IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRANKLIN J. MORRIS, as Personal Representative of the Wrongful Death Estate of MARCELLINO MORRIS, JR., (Deceased),

Plaintiff,

vs. No. 1:15-cv-00055-JCH-LF

GIANT FOUR CORNERS, INC. d/b/a GIANT #7251 and ANDY RAY DENNY, an Individual,

Defendants.

DEFENDANT GIANT FOUR CORNERS, INC.'S REPLY IN SUPPORT OF ITS RULE 12(B)(6) MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY [38]

Plaintiff Franklin J. Morris's Response in Opposition to Defendant Giant Four Corners, Inc.'s Rule 12(B)(6) Motion to Dismiss Plaintiff's Complaint ("MTD Response") fails to address the basic gravamen of Giant Four Corners' motion: that Plaintiff affirmatively chose the forum in which he wanted to pursue his wrongful death case against Giant Four Corners, and only after losing in his chosen forum, did he improperly forum shop his claims to this Court. Sound judicial policy and federal comity principles counsel this Court to dismiss his Complaint. Indeed, the United States Supreme Court decision upon which Plaintiff relies to oppose Giant Four Corners' motion to dismiss, *Semtek International Incorporated v. Lockheed Martin Corporation*, 531 U.S. 497 (2001), actually supports that this Court should give preclusive effect to the Navajo Nation tribal court judgment. This Court should thus follow Giant Four Corners' analysis under federal claim-preclusion law. But even if this Court accepted Plaintiff's false premise that New Mexico claim-preclusion law applies, this Court would reach the identical result, as New Mexico law

also supports that the tribal court judgment was a final judgment on the merits for claim-preclusion purposes. Thus, both federal and New Mexico claim-preclusion law support that this Court should grant Giant Four Corners' motion and dismiss Plaintiff's Complaint.

ARGUMENT

A. Plaintiff's reliance on *Semtek* is misguided, as that decision supports that this Court should dismiss Plaintiff's Complaint on claim-preclusion grounds.

Plaintiff's MTD Response relies almost entirely on *Semtek* for the proposition that this Court sitting in diversity must apply New Mexico's claim-preclusion law and, therefore, this Court cannot give effect to the Navajo Nation tribal court's dismissal of his tribal court lawsuit. (*See, e.g.,* MTD Response at 5 ("under *Semtek*, this Court *must* look to New Mexico law").) But that is simply not what the United States Supreme Court held in *Semtek*.

The Supreme Court's holding in *Semtek* was much narrower than Plaintiff would have this Court believe. The Supreme Court in *Semtek* held only that state courts are not required to give effect to federal court judgments when that federal court judgment was based on a state's statute of limitations: "[T]he Maryland Court of Special Appeals erred in holding that the dismissal [under California's statute of limitations] *necessarily* precluded the bringing of this action in the Maryland courts." *Semtek*, 531 U.S. at 509 (emphasis added).

This Court is not a state court. Giant Four Corners is not asking this Court to give effect to a federal-court judgment rendered on another state's law. And *Semtek*'s holding does not extend to the circumstances that Giant Four Corners' motion to dismiss presents to the Court, which is the claim-preclusive effect in federal court of a tribal court judgment.

But *Semtek* does provide this Court important guidance in support of this motion to dismiss Plaintiff's Complaint in federal court based on claim preclusion. *Semtek*'s reasoning supports that, because of the unique comity principles that play into a federal court's decision to

give preclusive effect to tribal court judgments, and because of Plaintiff's obvious forum shopping here, this Court should grant Giant Four Corners' motion and dismiss Plaintiff's Complaint.

In *Semtek*, the Supreme Court reached its decision that the California federal court's dismissal of the plaintiff's lawsuit on California's statute of limitations did not necessarily preclude the Maryland court from hearing the lawsuit based on three important points of federal law: (1) "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity," *id.* at 508; (2) there is no "uniform federal rule" under federal common law for this claim-preclusive effect, *id.*; and (3) federal courts in diversity should "reference . . . state law" when deciding upon the claim-preclusive effect of a judgment, *unless "state law is incompatible with federal interests*," *id.* at 509 (emphasis added.)

Here, federal courts' recognition of tribal court judgments' preclusive effect under comity principles, when read in the context of *Semtek*'s reasoning, show that Plaintiff's lawsuit before this Court presents such a situation in which New Mexico's state law regarding claim preclusion is incompatible with federal interests.

As above, *Semtek* is easily and importantly distinguished from the situation that Plaintiff's Complaint presents to this Court. In *Semtek*, the defendant removed the plaintiff's complaint filed in California state court to the United States District Court for the Central District of California, which rendered judgment against the plaintiff under California's 2-year statute of limitations. So the underlying judgment to which the Maryland court gave preclusive effect was a federal-court decision rendered based on California state law. Faced with that factual scenario, the Supreme Court looked to federalism principles related to state courts' autonomy to conclude that the Maryland state court was not required to give effect to the federal-court

decision rendered on another state's statute of limitations. *See id.* at 504. So the Supreme Court's decision in *Semtek* was based on encouraging federal courts to support states' rights to make and be governed by their own laws, and discouraging litigants from forum shopping:

> As we have alluded to above, any other rule would produce the sort of "forum-shopping . . . and . . . inequitable administration of the laws" that *Erie* seeks to avoid, since filing in, or removing to, federal court would be encouraged by the divergent effects that the litigants would anticipate from likely grounds of dismissal.

Semtek, 531 U.S. at 508-09 (citations omitted) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); citing *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78-80 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-110 (1945)). *Accord Steve D. Thompson Trucking v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1046 (5th Cir. 1989) ("Allowing plaintiffs who fail to comply with applicable statutes of limitations to move to the next state over would have the undesirable effect of encouraging forum shopping and rewarding dilatory conduct.")

Indeed, because of this concern for forum shopping, the Supreme Court in *Semtek* immediately provided an important qualification even to the general rule that federal courts sitting in diversity should look to state law when deciding whether to give effect to even a state court judgment: "This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests. If, for example, . . . federal courts' interest in the integrity of their own processes might justify a contrary federal rule." *Id.* at 509.

Under the circumstances that Plaintiff's Complaint and Giant Four Corners' motion to dismiss present to this Court, federal courts' interest in the integrity of their own processes justify, if not require, this Court to give effect to the Navajo Nation tribal court judgment. So does federal courts' interest in and policy to encourage tribes' ability to make their own laws and be governed by them. As articulated more fully in Giant Four Corners' brief in chief, it is clear

that Plaintiff and the decedent are Navajo Nation members. It is clear that the death and surrounding circumstances occurred within the Navajo Nation. It is clear that Plaintiff filed his virtually identical complaint in Navajo Nation tribal court almost a year before filing his state court Complaint that is before this Court, which he filed only after oral arguments on the summary judgment motion decided against him in Navajo Nation tribal court. And it makes clear that Plaintiff chose affirmatively, and properly, the Navajo Nation tribal court, including the Navajo Nation's laws, as his forum in which to litigate his claims that he has now forum-shopped to this Court. The federal courts' substantial jurisprudence regarding the comity afforded to tribal courts, and the Supreme Court's recognition of the policies favoring federal court judicial integrity in *Semtek*, support that this Court should therefore give preclusive effect to the Navajo Nation's judgment dismissing Plaintiff's lawsuit.

The United States Court of Appeals for the Tenth Circuit agrees specifically that one of "[t]he fundamental policies underlying the doctrine of res judicata (or claim preclusion) [is] . . . preventing repetitive litigation and forum-shopping." *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000). And the Supreme Court in *Semtek* reached the conclusion that federal courts in diversity should generally look to the forum state's law for claim-preclusion purposes expressly to avoid a "rule [that] would produce the sort of forum-shopping" in which Plaintiff engaged. 531 U.S. at 508 (internal quotation marks & citation omitted). For that reason alone, the Court should and give effect to the Navajo Nation tribal court's judgment and dismiss Plaintiff's Complaint for what it is: improper forum shopping. But given the additional comity principles afforded tribal court judgments that this motion implicates, there is even more reason to follow *Semtek*'s guidance and dismiss Plaintiff's Complaint.

B. Plaintiff's argument in Section B of his MTD Response is irrelevant under *Semtek*; it is also contrary to New Mexico law, which supports that the tribal court judgment rendered under the Navajo Nation statute of limitations is a final judgment on the merits for claim preclusion, and thus supports dismissal of Plaintiff's Complaint.

Plaintiff's argument in Section B relies on the false premise, which *Semtek* contradicts, that this Court must apply New Mexico law to determine whether to give claim-preclusive effect to the Navajo Nation's tribal court judgment that dismissed Plaintiff's same claims before this Court. Again, under *Semtek*, federal law regarding the claim-preclusive effect of tribal court judgments applies to this Court's consideration of Giant Four Corners' motion to dismiss. So Section B of Plaintiff's MTD Response is almost entirely inapposite to this Court's consideration of the motion.

There is, however, one point worth pointing out in relation to Plaintiff's arguments in Section B of his MTD Response: even if the Court accepted his premise and decided this case under New Mexico law, New Mexico claim-preclusion law supports that this Court should dismiss Plaintiff's Complaint because the tribal court's judgment is a final judgment on the merits for claim-preclusion purposes. Plaintiff asserts that "Defendant cannot establish that the tribal court dismissal on the statute of limitation grounds was 'on the merits.'" (MTD Response at 7.) That is demonstrably false. It is demonstrably false under the federal law that governs this matter. But it is also demonstrably false even under New Mexico law.

It is false, because most federal courts, including courts within the Tenth Circuit, hold that a dismissal on statute of limitations grounds constitutes an adjudication on the merits for claim-preclusion purposes. *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991); *Goichman v. City of Aspen*, 859 F.2d 1466, 1471 n.13 (10th Cir. 1988) (citing 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2712, at 584 (1983)); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180 (4th Cir. 1989); *Steve D. Thompson Trucking, Inc.*, 870 F.2d at

1046; *S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 52 Fed. Cl. 444, 454 (2002). *See also* 21A *Fed. Proc., L. Ed.* § 51:246 (stating that "[t]he prevailing view is that a dismissal for failure to comply with the statute of limitations is an adjudication on the merits"). Even *Semtek*, which Plaintiff cites completely out of context in Section B of his MTD Response, points out that a judgment rendered on statute-of-limitations grounds has claim-preclusive effect. *See* 531 U.S. at 502-03. *Semtek* explains that, while a judgment on the merits for claim-preclusion purposes perhaps at one time did not include dismissals under statutes of limitation, "over the years the meaning of the term 'judgment on the merits' has gradually undergone a change, and it has come to be applied to some judgments (*such as the one involved here* [on statute-of-limitations grounds]) that do not pass upon the substantive merits of a claim." *Id.* 502 (internal quotation marks & citations omitted) (emphasis added). Thus, the tribal court judgment was a final judgment on the merits for claim-preclusion purposes.

Second, and perhaps more importantly, although New Mexico's claim-preclusion law does not apply to this Court's decision, Plaintiff's conclusion that, under New Mexico law, a dismissal based on summary judgment is not a final judgment on the merits for claim-preclusion purposes, is simply mistaken. The New Mexico Supreme Court held that "[a] judgment dismissing a suit because [it is] barred by the statute of limitations is a judgment on the merits . . . ." *Lindauer Mercantile Co. v. Boyd*, 1902-NMSC-021, ¶ 1, 11 N.M. 464, 469, 70 P. 568, 568. Thus, even if this Court were to accept Plaintiff's mistaken contention that New Mexico claim-preclusion law governs, the result would be the same: Plaintiff's Complaint should be dismissed under New Mexico's claim preclusion law as well

At bottom, when deciding whether to give claim-preclusive effect to a tribal court judgment, federal law supports that federal courts, including the Tenth Circuit, should look to

principles of comity, *see, e.g., U.S. v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011), and should include within that decision whether giving preclusive effect to the judgment would discourage improper forum shopping, as happened in this case. *See Semtek*, 531 U.S. at 509. Under those circumstances, although the result under New Mexico's law would be the same -- dismissal of his suit under the claim-preclusion doctrine -- New Mexico's claim-preclusion law is inapposite. *Id.* Under the relevant federal case law, as Giant Four Corners' brief in chief demonstrates, this Court should conclude that federal law supports granting Giant Four Corners' motion to dismiss.

C. Giant Four Corners did not acquiesce in Plaintiff's current litigation in this Court and did not waive its claim-preclusion defense.

Plaintiff asserts that Giant Four Corners somehow waived its claim-preclusion defense by, in his words, acquiescing in this litigation. That contention lacks a sounds basis in the law and in the facts. First, Plaintiff's contention lacks a sounds basis in the law, as he concedes that Giant Four Corners raised the claim-preclusion defense in its answer to Plaintiff's Complaint and concedes that Giant Four Corners noted the defense specifically in its Notice of Removal. (*See* MTD Response at 10.) That is all that federal law, including Tenth Circuit law, requires to assert the claim-preclusion defense. *See Wisznia v. City of Albuquerque*, 135 F. App'x 181, 186 (10th Cir. 2005) (holding the City waived its claim-preclusion defense when "the City filed an answer but made no objection therein that Wisznia was splitting his claims," and "only after the state district court dismissed the administrative appeal did the City then seek to amend or supplement its answer in this civil action to plead the defense of res judicata."). *See also Davis v. Sun Oil Co.*, 148 F.3d 606, 612-13 (6th Cir. 1998) (cited in *Santa Fe North, Inc. v. Santa Fe Estates, Inc.*, 2008-NMCA-042, 143 N.M. 811, 182 P.3d 794).

Second, Plaintiff's contention lacks as sound basis in the facts, as the facts establish that, because there was no final judgment at the time Giant Four Corners answered, and given the

Court's November 30, 2015 discovery deadline, Giant Four Corners' motion is timely. Plaintiff's MTD Response concedes that, at the time Giant Four Corners filed its answer and the Notice of Removal, the Navajo Nation tribal court had not entered the judgment dismissing Plaintiff's tribal court complaint. (*See* MTD Response at 8 (noting the tribal court judgment was entered March 10, 2015), and *id.* at 10 (MTD Response at 10).) So Plaintiff cannot contend that, by removing and litigating the case, Giant Four Corners waived its claim-preclusion defense. Giant Four Corners did not at that time have any final judgment upon which it could rely for claim-preclusion purposes.

Plaintiff also takes issue with that Giant Four Corners did not move to dismiss this Complaint immediately after passage of the June 19, 2015 deadline to amend his Complaint. (*See* MTD Response at 10 ("It also sat on its hands even after the June 19, 2015 deadline to amend the complaint passed.").) Plaintiff contends that Giant Four Corners' "claim that it was waiting to see if Plaintiff would add any additional claims is merely a pretext." (*Id.*) But Plaintiff's pretext argument presents the events out of context. When placed within context, Giant Four Corners asserted the claim-preclusion defense at the appropriate time.

Although Plaintiff's MTD Response discusses written discovery and depositions before it discusses the June 19, 2015 deadline to amend, that is not the way these events took place chronologically. By June 19, 2015, no depositions had been taken. By June 19, 2015, Plaintiff had not responded to Giant Four Corners' first set of written discovery. (*See* Certificate of Service (Plaintiff's Answer and Responses to Defendant Giant's First Set of Interrogatories and Requests for Production) [24].) And by June 19, 2015, Plaintiff had not yet served his first set of written discovery on Giant Four Corners. (*See* Certificate of Service (Plaintiff's First Set of Interrogatories and Requests for Production to Giant Four Corners) [25].)

As the United States District Court for the District of New Mexico stated many times in the past, "the Court should freely give leave to amend." *Scull v. Management & Training Corp.*, No CIV 11-0207 JB/RHS, Mem'm Opinion & Order, 2013 WL 1657065, 2013 U.S. Dist. LEXIS 55070, *17 (D.N.M. Mar. 29, 2013). Moreover, the Court has pointed out that "[t]he Tenth Circuit has emphasized that the purpose of rule 15(a) is to provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Gerald v. Locksley*, 849 F. Supp. 2d 1190, 1237 (D.N.M. 2011) (internal quotation marks, citations & alterations omitted). Thus, the Court has many times found "good cause for granting leave to amend when a plaintiff filed for leave to amend after the deadline in the scheduling order." *Id.* (citing *Gerald*, 849 F. Supp. 2d at 1237-49). So it is disingenuous at best to say that, by letting the June 19, 2015 deadline for Plaintiff to amend his Complaint to pass without filing this motion to dismiss, Giant Four Corners' explanation why it filed the motion to dismiss at the beginning of November is pretext. Rather, Giant Four Corners knew that Plaintiff could add a claim to his Complaint if he found new information in discovery to support the claim. *See, e.g., Gerald*, 849 F. Supp. 2d at 1237-49 (allowing amendment after scheduling order deadline had passed, because of new information found in discovery).

Faced with the Tenth Circuit's guidance "that district courts should grant leave to amend when doing so would yield a meritorious claim," *Gerald*, 849 F. Supp. 2d at 1209 (citing *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001)), and faced with the Court's November 30, 2015 discovery deadline, Giant Four Corners timely filed this Motion to Dismiss on November 5, 2015. (*See* Order Granting Unopposed Motion to Modify Scheduling Order [29].) Given the November 30 discovery deadline, if Giant Four Corners had waited until December 1, 2015, after that deadline passed, to file this motion to dismiss on claim-preclusion grounds, it still

would be timely; Plaintiff at that point would not have had any more opportunity to develop new claims to add to his Complaint. Instead, when Plaintiff noticed the Rule 30(b)(6) depositions as the final two depositions he intended to take in this matter, which Giant Four Corners knew would not lead him to new claims, it was apparent that Plaintiff would not attempt to amend his Complaint to add additional claims. So to stop to the burden of Plaintiff's needless additional discovery, Giant Four Corners filed this motion on November 5, instead of December 1.

Finally, Plaintiff points to the New Mexico Court of Appeals' decision in *Santa Fe North* for the proposition that Giant Four Corners waived its claim-preclusion defense. But as Sections A and B of this reply make clear, New Mexico precedent is inapposite to this federal Court's consideration of this matter. Regardless, *Santa Fe North* is distinguished from this case. In that case, the district court contract claim and the administrative appeals were all state court actions, for which the law regarding the claim-preclusive effect of administrative proceedings in New Mexico state court is well-settled. *See Shovelin v. Cent. N.M. Elec. Coop.,* 1993-NMSC-015, ¶ 21, 115 N.M. 293, 850 P.2d 996 (holding that New Mexico law gives preclusive effect to administrative proceedings). Neither the preclusive effect of the tribal court judgment here, nor Giant Four Corners' optimal time or method to assert its claim-preclusion defense, are settled, let alone well-settled.

Giant Four Corners complied with the Tenth Circuit's requirements to preserve its claim-preclusion defense when it raised that defense in its answer and specifically noted in its Notice of Removal that it intended to assert that defense. (*See* MTD Response at 10.) Given that there was no final judgment at the time of removal, given the District of New Mexico's jurisprudence regarding amendments to the complaint, and given the Court's discovery deadline of November 30, 2015, Giant Four Corners timely asserted the claim-preclusion defense in this motion on

November 5, 2015. The Court should therefore conclude that Giant Four Corners did not waive this defense, and should grant Giant Four Corners' motion to dismiss Plaintiff's Complaint.

D. Plaintiff's contention that Giant Four Corners' cases are inapposite is contrary to federal law precedent, including Tenth Circuit precedent.

Plaintiff contends in Section D of the MTD Response that the authority on which Giant Four Corners' motion to dismiss relies is "inapposite," because he contends that "the 'comity' to be extended under the tribal exhaustion doctrine is *only* for the purpose of allowing the tribal court to determine the scope of its own jurisdiction before a federal court hears a challenge to that jurisdiction." (MTD Response at 11 (emphasis added).) Plaintiff's contention is directly contrary to federal law. As Giant Four Corners' brief in chief explains, aside from jurisdictional questions, comity principles also govern the claim-preclusive effect of tribal court judgments. *See U.S. v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011); *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006); *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997). So comity principles come into play *both* when a federal court reviews a tribal court's jurisdiction *and* when a federal court decides -- as here -- whether to give preclusive effect to a tribal court judgment. Thus, the case law that Giant Four Corners discusses in its brief in chief, which supports that this Court should dismiss Plaintiff's Complaint as precluded by the Navajo Nation tribal court's judgment in Giant Four Corners' favor, is the correct case law for this Court's consideration of this motion to dismiss.

CONCLUSION

For these reasons, Giant Four Corners respectfully requests that this Court grant Giant Four Corners the remedy that its motion to dismiss seeks, and that this Court dismiss Plaintiff's Complaint or, as an alternative, stay this proceeding until the Navajo Nation Supreme Court decides Plaintiff's appeal.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 7, 2015, the foregoing *Reply in Support of the Motion to Dismiss Plaintiff's Complaint, or in the Alternative, to Stay Proceedings* was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record:

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