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THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERTO NEPOMUCENO, Plaintiff, vs. CHEROKEE MEDICAL SERVICES, LLC, Defendant.	Civil Action No.: 13CV0633 BTM BGS **DEFENDANT CHEROKEE MEDICAL SERVICES, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.** Judge: Hon. Barry T. Moskowitz Courtroom: 15B Complaint Filed 3/18/13 Hearing Date: July 26, 2013, 11:00 a.m.

I. INTRODUCTION

Defendant, Cherokee Nation Medical Services LLC, pursuant to Local Rule 7.1(e)(3) and 7.1(h), hereby submits its Reply to Plaintiff's Opposition to Cherokee Medical Services' Motion to Dismiss. Cherokee Nation Medical Services incorporates all arguments and authorities contained within its Motion to Dismiss as though fully set forth herein.

II. CHEROKEE NATION IS A FEDERALLY RECOGNIZED TRIBE

In his Opposition to Cherokee Medical Services, LLC's ("CMS") Motion to Dismiss, Plaintiff Roberto Nepomuceno ("Plaintiff") eventually commences his argument with the assertion that CMS has not established that the Cherokee Nation is a federally recognized tribe. CMS is unsure whether the allegation was made in good faith, as the Cherokee Nation is the second largest tribe in the United States and recently received national attention in the United States Supreme Court case of *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (U.S.S.C. 2013). Regardless, CMS addresses Plaintiff's allegation below.

In the excerpt from the Federal Register, Vol. 77, No. 155 from August 10, 2012, the Department of the Interior, Bureau of Indian Affairs lists the 566 tribal entities recognized and eligible to receive federal funding. *Federal Register*, attached hereto as *Exhibit A*. Specifically, the Cherokee Nation is listed on p. 47869, directly underneath the Cher-Ae Heights Indian Community and directly above the Cheyenne and Arapaho Tribes. *Ex. A.*

In further support of the widely documented fact that the Cherokee Nation is a federally recognized tribe, CMS attaches a true and correct printout of the National Conference of State Legislatures, which lists all federal and state recognized tribes. *NCSL June 2013 Report*, attached hereto as *Exhibit B*. Under the Oklahoma section, CMS would point out that under the "Oklahoma" heading, the Cherokee Nation is

listed directly under the Caddo Nation and directly above the Cheyenne-Arapaho Tribe. *Exhibit B* at p.8.

Finally, the Cherokee Nation has an extensive history with the United States Supreme Court. For instance, in the landmark case *Cherokee Nation v. Georgia.*, 30 U.S. 1, 2, 8 L. Ed. 25 (1831), the U.S. Supreme Court defined the Cherokee Nation, and all Indian tribes, as a "domestic dependent nation[s]." By way of a small sample, see also *Cherokee Nation v. Whitmire*, 223 U.S. 108, 32 S. Ct. 200, 56 L. Ed. 370 (1912); *Talton v. Mayes*, 163 U.S. 376, 16 S. Ct. 986, 41 L. Ed. 196 (1896); *United States v. Cherokee Nation*, 202 U.S. 101, 26 S. Ct. 588, 50 L. Ed. 949 (1906).

In fact, even the California courts recognize that the Cherokee Nation is a federally recognized tribe. *See In re C.D.*, 110 Cal. App. 4th 214, 226, 1 Cal. Rptr. 3d 578, 587 (2003)("as listed in the Federal Register, the three federally "recognized" Cherokee Tribes are the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians of North Carolina, and the United Keetoowah Band of Cherokee Indians of Oklahoma."). Thus, it is perplexing, at the very least, that Plaintiff is so unsure of whether the Cherokee Nation is a federally recognized tribe.

Based on the foregoing authority, CMS respectfully requests the Court take judicial notice of the fact that the Cherokee Nation is a federally recognized tribe. Pursuant to Rule 201 of the Federal Rules of Evidence, judicial notice is proper based on the authorities cited herein along with the fact that the status of the Cherokee Nation is common knowledge. *Singh v.Ashcroft, 393 F.3d 903, 905 (9th Cir. 2004).*

III. CMS IS ENTITLED TO SOVEREIGN IMMUNITY

After alleging there is no proof that the Cherokee Nation is a federally recognized tribe despite years of authority to the contrary, Plaintiff argues that even if Cherokee Nation is a federally recognized tribe, CMS has not established that it is entitled to sovereign immunity as an arm of the Cherokee Nation. Further, Plaintiff

alleges it is CMS's duty to establish a non-waiver of sovereign immunity. Plaintiff's arguments are disingenuous and constitute a disregard of applicable law.

To begin, CMS affirmatively stated that it had not waived it sovereign immunity. It is recognized law in California that it is Plaintiff's duty, not CMS's, to establish a waiver of sovereign immunity. *See Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 956-57 (E.D. Cal. 2009) citing *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 2007 WL 2701995, *2, 2007 U.S. Dist. LEXIS 67422, *7 (D.Colo.2007); *Dontigney v. Conn. BIAC*, 2006 WL 2331079, *3, 2006 U.S. Dist. LEXIS 55625, *10 (D.Conn.2006); *Morgan v. Coushatta Tribe of Indians of La.*, 214 F.R.D. 202, 205 (E.D.Tex.2001).

Furthermore, CMS did establish that it was operating as an arm of the federally recognized Cherokee Nation and, as such, is entitled to sovereign immunity. Specifically, CMS alleged that it was created pursuant to a Cherokee Nation tribal ordinance, and CMS is technically wholly owned and managed by the Cherokee Nation. In support of this allegation, CMS attached the Articles of Incorporation of CMS which unequivocally state that CMS is wholly owned by the Cherokee Nation. *Articles of Incorporation* attached hereto as *Exhibit C*. The Ninth Circuit recognizes that where the tribe authorizes the entity through a tribal ordinance, and any economic advantages created by the entity "inure[d] to the benefit of the Tribe," immunity of the tribe will extend to the tribal entity. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

In *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006), the Ninth Circuit expanded upon the inurnment of economic advantages requirement, finding that when a tribe owns and operates an entity, "there is no question that these economic and other advantages inure to the benefit of the Tribe." Here, CMS was created pursuant to a tribal ordinance, and is wholly owned by the Cherokee Nation. Thus, the requirements of *Cook* and *Allen* are met herein, and CMS is entitled to

sovereign immunity because it is an arm of the Cherokee Nation. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d at 725.

IV. PLAINTIFF FAILED TO TIMELY FILE HIS COMPLAINT

In his Opposition, Plaintiff alleges that he filed additional charges with the Equal Employment Opportunity Commission ("EEOC") in September of 2012. Plaintiff further alleges that he received a notice of right to sue letter that was dated December 14, 2012. Even assuming this is factually accurate, Plaintiff's Complaint on file with the Court was still filed out of time.

If Plaintiff truly received a Notice of Right to Sue letter on December 14, 2012, he was required to file a claim under 42 U.S.C. § 2000e-5(f)(1) within ninety (90) days. Ninety (90) days from December 14, 2012 is March 14, 2013. Plaintiff's Complaint was filed on March 18, 2013, four (4) days outside the period allowed by statute. *Court Docket Sheet*, attached hereto as *Exhibit D.*

As noted in the Motion to Dismiss, the ninety (90) day period begins running from the "giving of such notice" rather than from the date the Plaintiff actually "receives" the notice. *Scholar v. Pac. Bell*, 963 F.2d 264, 267 (9th Cir. 1992) (internal citations omitted). Therefore, even though Claimant asserts a second Notice of Right to Sue letter was received, he still waited four (4) days too long in filing his Complaint. Accordingly, the Complaint is subject to dismissal.

V. PLAINTIFF FAILED TO ESTABLISH CMS AS HIS EMPLOYER UNDER CALIFORNIA LAW.

In support of his argument that CMS is his employer, Plaintiff offers nothing more than a self-serving affidavit asserting that CMS is his employer. This is in stark contrast to the evidence and authorities offered by CMS. Accordingly, CMS maintains that Plaintiff's Complaint remains subject to dismissal.

As identified in the Motion to Dismiss, California courts look to the "totality of circumstances" regarding the nature of the work relationship when determining whether an entity qualifies as an employer under state law. *Vernon v. State*, 116 Cal. App. 4th 114, 124-26, 10 Cal. Rptr. 3d 121, 129-30 (2004). The most important factor is "the extent of the defendant's right to control the means and manner of the workers' performance is the most important." *Id* (internal citations omitted).

Here, Plaintiff does not dispute CMS was not responsible for the means and manner of Plaintiff's performance. As provided in CMS's contract with the Government, Plaintiff's minimum salary, the location where work was performed, his work schedule, and required skills were all set by the Government, not CMS. *See Contract Exhibit A*; *Task Order Exhibit B* to the Motion to Dismiss [Dkt. 4].

Additionally, it is not disputed that CMS did not exercise any control over Plaintiff once he was contracted out to the Government. California courts recognize that "[i]n all cases, an 'employer must be an individual or entity who extends a certain degree of control over the plaintiff.'" *Vernon*, 116 Cal. App. 4th at 126 citing *Lee v. Mobile County Com'n* (S.D.Ala.(1995) 954 F.Supp. 1540, 1546, affd. 103 F.3d 148. CMS's lack of control over Plaintiff once he was contracted out, combined with the strict control executed by the Government, mandates a finding that CMS is on longer Plaintiff's employer as defined by California statutes once he is contracted out.

VI. TITLE VII PREEMPTION

Plaintiff devotes very little time arguing in opposition to CMS's assertion that California's state statute is preempted by the federal Title VII statute. In fact, it is quite clear that California state law and United State federal law directly conflict in this instance.

It is without dispute that Title VII specifically exempts Indian tribes, including tribal entities, from its coverage. However, the California state statute does not.

Because the federal and state law are in direct conflict, California's state law must give way to application of the federal standards. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577, 180 L. Ed. 2d 580 (2011) *reh'g denied*, 132 S. Ct. 55, 180 L. Ed. 2d 924 (U.S. 2011); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute").

California's state law stands as a hurdle to accomplishing the federal purpose of exempting tribes from liability. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See *Michigan Canners & Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 478, 104 S.Ct. 2518, 2527, 81 L.Ed.2d 399 (1984); *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 156, 102 S.Ct. 3014, 3024, 73 L.Ed.2d 664 (1982). Accordingly, Plaintiff's attempt to interpose California law on CMS should be held legally invalid due to the pre-emption of the same by Title VII.

VII. PLAINTIFF IS NOT ENTITLED TO LEAVE TO AMEND

Most likely realizing the insufficiency of his Complaint, Plaintiff requests leave to amend the same in the event the Court should agree with the arguments presented by CMS in its Motion to Dismiss. CMS asserts that leave to amend should be denied, as any amendment would be futile.

The Ninth Circuit recognizes that it is within the discretion of the trial court whether leave to amend should be granted. *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). In exercising such discretion, leave to amend may be denied when the proposed amendment would be futile. *Id*. *See also Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983), *cert. denied*, 464 U.S. 822 (1983), quoted in *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991) ("futile amendments should not be

permitted."); *Roth v. Garcia Marquez*, *supra*, 942 F.2d at 628 (affirming district court's order denying motion for leave to amend on grounds of futility of amendment); *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, supra*, 701 F.2d at 1293 (affirming district court's order denying motion based on delay and futility).

Plaintiff does not actually identify the proposed amendment; regardless, any amendment to his Complaint would be futile. Plaintiff cannot amend his Complaint so as to take away CMS's status as an arm of the Cherokee Nation, nor may he amend away CMS's right to sovereign immunity. Plaintiff cannot amend the fact that he filed his Complaint out of time, nor may he amend the fact that CMS is not an employer as defined by Title VII. Finally, Plaintiff would be unable to amend the fact that CMS is not an employer as defined by California statutes and that the California statutes are prempted by Title VII. In short, Plaintiff should not be granted leave to amend because the basic, underlying facts and legal arguments of this matter are not subject to amendment. Whether or not Plaintiff amends, CMS will still be entitled to sovereign immunity, and the same defenses that CMS asserts both herein and in its Motion to Dismiss will still apply.

Any amendment on the part of Plaintiff would be an exercise in futility. It is well within this Court's discretion to deny Plaintiff's request to amend on such basis.

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VIII. CONCLUSION

For the reasons discussed herein, and the arguments and authorities presented in its Motion to Dismiss, CMS respectfully requests the Court dismiss Plaintiff's Complaint with prejudice to its re-filing.

DATED: July 19, 2013

LATHAM, WAGNER, STEELE & LEHMAN

s/ Brandy L. Shores/

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Defendant Cherokee Medical Services, LLC's Reply in Support of Motion to Dismiss was filed with the Court's ECF system, which in turn served a true and accurate copy on the following:

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I declare under penalty of perjury under the laws of the United States of America and the State of Oklahoma the foregoing is true and correct.

Executed on **July 19, 2013,** Tulsa, Oklahoma.

/s/*Brandy L. Shores*/