 875 F. Supp. at 1366, *judgment aff'd, appeal dismissed in part*, 100 F.3d 556, 559 (8th Cir. 1996).

RICO claims are unavailable to resolve intra-tribal disputes and acts allegedly committed within the course and scope of a defendant's employment with the Tribe. Rabang allege that "RICO Defendants carried out their scheme to defraud Plaintiffs, through their official positions in or other affiliations with the Tribe. . ." FAC ¶ 3. As the FAC demonstrates, the issues in this lawsuit relate solely to "purely intramural matters touching exclusive rights of self-government." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). As such, the Court lacks jurisdiction and dismissal is required.

2. The District Court improperly relied on and gave deference to BIA letters to deny the motion, when the BIA also lacks authority to resolve intra-tribal disputes.

Rabang are expected to argue that the BIA has taken their side

in the intra-tribal dispute on the merits. This argument is of no moment because tribal governance disputes are controlled by tribal law and fall within the exclusive jurisdiction of tribal institutions—the BIA has no jurisdiction to determine the issues. The BIA's recognition of a member or faction is not binding on a tribe. *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 939 n. 7, 943 (8th Cir. 2010), citing *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). The District Court erred when it relied on and gave deference to the irrelevant BIA letters to support jurisdiction and the denial of the motion to dismiss.

While the BIA may at times be obliged to recognize one side or another in a dispute *as part of its responsibility for carrying on government relations with a tribe*, as the *Goodface* court noted, once the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself. See *Goodface*, 708 F.2d at 339. *See also Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549, 551-53 (10th Cir. 1987) ("[W]hen a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere."). In other words,

the BIA's opinions are not binding on the tribe.

In situations of federal-tribal government interaction where the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination. *See Wheeler*, 811 F.2d 549 at 552. *See also Winnemucca Indian Colony v. United States ex rel. DOI*, 837 F. Supp. 2d 1184, 1192 (D. Nev. 2011) ("As the BIA itself notes and indeed focuses on in its pleadings, it is not for the federal government to adjudicate disputed tribal leadership according to tribal law."), citing *Cohen's Handbook of Federal Indian Law* § 5.03[3][c], at 411 (2005 ed.); *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1138 (E.D. Cal. 2015).

In asserting jurisdiction, the District Court erroneously relied on and gave deference to letters of the BIA addressing the intra-tribal dispute (*see* ER 362 ¶ 50, ER 363 ¶ 56), and erroneously purported to treat the BIA letters as having "invalidated" actions of the Tribe. See ER 9:15-16 ("[T]he Court must also consider the three DOI decisions invalidating these judicial actions."); ER 9:22-24 (referencing DOI's "decisions to invalidate" actions of the Tribe); ER 10:25-26 ("deference is owed to the DOI decisions"), ER 11:5-6 (referencing

"DOI's decisions to invalidate actions taken by Defendants"); ER 11:25 to 12:1 ("DOI has found such disenrollment decisions to be invalid"). This reasoning was unsound. The District Court was misled to rely on these letters when they are not relevant. The BIA letters do not justify federal court jurisdiction of Rabang's claims.

The District Court reasoned that it "must also consider the three DOI decisions invalidating these judicial actions." ER 9:15-16. The District Court relied on the misnomer that the Department of the Interior could "invalidate" tribal court actions concerning internal disputes. *Id*. No authority suggests that the Department may or did. Similarly, Rabang's filing of a complaint in federal court does not permit the District Court or a jury to conclude that the actions of the Tribal government are "invalidated." Rabang may not bootstrap unauthorized determinations by the DOI relevant only to the DOI's inter-governmental relationship with the Tribe into this action, nor may the District Court replace the Tribe's sovereign authority to determine issues of self-government with the DOI's opinions.

The merits of the intra-tribal dispute have no bearing on the jurisdictional issues. The BIA's opinions of the merits diverted the District Court from the jurisdictional issues before it. The record and

the allegations show that the Tribe has a judicial system and it is functioning. That Rabang also seeks to undermine the legitimacy of its judicial system does not allow this Court to reach the merits or rely on the BIA.

The District Court overlooked that the Department of the Interior lacks authority to resolve the intra-tribal dispute. *See Cayuga Nation v. Tanner*, 824 F.3d 321 (2nd Cir. 2016). The Second Circuit explained that the BIA "has the authority to make recognition decisions regarding tribal leadership, but 'only when the situation [has] deteriorated to the point that recognition of some government was essential for *Federal* purposes.'" *Id*. at 328. Any determination the DOI makes is to "carry out the government-to-government relationship with the tribe." *Id*., citing *United Keetoowah Band of Cherokee Indians*, 22 IBIA 75, 80 (1992). DOI determinations are, therefore, for the limited purpose of the relationship between the tribe and the federal government. They do not carry over to affect the tribal members' relationships or resolve the intra-tribal dispute or, in this case, give credence to RICO claims charging illegitimacy of a tribal government.

The District Court described its jurisdiction as "interim." ER

10:25-11:1, 11:5, 11:8 ("This Court's jurisdiction … is not permanent or inflexible."), 12:1. It reasoned that it has jurisdiction "until the DOI and BIA recognize a newly elected Tribal Council or the DOI decisions are invalidated." ER 12:1-3. This is unsupported by any authority. No precedent suggests the District Court may assert jurisdiction temporarily that compels the Tribe and its agents to defend in federal court their acts of self-government, to prove an interpretation of tribal governing documents to the federal judiciary, or to allow a federal jury to judge the Tribe's acts of governance.

The District Court erred when it relied on and gave deference to the BIA letters opining on the merits of the intra-tribal dispute to deny the motion to dismiss. The District Court's view that the BIA "invalidated" Tribal actions is incorrect. These errors were compounded by its erroneous application of an exhaustion analysis, described below. This Court should recognize its jurisdictional limits and reverse.

3. The District Court applied inapposite jurisprudence concerning exhaustion and the wrong test to address Kelly's defenses.

The District Court committed another major error in its legal analysis. It conflated the issue of tribal court jurisdiction (whether a

tribal court has jurisdiction over a dispute involving a non-Indian and when a federal court also having jurisdiction should entertain the dispute) with a proper analysis concerning federal jurisdiction to resolve intra-tribal disputes. Instead of analyzing the latter, the District Court justified jurisdiction based on principles of federal abstention and exhaustion that are not applicable.

The District Court mistakenly relied on *Grand Canyon Skywalk Dev.*, a case that addressed "the subject of tribal court jurisdiction over disputes arising when non-Indians choose to do business in Indian country," to hold that it had jurisdiction over the dispute. *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc*., 715 F.3d 1196, 1198 (9th Cir. 2013). This case is inapposite.

As Judge Tallman explained in *Grand Canyon Skywalk*, whether a tribal court has jurisdiction to decide a matter involving a non-Indian is an issue that federal courts generally do not rule upon prior to the exhaustion of tribal court remedies, with some exceptions. *Id*. at 1198. The Court in *Grand Canyon Skywalk* did not undertake a sovereign immunity analysis nor scrutinize its own subject matter jurisdiction. Rather, the decision addresses tribal court jurisdiction. The Court cautioned the plaintiff not to assume that the tribe had

waived its sovereignty by allowing a tribal entity to contract with the plaintiff, *id*. at 1205, but did not decide whether the tribal entity was subject to suit in federal court. In the case at bar, the District Court erred when it relied on *Grand Canyon Skywalk* to determine the sovereign immunity or subject matter jurisdiction issue in this intra-tribal dispute.

Exhaustion—as discussed in *Grand Canyon Skywalk* to resolve a plaintiff's challenge to tribal court jurisdiction and the district court's decision to defer to the pending tribal court proceeding—is based on a rationale of comity afforded the Indian (or State) venue. *Id*., citing *Juidice v. Vail*, 430 U.S. 327, 338 (1977) (concerning comity to state court with jurisdiction for commitment order). *See also Burlington Northern R. R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) ("As a general rule, a federal district court should abstain from asserting federal question jurisdiction over claims that are identical to claims pending in tribal court until the tribal court has had a full opportunity to consider the basis for its own jurisdiction."). An exhaustion analysis applies when federal courts are considering deference to proceedings taking place in another *court* including a tribal court. This is distinct from the issue whether a federal court can

require a tribe to defend federal court proceedings despite its sovereign immunity and the tribal nature of the dispute.

No precedent permits a federal court to dispense with the protections of sovereign immunity or that court's own jurisdictional limits through application of an exhaustion analysis. In fact, it is well established that when sovereign immunity applies, the plaintiff is at a dead end and cannot force the sovereign to court. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Demontiney v. United States*, 255 F.3d 801, 814 (9th Cir. 2001).

The District Court erred as a matter of law when it mistakenly used exhaustion jurisprudence applicable to the issue of tribal court jurisdiction to resolve its own jurisdiction.

Tribal court jurisdiction is not at issue in this case, unlike in *Grand Canyon Skywalk Dev*. No case is pending in tribal court to determine the RICO claims asserted by Rabang to which the federal courts might defer. Rabang do not challenge the Tribal Court's jurisdiction over any pending dispute. Rabang instead seek to litigate RICO claims about tribal actions. Kelly did not assert failure to exhaust nor seek mere postponement of this litigation, nor argue that the District Court lacks jurisdiction now but might exercise

jurisdiction at some future date. Kelly assert that sovereign immunity and a lack of subject matter jurisdiction prevent the action now and always.

"[T]ribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction." 715 F.3d at 1200. Sovereign immunity, in contrast, is a jurisdictional bar. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Demontiney v. United States*, 255 F.3d 801, 814 (9th Cir. 2001). The District Court went down the wrong path both when it relied on the DOI letters and when it premised its resolution of Kelly's jurisdictional defenses on exhaustion and comity principles described in *Grand Canyon Skywalk Dev*.

The District Court also incorrectly attempted to rely on *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999), a case that further demonstrates that sovereign immunity and exhaustion are distinct analyses applicable to different issues that the District Court improperly merged together. In *Johnson*, a non-Indian subtenant of property on the Gila River Indian Community sued in federal court for a declaration that the tribal court had no jurisdiction over him and his property and for an injunction to prevent enforcement of a tribal court

judgment against him. 174 F.3d at 1034-35. The district court dismissed the complaint for failure to exhaust tribal court remedies. *Id*. at 1035. This Court then made two determinations on appeal. First, it affirmed dismissal of Johnson's claims against the tribe because "the Tribe has not waived its sovereign immunity defense." *Id*. Second, as to the individual Indian defendant, the Court addressed the issue of the tribal court's jurisdiction over Johnson and, applying an exception to the exhaustion requirement, ruled that Johnson did not have to exhaust tribal remedies because the facts showed exhaustion would be futile. *Id*. at 1035-36. Notably, Johnson himself did not assert sovereign immunity. Exhaustion was the proper analysis as to Johnson in that case.

Not so here, where Kelly assert sovereign immunity and lack of subject matter jurisdiction. In applying *Johnson* to the case at bar, the District Court lost sight of the first ruling in *Johnson* that sovereign immunity prevented the lawsuit against the tribe regardless of the asserted exhaustion prerequisite relevant to the issue of the tribal court jurisdiction. *Johnson* does not support the District Court's denial of the jurisdictional defenses on the irrelevant grounds of exhaustion and its exceptions. To the contrary, it shows that the jurisdictional bars

are absolute.

This Court has explicitly stated that "inadequacy of tribal remedies does not effect a waiver of the Tribe's sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 814 (9th Cir. 2001). Plaintiff *Demontiney* argued, like the District Court in the case at bar reasoned, that "a federal court has jurisdiction over a tribe under an exception to the sovereign immunity doctrine if tribal remedies are nonexistent." *Id*. This Court rejected the argument not only because Demontiney failed to show nonexistent tribal remedies, but also because "even if Demontiney's tribal remedies are uncertain or inadequate, our precedent that recognizes the inadequacy of tribal remedies as a basis of federal jurisdiction is not applicable here." *Id*. The Court cited *Johnson v. Gila River Indian Cmty.* (just like Kelly do) to explain that sovereign immunity will bar a suit against a tribe regardless of exhaustion issues or inquiry into suitable tribal remedies. *Id*.

The District Court's use of *Johnson* (ER 8:8-11) fails on its face and is incompatible with *Demontiney*. The District Court incorrectly believed that exhaustion relates to sovereign immunity. It does not.[5]

[5] This mistake is repeated by the District Court's citation to numerous

The District Court continued these errors when it relied on *Cayuga Nation v. Tanner*, a Second Circuit decision that addressed standing of purported agents of the tribe, not sovereign immunity. 824 F.3d 321 (2nd Cir. 2016). In *Tanner*, the Indian Nation itself initiated the federal proceedings. *Id*. at 326. It is not a sovereign immunity case. *Tanner* is distinguishable and does not support affirmance.[6]

Further, the District Court missed a main point of *Tanner*: "federal courts are forbidden to" "answer disputed questions of tribal law." *Id*. at 328. The Second Circuit recognized that it would be "disastrous for the tribe's rights" if a federal court determined a question of tribal law as a necessary element of an issue or suit before it. *Id*. The Second Circuit avoided deciding a tribal law issue to

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exhaustion decisions, ER 11-12, all of which are inapposite.

[6] *Tanner* concerned an underlying dispute over tribal governance. The BIA had recognized one faction in 2011, but the IBIA reversed that determination on the grounds the BIA "impermissibly intruded into internal tribal affairs" and clarified that the BIA "may make a recognition decision only when such recognition is necessary for a federal purpose." 824 F.3d at 326. Thereafter, the BIA made certain "interim" decisions for purposes of administering certain of its contracts "to provide the Nation with additional time to resolve this dispute without BIA interference" and to avoid "rendering a new recognition decision [that] would impermissibly intervene in the ongoing leadership dispute." *Id*. at 326-27.

resolve standing, essentially reasoning it would recognize standing in the unique circumstances, as the BIA had done for its purposes, to allow certain individuals to sue on behalf of a tribe to protect the tribe's interests. *Id*. at 328. The Second Circuit reasoned that the record contained "a sufficient basis … to conclude, without resolving disputes about tribal law, that the individual may bring a lawsuit on behalf of the tribe." *Id*. at 328.

This practical solution to permit someone to affirmatively represent a tribe's interests as a plaintiff does not lend itself to the current lawsuit, where the RICO claims asserted against tribal representatives as defendants require determination on the merits whether the government is legitimate. As the District Court recognized, this is the heart of Rabang's claim. This issue of legitimacy cannot be avoided. This Court should hold that federal courts cannot resolve the dispute and the lawsuit must be rejected for lack of subject matter jurisdiction.

None of the authority relied on by the District Court permitted it to disregard the sovereignty of the Tribe and its agents under the guise of an exhaustion requirement and make a decision—preliminary or not—regarding the legitimacy of the Tribal Council or the validity

of its acts. For example, the District Court concluded, "The facts demonstrate that the holdover council Defendants acted without a quorum when they altered the Nooksack judiciary judges and structure." ER 9:2-3. This requires interpretation of Tribal law, which is not the province of the District Court. The District Court correctly pointed out that "these are intra-tribal matters and are generally not for federal courts to review" (ER 9:10-11), but the District Court did so anyway.

For all of these reasons, denial of the motion to dismiss was legal error.

VIII. CONCLUSION

The FAC was improvidently filed as a vehicle to address the intra-tribal disputes detailed in its pages in federal court. This forum offers Rabang no opportunity to resolve their essential grievances. Dismissal is the proper result. This Court should reverse and require dismissal on the ground that the individual Kelly Appellants are protected by sovereign immunity from these RICO claims. The claims should be dismissed.

As an alternative basis for reversal, this Court should hold that federal courts do not have jurisdiction over the intra-tribal dispute.

DATED this 17th day of August, 2017.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: s/ Connie Sue Martin

Connie Sue Martin, WSBA #26525
Email: csmartin@schwabe.com
Christopher H. Howard, WSBA #11074
Email: choward@schwabe.com
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711
Facsimile: 206.292.0460
Attorneys for Appellants

STATEMENT OF RELATED CASES

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

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,416 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

DATED this 17th day of August, 2017.

Respectfully Submitted,

By: s/ Connie Sue Martin
Connie Sue Martin, WSBA #26525

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2017, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

Gabriel S. Galanda
Email: gabe@galandabroadman.com
Anthony S. Broadman
Email: anthony@galandabroadman.com
Ryan D. Dreveskracht
Email: ryan@galandabroadman.com
Bree R. Black Horse
Email: bree@galandabroadman.com
Galanda Broadman, PLLC
PO Box 15146
8606 35th Avenue NE, Suite L1
Seattle, WA 98115
Attorneys for Plaintiffs

Rachel Saimons
Email: rsaimons@kilpatricktownsend.com
Rob Roy Smith
Email: rrsmith@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP
1420 Fifth Avenue, Suite 3700
Seattle, WA 98101
Attorneys for Raymond Dodge

s/ Connie Sue Martin
Connie Sue Martin, WSBA #26525