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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

TAMMY WILHITE,)	
Plaintiff,)	Case No. 18-CV-80-BIL-SPW
)	
vs.)	
)	
AWE KUALAWAACHE CARE)	PLAINTIFF'S RESPONSE TO
CENTER, PAUL LITTLELIGHT,)	DEFENDANTS' THIRD RULE 12
LANA THREE IRONS,)	MOTION TO DISMISS
HENRY PRETTY ON TOP,)	
SHANNON BRADLEY, and)	
CARLA CATOLSTER,)	
Defendants.)	
_____)	

Defendants have moved for a third time to dismiss this action. Like the first two motions, this third motion to dismiss is not well taken.

ARGUMENT

I. The FTCA Does not Bar This Action.

The crux of the Defendants' argument is that should be treated like federal employees since they are operating under a 638 contract.¹ Plaintiff agrees that most tribal employees operating under a 638 contract are treated as federal employees.² But federal employment does not shield a federal employee from all liability. Federal employees are still liable if there is a separate statute that authorizes such liability. The Defendants cited that portion of 28 U.S.C. § 2679 that limits liability of employees but failed to cite the rest of rest of the statute. That section of the Federal Tort Claims Act specifically provides that the exclusiveness of the FTCA does not extend to “a civil action against an employee of the Government-- . . . (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.” In this action, RICO is a federal statute that authorizes an action against individuals for violation of the statute.

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¹ A 638 contract refers to contract the United States has with an Indian tribe in which the tribe performs duty that would otherwise be performed by the United States. It is called a 638 contract because such contracts were initially authorized by P.L. 93-638.

² Although Plaintiff could not find a current version of 25 U.S.C. § 450(f) Defendants cited for this proposition, Plaintiff does believe 25 U.S.C. § 5321(d) treats contract employees as federal employees when performing medical procedures. It is not clear that employees providing non-medical services, e.g. personnel matters, are covered by this provision.

The Ninth Circuit has found that RICO claims may be maintained against individual federal employees even after a FTCA claim was dismissed. The Court noted:

The RICO claims were not brought in the FTCA action, nor could they have been. To bring an action under 28 U.S.C. § 1346, the wrongful act must be committed “while acting within the scope of his office or employment.” Under the federal and state RICO statutes, the prohibited conduct involves an employee engaged in a pattern of racketeering activity. *See* 18 U.S.C. § 1962 and Ariz.Rev.Stat. 13–2314.04. An employee engaged in a pattern of racketeering activity, as required by the RICO counts, could not be doing so within the scope of his employment by the federal or state governments. Thus, the claims could not have been brought as an action under § 2646(b), as required by the judgment bar statute, 28 U.S.C. § 2676.

Pesnell v. Arsenault, 543 F.3d 1038, 1042 (9th Cir. 2008), *abrogated by Simmons v. Himmelreich*, 578 U.S. ____, 136 S. Ct. 1843 (2016)

Simmons abrogated the holding in *Pensell* by broadening even further the claims allowed against individual employees. Prior to both *Pensell* and *Simmons*, the issue of RICO liability for federal employees had been addressed in the Great Falls division of this Court. *Timberline Northwest, Inc. v. Hill*, 94-CV-82-GTF-CLL. That matter was appealed to the Ninth circuit which issued an unpublished opinion that cannot be cited pursuant to Ninth Circuit Rule 36-3(c).

This case is cleaner procedurally than *Pensell*. Wilhite did not file a FTCA case that Defendants could argue is a bar. The initial claim filed is the RICO claim. Plaintiff understood that RICO claims fall outside of the FTCA. Since this is a RICO case, there is no basis to argue that it must be brought as an FTCA claim.

II. A Motion to Dismiss Is Not the Proper Method to Argue the FTCA issue.

Assuming *arguendo* that the Defendants are covered by the FTCA, a motion to dismiss is not the proper method to deal with federal employees being sued for acts performed in their official capacity. The FTCA provides the procedure to be used. A federal employee, or tribal employee under a 638 contract, is required to deliver copies of the summons and complaint to his supervisor to be forwarded to the local United States Attorney. 28 U.S.C. § 2679(c). The United States Attorney then certifies to the Court that the individual named as a defendant was acting within the scope of his federal employment. 28 U.S.C. § 2679(d)(1). Upon that certification, the district court substitutes the United States as the defendant and proceeds under the FTCA. 28 U.S.C. § 2679(d)(2). The court does not dismiss the case. Here, the Defendants simply need to forward the complaint and request the United States Attorney to certify to this Court that the Defendants were acting in their official capacity.³ Very recently the Ninth Circuit has indicated this is the proper procedure to be followed even when the named defendant is a tribal member operating under a 638 contract. *Wilson v. Horton's Towing*, 16-35320, 2018 WL 4868025, at *6, ____ F.3d ____ (9th Cir. Oct. 9, 2018). It is the Defendants, not the Plaintiff, that must take the procedural steps have this heard as an FTCA case.

³ Plaintiff doubts the U.S. Attorney would make such a certification. As the Ninth Circuit has noted, an individual violating RICO cannot be acting in their official capacity. *Pesnell v. Arsenault*, *supra*.

CONCLUSION

RICO claims may be maintained against individual federal, or tribal 638 contract employees, independent of the FTCA. Even if the action falls under the FTCA, proper procedure is not to dismiss the action, but to substitute the United States as the party defendant after the United States Attorney has certified this should proceed under the FTCA. In short, the third Rule 12 motion to dismiss should be denied.

Dated this 10th day of October, 2018.

EAKIN, BERRY & GRYGIEL, PLLC

/s/ D. Michael Eakin

D. MICHAEL EAKIN
Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that the foregoing RESPONSE BRIEF TO DEFENDANTS' THIRD MOTION TO DISMISS contains 895 words excluding the caption, certificate of compliance and certificate of service.

CERTIFICATE OF SERVICE

I certify that on the 11th day of October, the foregoing document, Plaintiff's Response Brief to Defendants' Third Motion to Dismiss, was served by:

1, 2 CM/ECF
_____ Hand Delivery
_____ U.S. Mail
_____ Overnight Delivery Service
_____ Fax
_____ Email

Upon:

1. Clerk of Court
2. Michael L. Rausch
Browning, Kaleczye, Berry & Hoven, P.C.
Liberty Center, Suite 302
9 Third Street North
Great Falls, MT 59401

/s/ D. Michael Eakin
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