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8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **IN AND FOR THE COUNTY OF WHATCOM**

10 MARGRETTY RABANG, and ROBERT
11 RABANG,

12 Plaintiffs,

13 v.

14 RORY GILLIAND, et al.,

15 Defendants.

Case No.: 17-2-00163-1

**DEFENDANT CHIEF JUDGE
RAYMOND G. DODGE JR.'S MOTION
TO RE-NOTE MOTION TO DISMISS
AND FOR ORDER OF DISMISSAL**

Without Oral Argument

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17 **I. RELIEF REQUESTED**

18 Defendant Chief Judge Raymond G. Dodge, Jr. ("Judge Dodge"), by and through his
19 counsel of record, hereby moves to re-note his pending Motion to Dismiss for resolution
20 pursuant to the Court's April 21, 2017 Order, following the U.S. District Court for the Western
21 District of Washington's recent decision in *Rabang, et al. v. Kelly, Jr., et al.*, Case No. 17-CV-
22 00088-JCC, and moves for dismissal of Plaintiffs' Complaint for Intentional and Negligent
23 Infliction of Emotional Distress in light of the same decision.

24 **II. RELEVANT FACTS**

25 On January 31, 2017, Plaintiffs filed a Complaint for intentional and negligent infliction
26 of emotional distress against multiple defendants, including Judge Dodge. At the same time,
27 Plaintiffs filed a lawsuit in federal district court alleging violations of the Racketeer Influenced

1 and Corrupt Organizations Act (“RICO”). *See Rabang, et al. v. Kelly, Jr., et al.*, United States
2 District Court for the Western District of Washington (Case No. 17-CV-00088-JCC). On
3 March 9, 2017, Judge Dodge moved to dismiss Plaintiffs’ claims in this case on the basis of
4 judicial immunity, lack of subject matter jurisdiction, and failure to state a claim upon which
5 relief can be granted. On April 21, 2017, this Court issued an order in response to Judge Dodge’s
6 and other Defendants’ motion to dismiss, finding that:

7 Currently the parties and the Nooksack Indian Tribe are engaged in litigation in
8 the U.S. District Court for the Western District of Washington. The Court’s
9 review of the pleadings filed in the federal litigation indicates that the issue of the
10 Tribe’s authority will likely be resolved in that litigation. ***This Court will defer to***
11 ***the federal court proceedings on that issue.*** The parties are instructed to re-note
12 the CR 12 motions pending in this Court for resolution after the U.S. District
13 Court has issued its decision on the issue of the Tribe’s authority in the pending
14 federal litigation.

15 Court’s Order on Defendants’ Motions to Dismiss at 1–2 (emphasis added). On May 25, 2018,
16 Judge Dodge and other Defendants each moved to stay discovery pending resolution of Judge
17 Dodge’s motion to dismiss. On June 15, 2017, the Court granted Defendants’ motion until
18 further order of the Court.

19 In the companion federal case, the parties continued to litigate until the federal district
20 court ordered a stay of proceedings on October 25, 2017, pending a decision by the United States
21 Department of the Interior (“DOI”) as to recognition of the Tribal Council after the Tribe’s
22 scheduled elections. Declaration of Rachel Saimons (“Saimons Decl.”), Ex. A (filed herewith).
23 On January 29, 2018, the court again stayed all proceedings until April 30, 2018, awaiting a
24 recognition decision from Interior. Saimons Decl., Ex. B. On March 9, 2018, the Department of
25 Interior issued an interim recognition of the Nooksack Indian Tribal Council. Saimons Decl.,
26 Ex. C. In light of that decision, on June 7, 2018, the Court ordered Plaintiffs to show cause as to
27 why their claims should not be dismissed for lack of subject matter jurisdiction.

 On July 31, 2018, after briefing from both parties, the federal court dismissed Plaintiffs’
complaint on the basis that it no longer had subject matter jurisdiction to hear the case. Saimons

1 Decl., Ex. D. That same day, Judge Dodge filed a Notice of Decision for this Court’s review. On
2 August 14, 2018, this Court confirmed receipt of the Notice of Decision but indicated that it
3 would “not take any action unless a party makes a formal motion with notice and an opportunity
4 to respond in the normal course.” Saimons Decl., Ex. E. Judge Dodge accordingly moves to re-
5 note his pending motion to dismiss and for an order of dismissal in light of the federal court’s
6 decision.

7 **III. STATEMENT OF THE ISSUES**

8 1. Whether the Court should enter an order dismissing Plaintiffs’ claims for
9 intentional infliction of emotional distress and negligent infliction of emotional distress in light
10 of the federal district court’s recent decision.

11 **IV. EVIDENCE RELIED UPON**

12 Judge Dodge relies upon the pleadings in this case, as well as the declaration of Rachel
13 Saimons, and the exhibits attached thereto and filed herewith.

14 **V. AUTHORITY AND ARGUMENT**

15 **A. The Court Should Re-Note and Grant Judge Dodge’s Motion to Dismiss**

16 This Court has deferred ruling on Judge Dodge’s motion to dismiss for over a year,
17 awaiting a “decision on the issue of the Tribe’s authority in the pending federal litigation.” *See*
18 *Order of Defendants’ Respective Motions to Dismiss*. That decision issued on July 31, 2018,
19 and is clear and unequivocal: the United States’ recognition of the newly-elected Nooksack
20 Tribal Council divests the Court of its subject matter jurisdiction and requires that the Plaintiffs
21 exhaust their tribal court remedies before suing in federal court. Thus, “it is for the Nooksack
22 Tribe, not this court, to resolve Plaintiffs’ claims.” Saimons Decl., Ex. D at 8.

23 The federal court’s long-anticipated decision provides this Court with the guidance that it
24 has awaited. Judge Dodge respectfully requests that his pending motion to dismiss be re-noted
25 and that this Court follow the federal court’s lead and dismiss this action.

1 **1. The Federal Court’s Reasoning Applies With Equal Force Here**

2 Between the time this Court entered a stay of proceedings and before the federal court’s
3 order, a number of meaningful events occurred: (1) the Tribe held two elections, both of which
4 were observed and verified as valid by U.S. Department of the Interior (“DOI”); (2) DOI once
5 again formally recognized the Nooksack Tribal Council and the Chairman of the Tribe; and (3)
6 on March 15, 2018, after DOI had officially recognized the validity of the Tribal Council, the
7 newly-elected Tribal Council passed Resolution #18-15 to ratify the previous appointment of
8 Chief Judge Dodge to the Nooksack Tribal Court.¹ Exs. C and D at 4 to Saimons Decl.; Ex. F to
9 Saimons Decl. Although each of these events is independently significant, they culminated in an
10 even more meaningful decision: the federal court’s dismissal of the RICO claims against Judge
11 Dodge and remaining Defendants, disposing of that case in its entirety and providing a basis for
12 resolution of the claims in this case.

13 The federal court’s July 31, 2018 order additionally makes a number of findings and
14 conclusions that are relevant to this lawsuit. First, the order makes clear that the decision by DOI
15 to recognize the Nooksack Tribal Council as the Tribe’s governing body following the agency’s
16 validation of the December 2017 special election removed the Court’s original basis for
17 exercising jurisdiction. Saimons Decl., Ex. D at 4. Second, the order concludes that the dispute
18 was all along nothing more than “a dispute about their membership in the Nooksack Indian Tribe
19 and the actions taken by tribal leadership to renounce their membership,” and is therefore an
20 internal tribal matter. *Id.* at 5. These findings similarly weigh in favor of dismissing Plaintiffs’
21 IIED and NIED claims in this case.

22 **a. Plaintiffs’ Tort Claims Arise From An Enrollment Dispute**

23 The federal court’s order confirms what Judge Dodge has long known: Plaintiffs’ case is
24 about a membership dispute within the Nooksack Indian Tribe, masquerading as state tort claims
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26 _____
27 ¹ The stated purpose of the Resolution was to “eliminate all doubt and resolve the issue of the
validity of Resolution #16-92 by adopting Resolution #16-92 as its own through this current
ratification of the previous action.” *Id.*

1 against certain individuals. Saimons Decl., Ex. D at 5 (“At the heart of Plaintiffs’ RICO claims is
2 a dispute about their membership in the Nooksack Indian Tribe and the actions taken by tribal
3 leadership to renounce their membership.”). Because tribal enrollment “has long been recognized
4 as a matter of internal tribal governance,” “resolution of [Plaintiffs’] claims—whether on
5 summary judgment or at a jury trial—would ultimately require the Court to render a decision
6 about Plaintiffs’ enrollment status.” *Id.* at 5 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,
7 72 n.32 (1978)). Thus, to make such a determination, the Court would have “necessarily ha[d] to
8 make rulings on tribal law that go beyond the scope of a district court’s jurisdiction.” *Id.*

9 Further, because DOI’s recognition of the new Nooksack Tribal Council eliminated
10 concerns as to the legitimacy of the Tribe or the ability of the Tribe to adjudicate its own
11 disputes, the limited exception previously established by the Court to the tribal exhaustion rule
12 no longer applied, and Plaintiffs are required to exhaust their remedies in Tribal Court before
13 seeking federal court review. *See Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035 (9th
14 Cir. 1999) (when federal and tribal courts have concurrent jurisdiction over a claim,
15 “considerations of comity direct that tribal remedies be exhausted before the question is
16 addressed by the District Court.”) Saimons Decl., Ex. D at 4 (reiterating its earlier finding that “if
17 the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have
18 jurisdiction and the issues will be resolved internally.”). As Plaintiffs have not exhausted those
19 remedies, the federal court could not hear the case.

20 Similarly, state courts lack authority to make rulings on “purely tribal matters” such as
21 enrollment. *State v. Bertrand*, 61 Wn.2d 333, 340, 378 P. 2d 427 (1963) (holding Washington
22 court lacks jurisdiction over “internal dispute[s]” of tribes, including who composes the
23 governing body of an Indian tribe); *see also Lamere v. Superior Court*, 131 Cal. App. 4th 1059,
24 1067, 31 Cal. Rptr. 3d 880, 886 (2005) (“In short, we are persuaded that Congress did not intend
25 that the courts of this state should have the power to intervene—or interfere—in
26 purely tribal matters.”); *Salinas v. Barron*, E042846, 2008 WL 699205, at *3 (Cal. Ct. App. Mar.
27 17, 2008) (absent any contrary act of Congress, state court has no jurisdiction to determine tribal

1 membership). Thus, because neither federal court nor state court has subject matter jurisdiction
2 to hear tribal enrollment disputes, which is at the heart of this tort case, this Court should follow
3 the federal court in dismissing Plaintiffs' complaint.

4 **b. DOI's Recognition Decision Divests the Court of Jurisdiction**

5 The federal court affirms in its order that its prior decision to exercise jurisdiction was
6 "not permanent or inflexible" but conditional, based on deference to DOI's earlier decision that
7 "refused to recognize actions taken by the Nooksack Tribal Council and the Court, and
8 concluded that Plaintiffs lacked an adequate opportunity to challenge the Tribal Court's
9 jurisdiction." Saimons Decl., Ex. D at 4. The court explains, however, that "such deference was
10 only warranted in regard to DOI's interim recognition decision," so that if and when DOI chose
11 to recognize Tribal leadership after new elections, the Court would no longer have jurisdiction.
12 *Id.* The Court then concluded that "[t]hese circumstances have come to pass" after "DOI
13 concluded that the election results were valid and, pursuant to the MOA, once again recognized
14 the Tribal Council." *Id.* at 3.

15 Once DOI formally recognized the Nooksack Tribal leadership, under Federal Rule of
16 Civil Procedure 12(h)(3) the Court not only had the authority to reconsider subject matter
17 jurisdiction, but had a continuing independent *obligation* to determine whether subject matter
18 jurisdiction exists. *Id.* at 7, n.3. In making that consideration, the Court determined that its
19 "original basis for exercising jurisdiction under the tribal exhaustion rule no longer exists" and
20 "[p]ursuant to the MOA and the DOI's recent recognition decision, the DOI's past decisions no
21 longer provide a basis for this Court to exercise jurisdiction." *Id.* at 7. On this basis, the federal
22 court dismissed all of Plaintiffs' claims against Judge Dodge and the remaining defendants.

23 Here, the Court has awaited a finding from the federal court with respect to the Tribe's
24 authority. Just as DOI's recognition of Tribal leadership has divested the federal court of
25 jurisdiction, so too this Court lacks the authority to adjudicate Plaintiffs' tort claims.
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VI. CONCLUSION

For the foregoing reasons, Judge Dodge respectfully requests that the Court re-note his pending motion to dismiss and enter an order of dismissal of Plaintiffs' claims against him with prejudice.

DATED this 23rd day of August, 2018.

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1 **CERTIFICATE OF SERVICE**

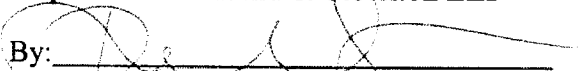
2 I certify that on August 23, 2018, I caused to have served a true and correct copy of
3 **DEFENDANT CHIEF JUDGE RAYMOND G. DODGE JR.'S MOTION TO RE-NOTE**
4 **MOTION TO DISMISS AND FOR ORDER OF DISMISSAL**, on the following by the
5 method(s) indicated below:

6 Gabe Galanda _____ E-Service (via the Clerk)
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19 *Ashby, Andy Garcia, John Does 1-10*

20 DATED this 23rd day of August, 2018.

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