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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

Forsythe et al,

Plaintiffs

v.

Reno-Sparks Indian Colony et al,

Defendants

Case Number
2:16-CV-01867-GMN-VCF

PLAINTIFFS' RESPONSE TO DEFENDANTS RENO-SPARKS INDIAN COLONY, STEVE STOUT, VICKY OLDENBURG, STEVE MORAN, AND ARLAN MELENDEZ'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

ORAL ARGUMENT REQUESTED

In ruling on Defendants' motion to dismiss, the Court is presented with two straight-forward issues:

- **Tribal Sovereign Immunity**. Reno-Sparks Indian Colony ("RSIC") inserted a written "Limited Waiver of Sovereign Immunity" clause in a federally funded contract that Plaintiffs submitted the low bid for but were later disqualified due to RSIC's discrimination. Plaintiffs allege RSIC waived immunity to receive the federal funds. Defendants say that the waiver is not effective with regard to Plaintiffs' suit. Have Plaintiffs shown by a preponderance of the evidence that RSIC waived immunity, thus giving this Court Fed. R. Civ. P. 12(b)(1) jurisdiction, if not, should the Court allow

limited jurisdictional discovery before the Court decides Defendants' motion?

- **Color of State Law.** The 42 U.S.C. § 1983 *prima facie* case involves a defendant that deprives a plaintiff of rights secured by the constitution or federal statutes while acting under color of state law. RSIC used federal funds to create bidder qualification specifications and bid procedures for procurement of a federal public works construction contract. Plaintiffs submitted the low bid while also meeting 100% of Defendants' qualification requirements. To award the contract to a man, and in violation of 42 U.S.C. § 6705(e)(1), Defendants created twenty-four new bidder qualifications which lead to Plaintiffs' disqualification and rejection of their bid. A different federal regulation stated Defendants' procurement procedures and policies "will reflect" Nevada public works contracting statutes. Defendants exercised control over the public sector performing acts traditionally reserved for a State of Nevada public works agency. Did Defendants act under color of state law for purposes of 42 U.S.C. § 1983?

INTRODUCTION

RSIC is a federally-recognized Indian tribe. During July 2014 Plaintiffs Jana Forsythe and FEI Construction submitted sealed bids to RSIC for two construction projects on reservation lands. RSIC received money from two executive branch federal agencies to pay for the cost of those two projects: The Economic Development Administration ("EDA"), a bureau within U.S. Department of Commerce, and; The U.S. Department of Housing and Urban Development ("HUD"). Plaintiffs submitted the low bid for the EDA contract and the only bid for the HUD contract, and met all bidder qualification requirements published in Defendants' advertised bid solicitations. Defendants opened Plaintiffs' EDA bid and discovered they were low bidder, then created twenty-four additional bidder requirements in violation of federal statutes and regulations, and used their post-bid qualification requirements to disqualify Plaintiffs and award the contract to another bidder. Defendants opened and publicly read the amount of Plaintiffs' HUD bid, then kept the procurement open for three more weeks to receive other bids, then awarded the contract to one of those other bidders. Plaintiffs brought this

42 U.S.C. § 1983 suit alleging Defendants deprived them of their rights under the constitution and federal statutes while acting under color of state law. Defendants filed a motion to dismiss Plaintiffs' suit claiming sovereign immunity and claiming they were acting under color of tribal law, not state law. This is Plaintiffs' request that the Court deny Defendants' motion.

ARGUMENT

I. RSIC WAIVED ITS TRIBAL SOVEREIGN IMMUNITY

Absent express waiver and consent by an Indian tribe to suit, or congressional authorization for such a suit, a federal court is without jurisdiction to entertain claims advanced against the Indian tribe.[1] To relinquish its immunity, a tribe's waiver must be "clear."[2] In resolving a motion to dismiss, a district court may hear evidence regarding jurisdiction and resolve factual disputes where necessary.[3] Because court's very power to hear case is at issue in Fed. R. Civ. P. 12(b)(1) motion, trial court is free to weigh evidence to determine existence of its jurisdiction; no presumptive truthfulness attaches to plaintiff's allegations, and existence of disputed material facts will not preclude trial court from evaluating for itself merits of jurisdictional claims.[4]

RSIC did not waive immunity simply by accepting federal money and agreeing to comply with federal laws.[5] RSIC inserted a contract provision entitled "Limited Waiver of Sovereign Immunity" into the EDA construction contract.[6] Plaintiffs attached RSIC's waiver clause to the amended complaint.[7] Defendants say Plaintiffs asked RSIC for a "sample waiver of tribal sovereign immunity form" during the EDA procurement, and grudgingly admit that the limited waiver of sovereign immunity language inserted in the EDA contract *may* be an example of what

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[1] Evans v. McKay, 869 F.2d 1341, 1345 (9th Cir. 1989).
[2] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, (1991).
[3] Robinson v. United States, 586 F.3d 683 (9th Cir. 2009).
[4] Materson v. Stokes, 166 F.R.D. 368, 371 (E.D. Va. 1996) (E.D. Va. 1996).
[5] ECF No. 8, p 6-13, ¶¶ 24-51; p 30-32, ¶¶ 140-156.
[6] ECF No. 8, ¶ 71.
[7] ECF No. 8-3, p 32.

an RSIC waiver of immunity "might look like."[8] Defendants say RSIC's waiver must be "clear," and "cannot be implied but must be unequivocally expressed," and assert that RSIC did not waive sovereign immunity for Plaintiff's suit.[9] Because a Fed. R. Civ. P. 12(b)(1) motion is a "speaking motion" and can include references to evidence extraneous to the complaint without converting it to a Fed. R. Civ. P. 56 motion, the district court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). If the court holds an evidentiary hearing to adjudicate the issue of whether the court has jurisdiction, the court determines the credibility of witness testimony, weighs the evidence, and finds the relevant jurisdictional facts.[10] When considering a motion to dismiss under Rule 12(b)(1), the court must determine whether the defendant is facially attacking the complaint or challenging the jurisdictional facts alleged by the plaintiff;[11] a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint; in reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true; or a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends; when reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations; in such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.[12]

Defendants challenge the Court's jurisdiction on both grounds, saying the alleged facts are insufficient to maintain Plaintiffs' claims and they attack the physical evidence Plaintiffs offer. When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed

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[8] ECF No. 17, p 9.

[9] ECF No. 17, p 7.

[10] Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1188 (10th Cir. 2010).

[11] Eaglesun Sys. Prods. v. Ass'n of Vill. Council Presidents, 2014 U.S. Dist. LEXIS 36659, 6 (ND Oka. 2014) (citing Clymore v. United States, 415 F.3d 1113, 1118 n.6 (10th Cir. 2005).

[12] Eaglesun, 2014 U.S. Dist. LEXIS 36659, 6-7 (ND Oka. 2014) (quoting Holt v. United States, 46 F.3d 1000 (10th Cir. 1995).

discovery on the factual issues raised by the motion.[13] A district court has discretion in the manner in which it resolves a motion to dismiss for lack of jurisdiction, and jurisdictional discovery is not required if no party will be prejudiced by the refusal to allow discovery; prejudice is present where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of facts is necessary. The party seeking jurisdictional discovery bears the burden to show that jurisdictional discovery is necessary.[14]

Prejudice is present because Defendants controvert both the facts and evidence alleged in Plaintiffs' amended complaint. The *Eaglesun* plaintiffs sued a tribal corporation, who asked the court to dismiss the complaint on grounds of sovereign immunity. The court denied plaintiff's request for leave to conduct limited discovery on defendant's motion because discovery would be expensive and time-consuming for the parties, and there was a low probability that the discovery would assist the Court in ruling on the jurisdictional issues. Unlike *Eaglesun*, Plaintiffs have a much narrower focus for their jurisdictional discovery and will be prejudiced if not allowed.

The RSIC Constitution and Bylaws[15] and RSIC Ordinances[16] are available on RSIC's website. The RSIC Constitution and Bylaws are silent as to how RSIC waives immunity to suit in federal court. (see Att. A). There are some Ordinances that mention sovereign immunity. In one, RSIC creates the RSIC-Housing Authority ("RSIC-HA") (see Att. B, p 1, ¶ 1), and consented to allow the RSIC-HA to enter into agreements, contracts and understandings with any governmental agency, federal, state or local and to agree to any conditions attached to federal financial assistance (see Att. B, p 5, ¶ 1), but stated that only the RSIC Tribal Council can waive sovereign immunity through written resolution (see Att. C, p 4, ¶ 7).

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[13] Eaglesun, 2014 U.S. Dist. LEXIS 36659, 9 (ND Oka. 2014) (quoting Sizova v. Nat'l Institute of Standards & Technology, 282 F.3d 1320, 1326 (10th Cir. 2002).

[14] Eaglesun, 2014 U.S. Dist. LEXIS 36659, 9 (quoting Breakthrough, 629 F.3d 1173, 1190 (10th Cir. 2010).

[15] http://www.rsic.org/wp-content/uploads/2013/10/Constitution.pdf.

[16] http://www.rsic.org/rsic-services/court-services/tribal-ordinances/.

Regarding jurisdictional discovery, Plaintiffs point to the RSIC limited waiver in the "Construction Contract Terms and Conditions" in the EDA bid documents.[17] RSIC said that that document (and waiver) contained the provisions **required** for the construction of the project.[18] The awardee will have to sign the "Agreement" containing the waiver.[19] RSIC said it would sign the "Agreement."[20] RSIC said that all applicable laws, ordinances, and the rules and regulations of all authorities having jurisdiction over construction of the project shall apply to the contract throughout.[21]

Defendants say there is no contract between RSIC and Plaintiffs; that the limited waiver is not valid for Plaintiffs' suit because it is just part of an unsigned contract.[22] But Plaintiffs have never alleged a contractual relationship with RSIC. None of the counts in the amended complaint relate to a dispute arising out of a contract with RSIC. Plaintiffs believe RSIC would *never* waive immunity unless forced to. So for whom and what purpose did RSIC insert the waiver in the EDA contract? RSIC said the EDA contract was not valid until EDA accepts it.[23] So it's likely RSIC inserted the waiver in the EDA contract to meet an EDA condition. If RSIC had to waive immunity for the EDA construction, RSIC would have had to waive immunity for the EDA procurement too and, by extension, waived immunity for bidders like Plaintiffs and this suit.

II. SOVEREIGN IMMUNITY, CAPACITY, *ULTRA VIRES*

Plaintiffs sue the individual Defendants in both their individual and personal capacities.[24] Defendants say Plaintiffs "purport" to sue individual Defendants in their

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[17] ECF No. 8-3, p 16, ¶ 3.
[18] ECF No. 8-3, p 18, ¶ 7.
[19] ECF No. 8-3, p 19, ¶ 3.
[20] ECF No. 8-3, ¶ 4.
[21] ECF No. 8-3, p 20, ¶ 2.
[22] ECF No. 17, p 9.
[23] ECF No. 8-3, p 32, ¶ 2.
[24] ECF No. 8, p 5, ¶17; p 5-6, ¶ 19.

individual capacities and Plaintiffs are using "pleading tricks" to use individual capacity as an indirect way to get around RSIC's sovereign immunity. Tribal sovereign immunity only extends to tribal officials when acting in their official capacity and within the scope of their authority.[25] Tribal defendants sued in their individual capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties.[26] As the Tenth Circuit has explained:

> The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities . . . . Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.[27]

"The principles reiterated in Maxwell foreclose the tribal defendants' claim to tribal sovereign immunity in this case. The gamblers have not sued the Tribe. The district court correctly determined that the gamblers are seeking to hold the tribal defendants liable in their individual rather than in their official capacities. They "seek[] money damages 'not from the [tribal] treasury but from the [tribal defendants] personally.'"[28] Even if the tribe agrees to pay for tribal defendants' liability, that does not entitle them to sovereign immunity: "The unilateral decision to insure a government officer against liability does not make the officer immune from that liability."[29] Plaintiffs seek relief from the individual Defendants in both their official and individual capacities[30] as a form of alternate, conflicting pleadings permitted by Fed. R. Civ. P. 8

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[25] Pistor v. Garcia, 791 F.3d 1104, 1112 (9th Cir. 2015) (quoting Cook v. AVI Casino Enters., 548 F.3d 718, 727 (9th Cir. 2008)).

[26] Id. at 1112 (citing Maxwell v. County of San Diego, 708 F.3d 1075, 1089 (9th Cir. 2013).

[27] Id. at 1112 (citing Maxwell, 708 F.3d at 1089 (quoting Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1296 (10th Cir. 2008)).

[28] Id. at 1113 (citing Maxwell, 708 F.3d at 1088, quoting Alden v. Maine, 527 U.S. 706, 757 (1999)).

[29] Id. at 1114 (quoting Maxwell, 708 F.3d at 1090).

[30] ECF No. 8, p 5, ¶17; p 5-6, ¶ 19.

which cannot be used to dismiss Plaintiffs' suit.

Defendant Melendez certified RSIC would comply with all federal laws and regulations applicable to the EDA grant.[31] Plaintiffs stated federal laws and regulations applicable to the EDA procurement.[32] Defendants violated every single one.[33] One federal statue provides that "No requirement or obligation shall be imposed as a condition precedent to the award of a contract unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications."[34] After Defendants opened Plaintiffs' bid they created twenty-four new bidder qualification requirements and used their **unpublished** qualification requirements to disqualify Plaintiffs and reject their bid.[35] Not one post-bid qualification requirement was in Defendants' published bid solicitation therefore each one violates the 42 U.S.C. § 6705(e)(1) time of publication requirement.[36] And most on their face violate 42 U.S.C. § 6705(e)(1) because they are biased towards Washoe County contractors and were written purposely to disqualify Plaintiffs, who are Clark County contractors.

Defendants allege they were "acting under color of tribal law," in other words, they were acting under authority of the RSIC Constitution and Bylaws, which expressly subjects their "Powers" to act "to any limitations imposed by the laws or the Constitution of the United States," (see Att. A, p 4). Defendants did not act under color of tribal law nor are they protected by sovereign immunity because they acted beyond and outside of their authority under RSIC's Constitution by violating **every** federal statute and regulation applicable to the EDA procurement.

As a first principle, it is important to note that the capacity in which an official acts when engaging in the alleged unconstitutional conduct does not determine the capacity in which the

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[31] ECF No. 8, pp 7-8, ¶ 33.
[32] ECF No. 8, pp 11-13, ¶¶ 48-51.
[33] ECF No. 8, pp 13-29, ¶¶ 52-135.
[34] ECF No. 8, pp 11-12, ¶ 49.
[35] ECF No. 8, pp 17-24, ¶¶ 71-111.
[36] ECF No. 8-3, pp 16-20.

official is sued.[37] Official capacity is best understood as a reference to the capacity in which the officer is sued, not the capacity in which the officer inflicts the alleged injury.[38] Tribal sovereign immunity ordinarily does not preclude prospective relief against tribal officers or employees when their actions are alleged to violate federal law, and it does not apply to actions taken by tribal members in their individual capacities. Tribal officers or other agents do not partake fully of the immunity possessed by tribes.[39] Tribal officers and other agents do not partake fully of the immunity possessed by tribes; analogizing to *Ex parte Young,* tribal immunity does not bar a lawsuit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct.[40] A broader range of relief may be available than the prospective relief normally associated with *Young*; we have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the state.[41] Tribal council members are not entitled to immunity in suits for declaratory relief.[42] Tribe's immunity may extend to tribal official in their official capacity, provided the tribe had the authority to take the action it delegated to the official.[43] A tribal chief sued in official and personal capacities enjoys immunity from suit only to the extent that he is sued in his official capacity for acts within the scope of his tribal authority.[44] Pueblo governor possessed immunity from damages verdict with respect to alleged discrimination in leasing relationship where trial evidence established that he acted within the scope of his authority as a Pueblo official when he issued the challenged directive.[45] A tribal official, even if sued in an individual capacity, is only stripped of tribal immunity when he acts

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[37] Hafer v. Melo, 502 U.S. 21, 31 (1991); Porter v. Jones, 319 F.3d 483, 491 (9th Cir. 2003).

[38] Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990).

[39] Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014).

[40] Id. at 2035.

[41] Okla. Tax Comm'n, 498 U.S. at 514.

[42] T T E A v. Ysleta Del Sur Pueblo, 181 F.3d 676, 680 (5th Cir. 1999).

[43] Davids v. Coyhis, 869 F. Supp. 1401, 1410 (E.D. Wis. 1994).

[44] U.S. v. Yakima Tribal Court, 806 F.2d 853, 860 (9th Cir. 1986).

[45] Cook v. AVI Casino Enters., 548 F.3d 718, 727 (9th Cir. 2008).

"without any colorable claim of authority."[46] In tort and state civil rights suit against tribal law enforcement officers, defendants required to show that they "performed discretionary or policymaking functions [for the Tribe] so that exposing them to liability would not undermine immunity of Tribe itself."[47]

III. 42 U.S.C. § 1983 CLAIMS

Section 1983 provides a cause of action against persons acting under color of state law who have violated rights guaranteed by the Constitution.[48] Section 1983 can provide a cause of action against persons acting under color of state law who have violated rights guaranteed by federal statutes.[49] Section 1983 can be used as a mechanism for enforcing the rights guaranteed by a particular federal statute only if (1) the statute creates enforceable rights and (2) Congress has not foreclosed the possibility of a 42 U.S.C. § 1983 remedy for violations of the statute in question.[50] To determine whether the federal statute has created rights enforceable through 42 U.S.C. § 1983, the court considers whether the statute (1) is intended to benefit the class of which the plaintiff is a member; (2) sets forth standards, clarifying the nature of the right, that make the right capable of enforcement by the judiciary; and (3) is mandatory, rather than precatory, in nature.[51] To determine whether the federal statute forecloses the possibility of a 42 U.S.C. § 1983 action, the court considers whether the statute contains (1) an express provision precluding a cause of action under 42 U.S.C. § 1983 or (2) a comprehensive enforcement scheme that is incompatible with individual enforcement under 42 U.S.C. § 1983.[52] Section 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the

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[46] Oberloh v. Johnson, 768 N.W.2d 373, 376 (Minn. Ct. App. 2009).

[47] Turner v. Martire, 82 Cal. App. 4th 1042, 99 Cal. Rptr. 2d 587, 595 (2000).

[48] Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995).

[49] Gonzaga Univ. v. Doe, 536 U.S. 273, 279 (2002).

[50] Dittman v. California, 191 F.3d 1020, 1027-28 (9th Cir. 1999).

[51] Day v. Apoliona, 496 F.3d 1027, 1035 (9th Cir. 2007).

[52] City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)); Dittman, 191 F.3d at 1028.

underlying constitutional right.[53] A person deprives another of a constitutional right within the meaning of 42 U.S.C. § 1983 if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.[54] The requisite causal connection may be established when an official sets in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional harms.[55]

IV. RSIC & OTHER DEFENDANTS CAN BE 42 U.S.C. § 1983 PLAINTIFFS OR DEFENDANTS

The motion to dismiss cites *Inyo County* [56] and says that Indian tribes "are not subject to suit under 42 U.S.C. § 1983." But that was not the *Inyo* holding—it was the Court's assumption and the opinion of the parties and, as *amicus curiae,* the United States. The Indian tribe in *Inyo* was the plaintiff. The Court held that the Indian tribe was not a "person" who could sue under 42 U.S.C. § 1983 to vindicate its sovereign rights because § 1983 was intended to secure private rights against state and local governments.[57] Concurring, Justice Stevens argued that an Indian tribe was a person who could sue under 42 U.S.C. § 1983, but the plaintiff did not state a 42 U.S.C. § 1983 cause of action because its claim was based on its sovereign status.[58] An Indian tribe can be a 42 U.S.C. § 1983 plaintiff if not suing as a sovereign to enforce sovereign rights. Indian tribe as plaintiff sued under 42 U.S.C. § 1983 alleging that state treasury officials violated its constitutional and statutory rights when they offset for back taxes federal funds that the state was obligated to transfer to the tribe. After analyzing *Inyo County*, the Sixth Circuit reversed the

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[53] Daniels v. Williams, 474 U.S. 327, 329-30 (1986).

[54] Preschooler II v. Clark Cty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)).

[55] Kwai Fun Wong v. U.S. INS, 373 F.3d 952, 966 (9th Cir. 2004); Gilbrook v. City of Westminster, 177 F.3d 839, 854 (9th Cir. 1999).

[56] Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701 (2003).

[57] Id. at 704-705 (per Justice Ginsburg

[58] Id. at 712.

district court's ruling that the plaintiff could not use 42 U.S.C. § 1983 and remanded to determine whether the plaintiff was entitled to the federal funds (a) only as a result of its sovereignty, or (b) simply because it provides social services. If the latter, then it would be able to sue under 42 U.S.C. § 1983 so long as other private, nonsovereign entities could likewise sue under § 1983.[59] An Indian tribe can be a 42 U.S.C. § 1983 defendant if Congress authorizes the suit or if the tribe waives sovereign immunity, and acts under color of state law, not tribal law. Tribal officers who are authorized to enforce state as well as tribal law, and proceed to exercise both powers in the operation of a roadblock, will be held to constitutional standards in establishing roadblocks.[60] Section 1983 requires a causal relation between the conduct of defendants and the plaintiff's constitutional deprivation, the same personal involvement and causal relation are necessary, the use of the word "cause" in 42 U.S.C. § 1983 supports this conclusion.[61] All Defendants can be defendants in Plaintiffs' suit.

V. MUNICIPALITY OR LOCAL GOVERNMENT LIABILITY

Plaintiffs do not assert respondeat superior-based claims against Defendants in their 42 U.S.C. § 1983 counts. Local governing bodies can be sued directly under 42 U.S.C. § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.[62] A local government will be found to be liable under a ratification theory for the decision of a high-ranking official only when the local government ratifies the reasons for the decision in addition to the decision itself.[63]

Plaintiffs allege RSIC waived immunity for the EDA contract. RSIC is a "person" whose taxonomy under 42 U.S.C. § 1983 could be either a municipality or a non-sovereign

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[59] Keweenaw Bay Indian Cmty. v. Rising, 569 F.3d 589, 596 (6th Cir. 2009).

[60] Bressi v. Ford, 575 F.3d 891, 897 (9th Cir. 2009).

[61] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978).

[62] Id. at 690.

[63] St. Louis v. Praprotnik, 485 U.S. 112 (1988).

private entity exercising control over the public sector.[64] The amended complaint alleges facts and advances alternative theories where RSIC is a municipality or a non-sovereign private entity exercising control over the public sector while acting under color of state law—not tribal law.[65]

Municipalities are among those persons to whom § 1983 applies.[66] Municipal officials are also persons for purposes of § 1983.[67] The amended complaint includes a count against RSIC and Defendant Melendez, its Tribal Chairman, under policy, custom, and failure to train.[68] A heightened pleading standard is not required unless required by the Fed. R. Civ. P.[69] There is no heightened pleading standard to meet the policy or custom requirement to demonstrate municipal liability in § 1983 suits.[70] A claim of municipal liability under § 1983 cannot be dismissed even if the claim is based on a bare allegation that the individual defendants' conduct conformed to official policy, custom, or practice.[71] Because vicarious liability is inapplicable to § 1983 suits, plaintiffs must plead that each official defendant of a municipality, through that official's own individual actions, deprived plaintiffs of rights under the Constitution or a federal statute.[72] A local governmental unit may not be held responsible for the acts of its employees under a respondeat superior theory of liability.[73] Because vicarious liability is inapplicable to Bivens and 42 U.S.C. § 1983 suits, a plaintiff must plead that each government official defendant, through the official's own individual actions, has violated the Constitution.[74] When a

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[64] ECF No. 8-3, p32, ¶ 1.

[65] ECF No. 8, pp 38-43, ¶¶ 194-210.

[66] Monell, 436 U.S. at 690.

[67] Id. at 691.

[68] ECF No. 8, pp 64-68, ¶¶ 282-295.

[69] Empress L.L.C. v. City & Cty. of S.F., 419 F.3d 1052, 1056 (9th Cir. 2005).

[70] Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167-68 (1993).

[71] Karim-Panahi v. L.A. Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988) (quoting Shah v. County of L.A., 797 F.2d 743, 747 (9th Cir. 1986)).

[72] Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

[73] Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997); Collins v. City of Harker Heights, 503 U.S. 115, 121 (1992); City of Canton v. Harris, 489 U.S. 378, 385 (1989).

[74] Ashcroft, 556 U.S. at 676.

supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates; therefore, a plaintiff must go beyond the respondeat superior theory of liability and demonstrate that the alleged constitutional deprivation was the product of a policy or custom of the local governmental unit, because municipal liability must rest on the actions of the municipality, and not the actions of the employees of the municipality.[75] Section 1983 plaintiffs must prove that an action pursuant to official municipal policy caused their injury.[76] Regardless of what theory the plaintiff employs to establish municipal liability—policy, custom or failure to train—the plaintiff must establish an affirmative causal link between the municipal policy or practice and the alleged constitutional violation.[77] The policy or custom requirement for a 42 U.S.C. § 1983 claim against a municipality applies whether the remedy sought is money damages or prospective relief.[78] A policy of inaction may be a municipal policy within the meaning of *Monell*.[79] Ratification of the decisions of a subordinate by an official with final decision-making authority can also be a policy for purposes of municipal liability under 42 U.S.C. § 1983.[80] The plaintiff may also establish municipal liability by demonstrating that the alleged constitutional violation was caused by a failure to train municipal employees adequately.[81] Such a showing depends on three elements: (1) the training program must be inadequate in relation to the tasks the particular officers must perform; (2) the city officials must have been deliberately indifferent to the rights of persons with whom the local officials come into contact; and (3) the inadequacy of the training must be shown to have actually caused

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[75] Bd. of the Cty. Comm'rs, 520 U.S. at 403; City of Canton, 489 U.S. at 385.

[76] Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154, 1167-68 (9th Cir. 2014).

[77] City of Canton, 489 U.S. at 385-92; Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996).

[78] L.A. Cty. v. Humphries, 562 U.S. 29, 34 (2010).

[79] Waggy v. Spokane Cty. Wash., 594 F.3d 707, 713 (9th Cir. 2010).

[80] St. Louis, 485 U.S. at 127.

[81] City of Canton, 489 U.S. at 388-91; Price v. Sery, 513 F.3d 962, 973 (9th Cir. 2008); Blankenhorn v. City of Orange, 485 F.3d 463, 484-85 (9th Cir. 2007).

the constitutional deprivation at issue.[82] The indifference of officials may be shown where, in light of the duties assigned to specific employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need.[83]

Defendants' motion characterizes Plaintiffs' pleadings as containing a few threadbare facts and clouds of conclusory arguments. That is not accurate. The pleadings separate the facts into either the EDA or HUD procurement. There are twenty-three pages with 109 paragraphs of fact allegations relating to the EDA procurement and the EDA Defendants.[84] Most paragraphs describe specific statements and acts of specific EDA Defendants. Many of the EDA factual allegations are supported with exhibits attached to the amended complaint. Many exhibits are Defendants' documents obtained through FOIA. There are only four paragraphs alleged "upon information and belief."[85] Plaintiffs put the explanations of their legal theories in a nine-page section of the amended complaint with the heading "Legal Context" to create a bright line between statements of fact for the Court and Defendants. There are thirty-one paragraphs of material fact-based legal theories that Plaintiffs allege in good faith and that align EDA and HUD facts with current 42 U.S.C. § 1983 case law.[86] The pleadings notify and inform individual HUD and EDA Defendants of each specific count and facts alleged against them.

VI. NON-SOVEREIGN PRIVATE ENTITIES AND COLOR OF LAW

The pleadings identify the Defendants and the fact that Plaintiffs sue them in their individual and official capacities.[87] Generally, private parties do not act under color of state law.[88]

The hardest state action cases are those in which a private person or entity acts

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[82] Merritt v. County of L.A., 875 F.2d 765, 770 (9th Cir. 1989).

[83] City of Canton, 489 U.S. at 390; Berry v. Baca, 379 F.3d 764, 767 (9th Cir. 2004).

[84] ECF No. 8, pp 6-29, ¶¶ 27-135.

[85] ECF No. 8, ¶¶ 54, 77b, 97, 299.

[86] ECF No. ¶¶ 179-210.

[87] ECF No. ¶¶ 17, 19.

[88] Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991).

> with some governmental involvement; the question then becomes whether such private conduct ought to be treated as if it were governmental conduct; there are no hard and fast rules for determining the presence of state action; the state action inquiry must be made on a case-by-case basis; it is impossible to fashion and apply a formula for state responsibility or action under the Equal Protection Clause.[89]

State action exists where the state and the private party or entity maintain a sufficiently interdependent relationship.[90] State action exists where the state requires, encourages, or is otherwise significantly involved in nominally private conduct.[91] State action exists where the private person or entity exercises a traditional state function.[92] There must be a *nexus* between the challenged conduct and the state.[93] None of the state action approaches used by the Supreme Court is exclusive of any of the others; not only is there considerable overlap, but the Court itself frequently considers the applicability of all three in many state action cases.[94] The Supreme Court may in effect be using a balancing test in its state action case analysis. If this is so, then the importance of Plaintiffs' 42 U.S.C. § 1983 equal protection and free speech constitutional claims should be a significant factor in the Court's decision to dismiss the amended complaint.

In a case where the federal legislation that created Amtrak declared that it was not a government entity, the Supreme Court held that even though Congress declared that Amtrak was private, that declaration was not determinative of governmental status and thus, was not determinative for 42 U.S.C. § 1983 constitutional purposes either.[95] As applied to states and

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[89] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[90] Id. at 723.

[91] Lombard v. Louisiana, 373 U.S. 267, 273-74 (1963).

[92] Marsh v. Alabama, 326 U.S. 501, 504-05 (1946); Smith v. Allwright, 321 U.S. 649, 664-66 (1944).

[93] Jackson v. Metro. Edison Co., 419 U.S. 345, 350-52 (1974).

[94] Flagg Bros. v. Brooks, 436 U.S. 149, 154-66 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 305-58 (1974).

[95] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394-400 (1995).

local governments, this means that it is power and control that are crucial for governmental status purposes, and not what states and local governments themselves say about the purportedly private status of their creation. The amended complaint sets forth the purpose and power and control RSIC and the other Defendants exerted over the private sector during the EDA and HUD procurements.[96] And eight counts based on those factual allegations and legal theories describe how Plaintiffs were deprived of their Fourteenth Amendment rights to Free Speech and Equal Protection, Interstate Travel, Substantive Due Process, Interstate Commerce, and Due Process. Because Plaintiffs are challenging the constitutionality of Defendants' procedures and not merely alleging their misuse or abuse, Plaintiffs were deprived of their rights through state action and the private Defendants therefore acted under color of law. The Court should apply the two-part test the Supreme Court used in *Luger*:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state, or by a rule of conduct imposed by the state, or by a person for whom the state is responsible .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor because he is a state official, or because he has acted together with or has obtained significant aid from state officials or because his conduct is otherwise chargeable to the state.[97]

Plaintiffs' deprivation of rights satisfies the first *Lugar* test—it occurred under color of Nevada law because EDA told RSIC that its procurement policies and procedures "will reflect" (see Att. D) State of Nevada public works policies and law,[98] and must conform to federal statutes and regulations.[99] RSIC's contemporaneous statements make obvious that it knew it was acting under color of Nevada law—not tribal law. RSIC stated that it would only receive

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[96] ECF No. 8, pp 2-43, ¶¶ 1-210.

[97] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

[98] ECF No. 8, p 12, ¶ 50.

[99] ECF No. 8, p 12, ¶ 50.

bids from "qualified Nevada licensed contractors."[100] RSIC said all bidders and their bonding companies "must be licensed to do business in Nevada."[101] RSIC investigated Plaintiffs' Nevada bidder qualifications and licensing.[102] RSIC said the construction contract was not governed by tribal law.[103] Plaintiffs satisfy *Lugar's* second test; employees of the State of Nevada, University of Nevada, Reno, played a significant role providing research and assistance to ensure that RSIC's EDA grant application met the EDA investment guidelines.[104]

A professional gambler who was arrested by security guard at casino for trespassing and obstructing the duties of a police officer, sued casino and others alleging unconstitutional arrest; court found that casino's acts were state action under joint action test because of system of cooperation and interdependence with Las Vegas police department.[105] An ordinance granting redevelopment powers, including the power of eminent domain, to a private redevelopment corporation; held that "the delegation under state law of powers possessed by virtue of state law and traditionally exercised by the City satisfies us that the City's action here is under color of state law".[106] A private corporation that did drug testing for Kentucky courts violated Fourth Amendment rights arising from "direct observation" method used.[107] Where challenge was to private apartment complex's adults only policy, there was a symbiotic relationship alleged between the complex and Los Angeles County.[108] Termination by public housing authority of the plaintiff was state action despite authority's claim that its action was mandated by federal regulations and was therefore federal action not governed by 42 U.S.C. § 1983.[109] Volunteer fire

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[100] ECF No. 8-3, p 16, ¶ 1.
[101] ECF No. 8-3, p 16, ¶ 4.
[102] ECF No. 8-3, pp 9-12.
[103] ECF No. 8-3, p20, ¶ 2.
[104] ECF No. 8, pp 6-7, ¶¶ 27-31.
[105] Tsao v. Desert Palace, Inc., 698 F.3d 1128 (9th Cir. 2012).
[106] Williams v. St. Louis, 783 F.2d 114, 117 (8th Cir. 1986).
[107] Norris v. Premier Integrity Solutions, Inc., 641 F.3d 695 (6th Cir. 2011).
[108] Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).
[109] Lubcke v. Boise City/Ada Cty. Hous. Auth., 124 Idaho 450, 860 P.2d 653 (1993).

department's dismissal of fireman was state action, symbiotic relationship existed.[110] Plaintiff sued volunteer fire department alleging sex discrimination; court reversed district court's grant of summary judgment for the defendant on state action grounds because there were material issues of fact in dispute: even though there was no symbiotic relationship or nexus, still firefighting might be an exclusive public function; this public function inquiry was a very fact-specific one and its "outcome hinges on how a given state itself views the conduct of the function by the private entity;" in this case the parties should be allowed to introduce evidence as to the function of firefighting in the state of Maryland and not be bound by the district court's "own unexplained conclusions" that constituted "unsubstantiated judicial notice."[111]

Defendants' motion cites *Bressi v. Ford* [112] as authority for the "well established rule that a 42 U.S.C. § 1983 claim cannot be maintained against defendants who act under color of tribal rather than state law."[113] That is the rule, but *Bressi* more importantly illustrates how defendants acting under color of tribal law one second can be deemed to be acting under color of state law the next. *Bressi* is a case where Indian tribal police that normally act under color of tribal law are found to have acted under color of state law. In *Bressi* a non-Indian sued tribal officers under § 1983 and the Fourth Amendment after he was stopped and cited at a roadblock on a state highway crossing the tribe's reservation. Disagreeing with the district court which had ruled that stopping the plaintiff was an exercise of tribal authority and thus not actionable under 42 U.S.C. § 1983, the Ninth Circuit observed that the roadblock was set up on a state highway, albeit within the reservation and thus part of Indian country. Here, the defendants were authorized under tribal law to stop and arrest Indian violators of tribal law traveling on the highway. They were also authorized to stop vehicles to determine whether the driver was Indian or non-Indian. If non-Indian, and a state or federal law was apparently violated, tribal officers could detain the non-Indian in order to turn him or her over to state or federal authorities. The

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[110] Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979).

[111] Haavistola v. Cmty. Fire Co., 6 F.3d 211, 218 (4th Cir. 1993).

[112] Bressi, 575 F.3d 891.

[113] ECF No. 18, p. 14, ¶ 2.

tribal officers were authorized to enforce state law against non-Indian drivers on the state highway. Once the defendants went beyond determining that the plaintiff was a non-Indian, and treated his refusal to provide his driver's license as a violation of state law, they acted under color of state law; the roadblock functioned not merely as a tribal exercise, but also as an instrument for the enforcement of state law; on remand plaintiff could argue that the roadblock violated the Fourth Amendment.[114]

The *Bressi* contours align with Plaintiffs' material facts and legal theories. Plaintiffs are non-Indians.[115] Defendants are a federally-recognized Indian tribe and employees or agents.[116] Both deprivations of Plaintiffs' rights occurred exclusively or mostly on reservation land.[117] Employee/agents of both tribes have authorization or are directed to act under state law.[118] Employee/agents of both tribes act under state law or under their own rules that reflect state law and determined non-Indian Plaintiffs are in violation of those laws.[119] Tribes and employees/agents act under color of state law.[120] The *Bressi* court also held that summary judgment based on the § 1983 color of law test is inappropriate if there is a factual issue to

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[114] Bressi, 575 F.3d at 897.

[115] Bressi, 575 F.3d at 893 (motorist arrested by tribal police was a non-Indian) See ECF No. 8, ¶ 7-9 (FEI is a corporation and, not alleged, but Jana Forsythe is a non-Indian).

[116] Bressi, 575 F.3d at 893 (three officers and a police chief) See ECF No. 8, ¶ 10-13, 15 (three officials and a tribal chairman).

[117] Bressi, 575 F.3d at 894 (Indian tribe and employees operating roadblock on state highway that runs through reservation) See ECF No. 8, ¶ 28, 52-139, 140-174 (generally, most acts of Defendants alleged as deprivations of Plaintiffs rights occurred in RSIC offices located on tribal lands), ECF No. 8, Exhibit A, p. 10, (RSIC owns Spanish Springs and land is part of RSIC reservation).

[118] Bressi, 575 F.3d at 894-95 (Indian tribe and employees authorized to enforce tribal law and state law; could eject non-tribal members from tribally-controlled areas; certification from state board authorized Indian tribe and employees to investigate violations of state law and federal law) See ECF No. 8, ¶ 50a (Indian tribe and employees directed to use procurement policies and procedures that "reflect" state law) See also Attachment F (definition of "reflect").

[119] Bressi, 575 F.3d at 894 (Tribe and defendants determine facts and enforce their decision against non-Indian plaintiff for violations of state law: failure to provide driver's license or proof of identity and failure to comply with a police officer's lawful order) See ECF No. 8, ¶ 60-123, ¶ 140-174 (Tribe and defendants created rules and specifications that "embody" state law, determined facts and enforced their decisions against non-Indian Plaintiffs).

[120] Bressi, 575 F.3d at 895 (Tribal employees acted under color of state law) See ECF No. 8, ¶ 203-201 (Application of Tribal employees' acts to 42 U.S.C. § 1983 color of law claim elements, alternatively, for a local government and a non-sovereign private entity).

determine if the tribal officers acted under color of tribal law and are protected by tribal sovereign immunity, or if they acted under color of state law and are not protected.[121]

VII. OTHER ARGUMENTS

A. **Independent claim.** Plaintiffs' 42 U.S.C. § 1983 count based on 42 U.S.C. § 6709 is also independent of 42 U.S.C. § 1983 and not subject to the color of law test.

B. **Defendant Oldenburg.** Plaintiffs do not allege Defendant Oldenburg owed them a special duty because she is an attorney. Today, Plaintiffs don't know the identities of every person who conceived, participated in, supported, and ratified the decisions to disqualify Plaintiffs' bid (EDA) and publicly disclose their bid amount and then give other bidders three-weeks to submit competing bids (HUD). But Defendant Oldenburg was brought in to consult with Defendants Stout, Moran, and Cendagorta regarding Plaintiffs' sovereign immunity question.[122] Defendant Oldenburg participated in and ratified the disqualification decision, copying Defendants Moran and Stout on her letter.[123] Defendant Oldenburg conceived and issued the threat of retaliation.[124] Defendant Oldenburg was personally aware of and approved the HUD bid extension decision.[125] She did all those things without ever questioning the basis or propriety of that decision—not as an attorney—but as a 42 U.S.C. § 1983 "person." Defendants' motion says Defendant Oldenburg just wrote letters and emails on behalf of RSIC. But that is all the other Defendants did too. Nuremburg? Defendant Oldenburg defamed Plaintiffs. Her statements were defamation *per se* in light of the fact Plaintiffs met 100% of Defendants' published bidder qualification requirements. And RSIC is her client—not Defendants Stout and Moran. Therefore, by publishing her defamatory statements to Defendants Stout and Moran she published to third parties for defamation purposes.[126] The

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[121] Bressi, 575 F.3d at 895-899.

[122] ECF No. 8, p 18, ¶ 77b, and ECF No. 8-3, p 30.

[123] ECF No. 8, pp 25-26, ¶¶ 117-118, and ECF No. 8-5, p 20.

[124] ECF No. 8, pp 26-27, ¶¶ 119-123; and ECF No. 8-5, p 22, ¶ 3.

[125] ECF No. 8, p 22.

[126] ECF No. 8-5, p 20.

proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity.[127] Absolute freedom from the threat of unfounded lawsuits is the rare exception to the rule.[128] Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.[129] The Supreme Court has set forth a two-part analysis for resolving government officials' qualified immunity claims.[130] First, the court must consider whether the facts taken in the light most favorable to the party asserting the injury show that the defendant's conduct violated a constitutional right.[131] Second, the court must determine whether the right was clearly established at the time of the alleged violation.[132] The doctrine of qualified immunity protects government officials from liability for civil damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.[133] The reasonableness inquiry is objective; the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.[134]

C. **Conspiracy.** It is necessary for a 42 U.S.C. § 1983 conspiracy claim that a constitutional deprivation be alleged and proved. A conspiracy standing alone is insufficient.[135]

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[127] Antoine v. Byers & Anderson, 508 U.S. 429, 432 (1993); see also Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993); Ewing v. City of Stockton, 588 F.3d 1218, 1234 (9th Cir. 2009).

[128] Meyers v. Contra Meyers v. Contra Meyers v. Contra Costa Cty. Dep't of Soc. Servs., 812 F.2d 1154, 1158 (9th Cir. 1987); see also Antoine, 508 U.S. at 432 n.4; Burns v. Reed, 500 U.S. 478, 486-87 (1991).

[129] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[130] See Saucier v. Katz, 533 U.S. 194, 201 (2001), overruled in part on other grounds by Pearson v. Callahan, 555 U.S. 223, 236 (2009).

[131] Id. at 201; see also Scott v. Harris, 550 U.S. 372, 377 (2007); Brosseau v. Haugen, 543 U.S. 194, 197 (2004) (per curiam).

[132] Saucier, 533 U.S. at 201; Wood v. Moss, 134 S. Ct. 2056, 2066-67 (2014).

[133] See Saucier, 533 U.S. at 201; Brosseau, 543 U.S. at 199-201;

[134] Graham v. Connor, 490 U.S. 386, 397 (1989). See also Plumhoff v. Rickard, 134 S. Ct. 2012, 2020-21 (2014); Castro v. County of L.A., 797 F.3d 654, 663-64 (9th Cir. 2015).

[135] Dixon v. Lawton, 898 F.2d 1443, 1449 (10th Cir. 1990).

In retaliation cases, at least, adequate notice to a defendant might require some statement of the essential facts constituting the retaliation.[136] The Ninth Circuit rejected any pleading distinction between civil rights claims against individuals (even those involving improper motive and qualified immunity) and those against local governments.[137] Plaintiffs have alleged facts that meet the 42 U.S.C. § 1983 and Nevada elements of conspiracy and Fed. R. Civ. P. pleading standards.

D. **Negligent failure to protect.** Nevada Supreme Court adopts the approach taken by the Restatement (Second) of Torts, which defines the duty as one of reasonable care to prevent intentional harm or to avoid an unreasonable risk of harm, when such harm is foreseeable. To recover in a negligence action, a plaintiff must demonstrate (1) that the defendant owed the plaintiff a duty of care, (2) that the defendant breached that duty, (3) that breach of the duty caused harm to the plaintiff that was reasonably foreseeable, and (4) damages.[138]

E. **Supplemental jurisdiction.** A federal court has the power to decide such claims where they are joined with a substantial federal claim over which the federal court has jurisdiction, provided that the substantial federal claim and the joined state or federal claim derive from a common nucleus of operative fact and the plaintiff would ordinarily be expected to try them all in one judicial proceeding.[139] Pendent jurisdiction has long been considered discretionary with the federal district court and could be exercised even though a plaintiff was ultimately unsuccessful on a substantial federal claim.[140]

F. **Costs.** A prevailing defendant may be awarded attorney's fees in the court's

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[136] Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002).

[137] Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

[138] Butler v. Bayer, 123 Nev. 450 (2007).

[139] Rosado v. Wyman, 397 U.S. 397, 405 (1970)

[140] The Supreme Court seemed to encourage the use of pendent jurisdiction and limit a district court's discretion to reject it in Hagans v. Lavine, 415 U.S. 528, 545-46 (1974), where it said: given advantages of economy and convenience and no unfairness to litigants, the doctrine contemplates adjudication of these pendent claims.

discretion only "upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith."[141] Simply because a defendant ultimately prevails, it does not follow that the 42 U.S.C. § 1983 claim was groundless at the outset. This post hoc approach is not appropriate under the fee statute because it would discourage plaintiffs from bringing 42 U.S.C. § 1983 claims whose outcomes are not certain.[142]

G. **Pride.** Defendants say they awarded the two contracts that Plaintiffs lost "to more qualified construction companies."[143] But Plaintiffs met 100% of Defendants' published requirements in the bid solicitation. By definition, there weren't "more qualified contractors"—there were only "other" qualified contractors.

Respectfully submitted,

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[141] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); see also Gen. Camera Corp. v. Urban Dev. Corp., 734 F.2d 468 (2d Cir. 1984) (per curiam) and Green v. Ten Eyck, 572 F.2d 1233, 1243 n.11 (8th Cir. 1978).

[142] The Sixth Circuit has cautioned against using a hindsight approach in awarding fees to defendants. "A plaintiff who continues to litigate claims after discovery has concluded, proceeds to summary judgment, and a judge thereafter rules that the claims are without merit, does not necessarily support the conclusion that the plaintiff's claims were frivolous, unreasonable, or groundless, especially if there are viable claims intertwined to the meritless claims." Riddle v. Egensperger, 266 F.3d 542, 551 (6th Cir. 2001), reh'g en bane denied (Nov. 16, 2001). In another Sixth Circuit case, Tahfs v. Proctor, 316 F.3d 584 (6th Cir. 2003), the court reversed the district court's award of fees to defendants under Rule 11 and 42 U.S.C. § 1988 where the plaintiff's complaint had correctly been dismissed for failure to properly allege state action. As to Rule 11, the plaintiff's state action allegation of corruption between the private defendants and government officials, while unsuccessful, was not completely unwarranted by existing law. In addition, district courts should hesitate to award Rule 11 sanctions where complaints are dismissed pursuant to Rule 12(b) (6). As to 42 U.S.C. § 1988, the plaintiff's complaint was not frivolous or groundless, even if it was "inadequate."

[143] ECF No. 17, page 2, ¶ 1.

CERTIFICATE OF SERVICE

I certify that service of the foregoing PLAINTIFFS' RESPONSE T DEFENDANTS RENO-SPARKS INDIAN COLONY, STEVE STOUT, VICKY OLDENBURG, STEVE MORAN, AND ARLAN MELENDEZ'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT was made through the Court's CM/ECF system, which will automatically e-serve all case participants in the CM/ECF filing and service system, on November 30, 2016.

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