Docket No. 18-35711

In the

United States Court of Appeals

for the

Ninth Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Western District of Washington, Case No. 2:17-cv-00088-JCC · Honorable John C. Coughenour, Senior District Judge

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

RICO vests the District Court with federal question jurisdiction. Neither the *Tuscarora* rule nor the intra-tribal dispute doctrine takes it away. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). The Holdovers and Dodge do not dispute that RICO is a federal law of general applicability. They do not respond to the argument that under *Tuscarora*, RICO provides jurisdiction to the District Court. Dkt. 6 at 22-25. Instead, they argue that the intra-tribal dispute doctrine takes back what RICO bestows on the District Court. Dkt. 11 at 13; Dkt. 13 at 24.[1] But that argument misapprehends the intra-tribal dispute doctrine.

The intra-tribal dispute doctrine simply prevents the District Court from answering questions that do not arise under federal law. *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004). It does not cast a cloak of invisibility over fraud in Indian Country. The District Court will not have to answer any questions that do not arise under federal law. The District Court will answer questions of law that federal courts routinely answer.

Further, sovereign immunity does not protect individuals sued in their personal capacity and material fact disputes should have prevented the District Court from dismissing the case.

[1] All Dkt. page numbers refer to page numbers in ECF document headers.

ARGUMENT

A. The *Tuscarora* Rule Provided The District Court With Jurisdiction.

Federal laws of general applicability apply to the Holdovers, Dodge, and their abettors. *U.S. Dep't of Labor v. OSHRC*, 935 F.2d 182, 184 (9th Cir.1991) (*quoting FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)). The Holdovers and Dodge did not dispute that the *Tuscarora* rule governs this case – they failed to respond to the argument.

Because the *Tuscarora* rule applies here, the only colorable exception the Holdovers could have argued is the "intramural" exception. The Holdovers and Dodge also did not dispute that the intramural exception is inapplicable to this case. They also failed to respond to that argument. They state only that this RICO suit is an intramural matter without explaining how it could be. Dkt. 13 at 30.

The intramural exception cannot apply because when the Holdovers and Dodge defrauded Rabang for purposes of this suit, there was no recognized tribal government and thus no "rights of self-government" with which to interfere. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Without legitimate "rights of self-government," the intramural exception is inapplicable.

Further, racketeering as penalized by RICO is neither "purely intramural," nor any form of self-government. *Id*. Rabang is seeking money damages. Rabang has not asked the District Court to do anything against a person in their official

capacity. Rabang has not asked the District Court for any relief against an Indian tribe. Rabang has not sought to force private citizens in their individual capacity to do anything related to a tribal government. Nobody will be added to a membership roll. Nobody will be added to or subtracted from tribal government. RICO cannot provide that relief; Rabang is not seeking it.

To overcome *Tuscarora*, the Holdovers, Dodge and their abettors must show that RICO itself does not apply to Indians in Indian Country. This cannot be the case since, as observed in Rabang's Opening Brief, this Court routinely applies RICO to racketeering in Indian Country.

The Holdovers find Rabang's citation to *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988) to be "puzzling." Dkt. 13 at 32-33. It should not be. In *Emrich*, this Court made clear that RICO claims are claims "arising under the laws of the United States" and therefore give the District Court subject matter jurisdiction. Dkt. 6 at 21; 846 F.2d at 1195–96.

The Holdovers also argue that *Paskenta Band of Nomlaki Indians v. Crosby*, 122 F. Supp.3d 982 (E.D. Cal. 2015), is not persuasive for the proposition that district courts have subject matter jurisdiction to hear civil claims arising from an alleged violation of the RICO statute. Dkt. 13 at 31. But there, the District Court agreed with the plaintiffs' position that "based on the . . . RICO claim, specifically, the Court has subject matter jurisdiction [under] . . . 18 U.S.C. § 1964(a),(c)."

Paskenta, 122 F. Supp. 3d at 988.

B. The Intra-Tribal Dispute Doctrine Does Not Apply To This Case.

The *Tuscarora* rule is as far as the Court needs to go in analyzing subject matter jurisdiction. But even if the Court examines the intra-tribal dispute doctrine, it should not have resulted in dismissal.

An intra-tribal dispute is one that the Court lacks jurisdiction over because it does not "'arise under the Constitution, laws, or treaties of the United States,' as required by 28 U.S.C. §§ 1331 and 1362." *Kaw*, 378 F.3d at 1143. In other words, pure questions of tribal law are not federal questions for federal courts to answer. *Id*. But here, the District Court will not have to answer any federal question involving tribal law that federal courts do not routinely address. As the Eleventh Circuit held, the only question here touching on tribal issue is one that district courts commonly answer: "a potential scope-of-authority question . . . examined in the context of suits against Tribal officials." *Miccosukee Tribe of Indians of Florida v. Cypress*, 814 F.3d 1202, 1210 (11th Cir. 2015).

The Holdovers claim that Rabang is asking the District Court to determine whether or not persons are Nooksack Tribal members. Dkt. 13 at 26. Rabang is not. First, Rabang has not sought that relief. Second, RICO probably does not make that relief available. Federal Courts cannot render a person a tribal member or not—there is no federal cause of action that could result in a person being added

to tribal membership. But *observing* whether someone is a tribal member is well within the District Court's jurisdiction. There is a distinction between making a final determination about an Indian's tribal membership, and observing that a person is a tribal member.

For instance, every time a federal court hears a criminal case involving an Indian, it must observe whether or not that person is Indian or not. *See U.S. v. Seymour*, 684 Fed. Appx. 662, 663 (9th Cir. 2017) (government failed to prove blood quantum tribal membership based on tribal law); *United States v. Cruz*, 554 F.3d 840, 847 (9th Cir. 2009) ("Cruz is not even eligible to become an enrolled member of the Blackfeet Tribe[.]") Federal courts are free to take into account whether or not someone is a tribal member. Federal courts are free to observe whether or not a person is an official within a legitimate tribal government. *Miccosukee*, 814 F.3d at 1210. Although they cannot order a Tribe to admit a person to membership or elect a particular leader, federal courts need not put on blinders when it comes to facts as to tribal governmental status or the lack thereof. *See Nooksack Indian Tribe v. Zinke*, 2017 WL 1957076, at *6 (W.D. Wash. May 11, 2017). Federal courts answer these questions routinely.

Similarly, every time a federal court examines whether a tribal court possesses jurisdiction over a person—which, like RICO, is a federal question in itself—it must examine whether a person is a tribal member. *See Fisher v. District*

Court, 424 U.S. 382, 386 (1976) (examining "litigation between Indians and non-Indians arising out of conduct on an Indian reservation[.]"). These are questions within the scope of the District Court's authority to answer.

Again, the intra-tribal dispute doctrine is distinct from the *Tuscarora* rule. The *Tuscarora* rule applies RICO to Indian Country and RICO provides the District Court with subject matter jurisdiction. The relief sought by Rabang does not trigger the intra-tribal dispute doctrine. There are no questions asked of the District Court that do not arise under federal law.

C. None Of Appellees' Authority Contradicts Rabang's Argument.

The Holdovers and Dodge attempt to fit Rabang's claims into several cases without any explanation. None of the cases are a good fit; each shows why this matter should not have been dismissed.

The Holdovers cite *Williams v. Gover*, 490 F.3d 785 (9th Cir. 2007). Dkt. 13 at 24. But that was an APA suit against the federal government by putative members who wanted to be part of a tribe. 490 F.3d at 789-90. Rabang is not suing the United States. Rabang is not asking anyone to add them to a membership roll.

Dodge cites *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005). Dkt. 11 at 19. In *Lewis*, the plaintiffs were trying to force the United States to put their names on a tribal membership roll. *Id.* at 961. Rabang is not asking for that relief. RICO

likely does not provide that relief.

Dodge cites *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*, 340 F.3d 749 (8th Cir. 2003). Dkt. 11 at 19. That case illustrates exactly why dismissal would be wrong here. In that case, the litigants sought an injunction under RICO recognizing one faction of tribal leadership over another. *Meskwaki Casino Litig.*, 340 F.3d at 752. Rabang is not asking the District Court for an injunction recognizing one faction. That question is not before any court.

Dodge cites *Miccosukee Tribe of Indians of Fla. v. Cypress*, 975 F. Supp. 2d 1298. (S.D. Fla. 2013). On appeal the Eleventh Circuit held that "the mere suggestion of a dispute regarding tribal law is insufficient to trigger the intra-tribal dispute doctrine." *Miccosukee Tribe of Indians of Florida*, 814 F.3d at 1209. The court held further that "even if at some future point the court is presented with a seemingly genuine question of Tribal law regarding whether the alleged acts of embezzlement and self-dealing were within the scope of Cypress's authority, it is not necessarily the type of question the court is categorically precluded from addressing." *Id*. at 1210. Dodge is correct; this case is much like *Miccosukee*. The District Court can answer every question that will be posed to it.

Dodge and the Holdovers cite *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996). Dkt. 11 at 34; Dkt. 13 at 24. But in *Smith*, the litigants sued under RICO and asked the court to determine whether names on a membership roll were put

there improperly under federally approved tribal law and whether other names should be removed. That question is not before the District Court here. Rabang is not asking the District Court to determine whether anyone is a member; Rabang is asking the Court for damages for being defrauded of homes, property, and money.

Dodge and the Holdovers repeatedly cite *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Dkt. 11 at 22; Dkt. 13 at 26. But that case does not help them. In *Santa Clara*, the plaintiff sued under the federal Indian Civil Rights Act; she sought to make her child eligible for membership in a tribe. 436 U.S. at 51. Rabang is not asking any court to put names on a membership roll or enjoin any tribal government. The District Court need not, and cannot itself make a tribal membership determination.

This is not a case like *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 832, 197 L. Ed. 2d 69 (2017), where disenrollees sought order reenrolling them. 827 F.3d at 1223. This is not a case like *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9th Cir.2013), where litigants sought an order adding names to a membership roll. *Id*. at 1226. Rabang is not like the plaintiffs in *Arviso v. Norton*, who sought reconsideration of an enrollment decision. 129 Fed. Appx. 391 (9th Cir. 2005).

Rabang is not asking the District Court to put any names on a tribal roll or reverse any membership decision. ER 227. Rabang is asking for money damages,

alone, from individuals in their personal capacity.

D. Exhaustion Was Not Required.

Dodge and the Holdovers fail to respond to Rabang's argument that tribal court exhaustion is not required to bring a claim under RICO. They do not attempt to defend the District Court's "analogy to the tribal exhaustion rule." ER 5. The Holdovers do not even mention the word "exhaust" in their brief. Dkt. 13.

RICO is a federal statute and any tribal court likely lacks jurisdiction to hear federal RICO claims. *See Nevada v. Hicks*, 533 U.S. 353, 369 (2001) ("[T]ribal courts cannot entertain § 1983 suits[.]"); *cf. El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999) (no tribal exhaustion required where Congress "expressed an unmistakable preference for a federal forum"). Further, the Tribal Court was one of the otherwise legitimate organizations that the Holdovers and Dodge infiltrated for racketeering purposes. Exhaustion before Dodge, who was pretending to be a judge during the RICO period, and the Holdovers, who were pretending to be the "Supreme Court," would have been futile *at most*. ER 237, 232. Tribal court exhaustion was not required here.

E. Sovereign Immunity Does Not Bar Personal Capacity Claims.

The District Court rejected the Holdovers' sovereign immunity arguments; the Holdovers appealed. *See* ER 59-60; *Rabang v. Kelly*, No. 17-35427 (9th Cir. 2018). Following oral argument on their appeal, the Holdovers dismissed their

appeal and agreed to pay Rabang's legal fees and costs on appeal. ER 59. Anyone can raise subject matter jurisdiction questions at any time. But sovereign immunity arguments should fail for the second time in this case because of *Lewis v. Clarke*. 137 S. Ct. 1285, 1287 (2017). Sovereign immunity is not an issue here because the individual Defendants were sued in their personal capacity. *Id*. "'Officers sued in their personal capacity come to court as individuals,' and the real party in interest is the individual, not the sovereign." *Lewis*, 137 S. Ct. at 1291.

The law in the Ninth Circuit is clear and has been for some time: As long as the remedy sought is against an individual in their personal capacity, as here, sovereign immunity is not a bar. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013); *Pistor v. Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015).

F. Ratification Proves Holdovers Lacked Authority During the RICO Period.

The Holdovers note that the District Court could rule that their acts were illegal "because there was no quorum of the Council and thus the Council lacked the authority to take the legislative actions to disenroll Rabang, and then strip them of their tribal benefits." Dkt. 13 at 47. But that is not what Rabang is arguing. Multiple determinations regarding the Holdovers' authority had already been made by the United States during the RICO period. ER 137; 171-78. Neither Holdovers, Rabang, nor the District Court will have to make any decision regarding whether or not the Holdovers had a quorum or had authority to do anything. The District

Court already held that Holdovers could not act as a tribe during the RICO period. *Nooksack Indian Tribe v. Zinke*, 2017 WL 1957076, at *6. The U.S. Department of the Interior already determined that the Holdovers could not carry out actions on behalf of any tribe during the RICO period. ER 171-178. Federal courts are well within their power to determine what weight to pay agency action of the U.S. Department the Interior and the binding effect of district court decisions that have not been appealed, like *Nooksack Indian Tribe v. Zinke.*

If the Holdovers were authorized to racketeer during the RICO period, they did not need to ratify those actions later.

G. The District Court Applied The Wrong Dismissal Standard.

The Holdovers argue that *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004) does not dictate that the District Court should have applied a summary judgment standard. Dkt. 13 at 56-57. But it does. The Holdovers correctly summarize the case:

> The Court concluded that, because the RICO statute provided the basis for both the subject matter jurisdiction of the court (as a matter arising under the laws of the United States, 28 U.S.C. §1331) and the substantive relief, the Court need not examine the issue of extraterritoriality (i.e., subject matter jurisdiction) too closely but, rather, need only assure itself that the RICO claim was not made solely for the purpose of obtaining jurisdiction and is not wholly insubstantial and frivolous.

Dkt. 13 at 57 (underline added). But the Holdovers do not even attempt to cast Rabang's claims as "insubstantial and frivolous." 379 F.3d at 662. They cannot

do so. The record is replete with evidence regarding the Holdovers' and Dodge's racketeering. The District Court did not find that Rabang's claims were insubstantial and frivolous, but rather that they were substantial and well documented. *See* ER 9.

Therefore, unless a RICO claim is "insubstantial and frivolous" *Poulos* dictates that the Rule 12(b)(6) standard applies, thereby converting this matter to question of summary judgment. Because viewing all the evidence in the light most favorable to Rabang reveals genuine issues of material fact for trial, dismissal was wrong.

The District Court held that "DOI's recognition decision [undid] its previous opinions concluding that the Tribal Council and Tribal Court had acted without authority." ER 8. This is a material factual dispute that the District Court was required to leave for a jury. PDAS John Tahsuda's recognition decision did not undo his predecessors' various prior determinations. ER 174, 171-72.

The District Court held that "relevant issue for assessing the Court's jurisdiction is whether the DOI recognizes the Tribal Council as the governing body of the Nooksack Tribe." ER 8. This exposes another material fact dispute: the DOI does not recognize the Holdovers as the governing body during the period when they defrauded Rabang. Only the Holdovers are claiming it did.

H. Absolute Or Qualified Immunities Provide A Practical Mechanism For Analyzing Rabang's Claims.

Dodge finds it "strange" that Rabang argues that the Holdovers "should have filed a motion to dismiss based on" absolute or qualified immunity. Dkt. 11 at 8. It is not strange. Legislative, executive, or judicial immunity could be available to legitimate tribal governmental actors.

Rabang did not suggest that *Dodge* needed to have filed an additional motion on judicial immunity. Dodge already filed a second motion for summary judgment on judicial immunity. Dkt. 12 at 72. Rabang sought discovery as to whether Dodge knew that he lacked authority while he was carrying out the RICO scheme, given that he had all the information about the Holdover's inability to function as a legitimate tribal government, having served as the Holdovers' attorney. *See* Dkt. 12 at 47. Dodge's motion would be taken up on remand after additional discovery because, as the District Court held: "A deposition of Defendant Dodge and information obtained through other discovery tools could create a genuine dispute of material fact as to whether Defendant Dodge knew he lacked authority." *Id*.

The Holdovers could also seek to protect themselves through executive, legislative, or judicial immunities. Doing so does not infringe in any matter the District Court cannot examine. Courts can examine absolute and qualified immunities applying to individuals employed by Indian tribes just like they can

with other government employees. *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003) (tribal judicial immunity); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Arizona*, 966 F. Supp. 2d 876, 885 (D. Ariz. 2013) (tribal legislative immunity); *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) ("individual members of the Tribal Council . . . enjoy absolute legislative immunity . . . for official actions taken when acting in a legislative capacity"); *cf. Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2041 (2014) (Sotomayor, J., concurring) (respect for tribal sovereignty requires according tribes the same immunities as states).

CONCLUSION

The District Court erred in dismissing Rabang's suit.

DATED this 10th day of December, 2018.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

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