CASE NO. 10-6157

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TINA MARIE SOMERLOTT,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CHEROKEE NATION DISTRIBUTORS, INC., AN OKLAHOMA CORPORATION, AND CND, L.L.C., AN OKLAHOMA LIMITED LIABILITY COMPANY,	)
	)
Defendant-Appellees	)

On Appeal From The United States District Court
for the Western District Of Oklahoma
The Honorable Judge TIMOTHY D. DEGIUSTI
D.C. No. 5:08-cv-00429-D

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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INTRODUCTION AND SUMMARY

In response to Plaintiff's Initial Brief, CND/CNDI skirt the substantive issues addressed, primarily attacking Plaintiff's right to discovery, her preservation of her arguments on appeal, and the standard of review. Plaintiff's substantive argument is very narrow – that because the Tribe has an ownership interest in CND/CNDI, they are entitled to sovereign immunity. This is so, even in the face of recent clarifications that make this matter all the more ripe for remand. For the following reasons, we ask that Defendant's novel arguments be rejected.

ARGUMENT

I - Review is Properly De Novo

A dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) is subject to de novo review. See, Southway v. Cent. Bank of Nigeria, 328 F.3d 1267, 1272 (10th Cir.2003); Sac & Fox Nation v. Cuomo, 193 F.3d 1162, 1165 (10th Cir. 1999). Defendant contends that this matter should be reviewed for abuse of discretion because it involves a factual finding. However, that factual finding is inconsequential without the correct underlying framework. To the extend that this appeal addresses that underlying framework, it is De Novo. To the extend that it addresses premature factual findings of the Court, it can be properly evaluated for abuse of discretion.

II - Even Applying the BMG Test, CND Is Not a Tribal Entity for Purposes of Sovereing Immunity

The Initial Brief argues that neither CND nor CNDI is the Tribe itself, nor a tribal sub-entity for purposes of immunity *per se*, in accordance with the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 503. Rather than address this undisputed fact, CND attempts to apply *Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F. 3d 1173, (11th Cir. 2010) (*BMG)* in order to convince this Court to find a sufficient relationship between the Tribe and the Appellees to uphold a dismissal. However, the corporate sub-entity in *BMG* is grossly distinguishable.

Most pointedly, the sub-entity at issue there was not formed in Oklahoma and/or subject to the Oklahoma Indian Welfare Act. Accordingly, the manner in which its sovereign sub-entities are defined is different than the manner in which the Cherokee Nation's sovereign sub-entities are defined. Moreover, the business at issue in that case dealt with the operation of a casino, which is barred for any entity other than the Indian Tribe in that state. Accordingly, it can be well assumed that any entity involved in the management of that endeavor does so at the behest of the Tribe which has likely entered into a Treaty allowing same. *Id.* at 1195 (understandably finding a very close relationship between the operation of a Casino and the Indian Tribe in Colorado).

Even assuming that the *BMG* factors outlined by the 10th Circuit should be applied here, the case would need to be remanded for that analysis to occur. This is not harmless error, as Plaintiff maintains that CND still does not qualify as a sub-entity of the Cherokee Indian Tribe, even under *BMG*. The factors as generally set forth therein are: (1) the method of the business' creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the Tribe has over the entities; (4) whether the Tribe intended for the entity to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting the entity immunity. Nearly every one of these factors compels a finding against CND as to sovereign immunity under the facts of this case, or at the very least, a finding that the District Court's ruling is premature pending CND's responses to Somerlott's timely discovery requests (see Section III below).

1) The method of creation of the economic entity.

This first factor of the *BMG* test weighs in favor of the conclusion that CND is not entitled to tribal sovereign immunity. CND argues that at the time it was originally formed, the Cherokee Nation did not have laws permitting the formation of a corporation or a limited liability company. That, in and of itself, indicates that it was formed independent of Tribal authority. CND was organized as an Oklahoma corporation under Oklahoma state law. It later converted to an

Oklahoma limited liability company, with the same Articles. At no time did CND dissolve its Oklahoma corporate status. It is, therefore, not a Tribal organizations within the permissible forms defined by the Oklahoma Indian Welfare Act, and cannot be regarded as sub-entities of the Tribe for purposes of tribal immunity *per se*.

2) Its purpose.

The second factor in the *BMG* test also weighs against tribal immunity. The purpose for which CND/CNDI were created was to function as a staffing agency, providing a U.S. Army Hospital with chiropractors to work in its physical therapy department. The employees of the staffing agency were non-Indian chiropractic professionals. The customers of the staffing agency were non-Indian military personnel. It has no relationship to any intramural Tribal governance – such as, in the case of BMG, operating a casino, which in Colorado is a strictly Tribal function. Rather, CND is a *mere business*, generating income for the tribe just like any other business. It should not be permitted to assert immunity. See, Myrick v. Devil's Lake Sioux Mfg. Corp., 718 F.Supp.753 (D.N.D. 1989) and Cano v. Cocopah Casino, 2007 U.S. Dist. LEXIS 54377 (D. Ariz. 2007).

3) Structure, ownership, and management.

The tribal council may have appointed some management of CND companies, however there is no evidence that those managers sat on the Tribal

Council as well. [1] CND claims that it was founded for the specific purpose of providing jobs for Cherokee tribal members, to meet the needs of business development and to provide income for the tribe. (v. 1, doc. 7). However, what little evidence there is in this regard rests entirely on the affidavit of Dennis McLemore, principal of CND/CNDI, who merely explains the relationship between the Cherokee Tribe and its various holding companies and business enterprises. (Id., Exh. A). Those ties are no different than what one would expect of any business reporting to and answering to its shareholders.

4) Whether the Tribe intended for the company to have tribal sovereign immunity.

Appellees point to a finding in the district court that tribal oversight requires that waiver of sovereign immunity must be approved by resolution of the Tribal Council. Answer Brief at p15. This information does not in any way relate to the Tribe's intent in sharing sovereign immunity. At all times material to this action, CND was holding itself out as a small business endeavor in order to qualify for the Small Business Administration's minority-owned business program. (v. 1, doc. 5, exh. C, D; v. 1, doc. 7, exh. A; v. 2, doc 23). (*Attachments 2, 4*). CND is formed

[1] As argued in Section IV below, these and other factual inquiries render the Order on Defendant's Motion to Dismiss premature, in light of jurisdictional discovery that had gone ignored by CND/CNDI, despite an Order requiring its production.

under the laws of the State of Oklahoma, and has no discernable connection to tribal self-governance, or to the intramural activities of the Cherokee tribe. (Id.)

CND was incorporated under Oklahoma state law in order to qualify for the SBA's Minority Owned Business program, and attract a government contract with Reynolds Army Hospital. A condition of qualifying for the contract under the SBA is waiver of immunity, if any is applicable. If indeed the Tribe intended to assert sovereign immunity over a company twice removed from it by corporate structure, even after complying with the SBA's requirements, then it was at the very least acting in bad faith, which should certainly be weighed in consideration of the sixth factor of the BMG test below.

5) The financial relationship between the Tribe and CND.

In this instance, the financial relationship between the Tribe and CND is limited. The Army hospital paid CND, and CND paid Ms. Somerlott and her colleagues' salaries. Ms. Somerlott's only connection to CND was payment of her salaries and benefits, as well as periodic evaluations. Nothing connects the Appellees with the Cherokee Tribe, other than dividends paid to the shareholder if any. This is the strongest factor in favor of CND, and even it is not compelling. A finding of sovereign immunity on the basis of this factor alone arises to an abuse of discretion, should that be the standard of review adopted.

6) Whether the purposes of tribal sovereign immunity are served by granting them immunity.

Unlike cases where tribes are engaging in purely intramural activities and performing traditional government functions through state-incorporated business entities, the purposes of tribal sovereign immunity are not served here. In *BMG*, this Court held that a Colorado Casino and the business sub-entity at issue there were "[S]o closely related to the Tribe that their 'activities are properly deemed to be those of the tribe." The Court further found that "The Authority and the Casino plainly promote and fund the Tribe's self-determination through revenue generation and the funding of diversified economic development." *BMG* at 1195. This factual scenario is starkly different than the one faced in *Somerlott*, where there is no showing of a nexus between staffing an Army hospital and uniquely Tribal operations and revenue sources.

CND concedes that the Tribe did not have any authority to operate it as a business entity at the time that it was formed. Neither CND nor the Tribe ever corrected the formation later. Accordingly, no third party could possibly be on notice of the connection between CND and the Tribe, or the Tribe's sovereign immunity – particularly where the corporate charter refers to, adopts, and agrees to be bound by the anti-discrimination code found in the Small Business Act (unlike those entities which are formed to operate a Casino in a state which forbids anyone

but the Tribe from doing so.)[2] Any association that is not readily apparent by either the formation of the company or the nature of the corporate business, should not be covered by Tribal immunity. It does not foster economic relations between Tribes and non-tribal entities to find otherwise. If anything, it most likely undermines them.

III - Somerlott Did Not Waive Any Arguments Below

CND appears to argue that Somerlott waived any specific argument not contained within her Response to its Motion to Dismiss. This analysis does not make sense. It would obviate the need for an Appellate Brief at all. Parties would simply submit their briefs below to the Appellate Court, and let the Court decide if the District Court erred. Clearly, that is not the process.

The Rule is that any issue not presented to the lower Court may not be appealed. Plaintiff stated a claim for relief pursuant to the ADEA in her Complaint. Therefore, her failure to enunciate specific reasons why this claim should survive, as opposed to both claims, is not a waiver under the authority cited by Defendant or any other that undersigned found in research on the issue.

Moreover, even assuming Plaintiff had failed to address the issue, this Court would be entitled to hear the argument in its discretion in certain circumstances.

[2] Comanche County, Oklahoma, where CND was operating, has a plethora of non-tribal businesses which use Tribal names. This is, accordingly, no indication whatever of any tribal affiliation.

"Those circumstances may include issues regarding jurisdiction and sovereign immunity, and instances where public interest is implicated, or where manifest injustice would result[.]" *Rademacher v. Colorado Ass'n of Soil Conservation Districts Medical Ben. Plan*, 11 F.3d 1567, 1572 (10th Cir. 1993) (*citing FDIC v. Ferguson*, 982 F.2d 404, 407 (10th Cir.1991) and *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir.1992)). Because this Appeal deals with both jurisdiction as well as a matter of great public importance, all arguments asserted in Appellant's Brief are properly before the Court for consideration.

IV - Applying the Rule Enunciated In BMG, The District Court Abused Its Discretion in Ruling Prior to The Close of Discovery

The 10th Circuit has previously held that "a refusal to grant [jurisdictional] discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant and that [p]rejudice is present where pertinent facts bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary." *Id.* at p. 1189, (internal citations omitted) citing *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) and *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). Here, unlike in *BMG*, Plaintiff has steadfastly maintained her need for and entitlement to the ignored discovery, including the filing of a motion to set aside the Order. Unlike in *BMG*, Plaintiff was never afforded and evidentiary hearing, and never told the Court she could proceed without the needed discovery. She was forced to

file her Response to the Motion to Dismiss having timely moved to Compel the discovery which was never answered. CND's position that it is Plaintiff's fault that she did not participate in the formation of a protective order is remarkable, as she was never under any obligation to perform this task for CND.

CONCLUSION

As a state-chartered corporation, operating off Tribal property, in a purely economic capacity, the relationship between the activities of CND and the traditional functions of the Tribe are so remote that the Court cannot consider them an "arm of the tribe" for purposes of covering them with the Tribe's immunity. No arguments were waived below, and nothing in Defendant's Response provides any rational basis for holding that a business formed under U.S. State law, performing a non-tribal, purely economic function, off of Tribal property, having agreed to abide by U.S. anti-discrimination law in order to gain priority for a Government contract under the Small Business Administration, should be afforded sovereign immunity when it then violates U.S. employee anti-discrimination law – particularly the ADEA, which is only tenuously extended to Tribal corporations. Accordingly, the District Court should be reversed. At best, because the District Court entered its Order prematurely, in light needed discovery, its Order should be vacated and the matter remanded for additional discovery and an evidentiary hearing.

Respectfully Submitted,

s/ Paula J. Phillips
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 2968 words.

I relied on my word processor to obtain the count and it is Microsoft Word.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Paula J. Phillips
Attorney for Appellant

CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS

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_X_ I hereby certify that on April 18, 2011, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing, and served via overnight delivery 7 duplicate copies of the Motion in accordance with the Local Rules. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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s/ Paula J. Phillips