

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 JANA FORSYTHE and FORSYTHE)
4 ENTERPRISES, INC., dba FEI)
5 CONSTRUCTION,)
6 Plaintiffs,)
7 vs.)
8 RENO-SPARKS INDIAN COLONY, STEVE)
9 STOUT, VICKY OLDENBURG, STEVE)
10 MORAN, ARLEN MELENDEZ, WOOD-)
11 RODGERS,)
12 INC., and MARK CENDAGORTA,)
13 Defendants.)

Case No.: 2:16-cv-01867-GMN-VCF

ORDER

14 Pending before the Court is the Motion to Dismiss, (ECF No. 17), filed by Defendants
15 Arlan Melendez, Steve Moran, Vicky Oldenburg, Steve Stout ("RSIC Officers"), and Reno-
16 Sparks Indian Colony ("RSIC") (collectively "RSIC Defendants"). Plaintiffs Jana Forsythe
17 ("Forsythe") and Forsythe Enterprises, Inc. ("FEI") (collectively "Plaintiffs") filed a Response,
18 (ECF No. 24), and RSIC Defendants filed a Reply, (ECF No. 27).

19 Also pending before the Court is the Motion to Dismiss, (ECF No. 19), filed by
20 Defendants Mark Cendagorta ("Cendagorta") and Wood Rodgers, Inc. ("Wood Rodgers")
21 (collectively "Wood Rodgers Defendants"). Plaintiffs filed a Response, (ECF No. 25), and
22 Wood Rodgers Defendants filed a Reply, (ECF No. 28). For the reasons discussed below, both
23 RSIC Defendants' and Wood Rodgers Defendants' Motions to Dismiss are GRANTED.

24 I. BACKGROUND

25 This case arises out of Plaintiffs' § 1983 lawsuit against an Indian colony and a private
civil engineering firm for Plaintiffs' bid not being chosen for a construction project. Forsythe

1 is “a woman and majority owner of a small Southern Nevada construction business surviving in
2 a male-dominated industry.” (Am. Compl. ¶ 2, ECF No. 8). RSIC is a “federally recognized
3 Indian tribe” and Wood Rodgers is a private civil engineering firm. (Id. ¶¶ 14, 20).

4 The case at hand pertains to two construction contracts federally funded by the
5 Economic Development Administration (“EDA”) and the U.S. Department of Housing and
6 Urban Development (“HUD”) respectively. (Id. ¶ 24). RSIC Defendants and Wood Rodgers
7 Defendants (collectively “Defendants”) opened bids for companies to work for the EDA
8 construction contract during an eight-day period in late July 2014. (Id. ¶ 25). Defendants led
9 the EDA procurement, as Wood Rodgers Defendants assisted with the bidding, and only RSIC
10 Defendants participated in the second HUD procurement. (Id. ¶¶ 25, 210).

11 During the EDA procurement, Plaintiffs signed and tendered what they assert to have
12 been the lowest bid on July 22, 2014. (Id. ¶¶ 80, 236). Plaintiffs submitted this bid in
13 competition with “three male-owned construction companies; two based in Sparks, the other
14 based in Fallon but with an office in Sparks.” (Id. ¶ 70). After a series of exchanges, RSIC
15 Defendants ultimately disqualified Plaintiffs’ bid and awarded the EDA contract to a “Male
16 Bidder, whose base bid was about \$48,301 higher than Plaintiffs’ base bid.” (Id. ¶¶ 108, 124).

17 A similar situation occurred with the HUD procurement. On July 25, 2014, Plaintiffs
18 tendered their bid for the HUD contract and on July 30, 2014, the bid opened. (Id. ¶¶ 146–147).
19 After a series of exchanges, on September 22, 2014, RSIC Defendants stated that they awarded
20 the HUD contract to another contractor and returned Plaintiffs’ bid and bid bond. (Id. ¶ 174).

21 On August 7, 2016, Plaintiffs filed their Complaint, (ECF No. 2), and on September 11,
22 2016, Plaintiffs filed their Amended Complaint, (ECF No. 8). In the Amended Complaint,
23 Plaintiffs allege twelve causes of action pursuant to § 1983 and four state causes of action.
24 (Am. Compl. at 1). The causes of action are: (1) sex discrimination pursuant to 42 U.S.C.
25 § 6709; (2) sex discrimination pursuant to 42 U.S.C. § 1323; (3) retaliation; (4) federal bidding;

1 (5) equal protection; (6) interstate travel; (7) substantive due process; (8) free speech and equal
2 protection; (9) interstate commerce; (10) due process; (11) deliberate indifference;
3 (12) conspiracy; (13) fraud through intentional misrepresentation; (14) negligent
4 misrepresentation; (15) intentional infliction of emotional distress; (16) and negligent infliction
5 of emotional distress. (Id.). Plaintiffs premise this case on the theory that “[e]verything that
6 happened to Jana Forsythe was because she is female. Defendants induced Jana Forsythe to bid
7 because she is female. Jana Forsythe lost the two contracts because she is female.” (Id. ¶ 179).

8 On November 14, 2016, RSIC Defendants filed their Motion to Dismiss, (ECF No. 17),
9 seeking dismissal of all of Plaintiffs’ claims due to sovereign immunity. (See RSIC Defendants’
10 Mot. to Dismiss (“RSIC MTD”) 2:13–14). On the same day, Wood Rodgers Defendants filed
11 their Motion to Dismiss, (ECF No. 19), seeking dismissal of all of Plaintiffs’ claims due to
12 Wood Rodgers Defendants failing to be state actors as required by § 1983. (See Wood Rodgers
13 Defendants’ Mot. to Dismiss (“Wood Rodgers MTD”) 2:13–14).

14 **II. LEGAL STANDARD**

15 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
16 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
17 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
18 which it rests, and although a court must take all factual allegations as true, legal conclusions
19 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
20 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
21 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain
22 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
23 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
24 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
25 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This
standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

1 If the Court grants a motion to dismiss for failure to state a claim, leave to amend should
2 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
3 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
4 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
5 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
6 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
7 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
8 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

9 **III. DISCUSSION**

10 The Court will first address RSIC Defendants’ Motion and then address Wood Rodgers
11 Defendants’ Motion.

12 **A. RSIC Defendants’ Motion to Dismiss**

13 RSIC Defendants seek dismissal of all of Plaintiffs’ claims because of sovereign
14 immunity. Specifically, RSIC Defendants state that both “RSIC and the RSIC Officers are
15 protected by the doctrine of sovereign immunity” because RSIC is a “federally-recognized
16 Indian tribe” and the RSIC Officers “have been sued in their official capacities as high-ranking
17 members of RSIC.” (RSIC MTD 2:13–19).

18 “Sovereign immunity limits a federal court’s subject matter jurisdiction over actions
19 brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in
20 an action against an Indian tribe.” *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015–16
21 (9th Cir. 2007). “Suits against Indian tribes are . . . barred by sovereign immunity absent a
22 clear waiver by the tribe or congressional abrogation.” *Oklahoma Tax Comm’n v. Citizen Band*
23 *Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Stock West Corp. v. Lujan*, 982 F.2d 1389,
24 1398 (9th Cir. 1993). “There is a strong presumption against waiver of tribal sovereign
25 immunity.” *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001). Waiver of

1 sovereign immunity by a tribe may not be implied and must be expressed unequivocally.
2 *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996). Similarly, congressional abrogation of
3 sovereign immunity may not be implied and must be “unequivocally expressed” in “explicit
4 legislation.” *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004).

5 Tribal sovereign immunity is not dependent on a distinction between on-reservation and
6 off-reservation conduct nor is it dependent upon a distinction between the governmental and
7 commercial activities. *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 754–55 (1998). A
8 tribe’s sovereign immunity extends both to tribal governing bodies and to tribal agencies that
9 act as an arm of the tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).
10 The Court will first address sovereign immunity as to RSIC and then to RSIC Officers.

11 **1. RSIC**

12 Plaintiffs allege that RSIC “expressly waived sovereign immunity and consented to
13 Plaintiffs’ suit against itself, its subdivisions, its officers, agents, employees, and members, in
14 both their individual and official capacities.” (Am. Compl. ¶ 200). Plaintiffs continue “[b]y
15 accepting federal monies validly conditioned on a waiver of tribal sovereign immunity, RSIC
16 subjected itself to private litigation.” (Id. ¶ 201).

17 RSIC asserts that “Plaintiffs fail to point to any language that supports the position that
18 the tribe’s receipt of federal monies was conditioned upon a waiver of sovereign immunity.”
19 (RSIC MTD 8:12–13). Indeed, “[a]bsent express waiver, consent by the Tribe to suit, or
20 congressional authorization for such a suit, a federal court is without jurisdiction to entertain
21 claims advanced against the Tribe.” *Evans v. McKay*, 869 F.2d 1341, 1345-46 (9th Cir. 1989).
22 Plaintiffs allege that “Congress has a significant interest in ensuring the benefits RSIC secured
23 through federal monies.” (Am. Compl. ¶ 197). Significant interest or not, however, Plaintiffs
24 do not identify the specific congressional authorization necessary for Plaintiffs to bring this
25 suit.

1 Plaintiffs further assert that Defendants are not entitled to sovereign immunity because
2 RSIC inserted a written “Limited Waiver of Sovereign Immunity” clause “in a federally funded
3 contract that Plaintiffs submitted the low bid for but were later disqualified due to RSIC’s
4 discrimination.” (Resp. 1:21–24). However, this allegation is unavailing. As Plaintiffs
5 themselves allege, Plaintiffs “asked [RSIC Defendants] for a sample waiver of tribal sovereign
6 immunity form.” (Am. Compl. ¶ 71) (emphasis added). This “sample” was just that—an
7 example provision in an unsigned contract that is not binding on any party at issue here.
8 Because of this, RSIC did not contractually waive its sovereign immunity with Plaintiffs, and
9 Defendants have established their entitlement to sovereign immunity. The Court fails to see
10 how Plaintiffs can amend their allegations to fix their deficiencies in order to provide this Court
11 with jurisdiction over RSIC; there is no express waiver, RSIC did not consent to the suit, and
12 there is no express congressional authorization for Plaintiffs to sue. Accordingly, RSIC has
13 sovereign immunity and the Court does not have jurisdiction over it.

14 **2. RSIC Officers**

15 Tribal sovereign immunity further extends to tribal officials when acting in their official
16 capacity and within the scope of their authority but not to individual tribe members generally.
17 *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981); see *Linneen v. Gila River*
18 *Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). “[C]ourts should look to whether the
19 sovereign is the real party in interest to determine whether sovereign immunity bars the suit.”
20 *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). “In an official-capacity claim, the relief sought
21 is only nominally against the official and in fact is against the official’s office and thus the
22 sovereign itself.” *Id.* (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989);
23 *Dugan v. Rank*, 372 U.S. 609, 611, 620–622 (1963)).

24 Here, Plaintiffs fail to identify what actions RSIC Officers committed in their individual
25 capacity to render them liable, as Plaintiffs’ Amended Complaint focuses mainly on the alleged

1 wrongs the RSIC Officers committed solely while acting in their official capacity. (See Am.
2 Compl. ¶¶ 10–15). Moreover, Plaintiffs allege specifically in the Amended Complaint that the
3 RSIC Officers are being sued as tribal employees. (Id. ¶¶ 10–13). Although Plaintiffs basely
4 allege that “Plaintiffs sue all RSIC Defendants (except RSIC) in their individual and official
5 capacities,” Plaintiffs only allege causes of action against RSIC Officers for conduct that
6 occurred while RSIC Officers were acting in their official capacity and within the scope of their
7 authority. (Id. ¶ 17); see *United States v. Oregon*, 657 F.2d at 1013 n.8. Pursuant to Plaintiffs’
8 pleadings, RSIC is the real party in interest and the relief sought from RSIC Officers is
9 nominal. (See Am. Compl. 92:3–93:15). Because of this, RSIC Officers are entitled to
10 sovereign immunity. Accordingly, the Court grants RSIC Defendants’ Motion to Dismiss for
11 both RSIC and RSIC Officers for lack of subject matter jurisdiction pursuant to tribal sovereign
12 immunity.

13 **B. Wood Rodgers Defendants’ Motion to Dismiss**

14 Wood Rodgers Defendants assert that they never acted under color of state law with
15 regard to the alleged conduct in this case, and because there is no state action, “the § 1983
16 claims must be dismissed.” (Wood Rodgers MTD 2:13–16). Specifically, Wood Rodgers is a
17 private civil engineering firm, of which Cendagorta is an employee. (Am. Compl. ¶ 19). Wood
18 Rodgers Defendants assert that neither “agreed to become nor were they required to become
19 government or state actors.” (Wood Rodgers MTD 3:15–16). Plaintiffs concede that Wood
20 Rodgers Defendants are “a private corporation and a design professional,” but assert that they
21 are able to be sued under § 1983 because they “accepted federal funds . . . for procurement of a
22 federal public works construction contract governed by federal regulations.” (Resp. 1:22–25).
23 Additionally, Plaintiffs allege that Wood Rodgers Defendants “exercised control over the
24 public sector” in “performing acts traditionally performed by a State of Nevada public works
25 agency, such as disqualifying a bidder and rejecting a bid.” (Id. 1:26–2:1).

1 Wood Rodgers Defendants argue that they are not state actors under any of the four tests
2 recognized by the Ninth Circuit. (Reply 3:16–18). These tests are: (1) public function; (2) joint
3 action; (3) state compulsion; and (4) governmental nexus. The Court will address each test in
4 turn.

5 **1. Public Function**

6 “Under the public function test, when private individuals or groups are endowed by the
7 State with powers or functions governmental in nature, they become agencies or
8 instrumentalities of the State and subject to its constitutional limitations.” *Kirtley v. Rainey*, 326
9 F.3d 1088, 1093 (9th Cir. 2003). A party satisfies the public function test only by showing that
10 the function at issue is “both traditionally and exclusively governmental.” *Id.*

11 Here, Plaintiffs assert that the Court should instead use a balancing test in determining
12 state action and consider Plaintiffs’ equal protection and free speech claims as significant
13 factors. (Resp. 4:14–17). Absent from this argument, however, is how Wood Rodgers
14 Defendants performed a function that is “traditionally and exclusively governmental.” See
15 *Kirtley*, 326 F.3d at 1093. Moreover, Plaintiffs’ attenuated allegation that Wood Rodgers
16 Defendants are state actors because Wood Rodgers Defendants were told that their policies and
17 procedures for bidding assistance should reflect State of Nevada policies and law is unavailing.
18 An instruction to reflect and follow state law does not constitute state action. Moreover,
19 Defendants inviting bids from only qualified Nevada-licensed contractors does not amount to
20 state action. Plaintiffs therefore fail to satisfy the public function test.

21 **2. Joint Action**

22 Under the joint action test, the Ninth Circuit considers whether “the state has so far
23 insinuated itself into a position of interdependence with the private entity that it must be
24 recognized as a joint participant in the challenged activity. This occurs when the state
25

1 knowingly accepts the benefits derived from unconstitutional behavior.” Parks Sch. of Bus.,
2 Inc. v. Symington, 51 F.3d 1480, 1486 (9th Cir. 1995).

3 The only argument Plaintiffs assert under joint action is a case comparison where the
4 Ninth Circuit found “that [the] casino’s acts were state action under [the] joint action test
5 because of [the] system of cooperation and interdependence with Las Vegas police
6 department.” (Resp. 6:19–20); see Tsao v. Desert Palace, Inc., 698 F.3d 1128 (9th Cir. 2012).
7 However, that is not the case here. In Tsao, the defendants’ security guards had police
8 authority normally reserved to the state and received this authority by being trained by state
9 police. Tsao, 698 F.3d at 1140. None of these facts, or even facts remotely comparable to this,
10 are present in this case. Moreover, Wood Rodgers contracted with an independent Indian tribe
11 that operates pursuant to federal law and is therefore not a governmental entity. As such,
12 Plaintiffs fail to satisfy the joint action test.

13 **3. State Compulsion**

14 The compulsion test considers whether the coercive influence or significant
15 encouragement of the state effectively converts a private action into a government action.
16 Kirtley, 326 F.3d at 1094. Here, Plaintiffs not only fail to present an argument addressing this
17 test, but also are unable to assert facts under the compulsion test because there is no
18 governmental entity that is exercising a coercive influence or significant encouragement.
19 Although Plaintiffs may allege that Wood Rodgers Defendants or RSIC Defendants exercised
20 these things, neither are the state or any sort of governmental entity. Therefore, the state
21 compulsion test does not apply.

22 **4. Governmental Nexus**

23 The nexus test asks whether there is such a “close nexus between the State and the
24 challenged action that the seemingly private behavior may be fairly treated as that of the State
25

1 itself.” Kirtley, 326 F.3d at 1095. Plaintiffs only passingly acknowledge this test¹ and fail to
2 present an argument as to why it applies. Moreover, Plaintiffs are unable to allege a nexus
3 because there is no governmental entity with which a nexus could exist. As such, the
4 governmental nexus test does not apply.

5 Accordingly, Plaintiffs have failed to sufficiently show that Wood Rodgers Defendants
6 were state actors. Because § 1983 requires a plaintiff to prove that its deprivation was
7 committed by a person acting under the color of state law, Plaintiffs’ § 1983 claims² against
8 Wood Rodgers Defendants are dismissed.³

9 **C. Leave to Amend**

10 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give
11 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit “ha[s]
12 held that in dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should
13 grant leave to amend even if no request to amend the pleading was made, unless it determines
14 that the pleading could not possibly be cured by the allegation of other facts.’” *Lopez v. Smith*,
15 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
16 1995)).

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19
20 ¹ Notably, Plaintiffs only allege that “[a]ll of those acts constitute traditional state public works procurement
21 functions and there is a close nexus between the conduct of RSIC and those traditional state functions.”
22 Plaintiffs only assert the nexus argument as between the State of Nevada and RSIC, which RSIC, as discussed
23 supra, is foreclosed due to sovereign immunity. Plaintiffs fail to anywhere allege how Wood Rodgers
24 Defendants exercised a nexus to a governmental entity.

25 ² Specifically, Plaintiffs’ first through twelfth causes of action are premised on § 1983.

³ Because the federal claims have been dismissed against Wood Rodgers Defendants, the Court only has
supplemental jurisdiction over the remaining state law claims. *Lacey v. Maricopa County*, 649 F.3d 1118, 1137
(9th Cir. 2011). Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiffs’ state law
claims and Plaintiffs’ thirteenth through sixteenth causes of action against Wood Rodgers Defendants are
dismissed for lack of subject matter jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)
(holding that if federal claims are dismissed before trial, state claims should be dismissed as well).

1 Because the Court does not have jurisdiction over RSIC Defendants, the Court cannot
2 provide Plaintiffs leave to amend their Complaint as to the RSIC Defendants. As to the
3 dismissal of the claims against Wood Rodgers Defendants, the Court finds that none of the
4 claims could possibly be cured by the allegations of other facts. Specifically, the Court finds
5 that leave to amend the claims against Wood Rodgers Defendants would be futile because there
6 are no facts available to be pled in order to allege Wood Rodgers Defendants as state actors.
7 Accordingly, the claims asserted against Wood Rodgers Defendants are dismissed with
8 prejudice.

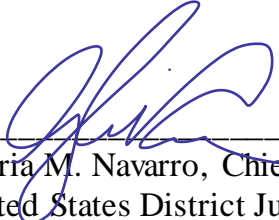
9 **IV. CONCLUSION**

10 **IT IS HEREBY ORDERED** that RSIC Defendants' Motion to Dismiss, (ECF No. 17),
11 is **GRANTED**. The Court does not have subject matter jurisdiction over RSIC Defendants and
12 therefore all claims against RSIC Defendants are **DISMISSED**.

13 **IT IS FURTHER ORDERED** that Wood Rodgers Defendants' Motion to Dismiss,
14 (ECF No. 19), is **GRANTED**, and because Wood Rodgers Defendants are not state actors,
15 Plaintiffs' claims against Wood Rodgers Defendants are **DISMISSED with prejudice**.

16 The Clerk of the Court shall close the case.

17 **DATED** this ³⁰_____ day of August, 2017.

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21 _____
22 Gloria M. Navarro, Chief Judge
23 United States District Judge
24
25