IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGRETTY RABANG, *et al*., Appellees, vs. ROBERT KELLY, *et al*. Appellants.	No. 18-35711 MOTION OF APPELLANTS KELLY, *et al*. TO STRIKE NOTICE OF RULE 62.1 MOTION FOR INDICATIVE RULING IN *DOUCETTE V. BERNHARDT*

GROUNDS AND RELIEF SOUGHT

Pursuant to FRAP 27, Fed.R.Civ.Proc. 12(f), and the inherent power of the Court, Appellants Kelly[1] move to strike the all of the contents of the January 29, 2020 Notice of Rule 62.1 Motion for Indicative Ruling (Dkt. Entry 42), on the grounds that the Notice is "immaterial, impertinent, or scandalous."

ARGUMENT

Rule 12(f) provides that a court may strike from any

[1] Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete, Elizabeth King George, Katrice Romero, Donia Edwards, and Rickie Wayne Armstrong.

pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The decision whether to strike material as redundant, immaterial, impertinent, or scandalous is within the discretion of the court. *Alvarado-Morales v. Digital Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. 1988); *Springer v. Best*, 266 F.2d 848, 849 (9th Cir. 1958) (Ninth Circuit struck motion and memorandum of points and authorities because they contained reference to impertinent and scandalous matters not before the court, and struck the affidavits supporting the motion as impertinent).

Allegations may be stricken if the matter bears no possible relation to the controversy or may cause the objecting party prejudice. *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664-65 (7th Cir. 1992), citing *Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1565 (N.D. Ill. 1985); *Gilbert v. Eli Lilly & Co.*, 56 F.R.D. 116, 120 n.7 (D.P.R. 1972).

Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being

pleaded. Immateriality is established by showing that the challenged allegations can have no possible bearing upon the subject matter of the controversy. *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953); *see, also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1382 (1990).

An "impertinent" allegation is neither responsive nor relevant to the issues involved in the action and which could not be put in issue or given in evidence between the parties. An "impertinent" matter consists of statements that do not pertain and are unnecessary to the issues in question. *Wilkerson v. Butler*, 229 F.R.D. 166, 168 (E.D. Cal. 2005).

Scandalous material is that which "cast[s] an excessively adverse light on the character of an individual or a party." *OKC Corp. v. Williams*, 461 F. Supp. 540, 550 (N.D. Tex. 1978), *cert. denied*, 449 U.S. 952, 66 L. Ed. 2d 216, 101 S. Ct. 357 (1980).

Rule 12(f)'s purpose is to protect parties from the improper use of judicial filings to broadcast scandalous or defamatory

material. *Father M. v. Various Tort Claimants (In re Roman Catholic Archbishop)*, 661 F.3d 417, 431-32 (9th Cir. 2011); *Marceaux v. Lafayette Consol. Government*, 2012 U.S. Dist. LEXIS 150922, 2012 WL 5197667, at *1 (W.D.La., 2012) ("The granting of a motion to strike scandalous matter is aimed, in part, at avoiding prejudice to a party by . . . giving the allegations any other unnecessary notoriety inasmuch as, once filed, pleadings generally are public documents and become generally available.") (citing C. Wright & A. Miller, 5C Fed. Prac. & Proc.3d § 1382).

In addition to Rule 12(f), the Court also has the inherent power to strike materials in its records. *Ready Transp., Inc. v. AAR Mfg.*, 627 F.3d 402, 405 (9th Cir. 2010) (concluding that the district court erred when it concluded it was powerless to strike a document from the public docket as a sanction for litigation conduct); *Carrigan v. Cal. State Legislature*, 263 F.2d 560, 564 (9th Cir. 1959) (discussing an appellate court's inherent power to strike briefs and pleadings "as either scandalous, impertinent, scurrilous, and/or without relevancy").

The motion Rabang have notified this Court of was filed in an unrelated matter before Judge Zilly, *Doucette v. Bernhardt*, Case No. 2-18-cv-0859-TSZ. The plaintiffs are four unsuccessful candidates in a 2018 Nooksack Tribal election and the defendant is the United States Department of the Interior. None of the parties in the Doucette case are parties to this appeal, but they have the same counsel.

According to the allegations contained in Doucette, et al's Amended Complaint (Doucette Doc. No. 18) and the August 13, 2019 order dismissing the case on summary judgment (Doucette Doc. No. 41), Doucette, et. al assert claims under the Administrative Procedure Act seeking a declaratory judgment that in recognizing the results of the Nooksack Indian Tribe's December, 2017 Special Election, the Department of Interior departed from its "policy" in dealing with the Nooksack Tribe and that alleged departure was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Amended Complaint at § VII.A (Doucette Doc. No. 18 at 24).

Setting aside the inflammatory language contained in their Notice, the crux of Doucette's Motion for Indicative Relief is a dispute between Doucette and the United States regarding the completeness of the administrative record submitted in that case. The relief Doucette seek with their motion (based on the proposed order submitted to the district court, Doucette Doc. No. 47) is an order allowing Doucette to file a Second Amended Complaint and requiring the United States to submit a supplemental Administrative Record and a certification that the record is complete.

Even if the District Court grants Doucette's motion (which seems unlikely, because the "newly discovered evidence" would not have changed the disposition of the case), the relief granted by the District Court would have no bearing on the merits of this appeal, which would simply remain in abeyance pending resolution of *Doucette* or resubmission by this Court. The allegations in the notice are thus immaterial and impertinent to this appeal.

Moreover, there is no basis for notifying **this Court** of its Rule 62.1 motion to Judge Zilly. While the Ninth Circuit's rules required notice to it if, after *Doucette* has been scheduled for oral argument, "the case has become moot, settlement discussions are pending, or relevant precedent has been decided since the briefs were filed," FRAP Rules, Ninth Circuit Rules, Circuit Advisory Committee Notes (1 December 2019), Rule E(7), *Court Structures and Procedures – Court Procedures for Processing and Hearing of Cases – Oral Argument*, the reason for the requirement is to prevent the commitment of the Court's resources in preparing to hear the case if the argument will be unnecessary, or if intervening precedent changes the case. It certainly does not provide leave to supplement the record in this appeal with unsupported allegations, without leave, after argument has been heard.

The Notice is more than immaterial and impertinent, however. Rabang's assertion in its notice, that the pending Motion for Indicative Ruling could make this appeal moot, is

patently false.

The notice also intentionally misrepresents and misstates the "newly discovered evidence" to "cast an excessively adverse light on the character of an individual or a party" – the Kelly Appellants – making it by definition scandalous material that must be stricken.

In the second and third paragraphs on page 1 of the Notice, Rabang set out text in quotations marks that is purportedly from e-mail exchanges between John Tahsuda and a representative of the Nooksack Tribe. The underlying e-mails were not provided to the Court by Rabang, although they were filed in *Doucette*. Copies of the e-mails are attached to the Declaration of Connie Sue Martin filed in support of this motion.

A comparison of the quoted text in the Notice with the original e-mail demonstrates how the Notice intentionally misquotes the e-mails by taking snippets out of context to

completely change their meaning:[2]

From the notice, page 1, ¶ 2:

> According to these newly discovered e-mails – which were sent from February 15, 2018 to March 8, 2018, between DOI's brand new Nooksack special election point-person and the holdover Tribal Council's Washington, D.C. private lobbyist – PDAS Tahsuda's decision "occurr[ed] by then" to avoid the possibility "that a federal court could find duly elected Tribal officials liable for RICO claims."

The actual February 15, 2018 e-mail states:

> FYI – I just heard from the Nooksack Tribal attorney that the 9th Circuit has scheduled an oral argument in the RICO case against the Nooksack elected officials. The record as you know does not reflect that the DOI recognizes a Nooksack Gov't. Were the DOI certification not occur [*sic*] by then, there is a great risk that a federal court could [*sic*] if it's a Tribal sovereign immunity defense and find duly elected Tribal officials liable for RICO claims for the first time. I believe you need to urge the Refional [s*ic*] director to complete his recommendation as soon as possible. It has been three weeks since the site visit and it seems really

[2] In May, 2019 this Court called out the strategic use of misstated quotations, with substitutions or omissions that were not explained, and ordered counsel for a party to explain how such misstated quotations "candidly represented" the underlying terms of the documents they purported to quote. *Swinomish Indian Tribal Community v. BNSF Railway Company*, Case No. 18-35704 (Dkt. Entry 53) (May 22, 2019).

> hard to believe – given his original letter – that there is not any basis for certifying to the AASIA. The stakes of continued delay continue to escalate the consequences for the Nooksack Tribe and, potentially, all other federally recognized sovereign tribal nations. If you would like more background on the case please let me know.

From the Notice, page 1, ¶ 3:

> PDAS Tahsuda issued the decision by March 9, 2018 because up until that moment, a "lack of DOI recognition" could have "mean[t] that the Tribe's officials [we]re acting ultra vires, and thus operating a 'racket' under RIO" according to the Ninth Circuit Court of Appeals in a pending appeal, Rabang v. Kelly, No. 17-35427 (9th Cir.).

The actual February 28, 2018 e-mail states:

> I wanted to touch base regarding the DOI recognition of the Nooksack Council. I understand that the process is proceeding, but I have been contacted by Counsel for the Tribe regarding the timing. As mentioned previously, there is a March 9th hearing before the 9th Circuit Court of Appeals and there is the need to prepare if the AASIA recognition letter is still pending by next week. (Recall that this case is [*sic*] RICO action brought by plaintiffs arguing that the lack of DOI recognition means that the Tribe's official are acting ultra vires, and thus operating a "racket" under RICO.) In short, the AASIA's recognition letter is needed asap, certainly by early next week.
>
> Rabang misquoted the e-mail of Mr. Porter, requesting that

the Department timely finish its review, and then alleged a "despotic scheme" by the Kelly Defendants, allegedly facilitated by the United States. The text and tone of the Notice appears to reflect Rabang's outrage that the Kelly Defendants were communicating with the agency.

There is no prohibition against an Indian Tribe communicating with the agency charged with responsibility over Indian affairs. 25 U.S.C. § 2. There was no prohibition against the Nooksack Tribe communicating with the Department of Interior. Indeed, the August 25, 2017 Memorandum of Agreement established a framework for facilitating the government-to-government relationship between the Tribe and the United States, through Chairman Kelly. ER 142 – 147.

Nor is there any prohibition against private citizens seeking the assistance of one's government, without fear of punishments or reprisals. That right is guaranteed by the First Amendment to the United States Constitution. Rabang have long communicated with the Department of Interior (often through back channels), to

solicit aid in their many-years-long efforts to prevent the Tribe from disenrolling them.

Rabang's allegations are clearly intended to prejudice the Kelly Defendants in this case, and to impermissibly supplement the record before this Court. The notice was also most certainly intended to give the allegations notoriety because, as has been Rabang's practice since the outset, as soon as the Notice was filed it was also published by the Turtle Talk blog (available here).

Rule 12(f) is intended to protect parties from improper use of judicial filings. *Father M.*, 661 F.3d at 431-32. The Court's inherent authority provides the power to strike items from the docket as a sanction for litigation conduct. Striking the Notice is appropriate and warranted here under either authority.

CONCLUSION

Pursuant to FRAP 27, Fed.R.Civ.Proc. 12(f), and its inherent power, the Court should strike Rabang's January 29, 2020 Notice of Motion for Indicative Ruling (Dkt. Entry 42), on

the grounds that the Notice is "immaterial, impertinent, or scandalous."

Dated this 13th day of February 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2020, I electronically filed the foregoing MOTION TO STRIKE with the Clerk of the Court of 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.

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