

Robert S. Malone
1804 T Street, NW
Washington, DC 20009
Phone: (202) 387-2688
Fax: (202) 387-2655
bobsmalone@msn.com
Arizona Bar No. 017352

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Gregory Russell,

Plaintiff,

vs.

United States of America,

Defendant.

No. CV-08-8111 MHM

RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COMPLAINT
PURSUANT TO RULES 12(b)(1) AND
12(b)(6) OF THE FED. R. CIV. P.; AND
REQUEST FOR DISCOVERY PURSUANT
TO FED. R. CIV. P. 56(f)

Plaintiff Gregory Russell, by and through undersigned counsel, hereby respectfully requests that Defendant's Motion to Dismiss Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) of the Fed. R. Civ. P. (Doc. 14) be denied.

Plaintiff's Response is supported by the attached Memorandum of Points and Authorities.

Respectfully Submitted, this the 15th day of April, 2009.

s/Robert S. Malone

Robert S. Malone
Counsel for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITES

I. This Court has Subject Matter Jurisdiction to Hear this Claim

Plaintiff has properly pled that this Court is vested with subject matter jurisdiction pursuant to 28 U.S.C. §1346(b). Further, Plaintiff has properly pled that this action arises under the Federal Tort Claims Act, 28 U.S.C. §§2681-2680. This is all that is required of Plaintiff to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). “Any non-frivolous assertion of a Federal Claim suffices to establish federal question jurisdiction....” *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F.3d 1003, 1008, (9th Cir. 1999) cert, den., 534 U.S. 1104, citing *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773 (1946).

The U.S. Supreme Court has stated:

Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of the United States Supreme Court, or otherwise completely devoid of merit as not to involve a federal controversy.

Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 89, 118 S. Ct. 1003, 1010 (1998).

Furthermore, where the 12(b)(1) jurisdictional challenge is not facial, but raises a factual issue going to the substance of the claim, the plaintiff should be allowed reasonable time to conduct discovery on the issue. If "the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question

1 is dependent on factual issues going to the merits, the district court should employ
2 the standard applicable to a motion for summary judgment." *Autery v. United States*,
3 424 F.3d 944, 956 (9th Cir. 2005), (citation omitted)."When a defendant moves to
4 dismiss for lack of jurisdiction, either party should be allowed discovery on the
5 factual issues raised by that motion." *Sizova v. National Inst. Of Standards & Tech.*,
6 282 F.3d 1320, 1326 (10th Cir. 2002) (citation omitted).
7

8
9 The Court should not dismiss this case before permitting Plaintiff to
10 conduct discovery of evidence that is in the sole possession of the Defendants
11 and giving Plaintiff the opportunity to respond with evidence that supports his
12 claim.
13

14 **II. Plaintiff Has Properly Stated a Claim Upon Which Relief can be**
15 **Granted and Should be Given the Opportunity for Discovery**

16 Defendant also bases the Motion to Dismiss upon Fed. R. Civ. P. 12(b)(6)
17 for failure to state a claim upon which relief can be granted. Fed. R. Civ. P.
18 12(d) provides: "If on a motion under Rule 12(b)(6) or 12(c), matters outside the
19 pleadings are presented to and not excluded by the court, the motion must be
20 treated as one for summary judgment under Rule 56. All parties must be given a
21 reasonable opportunity to present all the material that is pertinent to the motion."
22

23 Attached to Defendant's motion are two exhibits. Thus, in accordance with
24 Rule 12(d), if these exhibits are not excluded by the Court, Plaintiff must be
25 given a reasonable opportunity to present additional material that is pertinent to

1 the motion. The opportunity for Plaintiffs to present additional material when
2 extrinsic material accompanies a Rule12(b)(6) motion is recognized by the
3 Ninth Circuit, *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).
4

5 Once a court admits extrinsic material accompanying a Rule(b)(6) motion,
6 thus converting the motion into one for summary judgment, the Federal Rules
7 provide that non-moving parties must be given a full opportunity to oppose the
8 motion. Fed. R. Civ. P. 56(f) states:
9

10 Should it appear from the affidavits of a party opposing the motion
11 that the party cannot for reasons stated present by affidavit facts
12 essential to justify the party's opposition, the court may refuse the
13 application for judgment or may order a continuance to permit
14 affidavits to be obtained or depositions to be taken or discovery to
15 be had or may make such other order as is just.

16 Fed. R. Civ. P. 56(f).

17 Defendant filed the Answer to Plaintiff's Complaint on March 2, 2009, and
18 the Motion to Dismiss on March 5, 2009. Plaintiff has not yet had time to
19 discover additional documents and other evidence that may be in the possession
20 of Defendant and that is pertinent in order for the Court to render a decision on
21 the motion. The accompanying affidavit of counsel explains that Plaintiff
22 requires a reasonable time to conduct discovery of pertinent evidence. (See
23 Affidavit of Attorney Robert Malone).

24 This Court should postpone its ruling on Defendant's motion to dismiss to
25 allow Plaintiff a reasonable time to complete his discovery of the facts and

1 evidence necessary to respond to the assertions made in Defendant's motion and
2 supporting exhibits. All of the information upon which the motion is based is in
3 the exclusive control of the Defendant and subject to discovery by Plaintiff in
4 this case. Rule 56(f) serves as a "safety valve" designed to protect parties to
5 litigation from efforts by one party to terminate the litigation at an early stage
6 before the opposing party has a reasonable opportunity to conduct the discovery
7 provided to all parties by the federal rules. See: *Rivera-Torres v. Rey-*
8 *Hernandez*, 502 F.3d 7, 10-11 (1st Cir. 2007).

11 A party seeking a postponement of the ruling need only make a specific
12 request that the trial court defer ruling on the pending motion until discovery is
13 completed. See: *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1235 (10th Cir.
14 2007). The accompanying affidavit of counsel establishes good cause for the
15 postponement by: (1) Describing the particular discovery Plaintiff seeks to
16 conduct; (2) explaining how that discovery could preclude the entry of summary
17 judgment; and (3) providing the justification for why the discovery could not
18 have been obtained earlier. See: *Family Home and Finance Center, Inc. v.*
19 *Federal Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

22 In situations like the one before this Court, where one party files a
23 dispositive motion at the outset of the litigation, courts generally grant Rule
24 56(f) postponements freely. See: *Burlington Northern Santa Fe R.Co. v.*
25

1 *Assiniboine and Sioux Tribes of Fort Deck Reservation*, 323 F. 3d 767, 773-74
2 (9th Cir. 2003). Moreover, courts recognize that a party cannot be expected to
3 frame its motion for postponement with great specificity as to the nature of the
4 discovery likely to develop useful information because grounds for such
5 specificity have not yet been explored. *Id.*, 323 F.3d at 773-74.

7 Therefore, Plaintiff respectfully requests, pursuant to Fed. R. Civ. P. 56(f),
8 that the Court defer ruling on Defendant's motion until Plaintiff has had a
9 reasonable amount of time to conduct discovery.

11 **III. The Affidavits Accompanying Defendant's Motion do not Conclusively**
12 **Demonstrate that the Tribal Officers Involved in this Action were not**
13 **Acting as Federal Officers for Purposes of the Federal Tort Claims Act**

14 Defendant attaches two exhibits to its motion. Exhibit I is the affidavit of
15 Selanhongva McDonald, Special Agent in Charge of the Bureau of Indian
16 Affairs Office of Justice Services in Phoenix, who attests that the officers
17 involved in the incident that gave rise to this action had not been issued BIA
18 Special Law Enforcement Commissions (SLEC) at the time of the incident.
19 Exhibit II is the booking sheet at the time Plaintiff was booked into the
20 Coconino County Detention Facility. However, these documents are not
21 necessarily sufficient to establish that the officers involved were not acting as
22 federal law enforcement officers for purposes of the Federal Tort Claims Act.
23
24
25

1 In *Romero v. Peterson*, 930 F.2d 1502 (10th Cir. 1991), the Tenth Circuit
2 remanded the case to the district court to determine if the tribal officers who
3 allegedly beat the plaintiff were in fact federal actors at the time. Defendants
4 had submitted affidavits stating in part:
5

6 [T]hat defendants were not employed by the BIA, and that they
7 were under the supervision and control of the tribal police at the
8 time of the alleged beating. Special officer Richard La Fountain of
9 the BIA stated in his affidavit that defendants were permitted to
10 accept temporary duty assignments. He further stated that on the
11 day in question, defendants were neither employed nor acting on
12 behalf of the BIA and all matters were handled by the Pueblo of
13 Taos. Dennis Simmons, chief of the Taos tribal police, swore in his
14 affidavit that defendants were under his supervision and control and
15 not that of the BIA. Additionally, plaintiff was charged with
16 violation of tribal law.

17 930 F.2d at 1506.

18 The court of appeals found the assertions in these affidavits insufficient to
19 determine if the tribal officers were acting as federal law enforcement officers.
20 On remand the court of appeals instructed the New Mexico District Court that it
21 could consider a list of relevant, but not exclusive, factors in deciding if the
22 defendant officers were federal actors. Among the factors were:

- 23 (1) the sources of funding for their law enforcement activities;
24 (2) the extent of federal regulation of tribal law enforcement
25 activities; (3) the interdependence of the tribe and the BIA; (4)
the responsibility for defendants' supervision; (5) whether
defendants were wearing BIA uniforms, carrying
BIA weapons, using a BIA vehicle, or acting pursuant to the
authority of BIA badges....

1 Id. At 1507.

2 And in *LaVallie v. U.S.*, 396 F.Supp.2d 1082 (D.N.D. 2005), the court put
3 considerable emphasis in reaching its decision that tribal officers were not federal law
4 enforcement officers for purposes of the Federal Tort Claims Act on the specifics of
5 the contract between the Bureau of Indian Affairs and the Rock Sioux Tribe. “It is also
6 undisputed that the Tribe and the BIA entered into an agreement which clearly stated,
7 in part, that “[n]othing in this agreement shall be construed *to waive any immunities.*”
8 396 F.Supp.2d at 1086. Among the documents that are necessary to determine if the
9 tribal officers involved in the instant case were acting as federal law enforcement
10 officers are contracts between the Hualapai Nation and the BIA.
11
12
13

14 **IV. CONCLUSION**

15 For all of the foregoing reasons Plaintiff requests that Defendant’s Motion to
16 Dismiss be denied and that Plaintiff be granted a reasonable time to conduct discovery.
17
18

19 RESPECTFULLY SUBMITTED this 16 April 2009.
20

21 /ss/

22 _____
23 Robert S. Malone
24 Attorney for the Defendant
25

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2009, I electronically transmitted the attached document, Response to Defendant's Motion to Dismiss Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) of the Fed. R. Civ. P. and Request for Discovery Pursuant to Fed. R. Civ. P. 56(f), to the Clerk's Office using the CM/ECF System for filing, and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

Patrick J. Schneider
Assistant U.S. Attorney
123 N. San Francisco St., Suite 410
Flagstaff, AZ 86001
Patrick.schneider@usdoj.gov

s/Robert S. Malone

Robert S. Malone

**LAW OFFICE OF
LEE PHILLIPS, P.C.**
323 N. Leroux Street, Ste. 101
Flagstaff, Arizona 86001
(928) 779-1560

LEE PHILLIPS
State Bar No. 009540
ROBERT S. MALONE
State 017352

Attorney for the Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

GREGORY RUSSELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant

)
)
) Case No. CIV-08-8111-PCT-MHM
)
)

**AFFIDAVIT OF COUNSEL IN
SUPPORT OF PLAINTIFF'S RULE
56(f) REQUEST TO POSTPONE
RULING ON MOTION TO
DISMISS AND TO ALLOW FOR
DISCOVERY**

I, ROBERT MALONE, hereby depose and state the following in support of
Plaintiff's Rule 56(f) request to postpone the ruling on Defendant's motion to
dismiss filed on March 5, 2009 [Doc.# 14]:

1. I am counsel for Plaintiff, Gregory Russell in CV-08-8111-PCT-MHM;
2. Plaintiff filed his Complaint on 09/15/2008 [Doc. # 1] and Defendant filed
its Answer on March 2, 2009 [Doc. # 13]. Defendant then filed its motion to
dismiss on March 5, 2009 [Doc. # 14]. The motion to dismiss is based upon

1 assertions made in an affidavit and a second exhibit, both attached to Defendant's
2 motion;

3
4 3. In light of the Defendant's filing of its motion early in the litigation and
5 prior to the establishment of any discovery schedule, the parties have had no
6 opportunity to conduct any discovery in this case and Plaintiff therefore has had no
7 opportunity to investigate the factual assertions made by Defendant in its motion or
8 supporting exhibits.
9

10 4. Plaintiff therefore requests, pursuant to Rule 56(f) F.R.C.P. that this Court
11 postpone its ruling on Defendant's motion to dismiss and allow Plaintiff to conduct
12 discovery, including: (1) The deposition(s) of Defendant's law enforcement
13 officers who are alleged to have committed the tortious act against Plaintiff and
14 other witnesses; and (2) other discovery provided for in Rules 33,34 and 36 of the
15 Federal Rules of Civil Procedure;
16

17 5. This opportunity for Plaintiff to conduct the discovery allowed by law is
18 necessary so that Plaintiff can investigate the factual assertions made by the
19 Defendant in its motion and supporting exhibits and prepare his response to
20 Defendant's assertions. Specifically, Plaintiff requests the postponement to allow
21 him to discover, along with other pertinent information:
22

23 (1) the identity of all officers and other persons involved in the arrest and
24 subsequent assault of Plaintiff that gives rise to this action;
25

- 1 (2) the identity of the employer(s) of these officers and other persons;
2 (3) the sources of funding for their law enforcement activities;
3 (4) the extent of federal regulation of tribal law enforcement regulation;
4 (5) the interdependence for the supervision of the officers involved;
5 (6) the responsibility for the supervision of the officers involved;
6 (7) whether the officers were wearing BIA uniforms, carrying BIA weapons,
7 using BIA vehicles, working in a BIA law enforcement office with BIA officers, or
8 acting pursuant to the authority of BIA badges or other BIA authority.
9
10 (8) the existence of any contracts between the BIA and the Hualapai Tribe.
11
12 (9) Other pertinent information that may be obtained through Plaintiff's
13 investigation and discovery efforts, which will overcome the Defendant's claims
14 that the individuals who assaulted Plaintiff were not federal law enforcement
15 officers or investigators or working at the direction of such officers or
16 investigators.
17
18

19 RESPECTFULLY SUBMITTED this 16 April 2009.

20 /ss/

21 _____
22 Robert S. Malone
23 Attorney for the Defendant

24 Subscribed and sworn to this 15th day of April, 2009.

25 My notary expires: 10/14/2111

1
2 */s/ Vivian Johns*

3 -----
4 Vivan Johns
5 Notary public
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25