DOCKET NO. 13-16118
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA;
ex rel. Thomas Howard; Robert Weldy,

Relators/ Appellants ,

vs.

SHOSHONE PAIUTE TRIBES, DUCK VALLEY INDIAN RESERVATION,

Defendant/Appellee.

Appeal from the United States District Court for Clark County, Nevada
Case No. 2:10-cv-01890-GMN-PAL

APPELLANT'S REPLY BRIEF

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ARGUMENT

Before this Court is an issue with extraordinary policy implications. Defendant argues that this Court and the District Court lack any jurisdiction to recover funds illegally taken from the United States government solely based upon the fact that Defendant is a federally recognized Indian tribe. Defendant argues that its conduct is beyond the reach of recovery by the United States Government through this False Claims action.

Under Defendant's argument when Congress passed the False Claims Act, Congress effectively allowed Defendant the ability to take money illegally from the Federal Government while the government has no ability to recover these funds.

Members of all branches of government have repeatedly stated that Medicare Fraud is a major issue and must be stomped out. Under President Obama there is an administration-wide commitment to protect American taxpayers from health care fraud. USA Today, Michael Winter, May 2, 2012, *available at* http://content.usatoday.com/communities/ondeadline/post/2012/05/feds-charge-107-with-defrauding-medicare-of-450-million/1#.UuKnmNLTn-s. United States Attorney General Eric Holder estimates that there is between $60 and $90 billion dollars in medicare fraud each year. Forbes, Merrill Mathews, May 31, 2012,

available at

http://www.forbes.com/sites/merrillmatthews/2012/05/31/medicare-and-medicaid-fraud-is-costing-taxpayers-billions/2/.

Senate Majority Leader Harry Reid has also made the crackdown on medicare fraud on of his largest priorities in an attempt to expand the life of medicare for the nations elderly. *Available at* http://www.harryreid.com/index.php/blog/entry/the_alliance_for_retired_americans_award/. Speaker of the House John Boehner has also stated that Medicare Fraud costs tax payers billions and should be stopped. *Available at* http://boehner.house.gov/news/documentsingle.aspx?DocumentID=132758.

It is clear that Medicare fraud is a major issue. It is also clear that the President, the Congress, and the Senate agree that it must be stopped as it is costing United States tax payers billions of dollars per year. Despite all of the clear indications that there is agreement across the board that Medicare fraud must be actively pursued, Defendant argues before this Court not that it did not commit Medicare fraud, not that there is not proof that they committed medicare fraud, but that it does not matter whether they committed medicare fraud, because there is nothing that the government can do.

A. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT ALLOWING RELATORS TO CONDUCT DISCOVERY TO DETERMINE WHETHER THE DEFENDANT WAIVED ITS SOVEREIGN IMMUNITY

Subsequent to the granting of Defendant's Motion to Dismiss, Relators filed a Motion to Alter and Amend pursuant to **FRCP 59**. Exc. Vol. II at 067-085. Specifically, Relators argued that as any information needed to combat Defendant's Motion to Dismiss was in Defendant's sole possession, the District Court should not have granted Defendant's Motion to Dismiss and should have allowed Relators to conduct discovery to determine whether Defendant had waived its sovereign immunity.

It is well settled Ninth Circuit case law that the requirements of **Rule 9(b)** may be relaxed to permit discovery where the evidence of fraud is in Defendant's sole possession. **U.S. ex rel. Lee v. SmithKline Beecham, Inc.**, 245 F.3d 1048, 1051-52 (9th Cir. 2001) (citing **Wool v. Tandem Computers, Inc.**, 818 F.2d 1433, 1439 (9th Cir.1987); **Deutsch v. Flannery**, 823 F.2d 1361, 1366 (9th Cir.1987)). In the present matter Defendant holds sole possession of not only records which would prove Defendant committed fraud against the United States government, but also holds the sole records which would conclusively indicate that the Defendant waived its sovereign immunity with respect to suits such as the

present one when the tribe is operating as a business.

Defendant argues that the evidence and arguments presented by Relators in Relators' Motion to Alter and Amend were presented for the first time when they could have been raised earlier in the litigation. However, these were not new arguments as Defendant suggests. All of Relators' arguments had been previously raised by Relators on several occasions. Relators' Motion to Alter and Amend attempted to clarify Relators' position subsequent to the issuance of the District Court's previous order granting Defendant's Motion for Summary Judgment. In Relators' Motion Relators argued that the District Court erred in finding that the Defendant was not a person such as to be subject to the False Claims Act. In the Motion Relators argued that they should be able to conduct discovery to determine whether the Defendant waived its sovereign immunity (Exc. Vol. II at pp. 71-72) and that Defendant is not immune to suit with regard to false medicare claims (Exc. Vol. II at pp. 72-75). Neither of these arguments were new arguments on behalf of Relators. Additionally, these arguments were made in an attempt to clarify Relators' position after the District Court entered an order which stated that "Indian tribes, like states, are separate sovereigns only subject to suit when, absent a voluntary waiver, Congress has abrogated their immunity. Consequently, Indian tribes are also entitled to the application of the 'longstanding interpretive

presumption' that they are not 'persons' subject to *qui tam* liability under the FCA absent a showing of statutory intent to the contrary." See Exc. Vol. I at p. 11 (citations omitted). As the District Court misapprehended Relators' argument that the tribe had waived its immunity and/or that Relators should be allowed to conduct discovery to determine whether the tribe had waived its immunity, Relators' Motion to Alter and Amend was appropriate.

The heart of Relators' argument that they should be able to conduct discovery to determine whether Defendant waived its immunity was whether Defendant had waived its immunity. The Relators specifically argued in their Opposition to Motion to Dismiss that a tribe could waive its sovereign immunity, and specifically argued that such waivers could be found in a tribe's corporate charter pursuant to **Colorado v. Cash Advance and Preferred Cash Loans**, 205 P.3d 389, 407 (Colo. App. Ct. 2008). (Exc. Vol. II at p. 122 lines 12-17). This was therefore not a new argument presented for the first time at Relators' Motion to Alter and Amend.

Relators' claim that Defendant is not immune from suit with regard to false medicare claims was likewise not a new argument. Relators alleged on numerous occasions that Defendant submitted false medicare claims for which the Federal Government was entitled to reimbursement pursuant to the False Claims Act.

Such claims are contained throughout Relators' Complaint (Exc. Vol. II at pp. 148, 151, 152, and 153) and Relators' Opposition to Motion to Dismiss (Exc. Vol. II at p. 123-24).

Pursuant to an Order by Magistrate Judge Peggy Leen, Relators were unable to conduct any discovery either before or while the motion to dismiss was pending. Exc. Vol. I at 015-026. Because the Magistrate Judge prohibited Relators from conducting discovery, the District Court should have allowed Relators to conduct limited discovery to determine whether the Defendant waived its sovereign immunity. Relators argued that this information was in the hands of Defendant. Exc. Vol. II at 071-072. However, the District Court denied Relator's Motion and upheld its Order dismissing the matter. Exc. Vol. I at 001-007.

Despite the fact that no discovery was allowed, Relators were able to discover that pursuant to the Corporate Charter of the Shoshone-Paiute Tribes of the Duck Valley Reservation Idaho and Nevada which was ratified in 1936, the Defendant had the power "to sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned." Exc. Vol. II at 081.

The waiver contained within the corporate charter was not new evidence presented for the first time on Relators' Motion to Alter and Amend as Defendant and the District Court incorrectly claimed. The waiver issue was an existing argument made by Relators in Opposition to Defendant's Motion to Dismiss. Exc. Vol. II at p. 122 lines 12-17.

Relators' claim that Defendant was not sovereign with regard to false medicare claims was likewise not a new argument. Such claims were made throughout Relators' Complaint (Exc. Vol. II at pp. 148, 151, 152, and 153) and Relators' Opposition to Motion to Dismiss (Exc. Vol. II at p. 123-24).

The arguments presented by Relators in its Motion to Alter and Amend were not new arguments but were clarifications and explanations of Relators' existing arguments. As neither argument were new arguments, the District Court erred in failing to grant Relators' Motion to Alter and Amend upon the basis that they were new arguments raised for the first time on Relators' Motion to Alter and Amend.

Relators should have been afforded the opportunity to determine whether Defendant waived its sovereign immunity. Relators should have been able to discover at a minimum Defendant's Charter, any amendments thereto and any contracts for health services Defendant entered into with the United States

government so that Relators could determine whether Defendant waived its immunity.

B. THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANT IS NOT IMMUNE TO SUIT WITH REGARD TO FALSE MEDICARE CLAIMS

Pursuant to **42 U.S.C. 1320a**:

> (a) Improperly filed claims
>
> Any person (including an organization, agency, or other entity, but excluding a beneficiary, as defined in subsection (i)(5) of this section) that--

Pursuant to this section the definition of person is as broad as possible to include "any person including an organization, agency, or other entity" such that the Federal Government may pursue false claims made by any organization, agency, or other entity who has falsely filed claims with the Federal Government. **42 U.S.C. 1320a-7a**. Organization is defined as "A body of persons (such as a union or corporation) formed for a common purpose." Black's Law Dictionary, 8th ed. at 1133. Entity is defined as "An organization (such as a business **or a governmental unit**) that has a legal identity apart from its members." *Id.* at p. 573.

Two rules of statutory interpretation are important to note. First, "It is a venerable principle of statutory interpretation 'that where the Legislature makes a

plain provision, without making any exception, the courts can make none.'" **Tuan Thai v. Ashcroft**, 366 F.3d 790, 798 (9th Cir. 2004) (citing **Xi v. INS**, 298 F.3d 832, 836 (9th Cir.2002)) (citations omitted in original). Pursuant to **42 U.S.C. 1320a-7a** the only exception present is for beneficiaries as defined in subsection (i)(5) of the section for which Defendant does not qualify. Defendant argues for an unwritten exception to the law, which was not provided for by Congress. This argument ignores the rules of statutory interpretation.

The next issue of statutory interpretation is that "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there." **Freeman v. Gonzales**, 444 F.3d 1031, 1039 (9th Cir. 2006) (citing **BedRoc Ltd., LLC v. United States**, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (quoting **Connecticut Nat. Bank v. Germain**, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992))). In **42 U.S.C. 1320a-7a** Congress defined person to be "Any person (including an organization, agency, or other entity but excluding a beneficiary, as defined in subsection (i)(5) of this section) that--". Through the use of the words organization and entity, of which Defendant would obviously be encapsulated, Congress included Defendant in the definition of person and provided no exception for Defendant.

Through the use of these two bedrocks of statutory interpretation, it is clear that Congress did include Defendant as a person liable for false payments of medicare recoverable by the government and relators through the False Claims Act.

It would be illogical that Congress would set up a Medicare system and system of payments but would allow an entity to which it was paying the sums to defraud the Federal Government. The purpose of the False Claims Act was to combat against entities such as Defendant who wrongfully took sums from the Federal Government. The purpose is to recover those ill-begotten funds and place them back in the checkbook of the Federal Government.

C. THE DISTRICT COURT ERRED IN FINDING THAT SOVEREIGN IMMUNITY BARRED THE ACTION

The District Court erred in finding that Defendant's sovereign immunity divested the Court of jurisdiction. Exc. Vol. I at 008-014. In false claims act cases the relators bring an action on behalf of the United States government. The United States government is the plaintiff. While a tribe may have sovereignty, tribal sovereign immunity may not be interposed against the United States because the United States is a superior sovereign. **U.S. v. Red Lake Band of Chippewa Indians**, 827 F.2d 380, 382 (8th Cir. 1987). In ***Red Lake*** the tribe argued, as the

Defendant argues here, that, unless there is congressional action otherwise, an Indian tribe enjoys sovereign immunity. ***Id.*** However, the Eighth Circuit Court of Appeals held that there is no immunity when the United States government is the entity which the tribe is attempting to exercise the immunity against. ***Id.*** This ruling is seconded by the Ninth Circuit Court of Appeals which has held that "the Tribe's own sovereignty does not extend to preventing the Federal Government from exercising its superior sovereign powers." **United States v. Yakima Tribal Court**, 806 F.2d 853, 861 (9th Cir. 1986) (cert. denied 481 U.S. 1069, (1987)); **United States v. White Mountain Apache Tribe**, 784 F.2d 917, 920 (9th Cir. 1986).

Defendant attempts to argue that the Relators are not the government they are not able to assert that the United States government is a superior sovereign in order to give the District Court jurisdiction to hear the matter. Defendant, however, is mistaken. "The qui tam relator brings the action on behalf of the federal government. The relator stands in the government's shoes—in neither a better nor worse position than the government stands when it brings suit." **U.S. ex rel. Atkins v. McInteer**, 470 F.3d 1350, 1360 (11th Cir. 2006). Defendant's attempt to minimize Relators ability to stand in the Federal Government's shoes in False Claims litigation would emasculate the Act thereby making it difficult or

impossible for relators to pursue the government's interest in numerous instances. This was obviously not the intent of the legislature in enacting the False Claims Act the purpose of which was to encourage such suits to minimize government waste and fraud upon the government.

Where the District Court in ***U.S. v. Menominee Tribal Enterprises*** and Defendant err is that both attempt to liken federally recognized Indian tribes sovereignty to State sovereignty. 601 F. Supp. 2d 1061 (E.D. Wis. 2009). Such a comparison is unfounded. The United States Supreme Court has distinguished State sovereign immunity and Tribal sovereign immunity on the basis that the tribes were not at the Constitutional Convention and thus were not part of the "mutuality of ... concession" that "makes the States' surrender of immunity from suit by sister States plausible." **Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.**, 523 U.S. 751, 756, 118 S.Ct. 1700, 1704 (1998).

It should also be noted that there is no sovereign immunity which can be asserted when a tribe enters into a commercial business. **Somerlott v. Cherokee Nation Distributors, Inc.**, 686 F.3d 1144, 1150 (10th Cir. 2012). Plaintiff alleged in its Complaint that Defendant engaged in a scheme to defraud the Federal Government of tens of millions of dollars to which Defendant would not have otherwise been entitled. Exc. Vol. II at pp. 148-155. At the point that Defendant

began actively engaging in defrauding the Unites States government of tens of millions of dollars Defendant ceased operating within the bounds of running their people and lands as they saw fit and entered into a commercial enterprise of defrauding the Unites States government. The Defendant thus waived its immunity.

D. THE DISTRICT COURT ERRED IN FINDING THAT RELATORS FAILED TO MEET THE REQUIREMENTS OF RULE 59(e)

The District Court improperly held that Relators failed to meet the requirements of **FRCP 59(e)** as Relators failed to bring forth any new evidence which was not otherwise previously publically available (it must be noted that Relators were disallowed to conduct any discovery). Exc. Vol. I at 001-007.

FRCP 59(e) is an appropriate remedy when the district court committed clear error or made an initial determination that was manifestly unjust or when there is newly discovered evidence. **Ybarra v. McDaniel**, 565 F.3d 734, 740 (9th Cir. 2001). Relators claims that the District Court committed clear error in granting the Motion to Dismiss without allowing any discovery whatsoever. The District Court hamstrung the Relators by not allowing discovery then dismissing the case because Relators had not discovered evidence to show that Defendant was not entitled to sovereign immunity.

Relators specifically requested to be allowed to conduct discovery to determine wether such a waiver had been conducted by Defendant. Exc. Vol. II at pp. 71-72. Relators were never allowed to conduct discovery either before or after Defendants' Motion to Dismiss. Relators were never allowed to determine whether a waiver was made by Defendant therefore subjecting them to suit. Despite Relator's request that discovery into even this limited issue be allowed, no discovery was allowed.

The District Court erred in not allowing Relators the opportunity to conduct discovery to determine whether a waiver did in fact take place. This decision would not have prejudiced Defendant in any way, but has costed the federal government tens of millions of dollars as it has been disallowed to recover monies expended to Defendant based upon Defendant's false claims.

REMEDY REQUESTED

For all of the reasons set forth above, Thomas Howard and Robert Weldy request that this Court reverse the District Court's grant of dismissal and remand this matter back to the District Court for trial on the merits.

DATED this 27th day of January, 2014

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

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I hereby certify that:

This brief is proportionally spaced, has a typeface of 14 points or more with a Times New Roman Font and contains no more than 15 pages.

DATED this 27th day of January, 2014

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