

1 ROBERT W. STORY, ESQ., Bar No. 1268
2 STORY LAW GROUP
3 2450 Vassar Street, Suite 3B
4 Reno, Nevada 89502
5 Telephone: 775.284.5510
6 Facsimile: 775.996.4103
7 rstory@storylaw.net

8 Attorneys for Defendants Inter-Tribal
9 Council of Nevada, Risa Stearns, and Daryl Crawford
10
11

12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA
14
15

16 THERESA CARSTEN,

17 Plaintiff,

18 vs.

19 INTER-TRIBAL COUNCIL OF
20 NEVADA, RISA STEARNS, and
21 DARYL CRAWFORD,

22 Defendants.

Case No. 3:12-cv-00493

**REPLY IN SUPPORT OF MOTION TO
DISMISS AMENDED COMPLAINT**

23 Pursuant to Fed.R.Civ.P. 12(b), Defendants Inter-Tribal
24 Council of Nevada ("ITCN"), Risa Stearns, and Daryl Crawford hereby
25 reply in support of their Motion to Dismiss Plaintiff Theresa
26 Carsten's Amended Complaint for lack of subject matter
27 jurisdiction. Defendants base their Reply in Support of Motion to
28 Dismiss Amended Complaint on the following Memorandum of Points and
Authorities, the exhibit attached to the Motion to Dismiss, and all
papers and pleadings on file.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
DISMISS**

I. INTRODUCTION

1 In her Opposition to Motion to Dismiss Complaint, Ms. Carsten
 2 argues that this court does indeed have jurisdiction because "when
 3 Congress drafted the FMLA it elected not to exempt the FMLA from
 4 Indian Tribes." (Opposition, page 1, lines 27-28.) Ms. Carsten goes
 5 on to argue that because ITCN is not performing "tribal government
 6 functions" and because "almost half of ITCN's employees (including
 7 Plaintiff and Defendant Sterns [sic]) are non-Indians," ITCN is
 8 somehow not entitled to sovereign immunity from suit under the
 9 FMLA. (Opposition, page 6, lines 24-27.) Finally, Ms. Carsten
 10 argues that Risa Stearns and Daryl Crawford are not a Tribe and are
 11 therefore not entitled to sovereign immunity.

12 As the following arguments demonstrate, Ms. Carsten is
 13 incorrect. ITCN, Ms. Stearns, and Mr. Crawford enjoy sovereign
 14 immunity; and this court has no jurisdiction

15 **II. ARGUMENT**

16 **A. ITCN Is Exempt From The FMLA And Enjoys Sovereign** 17 **Immunity.**

18 As the court in *Pearson v. Chugach Government Services Inc.*,
 19 669 F.Supp.2^d 467, 477 (D. Del. 2009) correctly recognized, "[t]he
 20 only courts to examine whether tribal organizations are subject to
 21 the FMLA's employer obligations held, based on the doctrine of
 22 tribal immunity, there is no private cause of action under the FMLA
 23 against tribal organizations." This includes at least one federal
 24 district court in the Ninth Circuit - *Morrison v. Viejas*
 25 *Enterprises*, 355 F.3^d 141 (S.D. Cal. 2011). "As a matter of federal
 26 law, an Indian tribe is subject to suit only where Congress has
 27 authorized the suit or the tribe has waived its immunity." *Kiowa*
 28 *Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). All

1 other federal courts to consider the issue have concluded that
2 sovereign immunity bars FMLA lawsuits against Indian tribes.

3 Ms. Carsten's argument that Congress did not exempt Indian
4 tribes from FMLA is without merit. Congress clearly did not
5 authorize FMLA suits against Indian tribes, as all federal courts
6 to consider the issue have concluded.

7 **B. ITCN Is An Arm Of The 26 Federally Recognized Tribes That**
8 **Created And Govern ITCN.**

9 ITCN is a Nevada non-profit corporation created and controlled
10 by the 26 federally recognized Indian tribes of Nevada to deliver
11 services to Native Americans within the State of Nevada. As Mr.
12 Crawford informed this court in his declaration, "ITCN manages
13 federal and state funded programs that improve the welfare and
14 interests of Tribal members and their communities throughout
15 Nevada, including WIC, HeadStart, domestic violence, elder
16 nutrition programs, child care funding, workforce investment, and
17 the Tribal appellate courts." (Exhibit 1 to Motion to Dismiss,
18 paragraph 5.)

19 Ms. Carsten's suggestion that these programs are not "tribal
20 government functions" is without merit. These are exactly "tribal
21 government functions" that rural Indian tribes provide to their
22 citizens. The fact that ITCN hires and serves rural, tribal and
23 non-tribal members in no way diminishes the fact that these are
24 "tribal government functions." The wisdom of federal and state
25 funded programs allowing or requiring ITCN to serve both tribal and
26 non-tribal members in generally remote, sparsely populated area of
27 Nevada is obvious. Ms. Carsten's reliance on *Pearson v. Chugach*
28 *Government Services Inc., supra*, to show that ITCN should not enjoy

1 sovereign immunity because of its status is without merit. The
2 issue in *Pearson, supra*, was whether or not the Alaska Native
3 Claims Settlement Act ("ANCSA") exempted Alaskan Native
4 Corporations ("ANC") and their majority-owned subsidiaries from ADA
5 and FMLA claims. The *Pearson* court expressly held that "the
6 language and legislative history of ANCSA support a narrow
7 construction of the ANC exemption, limiting it to Title VII claims"
8 and not to ADA and FMLA claims. *Pearson*, 669 F.Supp.2^d at 477.

9 Significantly, *Pink v. Modoc Indian Health Project, Inc.*, 157
10 F.3^d 1185 (9th Cir. 1998), Ninth Circuit held that a non-profit
11 organization incorporated by Indian tribes for on- or off-
12 reservation services were indeed Indian tribes with sovereign
13 immunity where the board of directors was drawn from tribal
14 governments and controlled another tribal enterprise. This aptly
15 describes ITCN whose governing body consists of an Executive Board,
16 composed of Tribal Chairmen and Chairwomen from each of the 26
17 federally recognized Indian tribes in the State of Nevada which
18 incorporated ITCN to perform tribal government services. ITCN is an
19 arm of the 26 Nevada Indian Tribes that created ITCN and is
20 therefore exempt from the FMLA because it enjoys Tribal sovereign
21 immunity.

22 **C. Ms. Carsten Cannot Circumvent ITCN's Sovereign Immunity**
23 **By Naming Individual Defendants.**

24 Of course Ms. Stearns and Mr. Crawford are not an Indian
25 tribe. However, as the Second Circuit recognized, a plaintiff
26 "cannot circumvent tribal immunity by merely naming officers or
27 employees of the Tribe when the complaint concerns actions taken in
28 defendants' official or representative capacities and the complaint

1 does not allege they acted outside the scope of their authority.”
2 Chayoon, 355 F.3^d at 143 (citing, *Oneida Indian Nation of New York*
3 *v. City of Sherrill*, 337 F.3d 139, 169 (2d Cir.2003)). Mr. Crawford
4 is the Executive Director of ITCN; and Ms. Stearns is the Human
5 Resources Manager. Both acted in their official capacities in
6 dealing with Ms. Carsten. Accordingly, Ms. Carsten cannot
7 circumvent tribal immunity by naming Mr. Crawford and Ms. Stearns.

8 **III. CONCLUSION**

9 For the foregoing reasons, Defendants request that this Court
10 dismiss Ms. Carsten’s FMLA suit against them because ITCN enjoys
11 Tribal sovereign immunity; and Mr. Crawford and Ms. Stearns acted
12 in their official capacity and cannot be sued individually.
13 Therefore, this court lacks jurisdiction to entertain Ms. Carsten’s
14 FMLA suit.

15 December 21, 2012

16 STORY LAW GROUP

17
18
19 By: /s/ Robert W. Story .

20 Attorneys for Defendants Inter-
21 Tribal Council of Nevada, and
22 Risa Stearns, and Daryl Crawford
23
24
25
26
27
28

CERTIFICATE OF SERVICE

In accordance with Fed.R.Civ.P. 5(b)(3) and Local Rule 5-4, I hereby certify that on December 21, 2012, I electronically filed the foregoing **Reply in Support of Motion to Dismiss Amended Complaint** with the Clerk of the Court for the United States District Court for the District of Nevada by using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

Brian R. Morris
59 Damonte Ranch Parkway
B-221
Reno, NV 89521

I certify that the foregoing is true and correct.

Dated on December 21, 2012, at Reno, Nevada

/s/ Barbara A. Ancina
BARBARA A. ANCINA