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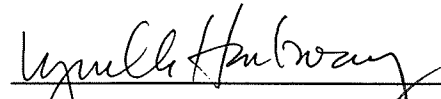
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RHONDA WHITEROCK FRED,)	No. Civ. S-10-0845 JAM GGH PS
)	
Plaintiff,)	
vs.)	DEFENDANT'S REPLY TO
)	PLAINTIFF'S "REBUTTAL TO
WASHOE TRIBE OF NEVADA &)	DEFENDANT'S MOTION TO
CALIFORNIA,)	DISMISS"
)	
Defendant.)	
)	

COMES NOW the undersigned Lynelle Hartway, appearing *Pro Hac Vice* on behalf of specially appearing Defendant the WASHOE TRIBE OF NEVADA & CALIFORNIA, and hereby files this Reply to the Plaintiff Rhonda Whiterock Fred's "Rebuttal to Defendant's Motion to Dismiss." Plaintiff's Rebuttal was received by the Defendant on March 7, 2011, and filed with this Court on March 10, 2011. This Reply is

1 supported by the attached Memorandum of Points and Authorities and other pleadings
2 and documents of record.

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4 DATED this 28th day of March, 2011.

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7 Lynelle Hartway (AZ Bar #020486)
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MEMORANDUM OF POINTS & AUTHORITIES

Defendant Washoe Tribe of Nevada and California (hereinafter "the Tribe") specially appeared before this Court in a November 22, 2010, Motion seeking dismissal of Plaintiff Rhonda Whiterock Fred's (hereinafter "Plaintiff" or "Ms. Fred") Complaint for lack of jurisdiction, failure to exhaust Tribal remedies, and/or for failure to state a claim. Rather than filing any response to the Tribe's Motion, Plaintiff instead filed a Motion for Summary Judgment. The Court vacated the Plaintiff's Motion and ordered Ms. Fred to file a response to the Defendant's Motion to Dismiss within 21 days. On March 7, 2011, the Tribe received Plaintiff's Rebuttal to Defendant's Motion to Dismiss (hereinafter "Plaintiff's Rebuttal"), which was filed with this Court on March 10, 2011.

As in her Complaint, Plaintiff's Rebuttal continues to ask this Court to overturn the Indian child custody decisions rendered by the Washoe Tribal Court. In her rebuttal, rather than addressing her burden of proving the jurisdiction of this Court or addressing the other arguments for dismissal presented by the Tribe in its Motion to Dismiss, Ms. Fred instead continues to discuss her claim for custody of her minor grandchildren and her grievances with the Washoe Tribe's Court and the Inter-Tribal Court of Appeals of Nevada. She supplies no additional law or facts as a means to justify her claims against the Tribe or this Court's jurisdiction. In doing so, Ms. Fred has failed to establish such jurisdiction, either personal or subject matter, has failed to state a claim upon which relief can be granted, and has failed to exhaust Tribal remedies. Her claims against the Washoe Tribe must therefore be dismissed in their entirety.

I. THE TRIBE'S MOTION TO DISMISS IS NOT VOID.

Ms. Fred begins her Rebuttal by arguing that the Tribe's Motion to Dismiss fails to comply with the Federal Rules of Civil Procedure (FRCP), Rule 7, and is therefore void. Her argument seems to be that the Tribe's Motion is not in fact an "answer" as referred to in Rule 7, and concludes this makes the Motion "void." Her argument misstates the law.

The FRCP *requires* that a party seeking, by motion, to assert defenses such as lack of subject matter or personal jurisdiction and/or failure to state a claim do so *before* any answer is filed. *See* Fed. R. Civ. P. 12(b) ("A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."); *see also* 61A Am. Jur. 2d. PLEADING §487, *citing Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988). Further, the filing of a motion pursuant to Rule 12(b) suspends the time for filing any answer. As was clearly stated by the Tribe on page 2, n. 1, of its Motion to Dismiss, "[p]ursuant to the Fed. R. Civ. P. 12(a)(4), this Motion is provided instead of an Answer, thereby suspending the time for any Answer until after the Court rules on this Motion."

The Tribe filed its motion in accordance with the FRCP and the Local Rules of this Court. Ms. Fred has provided no legal basis upon which to find such Motion void.

II. PLAINTIFF FAILED TO ESTABLISH THIS COURT'S JURISDICTION.

Despite Ms. Fred's statement otherwise, federal court jurisdiction over a complaint does not exist simply because a Plaintiff invokes it. "A party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject

matter jurisdiction.” *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996), citing
Trentacosta v. Frontier Pac. Aircraft Indus., Inc., 813 F.2d 1553, 1559 (9th Cir. 1987); see also
Defendant’s Motion to Dismiss Complaint for Lack of Jurisdiction, pp. 5-17. Ms. Fred’s
Complaint failed to meet her burden and the Tribe sought its dismissal for lack of
subject matter and/or personal jurisdiction. *Id.* Plaintiff’s Rebuttal fails to address the
majority of the arguments presented by the Tribe or provide any additional support for
her claims. Instead, Ms. Fred argues that: (1) she is not bringing suit against the
Washoe Tribe as a government but rather against the Tribe’s federally-chartered
corporate entity; (2) that due to the “fraud” perpetrated by the Washoe Tribal Court,
this Court has jurisdiction; and (3) the Washoe Tribal Court exceeded its jurisdiction.
Each of these will be addressed in turn.

1. Plaintiff did not Bring Suit Against the Tribe’s Corporation; She Cannot Establish this Court’s Jurisdiction.

First, Plaintiff’s assertion that her Complaint is actually against the Washoe
Tribe’s corporate entity does not solve her jurisdictional dilemma, and instead makes it
worse. For example, assuming for the purposes of argument that Ms. Fred’s Complaint
intended to name the Tribe’s federally-chartered Corporation as the defendant, Ms.
Fred’s failure to in fact do so or allege any action by that party would render her
Complaint insufficient on its face. Her argument, taken at face value, is new and would
therefore require exhaustion of Tribal remedies prior to being ripe for consideration
before this Court. See Defendant’s Motion to Dismiss, pp. 17-19 and cases cited therein.
Also, as it is the Washoe Tribal Court and the Tribe’s Department of Social Services

1 (DSS) that currently has custody and control of Ms. Fred's minor grandchildren, the
2 Washoe Tribe's corporate entity could not provide her the relief requested from this
3 Court.¹

4 Plaintiff's own filings to this Court and the claims therein, however, show that
5 her assertion regarding her intended defendant is disingenuous. Her Complaint names
6 the Washoe Tribe as the sole Defendant, making no mention of the Washoe Tribe's
7 Corporation. "Defendant Washoe Tribe is a federally recognized Tribe, known as 'The
8 Washoe Tribe of Nevada and California' and centrally located in the Indian colony
9 known as Dresslerville, in Douglas County, Nevada, near Gardnerville." Plaintiff's
10 Complaint, p. 3, para. 5. In fact, Plaintiff repeatedly cites to the actions of the Washoe
11 Tribe and the Tribe's Court as the source of her grievances and for their failure to
12 provide her with due process. *See e.g.*, Plaintiff's Rebuttal, p. 4 (stating she is seeking
13 relief from the "corrupt administration of Tribal government.") Nowhere does she
14 allege any relevant action was undertaken by the Tribe's corporate entity. Nor could
15 she. The Washoe Tribe is a governmental entity organized under 25 U.S.C. § 476, often
16 referred to as Section 16. The Tribe's Constitution and By-Laws have been a matter of
17 public record since 1936. The Washoe Tribe also has created a corporation organized
18 under 25 U.S.C. § 477 (hereinafter referred to as Section 17). However the Tribe's
19 Section 17 Corporation - like the Section 17 corporations of many tribes - has been and
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21 ¹ In addition to never having served process to a Washoe Tribe Corporation in the first instance, to the
22 extent that Ms. Fred seeks *habeas corpus* relief from this Court, failing to name a proper respondent results
in a lack of personal jurisdiction. *See* Defendant's Motion to Dismiss, p. 13, *citing Liska v. Macarro*, No. 08-
CV-1872-IEG (POR), 2010 WL 3718300, at *2 (S.D. Cal. Sept. 7, 2010).

1 remains inactive. As is pertinent here, neither the Washoe Tribal Court nor the Tribe's
 2 DSS is formed or operated pursuant to the Tribe's Section 17 Corporation. They are
 3 arms of the Washoe Tribal Council and the Tribal government and Ms. Fred has neither
 4 alleged nor offered proof otherwise.² In other words, it is clear from Ms. Fred's
 5 Complaint that she did in fact name the Washoe Tribe as a government as the sole
 6 Defendant and that the remedies she seeks from this Court concern the actions of the
 7 Washoe Tribe's Court and DSS. *See* Defendant's Motion to Dismiss, p. 14.

8 Claiming she is suing a different defendant in her Rebuttal does not establish this
 9 Court's jurisdiction nor does it address the other deficiencies pointed out by the Tribe in
 10 its Motion to Dismiss. Plaintiff named the Washoe Tribe, a federally recognized Tribe,
 11 as the sole Defendant; and for the reasons provided, that claim must be dismissed.

12 **2. Asserting Fraud Does Not Establish the Court's Jurisdiction.**

13 Ms. Fred's allegations of fraud do not provide the necessary waiver of Tribal
 14 immunity as such immunity is not defeated by claims that the Tribe acted beyond its
 15 authority. *Imperial Granite, Co. v. Pala Band of Indians*, 940 F.2d 1269 (9th Cir. 1991), *citing*
 16 *Chemehuevi Indian Tribe v. California Bd. of Equal.*, 757 F.2d 1047, 1052 (9th Cir. 1985), *rev'd*

17
 18 ² Further, even if Ms. Fred had in fact sued the Tribe's Section 17 Corporation, she would still have to
 19 establish the jurisdiction of this Court. Like tribes themselves, tribal corporations are immune from suit
 20 absent an explicit waiver of that immunity. *See Am. Vantage Co. v. Table Mtn. Rancheria*, 292 F.3d 1091,
 21 1099 (9th 2002). To establish this Court's jurisdiction over such corporate entity, Ms. Fred bears the
 22 burden of showing a clear and unequivocally expressed waiver of that immunity for her claims. *C & L*
Enter., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001). Though some courts have found a
 "sue or be sued" clause in a corporate charter to be a waiver of the corporations immunity, a majority of
 courts have found otherwise. Canby, William, Jr., *Am. Indian Law In A Nutshell* (5th ed., Thompson
 Reuters 2009). The question of the Tribe's corporate immunity must first be exhausted through tribal
 court. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916 (9th Cir. 2008). Regardless, any waiver of a corporate
 arm of the Tribe does not reach the Tribe itself. *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268
 (10th Cir. 1998).

1 on other grounds, 474 U.S. 9 (1985). Even if true, therefore, Plaintiff's fraud claims do not,
 2 by themselves, establish a waiver of Tribal sovereign immunity or otherwise establish a
 3 basis for this Court's jurisdiction.

4 **3. Plaintiff Cannot Establish This Court's Federal Question Jurisdiction.**

5 Ms. Fred's Rebuttal once again asserts that the Washoe Tribe exceeded its
 6 jurisdiction in the underlying child custody matter. She offers little more than her
 7 assertion, however, as the Rebuttal offers no new facts or law and fails to address any of
 8 the arguments presented by the Tribe's Motion to Dismiss on this issue. See p. 7-11.
 9 Pursuant to both Tribal and federal law, the Washoe Tribal Court clearly had the
 10 necessary jurisdiction to consider the care and custody of Ms. Fred's two minor
 11 grandchildren. See *Id.* This Court, therefore, does not have the limited "federal
 12 question" jurisdiction pursuant to *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*,
 13 471 U.S. 845 (1985) to hear Ms. Fred's Complaint against the Washoe Tribe. *Id.*

14 **III. PLAINTIFF FAILED TO EXHAUST TRIBAL REMEDIES.**

15 In addition to asserting fraud by the Tribe, Ms. Fred's Rebuttal concludes that the
 16 Washoe Tribal Court and the Inter-Tribal Court of Appeals provide her with no
 17 "meaningful" remedies for her claims, and therefore she should not be required to
 18 exhaust Tribal remedies before seeking this Court's intervention. Merely asserting that
 19 the Tribe has committed fraud and/or provides her with no meaningful process does
 20 not make it so. More importantly in the present circumstances, neither do such
 21 assertions establish this Court's jurisdiction to hear her Complaint. A simple review of
 22 the record provided to this Court shows that Ms. Fred has had access to the Washoe

1 Tribe's Court as well as an appellate court regarding the care and custody of her minor
2 grandchildren. *See e.g.*, Defendant's Motion to Dismiss, Exhibit J. Her failure to prevail
3 in her efforts to gain custody of her grandchildren is not the same as a lack of available
4 or meaningful Tribal remedies nor does it amount to any proof of fraud. Exhaustion of
5 Tribal remedies is a mandatory requirement. *Burlington N. R. Co. v. Crow Tribal Council*,
6 940 F.2d 1239, 1245 (9th Cir. 1991). Although limited exceptions to this general rule are
7 recognized by the courts, Ms. Fred has failed to allege or offer any evidence that her
8 case falls within any such exception. Moreover, as Ms. Fred is at this late juncture
9 asserting that the Tribal Court did not have jurisdiction over the underlying child
10 custody matter that began in 2005, the Washoe Tribe's Court must, at a minimum, be
11 given the first opportunity to determine the merits of that argument. *Id.* Unless and
12 until such opportunity is provided, Plaintiff's Complaint must be dismissed.

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14 **IV. PLAINTIFF FAILED TO ADDRESS THE TRIBE'S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

15 Nothing in Ms. Fred's Rebuttal addresses the Tribe's proffered Motion to
16 Dismiss the Complaint due to Ms. Fred's failure to state a claim upon which relief may
17 be granted. Having failed to refute such Motion, the Court should grant the Tribe's
18 Motion and dismiss Ms. Fred's Complaint in its entirety.

19 **Conclusion**

20 Ms. Fred's Rebuttal, despite its title, offers little if nothing to rebut the arguments
21 presented by the Tribe. To the extent that she fails to address the Tribe's Motion, the
22 Tribe's requested dismissal must be granted. Moreover, like her original Complaint,

1 Plaintiff's Rebuttal fails to overcome the Tribe's immunity, establish the Court's
2 jurisdiction, adequately show that she should not have to exhaust Tribal remedies, or
3 otherwise present a colorable claim for relief. As such, the Tribal Defendants hereby
4 respectfully request that the Court dismiss her Complaint in its entirety.

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6 DATED this 28th day of March, 2011.

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9 Lynelle Hartway (AZ Bar #020486)
10 General Counsel
11 Washoe Tribe of Nevada and California
12 Appearing *Pro Hac Vice*
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2011, I served a true and correct copy of the foregoing DEFENDANT'S REPLY TO PLAINTIFF'S REBUTTAL TO DEFENDANT'S MOTION TO DISMISS and MEMORANDUM OF POINTS & AUTHORITIES upon the following person(s) by depositing a copy of the same in a sealed envelope in the United States mail, postage pre-paid at Gardnerville, Nevada, and addressed as follows:

Ronda Whiterock Fred
2400 Baker Drive
Carson City, NV 89701

By: _____

Careen S. Sibbring

Employee of the Washoe Tribe of Nevada and California