IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TONY FOX,	)	
Plaintiff,	)	
v.	)	Case No. 1:10cv399
	)	The Hon. T.S. Ellis, III
PORTICO REALTY SERVICES,	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

COMES NOW, the Plaintiff, Tony Fox, by and through counsel, and as his opposition to Defendant's Motion for Reconsideration of Denial of Summary Judgment, hereby states as follows:

BACKGROUND

Defendant Portico Realty Services, LLC ("Portico") is a Virginia based company providing "a full spectrum of Construction, Facilities Maintenance and Real Estate solutions to the Commercial Industry, Federal, State and Local Governments." http://www.portico-realty.com/index.html. Qivliq, LLC -- headquartered in Herndon, Virginia -- owns Portico Realty Services and at least eight other companies which, collectively, provide "telecommunications, IT, product development, major program management, construction management, facility operations, and operations support" for government and commercial industry clientele. http://www.qivliq.com/ourcompanies.php. Qivliq, LLC, ("Qivliq") in turn, is a wholly owned subsidiary of NANA Development Corporation (hereinafter "NDC"), which employs more than 9,000 people throughout the United States and around the globe. NANA operations extend from the Arctic Circle to Antarctica, across the continental United States, to the Middle East and the

South Pacific. Our clients and partners are world-class professionals in a wide variety of industries including oil & gas, mining, healthcare, hospitality, and federal and tribal sectors." http://nana-dev.com/about/. NDC's subsidiary companies operate on four continents, in seven countries, and have a combined payroll of over $500 million. http://nana-dev.com/about/where_we_are/.

NDC is itself owned by NANA Regional Corporation with 12,739 shareholders, 12,375 of which are Natives or Descendants of Natives as defined by 43 U.S.C. § 1602(b) and (r). *See* Exhibit 2, "Motion for Reconsideration," Affidavit of Edith Garoutte. NANA Regional Corporation was established in 1972 by the passage of the Alaska Native Settlement Claims Act ("ANSCA") that transferred aboriginal land title to twelve "Regional Corporations" (a thirteenth was later added for Alaska Natives no longer living in Alaska) and over 200 "Village Corporations" (collectively "ANC's). *See* 43 U.S.C. § 1606, 1607. Alaska Natives were given shares of these corporations, and could thereby profit from oil and other rich natural resources found in their native lands.

In addition to financial compensation and ownership interests in the ANC's, ANSCA also provides for other legal and commercial advantages for the ANC's and certain subsidiaries and specifies how ANSCA will be applied in "Relation to Other Programs," pursuant to 43 U.S.C. § 1626 -- which does not itself create new benefits, but explains how the new entities created by ANSCA will "fit" into already existing programs, specifying *the requirements* for each. Subsection (e) provides that Native Corporations *and* direct and indirect subsidiaries or other corporations of which a majority of the equity and voting power are held by a Native Corporation will be considered "entities owned and controlled by Natives," and thereby given "minority and economically disadvantaged" status. 43 U.S.C. § 1626(e)(1) and (2). This

subsection therefore provides the two kinds of corporation that will qualify for the benefits associated with minority businesses, and what constitutes "Native" ownership.

The subsection in question here -- 43 U.S.C. § 1626(g) -- provides a special non-economic advantage: exemption from classification as an "employer" under Title VII for two kinds of corporations: "Native Corporations" and "corporations, partnerships, joint ventures, trusts or affiliates in which *the Native Corporation owns* not less than 25 per centum of the equity." 43 U.S.C. § 1626(g). Both of these types of corporations would receive an exemption to allow for preferential hiring of Alaskan Natives without subjecting Native Corporations and qualifying affiliates to liability for racial discrimination.

In its papers in support of its Motion for Reconsideration, Portico argues that it comes within the scope of the § 1626(g) exemption and should have been afforded the benefit of that exemption in this Court's consideration of its Motion for Summary Judgment. Plaintiff submits this memorandum to indicate and explain his opposition to Portico's reconsideration motion and his agreement with this Court's determination that Portico does not qualify for the exemption because it is neither an ANC nor an entity not less than 25 percent of which is owned by a "Native Corporation" within the meaning of § 1626(g).

ARGUMENT ON SUMMARY JUDGMENT

I. "Native Corporation" Defined

A Native Corporation must be a Regional, Village, Urban or Group Corporation, all of which are corporations established under the laws of Alaska in accordance with the provisions of ANSCA. *See* 43 U.S.C. § 1602. Thus, the only "Native Corporation" in the case at bar is NANA Regional Corporation, which is three steps removed from Portico in the corporate "family tree."

II. *Subsection (g) Companies v. Subsection (e) Companies*

Portico chiefly relies upon the argument that 43 U.S.C. § 1626(g) must be read along and in lockstep with the provisions of § 1626(e). In this they are mistaken. The Court did not (and need not) find that Portico is an affiliate of an ANC nor that Portico is disqualified from any benefit available under Federal Law open to "entities owned and controlled by Natives" and "minority and economically disadvantages enterprise[s]." Plaintiff agrees that Portico may qualify for all benefits accorded such entities by any provision of Federal Law, but Portico cannot show -- and nowhere in Federal Law is it provided, that all such entities have been exempted from the provisions of Title VII. The issue in the instant case has nothing to do with the attributes or qualifications that may qualify Portico for the range of economic benefits and preferences to which the provisions of § 1626(e) are addressed. Whether or not Portico qualifies for those programs, the question here boils down to whether or not Portico is either a "Native Corporation" or an affiliate "in which the Native Corporation owns not less than 25 per centum of the equity."

§ 1626(e) does *not* provide that qualifying entities are "Native Corporations" themselves nor '*owned* by Native Corporations' (as opposed to the language in subsection (g) " . . . . in which the Native Corporation owns . . . ."). In addition, no new preference is created for these corporations, they are simply afforded the same preferences provided in Federal law for "native owned," "minority owned," and/or "disadvantaged business enterprises," including no-bid contracts and other preferences. In fact, a LEXIS search of the U.S.C.S. for formulations of "disadvantaged" business enterprises yields 110 separate "hits," as "minority," "socially" and/or "economically disadvantaged" enjoy term-specific entitlements to, for example: benefits under: 15 U.S.C § 637 (providing for contract awarding to small business concerns "owned and

controlled by socially and economically disadvantaged individuals"); the "Foreign Relations Authorization Act, Fiscal Years 1990 and 1991," 101 P.L. 246; 104 Stat. 15; 1990 Enacted H.R. 3792; 101 Enacted H.R. 3792 (providing for a pilot program to increase, encourage and promote participation by "economically and socially disadvantaged enterprises" in foreign relations activity), and other federal programs. All that §1626(e) aims to do, and puts into effect by the phrase "for all purposes of Federal law," is the attribution of this particular status to the Native Corporations and other entities described therein. Assuredly, *if* in fact Portico Services meets the requirements of § 1626(e), it would be "an entity owned and controlled by Natives" and a "minority and economically disadvantaged enterprise."

It is a *far narrower* class of corporations, however, that receive the *added* benefit of Title VII exemption provided by 43 U.S.C. § 1626(g). Given the intent of the broader legislation (ANSCA) – to aid Alaskan economic development in return for the land for the pipeline – it is logical to create incentive and reward for the investment in subsidiaries by the Regional, Village, Urban and Group Corporations (i.e., "Native Corporations), allowing those companies to be given "economically disadvantaged status." § 1626(e)(2). However, as those companies may be far removed -- literally and figuratively -- from the Native Corporation, Natives and/or native land, these companies *are not* logically exempted from Title VII. The Court, in its June 28, 2010 opinion, correctly notes that there is a distinction between the language of 1626(e) and 1626(g), citing the omission of "direct and indirect" from subsection (g). More notably, however, is the omission of the class created by subsection (e), to wit: "entities owned and controlled by natives" – a class of corporations that are *not* Native Corporations and may or may not be directly owned thereby – so long as the Native Corporation and it's stockholders have a majority of the equity and voting power. *See* 43 U.S.C. § 1626(e). Nor does § 1626(g) utilize

any formulation of the "disadvantaged enterprise" rubric used throughout the United States Code Instead, 1626(g) refers only to the Native Corporation "and affiliates in which the Native Corporation owns not less than 25 per centum of the equity" -- which, in this case, Portico is not. 43 U.S.C. § 1626(g).

Also missing is *any* qualification of the term "owns." Not only are "direct and indirect" (which could easily have been included) missing, but a definition broadening ownership to "holding of shares of stock and voting power." (as in subsection (e)). The term "own" is used, and ownership – if unqualified in any fashion, should be interpreted as it was in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003), cited by the Court and making clear that a "holding corporation does not own the subsidiary's property." Subsection (e) of 43 U.S.C. 1626(e) used the term "shares of stock or units of ownership *held*," while 1626(g) uses the term "owns." According the Supreme Court, those terms are not interchangeable.

If the legislature intended to include companies such as -- in this case, Portico -- instance, the statute could read ". . . .and affiliates in which the Native Corporation *or an entity owned and controlled by natives* owns not less than 25 per centum of the equity" or "affiliates in which the Native Corporation or corporation qualifying under subsection (e) of this section own not less than 25 per centum of the equity." The legislature would not, as Defendants suggest -- have to repeat the term "direct and indirect," it would instead refer to the class of corporation referenced in subsection (e).

Elsewhere, the legislature clearly is willing and able to distinguish between types of ownership, specify classes of corporation, include "economically disadvantaged" as a class, *as well* as specify where indirect ownership by Natives is explicitly included. See*, e.g.,* 15 U.S.C. § 637(a)(4)(A):

> For purposes of this subsection, the term "socially and economically disadvantaged small business concern" means any small business concern which meets the requirements of subparagraph (B) and –
> (i) which is at least 51 percent unconditionally owned by –
> . . . (II) an economically disadvantaged Indian tribe (*or a wholly owned business entity of such tribe*), or
> (ii) in the case of any publicly owned business at least 51 per centum of the stock of which is unconditionally owned by . . .
> (II) an economically disadvantaged Indian tribe (*or a wholly owned business entity of such tribe*).

Thus "owns" means "owns," and what must be owned (25 per centum of the equity), by whom (Native Corporation – not Natives, or other specific entities) as well as to what degree (first) is clear. By the word "owns" being applied only to "Native Corporation" and *not* "entities owned and controlled by Natives," or similar phrasing such as "or a wholly owned business entity of such Native Corporation," the statute's phrasing doesn't only *imply* exclusion of indirect ownership – the exclusion is explicit. Another way of looking at the issue is to consider the statute, in effect, "creating" two classes of corporation beneath the Native Corporation in the corporate family: "entities owned and controlled by Natives," and "corporations . . . in which the Native Corporation owns not less than 25 per centum of the equity." The last category is *neither* a Native Corporation *nor* necessarily an "entity owned and controlled by natives."

Defendant's position is that "affiliate" in and of itself means "direct or indirect subsidiary." The Black's Law Dictionary definition of "affiliate," however, is not applicable where the statute itself narrows the class of affiliates to those affiliates *in which the Native Corporation owns at least 25% of the equity.* Focus on the term "affiliate" is a distraction from the key word – "owns," and the lack of any qualifying language surrounding it, most importantly language suggesting that the "ownership" can be by any other entity *except* the Native Corporation, despite the express reference to such corporations in subsection (e).

In addition, because only 25% ownership is enough to exempt such affiliates from Title VII, the legislature *must* intend direct ownership, or else the class of companies exempted from Title VII would, arguably, be limitless as subsidiaries buy subsidiaries and so on. In effect, it would "easier" to be exempted from Title VII than it is to qualify for benefits associated by "native ownership." Direct ownership provides an appropriate boundary – by requiring direct native ownership before the practice of preferential hiring is permitted. In summary, Subsection (g) companies are not subsection (e) companies unless the ownership share is sufficient. Subsection (e) companies are not subsection (g) companies unless the ownership is direct. Such an interpretation is in keeping with the Supreme Court's holding as to Native American tribes' exemption from Title VII – i.e., that the exemption be utilized in the "narrow context of tribal or reservation-related employment" was Congress' "clear sentiment." *Morton v. Mancari*, 417 U.S. 535, 547-48 (1974).

SUMMARY/APPLICATION OF ARGUMENT

In the case at bar, NANA Regional Corporation is *the* Native Corporation. NANA Development Corporation is an "entity owned and controlled by Natives," pursuant to 43 U.S.C. § 1626(e). Companies owned by NDC – such as Qivliq -- may or may not be "entities owned and controlled by Natives," pursuant to 43 U.S.C. § 1626(e), but because they are not corporations of which "the Native Corporation (i.e., *NRC)* owns no less than 25 per centum of the equity," they do not qualify for the Title VII exemption under § 1626(g). Likewise, and logically therefore, a company such as Portico Services -- not only *not* owned by NRC *or* NDC, but by a third-tier entity – does not qualify for the exemption. The question of common stock percentage and voting control is one for subsection (e) – creating "indirect," but nonetheless qualifying relationships for a certain status under the law. The question of ownership – not

"holding" or "control" – is the key question as to subsection (g), and the lack of reference to other entities, indirect "forms" of ownership (i.e., holding, controlling), or ownership *by* a subsidiary or "entity owned and controlled by natives," is a clear and explicit exclusion of any but direct ownership. This is the logical conclusion to be drawn from the language as well as that which can be inferred by the extraordinariness of the exemption provided by Congress therein. Otherwise, there is no limit to how many degrees of separation from the Native Corporation, Native land and Native concerns. As evidenced by Defendant's own exhibits, alleged racial discrimination claims have been rejected in Georgia, North Carolina, Colorado, Virginia – *not* alleging a hiring preference for Native Alaskans, and *a long way* from the oil pipeline. *See* Exhibit 1, Defendant's Motion for Reconsideration (EEOC Dismissals).

WHEREFORE, Plaintiff respectfully prays that this Honorable Court deny Defendant's Motion for Reconsideration, re-affirming its holding of June 28, 2010. In the alternative, should the Court reconsider and grant Defendants Summary Judgment, Plaintiff seeks leave to amend his Complaint to add a claim pursuant to 42 U.S.C. § 1981 (2000), from which none of the corporate entities involved herein are exempt. *See Aleman v. Chugach Support Services, Inc.*, 485 F.3d 206 (4th Cir. 2007).

Respectfully Submitted,
TONY FOX
By Counsel

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By:_____/s/_____.

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NOTICE OF ELECTRONIC FILING

I HEREBY CERTIFY THAT on July 28, 2010, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send an electronic notice and copy (NEF) to the following registered CM/ECF users. I have also sent a copy to the following via electronic mail.

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