

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

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

Defendants.

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

DEFENDANTS KELLY, CANETE AND  
ARMSTRONG'S MOTION TO STRIKE  
NOTICES OF DEPOSITION AND FOR  
PROTECTIVE ORDER

**NOTED FOR HEARING:  
NOVEMBER 3, 2017**

**I. INTRODUCTION**

Multiple discovery motions regarding Plaintiffs' efforts to obtain documents subpoenaed from non-party employees of the Nooksack Indian Tribe, and party discovery from defendants Chairman Robert Kelly, Katherine Canete, and Rickie Armstrong (Dkt. Nos. 95 – 114) are presently pending before the Court. These Defendants Kelly, Canete and Armstrong have raised jurisdictional objections to the discovery sought from them in light of their appeal. While those discovery motions were pending, the Court issued its Minute Order (Dkt. No. 115) directing the parties to provide briefing in response to the Memorandum of Agreement (MOA) entered into between Nooksack Tribal Chairman Robert Kelly and Michael Black, Acting

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Assistant Secretary of the Department of Interior, Indian Affairs.

Without waiting for the Court's decision on the discovery motions, on October 6, 2016 Plaintiffs served notices of deposition to Kelly, Canete and Armstrong. Plaintiffs are seeking depositions of three of the Kelly Defendants<sup>1</sup> who have sought appellate review of the sovereign immunity decision. This motion seeks to strike the three deposition notices and for a protective order precluding any further efforts to seek discovery from the Kelly Defendants until the issues of jurisdiction, sovereign immunity, and the effect of the MOA are resolved. Plaintiffs have refused to voluntarily delay the depositions until either the pending motions or the appeal have been decided.

## II. RELIEF REQUESTED

The Kelly Defendants move this court for an order to strike the notices of depositions to the Kelly Defendants served on it by Plaintiffs and for a protective order precluding any further efforts to seek discovery from the Kelly Defendants until the issues of jurisdiction, sovereign immunity, and the effects of the MOA are resolved.

## III. EVIDENCE RELIED UPON

The Declaration of Christopher H. Howard.

## IV. FACTS

The relevant facts have previously been recited by the Kelly Defendants. See Dkt. No. 102. In the present action, Plaintiffs have alleged a RICO conspiracy against several employees and/or agents of the tribe. The Kelly Defendants moved to dismiss Plaintiffs' claims based, in part, on sovereign immunity. The issue of sovereign immunity is currently before

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<sup>1</sup> The "Kelly Defendants" include all defendants except Raymond Dodge.

1 the Ninth Circuit Court of Appeals. The three Kelly Defendants who have received deposition  
 2 notices are parties to that appeal. Issues related to how that appeal affects or precludes certain  
 3 discovery have been briefed in the pending discovery motions. Rather than awaiting the  
 4 Court's decision and guidance, Plaintiffs seek additional discovery from the Kelly Defendants.  
 5 The deposition notices are not limited in scope, and would include discovery from the Kelly  
 6 Defendants relating specifically to the allegations against the Defendants that are before the  
 7 Ninth Circuit.<sup>2</sup>

9 The Amended Notices of Deposition served on counsel for the Kelly Defendants set  
 10 the depositions for October 18, 2017 and October 19, 2017. Counsel for the Kelly Defendants  
 11 and for Plaintiffs participated in a LCR 37(a)(1) discovery conference on October 16, 2017.  
 12 During the discovery conference, counsel for Plaintiffs indicated they were unwilling to delay  
 13 these depositions to await the outcome of those motions for guidance because of the  
 14 "impending trial date" beginning September 24, 2018. *Id.* Counsel for the Kelly Defendants  
 15 have clearly stated to Plaintiffs' counsel that they will not attend pending the Court's resolution  
 16 of these disputed issues. *Id.*

18 This motion to strike and for a protective order is timely brought before the response  
 19 date required in the deposition notices.

## 21 V. AUTHORITY AND ARGUMENT

### 22 A. Plaintiffs seek discovery over parties to the appeal.

23 This court should strike Plaintiffs' deposition notices of the three Kelly Defendants  
 24 because they seek discovery from parties over whom this court's jurisdiction has been

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26 <sup>2</sup> See ¶5 to Declaration of Christopher H. Howard.

1 divested by the appeal. As the Kelly Defendants have briefed, the law of this Circuit provides  
2 that the filing of a notice of appeal is an event of jurisdictional significance – it confers  
3 jurisdiction on the Court of Appeals and divests the District Court of its control over those  
4 aspects of the case involved in the appeal. *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992).  
5 Where the aspects of the case involve whether a defendant may be subjected to trial at all,  
6 discovery is not allowed. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (until the threshold  
7 immunity question is resolved on appeal, discovery not allowed before the trial court);  
8 *Apostol v. Gallion*, 870 F.2d 1335, 1337-1338 (7<sup>th</sup> Cir. 1989) (cited with approval in *Chuman*  
9 *v. Wright*, 960 F.2d at 105).

11 Under the binding authority of *Harlow*, 457 U.S. at 818, until the threshold sovereign  
12 immunity question is resolved on appeal, discovery directed to the Kelly Defendants is not  
13 allowed before this Court. Plaintiffs cannot bypass this divestiture of jurisdiction by noticing  
14 the depositions of the Kelly Defendants – notices specifically directed to the Kelly  
15 Defendants as defendants, not as percipient witnesses to the claims asserted against Judge  
16 Dodge. The deposition notices should be stricken.

18 The Court also should enter a protective order precluding any further efforts to seek  
19 discovery from the Kelly Defendants until the issues of jurisdiction, sovereign immunity, and  
20 the effects of the MOA have been resolved. It is clear that, absent such an order, Plaintiffs  
21 will continue their efforts to obtain party discovery from the Kelly Defendants,  
22 notwithstanding the appeal to the Ninth Circuit and the prohibition against discovery  
23 articulated in *Harlow*.  
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**B. Plaintiffs seek discovery of information to which they are not entitled.**

The heart of Plaintiffs' case is challenging action taken by the Nooksack Indian Tribe (the "Tribe"). The Tribe has a right to object to the information the Plaintiff is seeking, and, indeed, it has. See Dkt. Nos. 100, 124. The issue is already before the Court in pending discovery motions, as well as the issues on appeal to the Ninth Circuit. The Kelly Defendants requested that Plaintiffs put off the requested depositions until these issues are resolved.<sup>3</sup> Plaintiffs' counsel refused, citing the October 2018 trial date as the basis for moving forward now. Defendants fail to see how a trial date of October 2018 presents any urgency that militates in favor of immediately holding the depositions rather than allowing this Court to resolve the substantial issues pending for decision and the parties to analyze how those rulings apply to future discovery.

This issue has already been briefed in the pending discovery motions and the supplemental briefing regarding the MOA. Even if there were no loss of jurisdiction due to the appeal, and if the Plaintiffs had sought this information of third-party witnesses, the court would be obligated to quash these deposition notices. In *Alltel Communications LLC v. DeJordy*, 675 F.2D 1100 (8th Cir. 2012), the Eighth Circuit overturned a trial court's denial of a motion to quash similar subpoenas in a civil matter because there had been no waiver or abrogation of sovereign immunity. The same is true here. This court should quash or strike the deposition notices of three of the Kelly defendants.

**VI. CONCLUSION**

Plaintiffs' notices of deposition to Rickie Armstrong, Katherine Canete and Robert Kelly should be stricken and a protective order precluding any further efforts to seek discovery

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<sup>3</sup> See Exhibit B to the Declaration of Christopher H. Howard.

1 from the Kelly Defendants until the issues of jurisdiction, sovereign immunity, and the effects  
2 of the MOA have been resolved. Plaintiffs are well aware from all the pending motions that  
3 they are seeking discovery to which they are not entitled and to which the objections raised by  
4 the Kelly Defendants apply.

5 A Proposed Order is attached.

6 Dated this 17<sup>th</sup> day of October, 2017.

7 SCHWABE, WILLIAMSON & WYATT, P.C.

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**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 17<sup>th</sup> day of October, 2017, I electronically filed the foregoing MOTION TO STRIKE NOTICES OF DEPOSITION AND FOR PROTECTIVE ORDER with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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