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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JANA FORSYTHE, FORSYTHE ENTERPRISES, INC., dba FEI CONSTRUCTION,

Plaintiffs,

vs.

RENO-SPARKS INDIAN COLONY, STEVE STOUT, VICKY OLDENBURG, STEVE MORAN, ARLEN MELENDEZ, WOOD-RODGERS, INC. and MARK CENDAGORTA,

Defendants.
_____/

Case No.: 2:16-cv-01867-GMN-VCF

DEFENDANTS WOOD RODGERS, INC. AND MARK CENDAGORTA'S REPLY IN SUPPORT OF MOTION TO DISMISS

COMES NOW Defendants WOOD RODGERS, INC. ("Wood Rodgers") and MARK CENDAGORTA ("Mr. Cendagorta"), by and through their attorneys, Fahrendorf, Viloria, Oliphant & Oster, LLP, and hereby file this reply to their Motion to Dismiss Plaintiffs Jana Forsythe and FEI Construction's (hereinafter collectively referred to as "FEI") Amended Complaint, filed with this Honorable Court November 14, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Wood Rodgers' and Mr. Cendagorta's Motion to Dismiss ("Motion to Dismiss") applied established law to the undisputed facts of this case to reach the only possible conclusion: Wood Rodgers and Mr. Cendagorta are not state actors within the meaning of 42 U.S.C. § 1983. It is undisputed that for FEI to state a claim for relief pursuant to 42 U.S.C. § 1983 against Wood Rodgers and Mr. Cendagorta, FEI must establish the element that Wood Rodgers and Mr. Cendagorta are state actors. Flagg Brother, Inc. v. Brooks, 436 U.S. 149, 156-157, 98 S.Ct. 1729, 1733 (1978). The Motion to Dismiss outlined several state action tests, all of which establish that Wood Rodgers and Mr. Cendagorta are not state actors. Wood Rodgers and Mr. Cendagorta are independent contractors who provided engineering services and bid assistance regarding a private project on private sovereign land that belonged to the Reno Sparks Indian Colony ("RSIC"). Additionally, because RSIC never waived its tribal immunity and Wood Rodgers and Mr. Cendagorta are clearly not state actors, there is no governmental actor at all – a necessary prerequisite to support 42 U.S.C. § 1983 litigation. Consequently, FEI did not and cannot state a 42 U.S.C. §1983 claim that is plausible on its face and dismissal is warranted under FRCP 12(b)(1) & (6).

FEI's Response To Defendants Wood Rodgers and Mr. Cendagorta's Motion to Dismiss[1] ("FEI's Response") is based on unsupported legal conclusions and bare assertions. For example, in lieu of addressing established state actor tests, FEI suggests a new "balancing test" where apparently FEI's equal protection and free speech claims "should be a significant factor" in deciding whether FEI pled sufficient facts to support plausible 42 U.S.C. § 1983 claims.[2] Without any legal support whatsoever, FEI also contends that "power and control" are the determining factors in the state actor inquiry.[3] FEI further contends that because Wood Rodgers

[1] See FEI's Response at 1, ECF No. 25.

[2] Id. at 4: 14-17.

[3] Id. at 5: 2-7.

and Mr. Cendagorta agreed to follow Nevada law and the State of Nevada public works procurement policies, Wood Rodgers and Mr. Cendagorta are somehow cloaked under the color of law.[4] While examples such as these are pervasive throughout FEI's Response, they do not establish that Wood Rodgers and Mr. Cendagorta are state actors. Quite simply, the facts in this case are insufficient to overcome the presumption that Wood Rodgers and Mr. Cendagorta are not state actors within the meaning of 42 U.S.C. § 1983. See Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826, 835 (9th Cir. 1999) (courts must start with the presumption that a private party's conduct does not constitute state action). Since FEI's Response failed to identify facts that that support plausible 42 U.S.C. § 1983 claims, the same should be dismissed with prejudice. Additionally, because Wood Rodgers' and Mr. Cendagorta's Motion to Dismiss is also well founded in fact and law, there should be no federal question claims remaining and thus no reason for this Court to extend supplemental jurisdiction over FEI's state law claims pursuant to 29 U.S.C. § 1367.

II. Legal Argument

a. Wood Rodgers and Mr. Cendagorta are not state actors under any test

Wood Rodgers' and Mr. Cendagorta's Motion to Dismiss highlighted the following four tests, all of which are recognized by the Ninth Circuit: (1) Public Function, (2) Joint Action, (3) State Compulsion and (4) Governmental Nexus.[5] Each test was explained and applied to the facts alleged in Plaintiffs' Amended Complaint. Following the application of the law to the facts, the results were identical in each instance – Wood Rodgers and Mr. Cendagorta are not state actors subject to 42 U.S.C. § 1983 litigation. Of the four tests presented, FEI only mentioned the public function test in passing.[6] Local Rule 7-2(d) provides in relevant part, "[t]he failure of an opposing party to file points and authorities in response to any motion,.. constitutes a consent to the granting of the motion." Importantly, this failure-to-oppose rule does not apply solely to

[4] Id. at 5-6: 23-11.

[5] See Motion to Dismiss at 7-10, ECF No. 19.

[6] See FEI's Response, at 13: 14-17, ECF No. 25.

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failure to file a physical document, but also to failure to assert opposing argument to those presented in the motion to dismiss. Knickmeyer v. Nevada ex rel Eighth Judicial Dist. Court, 173 F. Supp. 3d 1034, 1044 (D. Nev. 2016); see also Duensing v. Gilbert, 2013 WL 1316890 (D.Nev. Mar. 1, 2013) (failing to respond to defendant's arguments on the issues constituting consent to the granting of the motion). Based on FEI's complete silence regarding the joint action, state compulsion and governmental nexus tests, this Court should deem those failures to respond as FEI's consent to granting Wood Rodgers' and Mr. Cendagorta's Motion to Dismiss.

With regard to FEI's position on the public function test, which is curiously found under the section titled *Tribal Sovereign Immunity Not Derivative*,[7] FEI states that Wood Rodgers and Mr. Cendagorta "engaged in one of the most highly public functions there is" by apparently (1) working on a publicly funded project, (2) allegedly creating bidder qualifications, and (3) following state law.[8] These allegations not only fail to satisfy the elements of the public function tests, but they have also been directly rejected by the United States Supreme Court and the Ninth Circuit.

The Supreme Court addressed the issue of public funding and state action in Kohn. There, the specific issue related to whether schools and nursing homes are state actors. Rendell-Baker v. Kohn, 457 U.S. 830, 841, 102 S. Ct. 2764, 2771 (1982). The Supreme Court noted, "the school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government." Id. Most damaging to FEI's contention is the Supreme Court's holding that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." Id. Thus, the fact that the EDA funded the RSIC project does not convert the conduct of private contractors, such as Wood Rodgers and Mr. Cendagorta, into state action.

[7] See FEI's Response, at 13: 9-18, ECF No. 25.

[8] Id.

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In addition, the fact that Wood Rodgers and Mr. Cendagorta were following state and federal law, or operating pursuant to EDA guidelines, similarly does not constitute state action.[9] The Supreme Court held that even if the government regulations are "extensive and detailed," such regulations do not convert private conduct into state action. Kohn, 457 U.S. at 841, 102 S. Ct. at 2771; quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 350, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 (1974) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.") (internal citations omitted). The Ninth Circuit also recognized that the "action taken by private entities with the mere approval or acquiescence of the State is not state action." Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 817 (9th Cir. 2010) (quoting Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52, 119 S.Ct. 977 (1999). Therefore, binding jurisprudence renders FEI's passing public function state actor arguments meritless.

Aside from FEI's suggestions of a balancing test[10] and "power and control" test[11] (two novel approaches that are unsupported by actual case law), FEI also asserts that the two-part test in Lugar lends support to its position that Wood Rodgers and Mr. Cendagorta are state actors.[12] Yet, a closer look at FEI's application of Lugar reveals that FEI's contention is misplaced. The Supreme Court in Lugar looked at the state action requirement from a slightly different perspective: whether the alleged deprivation of a federal right by a private party is "fairly attributable to the state." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 2753 (1982). "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." Id. Second, the party charged with the deprivation must be a state actor. Id. In

[9] See FEI's Response, at 13: 14-18, ECF No. 25.

[10] See FEI's Response, at 4: 15, ECF No. 25.

[11] Id. at 5: 2.

[12] Id. at 5-6: 14-16.

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support of the first prong, FEI simply recites the laws, policies and regulations that RSIC must adhere to while operating a construction project in Nevada that is funded by the EDA.[13] However, as discussed above, following detailed or extensive governmental laws or regulations simply does not convert a private party's conduct into state conduct. See Kohn, 457 U.S. at 841, 102 S. Ct. at 2771; see also Jackson, 419 U.S. at 350, 95 S. Ct. at 453. In support of the second prong of the Lugar approach (requiring the party be a state actor), in a somewhat confusing fashion FEI alleges that "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."[14] The University of Nevada and its employees have absolutely no bearing on whether Wood Rodgers and Mr. Cendagorta are state actors under the second prong of Lugar. FEI's allegation discusses how RSIC sought assistance from the University of Nevada, not Wood Rodgers or Mr. Cendagorta. Plus, there is no analysis by FEI in terms of the second prong of Lugar to address the state actor tests set forth in Wood Rodgers' and Mr. Cendagorta's Motion to Dismiss. FEI's Lugar discussion is simply conclusory without any application of law to facts. Consequently, FEI's application of the Lugar test to the facts of this case does not pass muster and Wood Rodgers and Mr. Cendagorta cannot be considered state actors for purposes of 42 U.S.C. § 1983.

The public policies outlined in Lugar are appropriate to note in this case:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Lugar, 457 U.S. at 936–37, 102 S. Ct. at 2753. The Supreme Court also noted that "[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely

[13] See FEI's Response, at 5-6: 23-11, ECF No. 25.

[14] See FEI's Response, at 6: 11-14, ECF No. 25.

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on some state rule governing their interactions with the community surrounding them." Id. These cautionary policies are critical and describe why FEI's 42 U.S.C. § 1983 claims should be dismissed. Wood Rodgers and Mr. Cendagorta are private parties that often operate pursuant to "some state rule governing their interactions with the community surrounding them" when providing engineering services. Id. It is also important note that only in rare circumstances is a private party to be viewed as a state actor for purposes of 42 U.S.C. § 1983. Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992) (prior to discussing the state action tests, the Court noted that private parties can be considered state actors only in rare circumnstances). The absence of facts supporting plausible 42 U.S.C. § 1983 claims demonstrates that this case is not one of those exceptional circumstances where Wood Rodgers or Mr. Cendagorta should be deemed state actors and forced to defend against legally deficient claims. Requiring Wood Rodgers and Mr. Cendagorta to continue their defense against the 42 U.S.C. § 1983 claims runs counter to the very policies identified in Lugar and Harvey and therefore, FEI's 42 U.S.C. § 1983 claims should be dismissed.

b. Wood Rodgers is not a municipality. Mr. Cendagorta is not a government official.

In a separate effort to avoid dismissal, FEI now contends that Wood Rodgers is a municipal government and Mr. Cendagorta is the government official.[15] While this theory appears illogical on its face, it *is* actually possible to claim that a private entity is a municipality for purposes of 42 U.S.C. § 1983 litigation under very limited circumstances. This is not one of those very limited circumstances.

In 2012, the Ninth Circuit recognized that like municipalities, private corporations can act under the color of state law. Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012). The Tsao Court required that a plaintiff must establish two elements to successfully claim municipal liability: (1) the defendant acted under the color of state law (i.e. a state actor), and (2) if a constitutional violation occurred, the violation was caused by an official policy, custom or

[15] See FEI's Response, at 10: 15-18, ECF No. 25.

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pattern of the defendant. Id. The finding that a private party is a state actor is still required. In Tsao, a casino patron, Ms. Tsao, sued the Desert Palace, a casino, following her arrest by Desert Palace security guards for trespassing, a misdemeanor. Id. at 1134. However, prior to her arrest, she had received marketing materials from the casino, apparently authorizing her return to casino property. Id. She was ultimately booked by Las Vegas Metro Police Department on the trespassing charge. Id. Following her release, Ms. Tsao brought a civil rights action under 42 U.S.C. § 1983 for unreasonable search and seizure. Id. In the Court's analysis, the Desert Palace was determined to be a state actor under the joint action test. Id. at 1140. The Court reasoned that the Desert Palace had a system of cooperation and interdependence with the Las Vegas Metropolitan Police Department, which ultimately allowed for casino security to issue trespassing citations and make arrests. Id. Despite a finding of state action satisfying the first prong for municipal liability, the Court found that the violation was not the result of a policy, custom or pattern, thereby not meeting the second prong of the analysis. Id. at 1146. Ms. Tsao could not demonstrate the Desert Palace had a pattern of sending marketing materials, then arresting the patron when they subsequently visited the casino. Id. at 1145. Thus, the elements for municipality liability were not established against the Desert Palace for purposes of 42 U.S.C. § 1983 litigation.

In this case, FEI failed to establish both prongs as set forth in Tsao to state a claim for municipal liability. FEI cannot satisfy the first prong of Tsao because Wood Rodgers and Mr. Cendagorta fail to qualify as state actors. Wood Rodgers and Mr. Cendagorta were not engaged in traditional and exclusive government functions and did not have a "system of cooperation and interdependence" with any governmental entity. Id. at 1146. Additionally, as pointed out herein and in the Motion to Dismiss, neither Wood Rodgers nor Mr. Cendagorta are state actors under the requisite tests. Moreover, FEI cannot establish the second element of municipal liability requiring a pattern, custom or policy of the alleged constitutional violation – here, gender discrimination. Id. at 1139. FEI has not alleged any facts that Wood Rodgers and Mr. Cendagorta have ever engaged in gender discrimination previously, such that a policy, custom or

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pattern of gender discrimination existed in any services provided by Wood Rodgers or Mr. Cendagorta. FEI has actually failed to even allege any facts, other than FEI is a female-owned business, to begin to establish Wood Rodgers or Mr. Cendagorta discriminated against FEI because of its owner's gender. Thus, FEI has failed to state a claim with regard to municipal liability and FEI may not sidestep the necessary element that Wood Rodgers and Mr. Cendagorta must have acted under the color of state law for purposes of 42 U.S.C. § 1983.

c. FEI's 42 U.S.C. § 6709 claims do not apply to Wood Rodgers or Mr. Cendagorta, thus if even they are considered claims independent of 42 U.S.C. § 1983, the same must be dismissed

Also for the first time in this litigation, FEI has alleged that its claims based on 42 U.S.C. § 6709 are independent of its 42 U.S.C. § 1983 claims.[16] FEI makes this allegation despite having expressly categorizing its 42 U.S.C. § 6709 claims as "42 U.S.C. § 1983 'laws' actions" on the face of its Amended Complaint.[17] This demonstrates FEI used 42 U.S.C. §1983 as its vehicle to bring its sex discrimination cause of action. Accordingly, this court should prohibit FEI from essentially amending its Complaint to avoid dismissal.

42 U.S.C. § 6709 provides:

> No person shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any project receiving Federal grant assistance under this chapter, including any supplemental grant made under this chapter. This provision will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee.

Even if a 42 U.S.C. § 6709 claim can survive independently from 42 U.S.C. § 1983 and in spite of the contrary allegations in FEI's Amended Complaint, FEI did not cite to a single case or statute that supports that position. FEI spent considerable time addressing § 601 Title VI, 42 U.S.C. § 2000d, for the apparent proposition that 42 U.S.C. § 6709 is treated similarly in

[16] See FEI's Response, at 19: 17-19, ECF No. 25.

[17] See Amended Complaint, at 1, ECF No. 8.

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litigation. While the language of 42 U.S.C. § 6709 mentions Title VI, it is clear that reference is to administrative remedies, rules and provisions similar to those of Title VI – the language does not give rise to the ability to bring a Title VI claim for gender discrimination. Although Plaintiff apparently attempts to argue the applicability of Title VI claims to gender or sex discrimination, this notion has been contemplated and rejected by various circuit courts when considering the application of Title VI to such claims. For example, in the context of a registered female-owned disadvantaged business claiming gender and racial discrimination when it did not receive Michigan Department of Transportation contracts, the Sixth Circuit Court provided the following analysis regarding the application of Title VI to gender-based discrimination claims:

> Title VI of the Civil Rights Act of 1964 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. As a matter of plain language, Title VI does not address discrimination on the basis of sex or gender. See id. "[W]hen the statutory *388 language is plain, we must enforce it according to its terms." Jimenez v. Quarterman, 555 U.S. 113, 118, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009).
>
> [1] Because it does not say anything about sex or gender, the text of 42 U.S.C. § 2000d itself compels us to conclude that Title VI does not provide a cause of action for gender discrimination. Two of our sister circuits have reached the same conclusion. See, e.g., Shannon v. Lardizzone, 334 F. App'x 506, 507 n. 1 (3d Cir.2009); Davis v. Monroe Cnty. Bd. of Educ., 120 F.3d 1390, 1396 (11th Cir.1997), *rev'd on other grounds,* 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). Moreover, dicta from Supreme Court cases contrasting Title VI with Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, suggests that Title VI is not applicable to gender discrimination. See Alexander v. Sandoval, 532 U.S. 275, 297, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (referring to Title IX, which addresses gender discrimination in educational settings, as Title VI's "gender-based twin"); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) (stating Title VI is "parallel to Title IX except that it prohibits race discrimination, not sex discrimination"); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n. 13, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (noting that there had been proposed legislation to "extend[ ] the prohibitions of Title VI ... to discrimination based on gender ..." but that this proposal "never emerged [from] the committee").

See Foster v. Michigan, 573 Fed.Appx. 377, 387–88 (6th Cir. 2014). As contemplated in Foster, Plaintiffs' attempted application of Title VI to FEI's gender-based discrimination claims brought

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against Wood Rodgers and Mr. Cendagorta under 42 U.S.C. § 6709 and 42 U.S.C. § 1983 is futile because Title VI does not apply to gender-based claims.

Additionally, Plaintiffs' contention also ignores the fact FEI simply did not plead a violation of 42 U.S.C. § 6709 as a separate or independent claim from Count 1, which consists of "Sex discrimination in violation of 42 U.S.C. § 6709 and 42 U.S.C. § 1983".[18] Moreover, FEI has not provided any case law that supports the proposition that an independent 42 U.S.C. § 6709 claim can be applied derivatively to a contractor providing services on a federally funded project.

FEI pled its sex discrimination claim as one count, pursuant to both 42 U.S.C. § 6709 and 42 U.S.C. § 1983.[19] Consequently, because all of FEI's 42 U.S.C. § 1983 claims should be dismissed, the entirety of Count 1 must be dismissed as well.

III. Conclusion

Based on the foregoing and the Points and Authorities in the Motion to Dismiss, Wood Rodgers and Mr. Cendagorta respectfully request this Court dismiss FEI's 42 U.S.C. § 1983 Claims (Counts 1-12) pursuant to FRCP 12(b)(6) with prejudice. FEI has failed to sufficiently plead plausible facts that support its 42 U.S.C. § 1983 claims. Wood Rodgers and Mr. Cendagorta also request this Court decline to extend supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(2) as the state law claims should be addressed in state court or tribal court. Finally, Wood Rodgers and Mr. Cendagorta also request this Court award reasonable attorney's fees and costs incurred in the filing of this Motion and such other relief the Court deems appropriate.

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[18] See Amended Complaint, at 43: 12, ECF No. 8

[19] Id.

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AFFIRMATION

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED this 9th day of December, 2016.

FAHRENDORF, VILORIA,
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the law firm of FAHRENDORF, VILORIA, OLIPHANT & OSTER L.L.P., and that on the date shown below, I caused service of a true and correct copy of the attached:

DEFENDANTS WOOD RODGERS, INC. AND MARK CENDAGORTA'S REPLY IN SUPPORT OF MOTION TO DISMISS

to be completed by:

_____ personally delivering

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__XX__ electronic service upon electronically filing the within document with CM/ECF system.

addressed to:

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DATED this 9th day of December, 2016.

Employee of Fahrendorf, Viloria, Oliphant & Oster L.L.P.