JENNY L. FOLEY, Ph.D., ESQ.
Nevada Bar No. 9017
E-mail: jfoley@hkm.com
DANA SNIEGOCKI, ESQ.
Nevada Bar No. 11715
E-mail: dsniegocki@hkm.com
HKM EMPLOYMENT ATTORNEYS LLP
1785 East Sahara, Suite 300
Las Vegas, Nevada 89104
Tel: (702) 805-8340
Fax: (702) 805-8340
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EDDIE DUTCHOVER, an Individual, Plaintiff, vs. MOAPA BAND OF PAIUTE INDIANS, MOAPA TRIBAL COUNCIL, AND MOAPA TRIBAL ENTERPRISES, collectively, "Moapa defendants", VICKIE SIMMONS, TYLER SAMSON, GREGORY ANDERSON, URAL BEGAY, LESLIE BRADLEY, DARREN DEBODA, DELAINE BOW, SAMANTHA LEE, a Corporation, DOES 1-50, inclusive and ROE CORPORATIONS 1-50, inclusive, Defendants.	**CASE NO.: 2:19-CV-01905-KLD-BNW** **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff, EDDIE DUTCHOVER (hereinafter "**Plaintiff**"), by and through his attorneys, Jenny L. Foley, Ph.D., Esq. and Dana Sniegocki, Esq. of HKM Employment Attorneys LLP hereby submit their OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ("Motion") [ECF 28]. This Opposition is supported by the following memorandum of points and authorities, the exhibits attached to, or incorporated by reference, and any and all arguments made at the hearing.

/ / /

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from Plaintiff's allegations that Defendants discriminated and retaliated against him in violation of state and federal law. Plaintiff began filing his EEOC charge against Defendants on July 10, 2018. On August 23, 2018, Plaintiff was constructively terminated from his position. On June 13, 2019, Plaintiff filed another charge of discrimination against Defendant and received his notice of right to sue on July 31, 2019. Plaintiff filed his initial complaint on October 29, 2019 [ECF No. 1]. On February 4, 2020, Plaintiff, in proper person, requested an extension of time to serve Defendants so that he could obtain legal counsel to assist him with the matter [ECF 5].

While Plaintiff was seeking counsel, the COVID-19 global pandemic occurred, which complicated the process of serving Defendants. Defendants during the quarantine period had closed their Reservation lands to all but tribal members. *See* ECF 12 at Ex. 1. Plaintiff was told only members of the Tribe with identification verifying the same were permitted onto the land during the current COVID-19 pandemic lockdown. *See* ECF 16 at Ex. 12. After obtaining counsel, on May 5, 2020, Plaintiff filed his Amended Complaint against Defendants [ECF 8].

On May 11, 2020, the Court issued an Order to Show Cause as to why Plaintiff's Complaint should not be dismissed for failure to serve [ECF 9]. On May 20, 2020, Plaintiff, through his counsel, responded to the Court's Order to Show Cause and contemporaneously filed a Motion for Extension of Time for Service [ECF 12 and ECF 14]. Plaintiff's motion was granted as Plaintiff demonstrated that he was, and would continue to, diligently attempt to effectuate service on Defendants. During this time, Plaintiff obtained declarations of attempted service from its process server, Legal Wings, which demonstrated numerous and diligent attempts to properly serve Defendants, to no avail. *See* ECF 16 at Ex. 1-11.

Furthermore, on May 19, 2020, Plaintiff's counsel reached out to counsel for Defendant requesting that he accept service of the Complaint and First Amended Complaint due to the current lockdown situation of the Tribal lands. *See* ECF 16 at Ex. 13. On May 20, 2020, Defendants' counsel responded that he could not accept service. *Id.* On May 26, 2020 Plaintiff's

counsel again contacted Mr. Chestnut inquiring about an alternative address at which to serve Defendants in light of the current COVID-19 lockdown. *Id.* Mr. Chestnut did not respond to such email inquiry.

On May 29, 2020, this Court granted Plaintiff's second Motion to Extend Time for Services [ECF 16 and 17]. Plaintiff continued his diligent attempts to serve Defendants, but they continued to evade service and Plaintiff requested a third extension. On July 30, 2020, this Court granted Plaintiff's request to extend the time to serve by an additional sixty days [ECF 19].

Since the Court's July 30, 2020 order, Plaintiff and his counsel remained diligent regarding their duties to serve the Defendants. *See* ECF 22 at Ex. 1-11. Moreover, Plaintiff's counsel made several more attempts to reach out to Defendant's only known counsel, Brian Chestnut. On September 16, 2020, Plaintiff's counsel inquired again whether he would accept service, but as before, Plaintiff's counsel received no response. *See* ECF 22 at Ex. 12. On September 22, 2020, Plaintiff's counsel asked for a response to their previous email and also requesting that Mr. Chestnut provide Plaintiff's counsel with the name of any other counsel that represents the tribe that may be able to accept service. *Id*. Again, Plaintiff's counsel received no response.

On September 15, 2020, Plaintiff's counsel contacted the United States Marshals Service (USMS) in the District of Nevada. ECF 22 at Ex. 13. The USMS agreed to attempt service on Plaintiff's behalf on the tribal lands, but indicated it was unsure whether it would be any more successful than Legal Wings. *Id.* While Plaintiff was awaiting a response from USMS, he filed his fourth and final Motion to extend time to serve on September 28, 2020 [ECF 22], which was granted October 5, 2020 [ECF 23].

Because process servers, including the US Marshalls, were not allowed onto the Reservation, and because Defense counsel was nonresponsive as to accepting service, Plaintiff could only be patient and serve Defendants when leaving the Reservation. Accordingly, on October 21, 2020, Defendant Laura Watters, the Chairwoman of the Moapa Band of Paiute Tribe, was properly served when a process server confirmed her identity and then presented her

with a copy of Plaintiff's original Complaint, Amended Complaint, and summons for each of the Defendants. On November 13, 2020, Plaintiff filed proof of service [ECF 34]. Based upon the foregoing, it is clear that the Defendants have received actual notice of the lawsuit.

II. ARGUMENT

1. Defendants Were Properly Served and As Such The Court Has Personal Jurisdiction

"A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under Fed. R. Civ. P. 4. However, 'Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint.'" *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc*., 840 F.2d 685, 688 (9th Cir. 1988) (citing *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir.1982); *United Food & Commercial Workers Union v. Alpha Beta Co*., 736 F.2d 1371, 1382 (9th Cir.1984)). Nonetheless, without substantial compliance with Rule 4 "neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction." *Id*. (citing *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir.1986), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987)).

"The provisions of Rule 4 should be given a liberal and flexible construction." *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984) (citing *United Food & Commercial Workers Union Local 197 v. Alpha Beta Food Co*., 736 F.2d 1371 (9th Cir.1984)). Many other courts have made similar statements. *Id*. (internal citations to thirteen cases omitted). Rule 4(d)(3) states that service may be made on a corporation "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." *Direct Mail Specialists, Inc*., 840 F.2d at 688.

Failure to comply with Rule 4(d)(5)'s personal service requirement does not require dismissal of the complaint if (a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed. *Borzeka*, 739 F.2d at 447. Even if process is insufficient, that does

not automatically warrant dismissal and Plaintiff can be given the opportunity to amend and effectuate proper service. *Caravetta v. GEICO*, No. CV180456TUCJASBGM, 2019 WL 4648453, at *2 (D. Ariz. July 26, 2019), (adopted in No. CV180456TUCJASBGM, 2019 WL 4643762 (D. Ariz. Sept. 24, 2019). **Actual notice is the goal of federal rule of civil procedure relating to personal service of summons.** *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) (emphasis added).

In *Smith v. Kincaid*, service of process was made in accordance with the provisions of Rule 4(d)(1), which do not require that the papers be served on a defendant personally or a showing that the papers were delivered to the defendant by the person with whom they were left. *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957). Rule 4(f)(2)(C)(i) permits service on an individual outside the United States by "delivering a copy of the summons and of the complaint to the individual personally" "unless prohibited by the foreign country's law." *Lagayan v. Odeh*, 318 F.R.D. 208, 209 (D.D.C. 2016). Courts have interpreted Rule 4(f)(2)(C)(i) to permit "personal service so long as the law of the foreign jurisdiction does not specifically forbid personal service." *Id.* (citing SEC v. Alexander, 248 F.R.D. 108, 111 (E.D.N.Y.2007)).

Here, Plaintiff has substantially complied with Rule 4 and Defendants have received actual notice of the case. Defendants were contacted several times regarding this case and then were finally served with required documents pursuant to Rule 4. Plaintiff contacted the various tribal offices on countless occasions to specifically inquire as to how Plaintiff could serve Defendants. Plaintiff even went to the Reservation to serve Defendants, and when he was told by a representative of the Tribe he could not enter, Plaintiff inquired further as to how he could serve these individuals as well as the Tribe. See ECF 16 at Ex. 12. In addition, Plaintiff's counsel corresponded with Defendant's counsel regarding this very case and service. Finally, Defendant Laura Watters, the Chairwoman of the Moapa Band of Paiute Tribe, was personally and properly served in compliance with Rule 4, which included the summons, Complaint, and Amended Complaint for the other named Defendants. Accordingly, Plaintiff effectuated service, but at the very least he has substantially complied with Rule 4 to provide Defendants

with actual notice.

Second, Defendant would suffer no prejudice from any perceived defect in service because Defendants would still be able to mount a full defense of the claims. Defendants have received actual notice of the case and as such know of the claims brought against them. No tribal law prohibits personal service, which was complicated by the shutdown of the Reservation. As such, allowing a permitting service in this manner would only save Defendants and this Court resources because Defendants have received actual notice and Plaintiff would just have to re-serve Defendants. Hence, Defendants would suffer no prejudice by this Court ruling that service had been effectuated against all Defendants.

Third, there is a justifiable excuse for the failure to serve properly. Not only has the Covid-19 Pandemic complicated legal proceedings in general, but there is added complication because Defendants' Reservation was only allowing members of the Tribe onto the Reservation. Plaintiff as well as several process servers, including US Marshalls, were unable to enter the Reservation, which shielded Defendants from being served. Plaintiff was only able to properly serve Defendant Watters because she had left the Reservation. Plaintiff has tried to sever the other Defendants, but unless they leave the Reservation or until the Reservation allows non-Tribal members in, process servers cannot get into contact with them to serve them. Therefore, there is a justifiable excuse for any perceived defect in service.

Finally, Plaintiff would be severely prejudiced by dismissal. Plaintiff has legitimate claims against Defendants, and dismissal for lack of service would mean dismissing Plaintiff's case because he is restricted from entering the Reservation. If there are defects in service, they are not from lack of trying, but because of the global pandemic and Defendants' evasiveness. Plaintiff has provided ample evidence of his diligence and substantial compliance with Rule 4. Accordingly, dismissing Plaintiff's claims because of this would severely prejudice Plaintiff and would not be in the interest of justice.

Defendant Watters as the chairperson for the Tribe is a representative of the Tribe and accepted service on behalf of the tribal counsel and its members because they received actual notice of the suit. Therefore, Plaintiff's Motion to Dismiss for lack of personal jurisdiction for

defective service should be denied.

A. In the alternative, if this Court finds that service was defective, Plaintiff Requests time and assistance to fix any defects.

If this Court finds that dismissal for lack of service is proper, Plaintiff requests the opportunity to properly effectuate service upon Defendants. Even if service of process is insufficient, that does not automatically warrant dismissal and Plaintiff can be given the opportunity to amend and effectuate proper service. Defendants have been out of reach because of the global pandemic. This has made it particularly difficult to personally serve each individual defendant because non-tribal members are barred from entering the Reservation. Accordingly, if this Court finds that service was defective, Plaintiff requests additional time and opportunities to serve Defendants, either by traditional or alternative means. Defendants are now represented, and counsel could accept service. The individual Defendants could also be served by a US Marshall who is permitted to enter the Reservation. Plaintiff could potentially serve Defendants via mail or publication. There are several options available to cure any defect, and Plaintiff is willing to continue to diligently effectuate service if this Court finds an issue with service. Therefore, dismissal on the basis of improper service is inappropriate, and as such, Defendants' Motion should be denied.

2. Plaintiff's Claims Are Not Barred by the Tribe's Sovereign Immunity

Tribal sovereign immunity presents a jurisdictional question. *See Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 722 (9th Cir. 2008). Generally, a plaintiff cannot bring a lawsuit in federal court against a tribe absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1133. "This immunity extends to tribal officials when acting in their official capacity and within the scope of their authority." *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002) (quoting *United States v. State of Or.*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981)). "[T]ribal officials are not necessarily immune from suit." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (quoting *Santa Clara Pueblo*, 436 U.S. 49, 59 (1978)). When such officials act beyond their authority, they lose their entitlement to the

immunity of the sovereign. *Id*. (citing *Santa Clara Pueblo*, 436 U.S. at 59; *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

The question whether sovereign immunity has been waived is, in the first instance, a question of subject matter jurisdiction. *McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir.1988). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving that jurisdiction exists. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs*., 594 F.2d 730, 733 (9th Cir.1979). The complaint's factual allegations must be accepted as true, but "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. F.D.I.C*., 139 F.3d 696, 699 (9th Cir.1998).

Here, Defendants have waived sovereign immunity by entering into a federal contract and by enacting, promoting, and adhering to federal law, including Title VII. Defendants entered a "638 Contract" where the US Department of Interior supplies a portion of the funding to Defendants. Several of Defendants' officers are funded by this government contract and Plaintiff was specifically enlisted as an employee carrying out work funded by a federal grant. Plaintiff was provided and covered by a Special Law Enforcement Commissions Policy via the Bureau of Indian Affairs, Office of Justice Services. *See* Office of Justice Services Policy, attached as Exhibit "1." Although this policy limits individuals to only being considered federal employees under Title 5 U.S.C. § 3374(c)(2), Title 18 U.S.C. § 111 and 1114, and Title 5 U.S.C. § 81911-8193, when conjoined with the policies Defendant had to sign, he was provided federal protections. *Id.*

This is further evidenced by the fact that Moapa Defendants' policies contained express anti-discrimination wording, but they also promoted such protections. Moapa Defendants had Equal Employment Opportunity posters displayed in the workplace targeted at their own employees, including Plaintiff. *See* Declaration from Eddie Dutchover dated December 10, 2020, attached as Exhibit "2." In fact, while employed by Defendants, Plaintiff, as well as other tribal employees, were mandated to attend a class on workplace discrimination and equal employment opportunity. *Id.* The class was not only held in the Moapa Travel Plaza where all tribal employees were required to attend, but it was also arranged by the tribe's human resources

department and the lecturer was an employee from the United States federal government. *Id.* As such Moapa Defendants were actively promoting Title VII protections, and thus, waiving immunity against such claims.

In addition, Plaintiff was forced to sign the handbook for the Bureau of Indian Affairs Office of Justice handbook which invoked several other legal bases for protections against discrimination and retaliation. Specifically, section 1-02-01 of the handbook states several other legal protections against discrimination and retaliation. *See* Office of Justice Handbook, attached as Exhibit "3." This policy committed Defendant to providing legal protections against discrimination and retaliation. Moreover, the policy outlines that the complaint processing procedures are in accordance with 29 CFR 1614, which specifically outlines procedures for discrimination and retaliation claims. *Id.* The Moapa Band of Paiute Policy also states that the Tribe "will not discriminate on the basis of "political or religious opinions or affiliations, race, national origin or other non-merit factors." The policy continues, "all aspects of employment will be governed on the basis of merit, competence, and qualifications and will not be influenced by race, color, religion, sex, age, national origin, disability, or any other basis prohibited by law." *See* Moapa Police Department Policy, attached as "Exhibit 4." Accordingly, because Defendants contracted with the Bureau of Indian Affairs for funding and were actively promoting federal protections, Defendants waived their sovereign immunity regarding anti-discrimination claims.

Defendants accepted and funded Plaintiff's employment, at least in part, using federal funds. They also actively accepted and promoted anti-discrimination policies backed by federal law. Thus, Defendants waived their sovereign immunity with consistent enumerations and commitments to anti-discrimination and anti-retaliation legal protections. Accordingly, Defendant's Motion should be denied.

3. Plaintiff's Title VII Claims are Cognizable Causes of Action Against Defendants.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a district court properly dismisses a complaint for failure to state a claim upon which relief may be granted if "there is a 'lack of a cognizable theory or the absence of sufficient facts alleged under a cognizable legal

theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir.2011) (citation omitted). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference" that the defendant may be liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing Twombly, 550 U.S. at 556.

In considering a motion to dismiss under Rule 12(b)(6), a district court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. *Pareto*, 139 F.3d at 699. Further, the district court must read the complaint in the light most favorable to the non-moving party. *Sprewell v, Golden State Warriors*, 226 F.3d 979, 988 (9th Cir.2001). The United States Supreme Court held that the ultimate determination of "whether a complaint states a plausible claim for relief [is] [. . .] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

Title VII states that Native American tribes are not considered "employers" under the Act, and thus cannot be held responsible for acts of discrimination. See 42 U.S.C. § 2000e(b) (1994). However, nothing in the statute specifically exempts tribal business or other entities. Other jurisdictions have held that Title VII's language does *not* exempt tribal businesses from Title VII claims by non-Native Americans. *Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753 (D.N.D. 1989). The tribe claimed they were exempt under the Native American tribe exception to Title VII, and that the ADEA does not apply to tribally owned businesses. *Id*. at 754-756. The court ruled that these defenses were "without merit," and allowed the suit against the tribally owned business to proceed. Id. The court distinguished contradictory cases such as *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) by finding that they "did not consider the present situation of non-tribal reservation employees." *Myrick*, 718 F. Supp. at 754 n.1.

Here, Plaintiff's claims are not subject to dismissal pursuant to Rule 12(b)(6) because Plaintiff states a claim on which relief can be granted. Although Defendant Moapa Tribal

Enterprises' exact entity name is unknown at this time, this entity is a corporation formed to conduct business on behalf of the Tribe. This corporation is used for the purposes of conducting non-governmental affairs and conducts business on behalf of the Moapa Band of Paiutes Business counsel. This enterprise is not limited to only governmental purposes and functions, but it also deals in private and commercial business. Furthermore, this entity was controlled by Moapa Defendants who were receiving government funds. This entity is tribal controlled and operates as a business. Plaintiff is a non-tribal reservation employee, who was employed in part by this enterprise that is controlled by Moapa Defendants. Accordingly, Defendant Moapa Tribal Enterprises is a tribally owned business which discriminated against a non-Indian, and as such Title VII applies. For these reasons, Plaintiff's claims allege a cognizable claim, and as such are not barred by Rule 12(b)(6) and Plaintiff requests that Defendants' Motion be denied in its entirely.

4. Plaintiff' States a Claim Against Defendants Under 42 U.S.C. § 1983.

Plaintiff states a claim against Defendants under § 1983 because Defendants' actions were under the color of state law. A § 1983 claim "cannot succeed" against Tribal officials "acting under color of tribal law." *Bressi v. Ford,* 575 F.3d 891, 895 (9th Cir. 2009). The Supreme Court has established that the state action requirement in a section 1983 claim is satisfied when the party charged with an alleged constitutional deprivation "may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., Inc*., 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). Plaintiff must show "must instead show: (1) that the conduct complained of was committed by a person acting under the color of state law; and (2) that this conduct deprived them of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Evans v. McKay,* 869 F.2d 1341, 1347 (9th Cir. 1989).

Here, Plaintiff establishes a § 1983 claim because Defendants were acting under the color of state law. Plaintiff was partially employed by the US Department of Interior Bureau of Indian Affairs, which afforded him certain federal protections. Moapa Defendants were acting under the color of state law when the elected Tribal officials desired to cut the Moapa Tribal Police Department to four Tribal Police Officers and hire only tribal members. These

discriminatory hiring practices, as well as the hostile work environment created by Defendants, deprived Plaintiff of rights and privileges secured by the laws of the United States. Hence, Moapa Defendants were acting under the color of state law by accepting, distributing, and using federal funds to enforce tribal, state, and federal law and it violated Plaintiffs rights, establishing a § 1983 claim.

Moreover, Moapa Defendants accepted grants from the US government to fund their police force and other enterprises in part. As such, Plaintiff was acting under the color of state law when performing his duties. In order for Plaintiff to perform his duties he was required to take and sign an oath to the US Bureau of Indian Affairs Office of Justice Services. *See* Ex. 1. As outlined in the department's policy manual, while Plaintiff was employed by Moapa Defendants, he was enforcing state and federal law alongside tribal law. This further demonstrates that Defendants were not only accepting of federal funding, but also operating on behalf of the state and federal governments in part. While working for Moapa Defendants, Plaintiff was enforcing state law at the direction of Moapa Defendants, which means that Moapa Defendants were acting under the color of state law by directing and employing Plaintiff. Since Defendants have waived their sovereign immunity, they are liable under § for their discriminatory actions against Plaintiff that deprived him of rights and privileges protected by law. For these reasons, Plaintiff does in fact state a claim under § 1983 and, thus, dismissal is inappropriate.

5. Plaintiff' States a Claim Against Defendants Under 42 U.S.C. § 1981.

To begin, 42 U.S.C. §§ 1981 and 1983 are each "a broad, general provision guaranteeing equal rights and equal protection or prohibiting racial discrimination. These broad civil rights provisions do not specifically prohibit preferential employment of tribal members by Indian tribes." *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 673 (10th Cir. 1980). Section 1981 "provides a federal remedy against race-based employment discrimination in the private and public sectors." *Magana v. Com. of the N. Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir.1997), as amended (May 1, 1997) (citing 42 U.S.C. § 1981(a), (c) and *Runyon v. McCrary*, 427 U.S. 160, 168–72, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976)). It does not, however, apply to discrimination

solely on the basis of national origin. *See Runyon*, 427 U.S. at 168 (noting that Section 1981 applies only to race-based discrimination).

The Supreme Court held, "[b]ased on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory." *Saint Francis Coll. v. Al–Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). Accordingly, the Ninth Circuit has consistently applied Section 1981 to claims for "racial, ancestral or ethnic discrimination." *Magana*, 107 F.3d at 1446–47.; see, *e.g.*, *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir.2004) (affirming judgment in favor of a "Hispanic" plaintiff because the "record shows that [the defendant] considered [the plaintiff] to be of a different race than himself and chose to harass [the plaintiff] based on his ancestry and ethnic characteristics"); *Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir.2003) ("[T]he Supreme Court has ruled that when Congress enacted § 1981, it intended "race" to be defined broadly, to cover discrimination against ethnic groups such as the Chinese."); *Karim–Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir.1988) (holding that a plaintiff could bring a Section 1981 claim for discrimination on the basis of his "Middle–Eastern Iranian [r]ace."); *Benigni v. City of Hemet*, 879 F.2d 473, 477–78 (9th Cir.1988) (finding that an Italian–American could bring a Section 1981 claim because "targets of race discrimination for purposes of section 1981 include groups that today are considered merely different ethnic ... groups, such as Arabs, Jews, Germans and Italians").

Moreover, a "distinctive physiognomy is not essential to qualify for § 1981 protection." *Saint Francis Coll.*, 481 U.S. at 613. This is because "[a] group's ethnic characteristics encompass more than its members' skin color and physical traits." *El–Hakem v. BJY Inc.*, 415 F.3d 1068, 1073 (9th Cir.2005). Rather, "[n]ames are often a proxy for race and ethnicity." *Id.* The Supreme Court has rejected the contention that Section 1981 "does not encompass claims of discrimination by one Caucasian against another." *Saint Francis Coll.*, 481 U.S. at 609–10.

"Title VII contains two provisions specifically addressing Indian tribes. First, it provides that the term 'employer' does not include 'an Indian tribe,' thus excluding Indian tribal governments entirely from coverage under Title VII. 42 U.S.C. § 2000e(b). Second, Section 703(i), known as the 'Indian Preference exemption,' expressly permits preferential hiring over non-Indians of Indians living on or near reservations." *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977, 984 (9th Cir. 2014). 42 U.S.C. § 2000e–2(i) states, "Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

"[T]he primary impetus behind § 703(i) was concern that by enacting Title VII Congress would render unlawful otherwise permissible hiring preferences for Native Americans." Malabed v. N. Slope Borough, 335 F.3d 864, 871 (9th Cir.2003). The exemption was designed "to protect existing or future preference programs." *Id.*; *see also* 110 Cong. Rec. 13,702 (statement of Sen. Karl Mundt) (stating that Section 703(i), along with the exclusion of Indian tribes from Title VII's definition of "employer," "will assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs now in operation or later to be instituted").

Moreover, the Indian preference exemption is not absolute, and the Ninth Circuit has held that Title VII claims can be brought against tribes when the preference is not within the intent of the exception. *Dawavendewa v. Salt River Project Agr. Imp*. & Power Dist., 154 F.3d 1117, 1121 (9th Cir. 1998). The purpose of the Indian Preferences exemption is to authorize an employer to grant preferences to all Indians (who live on or near a reservation)—to permit the favoring of Indians over non-Indians. In *Dawavendewa,* the court found that the exemption is not designed to permit employers to favor members of one Indian tribe over another, let alone to favor them over all other Indians. 154 F.3d at 1122.

In addition, in *Morton v. Mancari*, the Supreme Court held that this preference does not

constitute "racial discrimination," because it is a political classification. *Morton v. Mancari*, 417 U.S. 535, 554, 94 S. Ct. 2474, 2484, 41 L. Ed. 2d 290 (1974). However, the crux of the holding was that the preference criterion was reasonably designed to further the cause of Indian self-government . . . "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id*. at 555, 2485. *Morton v. Mancari* did not involve a claim brought directly under Title VII. Title VII was implicated only to the extent the plaintiffs claimed that the EEOA, an amendment to Title VII, impliedly preempted the BIA hiring preference. *E.E.O.C. v. Peabody W. Coal Co*., 773 F.3d 977, 988 (9th Cir. 2014) (citing *Morton*, 417 U.S. at 537, 94 S.Ct. 2474).

Here, Plaintiff states a claim under § 1981 because Defendants' discriminatory treatment of Plaintiff falls outside the intent of the § 2000e–2(i) exception. Plaintiff was subject to an onslaught of discrimination because of his race, not because he was not a member of the tribe, although that would often be conjoined with the racial discrimination. Plaintiff is a Caucasian and Hispanic male who is not a member of any tribe and was constantly discriminated because of it. *See* ECF 8 ¶ 20, 26, and 29-39. The purpose of the preferential Indian hiring exception does not give Defendants carte blanche to openly harass, demean, and openly degrade Plaintiff because of his race. The legislative intent for the Indian preference exception was to allow Indians to help correct long and systematic discrimination against Indians, not to allow Defendants to constantly harass Plaintiff because he was not Indian.

Many of Defendants discriminatory acts served no employment purpose or function and were only made for the purpose of creating a hostile work environment. Moapa Defendants, including the tribal council, their members, and Plaintiff's coworkers, would consistently make derogatory comments directed at Plaintiff's race, comments such as "a white cop," "cracker," "tribal cop killer," and "wonder bread." *See* ECF 8 ¶ 21 and 43. Moreover, there were several acts of intimidation and threats of violence. It is impossible to see how such acts fall within Congress' intent to allow for preferential employment treatment when such acts are irrelevant to employment. Further, these acts and remarks are clearly made on the basis of race and not tribal membership. Calling Plaintiff "cracker" or "wonder bread" is not a political comment, it

only functions as a derogatory epithet, as it was intended, because it focuses on Plaintiff's skin color. To claim otherwise is to not understand how these insults function. Hence, these acts only served to discriminate and harass Plaintiff on the basis of his race. There is no preferential treatment here for Indians or a program that benefits Indians over non-Indians; it is only hostile treatment towards Plaintiff, which is not the purpose of the § 2000e–2(i) exception.

Nevertheless, this is Defendants' position, that the Indian Preference exception allows Defendants to threaten, intimidate, and call Plaintiff racial epithets. Plaintiff's supervisors only added to the hostile work environment and failed to remedy the pervasive harassment. *See* ECF 8 ¶ 21, 24, 26, 32, and 35. .Defendants do not get to hide behind the Indian preference exception, or worse, use it to justify their discriminatory and hostile actions. Once again, Congress' intent was for the exception to act as a shield against claims for unequal hiring practices or programs that preferred Indians over non-Indians, it was not meant to be a sword for tribes to use to commit discriminatory acts on the basis of race.

For these reasons, Plaintiff states a claim under § 1981 because Defendants created a hostile work environment daily for non-tribal members and white people. Plaintiff was one of those people who underwent relentless discrimination and was subjected to an onslaught of racial epithets, threats, and intimidation because of his race, which created a hostile work environment. Had Plaintiff not been Caucasian, he would not have undergone such discrimination and harassment. Therefore, Defendants' argument is without merit and their Motion should be denied.

6. Plaintiff's Federal Claims Survive Dismissal, And As Such, This Court Still Retains Supplemental Jurisdiction Over Plaintiff's State Claims

As argued above, Plaintiff has shown that his claims survive this dismissal, which means that this Court still retains its jurisdiction over this case. This case arises under federal law within the meaning of the general federal question statute only if the federal question appears on the face of the plaintiff's well-pleaded complaint; if not, original jurisdiction is lacking even if the defense is based on federal law. *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984). Further, "a federal court has jurisdiction over an entire action, including state-law claims,

whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349, 108 S. Ct. 614, 618, 98 L. Ed. 2d 720 (1988) (citing Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The Court intended this standard not only to clarify, but also to broaden, the scope of federal pendent jurisdiction. *Id*. According to *Gibbs*, "considerations of judicial economy, convenience and fairness to litigants" support a wide-ranging power in the federal courts to decide state-law claims in cases that also present federal questions. *Id*. (citing *Gibbs*, 383 US at 726, 86 S.Ct. at 1139.

Here, Plaintiff has established several federal claims that survive dismissal. As such, this Court retains its jurisdiction over Plaintiff's state claims under 28 U.S.C. § 1331. Plaintiff makes a legitimate claim under Title VII, 42 U.S.C. § 1983, and 42 U.S.C. § 1981, all of which survive dismissal. Plaintiff's fifth, sixth, and seventh causes of action all arise out of state law, and this Court will still have jurisdiction over them because the federal claims remain. Plaintiff's well-pleaded Amended Complaint clearly contains several federal questions on its face, and all of his causes of action "derive from a common nucleus of operative fact." Further, Plaintiff would expect all causes of action to be tried in one judicial proceeding, which would also be the most judicially economical. Therefore, this Court still has jurisdiction over all of Plaintiff's claims and dismissal of Plaintiff's state claims is improper.

7. Defendant's Other Assertions Are Without Merit and Plaintiff States Claims Upon Which Relief Can Be Granted.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference" that the defendant may be liable. *Iqbal*, 556 U.S. at 678, citing *Twombly*, 550 U.S. at 556. In considering a motion to dismiss under Rule 12(b)(6), a district court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. *Pareto*, 139 F.3d at 699. Further, the district court

must read the complaint in the light most favorable to the non-moving party. *Sprewell*, 226 F.3d at 988. The United States Supreme Court held that the ultimate determination of "whether a complaint states a plausible claim for relief [is] [. . .] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Here, Defendants' fourth, sixth, and tenth points from their introduction generally claim that Plaintiff has not alleged sufficient facts to state a claim for relief. *See* ECF 28 at 2:6-17. However, this is false as Plaintiff's Amended Complaint contains several facts that establish a claim against Defendants Bradley, Daboda, and Bow as tribal members, a claim for retaliation under Title VII, and a § 1981 claim against Defendant Lee. *See* ECF 8 ¶ 20, 26, and 29-39. Further, Defendants' eighth unsupported point is that Plaintiff's claim against Defendant Begay is time barred under § 1983. *See* ECF 28 at 2-3:21-1. However, once again, Defendant has not provided any evidence to support this claim. Plaintiff sufficiently alleges that certain acts taken by Defendant Begay occurred within the necessary time period for the this claim to be brought. *See* ECF 8 at ¶ 47-51. Pursuant to Rule 12(b)(6), this court must take Plaintiff's allegations as true and in the light most favorable to Plaintiff, especially when Defendants offer no evidence to the contrary. Therefore, Defendants' remaining arguments for dismissal are without merit and Defendants' Motion should be denied.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

III. CONCLUSION

For the reasons stated in this Opposition, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss [ECF 28] in its entirety.

Dated: Thursday, December 10, 2020

HKM EMPLOYMENT ATTORNEYS LLP

/s/ Jenny L. Foley
Jenny L. Foley (Bar no. 9017)
Dana Sniegocki (Bar no. 11715)
1785 East Sahara, Suite 300
Las Vegas, Nevada 89104
Telephone: (702) 805-8340
Facsimile: (702) 805-8340
Email: jfoley@hkm.com
Email: dsniegocki@hkm.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2020, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** the following persons as follows:

_____ by placing the same for mailing in the United States Mail, in a sealed envelope on which first class postage was prepaid in Las Vegas, Nevada and/or

__X__ to be sent via electronic filing with the Clerk of the Court using the Court's electronic filing system CM/ECF and serving all parties with an email address of record who have agreed to receive Electronic Service in this action

_____ to be hand delivered to the persons and/or addresses below:

/s/ Jai Tanghal

An Employee of HKM Employment Lawyers