CASE NO. 10-6157

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TINA MARIE SOMERLOTT,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CHEROKEE NATION DISTRIBUTORS, INC., AN OKLAHOMA CORPORATION, AND CND, L.L.C., AN OKLAHOMA LIMITED LIABILITY COMPANY,	)
	)
Defendant-Appellees	)

On Appeal From The United States District Court
for the Western District Of Oklahoma
The Honorable Judge TIMOTHY D. DEGIUSTI
D.C. No. 5:08-cv-00429-D

APPELLANT'S OPENING BRIEF

Respectfully submitted,

PAULA J. PHILLIPS
Counsel for Plaintiff-Appellant
1005 Arlington
Lawton, Oklahoma 73507
(305) 609-7708

Oral Argument is requested.
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

January 6, 2011

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PRIOR TO OR RELATED APPEAL

None

Undersigned counsel, on behalf of Tina Somerlott, plaintiff-appellant, for her opening brief states:

STATEMENT OF JURISDICTION

The U.S. District Court for the Western District of Oklahoma had jurisdiction over this matter pursuant to 42 U.S.C. §2000e5 and 29 U.S.C. § 621-34, and also had jurisdiction to decide whether CND/CNDI were entitled to sovereign immunity. Holt v. United States, 46 F.3d 1000, 1003 (10th Cir.1995).

On April 16, 2010, the Court entered judgment in favor of CND/CNDI, finding lack of subject matter jurisdiction on the basis of tribal sovereign immunity. (v. 2, doc. 28) (Attachment 1). Plaintiff filed a motion to set aside the dismissal which was denied on June 11, 2010. (v. 2, doc. 32). The notice of appeal was timely filed in accordance with Rule 4(a)(4)(A)(iv), F.R.A.P., on July 9, 2010. This appellate Court's jurisdiction derives from 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

THE DISTRICT COURT ERRED IN EXTENDING TRIBAL SOVERIGN IMMUNITY TO THE DEFENDANT CORPORATIONS, WHICH HAVE A TRIBAL STAKEHOLDER, WITHOUT REGARD TO WHETHER THEIR ACTIVITIES WERE SUFFICIENTLY CONNECTED WITH THE SELF-GOVERNANCE OF THE TRIBE TO WARRANT SUCH IMMUNITY

THE COURT ERRED IN FINDING THAT CND/CNDI ARE EXEMPT FROM THE ADEA, WHERE CONGRESSIONAL ENACTMENT OF THE SBA SERVES AS EVIDENCE OF LEGISLATIVE INTENT TO INCLUDE THEM

THE COURT ERRED IN ENTERING JUDGMENT BEFORE CND/CNDI PROVIDED REQUIRED RESPONSES TO PLAINTIFF'S OUTSTANDING DISCOVERY

STATEMENT OF THE CASE

This appeal respectfully requests that the Court establish, as a matter of first impression, the proper standard to apply in deciding whether a business with a tribal stakeholder is entitled to tribal sovereign immunity. Defendants, CND, LLC and Cherokee Nations Distributors, Inc. ("CND/CNDI"), are business endeavors organized under Oklahoma state law. Although the Cherokee Tribes have a financial stake in these businesses, they have no involvement in any traditional, sovereign functions on tribal property. Nevertheless, defendants have claimed the benefit of Tribal sovereign immunity to avoid the instant action for sex and age discrimination pursuant to 42 U.S.C. § 2000 et seq. (Title VII) and 29 U.S.C. § 621-34 (ADEA).

After her wrongful termination, Plaintiff, Ms. Somerlott, timely filed an EEOC complaint. CND/CNDI responded on the merits. The EEOC recommended settlement, without success. This action followed. CND/CNDI filed a Motion to Dismiss based on tribal sovereign immunity.

The District Court granted limited discovery related to jurisdiction. (v. 1, doc. 4). (*Attachment 3*). Ms. Somerlott propounded her limited discovery requests, to which CND/CNDI served numerous objections. Ms. Somerlott timely moved to compel complete responses. (v. 1, doc. 8, 9). (*Attachment 10*). The motion was not ruled upon prior to the close of briefing.

After the close of briefing, the Court, *sua sponte*, set a hearing on the motion to compel the delinquent discovery responses, holding that Plaintiff could move to supplement the record with any pertinent material thereafter gained. (v. 2, doc 24) (*Attachment 11*). The parties reached an agreement whereby CND/CNDI withdrew certain objectives and agreed to respond to narrowed requests. (v. 2, doc. 27; doc. 30, Exh. 1) (*Attachment 8, and 13, Exh. 1*). However, there was no court-ordered deadline for Defendants to provide the delinquent responses.

Plaintiff never received the agreed-upon, supplemental responses to her discovery. As she was preparing to file a renewed motion to compel, the District court granted Appellees' Motion to Dismiss on the grounds that CND/CNDI were an economic arm of the Cherokee Indian Nation and therefore entitled to its sovereign immunity and exemption from anti-Discrimination laws. The Court rendered this Order based on an improper test, and without benefit of the relevant evidence that was properly requested in discovery by Ms. Somerlott but never produced by CND/CNDI.

Ms. Somerlott moved to set aside the Order on the basis that she did not receive necessary discovery that could have elucidated the Court as to the relationship between the movants and the Tribe. The Court denied the Motion on the grounds that Ms. Somerlott was not sufficiently diligent in seeking the outstanding discovery. This appeal follows.

STATEMENT OF THE FACTS

Plaintiff's Pre-Termination Work History

From 1986 to the date of her termination in January, 2007, Plaintiff, Tina Marie Somerlott, was a skilled chiropractic technician in the Lawton/Ft. Sill, Oklahoma community. (v. 1, doc. 5; v. 2, doc. 23). (*Attachment 2, 4*). For all but the last four years of her 21-year career, she worked for a local chiropractor in Lawton. (Id.). In 1995, she and her employer signed on for a Chiropractic Health Care Demonstration Program for the U.S. Army, to determine the benefit of having chiropractic care available at its military hospitals. The Army initiated a demonstration program at Ft. Sill. ALIRON, *a non-Tribal staffing agency*, selected Ms. Somerlott's long-time employer as one of four chiropractors for this new program, and she, of course, joined him. (Id.). The clinic was designed to serve the needs of those soldiers stationed at Ft. Sill, Oklahoma, our Nation's artillery headquarters. (v. 2, doc. 23). (*Attachment 4*).

The chiropractic program was successful, and the clinic became a permanent part of Reynolds Army Hospital at Fort Sill. (Id.). Ms. Somerlott served on the base for more than eleven years, providing therapy to the soldiers who came to the clinic for help with chiropractic issues that occurred as a part of their routine out in the field and, in some instances, overseas at war. Her work was commended by the servicemen and her employer alike. (v. 1, doc. 5, exh. B). (*Attachment 2*). As

time passed, the clinic program was expanded to other military bases. Plaintiff and her long time employer, Dr. Dorschler (himself a veteran), remained at Ft. Sill and formed the entire chiropractic unit there. (v. 1, doc. 5, ¶19). (*Attachment 2*).

Plaintiff received yearly pay increases during those eleven years at the base, prior to her firing. Though she started the job earning only $9.61 per hour, by 2006 she was earning $15.01 per hour. (v. 1, doc. 5). (*Attachment* 2). She received excellent evaluations, which consistently found her competent in every area of her responsibilities and ranked her excellent or superior in almost every aspect of her job. (v. 1, doc. 5, exh. B). (*Attachment 2*).

In 2003, Ms. Somerlott's long-time employer, and supervisor, Dr. Dorschler, retired. (v. 1, doc. 5). (*Attachment 2*). After a period of time, in 2005, Dr. Matthew Aguilar was hired as his permanent replacement. (Id.). Ms. Somerlott's performance evaluations remained positive until the events which give rise to the underlying litigation, described below.

Plaintiff's Relationship with CND

As stated above, in 1995, when Ms. Somerlott and her long-time employer, Dr. Dorschler, closed their Lawton office and signed on for the chiropractic clinic program on the Ft. Sill military base, the staffing contract for the program was managed by a corporation called ALIRON. Three years later, in 1998, the Army

switched contractors, deciding to use CND, Inc., as the new staffing agency.[1] CND retained the entire staff previously in place at the hospital. (Id.). Accordingly, Ms. Somerlott and her boss became CND/CNDI's employees.

At all times material to this action, CND/CNDI was holding itself out as a small business endeavor in order to qualify for the Small Business Administration's minority-owned business program. (v. 1, doc. 5, exh. C, D; v. 1, doc. 7, exh. A; v. 2, doc 23). (*Attachments 2, 4*). CND is formed under the laws of the State of Oklahoma, and has no discernable connection to tribal self-governance, or to the intramural activities of the Cherokee tribe. (Id.) The Army hospital paid CND/CNDI, and CND/CNDI paid Ms. Somerlott and her colleagues' salaries. (Id.). Ms. Somerlott's only connection to CND/CNDI was payment of her salaries and benefits, as well as periodic evaluations. Nothing else about her job duties or performance changed between her employment by ALIRON and CND/CNDI. (Id.).

When CND took over the Army chiropractic care contract, Ms. Somerlott did not know that it purported to be a branch of the Cherokee tribe, nor that it would purport her to be a tribal employee. (v. 2, doc. 23, ¶4). (*Attachment 4*). Nevertheless **CND, in effect, contends that on the day it took the Ft. Sill**

[1] Nothing in the record indicates that any of CND's materials or communications informed the Army of the company's relationship to the Indian Tribe, or claim of sovereign immunity.

contract from ALIRON, Ms. Somerlott lost all of her protections from workplace discrimination under Title VII and the ADEA – without warning or notice. In fact, Ms. Somerlott and her co-workers were still required to attend Title VII and other anti-discrimination training as part of their job duties. (v. 2, doc. 23, ¶ 5). (*Attachment 4*). Of course, this would have been without consequence had everyone simply behaved with decency and mutual respect.

Plaintiff's Termination

But alas they did not. Shortly after his arrival as Dr. Dorschler's permanent replacement, Dr. Aguilar began engaging in an extramarital affair with a technician from one of the other therapy departments in the hospital, Ms. Tiddark. (v. 1, doc. 5; vol. 2, doc. 23). (*Attachments 2, 4*). On May 16, 2006, at the end of a usual workday, Ms. Somerlott was alone in a quiet treatment room. She heard two people enter an adjacent treatment room, and soon after heard them engaging in sexual intercourse. (Id.). She attempted to determine who was in the room, but could not, as the door was locked. She was greatly disturbed. (v. 1, doc. 5, pg. 3-4; v. 2, doc. 23).

The next day, Ms. Somerlott reported the incident to the Chief of the Physical Therapy Department at the army hospital. (Id.). She soon learned that Dr. Aguilar was reprimanded for this sexual misconduct, as he had been noticed by

personnel in other departments disrobing in the hospital treatment areas with his mistress, Ms. Tiddark. (Id.)

After reporting the inappropriate sexual activity to her supervisors, **Ms. Somerlott received the first formal reprimand of her career on January 5, 2007, for clocking in one minute late**. (v. 1, doc. 5, p. 26; v. 2, doc. 23). (*Attachments 2, 4*). In the same reprimand, her supervisor, Dr. Aguilar, admonished her for tardiness two weeks earlier when her sick child caused her to be a few minutes late. (Id.). Ms. Somerlott never clocked in late again. Admittedly, she did not have much of a chance to do so.

Twenty days after the frivolous, pretextual reprimand, without further warning, and with a virtually unblemished performance record, Ms. Somerlott was fired without severance upon returning from allegedly taking a too-long bathroom break. (v. 1, doc. 5; v. 2, doc. 23). (*Attachments 2, 4*). She was ordered to vacate the premises immediately. As the primary breadwinner for her family, with a chronically sick child, the termination was devastating, economically, socially, psychologically, and in every possible sense. (Id.). She had been a skilled chiropractic technician for twenty-one years, half of which were spent generating income for CND - with no opportunity to find alternate employment first, or even tell her side of the story. (Id.).

Plaintiff's Allegations

Plaintiff's "bathroom break" firing was, of course, a pretext. In reality, her immediate supervisor, Dr. Aguilar, was retaliating against her because she complained about his sexual relationship with his mistress that was taking place in the treatment rooms. CND apparently went along with the charade so that it could hire a younger employee, and deny Plaintiff entitlement to the benefits of her long tenure with the clinic. The day following Plaintiff's termination, Dr. Aguilar submitted his mistress, Margaret Tiddark, for consideration as Ms. Somerlott's replacement. (Id.). She was not hired, but another younger replacement was found, earning substantially lower pay than Ms. Somerlott. (Id.).

Ms. Somerlott filed a grievance before the EEOC on the basis of sexual harassment and age discrimination. (v. 1, doc. 5, p. 4 and exh. D). (*Attachment 2*). CND/CNDI complied with the investigation process. Upon completion of its investigation, the EEOC recommended settlement to CND/CNDI and then issued a right to sue letter on January 24, 2008. (Id.). When no relief was had, Ms. Somerlott filed suit in the United States District Court for the Western District of Oklahoma, alleging Title VII Vicarious Liability, Negligence, Retaliation and Age Discrimination against CND/CNDI. (v. 1, doc. 1).

Sovereign Immunity Asserted

In response, CND/CNDI filed a Motion to Dismiss under Fed. R. Civ. P.

12(b)(1), on the grounds that it was entitled to sovereign immunity from suit due to its connections to the Cherokee Tribe. (vol. 1, doc. 2). The Tribe owns the parent company, Cherokee Nation Businesses, a limited liability company organized under the laws of the State of Oklahoma ("CNB"). (Id.). CNB owns CND, Ms. Somerlott's former employer, another Oklahoma limited liability company. (Id.). CNB bought CND from Cherokee Nation Industries, another Oklahoma company, apparently wholly owned by the Cherokee Indian Tribe. (Id.).

CND/CNDI claims that the respective companies were founded for the specific purpose of providing jobs for Cherokee tribal members, to meet the needs of business development and to provide income for the tribe. (v. 1, doc. 7). However, there is NO record evidence that the companies provided jobs for tribal members, met the needs of business development, *or* provided income for the tribe. What little evidence there is in this regard rests entirely on the affidavit of Dennis McLemore, principal of CND/CNDI who merely explains the relationship between the Cherokee Tribe and its various holding companies and business enterprises. (Id., Exh. A). **Those ties are no different than what one would expect of any business reporting to and answering to its shareholders.** There is absolutely nothing "special" about the companies' activities that should possibly warrant tribal immunity.

The record demonstrates several layers of corporate veil between

Ms. Somerlott and the Tribe, and a remote relationship between the Tribe and the management of its corporate holdings. (Id.). The record further reflects that CND/CNDI were not formed as tribal governmental sub-entities nor as tribal corporate sub-entities under relevant Oklahoma law. (Id.). There is also no evidence of any connection between the activities of CND/CNDI and tribal self-governance, such as Tribal education, Tribal health care, Tribal housing, Tribal law enforcement, or any other uniquely Tribal concern.

Ms. Somerlott is not a member of the Cherokee Indian Tribe. (v. 2, doc. 23). (*Attachment 4*). The Cherokee Tribe is not and never was her employer. She was not interviewed, hired, evaluated or paid by the Tribe. (Id.) None of her co-workers at the Fort Sill Army Hospital were ever members of the Tribe. (Id.) The only other employee of CND/CNDI working at Fort Sill at the time of her termination, Dr. Aguilar, her supervisor, was not a member of the Tribe. (Id.) Ms. Somerlott's patients were not members of the Tribe, but rather soldiers stationed at Fort Sill, a U.S. Army base that is located outside Cherokee Tribal territory. (Id.) The Tribe, under corporate law, could not have been named as a defendant in this suit against CNDI and CND, due to the corporate veil that existed between it and the operation of these companies. There was simply no relationship between Ms. Somerlott and the tribe, and no special relationship between the tribe and CND/CNDI.

SUMMARY OF THE ARGUMENTS

There must be a balance between a tribe's sovereign immunity, on the one hand, and the protection of those who are dealing with its aliases, on the other. It is one thing to fall subject to tribal immunity when dealing with the Tribe or with Tribally-formed sub-entities. It is another thing altogether to fall victim to the otherwise illegal acts of a corporation that is formed under State law and by all outward appearances is just like any other state corporation - but which has a Tribe as a stakeholder. This appeal asks the 10th Circuit to recognize that the jurisprudence relating to Indian tribal immunity limits that immunity to those businesses organized pursuant to federal law as economic arms of a tribe, or to businesses performing traditional intramural government functions. State-formed corporations should not be used as a Trojan horse for the Tribe, or the corporation, to avoid the economic and legal consequences of gender and age discrimination while enjoying the benefits of federal Small Business Administration programs and creating business relationships with unsuspecting parties.

Ms. Somerlott submits that the proper test to determine whether state-formed companies are entitled to tribal immunity is the intramural relationship test, rather than the economic benefit test applied by the District Court. Where, like here, a business functions off of tribal property, employs almost exclusively non-tribal personnel, and does not affect any intramural aspects of tribal life, such as

education, health care, or housing, then that business should not be considered an arm of the tribe for purposes of sovereign immunity and application of Title VII and the ADEA.

Moreover, the Court should examine the even more tenuous relationship between CND/CNDI and the ADEA, which does not expressly exempt tribal corporations (where, by contrast, Title VII does). This Act has been subject to much scrutiny as it relates to Tribes and their corporations. Ms. Somerlott contends that the scrutiny is warranted and should be re-examined in light of Congress' passage of the Small Business Act. This Act, under which CND/CNDI operate, expressly includes Tribal corporations and bars them from discrimination, except for preferential hiring of tribal members for enterprises taking place on tribal property. This serves as evidence of an express intent to subject corporations tribal-owned corporations like CND/CNDI to Federal anti-discrimination laws.

Finally, Ms. Somerlott contends that the Court erred in failing to allow for the receipt of CND/CNDI's delinquent responses to her limited discovery before ruling on the Motion to Dismiss. Financial records, applicable insurance policies, personnel lists, etc., were relevant even to the economic benefit standard applied by the Court. These requests went unanswered, despite diligent efforts. Because the requested information could have shed light on the true economic relationship

between the Tribe and CND/CNDI, the Court abused its discretion in entering its Order without holding CDN/CDNI accountable for not responding to it.

THE DISTRICT COURT ERRED IN EXTENDING TRIBAL SOVERIGN IMMUNITY TO THE DEFENDANT CORPORATIONS, WHICH HAVE A TRIBAL STAKEHOLDER, WITHOUT REGARD TO WHETHER THEIR ACTIVITIES WERE SUFFICIENTLY CONNECTED WITH THE SELF-GOVERNANCE OF THE TRIBE TO WARRANT SUCH IMMUNITY

Review is De Novo

A dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) is subject to de novo review. See, Southway v. Cent. Bank of Nigeria, 328 F.3d 1267, 1272 (10th Cir.2003); Sac & Fox Nation v. Cuomo, 193 F.3d 1162, 1165 (10th Cir. 1999).

CND/CNDI Are Not the Cherokee Indian Tribe or its Statutory Sub-Entities for Purposes of Tribal Immunity Per Se

Tribal immunity extends *per se* to Indian tribes and their subdivisions, and even bars suits arising from a Tribe's commercial activities, absent an express abrogation by Congress. See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751, 759 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."); see also, Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir.2006) (holding that a casino that "function[ed] as an arm of the Tribe" enjoyed tribal immunity), cert. denied, 549

U.S. 1231, (2007); Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir.1982) (holding that an inn which was "a sub-entity of the Tribe rather than a separate corporate entity" enjoyed tribal immunity).[2]

Neither CND nor CNDI is the Tribe itself, nor a tribal sub-entity for purposes of immunity *per se,* in accordance with the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 503. This Act authorizes tribes in Oklahoma to organize and operate through in either of two forms: either as a Tribal Government organized under a Tribal Constitution, or as a corporation organized under a Tribal Corporate Charter. A business conducted by a tribal government sub-committee created solely pursuant to tribal constitutional power, would be immune from suit as a sub-entity of the tribal government. Likewise, a business conducted by a corporation organized pursuant to a tribe's business organization rules would be immune from suit. See e.g. Native American Distributing v. Seneca-Cayuga Tobacco Company, 546 F.3d 1288 (10th Cir. 2008) (distinguishing between tobacco company established by resolution under tribal constitution, which is immune from suit, and

[2] Although this doctrine is still applicable to tribal activities, there are limits. Determination as to whether tribal sovereignty exists for the tribe itself is affected by the nature of the endeavor. When a law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, then application of the law might not impinge on tribal sovereignty. See generally, Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180-81 (2d Cir.1996) ("[E]mployment of non-Indians weighs heavily against [a] claim that ... activities affect rights of self-governance in purely intramural matters.").

corporation formed under the corporate charter); Cook v. Avi Casino Enterprises, Inc., 548 F.3d 718 (9th Cir. 2008) (a corporation under tribal law that operated a casino enterprise held immune from suit).

CND/CNDI, however, do not qualify as sub-entities of the Cherokee Indian Tribe within either definition above. Neither CND nor CNDI were created by Act or Resolution of the Cherokee Indian Tribe under powers established by the Tribe's Constitution or a tribal corporate charter. Rather, CNDI, now CND, was organized as an Oklahoma corporation under Oklahoma state law. It later converted to an Oklahoma limited liability company, with the same Articles. Since CND/CNDI are not tribal organizations within the permissible forms defined by the Oklahoma Indian Welfare Act, they cannot be regarded as sub-entities of the Tribe for purposes of tribal immunity *per se*.

A Non-Tribal Corporation Can Be Considered an "Arm of the Tribe" for Purposes of Immunity Where its Activities Are Closely Related to Traditional, Intramural Tribal Governance

Many activities of a tribal government fall somewhere between a purely intramural act of reservation governance and a purely off-reservation commercial enterprise. In such a case, the "inquiry [as to whether a general law inappropriately impairs tribal sovereignty] is not dependent on mechanical or absolute conceptions of ... tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." White

Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980) comparing Warren Trading Post Co. v. Arizona Tax Comm'n, 380 US 685 (1965) and Williams v. Lee, 358 U.S. 217 (1959), with Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) and Thomas v. Gay, 169 U.S. 264 (1898).

The Tenth Circuit has adopted this rationale in holding that the mere organization of an Indian tribal entity under state law does not necessarily preclude its characterization as a tribal organization as well. See, e.g., United States v. Logan, 641 F.2d 860, 862 (10th Cir. 1981) (rejecting the contention that incorporation under state law precluded characterization of a corporation as a tribal organization). Accordingly, there are a plethora of cases to be found where a state-formed business is engaging in an intramural activity of a tribe and, accordingly, is entitled to tribal immunity.[3] The additional factors that can be taken into account

[3] See, Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority, 199 F.3d 1123, 1125 (10 Cir. 1999) (tribal housing authority created pursuant to state statute was a "tribe" for Title VII exemption because housing is a fundamental tribal function); Dille v. Council of Energy Resource Tribes, 801 F.2d 373, 375-76 (10th Cir. 1986) (an organization representing the energy resource interests of thirty-nine Indian tribes was a "tribe" for purposes of the Title VII exemption); United States v. Crossland, 642 F.2d 1113, 1114-15 (10th Cir. 1981) (housing authority's creation under state statute did not prelude characterization as a tribal organization).

are: location on Indian Territory, serving Indian clientele and employing Indian workers.[4]

As stated in Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1463 (10th Cir. 1989)[5]:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches 'exclusive rights of self-governance in purely intramural-matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations....' In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

See also, Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 94 F.3d 747, 753 (2d Cir.1996)

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[4] See, Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188 (9th Cir. 1998) ("Modoc did not lose its exemption simply because it performed the self-determination contract for health services off the reservation."); Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1135 (9th Cir.2006) (en banc) (concluding that college where board of directors was selected by tribe, college was treated under tribal law as a tribal corporation, most students were Native American, and the college favored Native Americans in hiring was closer to Pink v. Modoc than N.L.R.B. v. Chapa De Indian Health Program).

[5] (citing Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir.1985) quoting United States v. Farris, 624 F.2d 890, 893-94 (9th Cir.1980), cert. denied, 449 U.S. 1111, (1981)).

This standard is instructive as to what circumstances should permit a state-formed company to claim tribal immunity. By extension, if a non-tribal corporation, formed under state law, is engaging in intramural tribal activities, then it should be entitled to sovereign immunity. However, if it is a mere business, generating income for the tribe, then it should not. See, Myrick v. Devil's Lake Sioux Mfg. Corp., 718 F.Supp.753 (D.N.D. 1989) and Cano v. Cocopah Casino, 2007 U.S. Dist. LEXIS 54377 (D. Ariz. 2007).

This makes sense from a policy standpoint. If a company, however formed, is engaging in traditional tribal endeavors, then any person or entity doing business with that company knows or should know that it is operating as an arm of the tribe. There can be no "hidden" tribal immunity. People are on notice and have the opportunity to a) choose not to engage in business relations with a company that is likely legally untouchable, b) attempt to get a waiver of immunity for purposes of litigation should a dispute arise, or c) go forward with the business endeavor in hopes that everybody engages in fair dealings for the mutual benefit of the parties, and accept the risk of no remedy in the event that it does not happen.

For instance, in United States v. Logan, the Choctaw Tribe formed a company under the corporate laws of Oklahoma with cooperation from the Bureau of Indian Affairs to enable the tribe to receive benefits under Title IV of the Indian Financing Act of 1974, 25 U.S.C. §§ 1521-1524. Clearly, the very purpose of this

corporation was to qualify under an act pertaining specifically to the Indian tribes. Id. at §§ 1521, 1452(e). Any third person later doing business with that company clearly ought to know that it was an Indian endeavor.[6]

The Court Erred in Finding that CND/CNDI Constituted an "Arm of the Tribe" For Purposes of Sovereign Immunity Because Their Business Activities Have Nothing to Do With the Intramural Activities of the Tribe

On the other hand, where a state-formed entity operates as a mere business, arm-of-the-tribe immunity should not apply. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 at 171 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 at 148 (1973); N.L.R.B. v. Chapa De Indian Health Program, 316 F.3d 995 (2003). In Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000), the court distinguished between the subject company, that was chartered, funded, and controlled by the Tribe to provide education to tribal members *on Indian land* and a "mere business." As a purely economic endeavor, the activities of CND/CNDI constitute, at best, the kind of "mere business" for which sovereign immunity will not apply.

In support of the Motion to Dismiss Plaintiff's Amended Complaint, CND/CNDI appear to argue that at the time CND/CNDI the corporate entities were

[6] This same analysis applies to off-reservation with casinos that are located in states which do not permit gambling, likely accounting for some of the jurisdictional differences in applying sovereign immunity to them. Where the state does not allow the operation of non-Indian casinos, individuals working or doing business with same can hardly claim ignorance to the involvement of the Tribe.

originally formed, the Cherokee Nation did not have laws permitting the formation of a corporation or a limited liability company. This argument implies that CND/CNDI have an excuse for not organizing under tribal law that should permit them to still assert immunity. However, this argument, if anything, weighs in favor of Ms. Somerlott. If the Tribe did not even have apparent authority to operate such a business entity, how could any third party possibly be on notice of the connection – particularly where the corporate charter refers to, adopts, and agrees to be bound by the anti-discrimination code found in the Small Business Act?[7]

Even Assuming that CND/CNDI Were Ever Entitled to Sovereign Immunity, They Waived it By Way of the Sue and Be Sued Clause in Their Corporate Charter

The 10th Circuit dealt with this issue in Native American Distributing, 546 F.3d at 1291. There, the Court engaged in significant inquiry as to whether a tribal endeavor was operating as a subcommittee of the tribe's government or, in the alternative, pursuant to a tribal corporate charter, to determine whether it had waived sovereign immunity by way of a sue and be sued clause. In that case, the corporation was actually formed by way of the Tribal Government, as opposed to state law. In the formation of the corporation, there was a limitation of sovereign immunity. Here, the corporation was established by state law, with a sue and be

[7] Moreover, CND/CNDI's argument leads to the inevitable conclusion that even after the Tribe created a mechanism by which to form a corporation or a limited liability company, CND/CNDI continued to operate as Oklahoma corporations – all the while gleaning the benefits of the Small Business Act.

sued clause. Ms. Somerlott suggests that the sue and be sued clause in the governing documents may serve to waive any sovereign immunity that the corporation may have otherwise enjoyed by way of its association with a Tribal stakeholder.

THE COURT ERRED IN FINDING THAT CND/CNDI ARE EXEMPT FROM THE ADEA, WHERE CONGRESSIONAL ENACTMENT OF THE SBA SERVES AS EVIDENCE OF ITS INTENT TO INCLUDE THEM

Review is De Novo

A dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) is subject to de novo review. See, Southway v. Cent. Bank of Nigeria, 328 F.3d 1267, 1272 (10th Cir.2003); Sac & Fox Nation v. Cuomo, 193 F.3d 1162, 1165 (10th Cir. 1999).

The ADEA Has Been Implicitly Extended to Indian Tribes Operating on Indian Territory Based on the Intent of Congress

The language of the ADEA neither expressly includes nor excludes Indian tribes from coverage. 29 U.S.C. § 621-34 (1982); Equal Employment Opportunity Comm'n v. Cherokee Nation, 871 F.2d 939, n. 4. (10th Cir. 1989). However, the Tenth Circuit has held that the Cherokee Tribe is not within its scope. EEOC v. Cherokee Nation, 871 F. 2d at 937. There, the EEOC had attempted to judicially enforce an administrative subpoena duces tecum related to the ADEA. The Tenth Circuit held that a statute of general applicability was inapplicable to a tribal business enterprise operating **on reservation property** for two reasons: first,

because its enforcement would violate treaty provisions which recognize the Tribe's right to exclude non-Indians from tribal lands; and second, because enforcement "would dilute the principles of tribal sovereignty and self-government recognized in the treaty." (citing Donovan v. Navajo Forrest Products Indus., 692 F.2d 709, 712 (10th Cir. 1982)). Accordingly, the Court found that the ADEA was not applicable where enforcement would have directly interfered with the Cherokee Nation's treaty-protected right of self-government on its own property. Id. at 938.

CND/CNDI Were Incorporated as a Small Business and Received the Benefits of Same Under the SBA Guidelines

Here, there can be no finding of a treaty-protected right of self-government to bar application of the ADEA to CND/CNDI companies. CND/CNDI is a state-formed business concern operating as a Small Business Act entity pursuant to 15 U.S.C. § 661 et seq. (v. 1, doc. 7). Accordingly, they received the benefits of same under the SBA guidelines. The benefits they received, however, were contingent on compliance with the very anti-discrimination laws upon which Ms. Somerlott bases her claims.

Congressional Inclusion of Tribal Corporations in the Provisions of the Small Business Act, Requiring Compliance with Sex and Age Discrimination Laws, is Evidence of Congressional Intent to Apply the ADEA to CND/CNDI

The SBA specifically includes application to Indian-owned corporations. In its definitions of those businesses which qualify for consideration as SBA businesses, the SBA states as follows:

> (p) DEFINITIONS RELATING TO HUBZONES. In this Act:
>
> * * * * *
>
> (2) HUBZONE. The term "HUBZone" means a historically underutilized business zone.
>
> (3) HUBZONE SMALL BUSINESS CONCERN. The term "HUBZone small business concern" means:
>
> * * * * *
>
> (C) a small business concern
>
> (i) **that is wholly owned by 1 or more Indian tribal governments, or by a corporation that is wholly owned by 1 or more Indian tribal governments; or**
>
> (ii) that is owned in part by 1 or more Indian tribal governments, or by a corporation that is wholly owned by 1 or more Indian tribal governments, if all other owners are either United States citizens or small business concerns[.]
>
> * * * * *
>
> 13 C.F.R. § 126.103

The enacting code of the SBA goes on to expressly prohibit gender discrimination, including sexual harassment, and age discrimination, in the workplace, in accordance with Title VII and the ADEA. The prohibition against discrimination is directed squarely toward corporations with Tribal stakeholders, and provides exceptions for preferential hiring of tribal citizens as employees. *See*, 41 C.F.R. §§60-1.1-1.4

Specifically, the Act states:

> (6) **Work on or near Indian reservations.** It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.
>
> Id.

Accordingly, **Congress expressly considered the application of these anti-discrimination laws to Indian tribes and their SBA concerns**, and determined that as to these entities, the applications of Federal anti-discrimination laws should apply.

Far from creating a disadvantage for these corporate entities, the imposition of restrictions upon gender and age restrictions increases the profitability of these entities with Tribal stakeholders by allowing preferential treatment under the SBA. The development of this body of law is not discussed for the purpose of suggesting that there is a private cause of action for discrimination based on the Small

Business Act. Rather, it is brought forth as evidence of the clear intent of congress that Title VII and the ADEA are meant to include tribal corporations – particularly those doing business under the auspices of the SBA.

Together with the fact that CND/CNDI do not meet the traditional definition of a tribal enterprise for purpose of extending Tribal immunity to them in the first place, the inclusion of tribal enterprises in the anti-discrimination clauses of the SBA demonstrates Congress's intent and, in turn, belief that regulating gender and age discrimination in non-reservation tribal corporate activities (even on-reservation corporate activities where they are operating as an SBA enterprise as to age and gender discrimination) does not in any way interfere with the socio-economic well-being of the Tribe, which is the primary consideration in determining whether CND/CNDI should be entitled to the immunities enjoyed by the Tribe itself.

The Corporate Veil

Well settled law allows businesses to incorporate to limit liability and isolate liabilities among separate entities. Frank v. U.S. West, Inc., 3 F.3d 1357 (10th Cir. 1993) See also, Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1576 (10th Cir.), cert. denied, 498 U.S. 849 (1990). Under the doctrine of limited liability in corporations, shareholders generally are not liable for the acts of the corporation. NLRB v. Deena Artware, Inc., 361 U.S. 398, 402-03, (1960). The

"corporate veil" shields shareholders from liability, by creating the presumption that acts of the corporation are not acts of the shareholder. DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681, 683 (4th Cir.1976). The underlying purpose of limited liability is to stimulate business investment by permitting individuals to take action in corporate form without the risk of direct liability or involvement. Labadie Coal Co. v. Black, 672 F.2d 92, 96 (D.C.Cir.1982).

Within the facts of this case, the Cherokee Indian Tribe is the shareholder of CND/CNDI companies. CND/CNDI companies are incorporated pursuant to Oklahoma state law. This corporate form shields the Cherokee tribe from risk of direct liability and from involvement in CND/CNDI companies. It also protects the tribe's investment in the CND/CNDI companies. That corporate veil, however, also distances the tribe from CND/CNDI companies because acts of CND/CNDI companies are not acts of the shareholder, the Cherokee Tribe.

In order to reach the Cherokee Tribe through CND/CNDI companies, Ms. Somerlott would have to seek to pierce the corporate veil according to any of the tests acceptable to this Honorable Court. At that point, the Tribe would be entitled to assert the defense of Title VII exemption for itself, shielding itself from suit under Title VII. Even in that situation, CND/CNDI companies would not be entitled to the Tribe's exemption from Title VII because the companies are not exempt from Title VII's definition of "employer." Acts of CND/CNDI companies

are not acts of their shareholder and therefore not acts of the Cherokee Tribe. Only the Cherokee Tribe could assert the exemption as a defense to suit.

In a different factual scenario, had CND/CNDI companies been organized as tribal government sub-entities pursuant to tribal constitutional power, or as tribal corporate sub-entities pursuant to tribal corporate power, then the companies would have been exempt from the definition of an employer under Title VII because as sub-entities of the tribe they would have been considered Indian tribes in light of "the purpose of promoting the ability of sovereign Indian tribes to control their own economic enterprises." Duke, 199 F. 3d at 1125 (internal citations and quotations omitted). Moreover, had CND/CNDI been organized as Tribal government sub-entities, then the companies could argue that their acts were acts of the Tribe and therefore entitled to Title VII exemption.

There are instances, as previously discussed, where state-chartered corporations have earned the protection of tribal immunity due to the nature of their activities. In the 10th Circuit's opinion in Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority, 199 F.3d 1123, 1125 (10 Cir. 1999), an Oklahoma Corporation acting as a tribal housing authority was found to be a "tribe" for Title VII exemption. However, this factual scenario is unlike that in Duke.

There, a housing authority created pursuant to state law to perform a governmental function on Indian territory was exempt from Title VII as an

economic arm of a tribe. Id. Here, CND/CNDI companies employed non-Indians and served non-Indian clientele off Indian territory. They were incorporated pursuant to state law. CND/CNDI companies do not implicate the Tribe's exemption because the Tribe is merely a shareholder. The companies cannot be considered an arm of the tribe as was the housing authority in Duke for reasons discussed supra. The tribe is both protected and limited by the corporate veil. It has no responsibility or involvement in CND/CNDI companies, but neither can the companies use the tribe's exemption for their benefit because acts of the companies are not acts of the shareholder. CND/CNDI companies may not assert Title VII exemption to evade responsibility for their actions towards Ms. Somerlott simply because they are owned, in whole or in part, by an Indian tribe or its subsidiaries.

In light of CND/ CNDI's Corporate Structure, The Tribe was not Ms. Somerlott's Employer under Title VII

Where there is a question as to the "employer" of a Plaintiff in a Title VII Sex Discrimination Action, the Tenth Circuit has identified three approaches: (1) the common law agency inquiry; (2) the "hybrid" common law-economic realities method; and (3) the single employer or true economic realities test. Lambertsen v. Utah Dep't of Corrections, 79 F.3d 1024 (10th Cir.1996). Under the common law agency inquiry, the focus is on whether the putative employer "controls the means and manner by which work is accomplished." Id. at 1028.

The hybrid method combines the focus on the common law right to control with additional factors relating to the degree of economic dependence of the worker on the putative employer. See id. at 1028. The third approach is used by courts that have "turned for guidance to a test promulgated by the National Labor Relations Board." Evans v. McDonald's Corp., 936 F.2d 1087, 1089 (10th Cir.1991). Under this approach, which is known as the "single employer," "economic realities," or "integrated enterprise" test, courts consider the following factors: interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control. See id. (citing McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir.1987)).

All three of these tests can be applied to determine whether an employee can maintain a Title VII cause of action against an employer. They conversely should be applicable to determining whether an employer can claim to employ a Plaintiff for the purpose of asserting a dispositive defense. Under the circumstances in this case, the Cherokee Tribe did not control the means or manner by which Ms. Somerlott accomplished her work. If anyone did so, it was the physical therapy department of Reynolds Army Hospital. Accordingly, the Tribe could not be considered her employer under the agency inquiry.

According to the hybrid method, the tribe still lacked the right to control Ms. Somerlott, because they were merely a shareholder in the company. She had no

economic dependence on the Tribe, and only economically interacted with CND/CNDI companies. Finally, applying the integrated enterprise test, there can be no employment relationship between Ms. Somerlott and the Cherokee Tribe because the Tribe did not interrelate its operations with CND/CNDI companies or with their control of labor relations.

The tribal council may have appointed some management of CND/CNDI companies, however there is no evidence that those managers sat on the Tribal Council as well. Common ownership by the Tribe existed, because it was sole shareholder of both companies, but based on information provided by CND/CNDI, the exercise of financial control over those companies was limited. [8] In any event, regardless of the test applied to the relationship between Ms. Somerlott and the Cherokee Tribe, it is doubtless that she was not employed by the Tribe. Accordingly, her employers, CND/CNDI cannot assert any Title VII exemption.

For the foregoing reasons, the Appellees are not exempt from Title VII's definition of an "employer," and Appellant's employer was not the Tribe.

[8] As argued in Section IV below, these and other factual inquiries render the Order on Defendant's Motion to Dismiss premature, in light of jurisdictional discovery that had gone ignored by CND/CNDI, despite an Order requiring its production.

THE COURT ERRED IN ENTERING JUDGMENT BEFORE CND/CNDI PROVIDED REQUIRED RESPONSES TO PLAINTIFF'S OUTSTANDING DISCOVERY

Review is for Abuse of Discretion

A denial of discovery is reviewed for abuse of discretion. Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1520 (10th Cir.1995). However, this inquiry also takes into consideration whether prejudice has occurred. See, e.g., United States v. Prichard, 781 F.2d 179, 183 (10th Cir.1986) (stating that standard of review is prejudice or abuse of discretion; examining whether prejudice occurred).

CND/CNDI Agreed to Provide Relevant Discovery
Which Agreement was Ratified by Court Order Dated February 16, 2010

On February 6, 2010, the parties appeared before the Court regarding Plaintiff's Motion to Compel responses to discovery from Defendants. Prior to the hearing, the parties reached agreement with respect to all of the discovery responses with the exception of the financial records requested, with Plaintiff withdrawing as to some of the requests and CND/CNDI agreeing to provide amended responses with respect to others. Prior to the time of the hearing, the only matter unresolved by the parties was the disagreement with respect to the scope of the financial documents requested related to Request No. 13; however, an agreement was reached during the pre-hearing conference. The parties submitted a

proposed agreed Order to the Court and, on February 28, 2010, the Court entered the Order. (v. 2, doc. 27). This Order acknowledged that there were documents to be produced subject to a prior agreement between the parties. Id.

The Discovery Was Relevant to the Issues Before the Court

The discovery sought by CND/CNDI was relevant to determining several of the issues before the Court. Specifically, the claims that the business enterprises of CND/CNDI were for the benefit of the Tribe were covered by the requested discovery, as well as the degree of relationship between the business and the Tribe. (v. 2, doc. 30). In addition to these subjects, which go to the economic relationship test applied by the District Court, Plaintiff's discovery also sought information regarding the percentage of business conducted on Tribal property as opposed to off.

Plaintiff Was Diligent in Pursuing Discovery Responses

The Court had previously denied Defendant's motion for protective order regarding document production. (v. 2, doc. 26). Notwithstanding the agreement of the parties prior to and at the hearing on February 4th, 2010, and notwithstanding the denial of the motion for protective order, CND/CNDI never produced any of the outstanding documents, including the financial documents requested and agreed upon, reflecting the scope of activities engaged in by CND/CNDI and their impact on the Tribe.

Counsel for Ms. Somerlott was in the process of preparing a Supplemental Motion to Compel when, on April 16, 2010, the Court entered its Order Dismissing her claims. (v. 2, doc. 28). As part of the Order on the Motion to Dismiss, the Court evaluated the financial structure of CND/CNDI and its revenues as being for the benefit of the Cherokee Tribe. The Court further noted that a lawsuit negatively impacting CND/CNDI would also negatively impact the revenue of the Tribe. However, Ms. Somerlott and, indeed, the Court have never been provided the financial records with which to support or disprove any such claims.

In denying Plaintiff's Motion to Set Aside, the Court held that she had not been sufficiently diligent in attempting to obtain the discovery. This is despite Plaintiff's timely filing of her motion to compel which went un-ruled upon until after the close of briefing, as well as Plaintiff's timely motion to extend briefing until the Court had dealt with same – which motion was denied. There is no basis in the record as to why Defendant would have been prejudiced by the Court ruling upon the motion to compel prior to the close of briefing, which would have prevented the unjust result experienced in this instance. It appears to be an abuse of discretion to promote the kind of dilatory tactics employed here by defendants, letting them benefit from simply doing nothing in the face of valid, relevant discovery.

Moreover, in considering the Motion to Set Aside, the Court ignored the agreement between the parties that CND/CNDI would provide financial documents subject to a previous agreement, other than those addressed in RFP No. 13 (which asked the Defendants to produce documents showing the percentage of revenue that CND/CNDI generated by off-reservation activities). These documents, by CND/CNDI's own account, acknowledged by the Court in its Order, were to be produced "after entry of a protective order." Initially, Plaintiff joined Defendant in an attempt to draft same, which was subject to its representations that such Orders were commonplace and granted as a matter of Court. (v. 2, doc. 31). However, after the initial attempt was denied, Plaintiff's counsel learned that there was more to the practice in the Western District than Defendant could be trusted to disclose. Therefore, Plaintiff chose to withdraw joint submission of a motion and proposed Order and allow CND/CNDI to proceed on its own. There was absolutely nothing in Plaintiff's discovery agreement which precluded her from doing so.

The motion, which the Court was advised was a condition precedent to CND/CNDI's production (Id.), was never filed. CND/CNDI seems to excuse its failure on Plaintiff's withdrawal of her joint support. However, there never was any. She was certainly willing to wait for the documents until after an order was entered. But she was under no obligation whatsoever to draft any Motion on behalf of the Defendants.

As evidenced by the record, CND/CNDI knowingly left Plaintiff's primary counsel off communications related to this discovery, and failed to even attempt to gain a protective order on its own - which, of course, it could have. Plaintiff gave Defendant ample time to do so and, when nothing happened, prepared a detailed motion to compel the discovery based on the agreements made. However, prior to Plaintiff filing the Motion, the Court entered its order granting Defendants' motion to dismiss without further recourse.

The Court Relied Upon Factual Findings that Plaintiff Did Not Have the Opportunity to Fairly Refute Due to CND/CNDI's Failure to Respond to Her Discovery

In its order granting Plaintiff's motion to dismiss, the District Court made factual findings which Plaintiff did not have fair opportunity to refute, due to CND/CNDI's failure to respond to her discovery – which discovery should have been produced without need for a motion to compel. Even assuming that the economic relationship test were the correct criteria by which to determine whether CND/CNDI should be entitled to sovereign immunity, Defendants withheld relevant documentation regarding the economic relationship between themselves and the Tribe. Specifically, Plaintiff requested and Defendants refused to produce documents related to the financial holdings of CND/CNDI, the internal corporate structure of CND/CNDI, and the transfer of revenue from CND/CNDI to the Tribe.

The Court foreclosed Plaintiff's opportunity to gain access to the relevant and timely-requested discovery that Defendants ignored. There is no evidence that Plaintiff unduly delayed or acted without diligence in obtaining same. These records being necessary for the evaluation of the facts of this case, Ms. Somerlott respectfully submits that the District Court erred in Granting the Motion to Dismiss prior to the close of jurisdictional discovery. See, Id.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because this issue presents a matter of first impression, as to the relationship required between a business concern and a Tribe for purposes of extension of tribal immunity and exemptions, counsel respectfully requests to opportunity for oral argument.

CONCLUSION

CND and CNDI are not organized in either manner required by Federal Law to create a Tribal business entity entitled per se to immunity from suit and exemption from Title VII. As a state-chartered corporation, the relationship between the activities of CND/CNDI and the traditional functions of the Tribe are so remote that the Court cannot consider them an "arm of the tribe" for purposes of covering them with the Tribe's immunity. Accordingly, they are not entitled to sovereign immunity, or exemption from Title VII and the ADEA.

Moreover, the District Court entered its Order prematurely, in light of timely-sought, relevant discovery that went ignored by CND/CNDI, despite an agreement recognized by Court Order that same should be produced. Accordingly, even assuming that the Court adopts the economic benefits test used below, Ms. Somerlott seeks an Order vacating the decision of the District Court that found in favor of Defendants, and remanding the matter for further discovery.

Respectfully Submitted,

s/ Paula J. Phillips
Attorney for Appellant

Jane Muir
FBN 70065
10th Circuit Application Pending

CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 10,277 words.

I relied on my word processor to obtain the count and it is Microsoft Word.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Paula J. Phillips
Attorney for Appellant

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing APPELLANT'S OPENING BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint version 11.0.5002.333, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

CERTIFICATE OF SERVICE

_X_ I hereby certify that on January 6, 2011, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing, and served via overnight delivery 7 duplicate copies of the Motion in accordance with the Local Rules. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Graydon Dean Luthey: dluthey@hallestill.com

Chandra L Holmes: chandra@zelbst.com, pauline@zelbst.com

s/ Paula J. Phillips