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

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

The District Court possessed federal question jurisdiction pursuant to 28 U.S.C. § 1331 over claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, by Plaintiff-Appellants Margretty Rabang, Olive Oshiro, Dominador Aure, Christina Peato, and Elizabeth Oshiro (collectively, "Rabang").

On July 31, 2018, the District Court dismissed Rabang's complaint without prejudice and without leave to amend. ER 1-9.

Rabang filed her notice of appeal on time on August 24, 2018. ER 10. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the District Court erred when it dismissed Rabang's case for lack of subject matter jurisdiction.

STATEMENT OF THE CASE

The federal question in this case is, at its core, whether the Holdovers and their abettors knowingly took money and property from Rabang by false pretenses. RICO creates that federal question and provided the District Court with subject matter jurisdiction.

RICO is a federal law generally applicable in Indian Country. The intra-tribal dispute doctrine does not apply because RICO itself confers federal question

subject matter jurisdiction.

But even if the intra-tribal dispute doctrine did apply, it would not deprive the District Court of jurisdiction in this case because Rabang is not seeking the types of relief barred by that doctrine: adding or removing names on tribal membership rolls or resolving faction battles for control of a tribe.

This is a case focused on a finite period of time during which Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete (collectively, "Holdovers"), assisted by Raymond Dodge and others, defrauded Rabang. Through successive federal agency actions, the U.S. Department of Interior determined that the Holdovers and Dodge were illegitimate tribal actors. Seeking to cover their tracks, the Holdovers have sought to disguise this controversy as a non-justiciable intra-tribal dispute. The District Court mistakenly agreed with that mischaracterization, failing to appreciate that every question necessary to this dispute arises under federal law.

The District Court also created a new rule—"an analogy to the tribal exhaustion rule"—without any precursor or basis in federal law. ER 5. Tribal exhaustion is irrelevant in the RICO context. RICO actions are creatures of federal statute, forumed in federal court, and do not require exhaustion of tribal remedies.

If the Holdovers wanted to argue that their fraudulent scheme Rabang was somehow authorized by virtue of an alleged connection to a functioning tribal

government, they should have sought dismissal based on purported legislative or judicial immunity. They did not. Neither the intra-tribal dispute doctrine nor sovereign immunity gives them cover.

The District Court further erred by not applying the appropriate summary judgment standard; the material fact disputes present in this matter would have prevented dismissal.

Affirming the District Court would inoculate racketeering conspiracies that infiltrate tribal governments from the force of RICO. While RICO would continue to deter individuals from conspiring to defraud federal, state, and local governments, tribal governments would be left uniquely exposed to mail fraud, wire fraud, and conspiracy. The Court should apply RICO in the face of all pretend-governmental racketeering. This Court should not create a blanket affirmative defense to civil RICO activity in Indian Country where defendants can baldly proclaim "intra-tribal dispute" and be free from prosecution.

STATEMENT OF FACTS

A. Procedural History

This is the second appeal in this case. On April 26, 2017, the District Court denied a motion to dismiss brought by the Holdovers, who then appealed that denied to this Court. ER 275, 229-47, 59. Following oral argument on the first appeal, the Holdovers voluntarily dismissed their appeal on May 18, 2018. ER 59.

Upon remand, the District Court issued an Order to Show Cause why Rabang's case—as by then pled in a May 3, 2017, Second Amended Complaint—should not be dismissed for lack of subject matter jurisdiction. ER 57-58. On July 31, 2018, the District Court dismissed Rabang's case *sua sponte*. ER 2-9. The District Court reasoned that it lacked subject matter jurisdiction because allowing the case to proceed "would ultimately require the Court to render a decision about Plaintiffs' enrollment status" and "interpret and make rulings regarding Nooksack Tribal law." ER 6. Rabang filed a Notice of Appeal on August 24, 2018. ER 10.

B. Factual Background

Between March 2016 and March 9, 2018, the Holdovers pretended to be an Indian tribal government even though the United States had repeatedly determined that those six individuals and their abettors acted illegally and without authority that entire time.[1] ER 171-178. Throughout those two years, Holdovers misrepresented themselves as the Nooksack Indian Tribe ("Tribe") and Nooksack Indian Tribal Council ("NITC"). ER 185. Meanwhile, the Tribe of over 2,000 members lacked a governing body that was recognized by the Federal Government. *To be clear*: during this two-year period time the Nooksack Tribe lacked a government. ER 137; 171-78.

[1] The allegations in Rabang's complaint span the period of time between December 2015 and January 2017. ER 227.

The Holdovers and their abettors were central to an elaborate scheme to defraud Rabang of money and property, most notably federally subsidized homes; and to personally enrich themselves with federal monies. ER 190-191.

C. Holdovers Prevent Tribal Elections And Commence A Scheme To Defraud Plaintiffs.

In December of 2015, Holdovers realized that the four-year terms of Appellees George, Smith, Canete, and Johnson were each set to expire on March 24, 2016—and that they were at risk of losing an election. ER 190. In an attempt to maintain control of the Tribe and execute their scheme to defraud Plaintiffs, Holdovers prevented those four NITC seats from being subjected to an election that was required to commence that December. ER 191-192.

On March 24, 2016, those four NITC positions lapsed, but Appellees George, Smith, Canete, and Johnson refused to vacate their seats. ER 194-195.[2]

[2] The Holdovers, masquerading as the "Nooksack Indian Tribe," filed a Complaint against the United States, challenging DOI's determinations three determinations that they, acting as the NITC, were illegitimate. ER 130 (citing *Nooksack Indian Tribe v. Zinke*, No. 2:17-cv-0219, Dkt. # 1 (W.D. Wash. Feb. 13, 2017). In according deference to the DOI determinations, the District Court dismissed the action for lack of standing because the "holdover Council does not have authority to bring this case against the federal government in the interim period where the tribal leadership is considered inadequate by the DOI." *Zinke*, 2017 WL 1957076, at *6 (W.D. Wash. May 11, 2017).

D. Holdovers Overthrow The Nooksack Tribal Court In Furtherance Of Their Scheme To Defraud Plaintiffs.

On March 28, 2016, while former Nooksack Tribal Court Chief Judge Susan Alexander was in the final stage of preparing a ruling to compel Holdovers to call the election for the four seats, they fired her. ER 180-183; 195. Holdovers replaced her with *their own lawyer*, Senior Tribal Attorney Raymond Dodge—a primary architect of Holdovers' entire scheme to defraud Plaintiffs. *Id*.

In the months that followed, Holdovers refused to issue "business licenses" to the lawyers Plaintiffs hired to defend their civil liberties in the defunct Tribal Court, and otherwise excluded those lawyers from practicing law at Nooksack—rendering Plaintiffs *pro se*. ER 196. Meanwhile, Defendant Dodge first rejected, and then accepted but never convened, two *pro se* lawsuits brought by Plaintiff Margretty Rabang in which she sought to challenge the authority and Holdovers' purported actions to evict her from her federal housing and take her money and property. ER 196-199. Defendant Dodge, now masquerading as a judge and pretending not to still be the Holdovers' lawyer, evicted Plaintiff Elizabeth Oshiro from her home that summer and later ordered Plaintiff Margretty Rabang evicted from her home days immediately before Christmas. ER 197-198. Holdovers used

"non-functioning" pretend Tribal Court to evict Plaintiffs Elizabeth Oshiro and Margretty Rabang from their federal housing.[3] ER 137, 199-201; 203-205.

E. The United States Officially Invalidates The Holdovers, Who In Turn Expand Their Scheme To Defraud Plaintiffs.

By fall 2016, the Federal Government had seen enough from the Holdovers. On October 17, 2016, the highest-ranking federal Indian affairs official, DOI Principal Deputy Assistant Secretary-Indian Affairs Lawrence S. Roberts ("PDAS Roberts") issued a formal agency determination to Defendant Kelly that:

> As you know, the Nooksack Tribal Council (Council) lacks a quorum to conduct tribal business as required by the Nooksack Tribe's (Tribe) Constitution and Bylaws. Four Council members' terms expired in March 2016, and an election was never held to fill their seats. The Council currently consists of four members . . . . [T]he Council must have five duly elected officers to take any official action."

ER 174-175. Calling the situation caused by Holdovers "exceedingly rare," PDAS Roberts advised Defendant Kelly "and the remaining Council members that the Department will only recognize those actions taken by the Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time because of a lack of quorum." *Id.* In rendering this decision, PDAS

[3] Ms. Oshiro participated in the U.S. Department of Housing and Urban Development's ("HUD") Mutual Help Occupancy Program ("MHOP"), which is a federal lease-to-own program administered by the Nooksack Indian Housing Authority ("NIHA"). ER 186, 198-99, 204, 206. Prior to her illegal eviction from her home, Ms. Oshiro only needed to make **one** more payment before she owned the property outright under the terms of her HUD MHOP agreement. *Id.* She made this payment—and thought she owned her home outright, having paid over $90,000 throughout the years. *Id.*

Roberts explained the United States' "duty to ensure that tribal trust finds, Federal funds for the benefit of the Tribe, and [DOI's] day-to-day government-to-government relationship is with a full quorum of the Council . . . ." *Id.*[4]

Undeterred by what would prove to be DOI's first of three determinations to not recognize Holdovers' authority, they nonetheless moved forward with their scheme to defraud Plaintiffs of money and property by purportedly initiating "involuntary" proceedings to terminate the Tribal citizenships of Plaintiffs and over 275 other Tribal members; and, for good measure, also conducting a "referendum election" to accomplish the same goal. ER 200-201. DOI soon rejected both efforts. ER 201-202; 171-172.

F. The United States Reiterates Its Refusal To Recognize The Holdovers, Who Persist With Their Scheme To Defraud Plaintiffs.

By November 14, 2016, Holdovers had forced DOI's hand, causing the agency to render a second decision to Defendant Kelly, reiterating that DOI "will not recognize actions by you and the current Tribal Council members without a quorum . . . ." ER 171-172. DOI spelled out the need to have a NITC "seated through an election consistent with tribal law" and rejected Holdovers' purported termination of "current tribal citizens" through a "'referendum election.'" *Id.*

[4] DOI did suspend the Tribe's federal self-governance funding until August 2017. *Nooksack Indian Tribe v. Zinke, et al.*, No. 17-0219, 2017 WL 1957076, * at 5 (W.D. Wash. May 11, 2017); ER 135.

Still, the Holdovers ignored DOI. They:

- Denied federal healthcare and Temporary Assistance for Needy Families ("TANF") services to Plaintiffs Aure, Peato, and Elizabeth Oshiro, ER 203-205;
- Caused Defendant Dodge to order Plaintiff Margretty Rabang's eviction from her federally subsidized home, ER 205;
- Caused a hand-picked "Judge Pro Tem" to issue an *ex parte* injunction against the Tribe's own Nooksack Court of Appeals, for all intent and purpose terminating the Appeals Court's operations, ER 283; and
- Created a "Nooksack Supreme Court" comprised of "Chief Justice" Kelly and other Holdover "Justices," who together purported to "vacate" twelve prior adverse rulings from the Nooksack Court of Appeals, ER 232.

HUD and the United States Department of Health and Human Services ("HHS") joined DOI in rejecting the Holdovers' actions. ER 201-02; 204.

G. The United States Once Again Rejects The Holdover Council.

On December 23, 2016, DOI issued its third decision against the Holdovers, reiterating the first two determinations and again invalidating the actions by Defendant Kelly and those "who have exceeded their term of office to anoint [them]selves as the Tribe's Supreme Court . . . without a quorum and without holding a valid election . . . ." ER 177-78. DOI invalidated Holdovers' purported acts to appoint Dodge as "Chief Judge," to terminate the Court of Appeals, and to

"establish an alternative" Supreme Court, explaining: "Any actions taken by the Tribal Council after March 24, 2016, including so-called tribal court actions and orders, and not valid for purposes of Federal services and funding." *Id*. DOI's latest determination specifically invalidated "orders of eviction" Dodge issued against Plaintiff Rabang. *Id*.

But that third federal determination *still* did not deter Holdovers, who continued with their eviction of Plaintiff Margretty Rabang from her HUD home over the Christmas holiday; and, to give another example, denied Plaintiff Elizabeth Oshiro's son federal Johnson O'Malley education assistance. ER 206.

H. Dismissal Of Appeal And Aftermath

On May 17, 2017, the Holdovers appealed the District Court's denial of a Motion to Dismiss. *See* ER 59-60; *Rabang v. Kelly*, No. 17-35427 (9th Cir. 2018). That same week, the District Court ruled that the Holdovers lacked standing to sue DOI as the "Nooksack Indian Tribe" in *Nooksack Indian Tribe v. Zinke*. ER 130.

The Holdovers immediately entered into negotiations of what would become a Memorandum of Agreement ("MOA") with DOI's Acting Assistant Secretary – Indian Affairs. ER 135; 142-46. Under the MOA, the DOI agreed to recognize a Nooksack Tribal Council as the governing body of the Nooksack Tribe, if the Tribe conducted a special election in accordance with the terms of the MOA. *Id.*

On October 25, 2017, the District Court stayed all proceedings in deference to the special election "and any subsequent action taken by the DOI in accordance with the MOA." ER 140. Amidst the Court's stay, two elections were held. ER 4.

On December 2, 2017, the special election contemplated by the MOA was held to election to fill four vacant Tribal Council seats. The election was deeply flawed, having been corrupted by the Holdovers and the surrogate, Defendant Romero, who served as Election Superintendent. ER 28-32, 49, 116-122.[5]

On March 9, 2018, the day of the oral argument on the Holdovers' first appeal, DOI PDAS John Tahsuda acknowledged the newly elected Tribal Council on an interim basis—rubber stamping a Bureau of Indian Affairs ("BIA") Acting Regional Director's March 7, 2018, endorsement of the special election. ER 49. PDAS Tahsuda extended that interim recognition "until the results of the general election originally scheduled for March 17, 2018, can be certified." *Id*. That regular general election completed on May 5, 2018. *Id.*

Of note, PDAS Tahsuda did not invalidate or withdraw any prior DOI determinations—most notably PDAS Roberts' October 17, 2016, November 14, 2016, or December 23, 2016, determinations—regarding the Holdovers' lack of authority. ER 49-50. Nor did he retroactively ratify the Holdovers' past conduct.

[5] The special election is the subject of another lawsuit, *Doucette v. Zinke*, No. 18-cv-00859 (W.D. Wash. June 13, 2018).

Id. PDAS Tahsuda's last word on "the three letters issued by Principal Deputy Roberts in 2016," on January 16, 2018, was to affirm them. ER 50.

On May 5, 2018, the Tribe held a regular general election to select a Chairman and fill three other seats on the Tribal Council. ER 4. This election was also deeply flawed, also having been corrupted by the Holdovers and Romero. ER 105-10; 116-22. On June 11, 2018, PDAS Tahsuda wrote Roswell "Ross" Cline to congratulate him on his "recent election as Chairman of the Nooksack Indian Tribe," but not without commenting on the "disharmony in the relationship between the United States and Tribe" spanning "the past few years." ER 4, 47. PDAS Tahsuda again had a chance to invalidate or withdraw DOI's prior determinations, but he did not.

Based on the DOI's recognition of a Nooksack Tribal Council – albeit one distinct from the Holdovers – the District Court suddenly found that it lacked jurisdiction and dismissed Rabang's case *sua sponte*, following briefing on an order to show cause. ER 2, 9.

SUMMARY OF ARGUMENT

The Court should reverse the District Court's judgment in this case because the District Court possessed subject matter jurisdiction over Rabang's claims.

The RICO statute provided the District Court subject matter jurisdiction. As a federal law of general applicability, it applies in Indian Country. That alone is

enough for subject matter jurisdiction. Further, the relief sought by Rabang does not trigger the intra-tribal dispute doctrine.

Finally, the District Court erred in applying an exhaustion-style theory in its dismissal order. Exhaustion is not relevant to this case. This error caused the District Court to look at whether some alleged tribal forum had jurisdiction; but this inquiry is not part of the relevant subject matter jurisdiction question and only served to confuse.

The appropriate legal approach for Holdovers and their abettors was to argue that they were allowed to defraud Rabang because of their alleged positions within government and thus purportedly enjoyed judicial and legislative immunities.

This Court should reverse the District Court's decision and remand this matter for discovery and trial.

ARGUMENT

I. STANDARD OF REVIEW

Because the District Court should have applied the summary judgment standard as argued below in Section IV at page 28-29, the Court should review the law in this case *de novo* and determine whether, viewing the evidence in the light most favorable to Rabang, genuine issues of material fact remain for trial, and whether the District Court correctly applied relevant substantive law.

Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1044 (9th Cir. 2003).

II. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION.

A. § 1331 And The RICO Statute Provide Subject-Matter Jurisdiction.

"[D]istrict courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Section 1331 therefore provides federal district courts subject-matter jurisdiction to hear a claim arising from an alleged violation of a federal law or statute.

A federal law that creates the right of action and provides the rules of decision plainly arises under the laws of the United States. *Mims v. Arrow Fin. Servs., LLC,* 565 U.S. 368, 377 (2012). "There is no serious debate that a federally created claim for relief" creates a federal question. *Id.* RICO does just that. Federal district courts have subject matter jurisdiction to hear civil claims arising from an alleged violation of the RICO statute. 18 U.S.C. § 1964(c); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1988); *see Paskenta Band of Nomlaki Indians v. Crosby*, 122 F. Supp. 3d 982, 988 (E.D. Cal. 2015).

The District Court incorrectly applied the intra-tribal dispute doctrine. That doctrine really asks whether a claim arises from federal law, as discussed below in Section II.E at page 19. *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004). This matter obviously arises from violations of a federal

law: RICO. In other words, if the RICO statute applies to this case and to the parties as a federal law of general applicability, there is subject matter jurisdiction. The RICO statute itself provides jurisdiction to the District Court.

B. RICO Is A Federal Law Of General Applicability And Applies To Indians.

Federal laws of general applicability presumptively apply with equal force to Indians. *United States 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)). RICO is such a law, having been repeatedly applied to tribes and tribal members by the Court. *Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093, 1095 (9th Cir. 2017) (applying RICO in dispute between Tribe and Indians over Tribe's taxes); *United States v. Fiander*, 547 F.3d 1036, 1037 (9th Cir. 2008) (applying RICO to Indians); *United States v. Baker*, 63 F.3d 1478, 1491 (9th Cir. 1995), *as amended on denial of reh'g and reh'g en banc* (Oct. 6, 1995) (applying RICO to Indians); *see also Miccosukee Tribe of Indians of Florida v. Cypress*, 814 F.3d 1202, 1209 (11th Cir. 2015) (applying RICO to former tribal chairman); *Gingras v. Rosette*, 5:15-CV-101, 2016 WL 2932163, at *13 (D. Vt. May 18, 2016) (applying RICO to tribal defendants). There is only one exception to this rule that the Holdovers will argue applies here:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law

> touches 'exclusive rights of self-governance in purely intramural matters'[.]

Pauma v. Nat'l Labor Relations Bd., 888 F.3d 1066, 1076 (9th Cir. 2018) (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

In other words, RICO applies to the Holdovers unless the RICO statute itself touches "exclusive rights of self-governance in purely intramural matters." *Id*. Because there was not any form of legitimate Nooksack self-governance during the time in question, RICO applies.

C. There Was No Nooksack Self-Governance With Which To Interfere.

"[T]he self-government exception applies only where the tribe's decision-making power is usurped[.]" *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 684–85 (9th Cir.1991); *Solis v. Matheson*, 563 F.3d 425, 432–33 (9th Cir. 2009). During the time period of the RICO activity, there was no legitimate Tribal Council decision making of any kind. ER 171-79; 164-65. Nor was there any federal funding or support for Nooksack self-governance. ER 175. The District Court held during the RICO period that "the Nooksack government and judiciary, as noted by DOI's prior opinion letters, are still 'nonfunctioning.'" ER 137. In December 2017, the Holdovers admitted they were not a recognized the Tribal government. ER 130. In short, there was no tribal

decision-making to usurp, and no self-governance to infringe upon, by the District Court's application of RICO to the facts alleged in Rabang's lawsuit.

D. RICO Does Not Touch "Purely" Intramural Matters Either.

Even if there was Nooksack self-governance during the time in question, the RICO statute does not touch "purely" intramural matters. The RICO law allows private citizens who have been victims of racketeering activity to seek money damages against other individuals. 18 U.S.C. § 1965. It does not allow private citizens to sue anyone to force an Indian Tribe to admit or expunge a person from a Tribe's membership roll. It does not allow a private citizen to seek a District Court declaration as to who is the governing body of a Tribe.

Rabang has not asked the District Court to provide any relief that would interfere with "self-governance in purely intramural matters" and it is unlikely that RICO could provide such relief. Certainly money damages against individuals who have defrauded Rabang cannot be cast as "purely" intramural or interfering with self-governance. If criminals who infiltrate an otherwise legitimate entity have harmed a person—Indian or non-Indian—RICO is intended to provide her or him relief. In this case, that relief is money damages.

The intramural exception asks whether the federal law itself would interfere with tribal self-governance. *Pauma*, 888 F.3d at 1076. In other words, the Holdovers and Dodge must prove that because of alleged interference with

membership and leadership decisions, RICO does not apply to Indians at all. *See generally Snyder v. Navajo Nation*, 382 F.3d 892, 895–96 (9th Cir. 2004); *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1079–80 (9th Cir. 2001).

This cannot be the case as the Court has applied RICO to Indians several times and never held that *Tuscarora* limited that application. *See Pearson for Estate of Comenout*, 868 F.3d at 1095.

The intramural exception is strongest where a tribe has an "established internal process" that a plaintiff avails herself of. *E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001). But there is no internal or tribal RICO process that Rabang could have availed herself of. First, RICO is a federal statute and any tribal court likely lacks jurisdiction to hear 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"). Second, the Tribal Court was one of the otherwise legitimate organizations that the Holdovers and their abettors infiltrated for racketeering purposes. Even assuming there was a legitimate self-governing tribe during the time period alleged in Rabang's complaint, there was no "established internal process" that would make the intramural exception applicable here.

E. The Intra-Tribal Dispute Doctrine Is Limited To Cases Not Arising Under Federal Law.

The District Court held that it lacked subject-matter jurisdiction because resolving Rabang's RICO case "would ultimately require the Court to render a decision about Plaintiffs' enrollment status" and "interpret and make rulings regarding Nooksack Tribal law." *Id*. at 5. This was incorrect and misapprehends the intra-tribal dispute doctrine.

The question of subject matter jurisdiction in this case should begin and end with the RICO statute, which provided the District Court with subject matter jurisdiction. But if the Court wishes to traffic in the intra-tribal dispute doctrine, the District Court still had jurisdiction.

No Ninth Circuit cases describe exactly how an alleged intra-tribal dispute deprives a district court of subject matter jurisdiction. But the Tenth Circuit summarized the rationale for the doctrine as follows:

> A dispute over the meaning of tribal law does not "arise under the Constitution, laws, or treaties of the United States," as required by 28 U.S.C. §§ 1331 and 1362. This is the essential point of opinions holding that a federal court has no jurisdiction over an intratribal dispute. *See, e.g., Motah v. United States*, 402 F.2d 1, 2 (10th Cir.1968); *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364, 366 (10th Cir.1966).

Kaw Nation ex rel. McCauley v. Lujan, 378 F.3d 1139, 1143 (10th Cir. 2004). This is consistent with hornbook readings of the Court's jurisdiction. The Court only needs to ask whether Rabang's right "to recover under their complaint will be

sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction." *Bell v. Hood*, 327 U.S. 678, 685 (1946). Critically, this is not a comity, abstention, or prudential question. It is one of federal constitutional subject matter jurisdiction.

This formulation lays bare the real problem with the District Court's application of the intra-tribal dispute doctrine to this RICO case: all of the critical questions in this case arise under the laws of the United States. None of the critical questions require the District Court to resolve a "dispute over the meaning of tribal law." *Kaw*, 378 F.3d at 1143.

The better approach here, if Holdovers wanted to argue that their defrauding of Rabang was somehow authorized by virtue of their alleged connection to a functioning tribal government, would have been to argue legislative or judicial immunity. Federal courts commonly answer tribal legislative and judicial immunity questions; doing so does not constitute an impermissible intrusion into an intra-tribal dispute. *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); *Tohono O'odham Nation v. Ducey*, CV-15-01135-PHX-DGC, 2016 WL 3402391, at *3–4 (D. Ariz. June 21, 2016) (collecting cases on tribal legislative immunity).

The District Court possessed subject matter jurisdiction to decide whether the Holdovers' alleged tribal governmental status allowed them to defraud Rabang. That is the mechanism the District Court and the Holdovers should have employed.

F. The Intra-Tribal Dispute Doctrine Is Limited to "Internal Questions."

Courts applying the intra-tribal dispute doctrine have stayed out of "purely" internal affairs such as "membership determinations, inheritance rules, domestic relations, and the resolution of competing claims to tribal leadership." *Miccosukee Tribe of Indians of Florida v. Cypress*, 814 F.3d 1202, 1208 (11th Cir. 2015).

In other words, if litigants ask a federal court to resolve a membership dispute or a competing claim to tribal leadership, federal courts decline to do so because those questions are not federal questions. *Kaw*, 378 F.3d at 1143. Here, Rabang has not asked the District Court to make a membership decision or resolve a competing claim to tribal leadership. ER 227. The District Court was incorrect when it held that the case "would ultimately require the Court to render a decision

about Plaintiffs' enrollment status." ER 6. The District Court cannot render a decision that affects Rabang's enrollment status—in part because Rabang did not ask it to make any such decision.

The District Court can only render decisions about whether the Holdovers committed RICO violations. For instance, did the Holdovers knowingly obtain money from Rabang by false or fraudulent pretenses and otherwise violate RICO? *See Cohen v. Trump*, 200 F. Supp. 3d 1063, 1068 (S.D. Cal. 2016). That is the central question Rabang posed to the District Court. ER 227.

The federal question in this case is, at its core, whether the Holdovers and their abettors knowingly took a house, money, and property from Rabang by false pretenses. *Id.* Again, if the Holdovers contend they were somehow allowed to take a house, money, and property, they should have filed a motion to dismiss based on legislative or judicial immunity.

The Ninth Circuit has applied the intra-tribal dispute doctrine sparingly to dismiss "purely intra-tribal matters" where litigants have sought relief that would itself be an intra-tribal decision. In *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005), petitioners sought relief "ordering the agencies to order the tribe to recognize the plaintiffs as members." *Id*. at 961. Petitioners there obviously ran afoul of the "double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." *Id*. at 960. Here, Rabang

is not asking the District Court to do anything with regard to any person's tribal membership. ER 227. The District Court cannot order anyone to make any person a tribal member any more than it can disenroll a tribal member. Those are neither federal questions nor causes of action available in federal court.

In *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 832, 197 L. Ed. 2d 69 (2017), disenrollees sought an order against the BIA to "compel the tribe to re-enroll" disenrolled Indians. *Id*. at 1223. The same thing was true in *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9th Cir. 2013), where litigants had sought an order from the BIA directing the Tribe to place the names of certain disenrolled individuals back on its membership roll. *Id*. at 1226. Similarly, in *Arviso v. Norton*, 129 Fed. Appx. 391 (9th Cir. 2005), litigants sought an order directing the BIA to reconsider the enrollment of the disputed individuals and the Court dismissed the case under the intra-tribal dispute doctrine. *Id*. at 393.

Again, Rabang is not asking the District Court to put any names on a tribal roll or reverse any membership decision. ER 227. Rabang is instead asking the District Court for recompense for stolen homes and property. *Id*. The District Court does not need to render any decisions about membership or contested factions to award money damages for racketeering harm.

The Holdovers will argue that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), stands for the proposition that any case with a whiff of "membership dispute" is off limits to federal courts. But *Santa Clara* was primarily a case about whether Indian Civil Rights Act waived tribal sovereign immunity and provided an implied cause of action. *Id*. at 59 ("[W]e conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.").[6] Sovereign immunity is not an issue here; the District Court did not dismiss this case on that basis as the individual Defendants were sued in their personal capacity. *Lewis v. Clarke*, 137 S. Ct. 1285, 1287 (2017). Even if the Court reads *Santa Clara* as examining whether a federal question jurisdiction exists, the relief sought in that case was to make a child eligible for membership in a tribe. 436 U.S. at 51. Again, here the District Court does not need to make a membership determination.

The intra-tribal dispute doctrine applies only to cases that "present a genuine and non-frivolous question of tribal law," and not when there is a "mere suggestion" of such a dispute." *JW Gaming Development, LLC, v. James*, 3:18-

[6] The Nooksack Tribe and its appellate counsel in this action have taken this position before the Washington State Supreme Court. *See Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 181 Wn.2d 272 (2014), Petitioner Nooksack Business Corporation's Second Supplemental Statement of Additional Authorities, 2014 WL 730050 at *2 ("where a tribe – in this case the Santa Clara Pueblo – was a litigant, addressing whether the cause of action against the tribe existed and relating the principles of *Williams v. Lee* to suits against tribes.")

CV-02669-WHO, 2018 WL 4853222, at *5 (N.D. Cal. Oct. 5, 2018) (quoting *Miccosukee*, 814 F.3d at 1209). The Holdovers' mere suggestion of an intra-tribal dispute is just that—mere suggestion.

G. The Ninth Circuit Has Not Immunized RICO Schemes Using The Intra-Tribal Dispute Doctrine.

The Ninth Circuit has not extended the intra-tribal dispute doctrine to protect Indians from RICO prosecution when their racketeering involves tribal governmental fraud. When presented with similar issues in *Miccosukee*, the Eleventh Circuit held:

> Our jurisdiction over an otherwise justiciable RICO claim does not fail merely due to the suggestion that an issue of tribal law may arise based on the presence of an errant, unclear, and potentially inconsistent statement in an extensive pleading. The facts of this case do not require us to decide whether the intra-tribal-dispute doctrine may ever find application in this or a similar case. We hold merely that more than the speculative assertion of undefined Tribal law and reference to a vague and seemingly errant statement in a pleading is required to introduce a genuine question of Tribal law into the case and convert the otherwise justiciable RICO claim into a non-justiciable matter of internal Tribal affairs.
>
> Second, **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.** It does not touch upon the cited matters of membership disputes, active disputes between competing factions claiming current leadership power, domestic relations, or inheritance rules. Rather, it presents a potential scope-of-authority question we previously have examined in the context of suits against Tribal officials. *See Tamiami Partners*, 177 F.3d at 1225 ("[W]e begin with the proposition that tribal officers

> are protected by tribal sovereign immunity when they act in their official capacity and within the scope of their authority; however, they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority."). While the cited case involved injunctive, *Ex Parte Young* actions against tribal officials (and necessarily involved questions regarding the constitutional scope of permissible authority for tribal leaders) it nevertheless required the courts to examine the scope of authority granted by a tribe to its officials. And although courts are not free to delve into the resolution of outstanding questions of Tribal law, courts are competent to examine a developed record to determine whether an actual dispute exists regarding the scope of tribal authority.

Miccosukee Tribe of Indians of Florida, 814 F.3d at 1210 (emphasis added).

Like *Miccosukee*, this case is a RICO case involving alleged tribal officials who are accused of violating the law. Like *Miccosukee*, this case does not require the District Court to decide who is a tribal member during the jurisdictionally operative time period. It does not touch on an "active dispute[] between competing factions claiming current leadership power." *Id.* The Eleventh Circuit was comfortable asking and answering the same types of factual "scope-of-authority question we previously have examined in the context of suits against Tribal officials." *Id*. These questions are not off limits to the District Court: were the Holdovers authorized to take Rabang's homes? Were the Holdovers authorized to take Rabang's property?

Again, the Holdovers can argue that they were immune by virtue of alleged legislative and judicial positions within a defunct tribal government. But this question and category of question did not deprive the Eleventh Circuit of

jurisdiction in *Miccosukee* and it should not deprive the District Court of jurisdiction here.

III. THE DISTRICT ERRED IN APPLYING EXHAUSTION STANDARDS.

A. No Exhaustion Was Necessary.

Exhaustion of tribal remedies is not required when it is plain that tribal court jurisdiction is lacking, such that exhaustion would serve no purpose other than delay. *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009). Again, to the extent there was a Nooksack Tribal Court, it lacked jurisdiction to hear federal RICO suits. *See Hicks*, 533 U.S. at 369. Exhaustion is also not required when it would be futile. *Elliott*, 566 F.3d at 847.

Exhaustion of tribal remedies in what was left of the Nooksack Tribal Court—to the extent it actually existed during the relevant jurisdictional period—would have been futile. Dodge presided over the pretend Nooksack Tribal Court and served as a lawyer to Holdovers. ER 237. Further, the Holdovers had styled themselves as the pretend Nooksack Supreme Court. ER 232. Tribal Court exhaustion was not required here.

B. Applying Exhaustion Standards Caused The Court To Err Further.

Whether a court has subject matter jurisdiction over a claim is distinct from whether a court chooses to exercise that jurisdiction. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (distinguishing abstention and exhaustion from

subject-matter jurisdiction questions). The District Court ruled that its jurisdiction was 'flexible' because, under an exhaustion-style theory, "matters of internal tribal governance should not be adjudicated by federal courts unless and until tribal remedies have been exhausted." ER 5. To the extent the District Court was using an exhaustion standard to apply something like the intra-tribal dispute doctrine, it was incorrect for all of the reasons argued above. But the District Court's 'flexible' jurisdiction was incorrect because it allowed the Court to look beyond the moment of filing. The relevant time for calculating the District Court's subject matter jurisdiction was the time of filing of Rabang's complaint. *Smith v. Campbell*, 450 F.2d 829, 832 (9th Cir. 1971) (collecting non-diversity cases); *Anderson v. Duran*, 70 F. Supp. 3d 1143, 1151 (N.D. Cal. 2014) ("jurisdiction is assessed on the facts as they existed at the moment of filing" in Tribal court jurisdiction case).

The appropriate inquiry would have been for the District Court to ask whether a federal question existed when Rabang filed her complaint. It did. That should have ended the question of subject-matter jurisdiction. The District Court's jurisdiction is supposed to be "inflexible." It either exists or it does not.

C. Post-RICO Ratification Counsels For Subject-Matter Jurisdiction.

Subsequent events cannot divest the District Court of federal question jurisdiction. *Smith v. Campbell*, 450 F.2d 829, 832 (9th Cir.1971). And fraudulent

or illegal acts cannot be ratified. *Gen. Fin. Corp. v. Fid. & Cas. Co. of New York*, 439 F.2d 981, 986 (8th Cir. 1971); *Midland Bank & Tr. Co. v. Fid. & Deposit Co. of Maryland*, 442 F. Supp. 960, 973 (D.N.J. 1977). The Holdovers' attempt to "ratify" their earlier fraudulent acts is an admission that they were operating without adequate authority when they defrauded Rabang of property. ER 62-72. Otherwise, there would be no need to ratify anything. Holdovers' after-the-fact ratification efforts have no impact on the District Court's jurisdiction.

IV. THE DISTRICT COURT APPLIED THE WRONG STANDARD.

A. The Court Should Have Applied The Summary Judgment Standard.

Because RICO "provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 662 (9th Cir. 2004) (*citing Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 602 (9th Cir.1976)).

All parties and the District Court relied on factual matters beyond Rabang's Second Amended Complaint, making this a question of summary judgment—not failure to state a claim. ER 3-4; *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004) (summary judgment standard used when "the jurisdictional

issue and substantive issues in [the] case are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits.").

Therefore, the proper approach to evaluate Rabang's claims was under the summary judgment standard[7] since neither the District Court nor the Holdovers have suggested—or can suggest—Rabang's allegations are frivolous. In fact, the District Court observed Rabang's allegations "have been well documented." ER 9.

B. Material Fact Disputes Prevented Dismissal.

Viewing all the evidence in the light most favorable to Rabang, genuine issues of material fact remain for trial and dismissal was incorrect. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040, FN 4 (9th Cir. 2004).

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. The DOI's recognition decision did not undo its previous opinions.

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:

[7] The summary judgment standard applies to the District Court's Rule 12(h)(3) "suggestion of lack of subject matter jurisdiction" like it would to a similar Rule 12(b)(1) motion. *Augustine v. United States*, 704 F.2d 1074, 1075 FN 3 (9th Cir. 1983).

the DOI does not recognize the Holdovers as the governing body during the period when they defrauded Rabang. All of the factual disputes in this case, including the foregoing, prevent this matter from being dismissed.

CONCLUSION

The District Court erred in dismissing this case.

DATED this 23rd day of October 2018.

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Signature of Attorney or Unrepresented Litigant: s/Anthony S. Broadman

Date: 10/23/2018

("s/" plus typed name is acceptable for electronically-filed documents)

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that they know of no related case pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, **OPENING BRIEF OF PLAINTIFFS-APPELLANTS,** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 23, 2018. 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 to the following parties:

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