

Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

MARGRETTY RABANG, et al.,

Plaintiffs,

v.

ROBERT KELLY, JR., et al.,

Defendants.

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

**DEFENDANT CHIEF JUDGE
RAYMOND G. DODGE, JR.'S
BRIEFING IN RESPONSE TO
MEMORANDUM OF AGREEMENT
(PER ORDER, DKT. # 115)**

Defendant Chief Judge Raymond G. Dodge, Jr. ("Judge Dodge") hereby provides the requested briefing concerning the Memorandum of Agreement ("MOA") entered into on August 25, 2017 by Robert Kelly, Chairman of the Nooksack Indian Tribal Council, and Michael Black, the Acting Assistant Secretary – Indian Affairs ("AS-IA"), Department of the Interior ("DOI").

INTRODUCTION

This Court requested briefing on the effect of the MOA with respect to three topics that pertain to Judge Dodge, as follows:

1. The effect of the MOA, if any, on the Court's continued jurisdiction over this lawsuit;
2. The effect of the MOA, if any, on Defendant Dodge's pending motion for summary judgment; and

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KILPATRICK TOWNSEND & STOCKTON LLP
1420 Fifth Avenue, Suite 3700
Seattle, Washington 98101
(206) 467-9600

3. The effect of the MOA, if any, on Plaintiffs' pending motion to compel discovery. Dkt. # 115. As set forth below, answering the first question, the MOA deprives this Court of jurisdiction over the entire case by recognizing Chairman Kelly and relying on, and funding, the Tribal Court to implement part of the MOA. Second, the MOA supports Judge Dodge's pending motion for summary judgment by affirming that he is entitled to judicial immunity for the acts he is alleged to have taken while acting as Tribal Court Judge. Third, the MOA has no discernible impact on Plaintiffs' pending motion to compel, unless the Court agrees that the case should now be dismissed for jurisdictional reasons. For the Court's convenience, Judge Dodge joins in the arguments of the other Defendants' Brief Regarding the Effect of the MOA.

ARGUMENT

A. With the MOA in Place, the Court No Longer Has Jurisdiction Over This Action

In response to the other Defendants' Motion to Dismiss, this Court found that, because deference was owed to the DOI decisions, it had jurisdiction "in the interim period where the tribal leadership is considered inadequate by the DOI." Dkt. # 62 at 10-11. The Court noted, however, that its jurisdiction was "not permanent or inflexible" and that "if the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have jurisdiction and the issues will be resolved internally." *Id.* With the MOA, the facts have changed, and this Court no longer has jurisdiction over any aspect of this RICO dispute as to all defendants.

1. DOI No Longer Considers the Tribal Leadership Inadequate

DOI has decided to recognize Tribal leadership pending an election, agreeing to recognize Chairman Kelly as a person of authority within the Tribe; resume funding Indian Self-Determination and Education Assistance Act Contracts with the Tribe; and, maintain a government-to-government relationship with the Tribe. MOA, §§ C, F. Whereas in 2016 DOI concluded that the Tribal Council "lack[ed] authority to conduct business on behalf of the

1 Tribe,” the MOA now conversely relays DOI’s intention to “provide and to outline a procedure
 2 whereby [AS-IA Black] recognizes a Nooksack Indian Tribal Council as governing body of the
 3 Nooksack Indian Tribe.” *Compare* Dkt. # 74-17 and MOA, § A. This recognition is a
 4 fundamental alteration to DOI’s previous position as to Tribal leadership that materially changes
 5 the nature of this case.

6 Just as this Court determined that DOI’s earlier letters had precedential weight on its
 7 decision, so too should the Court defer to the MOA. By recognizing Chairman Kelly and laying
 8 out a process for future recognition of the Tribal Council, the MOA eliminates what DOI
 9 previously considered to be “inadequate” leadership. Dkt. # 62 at 10-11. This change in
 10 position as to the Tribe’s authority impacts the Court’s jurisdictional analysis because there is no
 11 longer “no recognized tribal leadership.” *Id.* at 11. Plaintiffs’ case, which hinges on the alleged
 12 false representations of Defendants acting as a tribal government, is now moot. *See, e.g., Pitts v.*
 13 *Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011) (requiring that “an actual, ongoing
 14 controversy exist at all stages of federal court proceedings”).

15 **2. The Nooksack Tribal Court’s Authority is No Longer in Question**

16 As the Court noted, “[P]roper respect for tribal legal institutions requires that they be
 17 given a full opportunity to consider the issues before them and to rectify any errors.” Dkt. # 62
 18 at 8 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987)). This Court previously
 19 determined that the Tribal Court was “operating with questionable authority based on the facts
 20 and exhibits submitted” and that certain actions taken without a quorum “could mean the
 21 Nooksack judiciary is non-functioning.” Dkt. # 62 at 9. The Court’s use of the subjunctive
 22 “could” illustrates only that it was possible that the judiciary was non-functioning based on the
 23 facts available and alleged by Plaintiffs at that time. Since that Order was issued, it has become
 24 increasingly clear that DOI’s concern was only with the Nooksack Tribal Council, not with the
 25

1 Tribal Court. As evidence of this, the MOA includes terms which assume and require the
 2 continuing functionality of the Tribal Court. In addition, DOI has declined to expressly disavow
 3 the Court's legitimacy despite ample opportunity to do so. Instead, BIA Court Consultant Karen
 4 Gottlieb issued a very positive report on the Nooksack Tribal Court and DOI has continued to
 5 fund the Tribal Court. Taken together, these actions acknowledge that the Tribal Court is a
 6 legitimate and functioning entity.

7 Again, because Plaintiffs' RICO claims and this Court's jurisdiction hinge on allegations
 8 that the Tribal Court was participating in a RICO enterprise, the MOA means that the Court now
 9 lacks jurisdiction over the RICO claims.

10 **a. The Terms of the MOA Require the Continued Recognition of the**
 11 **Tribal Court**

12 Similar to the three letters issued by AS-IA Roberts to Chairman Kelly in 2016, the MOA
 13 makes no explicit mention of the Tribal Court or Judge Dodge.¹ However, the terms of the MOA
 14 require recognition of the Tribal Court to carry out its provisions in order to hear any challenges
 15 to the elections results.

16 In Subsection D, "Final Tribal Council Recognition," the MOA provides:

17 Upon certification of the special election results as set forth in NOOKSACK
 18 TRIBAL LAWS AND ORDINANCES, *the final resolution of any challenges to*
 19 *those results*, and the submission of the Election Board's report to the Regional
 20 Director, the Regional Director shall forward to the ASSISTANT SECRETARY
 21 the Tribe's report along with the Regional Director's endorsement thereof, or an
 22 explanation for withholding such endorsement.

23 ¹ DOI makes a disclaimer in the MOA that "the Assistant Secretary does not recognize Nooksack
 24 Indian Tribal Council actions taken without a quorum," and pointedly includes within those
 25 actions "the purported recall of Councilmember Carmen Tageant in April 2016." MOA, § B.
 26 Singling out this incident, DOI declines to mention—let alone reject—any actions taken by
 either Judge Dodge or the Tribal Court. This silence should not be overlooked, as it illustrates
 DOI's deliberate decision to not disavow the Tribal Court.

MOA at 2 (emphasis added). The Nooksack Tribal Election Ordinance, Title 62, provides that while “[t]he Election Board shall be the administrative body with original jurisdiction to hear all appeals of its decisions,” “[t]he Nooksack Tribal Court shall have appellate jurisdiction to hear reviews of final decision of the Election Board consistent with this Ordinance.” Dodge Decl., Ex. A at p. 4 (§ 62.03.030). Once the Tribal Court issues a written opinion on an appeal of an Election Board decision, it is final. *Id.*

Thus, in order to reach a “final resolution of any challenges to those [special election] results” the MOA must be read as DOI’s recognition of and deferral to Judge Dodge and the Tribal Court. The legitimacy of the Tribal Court is not simply suggested by the MOA, but is necessary to carry out its terms.

b. DOI Has Continued to Provide Funding to the Tribal Court, Even as Tribal Council’s Authority Was Disputed

The MOA provides that “immediately upon execution of this MEMORANDUM, the ASSISTANT SECRETARY shall resume funding Indian Self-Determination and Education Assistance Act Contracts with the Tribe.” MOA at 3. Although DOI funds a number of contracts with the Tribe, its funding for the Tribal Court is especially significant. The contract the Nooksack Tribe has with the BIA accounts for over forty percent of the Tribal Court’s funding for FY 2017, which is almost entirely used to pay employee wages and benefits. Dodge Decl., ¶ 2. Despite the MOA noting that DOI would “resume funding,” the Tribal Court has continued to receive funds from DOI; for example, on December 1, 2016, the BIA approved “one time funding” to the Nooksack Tribal Court to be used for the Tribal Court Clerk’s training in light of the ongoing court assessment. Dkt. # 67-10 (Ex. J).

DOI’s funding of the Tribal Court’s operations is another acknowledgment by the United States that the Tribal Court is, and has been, a legitimate functioning entity.

c. The BIA Has Determined that the Tribal Court Operates as a Properly Functioning and Legitimate Entity

Although the terms of the MOA sufficiently recognize the legitimacy of the Tribal Court on its face, the Court need not review the MOA in a vacuum. Other evidence puts the MOA in the proper perspective, confirming both the legitimacy of the Tribal Court and that Judge Dodge has never acted in a manner that divests him of judicial immunity.

As discussed in Judge Dodge's summary judgment motion, in April 2016, the Tribe authorized an assessment of the Nooksack Tribal Court to be completed by the BIA Office of Justice Services. On January 25, 2017, BIA Court Consultant Karen Gottlieb sent an e-mail to Judge Dodge, explaining that "[t]he Nooksack report is finished except for some gaps," and providing a list of questions for response. Dkt # 67-11 (Ex. K). Ms. Gottlieb made clear that "the report is very positive about the Tribal Court's operations." *Id.* On April 4, 2017, the BIA notified the Tribe that it had completed the assessment of the Nooksack Indian Tribe Tribal Court system and "look[ed] forward to the discussions and stand[s] ready to work with you." Dkt. # 67-12 (Ex. L). The Court assessment—completed after AS-IA Roberts's three letters to Chairman Kelly regarding Tribal Council's authority, but before the MOA—illustrates that issues raised about legitimacy by DOI were not focused on actions by the Tribal Court or Judge Dodge.

Each of these actions by DOI—approving the Court's operations, funding the Court, and including terms in the MOA which require the legitimacy of the Court—support that the Nooksack Tribal Court is fully functional and capable of managing its own affairs. *See* Dkt. # 62 at 8. The Tribal Court has been and continues to be legitimate judicial entity, and Judge Dodge a legitimate Tribal Court judge. This Court should relinquish jurisdiction and dismiss the RICO claims against Judge Dodge.

B. The MOA Supports That Judge Dodge is Entitled to Judicial Immunity, as Set Forth in His Motion for Summary Judgment

Even if this Court determines that it has continuing jurisdiction, the claims against Judge Dodge should nonetheless be dismissed on the basis of judicial immunity. Judge Dodge has consistently maintained that Plaintiffs have failed to establish either exception required to abrogate the broad protections of judicial immunity. This Court agreed, granting Judge Dodge's motion to dismiss on the basis of judicial immunity before Plaintiffs amended their complaint a second time. Dkt. # 63. Judge Dodge's motion for summary judgment, in which he again asserts judicial immunity, is currently pending before the Court. Dkt. # 66.

The MOA only serves to bolster Judge Dodge's position. By declining to disavow the Nooksack Tribal Court or Judge Dodge, and relying on (and funding) the Tribal Court to implement the MOA by hearing any election challenge under Tribal law, the MOA highlights that there is no dispute of material fact that Judge Dodge acted in a judicial capacity and that he did not act in the clear absence of jurisdiction when he issued the orders and took other judicial actions alleged by Plaintiffs to constitute RICO. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). The MOA, combined with the BIA's funding of the Tribal Court and a favorable court assessment by the BIA as described above, all amount to a recognition of the legitimacy of both the Tribal Court and Judge Dodge. Judge Dodge is therefore subject to the immunity afforded to judges acting within their judicial capacity and without the clear absence of jurisdiction, and the claims against him should be dismissed.

C. The MOA Has Direct No Effect on Plaintiffs' Pending Motion to Compel Discovery

Plaintiffs' Motion to Compel seeks to compel discovery from Judge Dodge and other defendants on the basis that Judge Dodge has failed to produce responsive documents which belong to the Tribe. Dkt. # 95. In response, Judge Dodge has asserted that the sought-after documents are not within his legal ownership and are therefore outside of his possession, custody

1 or control within the meaning of Fed. R. Civ. P. 34. Because the crux of this discovery dispute is
2 a legal interpretation of Rule 34's requirements, the MOA has no direct effect on the pending
3 motion, unless the Court agrees with prior arguments that the case should now be dismissed.

4 **CONCLUSION**

5 For the foregoing reasons, Judge Dodge respectfully request that the Court dismiss
6 Plaintiffs' claims against Judge Dodge.

7 DATED this 6th day of October, 2017.

8
9 **Kilpatrick, Townsend & Stockton LLP**

10 By: /s/ Rob Roy Smith

11 Rob Roy Smith, WSBA # 33798

12 Email: rsmith@kilpatricktownsend.com

13 Rachel Saimons, WSBA #46553

14 Email: rsaimons@kilpatricktownsend.com

15 1420 Fifth Avenue, Suite 3700

16 Seattle, WA 98101

17 Telephone: (206) 467-9600

18 Facsimile: (206) 623-6793

19 *Attorneys for Defendant Chief Judge*

20 *Raymond G. Dodge, Jr.*

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2017, I served the foregoing **DEFENDANT CHIEF JUDGE RAYMOND G. DODGE, JR.'S BRIEFING IN RESPONSE TO MEMORANDUM OF AGREEMENT (PER ORDER, DKT. # 115)** by electronic mail, to the following:

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

Attorneys for Plaintiffs

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

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

DATED this 6th day of October, 2017.

Kilpatrick Townsend & Stockton LLP

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

CERTIFICATE OF SERVICE

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