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Attorneys Defendant, Tuba City Regional Healthcare Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Rocky Vulgamore,

Plaintiff,

v.

Tuba City Regional Healthcare  
Corporation,

Defendant.

Case No. CV 11-08087-PCT-DGC

**REPLY TO PLAINTIFF'S  
RESPONSE TO DEFENDANT'S  
MOTION TO DISMISS  
FILED JULY 8, 2011  
ECF NO.11**

Defendant, by and through its undersigned attorney, hereby submits its reply to Plaintiff's response to Defendant's motion to dismiss and renews its request that this action be dismissed by this court. As more fully set forth herein, Plaintiff has failed to meet his burden of proof to establish, by a preponderance of the evidence, that this Court has jurisdiction over the subject matter of the complaint and has failed to establish that Defendant's tribal immunity has been abrogated or waived to allow Defendant to be sued in State or Federal court.

///

1           Additionally, because Plaintiff's suit is meritless from the outset, Defendant  
2 requests and award of attorney's fees and reasonable expenses incurred in defending  
3 against this frivolous complaint.  
4

5           RESPECTFULLY SUBMITTED this 22nd day of July, 2011.  
6

7           HUFFORD, HORSTMAN, MONGINI,  
8           PARNELL & TUCKER, P.C.

9           *s/ Patrice M. Horstman*  
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11           \_\_\_\_\_  
12           Patrice M. Horstman  
13           Attorneys for Defendant,  
14           Tuba City Regional Healthcare Corporation  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### Introduction

Defendant agrees that, in considering a Rule 12(b) motion to dismiss, the Court must accept as true all factual allegations in the complaint and draw inferences from these allegations in the light most favorable to the Plaintiff. Dismissal is proper only if it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Given this standard for review, Defendant agrees with Plaintiff's objections to the portions of Defendant's motion to dismiss which describe the Defendant hospital and its Board of Directors, as well as factual allegations concerning the use of the federal funds. None of these allegations need be or should be considered by this Court. For purposes of the motion to dismiss and this reply, Defendant will rely solely on the allegations contained in Plaintiff's complaint.

### The Issues to be decided by the Court

Defendant submits that, contrary to Plaintiff's convoluted and irrelevant discussions of law, there are only two issues before this Court:

1. Whether Defendant, as an organization owned and operated by the Navajo Nation, a Federally recognized Indian Tribe, is immune from suit for violation of the ADA (42 U.S.C. §1201 et seq.) as amended, and Section 504 of the Rehabilitation Act 29 U.S.C. §701 et seq.), and if so,
2. Whether Defendant, a Tribal organization has, in this case, lost its Tribal immunity from being sued in State or Federal court.

Defendant believes that this motion to dismiss is dispositive of this case and that this Court need not consider or review any other issues raised in Plaintiff's response.

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1 Plaintiff, in his response, has attempted to obfuscate the two issues before the  
2 Court by citing irrelevant case law in support of his claims that Defendant is covered  
3 by the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation  
4 Act. None of Plaintiff's cases cited for this proposition involve Indian Tribes. On the  
5 other hand, there is a plethora of Federal Indian case law that makes clear that Tribes  
6 and Tribal organizations are exempt by Federal anti-discrimination statutes and civil  
7 rights legislation including the ADA and the Rehabilitation Act through both statutory  
8 exemption and/or through principals of sovereign immunity. Further, Tribes and  
9 Tribal organizations are also protected from suit in State or Federal court by the long  
10 recognized principle of Tribal immunity. Courts have consistently held that a Tribe's  
11 sovereignty and Tribal immunity may only be lost by the Tribe executing a voluntary,  
12 express and unequivocal waiver or through an express act of Congress which  
13 abrogates the sovereign immunity. Plaintiff has presented no evidence of any such  
14 waiver or abrogation because no such waiver or Congressional abrogation exists in this  
15 case. Therefore, this Complaint should be dismissed as a matter of law for lack of  
16 subject matter jurisdiction.  
17

18 It should be noted that on a motion to dismiss, wherein the Defendant is raising  
19 sovereign immunity to substantiate a lack of subject matter jurisdiction, the plaintiff  
20 bears the burden of proving by a preponderance of the evidence that jurisdiction exists.  
21 *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2<sup>nd</sup> Cir. 2001). Plaintiff has  
22 failed to meet his burden and has failed to show that this Court has jurisdiction in this  
23 case. Therefore, the complaint must be dismissed.  
24

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**ISSUE 1: DEFENDANT IS IMMUNE FROM SUIT FOR VIOLATION OF THE ADA AND/OR SECTION 504 OF THE REHABILITATION ACT**

**A. The ADA specifically exempts Native American Tribes from Coverage. Additionally, Federal Courts have consistently refused to apply anti-discrimination Statutes Including the Rehabilitation Act to Indian Tribes in recognition of the Tribes' inherent Sovereignty.**

Plaintiff, in his complaint, has acknowledged that Defendant TCRHCC is a Tribal organization. Paragraph 8 of Plaintiff's complaint alleges that "[U]pon information and belief TCRHCC is owned and operated by the Navajo tribe."

Federal law has recognized that Tribal organizations are deemed the same as the Tribe that authorized them and have the same rights and responsibilities as the Tribe. *See 42 C.F.R. 137.10*. The Ninth Circuit has repeatedly recognized that a health service such as the Defendant, which was organized to provide health services under the Indian Self-Determination and Education Assistance Act, is treated in the same manner as the Tribe who authorized the Tribal organization. *See Pink v. Modoc Indian Health Project, Inc.* 157 F. 3d 1185 (9<sup>th</sup> Cir. 1998); *EEOC v. Sage Memorial Hospital, Inc.*, 2007 U.S. Dist. LEXIS 66839 (Sept. 6, 2007).

Paragraph 1 of Plaintiff's complaint alleges that this action is brought "under Title I of the Americans with Disabilities Act, 42 U.S.C. §1201 et seq. ("ADA") as amended by the ADA Amendments Act of 2008, Pub. L. No. 110-325". Yet, the ADA, in 42 U.S.C. §12111(5)(B)(i), specifically exempts "Indian tribes" from the application of Title I of the ADA. Because Defendant Tribal organization is deemed the same as the Tribe, the express exemption from the definition of "employer" granted to "Indian tribes" in the ADA also applies to the Defendant Tribal organization. *See Giedosh v. Little Wound School Board, Inc.*, 995 F. Supp. 1052

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1 (D.S.D. 1997) (As a matter of law, the definition of an "Indian tribe" under Title VII  
2 and the ADA includes a school board which is established and controlled by  
3 individuals of the Tribe; therefore, the Court does not have the subject matter  
4 jurisdiction to proceed over the above entitled matter.)

5 Plaintiff is also claiming a private cause of action under 29 U.S.C. §794, better  
6 known as "Section 504" of the Rehabilitation Act. Plaintiff asserts that Defendant is  
7 an "employer" under Section 504 and, therefore, the Rehabilitation Act as well as the  
8 ADA (42 U.S.C. §1201 et seq.) apply here. Plaintiff's claim has no basis in fact or in  
9 law. Unlike in the ADA, there is no definition of "employer" in the Rehabilitation  
10 Act, and unlike in the ADA, there is no specific statutory exemption of Indian tribes  
11 under Section 504. However, it is clear that the same reasoning that underlies the  
12 specific exemption in the ADA also applies here.

13  
14 Courts have consistently held that the Federal antidiscrimination statutes, such  
15 as the ADA, ADEA and Title VII, do not apply to Indian Tribes, concluding that the  
16 application of these statutes would interfere with the Tribes' sovereign rights of self-  
17 government. *See Ferguson v. SMSC Gaming Enter.*, 475 F. Supp. 2d 929, 931 (D.  
18 Minn. 2007), ( Indian tribes and tribal entities are not subject to the provisions of the  
19 ADA); *Curtis v. Sandia Casino*, No. 02-2274, 2003 WL 21386332 (10th Cir. June 17,  
20 2003) (unpublished opinion) (dismissing Title VII, ADEA, and ADA claims and  
21 stating that the "ADA claim fails because the ADA excludes Indian tribes as  
22 employers subject to suit"); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9<sup>th</sup> Cir.  
23 2001) (ADEA did not apply to Defendant Tribe's employment relationship with  
24 plaintiff because employment relationship touched on "purely intramural matters"  
25

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1 related to the Tribe's self-governance); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10<sup>th</sup>  
2 Cir. 1989) (ADEA is not applicable because its enforcement would directly interfere  
3 with the Cherokee Nation's treaty-protected right of self-government); *Nero v.*  
4 *Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10<sup>th</sup> Cir. 1989) (Plaintiffs could not  
5 assert claims under 42 U.S.C. §§1981 and 2000d because they would affect the tribe's  
6 right to self-governance).

7  
8 The courts have found that Congress did not intend such interference with tribal  
9 sovereignty. *See Pink v. Modoc Indian Health Project, Inc.*, 157 F. 3d 1185 (9<sup>th</sup> Cir.  
10 1998), ("Congress intended to exempt individual Indian tribes as well as collective  
11 efforts by Indian tribes...the purpose of the tribal exemption, like the purpose of  
12 sovereign immunity itself, was to promote the ability of Indian tribes to control their  
13 own enterprises.")

14 Because the Rehabilitation Act falls into the same category of Federal  
15 antidiscrimination statutes such as the ADA, ADEA and Title VII, the application of  
16 the Rehabilitation Act is precluded in this case because such application would clearly  
17 interfere with the Defendant Tribal organization's sovereign rights of self-government.  
18 *See Ferguson v. SMSC Gaming Enter.*, supra; *Curtis v. Sandia Casino*, supra; *EEOC*  
19 *v. Karuk Tribe*, supra; *EEOC v. Cherokee Nation*, supra. Additionally, the Federal  
20 Court in *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, (11<sup>th</sup> Cir. La. 2001) specifically  
21 found that the Rehabilitation Act did not apply to tribes because the application of the  
22 Rehabilitation Act to Native American Tribes would interfere with a Tribe's  
23 sovereignty.  
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25 ///

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1 This was clearly recognized by the EEOC when it dismissed Plaintiff's charge  
2 of disability discrimination.

3 **B. Tribal Sovereignty has not been abrogated by Congress nor has it been**  
4 **waived by the Tribe or Tribal Entity.**

5 It is well established that Tribal sovereignty and immunity must be specifically  
6 abrogated by Congress or expressly and voluntarily waived by the Tribe. *See Kiowa*  
7 *Tribe of Oklahoma v. Manufacturing Technologies, Inc., supra; Miner Elec., Inc. v.*  
8 *Muscogee (Creek) Nation*, 505 F.3d 1007, 1009-10 (10th Cir. 2007). Any waiver or  
9 abrogation of tribal immunity "must be unequivocally expressed" rather than implied.  
10 *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir.  
11 2008). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L.  
12 Ed. 2d 106 (1978) (Neither congressional abrogation of tribal immunity nor a tribe's  
13 waiver of immunity may be implied, but instead must be "unequivocally expressed.");  
14 *Seminole Tribe*, 181 F.3d at 1241-42 ("Congress abrogates tribal immunity only where  
15 the definitive language of the statute itself states an intent either to abolish Indian  
16 tribes' common law immunity or to subject tribes to suit under the act"). *See also*  
17 *Florida Paralegic Association*, ("neither the enforcement provision of Title III of the  
18 ADA nor the parallel section of the Civil Rights Act specifically authorizes suits  
19 against Indian tribes who allegedly have violated the Acts' substantive requirements  
20 against disability discrimination .... Congress declined to abrogate Indian tribes'  
21 sovereign immunity from suit either by direct statement in Title III itself or by  
22 reference to other statutes having that effect. No support exists in the statute for a  
23 finding that Congress has waived tribal sovereign immunity under Title III of the  
24  
25

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1 ADA.") 166 F.3d at 1132.

2 Further, there is nothing in the Rehabilitation Act which would indicate that  
 3 Congress has abrogated Tribal immunity in these circumstances and Plaintiff has  
 4 shown no such abrogation. Absent such unequivocal expression of legislative intent to  
 5 abrogate, Tribal immunity must be presumed. *See Santa Clara Pueblo*, 436 U.S. at 59,  
 6 98 S. Ct. 1670. Further, Plaintiff has shown no express, knowing, voluntary and  
 7 express waiver of its immunity by the Navajo Nation which would defeat this  
 8 presumption.

9 Although Plaintiff has not raised this issue either in his complaint or response to  
 10 the motion to dismiss, there is a program-specific, limited abrogation of Tribal  
 11 immunity in Section 504 of the Rehabilitation Act, which applies only to a narrow  
 12 program not present here.<sup>1</sup> This section provides that a Tribe may elect to enter into  
 13 an agreement with a State agency for the provision of vocational rehabilitation  
 14 services. In this program-specific exemption, the Tribe, by participation in the  
 15 program, waives its tribal sovereign immunity. The Congressional intent underlying  
 16 this abrogation is clear: Where a Tribe enters into such an agreement with a State, the  
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18  
 19  
 20 <sup>1</sup> The Rehabilitation Act (29 U.S.C. §§ 701 et seq. states in relevant part: "No otherwise qualified individual  
 21 with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of  
 22 her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to  
 discrimination under any program or activity receiving Federal financial assistance or under any program or  
 activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794,  
 subparagraph (b) clarifies the term "program or activity" as

"all of the operations of –

(1)(A) a department, agency, special purpose district or other instrumentality of a State or of a  
 local government; . . ."

24 A "local agency" is defined as an "agency of a unit of general local government or of an Indian Tribe which has  
 25 an agreement with the designated State agency to conduct a vocational rehabilitation program under the  
 supervision of such State agency . . ." See 29 U.S.C. § 705(24).

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1 Tribe is making a voluntary, knowing and express decision to subordinate itself to the  
2 supervision of the State agency in exchange for the services provided.

3 This isolated provision, concerned with the provision of vocational  
4 rehabilitation services, does not suggest the unequivocal, broad abrogation of Tribal  
5 immunity claimed by Plaintiff in this case. See *Barnes v. Mashantucket Pequot Tribal*  
6 *Nation*, 2007 U.S. Dist. LEXIS 15591(March 3, 2007). In fact, it is a perfect example  
7 of where Congress has expressed its unequivocal intent to abrogate Tribal sovereign  
8 immunity in this narrow, specific fact situation.

9  
10 **C. Defendant's acceptance of Federal Funds does not constitute a Waiver of Tribal Sovereign Immunity.**

11 In his complaint, Plaintiff asserts that, "notwithstanding TCRHCC's claim of  
12 exemption from the ADA," since Defendant accepted federal funds under the  
13 American Recovery and Reinvestment Act, Defendant is now required to comply with  
14 the ADA, as amended as well as Section 504 of the Rehabilitation Act of 1973. (See  
15 pages 16 and 17 of Plaintiff's complaint.) There is no legal authority for Plaintiff's  
16 position.

17  
18 It is clear, as a matter of law, that Defendant's acceptance of federal funds does  
19 not constitute an express, knowing and voluntary waiver Tribal sovereignty that would  
20 defeat the express exemption granted under 42 U.S.C. §12111(5)(B)(i) nor does it  
21 constitute an express waiver of sovereign immunity under Section 504.

22 The case of *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, (11<sup>th</sup> Cir. Fla. 2001), is  
23 instructive here. In *Sanderlin*, the plaintiff appealed a district court order granting the  
24 Defendant *Seminole Tribe*'s motion to dismiss for lack of jurisdiction. Similar to the  
25

1 Plaintiff's allegations in the instant case, the plaintiff in *Sanderlin* alleged that the  
2 Seminole Department of Law Enforcement had discriminated against him on the basis  
3 of disability, in violation of the Federal Rehabilitation Act.

4 On appeal, the plaintiff in *Sanderlin* also argued that by accepting federal funds,  
5 the Tribe had voluntarily waived its sovereign immunity. However, the 11<sup>th</sup> Circuit  
6 Court of Appeals was not persuaded by this argument. The Court noted that "the  
7 Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be  
8 implied on the basis of the tribe's actions, but must be unequivocally expressed." *Id.* at  
9 page 1286.  
10

11 In *Sanderlin*, the contracts for federal financial assistance entered into by the  
12 Seminole Department of Law Enforcement required the Tribe to refrain from  
13 discrimination on the basis of disability. The Court found, however, that these  
14 contracts merely conveyed a "promise not to discriminate. They in no way constitute  
15 an express and unequivocal waiver of sovereign immunity and consent to be sued in  
16 federal court" on the specific claim alleged in that case. "The Tribe, simply put, did  
17 not voluntarily waive its sovereign immunity." *Id.* at page 1289.

18 When a waiver of immunity is asserted, the party claiming waiver bears the  
19 burden of providing evidence of an express waiver of sovereign immunity by that  
20 tribe. *See Makarova v. U.S.*, 201 F.3d 110 (2<sup>nd</sup> Cir. 2000); *Elliott v. Capital Int'l Bank*  
21 *& Trust*, 870 F. Supp. 733, 735 (E.D. Tex. 1994) (declining invitation to disregard  
22 Indian tribal immunity because plaintiff "provided no evidence of ... waiver ... by the  
23 Tribe.") Moreover, the party asserting waiver may not satisfy its burden by showing  
24 waiver by implication. *Id.* (soliciting business from and contracting with a non-Indian  
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party was not an express waiver). Waivers of tribal immunity cannot be implied on the basis of a tribe's commercial or other activities. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe Tribe of Oklahoma*, 498 U.S. 505, 509-510, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 173, 97 S. Ct. 2616, 2621, 53 L. Ed. 2d 667 (1977); *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir. 1995); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). Rather, nothing short of a formal, express and unequivocal waiver can defeat the sovereign immunity of an Indian Nation. *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589, 1593, 149 L. Ed. 2d 623 (2001).

Because the Tribe's immunity from suit remains intact and has neither been abrogated by Congress nor waived by the Tribe, Plaintiff's action must be dismissed. "When suit is brought against an immune entity that has neither consented to suit nor suffered Congressional abrogation of immunity, the court lacks subject-matter jurisdiction." *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). In such cases, the court is powerless to act except to order dismissal.

**ISSUE 2: TRIBAL IMMUNITY FROM BEING SUED IN STATE OR FEDERAL COURT HAS NOT BEEN LOST IN THIS CASE AND SUIT AGAINST DEFENDANT IN THE FEDERAL COURT IS INAPPROPRIATE.**

Sovereign immunity is a primary and inherent aspect of sovereignty. Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. Thus, as a matter of federal law, an Indian

1 tribe is not subject to suit in State or Federal court unless where Congress has  
2 authorized the suit or the tribe has waived its immunity from being sued in Federal or  
3 State Court. . See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523  
4 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998); *Big Valley Band of Pomo Indians*  
5 *v. Superior Court*, 133 Cal. App. 4th 1185, 35 Cal. Rptr. 3d 357 (1st Dist. 2005);  
6 *Ackerman v. Edwards*, 121 Cal. App. 4th 946, 17 Cal. Rptr. 3d 517 (3d Dist. 2004),  
7 review denied, (Dec. 15, 2004) and cert. denied.

8  
9 In the instant case, Congress has not authorized the suit nor has the Defendant  
10 Tribal organization expressly waived its inherent immunity. Therefore, suit against the  
11 Defendant tribal organization is not properly before the Federal Court and the court  
12 should dismiss this matter.

13 **DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND**  
14 **COSTS INCURRED HEREIN.**

15 Under 42 U.S.C. § 12205, the court has discretion to award a reasonable  
16 attorney's fee to a prevailing party in an ADA action. Fees are awarded to a prevailing  
17 defendant only upon a finding that the plaintiff's action was frivolous, unreasonable, or  
18 without foundation. See *Summers v. A. Teichert & Son*, 127 F.3d 1150, 1154 (9th Cir.  
19 1997). "An action is frivolous if it lacks an arguable basis in law or in fact, though it  
20 need not be brought in bad faith." *Peters v. Winco Foods, Inc.*, 320 F.Supp.2d 1035,  
21 1037 (E.D. Cal. 2004).

22 The case of *Schutts v Bently Nev. Corp.* 966 F Supp 1549, (1997, DC Nev.), is  
23 instructive here. In that case, the court found that where the employee's action against  
24 the employer under the ADA was meritless and frivolous, and the employee continued  
25

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1 to litigate despite absence of legal support for his claim, the employee caused the  
2 employer to incur unnecessary expenses by ignoring legal authority devastating to his  
3 claim, and the employee improperly opposed the employer's summary judgment  
4 motion, the employer was entitled to recover award of attorney fees from employee  
5 under 42 USCS § 12205.

6 Plaintiff's complaint before this Court is meritless as it lacks any arguable basis  
7 in law or in fact. Notably, Plaintiff's original charge filed with the EEOC was  
8 dismissed by the Commission for lack of jurisdiction due to Defendant's status as an  
9 Indian tribe and its resulting express exemption from ADA coverage and its exemption  
10 from coverage under the Rehabilitation Act under principles or tribal sovereignty.  
11 Further, reasonable investigation into applicable law, if such had been made, would  
12 have easily revealed that Plaintiff has no legal basis to pursue his complaint against a  
13 tribal organization in federal court. Plaintiff's pursuit of his meritless claim has caused  
14 the Defendant to incur substantial attorney's fees and costs in order to defend against  
15 this frivolous claim. Defendant should be entitled to recover these fees and expenses  
16 from Plaintiff.

17  
18 **CONCLUSION.**

19 Plaintiff, in his response to Defendant's motion to dismiss, has studiously  
20 ignored and/or avoided to address the key issues here, namely, that Defendant is  
21 specifically exempt from coverage under the ADA and, likewise, is exempt under the  
22 principles of Tribal sovereign immunity from other Federal anti-discrimination  
23 statutes, including the ADEA, Title VII and the Rehabilitation Act. Congress has not  
24 abrogated and Defendant has not waived its Tribal immunity or Tribal sovereignty  
25

1 under the ADA or Section 504 of the Rehabilitation Act. Additionally, the acceptance  
2 of federal funds by the Tribe has not resulted in any legal waiver of Defendant's Tribal  
3 immunity or sovereignty under either Act. Lastly, Defendant, as a Tribal organization,  
4 has Tribal immunity from being sued in Federal or State court.

5 Plaintiff has failed to meet his burden of proof to show, by a preponderance of  
6 the evidence, subject matter jurisdiction under either the ADA or Section 504 of the  
7 Rehabilitation Act. Plaintiff's complaint must, therefore, be dismissed. Because  
8 Plaintiff's action has no merit and is frivolous, Defendant requests that the Court  
9 award to Defendant its reasonable attorney's fees and costs incurred herein.  
10

11  
12 RESPECTFULLY SUBMITTED this 22nd day of July, 2011.

13  
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15 *s/ Patrice M. Horstman*

16 \_\_\_\_\_  
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19 Tuba City Regional Healthcare Corporation  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2011, I electronically transmitted the attached document 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 registrants:

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