Appeal No. 18-35711

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Margretty Rabang, et al.,

Appellant-Appellants,

v.

Robert Kelly, Jr., et al.

Defendants-Appellees,

United States District Court
Western District of Washington, Seattle Division
Honorable John C. Coughenour
Case No. 2:17-cv-00888-JCC

APPELLEE CHIEF JUDGE RAYMOND G. DODGE JR.'S ANSWERING BRIEF

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INTRODUCTION

This case is and has always been an internal dispute over Nooksack Indian Tribal membership artfully plead as a Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, case against Nooksack Tribal leaders and key Tribal employees in an attempt to manufacture federal court jurisdiction where none exists. ER 185; ER 225-26. As to Chief Judge Dodge, Ms. Rabang, Ms. Oshiro and the other Appellants (collectively "Rabang") simply seek to collaterally attack Tribal Court eviction orders with which they disagree. The District Court correctly set aside Rabang's fantastic allegations of illegitimate actions and saw the case for what it is, dismissing all claims for lack of subject matter jurisdiction. The decision of the District Court should be affirmed.

JURISDICTIONAL STATEMENT

This is an appeal from a ruling on an order to show cause why Rabang's claims should not be dismissed for lack of subject matter jurisdiction by the U.S. District Court for the Western District of Washington (Coughenour, J.), dated July 31, 2018, which disposed of all claims from the proceeding below. ER 1-9. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

This appeal presents the following issue for review: whether RICO can override the well-established rule that federal courts lack subject matter jurisdiction over internal Indian tribal membership and election disputes.

STATEMENT OF THE CASE

On February 2, 2017, Rabang filed a complaint against multiple Nooksack Tribal government officials and employees, including Chief Judge Dodge. DSER[1] 475. Chief Judge Dodge moved to dismiss the action against him.[2] DSER 459. On May 2, 2017, the District Court granted Chief Judge Dodge's motion to dismiss all claims against him on the basis of judicial immunity, but provided leave to amend. DSER 444.[3]

Following the dismissal as to Chief Judge Dodge, Rabang immediately filed a Second Amended Complaint, again alleging violations of RICO against multiple

[1] "DSER" references Chief Judge Dodge's Supplemental Excerpts of Record.

[2] On March 2, 2017, the remaining defendants moved to dismiss the claims against them. ER 275. On April 26, 2017, the District Court dismissed Rabang's money laundering claim and all claims against Defendant Armstrong, but otherwise denied the motion. ER 229. After filing an appeal, the Kelly Defendants voluntarily dismissed their appeal to this Court. DSER 346.

[3] Strangely, Rabang complains that the Appellees "should have filed a motion to dismiss based on . . . judicial immunity." Br. at 22. Chief Judge Dodge did so, and prevailed, and then filed for summary judgment on the same theory after the Second Amended Complaint was filed.

defendants including Chief Judge Dodge. ER 184. Chief Judge Dodge responded by filing an Answer and a Motion for Summary Judgment. DSER 420; DSER 397. Rabang sought to continue Chief Judge Dodge's motion for summary judgment to allow for discovery under Fed. R. Civ. P. 56(d). DSER 374. On June 29, 2017, the District Court granted Rabang's motion. DSER 371. Following the issuance of the U.S. Department of the Interior's ("DOI") August 25, 2017 Memorandum of Agreement, on September 19, 2017 the District Court issued a minute order instructing the parties to provide briefing to address the effect of the agreement, if any, on the court's continued jurisdiction over the case and on Chief Judge Dodge's motion for summary judgment. ER 168.

On October 25, 2017, the District Court ordered a stay of proceedings until January 12, 2018, pending a scheduled election for Nooksack Tribal Council positions on December 2, 2017. ER 133. On January 12, 2018, the parties filed a joint status report as instructed by the District Court. ER 114. On January 29, 2018, the Court issued a second stay of proceedings, finding that although the Tribe's general election had been held and the results had been certified, the results were still being reviewed by the Bureau of Indian Affairs' ("BIA") Regional Director. The case was stayed until either the earlier of when the BIA rendered a final determination regarding the validity of the 2017 General Election, or March 30, 2018. ER 82.

In mid-March 2018, all defendants, joined by Chief Judge Dodge, filed a motion for an indicative ruling from the District Court finding that it lacked subject matter jurisdiction over the case. DSER 356. On April 11, 2018, the District Court denied the motion, finding that "Defendants are asking the Court to decide an issue that [the Kelly Defendants] have clearly put before the Court of Appeals." DSER 353.

On June 7, 2018, the District Court lifted its stay of proceedings and *sua sponte* ordered Rabang to show cause why their claims should not be dismissed for lack of subject matter jurisdiction following DOI's March 9, 2018 letter recognizing the Nooksack Tribal Council. ER 57. On July 31, 2018, after briefing from all parties, the District Court dismissed Rabang's claims for lack of subject matter jurisdiction without prejudice and without leave to amend. ER 2.

In dismissing the case, the District Court noted, although it had previously relied on a narrow exception to the rule precluding federal courts from adjudicating matters of internal tribal governance unless and until tribal remedies have been exhausted, that exception no longer existed. *Id.* The District Court based this finding on the decisions from DOI to recognize Nooksack Tribal leadership following the recent elections. *Id.* In addition, the District Court found that to resolve the enrollment disputes at the heart of Rabang's claims, "the Court would

necessarily have to make rulings on tribal law that go beyond the scope of a district court's jurisdiction." *Id.*

STATEMENT OF FACTS

A. The Enrollment Dispute Arose at the Nooksack Indian Tribe Before Chief Judge Dodge Was Appointed

Raymond G. Dodge, Jr. is the current Chief Judge of the Nooksack Tribal Court. DSER 386, ¶ 1. The Nooksack Tribal Court was established in 1980 by the Nooksack Tribal Council in accordance with the authority vested in it by the Constitution and Bylaws of the Nooksack Indian Tribe. DSER 399. Although the Chief Judge is appointed by the Nooksack Tribal Council, the Nooksack Tribal Court exists and functions separate and apart from the Tribal Council. DSER 387, ¶ 4.

Chief Judge Dodge was appointed as Chief Judge effective June 27, 2016 by Tribal Resolution #16-92. *Id.*, ¶ 3. As Chief Judge, his duties and responsibilities include presiding over assigned cases, analyzing facts and legal issues, and preparing and issuing written orders, judgments, search and arrest warrants. *Id.*, ¶ 5. Consistent with these duties, Chief Judge Dodge has heard and decided an estimated 200 cases in Nooksack Tribal Court, including both civil and criminal matters. *Id.* Many of these orders have been granted full faith and credit by the Whatcom County Superior Court. *Id.* Prior to being appointed Chief Judge, Chief

Judge Dodge was employed by the Tribe as its Senior Tribal Attorney from August 2015 to April 29, 2016. *Id.*, ¶ 6.

Starting in approximately 2012, three years before Chief Judge Dodge was employed by the Tribe, the Tribe became embroiled in a dispute over Tribal enrollment. *Id.*, ¶ 9. In his time as Chief Judge, and as is relevant to the RICO claims against him, Chief Judge Dodge did not issue any decision or order which denies Nooksack Tribal membership to any person, nor did he rely on enrollment status as a basis for the eviction orders that led to him being sued by Rabang.

B. Appellant Oshiro is Evicted After Failing to Appear

In January and February 2016, respectively, the Nooksack Tribe's Indian Housing Authority ("NIHA") provided two notices of delinquency to Appellant Elizabeth Oshiro. DSER 388, ¶ 12. By March 15, 2016, NIHA issued a Notice of Eviction to Ms. Oshiro, notifying her that she would have 14 days to either cure the balance or vacate the premises. *Id.*, ¶ 14.

On June 9, 2016—after Chief Judge Dodge had resigned as Senior Tribal Attorney and before his appointment to the Tribal Court—the NIHA served a proposed Writ of Restitution and Order of Eviction against Appellant Oshiro in Tribal Court. *Id.*, ¶ 16. On July 8, 2016, the Nooksack Tribal Court issued a Notice of Hearing to Ms. Oshiro. The Notice indicated that a hearing would be held on July 18, 2016, and instructed Ms. Oshiro to "bring any information you may want

to present to the court on your behalf." DSER 388-89, ¶ 18. The hearing was subsequently rescheduled for July 20, 2016, and Ms. Oshiro was notified of this change. *Id.*

On July 20, 2016, although the hearing was held as scheduled, Ms. Oshiro did not appear. DSER 389, ¶ 19. Further, the NIHA presented evidence that Ms. Oshiro was in arrears on rent in the amount of $1,329.00, owed $360.10 in other outstanding amounts plus $252.34 in late fees. *Id.*, ¶ 20. NIHA also presented evidence that despite proper notification, Ms. Oshiro had failed to keep or perform certain conditions or covenants of the lease under which the property was held. *Id.* In light of this evidence and her failure to appear, Chief Judge Dodge had little choice but to enter judgment against her, as is standard practice when a party fails to appear. *Id.*, ¶ 21. Chief Judge Dodge accordingly issued a notice for Ms. Oshiro's eviction on July 20, 2016. *Id.*

C. Appellant Rabang is Evicted For Not Having A Signed Lease After Repeatedly Failing to Obtain Counsel

On August 19, 2016, NIHA issued a Notice of Termination/ Notice to Vacate to Appellant Rabang, indicating her Mutual Help Occupancy Agreement and participation in the Mutual Help Program would be terminated effective September 18, 2016. DSER 389, ¶ 22. When she failed to vacate the premises, a 14-Day Notice to Vacate was issued to Ms. Rabang on October 3, 2016. *Id.*, ¶ 24. Subsequently, on November 2, 2016, Nooksack Tribal Attorney (Defendant

Armstrong) filed a Complaint for Unlawful Detainer. *Id.*, ¶ 26. Although a trial was scheduled to be held on November 9, 2016, Ms. Rabang appeared pro se. Chief Judge Dodge granted Ms. Rabang a continuance to obtain counsel. DSER 390, ¶ 28. He also provided her with the names of two attorneys at the Northwest Justice Project who had recently successfully defended a Nooksack Tribal member in an eviction proceeding. *Id.*

However, as of December 14, 2016, Ms. Rabang had not retained counsel. *Id.* Due to the Tribe's Unlawful Detainer procedural rules requiring a trial date to be held "not less than, nor more than 45 days from the date of service of the summons and complaint," and counsel for NIHA objecting to additional continuances, Chief Judge Dodge conducted an unlawful detainer hearing on December 14, 2016. *Id.*, ¶ 29. During the trial, the Tribal Court inquired as to whether either party possessed a copy of the executed rental agreement. *Id.*, ¶ 30. Ms. Rabang stated she did not have a signed copy, and the agreement submitted to the Court by NIHA was not signed. *Id.* Without evidence of a signed lease, the Court found that NIHA could require Ms. Rabang to vacate upon notice. *Id.*, ¶ 31. As Ms. Rabang had failed to vacate the premises, the Court found her guilty of unlawful detainer and issued a writ of restitution. *Id.*, ¶ 32.

D. DOI Questions the Authority of the Tribal Council

In light of the ongoing enrollment dispute within the Tribe, on October 17, 2016, then Assistant Secretary of Indian Affairs ("AS-IA") Larry Roberts issued a letter to then-Tribal Chairman Robert Kelly, Jr., notifying him that the Tribal Council "lack[ed] a quorum to conduct tribal business as required by the Nooksack Tribe's [ ] Constitution and Bylaws" and that "the Department [would] only recognize those actions taken by the Council prior to March 24, 2016..." DSER 402. Although the letter noted that "recent actions ... to enjoin the authority of the Northwest Intertribal Court System" would not be recognized by the Department, the letter did not address the Nooksack Tribal Court, Chief Judge Dodge, or either of the eviction actions. *Id.* Chief Judge Dodge was not an addressee of the letter, nor was he provided a copy of the letter by the Nooksack Tribal Court Clerk or any other person. ER 184; DSER 391, DSER 402-3.

On November 14, 2016, AS-IA Roberts issued a second letter to Chairman Kelly. ER 171 This letter pertained specifically to the BIA's directive to the Tribal Council to carry out elections. *Id.* Again, this letter made no mention of Chief Judge Dodge, the Tribal Court (other than with regard to Tribal elections), or Rabang's eviction matters. *Id.* And, again, Chief Judge Dodge was not an addressee of the letter. *Id.*

On December 23, 2016, AS-IA Roberts issued a third letter to Chairman Kelly. ER 177. Unlike the previous two notices, in this letter AS-IA Roberts addressed the eviction matters, noting that "[i]t has come to the Department's attention that orders of eviction may have been recently issued to be served by the Nooksack Chief of Police or could be issued and served in the near future. It appears that such orders are based on actions taken by the Tribal Council after March 24, 2016. Therefore . . . those orders are invalid and the Department does not recognize them as lawful. . ." *Id*.

When Chief Judge Dodge eventually learned of and read this letter, he assumed it did not apply to him, because it referred only to "***actions taken by the Tribal Council***." *Id*., DSER 392, ¶ 46 (emphasis added). Moreover, by December 23, 2016, when the letter was issued, Chief Judge Dodge had already issued the Order Following Show Cause Hearing, the final order in Ms. Rabang's case. *Id.*, ¶ 45. Similarly, the default order against Ms. Oshiro had been issued months earlier, before any of the letters from AS-IA Roberts had been written or received. *Id*., ¶ 48.

E. The Tribe Holds New Elections and DOI Recognizes the Tribal Council as Valid

On August 25, 2017 DOI issued a Memorandum of Agreement between Acting Assistant of Indian Affairs Michael Black and Defendant Kelly ("MOA").

ER 142. The MOA called for a Special Election to fill four then-vacant seats, and required that all eligible Nooksack voters as of March 2016 be eligible to vote.

On December 2, 2017, the Tribe concluded the Special Election required by the MOA. The election was observed and verified by the BIA. DSER 342-45. On March 7, 2018, the BIA Acting Northwest Regional Director endorsed the Special Election, finding that it was conducted in accordance with the Tribe's Constitution, Bylaws, and Tribal Law and Ordinances. Despite Rabang's claims of election fraud, the Acting Northwest Regional Director's March 7, 2018 memorandum endorsing the Special Election put that issue to rest by finding, after investigation, that "[t]he evidence before the BIA indicates that the election was conducted in a proper manner and the BIA finds nothing to disturb the Board's conclusions." ER 31.

On March 9, 2018, DOI Principal Deputy Assistant Secretary ("PDAS") John Tahsuda acknowledged the newly elected Tribal Council and endorsed the Tribe's special election which had occurred December 2, 2017. ER 81. His decision was acted "to recognize the validity of" the Tribal Council as it was comprised. *Id.* The Tribe's General Election was held on May 5, 2018. ER 4; DSER 330. The Tribe's Election Superintendent certified those election results and provided the certification to the BIA and DOI.

On May 21, 2018, Acting Northwest Regional Director Tammie Poitra sent a letter to Tribal Council Chairman Roswell "Ross" Cline to "acknowledge and congratulate [him] as the Chairman of the Nooksack Indian Tribe." ER 14. On June 11, 2018, PDAS Tahsuda sent Chairman Cline a letter congratulating him on his recent election as Chairman of the Tribe and inviting Chairman Cline to meet. ER 47.

F. Chief Judge Dodge's Appointment is Ratified by the Tribal Council

On March 15, 2018, following DOI's decision to recognize the validity of the Tribal Council, the Tribal Council passed Resolution #18-15 to ratify the previous appointment of Chief Judge Dodge to the Nooksack Tribal Court. ER 68. 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." ER 68-69. On May 29, 2018, the Nooksack Tribal Council ratified a number of phone polls which occurred between July 2017 and May 2018. Among the polls was Resolution #18-15, in which the current federally-recognized Tribal Council ratified Chief Judge Dodge's 2016 appointment to the Nooksack Tribal Court. DSER 328-29.

SUMMARY OF ARGUMENT

It is well-established that Indian tribes have the exclusive authority to resolve matters of internal tribal governance, including tribal membership

disputes, absent four very narrow exceptions, none of which are present here. Despite Rabang's clever pleading, their RICO claims are nothing more an effort to manufacture federal jurisdiction to collaterally attack Tribal Court decisions issued by Chief Judge Dodge with which they disagree. *Oscar v. Univ. Students Co-Op. Assoc.*, 965 F.2d 783, 786 (9th Cir. 1992), *abrogated on other grounds by Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) ("RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff."). The District Court correctly agreed when it concluded that "[a]t the heart of [Rabang's] RICO claims is a dispute about their membership in the Nooksack Indian Tribe and the actions taken by tribal leadership to renounce their membership." ER 6. Even if Rabang's allegations were true—which they are not—federal courts do not have jurisdiction over such intra-tribal disputes. *See, e.g., Lewis v. Norton*, 424 F.3d 959, 960-63 (9th Cir. 2005); *In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 767 (8th Cir. 2003); *Miccosukee Tribe of Indians of Fla. v. Cypress*, 975 F. Supp. 2d 1298, 1300-09 (S.D. Fla. 2013).

RICO has been called "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). The gist of Rabang's appeal is that because RICO is so powerful, it must entail the right to

have their case heard on the merits, even where federal courts would normally lack subject matter jurisdiction. This is not the law.

STANDARD OF REVIEW

Chief Judge Dodge disagrees with Rabang's attempt to have this Court apply a summary judgment standard of review to an attack on subject matter jurisdiction that was wholly divorced from the merits of the RICO claim concerning mail and wire fraud. Br. at 13-14. In any event, there is no factual dispute—and Rabang does not allege one—related to the DOI decision relied upon by the District Court when it dismissed the action under Fed. R. Civ. P. 12(h)(3). Questions of subject matter jurisdiction are reviewed de novo. *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1130 (9th Cir. 2000). A federal court is presumed to lack subject matter jurisdiction until the contrary is affirmatively established by the plaintiff. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

ARGUMENT

A. The District Court Properly Dismissed Rabang's Claims Against Chief Judge Dodge for Lack of Subject Matter Jurisdiction

Federal courts are of limited jurisdiction. *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769, 774 (9th Cir. 1986). It is elementary that a federal court "cannot create jurisdiction where none exists." 5A Wright & Miller § 1350, at 204-05. As the Supreme Court has explained, "it is a Court's obligation to dismiss a case whenever it becomes convinced that it has no proper jurisdiction, no matter

how late that wisdom may arrive." *Wyoming v. Oklahoma*, 502 U.S. 437, 462 (1991) (Scalia, J., dissenting).

A court's ability to dismiss an action for lack of subject matter jurisdiction is addressed in Fed. R. Civ. P. 12(h)(3), which states: "If the court determines ***at any time*** that it lacks subject-matter jurisdiction, the court ***must*** dismiss the action." (emphasis added). Numerous decisions from this Court and its sister circuits echo this principle. *E.g., Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 976 n. 12 (9th Cir. 2012) (holding subject matter jurisdiction "can never be forfeited or waived" and federal courts have a continuing "independent obligation to determine whether subject-matter jurisdiction exists...."); *Ogle v. Church of God*, 153 Fed. Appx. 371, 374 (6th Cir. 2005) (holding the existence of subject matter jurisdiction may be raised at any time, by any party, or even *sua sponte* by the court itself). Federal courts may consider subject matter jurisdiction claims at any time during litigation. *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999).

Although Rabang seeks to obscure these principles with a novel reading of 28 U.S.C. § 1331, the ability of the District Court to decide for itself, at any time, whether it possesses subject matter jurisdiction is at the heart of this appeal. The District Court did not err when it found that resolving Rabang's dispute would have required the District Court to "necessarily have to make rulings on tribal law that go beyond the scope of a district court's jurisdiction" and would "ultimately

require the Court to render a decision about [Rabang's] enrollment status." ER 6. The District Court correctly determined that is for the Tribe to resolve such internal Tribal governance matters, not the federal courts. ER 9. RICO does nothing to change or override that analysis.

1. Federal Courts Do Not Have Jurisdiction Over Internal Tribal Disputes

a. Tribes Have the Exclusive Authority to Make and Enforce Their Own Laws

Indian tribes possess inherent and exclusive power over matters of internal tribal governance. *E.g.*, *Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983); *Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp.2d 1171, 1185 (E.D. Cal. 2009). Tribes have the power to both make their own substantive law in internal matters and to enforce that law in their own forums. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978). Internal matters include the tribal membership determinations, domestic relations among members, rules of inheritance for members, and the power to punish tribal offenders. *Id* at 56; *Montana v. U. S.*, 450 U.S. 544, 564 (1981). Part of tribal self-government over internal matters requires that tribal remedies be exhausted before the question is addressed by federal district courts. *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035 (9th Cir. 1999).

There are only four limited instances in which a litigant can bypass tribal court for federal district court: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the tribal court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance on nonmembers' conduct on land covered by *Montana's* main rule. ER 236; *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.,* 715 F.3d 1196, 1200 (9th Cir. 2013).

The District Court initially identified "[t]he issue at the heart of this case [to be] the legitimacy of the internal tribal actions taken by the Nooksack tribal leadership." ER 235. It emphasized that it was "very aware and respects the fact that" issues such as Chief Judge Dodge's appointment and rulings on Ms. Rabang's and Ms. Oshiro's eviction proceedings "are intra-tribal matters and are generally not for federal courts to review or preside over." ER 237. Nonetheless, the Court found that the alleged actions, taken without a quorum, "***could*** mean the Nooksack judiciary is non-functioning," which "***could*** potentially be enough to find a lack of opportunity to challenge the tribal court's jurisdiction." *Id.* (emphasis added). The District Court therefore initially held that "DOI's decisions to invalidate actions taken by Defendants, namely those related to the

Nooksack judiciary, indicate that Plaintiffs have a lack of adequate opportunity to challenge the tribal court's jurisdiction." ER 239. There was a significant caveat.

The District Court noted that "it has no place deciding how the Nooksack Indian Tribe determines tribal membership and the benefits that derive from membership" and that the DOI decisions would stand only "during the interim until the DOI and BIA recognize a newly elected Tribal Council or the DOI decision are invalidated." ER 239-40. As the DOI and BIA have now recognized a newly elected Tribal Council, the previously-found exception to the Tribe's exclusive right to self-govern does not apply.

b. DOI's Undisputed Recognition Decision Removes Any Doubt as to the Tribal Court's Functionality

The District Court explicitly and correctly acknowledged that its jurisdiction in this case was subject to divestment upon a change of circumstances. DOI's recognition of the Tribal Council triggered that divestment. As the District Court stated:

> This Court's jurisdiction over this matter is not permanent or inflexible. For instance, the DOI decisions in this matter are being challenged in the related case, *Nooksack Indian Tribe v. Zinke*, C17-0219-JCC. If the Court there determines the DOI decisions were invalid, it is possible that this Court will not have jurisdiction over this matter. Moreover, if the DOI and BIA recognize tribal leadership after new elections, the Court will no longer have jurisdiction and the issues will be resolved internally.

ER 239. It was only because of the "very rare circumstances" identified by the District Court which existed as of April 2017—*i.e.*, the BIA's determination that the Tribal Council had acted without a quorum—that the Court found that it had jurisdiction in the first place. ER 239-40. Indeed, the provisional nature of the District Court's finding of jurisdiction is apparent from its determination that it had jurisdiction only "[u]nder this set of facts." *Id*. Six months later, the District Court again emphasized the impermanent nature of its jurisdiction and stayed the proceedings "to allow for the completion of the process outlined in the MOA and to await the DOI's recognition decision." ER 137.

Early in the case, the District Court concluded that deference was owed to prior BIA decisions with respect to whether the DOI decisions meant that there was a "lack of adequate opportunity to challenge the [tribal] court's jurisdiction." ER 239. Relying on *Cayuga Nation v. Tanner*, 824 F.3d 321 (2d Cir. 2016), the District Court concluded that "deference to the Executive Branch is appropriate in addressing this question," because the "BIA has special expertise in dealing with Indian affairs, and we have previously indicated that the BIA's decision to recognize a tribal government" can be outcome determinative.[4] ER 238.

[4] Prior to DOI's letters acknowledging the Tribal Council as valid, Rabang agreed with this approach, arguing that "Courts generally should not substitute their judgment for that of Interior." DSER 450.

The March 9, 2018 decision from PDAS Tahsuda confirmed that DOI recognized the validity of the Tribal Council as it is currently comprised. DSER 370. This is precisely the event that the District Court was waiting for when it had advised the parties 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." ER 239; *see Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa,* 609 F.3d 927, 943 (8th Cir. 2010) (noting that once "the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself."). The District Court accordingly found that "[t]hese circumstances have come to pass," and "[t]he Court's original basis for exercising jurisdiction under an exception to the tribal exhaustion rule no longer exists." ER 5. On that basis, the District Court dismissed Rabang's claims.

The District Court properly accorded deference to the decision by DOI to recognize the current Tribal Council. The United States' decisions, coupled with the Tribe's Resolutions, remove any doubt as to the authority of the Chief Judge of the Nooksack Tribal Court. Thus, the previously-found exception to the requirement for exhaustion of tribal court remedies, which "applies narrowly to only the most extreme cases" is no longer in effect. ER 236. Consistent with the District Court's declaration that a decision to recognize new tribal leadership

would mean that it would no longer have jurisdiction because "the issues would be resolved internally," jurisdiction over this action is correctly restored to the Tribe. With that, so too ends any application of an exception the tribal court remedy exhaustion requirement.

c. Rabang Has Not Exhausted Tribal Court Remedies

Proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, (1987) (quoting *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)). Part of tribal self-government over internal matters requires that "tribal remedies be exhausted before the question is addressed by the District Court." *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035 (9th Cir. 1999).

In dismissing the case, the District Court concluded that "it is for the Nooksack Tribe, not this Court, to resolve Plaintiffs' claims." ER 9. Rabang, however, has not sought resolution from the Nooksack Tribal Court nor given the Tribal Court the opportunity to consider the issues before it and to rectify any errors. Advancing a self-serving and circular argument about the alleged illegitimacy of the Tribal Court fails to avoid that obligation. In order for tribal courts to be given the respect that they deserve, they must have the ability to adjudicate disputes over which they have jurisdiction in the first instance. Sandra

D. O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1 (2013); *Enrolled Members of the Blackfeet Tribe v. Crowe,* No. 15-0092, 2018 WL 6012442 *2 (D. Mont., Nov. 16, 2018) (granting motion to dismiss tribal member claims with a "genesis in an intra-tribal dispute" and "grounded in Blackfeet tribal law", and holding that "Blackfeet Tribal Court represents the proper forum"). Rabang is required to exhaust their Tribal Court remedies.

2. This Is an Internal Tribal Enrollment Dispute, Not a RICO Case

Since this case's inception, it has been evident that Rabang has no legitimate basis for claims under RICO. With respect to Chief Judge Dodge, Rabang alleges federal criminal mail and wire fraud for four purely judicial acts: (1) mailing an "Amended Notice of Hearing" to Plaintiff Oshiro on July 11, 2016; (2) mailing an "eviction order" to Plaintiff Oshiro on July 20, 2016; (3) mailing or wiring Defendant Romero a copy of an eviction order for Plaintiff Oshiro on July 27, 2016; and (4) mailing an "Order Following Show Cause Hearing" to Plaintiff Rabang on December 23, 2016."[5] ER 184. Try as they might to create one from whole cloth,

[5] Although the District Court dismissed on the basis of subject matter jurisdiction, the claims against Chief Judge Dodge may also be dismissed based on judicial immunity. This Court "'may affirm on any basis supported by the record, whether or not relied upon by the district court.'" *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007). Judges have long enjoyed absolute immunity from personal capacity claims and liability in damages for their judicial acts. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011); *Forrester v. White*, 484 U.S. 219, 219 (1988) (judges have absolute immunity in order to protect judicial

there is no scheme to defraud by Chief Judge Dodge, and the routine judicial acts related to the eviction proceedings that he heard as Chief Judge are not the types of claims for which RICO was intended. *See Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025-26 (7th Cir. 1992) ("The widespread abuse of civil RICO stems from the fact that all modern business transactions entail use of the mails or wires—giving Appellants a jurisdictional hook— and the fact that RICO offers a far more generous compensation scheme than typically available in state court."). Rabang's

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independence). Tribal court judges are entitled to the same absolute judicial immunity that shields state and federal court judges. *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003). There are two limited exceptions to judicial immunity: non-judicial actions and judicial actions taken in the "complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Neither exception applies here. Each of the acts Chief Judge Dodge is alleged to have taken is an objectively unremarkable, commonly executed judicial task well within the scope of a Tribal Court Judge's authority. Indeed, there are few actions more routine than issuing orders. *See Jenkins v. Kerry*, 928 F.Supp.2d 122, 134 (D.D.C. 2013) ("[A] judge acting in his or her judicial capacity— i.e., performing a function normally performed by a judge—is immune from suit on all judicial acts.") (citations and quotations omitted). Second, a judicial officer acts in the clear absence of jurisdiction only if he "knows that he lacks jurisdiction, or acts despite a clearly valid statute or case law expressly depriving him of jurisdiction." *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985) (citing *Rankin v. Howard,* 633 F.2d 844, 849 (9th Cir. 1980)). The scope of a judge's jurisdiction is construed broadly where judicial immunity is at stake. *Penn*, 335 F.3d at 789-90. Thus, courts have held that judges enjoy judicial immunity even when there are procedural defects in their appointment where they are "discharging the duties of that position under color of authority." *White by Swafford v. Gerbitz,* 892 F.2d 457, 462 (6th Cir. 1989); *see also Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994). Chief Judge Dodge did not knowingly act in the absence of jurisdiction as required to create an exception to the absolute judicial immunity enjoyed by Chief Judge Dodge.

use of RICO to make their claims is nothing more than an impermissible attempt to collaterally attack Tribal Court eviction orders issued by Chief Judge Dodge with which they disagree. Appellants have blatantly misused RICO as a vehicle to manufacture federal jurisdiction where it would not otherwise exist.

The District Court saw through Rabang's Orwellian ruse to find that "[a]t the heart of [Rabang's] RICO claims is a dispute about their membership in the Nooksack Indian Tribe and the actions taken by tribal leadership to renounce their membership."[6] ER 6. The District Court further concluded that although Rabang may "refuse to acknowledge that resolution of their claims—whether on summary judgment or at a jury trial—would ultimately require the Court to render a decision about Plaintiffs' enrollment status . . . Plaintiffs cannot eliminate this inherent issue just by bringing their challenge as a civil RICO action." *Id.*

Although Rabang argues that their allegations did not implicate matters of internal Tribal self-governance, the substance of the Second Amended Complaint unmistakably hues closely to internal tribal enrollment and election matters. Indeed, despite being labeled as a RICO action, Rabang's Second Amended

[6] In a similar proceeding brought by Appellants' counsel, the Interior Board of Indian Appeals also correctly denoted the case as "at its core, a tribal enrollment dispute." *Eleanor J. Belmont, et al. v. Acting Northwest Regional Director, Bureau of Indian Affairs*, 65 IBIA 283 (2018); DSER 330; ER 239.

Complaint uses a form of the words "enroll" or "disenroll" no fewer than 56 times, including in the following allegations:

- "Defendant Dodge arrived to Nooksack as the Tribal Attorney, at which time Plaintiffs' disenrollment was stayed, and they were otherwise secure in their homes, benefits and other properties, by operation of federal and Tribal law." ER 191.
- "On April 29, 2016, Plaintiff Rabang filed suit in NTC for prospective equitable relief, including 'declaratory judgment that [Holdover Council Defendants] have no authority to act on may matter, including [Ms. Rabang's] disenrollment.'" ER 196.
- "On June 8, 2016, Holdover Council Defendants notified the NIHA by mail or wire that it had disenrolled Plaintiffs Rabang and Elizabeth Oshiro. Holdover Council Defendants, together with other RICO Defendants Romero, Dodge, and Armstrong, then utilized the [Nooksack Indian Housing Authority] and [Nooksack Tribal Court] to defraud Ms. Rabang and Ms. Oshiro of their HUD MHOP homes." ER 198.
- "Holdover Council Defendants and Defendant King George's disenrollment efforts, as referenced by AS-IA Roberts, violate federal law." ER 202.

- On November 22, 2016, Holdover Council Defendants purportedly passed over 275 NITC Resolutions to disenroll Plaintiffs and over 275 other Tribal members, respectively. ER 203.
- "In furtherance of their scheme, RICO Defendants used the wires and/or U.S. mails or private or commercial carriers to delivery documents and things to Plaintiffs or the Enterprises for the purposes of defrauding Plaintiffs, including, but not limited to . . . Emails and website postings incorporating false, fraudulent and misleading statements regarding: the authority of Holdover Council Defendants; the purported disenrollment of Plaintiffs . . ." ER 212.

Thus, despite Rabang's claim that they "did not ask [the District Court] to make any such decision" about their enrollment status (Br. at 22), the Second Amended Complaint is plead to the contrary and District Court correctly concluded that there was no way to extricate itself from, at a minimum, having to "interpret and make rulings regarding Nooksack Tribal law" based on the Second Amended Complaint. ER 6.; *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (a cause of action only "arises under" federal law if the "well-pleaded complaint" raises an issue of federal law). There is a "lack of federal court jurisdiction to intervene in tribal membership disputes" and other "matters of local self-government." *Lewis*, 424 F.3d at 960-61 (internal quotation omitted); *Miccosukee*, 975 F. Supp. 2d at 1306

(holding that court lacked jurisdiction over RICO claim because "at its core, this is a dispute involving the Miccosukee Tribe and the alleged abuse of power granted to its former chairman under its tribal constitution.").

Rabang's allegations are nothing more than "bootstrapping what is discontent with the prior leadership onto alleged federal claims that are better resolved in another venue." *Miccosukee*, 975 F. Supp. 2d at 1306. Federal jurisdiction is lacking because, as Rabang's own allegations make clear, this is a dispute over tribal membership and tribal politics. No matter how they have pleaded it or tried to re-frame it, Rabang simply cannot overcome the absence of federal court jurisdiction over these internal tribal disputes.

a. RICO Does Not Override the Well-Established Rule that Federal Courts Lack Subject Matter Jurisdiction Over Internal Questions of Tribal Membership

Unable to escape the fact that this is an internal tribal enrollment dispute over which federal courts have no jurisdiction, Rabang resorts to the novel proposition that RICO—by its very existence as a federal statute—vests federal courts with unasailable jurisdiction to hear Rabang's claim. Br. at 14-16. Of course, there is no dispute that a RICO claim arises under the laws of the United States for purposes of 28 U.S.C. §1331. But Rabang grossly oversimplifies how a federal court determines whether it has jurisdiction.

It is not the rule, and never has been the rule, that merely styling a cause of action for a violation of a federal statute (including RICO) provides a plaintiff with unfettered access to the federal courts. In *Smith v. Babbitt*, the Eighth Circuit held that it lacked jurisdiction over RICO claims that were based on "an intra-tribal dispute" over allegations of "improper inclusion of non-members on the tribe's membership rolls." 100 F.3d 556, 559 (8th Cir. 1996). Rabang never cites to *Smith*, and for good reason, as there is no justification for this Court to hold differently and divorce RICO from the facts as plead and the relief sought. Rabang's bare reliance on RICO to evade the proper limits on the scope of federal judicial review of internal tribal matters is utterly misplaced.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

DATED: November 21, 2018. Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellee knows of no cases pending in this Court that would be deemed related under Circuit Rule 28-2.6.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,669 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and is 14-point font, Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jeremy Black
Jeremy Black