THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MARGRETTY RABANG, *et al.*,

Plaintiffs,

v.

ROBERT KELLY, JR., *et al.*,

Defendants.

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

PLAINTIFFS' BRIEF RE: SHOW CAUSE ORDER

This Court has directed Plaintiffs to show cause why the claims filed on February 8, 2017, should not be dismissed for lack of subject matter jurisdiction in light of the U.S. Department of Interior's ("DOI") interim recognition of the Nooksack Indian Tribal Council ("Tribal Council") on March 9, 2018. Dkt. # 7; Dkt. # 156.

DOI's acknowledgement of the Tribal Council cannot divest this Court of its original subject matter jurisdiction over Plaintiffs' Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), claims against Defendants, in their personal capacities, which Plaintiffs filed over a year ago. It is the law of the case that none of Defendants enjoy tribal sovereign immunity and that this Court otherwise possesses subject matter jurisdiction over this backward-looking RICO suit. *See* Dkt. # 62 at 9, 11. This Court should therefore affirm its jurisdiction, rule on the pending motions, and proceed toward trial on Plaintiffs' claims.

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I. RELEVANT FACTS

On March 9, 2018, DOI Principal Deputy Assistant Secretary ("PDAS") John Tahsuda acknowledged the newly elected Tribal Council on an interim basis, upon his endorsement of the December 2, 2017, special election. Dkt. # 145-1. PDAS Tahsuda extended that interim recognition "until the results of the general election originally scheduled for March 17, 2018, can be certified." *Id.* That general election completed on May 5, 2018. *See* Declaration of Gabriel S. Galanda in Support of Plaintiffs' Brief Re: Show Cause Order ("Galanda Decl."), Ex. A.[1]

Most significantly, PDAS Tahsuda did not invalidate or withdraw any prior DOI determinations—most notably PDAS Roberts' October 17, 2016, November 14, 2016, or

[1] Both the special and general elections were rife with fraud; each is now the subject of other litigation. In *Doucette v. Zinke*, No. 18-cv-00859 (W.D. Wash. June 13, 2018), four Nooksack general election candidates—none of whom are Plaintiffs here—have sued DOI officials pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq*., for looking away from Kelly Defendants' election fraud—ballot stuffing in particular. They allege:

> After having interpreted Nooksack Tribal constitutional, statutory, and common law on at least six occasions and on various Tribal governance and election issues since October 17, 2016, Interior abruptly declined to "insert itself and interpret tribal law" in one pivotal instance: in a December 2, 2017, special election funded and regulated by Interior, the Department refused to consider whether 812 ballots were cast in accordance with Nooksack law. Interior refused to consider whether—in an election in which "[v]oting shall be conducted entirely through the United States Postal Service"—*any* of those ballots arrived in envelopes bearing postmarks or voter signatures. Interior's refusal to interpret Tribal law on that crucial election issue—in the face of proof of election fraud—was a sudden, unexplained, and unlawful change in policy. It is therefore arbitrary and capricious, an abuse of discretion, not in accordance with law, and unwarranted by the facts.

(emphasis in original).

In *Belmont v. Acting Northwest. Regional Director*, IBIA 18-061 (Bd. of Indian App. June 12, 2018), 230 Nooksack Indians of voting age ("Appellants")—including Plaintiffs here—filed an administrative appeal of the Bureau of Indian Affairs' May 21, 2018, decision to acknowledge Roswell "Ross" Cline, Sr., as the legally elected Tribal Council Chairman. Kelly Defendants categorically denied Appellants the right to vote in the May 5, 2018, general election in violation of, *inter alia*, PDAS Roberts' and PDAS Tahsuda's various determinations dating back to October 2016, which proclaimed Appellants "entitled to vote" and pledged that "[e]lections or actions inconsistent with . . . Nooksack law will not be recognized by the Department." *See, e.g.*, Dkt. ## 139-1 at 1; 74-17. This week, DOI's Board of Indian Appeals divested itself of jurisdiction over the matter by referring it to PDAS Tahsuda for consideration per 43 C.F.R. § 4.337(b). Order Docketing and Dismissing Appeal, and Referring Matter to the Assistant Secretary - Indian Affairs, *Belmont v. Acting Northwest. Regional Director*, IBIA 18-061 (Bd. of Indian App. June 21, 2018). PDAS Tahsuda now has sixty days to decide the matter. 25 C.F.R. § 2.20(e).

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December 23, 2016, determinations—regarding the Holdover Council Defendants'[2] lack of authority, or retroactively ratify RICO Defendants' past conduct. Dkt. # 145-1. PDAS Tahsuda's last word on "the three letters issued by Principal Deputy Roberts in 2016," on January 16, 2018, was to affirm them. Dkt. # 139-1 at 3. Those determinations remain intact today.

On June 11, 2018, PDAS Tahsuda wrote Mr. Cline to congratulate him on his "recent election as Chairman of the Nooksack Indian Tribe," but not without commenting on the "disharmony in the relationship between the United States and Tribe" dating back "over the past few years." Galanda Decl., Ex. A. PDAS Tahsuda again had a chance to invalidate or withdraw DOI's prior determinations, but he did not. *Id.* He did, however, question whether "respect for the rule of law" exists at Nooksack—it does not. *Id.* With the Tribal Court still defunct, the Nooksack rule of law remains dead.[3] Plaintiffs' hope of redressing the deprivation of their homes, monies, and other properties rests with this Court alone.

II. ARGUMENT

This Court maintains subject matter jurisdiction over this action. This Court's jurisdiction has been tested and remains intact. Subsequent events do not divest this Court of its original jurisdiction over Plaintiffs' RICO claims. In particular, DOI's March 9, 2018, interim recognition of the Tribal Council, as referenced by this Court for show cause purposes, does not divest or disturb that jurisdiction. Dkt. # 156 at 1. This Court still possesses subject matter jurisdiction, as it has since February 8, 2017, and should proceed with adjudication of Plaintiffs' claims.

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[2] The Holdover Council Defendants are Defendants Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, and Katherine Canete. *See* Dkt. # 7 ¶¶10-16. Only five of those defendants are among the eight people PDAS Tahsuda "recognized" on March 9, 2018. Dkt. # 145-1. Defendant Kelly is not even Tribal Chairman, or a member of the Tribal Council, any longer. Galanda Decl., Ex. A. PDAS Tahsuda has done nothing to legalize or legitimize the past fraudulent behavior of any of the Defendants dating back to December of 2015.

[3] As of April 10, 2018, the Washington State Bar Association opined that the Nooksack "'justice system'" is "probably not worthy of that description." Galanda Decl., Ex. B. *See also* Order on Motion to Enforce Contempt Order, *In re Gabriel S. Galanda, et al v. Nooksack Tribal Ct.*, No. 2016-CI-CL-002 (Nooksack Ct. App. Aug. 15, 2016) (declaring the Nooksack rule of law "dead.").

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A. This Court Still Has Original Jurisdiction Over Plaintiffs' RICO Claims.

It is well settled law that subject matter jurisdiction is determined as of the time an action is filed. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570-71 (2004) (citing *Mollan v. Torrance,* 9 Wheat. 537, 539, 6 L.Ed. 154 (1824)). "This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure." *Id.* The U.S. Supreme Court has "consistently held that if jurisdiction exists at the time the action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991); *Wichita R.R. & Light Co. v. Pub. Util. Comm'n of Kan.,* 260 U.S. 48, 54 (1922)); *see also In re Canion*, 196 F.3d 579, 587 n.29 (5th Cir. 1999) ("[S]ubject matter jurisdiction is tested when the jurisdiction of the federal court is invoked.") (citing *Freeport-McMoRan, Inc.*, 498 U.S. 426; *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 283 (1938)).

Although many of the cases invoking this principle involve diversity jurisdiction, federal courts, including those in the Ninth Circuit, also apply this rule to cases predicated upon a federal question. *See, e.g., Keene Corp. v. United* States, 508 U.S. 200 (1993); *Rosado v. Wyman*, 397 U.S. 397, 402 (1970); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380-84 (9th Cir. 1988); *Aamodt v. United States*, 22 Cl. Ct. 716 (Fed. Cir. 1991); *Rosa v. Resolution Tr. Corp.*, 938 F.2d 383, 392 n.12 (3rd Cir.), *cert. denied*, 502 U.S. 981 (1991); *Schoenberg v. Shapolsky Publishers, Inc.*, 916 F. Supp. 333 (S.D.N.Y. 1996).

The time-of-filing rule likewise controls this case. Plaintiffs' suit poses a federal question: 18 U.S.C. § 1964(c). Dkt. # 7. This Court possesses original federal question jurisdiction, as it did when Plaintiffs filed suit to rectify Defendants' RICO violations. 28 U.S.C. § 1331; *Am. Well Works Co. v. Laybe & Bowler Co.*, 241 U.S. 257, 260 (1916); Dkt. # 7. This Court cannot

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dismiss Plaintiffs' case based on DOI's subsequent recognition of the Tribal Council. *Freeport-McMoRan, Inc.,* 498 U.S. at 428; *Grupo Dataflux*, 541 U.S. at 569–70.

B. Kelly Defendants Are Estopped From Re-Litigating The Same Jurisdictional Issues They Lost On Appeal.

Kelly Defendants[4] challenged this Court's subject matter jurisdiction over Plaintiffs' RICO claims over a year ago—and failed. *Rabang v. Kelly*, No. 17-0088, 2017 WL 1496415, at *6-7 (W.D. Wash. Apr. 26, 2017). On May 17, 2017, Kelly Defendants appealed this Court's April 26, 2017, Order "denying their claim of sovereign immunity and holding that subject matter jurisdiction exists . . . ." Dkt. # 69. Alleviating any doubt regarding whether Kelly Defendants stated two alternative grounds for appeal, this Court recently explained:

> While the basis for the Kelly Defendants' interlocutory appeal was this Court's denial of their sovereign immunity claim, their brief asserts that "the subject matter jurisdiction issue is intertwined with the sovereignty issues." Characterizing Plaintiffs' complaint as an "intra-tribal dispute," the Kelly Defendants argue that this Court lacked subject matter jurisdiction over Plaintiffs' claims "now and always." The Kelly Defendants repeated that position during oral argument, making clear that they were challenging this Court's subject matter jurisdiction over what they believe to be an intra-tribal dispute. The Kelly Defendants told the Court of Appeals that the Court should request briefing from the United States regarding the issue of subject matter jurisdiction. They went even further by filing the DOI's recent letter recognizing the Nooksack Tribal Council with the Court of Appeals.

Dkt. # 153 at 5 (citations omitted). But after "wield[ing] their interlocutory appeal as both a sword and shield" for nearly a year—at significant expense to Plaintiffs—Kelly Defendants suddenly abandoned their jurisdictional appeal, claiming some unspecified "changed circumstances." Dkt. # 153 at 7; Appellants' Motion for Voluntary Dismissal of Appeal, *Rabang*

[4] Kelly Defendants includes all named RICO Defendants except Defendant "Chief Judge" Raymond Dodge. Defendant Dodge is, however, also bound by the law of the case.

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v. Kelly, No. 17-35427 (9th Cir. Apr. 11, 2018), ECF No. 36 at 2; Order Granting Appellants' Motion for Voluntary Dismissal, *Rabang*, No. 17-35427 (May 18, 2018), ECF No. 39.[5]

In all likelihood, the alleged change in circumstance was Kelly Defendants' realization that they were not going to fare well before the Ninth Circuit. *See* Oral Argument, *Rabang*, No. 17-35427 (Mar. 9, 2018), *available at* https://youtu.be/0NZUfypqVIs (last visited June 29, 2018) (excoriating "a record a tin pot dictator of a banana republic might be proud of . . . ."). So, rather than face cascading defeat, Kelly Defendants returned to this Court hoping for a second bite at the jurisdictional apple. It is well established, though, that this type of gamesmanship is not allowed:

> [A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.

Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987); *see also Magnesystems, Inc. v. Nikken, Inc.*, 933 F. Supp. 944, 949 (C.D. Cal. 1996) ("[A]n issue or factual argument . . . subsequently waived on appeal[] cannot be revived."); *Rudnick v. Allustiarte*, 974 F.2d 1343 (9th Cir. 1992) (collateral estoppel applied to bankruptcy court order when the appeal of order was docketed and later voluntarily dismissed).[6]

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[5] Plaintiffs have asked the Ninth Circuit for a fee award of $107,347.00. Appellees' Memorandum in Support of Application for Attorneys' Fees at 2, *Rabang,* No. 17-35427 (9th Cir. June 1, 2018), ECF No. 41-2. After admitting in their voluntary dismissal notice that Plaintiffs-Appellees are entitled to "**all** reasonable costs and attorneys' fees incurred . . . in the preparation and **other legal work incidental** to their defense against Appellants Kelly on this appeal," and securing the dismissal, Kelly Defendants-Appellants now quibble about why Plaintiffs do not deserve the entirety of their fees. Appellants' Motion For Voluntary Dismissal Of Appeal at 1-2, *Rabang,* No. 17-35427 (Apr. 11, 2018), ECF No. 36 (emphasis added); Appellants' Opposition to Appellees' Request for Attorney Fees and Fee Affidavit, *Rabang,* No. 17-35427 (9th Cir. June 11, 2018), ECF No. 43-1. Seeking to once again have it both ways, Kelly Defendants have asked the Ninth Circuit to slash $47,044.50 from Plaintiffs' award for incidental "time spent in proceedings before the District Court"—*i.e.*, time they incurred due to Kelly Defendants' use of their interlocutory appeal both before this Court and the Ninth Circuit "for whatever litigation position [was] most expedient." Dkt. # 153 at 6. For any incidental District Court fees not awarded by the Ninth Circuit, this Court should award Plaintiffs' those fees resulting from Kelly Defendants' discovery evasion and other exploits, as well as related costs. *Id.*

[6] In the bankruptcy context, the Ninth Circuit's decision in *Rudnick* persuasively holds that parties who appeal orders and subsequently voluntarily dismiss the appeal are estopped from rearguing the same issues before the trial court.

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Kelly Defendants appealed this Court's original jurisdiction on two "intertwined" questions—claiming that (1) they enjoy sovereign immunity and (2) this action is an "intra-tribal dispute"[7]—and lost on both questions. Dkt. # 153 at 5. Kelly Defendants had a chance to obtain a ruling in their favor, but they forfeited that chance. This Court's original subject matter jurisdiction remains intact. *See Rabang*, 2017 WL 1496415, at *6-7.

C. Plaintiffs' Suit Concerns Past Fraudulent Conduct; DOI's Determinations Stand.

Plaintiffs' RICO claims stem from Defendants' **past conduct** dating back to 2015—years before DOI's March 9, 2018, decision. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). While this Court has determined that the series of DOI determinations in 2016 are "most important[]" for determining its jurisdiction, all of those determinations remain fully intact. *Rabang*, 2017 WL 1496415, at *6; *see* Dkt. # 139-1 at 3.

DOI has not invalidated, reversed, or withdrawn either its October 17, 2016, November 14, 2016, or December 23, 2016, determinations. Dkt. # 7 ¶¶ 50, 56, 69; *see* Dkt. ## 141-1, 145-1.[8] In fact, as of January 16, 2018, DOI affirmed "the three letters issued by Principal Deputy Roberts in 2016." Dkt. # 139-1 at 3. PDAS Tahsuda could have done away with those decisions on March 9, 2018, or most recently, on June 11, 2018. Dkt. # 141-1; Galanda Decl., Ex. A. But he chose not to—he let them stand. *Id.*

[7] This is not a so-called "intra-tribal dispute." Kelly Defendants' "mere suggestion of a dispute regarding tribal law" does not divest this Court of jurisdiction over an otherwise justiciable federal RICO suit. *Miccosukee Tribe of Indians of Florida v. Cypress*, 814 F.3d 1202, 1209 (11th Cir. 2015). If Kelly Defendants wish to again appeal on justiciability, or if Defendant Dodge wishes to try his hand on that issue, they can do so upon entry of final judgment. *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 868 (1994) ("a party is entitled to a single appeal, to be deferred until final judgment has been entered . . ."); *see also Catlin v. United States*, 324 U.S. 229, 236 (1945) (holding "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."). Until then, this Court's jurisdiction stands.

[8] Nor did the August 25, 2017, Memorandum of Agreement between former Acting Assistant Secretary - Indian Affairs Mike Black and Defendant Kelly at all contemplate that upon any recognition of the Nooksack Tribal Council those determinations would dissipate. Dkt. # 121-1.

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Likewise, this Court has not "determined the DOI decisions were invalid," as it once suggested was a possibility. *Rabang*, 2017 WL 1496415, at *7. Nor did the "Nooksack Indian Tribe" succeed in its APA challenge to those decisions—it was dismissed and not appealed. *Nooksack Indian Tribe v. Zinke*, No. 17-0219, 2017 WL 1957076 (W.D. Wash. May 11, 2017).

Assuming arguendo that some federal action could divest this Court of subject matter jurisdiction over Plaintiffs' RICO claims for Defendants' past fraudulent conduct—it cannot—neither DOI nor the federal courts have taken any such action.[9]

III. CONCLUSION

This Court retains original subject matter jurisdiction over Plaintiffs' civil RICO claims.

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[9] Nor are Plaintiffs' RICO claims now moot. Article III, Section 2 of the U.S. Constitution vests this Court with jurisdiction over cases "arising under this Constitution [and] the Laws of the United States," which includes Plaintiffs' RICO claims. *See also* 28 U.S.C. § 1331. This Court therefore continues to have jurisdiction unless and until the "suit becomes moot," *i.e.*, "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotations and citations omitted). A case only becomes moot when it is impossible for a court to grant any effectual relief whatever to the prevailing party. *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Ry. Clerks,* 466 U.S. 435, 442 (1984). No recent DOI decisions address or resolve Plaintiffs' RICO claims. Dkts. ## 139-1, 141-1; Galanda Decl., Ex. A. Plaintiffs retain a "concrete interest" in the resolution of this case insofar as they continue to seek relief to rectify past injuries inflicted upon them by Defendants. Defendants, meanwhile continue to argue that Plaintiffs are not entitled to any relief. Dkts. ## 146, 147. Thus, "there is not the slightest doubt that there continues to exist between the parties 'that concrete adverseness with sharpens the presentation of issues.'" *Chafin*, 568 U.S. at 173 (internal citations omitted). And any legitimacy some of the Kelly Defendants now have does not moot Plaintiffs' RICO claims or divest this Court of jurisdiction. *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways") (internal quotations and citations omitted). This dispute remains very much alive.

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DATED this 29th day of June 2018.

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