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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, et al, Plaintiffs, vs. UNITED STATES OF AMERICA, et al; Defendants.	NO. 09-CV-00018-RMP PLAINTIFFS' REPLY BRIEF IN SUPPORT OF (1) MOTION FOR SUMMARY JUDGMENT AGAINST CERTAIN INDIVIDUAL ALLOTTEES (ECF 439) AND (2) MOTION FOR DEFAULT JUDGMENT AGAINST CERTAIN ALLOTTEES (ECF 433)

The U.S. (and Tribe, for that matter) is again inserting itself into a dispute of which it has no concern, resurrecting arguments already decided in Plaintiffs' favor and contradicted by the law and facts. Plaintiffs' Motions are directed at 28 Allottees who failed to respond to the Complaint and RFAs; *the Motions have nothing to do with the U.S. or Tribe, except by solidifying Plaintiffs' complete defense to the MSJ Re Ejectment.* Most of the 28 still do not respond; none remedy the pleading and discovery deficiencies. Still, the U.S. and Tribe file 40-plus pages of briefing attempting to re-write history. They cannot.

The BIA, acting in a *commercial*, *non-governmental* capacity, got itself and its fiduciary Allottees into the business of marketing and selling to Washington residents camping resort membership contracts expressly governed by Washington law. ECF 294 at ¶¶ 18-80; ECF 90-6 at Ex. 25. *Three judges have held state law and jurisdiction apply to the claims asserted in this case.* ECF 423-1 at 19-24; ECF 423-2; ECF 144 at 33-34. BIA officials *testified under oath* that: (i) they represented to Washington residents and the State that memberships would last through 2034; (ii) they had authority to do so; and (iii) they knew Plaintiffs would rely thereon, and Plaintiffs had a right to. ECF 294 at ¶¶ 39-80. The BIA: (i) gave notice to Allottees owning a majority interest in MA-8 of the 2034 expiration date (*id.* at ¶¶ 48-49); (ii) attended the 2004 mediation on the Allottees' behalf (*id.* at ¶¶ 121-126); (iii) received notice of and did not object to the 2004 Settlement Agreement providing for Plaintiffs to pay the Allottees rents to use MA-8 through 2034 (*id.* at ¶¶ 130-141); and (iv) sent notice of the settlement and Plaintiffs' payments to the Allottees. *Id.* at

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¶¶ 142-151. The BIA had apparent if not actual authority to act on the Allottees' behalf and, in so doing, bound them. ECF 295 at 11-17, 29-30. The U.S. is not above the law. It can—*and must*—be held accountable for the mess it created. But the Allottees—on whose behalf the BIA acted, who received notice and failed to object to the settlement, and who pocketed funds in exchange for Plaintiffs' right to stay through 2034—are also responsible. Their failure to meaningfully participate in this action warrants judgment for Plaintiffs.

Finally, Plaintiffs expressly incorporate by reference the arguments in Wapato Heritage's accompanying brief filed herewith.

A. Allegations of Pleading and Procedural Deficiencies are Baseless.

The U.S. and Tribe's argument that the Complaint asserts no claim against the Allottees was raised in 2010. ECF 186 at p. 8. Judge Quackenbush rejected it. ECF 197 at 2. No doubt because the Complaint references the Allottees no less than *68 times* and states a claim for relief against them. ECF 1 at ¶¶ 165, 175, 178, 179, 182, 211, 218, 219, Prayer at ¶ 2. The timing of his Order is irrelevant; the Complaint was never amended.

Likewise specious are the U.S. and Tribe's assertions that the RFAs were untimely or improperly served. The quoted discovery order sets only a deadline for discovery regarding the MSJ Re Ejectment, not *all* discovery. ECF 272 at ¶ 5. At ¶ 9, it states (emphasis added): "[T]he parties are free to conduct *other discovery and/or motion practice as they see fit*." This includes RFAs to support the estoppel claim against the Allottees. But even if not, untimely RFAs are deemed admitted via failure to respond where

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responding party did not object or seek a protective order. *Shelton v. Fast Adv. Funding*, 378 F. Supp. 3d 356, 358 (E.D. Pa. 2019) (even when untimely by 12 days). ***The Allottees never objected.*** "Rule 36 places the burden upon *a party to whom the requests are directed* to take some affirmative action, either by response . . . or by objecting . . . . Having done nothing . . ., [that party] must bear the consequences of their standing admitted." *Mangan v. Broderick & Bascom Rope Co.*, 351 F.2d 24, 28 (7th Cir. 1965) (emphasis added); *Dulansky v. Iowa-Illinois Gas & Elec.*, 92 F. Supp. 118, 123-124 (S.D. Iowa 1950) (same). The U.S. and Tribe do not represent the Allottees; they may not object on their behalf.

The U.S. claims it was not served with the RFAs. In fact, it was via Exh. 7 to ECF 296 on 12/1/2012 through the ECF system. FRCP 5(b)(3), 550 U.S. 1003 (2007) (amended 2018) (service is effected via "us[ing] the court's transmission facilities"); *Renfroe v. Quality Loan Serv. Corp.*, 2017 WL 8777463, at *2 (E.D. Wash. Oct. 26, 2017) (same). The U.S. twice acknowledged the RFAs without raising objection. ECF 306 at 9, 16; ECF 352 at 15. They are referenced in court filings. *E.g.*, ECF 295 at 17. Any objection is waived. *Friedman v. Live Nat. Merch.*, 833 F.3d 1180, 1185 n.2 (9th Cir. 2016).

Finally, the Tribe says the motion for default judgment is "stale." The Tribe admits "no rule or caselaw" sets a deadline on seeking default judgment after the order of default. ECF 469 at 13. The Tribe's comparison to motions to set aside defaults is inapposite. It is not uncommon for months or years to transpire between a court's entry of default and default judgment. *E.g., Ocwen Loan Svc. v. Corpolo Ave. Tr.*, 2020 WL 406377, at *3 (D.

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Nev. Jan. 23, 2020); *Tristrata Tech. v. Med. Skin Therapy Res.*, 270 F.R.D. 161, 164 (D. Del. 2010). Here, the delay arose from the need to resolve the dispute concerning Allottee representation first. Upon Court resolution of that issue, Plaintiffs immediately moved for default judgment. The Tribe claims no prejudice from the delay; nor could it.

B. The Allottee Statements Submitted to the Court are a Red Herring.

Ten Allottees filed Statements in response to Plaintiffs' Motions for Default (J. Condon, C. Garrison, and S. Van Woerkon (ECF 458-1, 476-477)) and Summary Judgment (D. Hyland; J. Abraham; L. Benson; Maureen, Marlene, and Michael Marcellay (ECF 475, 479-481)). Gabe Marcellay responded (ECF 478) but is not the subject of either Motion. The Statements are boilerplate forms misstating the case history and expressing support for the U.S. and Tribe, and distaste for Plaintiffs and Wapato Heritage. They do not address, *e.g.*, the Allottees' knowledge of the 2004 settlement or receipt of funds in exchange for Plaintiffs' presence through 2034—the actual matters on which the Complaint and RFAs are based. They show only that 10 Allottees want Plaintiffs ejected *now*, even though they are estopped to so state due to their defaults, admissions, and/or prior acts. *Bignold v. King Cty.*, 65 Wn.2d 817, 823-24, 399 P.2d 611 (1965) ("We have here the classic requisites of an equitable estoppel…an admission, statement, or act inconsistent with the claim afterward asserted."); *Kingsley Cap. Mgmt v. Sly*, 820 F. Supp. 2d 1011, 1023 (D. Ariz. 2011). A party's mere appearance or letter submission, without actual defense on the merits, does not preclude default judgment. *Wilson v. Moore & Assocs.*, 564 F.2d 366, 369

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(9th Cir. 1977); *U.S. v. Pflum*, 2013 WL 2948163, *4 (E.D. Wash June 14, 2013); *EEOC v. Glob. Horizons*, 2015 WL 11004480, *2 (E.D. Wash. Sep. 28, 2015). RFAs not responded to are deemed admitted and established. ECF 439 at 5-6.

Notably, the 10 Allottees say the U.S. represents them. *E.g.*, ECF 458-1 ("I believe that my…representation by the BIA is in my best interests."). According to the U.S., however, *it does not* due to conflicts of interest (ECF 146 at 2; ECF 398 at 6) but claims to represent their collective *interests*, alleged to be aligned. ECF 469 at 13. *But this is belied by Allottee Gary Reyes, the only Allottee who is actually represented by counsel.* Mr. Reyes has withdrawn his ECF 467 opposition to Plaintiffs' MSJ, does not support ejectment, and Plaintiffs no longer seek judgment against him. Harmeling ("SWH") Reply Dec., Ex. A. He appears poised to sue the U.S. and Tribe for fraudulent conveyance via their collusion to purchase his interest in MA-8 without an appraisal, below market value, and when he was unrepresented. *Id.*; ECF 405. Were other Allottees similarly educated by counsel on their actual rights and interests herein, they would likely take similar positions. ECF 405.

C. Estoppel is Viable Against the Government.

The U.S. rattles off its familiar cases to argue it is immune from estoppel. Again, Judge Quackenbush concluded this case "presents a unique context" in which estoppel may be appropriate vis-à-vis the U.S. ECF 144 at 38; ECF 329 at 21, 38. Per the Ninth Circuit:

> [A]n equitable estoppel may be found against the Government (1) if the Government is acting in its proprietary rather than sovereign capacity; and (2) if its representative has been acting within the scope of his authority. . . . In its proprietary role, the Government is acting as a private concern would; in its

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> sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public. In the instant case, the Government is suing to enforce a contract between it and a third party, and is thus acting as a private party would. . . . "When the government enters into a contract with an individual or corporation, it divests itself of its sovereign character as to that particular transaction and takes that of an ordinary citizen and submits to the same law as governs individuals under like circumstances." . . . One commentator has summarized the law in this area by saying that, "The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice." We agree, and we find that the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case.

U.S. v. Georgia-Pac. Co., 421 F.2d 92, 100-101 (9th Cir. 1970) (footnotes omitted). The Ninth Circuit has since clarified that estoppel may also be applied against the government even when acting in its sovereign capacity, if it acted with affirmative misconduct. *U.S. v. Wharton*, 514 F.2d 406, 409-413 (9th Cir. 1975) (estoppel applied as to government's dealings with private citizens concerning public lands: "the public has an interest in seeing its government deal carefully, honestly, and fairly with its citizens").

To be sure, the U.S. was *not* acting in a governmental capacity when it: (i) partnered with Evans for the commercial purpose of selling campground memberships to Washington residents in 1984; (ii) represented to Washington State and its residents the memberships would last through 2034; (iii) unilaterally initiated ejectment against the Plaintiffs without consulting the MA-8 landowners, to accelerate the Tribe's plans of expanding its casino (ECF 438 at 12-13; ECF 405 at ¶¶ 6-7); or (iv) aided the Tribe's purchase of shares in MA-8 from unrepresented Allottees, at prices below market value and without appraisals (SWH Reply Dec. Ex. A; ECF 405 at ¶¶ 10-14), purporting to give the Tribe majority ownership

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to support its ejectment, as Defendants argue herein. These acts were neither designed to benefit the public nor governmental. They are suggestive of affirmative misconduct. But the U.S. was acting in a *proprietary, commercial, non-governmental* capacity, as a *private* concern. It is of no moment that the U.S. purports to be vindicating its trustees' interests; the alleged "trust relationship" appears a pretext for advancing a commercial venture. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005) (equitable defense applied against government for enforcing private rights, despite its intervention "to vindicate the interests of the Tribe, with whom it has a trust relationship"). At the very least, issues of fact as to whether the U.S. is estopped here preclude the MSJ re ejectment.

D. Estoppel is Viable Against the Allottees.

Despite the U.S. and Tribe's artful use of headings and string cites, notably absent from their briefing is a single case holding estoppel is not a viable claim against Indian allotment owners. Instead, they conflate cases discussing estoppel as applied to *the government* to argue estoppel is also invalid against Indian allotment owners. Those cases have no bearing on Plaintiffs' ability to estop the Allottees. Estoppel *is* viable against Indian allotment owners, as has been suggested vis-à-vis BIA-approved leases where allottees have accepted lease payments for years. *Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000, 1003 (D. Nev. 2015) (ultimately deciding case on other grounds). Defendants are also incorrect that estoppel may be pled only defensively. Notwithstanding that Judge Quackenbush expressly found estoppel was properly pled against the Allottees here (ECF

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197 at 2), Washington cases hold similarly. *E.g.*, *Beggs v. City of Pasco*, 93 Wn.2d 682 (1980) (en banc) (equitable estoppel used affirmatively); *Washington Educ. Ass'n v. Wash. Dept. of Ret. Sys.*, 181 Wn.2d 212, 224-227 (2014) (en banc) (analyzing equitable estoppel on the merits with no suggestion of invalidity under Washington law); *DigiDeal Corp. v. Kuhn*, 2015 WL 5477819, at *3 (E.D. Wash. Sep. 16, 2015) (refusing to find equitable estoppel fails as a cause of action "[g]iven the Washington Supreme Court's apparent recognition of equitable estoppel as a cause of action"); *Foltz v. Crum & Forster Pers. Ins.*, 2000 WL 54811, at *7 (Wn.App. Apr. 24, 2000) (denying summary judgment and permitting equitable estoppel claim to proceed to trial). And even the Washington cases rejecting equitable estoppel as an offensive claim acknowledge its broad defensive application in response to another party's position, claim, or affirmative defense. *Byrd v. Pierce Cty.*, 5 Wn.App.2d 249, 264-65 (2018); *Farm Crop Energy v. Old Nat. Bank of Wash.*, 38 Wn.App. 50, 54 (1984). Plaintiffs seek a defensive application—to estop the Allottees from taking a position inconsistent with their prior acts and omissions—like that endorsed in *Byrd* and *Motley-Motley v. Pollution Control Hr'gs Bd.*, 127 Wn.App. 62, 67 (2005). Unlike plaintiff in *Sloma v. Wash. State Dept. of Ret. Sys.*, 459 P.3d 396, 406 (Wn. Ct. App. 2020), Plaintiffs do not seek to compel the Allottees to do anything. If the U.S. was not trying to evict Plaintiffs, the shield and sword analogy would be more apt. At the very least, the Allottees' admissions create issues of fact precluding the MSJ re ejectment.

E. Default Judgment is Appropriate Against Individual Allottees Now.

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FRCP 54(b) gives the Court discretion to enter default judgment against less than all defendants. "The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until final adjudication of the entire case by making an immediate appeal available." Wright & Miller, 10 Fed. Prac. & Proc. Civ. § 2654 (4th ed.).

> In deciding whether to enter final judgment pursuant to Rule 54(b), the district court may consider, among other things, the need for partial final judgments in complex modern civil actions . . . and the seriousness of the charges in the complaint, together with the willful and deliberate avoidance of those charges by the defaulting defendants.

Steffenberg v. Gilman, 2005 WL 8176506, at *5 (D. Mass. Sep. 13, 2005). The U.S. cites cases where defendants are jointly and severally liable and judgments against less than all risk inconsistencies, arising from *Frow v. De La Vega*, 82 U.S. 552 (1872) (joint conspiracy to defraud the plaintiff). *Frow* is not our case. Plaintiffs do not seek to bind the Allottees as a whole; nor could they. *Reinhart v. Centennial Flouring Mills*, 6 Wn.2d 620 (1940) (actions of some tenants in common cannot bind others, "but cotenant, by his own acts and conduct, can 'estop' himself from insisting upon *his rights*, particularly where cotenant has by his acts and conduct assisted tenant in common perpetrating fraud on third party."). Instead, each Allottee *individually*: (i) received notice of the 2004 settlement; (ii) failed to object; and (ii) took settlement funds in consideration of Plaintiffs' presence through 2034. Each Allottee is *individually* estopped. The U.S. cannot revoke Plaintiffs' license and eject without (at the least) majority approval of the relevant owners, requiring *individual*

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consents. Joint and several liability is not pled. If individual Allottees are estopped, the U.S. could still argue ejectment should proceed nonetheless. *Carter v. District of Columbia*, 795 F.2d 116, 137-138 (D.C. Cir. 1986) (distinguishing *Frow* as divergent outcomes could be reconciled); *Shanghai Auto. Inst. v. Kuei*, 194 F. Supp. 2d 995, 1009 (N.D. Cal. 2001); *Univ. Ath. Sales v. Am. Gym*, 480 F. Supp. 408 (W.D. Pa. 1979). As this case is complex, with more than 35 parties and causes of action asserted affirmatively, cross, and counter, and the subject Allottees failed to participate for more than 11 years, default judgment against less than all is appropriate. *Steffenberg*, 2005 WL 8176506 at *6.

F. The Eitel Factors Need Not be Addressed, but Support Plaintiffs.

The *Eitel* factors are not mandatory; courts have discretion whether to apply them in evaluating motions for default judgment (*Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (factors which "may" be considered)), and have granted such motions even when *Eitel* is not discussed therein. *E.g., Davies v. Perey*, 2020 WL 1223537, *1 (C.D. Cal. Jan. 24, 2020); *Farmers New World Life Ins. v. Burton*, 2019 WL 1103395, *3 (E.D. Wash. Mar. 8, 2019). But all factors have been addressed: (1)-(2) the Complaint pleads a meritorious cause of action against the Allottees; (3) default judgment may be granted for less than all defendants; (4) at issue is Plaintiffs' property interest of significant value; and (5) default was not due to excusable neglect, as many Allottees deliberately did not defend.

G. Conclusion.

For all these reasons and ECF 433, 438-439, Plaintiffs' Motions should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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