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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Eddie Dutchover

Plaintiff,

v.

Moapa Band of Paiute Indians, *et al*.,

Defendants.

Case No. 2:19-cv-01905-KJD-BNW

REPLY IN SUPPORT OF DEFENDANTS' RULE 12 MOTION TO DISMISS

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I. The Motion Should Be Granted On Grounds Conceded By Plaintiff.

The Moapa Band of Paiute Indians ("Tribe") and the Tribal entities and individuals (collectively, "Defendants") stated eleven grounds for dismissing Plaintiff's amended complaint. ECF No. 28 at 1-3. Where plaintiff fails to defend a claim in opposition to a motion to dismiss, the claim is waived. *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009) (citing *Locricchio v. Office of U.S. Trustee*, 313 Fed. Appx. 51, 52 (9th Cir. 2009)); *see also Dickerson v. Samson*, 2020 U.S. Dist. LEXIS 224857, *12 (E.D. Cal. Nov. 30, 2020). As discussed *infra*, because Plaintiff's response (ECF No. 37) did not address several grounds argued in Defendants' motion, Plaintiff waived these claims and they should be dismissed.

Plaintiff's cursory attempt to refute Defendants' fourth ground for dismissal lacks any discussion of the facts and law raised by Defendants. All claims against Defendants Bradley, Daboda, and Bow should be dismissed under Federal Rule of Civil Procedure ("Rule") 12(b)(6) because the complaint fails to allege sufficient facts to state any employment-related claims against them, ECF No. 28 at 10 n.6; Plaintiff's opposition brief points only to paragraphs in his amended complaint that make general allegations against the entire Tribe or allegations against Defendant Lee. *See* ECF No. 37 at 18 (citing ECF No. 8 ¶¶ 20, 26 and 29-39). If Plaintiff sued Bradley, Daboda and Bow "as tribal members," *id.*, he concedes that his Title VII and §1981 claims fail because individual tribal members cannot be liable for employment discrimination under Title VII or Section 1981. *See* ECF No. 28 at 14-15 n.7.

As to Defendants' eighth ground for dismissal, *see* ECF No. 28 at 2, 20-21 n. 10, Plaintiff argues that Defendants have not provided any "evidence" that the § 1983 claim against Defendant Begay is time-barred. ECF No. 37 at 18. On a motion to dismiss under Rule 12(b)(6), Plaintiff's complaint allegations are taken as true. *See Jones v. Bock*, 549 U.S. 199, 215 (2007). Plaintiff

does not dispute that the § 1983 statute of limitations is two years or that all allegations against Defendant Begay occurred more than two years before Plaintiff's initial complaint filing. *See* ECF No. 8 ¶¶ 46-56. Neither Plaintiff's complaint or response brief include any allegations that the statute of limitations should be tolled or that the claim accrued at a later date; thus, the § 1983 claim against Defendant Begay fails on statute-of-limitations grounds. *See Cummins v. City of Yuma*, 410 Fed. Appx. 72, 73 (9th Cir. 2011) ("[A] claim can be dismissed for failure to state a claim if the allegations in the complaint establish an affirmative defense."); *accord Jones*, 549 U.S. at 215 (complaint subject to dismissal if allegations "show that relief is barred by the applicable statute of limitations").

II. Plaintiff Failed to Properly Serve Individual Defendants in their Personal Capacities and Failed to Timely Consider Alternative Methods of Service as Ordered by This Court.

Plaintiff failed to properly serve process on the individual Defendants because he served only a single individual who is not a defendant nor an authorized agent of any individual Defendant, at a location that is not the dwelling or usual place of abode of any individual Defendant. Plaintiff's complaint should be dismissed as to the individual Defendants under Rules 12(b)(2) and 12(b)(5) because Plaintiff's deficient service failed to confer personal jurisdiction over those Defendants.

"Defendants must be served in accordance with Rule 4[] of the Federal Rules of Civil Procedure, or there is no personal jurisdiction." *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) (footnote omitted). Actual notice, without more, does not subject defendants to personal jurisdiction. *Id*. "Once service is challenged, plaintiffs bear the burden of establishing that service was valid under Rule 4." *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). As to individual

defendants, failure to perfect personal service is "fatal." *Green v. Moeller*, 2013 U.S. Dist. LEXIS 150200, *4 (D. Nev. Oct. 18, 2013).

Plaintiff is incorrect that "[f]ailure to comply with Rule 4(d)(5)'s personal service requirement" should not require dismissal. *See* ECF No. 37 at 4. Plaintiff relies on a narrow, four-factor "exception" articulated in *Borzeka v. Heckler*, 739 F.2d 444, 447 n.1, 446 (9th Cir. 1984), that was adopted because the *Borzeka* plaintiff "was handling the litigation *pro se*" and sent the summons and complaint "by certified mail." In contrast, Mr. Dutchover has been represented by counsel for more than seven months. More than five months after retaining counsel, Plaintiff has not properly served any individual Defendant – despite this Court's strong entreaty to "consider whether other means of service might be reasonably calculated to provide defendants with notice and an opportunity to respond," ECF No. 19 at 6, and pronouncement that "[i]f plaintiff desires to serve defendants by alternative means, he must file the appropriate motion." ECF No. 23 at 7. Unlike the *Borzeka* plaintiff, Plaintiff never attempted service by certified mail or other means. *See* ECF Nos. 16-2, 18-2, 22-2. Rather, Plaintiff continued futile attempts at personal service by trying to enter the Tribe's Reservation, despite Plaintiff's awareness that the Reservation remained closed to protect the Tribe during the COVID-19 pandemic. *See id*. Plaintiff's attempts to serve all Defendants within the Reservation are particularly inept given that at least one individual Defendant resides off-Reservation. *See* Parry Decl. (ECF No. 28-1) ¶ 10 (Defendant Samson).

For these reasons, Plaintiff's complaint should be dismissed as to the individual Defendants in their personal capacities for insufficient service of process and lack of personal jurisdiction.[1]

[1] If Plaintiff is suing the individual Defendants in their official capacities as current or former Tribal officials, the complaint should be dismissed as to those Defendants pursuant to the doctrine of tribal sovereign immunity. *See* Part III, *infra*.

Plaintiff should not be granted yet more time and assistance to cure his defective service because this Court already encouraged him – on multiple occasions – to pursue alternative means of service and provided extension after extension. Despite those accommodations, Plaintiff failed to effect service on the individual Defendants, which warrants dismissal of his complaint as to them.

III. Plaintiff Failed to Demonstrate That Any Applicable Waiver of the Tribe's Sovereign Immunity Exists.

Plaintiff argues that the Tribe's self-determination contract with the Bureau of Indian Affairs ("BIA" or "Bureau"), known as a "638 contract" after Public Law 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5301 *et seq.*), BIA's Special Law Enforcement Commission policy, BIA's law enforcement handbook, and the Tribe's internal employment policies waive the Tribe's immunity to "anti-discrimination and anti-retaliation" claims by creating "consistent enumerations and commitments" to such "legal protections," and "accepting and promoting anti-discrimination policies backed by federal law." *See* ECF No. 37 at 8-9. Plaintiff's response does not dispute that the individual defendants are being sued in their official capacities and thus are protected by the Tribe's sovereign immunity. *See* ECF No. 28 at 2 (second ground for dismissal), 9-13, 16-17, 21. Thus, if the Court determines that the Tribe's sovereign immunity has not been waived, all claims against the Tribe and individual defendants in their official capacities must be dismissed.

A. Plaintiff Failed to Carry His Burden to Submit Admissible Evidence Establishing Subject Matter Jurisdiction.

When subject matter jurisdiction is challenged under Rule 12(b)(1), "the plaintiff has the burden of proving jurisdiction." *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). Plaintiff "must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case." *Id.* (internal

quotation omitted). When defendants raise a factual attack on jurisdiction, "the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). If the moving party supports its factual motion by submitting affidavits or evidence, the opposing party must present evidence to meet its burden. *Id.*

Plaintiff submitted a declaration supporting his opposition by stating that, during his Tribal employment: (1) he saw an equal opportunity poster at the Tribal Police office; and (2) he attended an equal opportunity employment training. ECF No. 37-1 at 12-13 (Pltf.'s Ex. 2). Without further explanation, he attached a photograph of an equal employment poster to his declaration (*id.* at 14) and provided pages from a BIA Handbook (*id.* at 16-25, Pltf.'s Ex. 3), a Tribal Police manual (*id.* at 27-30, Pltf.'s Ex. 4), and Tribal personnel policies (*id.* at 32-36) as exhibits to his brief. Plaintiff also submitted a copy of a "Special Law Enforcement Commissions" policy. ECF No. 37-1 at 2-10 (Pltf.'s Ex. 1). Plaintiff failed to provide a copy of the Tribe's 638 contract.

Plaintiff's Exhibits 1 through 4, excluding Mr. Dutchover's declaration at ECF No. 37 pages 12-13, are inadmissible under Federal Rule of Evidence ("FRE") 901 because they are not properly identified or authenticated. Plaintiff's declaration provides no evidence "sufficient to support a finding that the item[s are] what the proponent claims." FRE 901(a). Plaintiff's declaration fails to provide any explanation of the items, including the materials' sources or what they purport to be. Plaintiff's declaration does not establish that he took the photograph attached to his declaration or that the photograph depicts a poster that he observed at his place of Tribal employment. Plaintiff's opposition brief asserts that he was "forced to sign" the BIA-OJS handbook, ECF No. 37 at 9, yet neither Plaintiff's declaration nor his amended complaint contain that allegation, *see* ECF No. 37-1 at 12-13, ECF No. 8, and the version of the handbook supplied

as Exhibit 3 does not contain Plaintiff's signature. *See* ECF No. 37-1 at 22. Nor does Plaintiff declare or allege that he received copies of the polices contained in Exhibits 1 or 4 from Defendants. The Court cannot consider unauthenticated and unidentified materials. *Cooper v. United Air Lines, Inc.*, 82 F. Supp. 3d 1084, 1097-98 (N.D. Cal. 2015) (assorted emails and a form inadmissible because not authenticated, no foundation and hearsay); *United States v. 475 Martin Lane*, 2007 U.S. Dist. LEXIS 44493, *16 (C.D. Cal. Mar. 13, 2007) (travel records inadmissible because not authenticated and hearsay).

Furthermore, Defendants object to Exhibits 3 and 4 under FRE 106 because Plaintiff supplied incomplete versions of the handbooks and policies. In particular, Exhibit 4 omits the part of the Tribe's Personnel Policy which states that nothing in the policy is intended to or should be construed as a waiver of the Tribe's sovereign immunity. *See* Declaration of Beth Baldwin, Ex. 1 at pdf page 10 (filed herewith); *accord United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014) (admission of complete statement necessary "'to correct a misleading impression'" created by out-of-context, incomplete statement) (quoting *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996)).

B. Plaintiff's Evidence Fails to Demonstrate an Express Waiver of Sovereign Immunity.

Waiver of sovereign immunity must be express and unequivocal; implied waivers are insufficient. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). "[W]aivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions." *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1286 (11th Cir. 2001). Acceptance of federal funds, even when accompanied by an agreement to abide by civil rights law, is insufficient to waive tribal sovereign immunity. *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 584 (8th Cir. 1998). And acceptance of federal

funding via 638 contract does not waive tribal sovereign immunity. 25 U.S.C. § 5332(1) ("nothing in this Act shall be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe."). Even though it is Plaintiff's burden to produce evidence demonstrating waiver of immunity, Defendants provide a copy of the Tribe's 638 contract to remove any doubt that the contract does not waive the Tribe's sovereign immunity; Section D.9 of the contract clearly states that the contract does not affect, modify, diminish or impair the Tribe's sovereign immunity. *See* Baldwin Decl., Ex. 2 at pdf page 56.

Plaintiff's opposition brief states that Plaintiff "was provided and covered by a Special Law Enforcement Commissions Policy via the Bureau of Indian Affairs, Office of Justice Services." ECF No. 37 at 8. Tribal officers only receive Special Law Enforcement Commissions ("SLEC") after the Bureau of Indian Affairs ("BIA") and a tribe enter into a deputation agreement and tribal officers complete additional training; a 638 contract does not automatically vest tribal officers with SLECs. *See* 25 U.S.C. § 2804; 25 C.F.R. § 12.21. Plaintiff provides no evidence that the Tribe and BIA entered into a deputation agreement or that he received an SLEC card. *See* ECF No. 37 at 8; 37-1 at 5 (§ G, describing SLEC cards issued to SLEC officers).

Regardless, nothing in the SLEC policy suggests that if the Tribe signed an SLEC agreement with BIA, then the Tribe waived its immunity to Plaintiff's claims under federal anti-discrimination laws. As Plaintiff admits, Tribal officers holding SLECs are considered federal officers only for limited purposes, which do not include anti-discrimination laws. ECF No. 37 at 8; *accord* 25 U.S.C. § 2804(f). Because the SLEC policy lacks any mention of tribal sovereign immunity against employment discrimination claims, it falls far short of containing a clear and express waiver of that immunity. *See C & L Enters. v. Citizen Band Potawatomi Indian Tribe of*

Okla., 532 U.S. 411, 418 (2001) ("to relinquish its immunity, a tribe's waiver must be clear") (internal quotation omitted).

Plaintiff alleges that the Tribe waived its immunity by requiring Plaintiff to sign a BIA-Office of Justice Services ("OJS") handbook which "invoke[s] several other legal bases for protections against discrimination and retaliation." ECF No. 37 at 9. The BIA-OJS handbook applies to law enforcement officers employed by BIA, and not those employed by a tribe. *See* ECF No. 37-1 at 16 (stating that "Tribal police agencies are *encouraged*"—but not required—"to consider adoption of this Handbook") (emphasis added). BIA's statement of what *federal* laws apply to *federal* employees is not binding on the Tribe as to Tribal employees. Plaintiff asserts that the OJS handbook provides a complaint processing procedure under 29 C.F.R. Part 1614, which Plaintiff equates to a commitment by "Defendant to providing legal protections against discrimination and retaliation." ECF No. 37 at 9. However, only complaints of discrimination against *federal* agencies can be brought under 29 C.F.R. Part 1614. *See* 29 C.F.R. § 1614.103(b). Plaintiff does not allege that he used, or was eligible to use, the 29 C.F.R. Part 1614 complaint process as a *Tribal* employee.

At most, these policy statements "merely convey a promise not to discriminate. They in no way constitute an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court" on a specific discrimination claim. *Sanderlin*, 243 F.3d at 1289. The Tribe has policies prohibiting workplace harassment and discrimination *as a matter of Tribal law*. *Accord* ECF No. 37-1 at 32-33 (Tribal Employment Policy §§ 4.1, 4.2). That the Tribe provides an equal opportunity workplace under Tribal law does not mean that the Tribe has agreed to be subject to suit to enforce similar *federal* laws and policy. None of the Tribal employment policies provided by Plaintiff concedes that federal anti-discrimination laws will apply to the Tribe; indeed, they

state the exact opposite. *See id*. at § 4.1.3 (tribal employment or contract preference laws adopted by the Tribe govern). Plaintiff cites no cases suggesting that a tribe's use of "workplace rights" posters or anti-discrimination training, *see* ECF No. 37-1 at 12-13, waives tribal sovereign immunity as to employment discrimination claims. In fact, the cases compel the opposite conclusion. *See Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1153 (10th Cir. 2011) (tribal personnel handbook statement that tribe will comply with provisions of Title VII was insufficient to waive sovereign immunity); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (no clear waiver of immunity by tribe's statement "in the Employee Orientation Booklet that it would 'practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin . . . and other categories protected by applicable federal laws'").

IV. Title VII Does Not Apply to an Arm of the Tribe.

Plaintiff argues that Title VII applies to Defendants because Title VII applies to tribal businesses, there is some unknown corporate entity that "is tribal controlled and operates as a business," and Plaintiff "was employed in part by this enterprise that is controlled by Moapa Defendants." ECF No. 37 at 10-11. Plaintiff cites no allegations in his complaint suggesting that he was employed by an unidentified Tribal business. *Contra* ECF No. 8 ¶ 92 (alleging Plaintiff resigned because he could no longer work for the Tribal government). Plaintiff does not dispute that Title VII is inapplicable to individual Defendants and to the Tribe itself, *see* ECF No. 28 at 2 (fifth ground for dismissal), 14-16, and thus concedes that his first and second causes of action under Title VII against the individual Defendants, the Tribe and the Tribe's Business Council should be dismissed.

Plaintiff concedes that Moapa Tribal Enterprises does not exist, but insists that there is a corporate entity that owns and operates Tribal businesses and is subject to suit under Title VII.

ECF No. 37 at 10-11. This is legally and factually incorrect. An entity that functions as an arm of a tribe "falls within the scope of the Indian Tribe exemption of Title VII." *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998). To determine whether an entity is an "arm of a tribe," courts must consider the following factors:

> "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."

White v. Univ. of Cal., 765 F.3d 1010, 1025 (9th Cir. 2014) (internal quotation omitted). Plaintiff argues that the unknown tribal enterprise "conducts business on behalf of the [Tribe's] Business counsel [*sic*]" and is "tribal controlled," specifically by the Tribe and its governing body. *See* ECF No. 37 at 11. Taken as true, these allegations *weigh in favor* of treating the alleged tribal enterprise as an arm of the tribe that is exempt from the scope of Title VII. *See McCoy v. Salish Kootenai Coll., Inc.*, 785 Fed. Appx. 414, 415 (9th Cir. 2019) (holding that tribal entity is an arm of a tribe where "the record demonstrates that [the tribe] has significant control over the [entity] and that the [entity] is structured and operates for the benefit of [the tribe]").

Regardless, there is no separate corporation that runs Tribal businesses. ECF No. 28 at 10 n.5.[2] The Tribe is the only employer implicated by Plaintiff's complaint. When a tribal business

[2] Although Plaintiff presents this defense of his Title VII claim under Rule 12(b)(6), ECF No. 37 at 10-11, it is also properly considered under Defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because "Title VII's express exemption of Indian tribes from employer status eschews subject matter jurisdiction" over employment discrimination complaints "brought against unincorporated commercial enterprises entirely owned and operated by

is "not a corporation at all [but] is, in fact, a direct proprietary enterprise" of the Tribe, "from which it is legally inseparable," the tribal business falls within the tribal-employer exemption of 42 U.S.C. § 2000e(b). *See Thomas*, 313 F.3d at 911 (plaintiff's failure to substantiate contention that tribal business was "a separate legal entity" from the tribe in the face of defendants' showing that business was "an unincorporated business venture owned 100% by the Choctaw Nation[,]" rendered Title VII claims "legally frivolous").

Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753 (D.N.D. 1989), is unpersuasive. *See* ECF No. 37 at 10. In *Myrick*, the Devils Lake Sioux Tribe was not a party to the suit and the tribe owned 51% of the defendant business. 718 F. Supp. at 753. The *Myrick* court concluded that the defendant business was not "the tribe or an arm of the tribe." *Id.* at 755. Here, the Tribe and its Business Council *are* defendants and the Tribe itself was Plaintiff's employer. Under 42 U.S.C. § 2000e(b)'s express terms, the Tribe is not an employer subject to Title VII.

V. A § 1983 Claim Cannot Be Brought Against Officials Acting Under Color of Federal Law and Plaintiff Fails to Demonstrate Any State Action by Defendants.

Plaintiff does not dispute, and thus concedes, that his third cause of action fails to state a claim under 42 U.S.C. § 1983 because the Tribe is not a "person" subject to suit under § 1983, and that Plaintiff asserts this claim only against the Tribe's "governing entity," not against any individual Defendant in a personal capacity. *See* ECF No. 28 at 2 (seventh ground for dismissal), 16-17. Plaintiff disputes only whether Defendants acted under color of state law. *See* ECF No. 37 at 11-12.

A court "need not assume the truth of legal conclusions cast in the form of factual

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recognized Indian tribes." *Thomas v. Choctaw Mgmt./Services Enter.*, 313 F.3d 910, 911 (5th Cir. 2002) (citing *Pink*, 157 F.3d 1185).

allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). Nor is it proper to assume that the plaintiff "can prove facts that it has not alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Plaintiff failed to allege any facts suggesting state action by any defendant or explain how Plaintiff's proffered facts satisfy any legal test for state action. *Cf. Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020) (recognizing "at least four different general tests" for state action; however, "'[n]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient'") (quoting *Brentwood Acad v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001)).

Assuming Plaintiff is correct that he may have occasionally enforced state law in his role as a Tribal police officer, *see* ECF No. 37 at 12, this does not mean that Tribal *officials* acted under color of state law by employing him as a Tribal police officer or allegedly discriminating against him because he is not a Tribal member. *See West v. Atkins*, 487 U.S. 42, 49 (1988) ("[A]cting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of *state law* and made possible only because the wrongdoer is clothed with the authority of *state law*") (emphasis added, internal quotation omitted). It is undisputed that the Tribe created, supervises and manages its own Tribal Police Department using power possessed by virtue of Tribal law and recognized in federal law. *See* ECF No. 28 at 17-20.

Even if state law separately provides tribal officers the limited authority to arrest non-Indians who violate state law within a tribe's reservation, ECF No. 37-1 at 28 (citing Nev. Rev. Stat. §171.1255), it does not follow that Defendants' treatment of Tribal Police employees occurs under color of state law. The individual Defendants are all Tribal members, ECF No. 8 ¶¶ 10-17, and their alleged discriminatory comments arose either in the context of Plaintiff enforcing Tribal

laws against Defendants and other Tribal members within the Reservation, or Defendants exercising Tribal governmental authority over internal matters under Tribal law. *See, e.g.,* ECF No. 8 ¶¶ 23-25, 89 (arrest of Defendant Lee, shooting of Defendant Lee's brother and Defendant Lee's tribal court appearance, all occurring within the Reservation); ¶¶ 47-51 (Defendant Begay's on-Reservation actions); ¶¶ 58-59 (Defendant Samson's interactions with Plaintiff within the Reservation); *see also* ECF No. 28 at 11-12 (detailing complaint allegations relating to "Defendants' exercise of core [Tribal] governmental functions") and 18-20 (detailing complaint allegations made under color of Tribal law). Plaintiff fails to offer anything in response except unfounded legal conclusions. *See* ECF No. 37 at 11 (stating, without explanation, that defendants "were acting under color of state law when elected Tribal officials desired to cut the Moapa Tribal Police Department to four Tribal Police Officers and hire only tribal members.").

Plaintiff makes only conclusory allegations that using federal funds to employ Tribal police officers imbues Defendants' actions with the color of state law. *See* ECF No. 37 at 12. If a Tribe's receipt of federal funding via law enforcement 638 contract is insufficient to "impute *federal* government action to the conduct of a private or non-federal actor," *Boney v. Valline*, 597 F. Supp. 2d 1167, 1175 (D. Nev. 2009) (emphasis added), it provides no reason to impute *state* government action to the Tribe. *Accord Gugliemi v. Fed. Bureau of Prisons*, 2013 U.S. Dist. LEXIS 176098, *2-3 (D. Nev. Dec. 13, 2013) (private prison operator not a state actor where its authority to incarcerate prisoners stems from agreement with federal agency). Regardless, § 1983 provides no cause of action against federal agents acting under color of federal law. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987); *accord Morse v. N. Coast Opportunities*, 118 F.3d 1338, 1343 (9th Cir. 1997). Plaintiff failed to allege any facts that Defendants acted under color of state law when allegedly discriminating against him, therefore requiring dismissal of his § 1983 claim.

VI. Plaintiff's § 1981 Claim Fails to Adequately Plead Causation.

Plaintiff does not dispute that his fourth cause of action is asserted solely against the Tribe as employer and government body and not against any individual Defendant in a personal capacity, or dispute that he failed to state a claim under 42 U.S.C. § 1981 because disparate-treatment employment discrimination suits against tribes arising out of tribal employment are barred under federal law. *See* ECF No. 28 at 2 (ninth ground for dismissal), 21-22. Thus, this claim should be dismissed.

Although Plaintiff's complaint is rife with allegations of discrimination, the complaint is deficient as to a § 1981 claim against any defendant. "To prevail [under § 1981], a plaintiff must initially plead and ultimately prove that, *but for race*, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (emphasis added). Plaintiff's complaint demonstrates that in addition to race, a political classification and personal animus motivated Defendants' alleged statements. *See* ECF No. 28 at 13-14 n. 7, 19-20, 22. As Plaintiff admits, Defendants' alleged racial discrimination "would often be conjoined with" discrimination against Plaintiff "because he was not a member of the tribe." ECF No. 37 at 15.

Even if § 1981 employment-based claims against tribes were not categorically barred, Plaintiff's allegations boil down to racially-tinged comments by members of the minority community he was hired to police. *Accord* ECF No. 37 at 15 (accusing *tribal members* of calling Plaintiff "a white cop" and "tribal cop killer"); ECF No. 8 at ¶ 43 (alleged discrimination by *tribal members*). Employer liability for a hostile work environment can stem from actions by supervisors or employees, *see Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 688 (9th Cir. 2017), but there

is no suggestion that a *government* employer can be liable for a hostile work environment created by the government's *citizens*.

In response to Defendants' tenth ground for dismissal arguing that Plaintiff's § 1981 claim against Defendant Lee fails because Plaintiff alleges no facts demonstrating that Defendant Lee had any authority or ability to deprive Plaintiff of contractual rights, *see* ECF No. 28 at 2 (tenth ground for dismissal), 13-14 n.7, Plaintiff fails to cite any facts alleging that Defendant Lee was anything more than a member of the Tribal community Plaintiff was hired to police, and a person employed by one of the Tribe's businesses. *See* ECF No. 8 at ¶¶ 17, 20, 24. Thus, the § 1981 claim against Defendant Lee fails.

Signed this 30th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2020, a true and correct copy of the foregoing REPLY IN SUPPORT OF DEFENDANTS' RULE 12 MOTION TO DISMISS was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

BY /s/ *Laura Bartholet*
Laura Bartholet, an employee of
Ziontz Chestnut