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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARGRETTY RABANG, and ROBERT RABANG,

Plaintiffs,

v.

RORY GILLILAND, MICHAEL ASHBY,
ANDY GARCIA, RAYMOND DODGE, and
JOHN DOES 1-10,

Defendants.

NO. 17-2-00163-1

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
RENEWED MOTIONS TO DISMISS**

Plaintiffs Margretty Rabang and Robert Rabang respond to Defendant Dodge's renewed Motion to Dismiss ("Dodge Motion") and to Defendants Gilliland, Ashby, and Garcia's renewed Motion to Dismiss ("Gilliland Motion").

This Court still possesses subject matter jurisdiction over Plaintiffs' emotional distress claims against Defendants, who are each non-Tribal members and who each acted without any lawful authority when trying to eject Plaintiffs and their grandchildren from their home over the Christmas weekend in 2016. Also, Defendants, who are now sued personally, are not entitled to assert any immunity from suit. Defendants' motions must therefore be denied.

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1 Alternatively, this Court should continue to stay this case and maintain the status quo
2 pending the outcome of Ms. Rabang’s appeal of the U.S. District Court’s recent order regarding
3 subject matter jurisdiction in *Rabang v. Kelly*¹ to the Ninth Circuit Court of Appeals.²

4 **I. FACTUAL BACKGROUND**

5 On December 23, 2016, U.S. Department of the Interior (“DOI”) Principal Deputy
6 Assistant Secretary – Indian Affairs (“PDAS”) Lawrence Roberts issued a determination that
7 invalidated Defendant Dodge’s “orders of eviction” against Plaintiffs. Declaration of Gabriel S.
8 Galanda (“Galanda Decl.”), Ex. A. That determination also held that Nooksack Tribal law
9 enforcement officers, specifically Defendants Gilliland and Ashby, lacked federal legal
10 protection in relation to Defendant Dodge’s “invalid” orders of eviction against Plaintiffs. *Id.* at
11 1. PDAS Roberts proclaimed: “Enforcement of invalid or unlawful orders is outside the scope of

12 ¹ No. 17-00088, 2018 WL 3630295 (W.D. Wash. July 31, 2018) (Slip Op.).

13 ² There are also two pending federal challenges to DOI’s recognition of the Tribal Council. In *Doucette v. Zinke*,
14 No. 18-cv-00859 (W.D. Wash. June 13, 2018), four Nooksack general election candidates—none of whom are
15 plaintiffs here—have sued DOI officials pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et*
16 *seq.*, for looking away from election fraud—ballot stuffing in particular. The plaintiffs in that case allege:

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

20 (emphasis in original).

21 In *Belmont v. Acting Northwest Regional Director*, IBIA 18-061 (Bd. of Indian App.), 230 Nooksack Indians of
22 voting age (“Appellants”)—including Plaintiffs here—filed an administrative appeal of the Bureau of Indian
23 Affairs’ May 21, 2018, decision to acknowledge Roswell “Ross” Cline, Sr., as the legally elected Tribal Council
24 Chairman. Appellants were categorically denied the right to vote in the May 5, 2018, general election in violation
25 of, *inter alia*, PDAS Roberts and his predecessors’ 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. DOI’s Board of Indian Appeals (“IBIA”)
divested itself of jurisdiction over the matter by referring it to the current PDAS for consideration per 43 C.F.R. §
4.337(b). Not surprisingly, the current PDAS refused to reconsider his May 21, 2018, recognition decision,
incorrectly determining it non-appealable. Galanda Decl., Exs. D, E. Pending any final word from the IBIA (*see*
id., Ex. E), that decision is now ripe for litigation in the U.S. District Court under the APA.

1 law enforcement officer’s duties . . .” *Id.* at 2. The same holds true for Mr. Garcia, who took
2 action against Plaintiffs “based on actions taken by the Tribal Council” that PDAS Roberts
3 deemed invalid. *Id.* at 1.

4 Critically, Defendants’ actions remain invalid—because PDAS Roberts’ December 23,
5 2016, determination remains intact today. *See id.*, Ex. B. That decision has never been
6 invalidated or withdrawn. *See, e.g.*, Declaration of Rachel B. Saimons (“Saimons Decl.”), Exs.
7 C, D. In fact, the United States’ last word on “the three letters issued by Principal Deputy
8 Roberts in 2016,” on January 16, 2018, was to affirm them. *Id.*, Ex. B. Neither DOI nor the
9 federal courts have disturbed that December 23, 2016, determination.

10 On July 31, 2018, the U.S. District Court did dismiss Plaintiffs’ federal RICO claims,
11 concluding it “no longer has subject matter jurisdiction” over those federal statutory claims.
12 *Rabang v. Kelly*, No. 17-00088, 2018 WL 3630295 (W.D. Wash. July 31, 2018) (slip op.).
13 Plaintiffs have since appealed to the Ninth Circuit Court of Appeals. Galanda Decl., Ex. C.

14 Of note, Defendant Dodge argued to the District Court that because the Trump
15 Administration recognized the new Nooksack Tribal Council, “the cloud over the Tribe’ has
16 been removed.” *Rabang*, 2018 WL 3630295, at *5. The District Court rejected his contention,
17 explaining that the Court “does not at all think” that to be true; and further, that “Plaintiffs’
18 allegations against Defendants, which have been well documented here and elsewhere, are highly
19 concerning.” *Id.*³

20 The District Court suggested that “it is for the Nooksack Tribe . . . to resolve Plaintiffs’
21 claims” under RICO.⁴ *Id.* But the fact remains that with Defendant Dodge, the Tribe’s former
22

23 ³ This Court likewise expressed concern in January 2017 that “the Tribal Court is acting in a way that causes great
24 question about [Defendant Dodge’s] ability . . . to manage a trial court that is truly fair and truly accords due process
25 to Tribal members.” Defendant Dodge cannot make any showing here that would since assuage that concern.

⁴ The Court is mistaken because even a legitimate Nooksack judiciary would not have subject matter jurisdiction
over Plaintiffs’ *federal* RICO claims. 18 U.S.C. §§ 1962(c)-(d); *see also El Paso Natural Gas v. Neztosie*, 526 U.S.
473, 483, n.5 (1999); *Nevada v. Hicks*, 533 U.S. 353, 366-67 (2001).

1 Senior Tribal Attorney, masquerading as Chief Judge, the Nooksack rule of law remains dead.
2 Galanda Decl., Ex. F. As recent as April 10, 2018, the Washington State Bar Association opined
3 that the Nooksack “justice system” is “probably not worthy of that description.” *Id.* Indeed, on
4 August 7, 2018, in a Tribal Court matter that Plaintiffs filed in April of 2016—which Defendant
5 Dodge has since sat on—the Tribal Court denied Plaintiffs’ due process right to counsel.⁵ *Id.*,
6 Ex. G; *see also id.*, Ex. F.

7 Therefore, the only legitimate forum that can hear Plaintiffs’ emotional distress claims
8 against Defendants—all of who are non-members and thus subject to state court action—is this
9 Superior Court.

10 **II. ARGUMENT**

11 **A. The Court Should Not Decide This Case Pending Appeal In *Rabang v. Kelly*.**

12 This Court has refrained from issuing a decision regarding its subject matter jurisdiction
13 pending determination of the U.S. District Court’s subject matter jurisdiction in *Rabang v. Kelly*.
14 Even after the District Court first rendered a determination regarding its jurisdiction on April 26,
15 2017, this Court did not issue a decision on its own subject matter jurisdiction. Instead, this
16 Court allowed defendants’ Ninth Circuit appeal of that determination to run its course. This
17 Court should likewise refrain from deciding Defendants’ dismissal motions pending Ms.
18 Rabang’s appeal of the District Court’s latest order regarding its subject matter jurisdiction to the
19 Ninth Circuit and resolution of the challenges to the United States’ recognition of the Nooksack
20 Tribal Council following the Tribal Council Election. *See id.*, Ex. C. This Court should
21 continue to maintain the status quo.

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25 ⁵ That other matter does concern Plaintiffs’ membership—*i.e.*, illegal disenrollment. This matter plainly does not.
PLAINTIFFS’ RESPONSE IN OPPOSITION TO GALANDA BROADMAN, PLLC
DEFENDANTS’ RENEWED MOTIONS TO 8606 35th Avenue, NE, Ste. L1
DISMISS - 4 Mailing: P.O. Box 15146
Seattle, Washington 98115
(206) 557-7509

1 **B. Plaintiffs' Claims Do Not Infringe Upon Tribal Self-Governance.**

2 Defendants argue that this Court lacks subject matter jurisdiction over Plaintiffs'
3 negligent and intentional infliction of emotional distress claims because "state court resolution of
4 the internal tribal dispute infringes on the rights of the Tribe to make its own laws and by ruled
5 by them." Gilliland Motion at 5. Defendants are mistaken.

6 This Court's adjudication of Plaintiffs' emotional distress claims do not call for the
7 resolution of an internal tribal dispute and do not implicate Nooksack self-governance, which
8 could occur in only one of two ways: (1) if a state court resolves a dispute that is within the
9 exclusive province of a Tribal Court; or (2) if the dispute calls into question the validity or
10 propriety of an act fairly attributable to the Tribe as a governing body. *R.J. Williams Co. v. Ft.*
11 *Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985);
12 *Fisher v. District Court*, 424 U.S. 382, 384 (1976). Under either test, it is dispositive that
13 Defendants are non-tribal members.

14 First, the U.S. Supreme Court "repeatedly has approved the exercise of jurisdiction by
15 state courts over claims by Indians against non-Indians, even when those claims arose in Indian
16 country." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g P.C.*, 467 U.S.
17 138, 148 (1984); *see also Powell v. Farris*, 94 Wn.2d 782, 785, 620 P.2d 525 (1980) ("[T]he
18 state may exercise some jurisdiction over some reservation conduct."). Insofar as this Court has
19 concurrent jurisdiction over Plaintiffs' tort claims against non-member Defendants, this Court's
20 resolution does not impinge upon the exclusive province of the Tribal Court. *Strate v. A-1*
21 *Contractors*, 520 U.S. 438 (1997) (state court had jurisdiction over tort action involving non-

1 members even though events occurred on tribal land where tribal court jurisdiction was not
2 necessary to protect tribal self governance).⁶

3 Secondly, “tribal self-government is not impeded when a State allows an Indian to enter
4 its courts on equal terms with other persons to seek relief against a non-Indian concerning a
5 claim arising in Indian country.” *Three Affiliates Tribes of the Ft. Berthold Reservation*, 467
6 U.S. at 148-49. Washington state have long allowed Indians to sue non-members in its Superior
7 Courts for claims arising on tribal lands. *Powell v. Farris*, 94 Wn.2d 782 (1980). Here,
8 Plaintiffs seek relief against non-members for the emotional distress Defendants caused Plaintiffs
9 by attempting to eject them and their grandchildren from their home over the Christmas weekend
10 in 2016. Nooksack self-government is not impeded.

11 Further, Plaintiffs’ common law tort claims arose in December 2016, when there was no
12 legitimate Nooksack self-government. *See* Galanda Decl., Ex. A. In fact, all acts purportedly
13 attributable to the Tribe at that time were—and remain—invalidated by the Federal Government.
14 *Id.* Again, “the three letters issued by Principal Deputy Roberts in 2016” were affirmed by the
15 United States as recently as January 16, 2018, and those decisions have never been invalidated or
16 withdrawn. *Id.*, Ex. B. Nooksack self-government therefore does not bar Plaintiffs’ claims.

17 **C. Tribal Sovereign Immunity “Is Not Implicated.”**

18 Defendants continue to argue that tribal sovereign immunity bars Plaintiffs’ personal
19 capacity emotional distress claims against them. Motion at 7-8. Defendants completely fail to
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21 _____
22 ⁶ Tribal court jurisdiction can potentially “preclude state court jurisdiction, particularly where the tribe has
23 established tribal courts and adopted a tribal court which provides for personal jurisdiction over non-Indians, subject
24 matter jurisdiction over torts arising on the reservation, and application of tribal law.” *A-1 Contractors v. Strate*, 76
25 F.3d 930, 950 (8th Cir. 1996), *aff’d*, 520 U.S. 438 (1997). Many Washington tribes have adopted tribal tort
ordinances, in part to defeat state jurisdiction over tort claims like Plaintiffs’, but to Plaintiffs’ knowledge, Nooksack
is not one of those tribes. *See, e.g.*, Chapter 2.35, Tulalip Tribal Code, Title 43, Nisqually Tribal Code, *available at*
<http://www.codepublishing.com/WA/Tulalip/>; http://www.nisqually-nsn.gov/files/3913/7356/7213/Title_43_-_Tort_Claims_Act.pdf. Thus, contrary to Defendants’ claims, Plaintiffs could not “exhaust” their tort claims in
Defendant Dodge’s Tribal Court. *See* Dodge Motion at 5; Gilliland Motion at 6-7.

1 acknowledge, however, the dispositive U.S. Supreme Court decision that allows tribal actors to
2 be sued in their personal capacities as here. *See* CR 11.

3 That decision is *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). *Rabang v. Kelly*, No. 17-00088,
4 2017 WL 1496415, at *6 (W.D. Wash. Apr. 26, 2017) (Slip Op.) (“[T]he Supreme Court’s recent
5 decision on this issue is dispositive.”). In *Lewis*, the U.S. Supreme Court held that “when a suit
6 is brought against a tribal employee in his individual capacity, the employee, not the tribe, is the
7 real party in interest and the tribe’s sovereign immunity is not implicated.” 137 S. Ct. at 1286.

8 Plaintiffs have plainly sued Defendants in their personal capacities. Complaint ¶ 11.
9 Tribal sovereign immunity thus is not a jurisdictional bar. *Id.*; *Rabang*, No. 17-00088, 2017 WL
10 1496415, *6; *see also Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 116, 147 P.3d
11 1275 (2006) (“Of course, tribal sovereign immunity would not protect [a tribal employee] from
12 an action against him in his individual capacity.”); *Pistor v. Garcia*, 791 F.3d 1104, 112 (9th Cir.
13 2015) (citing *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013)).

14 **D. The U.S. District Court’s Recent Decision Does Not Impact This Court.**

15 Defendants further argue “[f]or the same reason that the federal court dismissed the
16 parallel federal case, this Court should dismiss the current case; this Court lacks jurisdiction to
17 resolve internal tribal disputes.” Gilliland Motion at 7. Defendant Dodge makes a similar
18 argument. *See* Dodge Motion at 3-6. Contrary to Defendants’ claims, the U.S. District Court’s
19 decision regarding its federal subject matter jurisdiction over federal statutory RICO claims does
20 not defeat this Court’s general jurisdiction over Plaintiffs’ state law emotional distress claims
21 against these non-tribal member Defendants.

22 This Court is a court of general jurisdiction and “few limitations on the subject matter of
23 superior courts in Washington.” *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 181
24 Wn.2d 272, 276, 333 P.3d 380 (2014). Unlike state courts, federal courts are courts of limited

1 subject matter jurisdiction, vested only with the authority to hear cases if that power is granted
2 by the Constitution and authorized by federal statute. *Kokkonen v. Guardian Life Ins. Co. of*
3 *Am.*, 511 U.S. 375, 377 (1994). The U.S. District Court's jurisdictional decision regarding
4 plaintiffs' federal statutory RICO claims in *Rabang v. Kelly* does not impact this Court's general
5 jurisdiction over Plaintiffs' state law tort claims against non-member Defendants.

6 The District Court's decision also did not address Defendant Dodge's claim to judicial
7 immunity, which Plaintiffs have addressed here in response to his initial motion to dismiss. The
8 fact remains that as of December 2016, Defendant Dodge was not a "judge." *See Galanda Decl.*,
9 Exs. A, B. He is therefore still not entitled to invoke the defense of judicial immunity for the
10 emotional harm he inflicted upon Plaintiffs at that time.

11 III. CONCLUSION

12 This Court possesses subject matter jurisdiction. Defendants are not entitled to tribal
13 sovereign immunity under crystal clear U.S. Supreme Court precedent. This Court may exercise
14 jurisdiction over this matter because Defendants are not members of the Tribe.

15 Accordingly, the Court must DENY Defendants' motion to dismiss. Alternatively, this
16 Court should continue to stay this case and maintain the status quo pending the outcome of Ms.
17 Rabang's appeal to the Ninth Circuit.

18 Proposed Orders accompany this Response.

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DATED this 31st day of August 2018.

GALANDA BROADMAN, PLLC



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Attorneys for Plaintiffs

1
2 **CERTIFICATE OF SERVICE**

3 I, Wendy Foster, declare as follows:

4 I am now and at all times herein mentioned a legal and permanent resident of the United
5 States and the State of Washington, over the age of eighteen years, not a party to the above-
6 entitled action, and competent to testify as a witness.

7 I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite
8 L1, Seattle, WA 98115.

9 On August 28, 2018, I served the foregoing on the following via U.S. Mail and email,

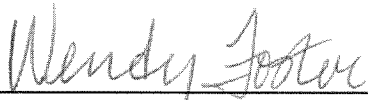
10 Rachel B. Saimons
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15 RSaimons@kilpatricktownsend.com
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17 Attorneys for Defendant Dodge

18 and the following via U.S. Mail and fax because emails to the addresses below get rejected:

19 Charles Hurt
20 Rickie Armstrong
21 Nooksack Indian Tribe
22 Office of Tribal Attorney
23 P.O. Box 63
24 Deming, WA 98244
25 F: (360) 592-2227
churt@nooksack-nsn.gov
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Attorneys for Defendants Gilliland, Ashby, and Gilliland

1 The foregoing statement is made under penalty of perjury and under the laws of the State
2 of Washington and is true and correct.

3 Signed at Seattle, Washington, this 31st day of August, 2018.

4
5 
6 Wendy Foster

Superior Court ----- Whatcom County ----- Washington State

Margretty Rabang, and Robert Rabang,

vs.

Rory Gilliland, Michael Ashby, Andy
Garcia, Raymond Dodge, and John Does
1-10

17-2-00163-1

GR-17 Declaration

I DECLARE THAT:

1. I am over the age of 18 years, competent to be a witness, and not a party to this action.
2. I received, by electronic means, a document for filing in the above captioned case.
3. I have examined said document, found it clear and discernible, and attached this Declaration thereto.
4. I received said document on: **08/31/2018**
5. The name of said document was: **Plaintiffs ' Response In Opposition To Defendants' Renewed Motions To Dismiss**
6. The number of pages in said document, including this Declaration, was: **12**

I declare under the penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

Signed on **08/31/2018**

4th Corner Network, Inc.
110 Prospect St.
Bellingham, WA 98225
360-671-2455


Linda Duralia
310365

2 ORIGINAL