UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

DINE DEVELOPMENT CORPORATION
and NOVA CORPORATION

Plaintiffs,

v. **Case No. 1:17-CV-00015 JB/KBM**

ERIN FLETCHER,

Defendant.

REPLY IN SUPPORT OF
APPLICATION FOR PRELIMINARY INJUNCTION

Briefing was complete on Plaintiffs' Application for Preliminary Injunction on February 3, 2017 when Defendant Erin Fletcher failed to file a response brief. But on February 17—two weeks after her response was due—Fletcher filed, without seeking leave of the Court or even contacting Plaintiffs—a Response [Doc. No. 13]. In that Response, Fletcher incorporated by reference arguments that she had made in her earlier filed Answer [Doc. No. 5]. While Plaintiffs believe that the Court should disregard Fletcher's Response on account of its untimeliness, Plaintiffs are submitting this reply brief in the event that the Court considers the arguments made by Fletcher in her Response and her Answer. Plaintiffs note that the issues raised in their Application are time-sensitive as the automatic stay that the AAA put xcvxghcn place will be lifted on March 10, 2017. Injunctive relief is thus necessary on or before that date to avoid the prejudice that will flow from the lifting of the stay.

REPLY

If the Court considers Fletcher's untimely Response, Fletcher has failed in her Response to set forth any legitimate reason that an injunction should not be entered. It appears that

Fletcher's argument hinges entirely on the arbitration clause in the Employment Agreement that Fletcher claims governed her relationship with NOVA. But as Plaintiffs explained in detail in their Application, that arbitration clause does not validly waive NOVA's sovereign immunity (much less DDC's) as the agreement did not comply with *any* of the requirements for a waiver of NOVA's sovereign immunity. Fletcher does not address this in her Response or her Answer whatsoever. It is thus undisputed that NOVA's Board of Directors did not authorize a waiver of sovereign immunity with respect to Fletcher, identify Fletcher as the person for whose benefit waiver was granted, specify the agreement or transaction for which waiver was granted, identify property of NOVA subject to execution in the event of a judgment, or identify the court in which suit could be brought. *See* Application at 13. The Employment Agreement on which Fletcher relies was not in any way authorized by NOVA's Board of Directors, and Fletcher has thus failed to establish that the arbitration clause in that agreement constitutes a valid waiver of NOVA's sovereign immunity. Moreover, Fletcher does not even attempt to explain how NOVA's supposed waiver of immunity is binding on DDC.

While the only argument Fletcher makes in her Response is that the Employment Agreement constitutes a waiver of NOVA and DDC's sovereign immunity, Fletcher argues in her Answer that DDC and NOVA waived their immunity by participating in SBA Section 8(a) Programs. But, Fletcher does not explain how any waiver of immunity for issues related to Section 8(a) contracting extends to the claims for breach of contract and employment discrimination that she has asserted before the AAA. As Plaintiffs explained in their Application, issues regarding Fletcher's employment are not within the scope of NOVA's Section 8(a) waiver and DDC, which does not participate in Section 8(a) programs, has no Section 8(a) waiver.

While Fletcher makes an argument that DDC has waived its sovereign immunity because one or more of its *subsidiaries* entered into Section 8(a) contracts, Fletcher cites no authority for her contention that waiver of a immunity by a tribal subsidiary is also applicable to the tribal parent corporation. And, her argument ignores the well-established fact that parent and subsidiary corporations are distinct legal entities, *see Cruttenden v. Mantura*, 1982-NMSC-021, ¶7, 640 P.2d 932 ("A subsidiary and its parent corporation are viewed as independent corporations"), as well as the explicit steps that DDC must take to waive its sovereign immunity. DDC has never entered into Section 8(a) contracts, it has not waived its sovereign immunity in relation to any claim asserted by Fletcher, and DDC cannot be subjected to the claims Fletcher has asserted.

CONCLUSION

Fletcher has failed to establish the existence of any valid waiver of NOVA or DDC's sovereign immunity in either her Response or her Answer. The Employment Agreement on which Fletcher primarily relies cannot constitute a waiver of NOVA's immunity, and Fletcher fails to explain how NOVA's participation in Section 8(a) programs constitutes a waiver of immunity for the types of claims that Fletcher has asserted. Since Fletcher has failed to identify any waiver of NOVA or DDC's sovereign immunity, the Court should enter a preliminary injunction, on or before March 10, 2017, barring Fletcher from proceeding with her claim before the AAA or in any other forum.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

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WE HEREBY CERTIFY that on this 27th day of February, 2017, we filed the foregoing pleading electronically through the CM/ECF system, and sent a copy of the same by first class U.S. mail to the following, as more fully reflected in the Notice of Electronic Filing:

Erin Fletcher
1933 Lindsay Drive
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MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: */s/Jeremy K. Harrison*
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