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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

TAMMY WILHITE, Plaintiff, vs. PAUL LITTLELIGHT, LANA THREE IRONS, HENRY PRETTY ON TOP, SHANNON BRADLEY, and CARLA CATOLSTER, Defendants.	)	Case No. CV19-20-BLG-SPW-TJC RESPONSE TO RULE 12(b)(6) MOTION TO DISMISS

I. Defendants' Motion to Dismiss is Not Proper Under Rule 12.

On a motion made pursuant to Rule 12(b)(6) of the Fed.R.Civ.P., this Court is to consider only the sufficiency of the complaint. The Court does not consider affidavits, exhibits or other matters submitted by the Defendants. *Khoja v. Orexigen*

Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018). [Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.] In this case, the Defendants attached 49 pages of affidavits and exhibits in support of its Rule 12(b)(6) motion. (Dkt 5-1). This Court should ignore the extraneous materials. The Court should limit its review to see if the Complaint states a claim upon which relief can be granted if the allegations are true. It does, and the motion to dismiss should be denied.

Plaintiff notes that Defendants argue the standard of review that an appellate court applies when reviewing the grant of a Rule 12(b)(6) motion. Defendants did not discuss the standard a trial court applies when considering such a motion. A trial court should dismiss "only when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). *See also*, *MacMillan v. United Parcel Serv., Inc*., CV 18-30-BU-JCL, 2019 WL 1763203, at *2 (D. Mont. Apr. 19, 2019). The Complaint states a cognizable legal theory and alleges facts sufficient to support that theory. Defendants' Rule 12(b)(6) motion does not argue that either of the standards that would permit dismissal at this stage. Rather, Defendants argue they have a viable defense to the claim and then argue the facts of that defense. That argument is not appropriate for a Rule 12(b)(6) motion.

At times a court can consider materials outside the Complaint by converting the Rule 12(b)(6) to a motion for summary judgment. *Id*. However when doing so, the Court should provide the Plaintiff the opportunity to engage in discovery prior to ruling on a motion for summary judgment. Rule 12(d) expressly provides that if a 12(b)(6) motion is converted to a motion for summary judgment, "All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." That can only be done if Plaintiff is permitted to engage in discovery to develop the factual recorded needed for this Court to make an informed decision. As the Supreme Court has noted, "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

II. The FTCA Is Not an Exclusive Remedy..

The crux of the Defendants' argument is that they should be treated like federal employees since they are operating under a 638 contract. Plaintiff agrees that tribal employees operating under a 638 contract are treated as federal employees.[1] But federal employment does not shield a federal employee from all personal liability. Federal employees are still individually liable if they act outside the scope of their employment or if there is a separate statute that authorizes liability.

[1] Although Plaintiff could not find a current version of 25 U.S.C. § 450(f) which Defendants cited for this proposition, Plaintiff does believe 25 U.S.C. § 5321(d) treats contract employees as federal employees when acting within the scope of their employment.

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. The Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA"), now codified within the FTCA, 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." 28 U.S.C. § 2679(b)(2)(B). In this action, RICO is a federal statute that authorizes an action against individuals for violation of the statute. In *Wilhite I*, the Court expressly stated that "Wilhite is free to properly file a new claim against the board of directors individually and/or file potential claims against the United States under the Federal Torts Claim Act." (*Wilhite I*, Dkt 45 at p. 5).

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*. In *Pensell*, the plaintiff had previously filed an FTCA claim that had been denied. The defendants argued res judicata then barred the RICO claim. In this action, Wilhite has filed an FTCA claim that has not been ruled upon. There is no judgment or administrative decision that Defendants could argue is a bar to this action. 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.

III. 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 Federal Employees Liability Reform

and Tort Compensation Act 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. It is the Defendants, not the Plaintiff, that must take the procedural steps have this heard as an FTCA case.

By statute, the determination of whether an employee was acting within the scope of his employment is placed with the Attorney General. It is not the individual employee or even this Court that has the initial right to determine whether the employee was acting in an official capacity. The Defendants must follow proper administrative remedies to claim that they were acting within the scope of their employment. Here, the Defendants simply needed to forward the complaint to the United States Attorney Office and request that office to certify to this Court that the Defendants were acting in their official capacity.[2] Very recently the Ninth Circuit has indicated this is the proper procedure to be followed even when the named

[2] 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.*

defendant is a tribal member operating under a 638 contract. *Wilson v. Horton's Towing*, 906 F.3d 773 (9th Cir. 2018). The Butte Division of the Court relieved a Public Health Service employee of individual liability only after the United States Attorney certified to the Court that the Defendant was acting within the scope of his federal employment. Blum v. Barrett Hosp. Dev. Corp., CV 16-38-BU-BMM-JCL, 2016 WL 11423519, at *4 (D. Mont. Sept. 14, 2016), report and recommendation adopted, CV-16-38-BU-BMM-JCL, 2016 WL 7331977 (D. Mont. Dec. 15, 2016). Defendants should follow the same procedure if they truly believe they were acting within the scope of their employment.

CONCLUSION

On a Rule 12(b)(6) motion, the Court determines only whether on its face the Complaint states a cause of action. The Court does not consider affidavits and exhibits. This Court should deny the Rule 12(b)(6) motion since Defendants rely on substantial material outside Compliant.

Federal employees, and tribal 638 employees, are individually liable for acts outside the scope of their employment or for acts where individual liability is expressly permitted by statute. RICO claims may be maintained against individuals 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 that employees were acting within the scope of their employment.

In short, the Rule 12 motion to dismiss should be denied.

Dated this 6th day of May, 2019.

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 MOTION TO DISMISS contains 1637 words excluding the caption, certificate of compliance and certificate of service.

/s/ D. Michael Eakin
D. MICHAEL EAKIN

CERTIFICATE OF SERVICE

I certify that on the 6th day of May, 2019 the foregoing document, 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
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