IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TINA MARIE SOMERLOTT, **Plaintiff-Appellant,** **v.** **CHEROKEE NATION DISTRIBUTORS, INC., AN OKLAHOMA CORPRATION, AND CND, L.L.C., AN OKLAHOMA LIMITED LIABILITY COMPANY,** **Defendant-Appellees.**	**No. 10-6157**

Appeal From the United States District Court Western District of Oklahoma
Case No. 5:08-CV-00429-D
The Honorable Timothy D. DeGiusti,
United States District Court Judge

APPELLEES' CORRECTED RESPONSE BRIEF

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NO ORAL ARGUMENT IS DESIRED

MARCH 11, 2011

CORPORATE DISCLOSURE STATEMENT

Since the defendants/appellees are governmentally owned entities, no corporate disclosure statement is required by F.R. App. P. 26.1(a). Nevertheless, CND, LLC. ("CND") to which Cherokee Nation Distributors, Inc. ("CNDI") was converted, is wholly-owned by Cherokee Nation Business, LLC., a holding company wholly-owned by the Cherokee Nation, a federally recognized Native American or Indian tribe. CNDI, prior to its conversion to CND, was a wholly-owned subsidiary of the Cherokee Nation.

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PRIOR OR RELATED APPEAL

None.

ISSUES PRESENTED FOR REVIEW

Whether the district court made factual findings that are clearly erroneous or legal conclusions contrary to law in determining that Defendants/Appellees CND, LLC ("CND") and Cherokee Nation Distributors, Inc. ("CNDI") are entitled to tribal sovereign immunity.[1]

Whether the district court abused its discretion in denying plaintiff/appellee Tina Marie Somerlott's ("Somerlott") Rule 59(e) Motion to Alter or Amend the Judgment for post-judgment discovery, when the record demonstrated, (a) that Somerlott had not diligently sought that otherwise available discovery prior to the Judgment and, (b) that Somerlott had not established that the information for which post-judgment discovery was sought would show error in the Judgment.

STATEMENT OF THE CASE

In her Amended Complaint, Somerlott asserted four claims for relief against her employer, wholly-tribal-owned CND:

a) Vicariously liability under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S. §2000e-5;

b) Negligence under Title VII;

c) Retaliation under Title VII; and

[1] CNDI, which no longer exists (Aplt. App. 57), was converted into CND. Accordingly, both CND and CNDI will be referred to collectively as CND in procedural descriptions.

c) Discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 25 U.S.C. §621, et seq. (Aplt. App. 39-45)

On June 23, 2009, CND moved for dismissal of the Amended Complaint pursuant to Fed R. Civ. P. 12(b)(1) due to its Tribal sovereign immunity. (Aplt. App. 63-74) Additionally, it sought dismissal on the bases that Indian tribes expressly are exempted from the scope of Title VII and that this Court has held that the Cherokee Nation was not within the scope of the ADEA. (Aplt. App. 74-78)

On April 16, 2010, the court entered its Order sustaining the Motion to Dismiss, because of tribal sovereign immunity based on CND's status as an "arm of the Tribe". The Court did not address exemptions under Title VII or the ADEA. (Aplt. App. 342-352) A Judgment of Dismissal without prejudice was entered that day. (Aplt. App. 353)

On April 21, 2010, Somerlott filed a Motion to Set Aside Order of Dismissal to Allow Filing of Motion to Compel Agreed Upon Response to Discovery. (Aplt. App. 354-377) The three-page motion, with attachments, was unaccompanied by a brief and failed to cite Fed R. Civ. P. 59(e), the standard under that rule, or any other authority. In essence, Somerlott claimed that her unexplained failure to file a motion to compel production of CND's financial statements before the Court's ruling on the motion to dismiss warranted vacation of the Judgment. Somerlott did

not explain how the financial statements would establish error in the Order of Dismissal.

CND responded, including an affidavit of CND's counsel stating that (a) the parties had agreed to production of the financial statement pursuant to an Agreed Protective Order; (b) Somerlott's counsel refused to participate in submitting such an order after the court required changes to a prior draft; (c) CND's counsel immediately had informed Somerlott's counsel in writing to set the financial statement issue for hearing if Somerlott deemed it relevant; (d) Somerlott's counsel did not seek court assistance; and (e) Somerlott's counsel subsequently did not communicate with CND's counsel until filing her Rule 59(e) motion. (Aplt. App. 378-398, Aplee. Supp. App. 56-57) [2] Somerlott did not file a reply brief challenging defendants' response.

Noting that absence of a response by Somerlott, the district court denied the motion, finding that Somerlott had failed to exercise diligence in seeking production of the financial statements and had not shown how those records would reveal any error in the court's jurisdictional ruling. (Aplt. App. 399-401)

STATEMENT OF FACTS

[2] Although Somerlott filed an Appendix with this court including CND's Response, she included only one of the seven exhibits to that Response and omitted the emails between counsel. Accordingly, CND is including the Response and all seven exhibits in its Appellees' Supplemental Appendix.

Because the order of dismissal under review turned solely on sovereign immunity, Somerlott's lengthy statement of facts concerning her claim (Aplt. Br. 3-8) is legally irrelevant to the appeal. Accordingly, the relevant facts here pertain only to CND's status as a subordinate economic entity of the Cherokee Nation (the "Nation") entitled to share in the Nation's sovereign immunity.

The Nation is a federally recognized Native American Indian Tribe. 68 Fed. Reg. 68108 (Dec. 5, 2005). Cherokee Nation Business ("CNB"), is a limited liability company wholly-owned by the Nation. (Aplt. App. 81, ¶3, Affidavit of Dennis McLemore, Secretary of CND) CND is a limited liability company wholly-owned by CNB. (*Id).* CND was originally formed as Cherokee Nation Distributors, Inc. ("CNDI"), a wholly-owned subsidiary of Cherokee Nation Industries ("CNI"). (Aplt. App. 82, ¶9) At the time CND was originally formed, the Nation did not have its own laws permitting formation of a corporation or a limited liability company and accordingly, the entities were Oklahoma entities. (*Id).*

On October 25, 2001, ownership of CNDI was transferred by CNI directly to the Nation in anticipation of CNDI being certified under the Small Business Administration's 8(a) Business Development Program. (*Id).* On April 29, 2004, CNDI was converted to an Oklahoma LLC and renamed CND, LLC, with the Nation as its sole member. *(Id.)*

Pursuant to the Nation's Jobs Growth Act of 2005, Cherokee Nation Legislative Act 37-05, (Aplt. App. 85-87) the Nation assigned its interest in CND to CNB, the Nation's wholly-owned holding company. (Aplt. App. 81, ¶5)

Both CND and CNB were created by, are ultimately wholly-owned by, are regulated by, and serve the governmental purposes of the Cherokee Nation, which purposes includes tribal self-determination and a thriving economy. (Aplt. App. 81, ¶5) CND and CNB were founded for the specific purpose of providing jobs for Cherokee tribal members, to meet the needs of business development and to produce income for the Nation. (*Id.)* This purpose was reaffirmed by the Jobs Growth Act of 2005, which reorganized the structure of the Nation's enterprises as a means of advancing the Nation's long-term visions of responsible economic development, self-sufficiency for the Nation's government and citizens, and a strong Tribal government. (*Id.)*

CND is very much an integral part of the Nation. (Aplt. App. 81, ¶5). CND is required to provide notice to the Cherokee Nation Tribal Council (the Nation's Legislature) of CND's business operations. (Aplt. App. 82, ¶9) CND's Board of Directors are selected by the Principal Chief of the Cherokee Nation and must be approved by the Cherokee Nation Tribal Council. (Aplt. App. 81, ¶6).

Each individual manager or the entire Board of Managers of CND may be removed with or without cause by the Principal Chief. *Id.* Under the CND

Operating Agreement, the Principal Chief's appointment of the CND Board is annual. (*Id.)* The Principal Chief also appoints CND Board's Chairman. (*Id.)*

Both CNB and CND officials must make a monthly report to the Nation's Tribal Council at its regular Council meeting and the monthly meeting of the Council Executive and Finance Committee regarding their finances and the state of affairs. (Aplt. App. 82, ¶7). Under Article X, Section 4 of the Constitution of the Cherokee Nation, CND must provide financial records to the Tribal Council. (Aplt. App. 82, ¶8)

In particular, pursuant to that Constitutional section, CND must provide to the Treasurer of the Cherokee Nation information as to all funds, monies, accounts and indebtedness by use of an accounting system adhering to Generally Accepted Accounting Principles so that appropriate records may be maintained and provided to the Tribal Council. (*Id.)* Additionally, the Tribal Council has access to all records prepared by CND. (*Id.)*

CND's activities are limited by both the Constitution and various legislative acts of the Nation. CND cannot give, pledge or loan its credit to any individual, firm, company, corporation or association. (Aplt. App. 83, ¶10) CND is further prohibited by legislative act from making certain real property purchases without prior approval of the Tribal Council. (Aplt. App. 83, ¶11) CND is subject to the Cherokee Nation Minimum Wage Act of 2006. (Aplt. App. 82, ¶12)

CND and CNB are subject to the same Legislative and Executive Branch requirements for waiver of sovereign immunity required of the Cherokee Nation. CND's and CNB's waiver of sovereign immunity must be approved by a duly enacted resolution of the Cherokee Nation Tribal Council and signed into law by the Principal Chief. (Aplt. App. 83, ¶13) The Cherokee Nation Tribal Council and the Principal Chief have not waived sovereign immunity in this matter. (Aplt. App. 83, ¶14)

SUMMARY OF THE ARGUMENT

Somerlott has failed to carry her burden on appeal of demonstrating that the district court committed reversible error in finding that CND is entitled to Tribal sovereign immunity from suit. Under the mixed standard of review for this issue announced in *Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F.3d.1173, 1182 (10th Cir. 2010), the court's factual findings are reviewed for clear error and its legal conclusions de novo.

The district court order of dismissal's factual findings, which reprise the preceding statement of facts, are all supported by citations to the record in that court. They are not challenged on appeal by Somerlott as clearly erroneous. Because of their support in the record, those factual findings do not constitute reversible error under the pertinent standard of review.

Application of those factual findings to the six factors for subordinate economic entity status announced in *BMG* confirms that CND is a subordinate economic entity of the Cherokee Nation entitled to sovereign immunity. That legal conclusion is amply supported by the record below and is consistent with the reasoning of *BMG*.

Somerlott offers no case holding, on analogous facts, a wholly-tribal-owned entity such as CND is not a subordinate economic entity entitled to sovereign immunity. None of Somerlott's decisions involve a wholly- tribal-owned entity whose relationship with the tribe results from tribal legislation. Likewise, no decision offered by Somerlott holds that a wholly-tribal-owned entity is disqualified from sovereign immunity simply because it was created under state law. No decision offered by Somerlott holds that sovereign immunity is precluded because the tribal entity engaged in commercial activity outside of tribal lands.[3] Somerlott's claim that a wholly-tribal-owned business loses its immunity if individuals cannot determine the entity's tribal status is unsupported by any decisional law. Finally, since Somerlott's argument that CND's sovereign immunity was waived by a "sue and be sued" charter provision was not made below and is not supported by the record, that argument must be rejected.

[3] In fact, the Supreme Court has expressly recognized that sovereign immunity is available for tribal commercial activity conducted off tribal land. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998).

Somerlott's second proposition of error, that the district court erred in finding that the defendants are exempt from the ADEA, requires rejection since the district court made no such finding. Further, Somerlott's argument that the Small Business Administration precludes an ADEA exemption is improper since she failed to develop such an argument in the district court. Additionally, Somerlott's argument, included in the ADEA second preposition of error, that the district court erred in finding CND's exemption from Tribal VII is wrong since the district court made no such finding of exemption.

Finally, Somerlott fails to demonstrate that the district court abused its discretion in denying her Rule 59(e) motion for post-judgment discovery. Somerlott did not show in the district court, as required under Rule 59(e), that she had made diligent efforts to obtain the discovery before judgment, particularly in light of the undisputed fact that CND's counsel informed her counsel, in vain, to set the discovery issues for hearing when her counsel breached the discovery agreement. Neither did Somerlott show in the district court how the material on which post-judgment discovery was sought would have demonstrated error in the judgment. Without those showings, Somerlott cannot carry her heavy burden of showing an abuse of discretion in the denial of the Rule 59(e) motion.

ARGUMENT

PROPOSITION I: The district court's factual findings, which under the clear error standard are not reversible, require the legal conclusion that CND is entitled to sovereign immunity as a subordinate economic entity of the Nation.

A. Standard of Review.

The question of whether CND is a subordinate economic entity of the Nation, and therefore shares in the Nation's immunity from suit, involves a mixed question of law and fact. The factual issue involves the application of the appropriate legal test for subordinate economic entity status to the relationship between the Nation and CND. See *BMG*, 629 F.3d at 1181-82. When subject matter jurisdiction turns on a question of fact, this Court reviews the district court's factual findings for clear error and its legal conclusions de novo. *BMG*, 629 F.3d at 1182. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. The evidence is viewed in the light most favorable to the district court's ruling. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse. That proposition holds true not only when the district court's factual filings are predicated upon assessments of witness credibility, but also when they arise from

consideration of the documentary evidence. *Rio Grande Silvery Minnow .v Bureau of Reclamation*, 599 F.3d 1165, 1175 (10th Cir. 2010).

B. *BMG* provides the legal test for determining subordinate economic entity status resulting in protection from suit due to sovereign immunity.

In reversing an order denying dismissal for tribal sovereign immunity, this Court in *BMG*, 629 F.3d at 1182, succinctly restated the jurisprudential underpinning of tribal sovereign immunity:

> Because Indian Tribes are sovereign powers, they possess immunity from suit to the extent that Congress has not abrogated that immunity and the tribe has not clearly waived its immunity. [citations omitted]. Not only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but "immunity [also] is thought [to be] necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy." *Am Indian. Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985).

In explaining the availability of sovereign immunity to subordinate economic entities of Tribes, this Court explained in *BMG*, 629 F.3d at 1183:

> Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity [footnote and citations omitted]. The broad interpretation of tribal sovereign immunity can trace its origins to "Congress' to desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.' " [citations omitted], as well as to "Executive Branch policies and judicial opinions", [citation omitted]. As the Ninth Circuit has noted, immunity for subordinate economic entities "directly protects the

> sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." [citations omitted].

This Court went on to identify six factors to assist in the determination of whether a tribe's economic entity qualifies as a subordinate economic entity entitled to share in the tribe's immunity:

1) The method of creation of the economic entity;

2) Its purpose;

3) Its structure, ownership, and management, including the amount of control the tribe has over the entity;

4) The tribe's intent with respect to the sharing of its sovereign immunity;

5) The financial relationship between the tribe and the entity; and

6) The policies underlying tribal sovereign immunity and its connection to tribal economic development and whether those policies are served by granting immunity to the economic entity. Those policies include the protection of the tribe's monies, as well as preservation of tribal cultural autonomy, presentation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians.

BMG, 629 F.3d at 1187.

C. The facts found by the district court relevant to the *BMG* factors are supported by the record and do not constitute clear error.

1) The method of creation of the economic entities.

The relation of CND to the Nation is the result of the Nation's Legislative Act 37-05, the Jobs Growth Act of 2005. As the district court found with supporting record citations and without challenge by Somerlott below or on appeal:

> In this 2005 Act of the Cherokee Legislature, Cherokee Nation Businesses, Inc. ("CNB"), a corporation wholly owned and regulated by the Cherokee Nation, was assigned ownership of multiple entities including CND, where Plaintiff was employed. *Id at 3.* As a result of this legislative action, CND became a subsidiary of CNB under the Act. *Id.* (Aplt. App. 348)

2) Their purposes.

As in *BMG*, the purposes of CND, and its parent CNB, are to promote the Nation's economic development for the benefit of the Nation and to enable the Nation to engage in various governmental functions. As the district court noted, with supporting citations and without challenge by Somerlott below or on appeal:

> The Act shows that at the time CNB was established as a holding company for subsidiary entities like CND, it had multiple purposes, including promoting the Cherokee Nation's economic development and preserving and enhancing profits for redistribution throughout the Nation. *Id.* The language of the Act states that the reorganization of Cherokee properties, including CND, under the parent corporation CNB, was aimed at benefitting the tribe as a whole through the management and exploitation of business profits and other resources for the good of the tribe. *Id.* CNB was intended to control preexisting tribal corporations, including CND, in order to preserve and enhance those corporations as a source of income for the Cherokee Nation. *Id.* Under the control of CNB, Defendant CND's purpose was to act as a means of raising revenue for the Cherokee Nation. *Id.* (Aplt. App. 348)

The district court went on to explain in a statement supported by citation to the record in that court, and without challenge by Somerlott below or on appeal:

> Further, CNB's stated purposes, and thus CND's purposes, included the goals of "facilitat[ing] and promot[ing] the Nation's economic development through strategic planning, self-sufficiency, and a strong tribal government" and "preserv[ing] and enhance[ing] profits and cash flow available for redistribution and investment, consistent with the policy and direction of the Cherokee Nation. Def. Br., Ex. "B" at 3. These stated goals reflect that the newly formed parent corporation was designed to manage the subsidiary entities, like CND, in a manner consistent with the goals of the Cherokee Nation. (Aplt. App. 349)

3) Management, including the amount of control the tribe has over the entities.

CND's management is subject to the direct control of the Principal Chief. As the district court noted with supporting citations and without challenge by Somerlott below or on appeal:

> Dennis McLemore, secretary of CND, states that members of CND's board of directors are selected by the Principal Chief of the Cherokee Nation and confirmed by the Cherokee Nation Tribal Council. (Aplt. App. 350)

and:

> The Principal Chief may remove any or all of the Managers of CND with or without cause. (*Id.*)

The district court further noted other aspects of tribal involvement in CND management. The officials of CND must make monthly reports to the Cherokee Tribal Council using an accounting system adhering to Generally Accepted Accounting Principles. (Aplt. App. 350) CND cannot acquire real estate with

values in excess of $6 million dollars without approval of the Tribal Council. (Aplt. App. 350)

Additionally, the undisputed record before the district court showed that Legislative Act 37-05 requires CND to provide notice to the Cherokee Nation Tribal Council of its business activities. The Tribal Council has access to all of CND's records. The Cherokee Nation Minimum Wage Act of 2006 applies to CND. The Cherokee Nation Constitution and legislation prohibits CND from giving, pledging or loaning its credit to any individual, firm, company, corporation or association. (Aplt. App. 81-82, ¶¶7-12)

4) The Tribe's interest with respect to the sharing of sovereign immunity.

The district court expressly found with citation to the record, and without challenge by Somerlott either below or on appeal, that the Nation has control over CND's sovereign immunity:

> McLemore also attests to tribal oversight of CND's affairs, stating that any waiver of the sovereign immunity of the Cherokee Nation, CNB or CND must be approved by a duly enacted resolution of the Cherokee Tribal Council and signed by the Principal Chief. (Aplt. App. 349)

5) The financial relationship between the tribe and the entities.

The financial relationship between the Nation and CND is obvious from the purpose of Legislative Act 37-05. The district court's factual findings, unchallenged by Somerlott below or on appeal, underscore the relationship:

> The language of the Act states that the reorganization of Cherokee properties, including CND, under the parent corporation CNB, was aimed at benefitting the tribe as a whole through the management and exploration of business profits and other resources for the good of the tribe. *Id.* CNB was intended to control pre-existing tribal corporations, including CND, in order to preserve and enhance those corporations as a source of income for the Cherokee Nation. *Id.* Under the control of CNB, Defendant CND's purpose was to act as a means of raising revenue for the Cherokee Nation. *Id.* (Aplt. App. 348)

and

> Finally, although CND appears to generate its own revenue, that revenue is for the benefit of the Cherokee Nation. (Aplt. App. 350)

6) Whether the policies underlying tribal sovereign immunity and its connection to tribal economic development are served by granting immunity to the economic entities.

The district court made specific factual findings, supported by the citation to the record, concerning the policies underlying the tribal sovereign immunity, including policies mentioned in *BMG*: protection of the tribes monies, presentation of tribal cultural autonomy, and preservation of tribal self-determination. In discussing Legislative Act 37-05, the district court stated:

> Considering the importance of CND and similar entities as revenue services for the tribe, extending the tribe's sovereign immunity to CND would further several policies aimed at protecting Indian assets, and would also help preserve Cherokee cultural autonomy by protecting and encouraging the Cherokee Nation's continuing efforts at economic self-sufficiency. (Aplt. App. 349)

As to money, the district court specifically stated that:

> "Any suit or judgment against CND would negatively impact that revenue stream, a valuable tribal resource, and would ultimately bind

> or obligate tribal funds that would otherwise be available for the tribe. (Aplt. App. 350)

The district court also found that:

> Further, CNB's stated purposes, and thus CND's purposes, included the goals of "facilitat[ing] and promot[ing] the Nation's economic development through strategic planning, self-sufficiency, and a strong tribal government" and "preserv[ing] and enhance[ing] profits and cash flow available for redistribution and investment, consistent with the policy and direction of the Cherokee Nation." Def. Br., Ex. "B" at 3. These stated goals reflect that the newly formed parent corporation was designed to manage the subsidiary entities, like CND, in a manner consistent with the goals of the Cherokee Nation. (Aplt. App. 346)

Since those findings are all supported by citations to the record, they cannot be said to constitute clear error, as Somerlott's failure to directly challenge them confirms. When viewed in light most favorable to the district court's ruling, it is patent that the district court's account of the documentary evidence is plausible in light of the record viewed in its entirety. Reversal is inappropriate.

D. Application of those factual findings to the *BMG* factors confirm that CND is a subordinate economic entity of the Nation, entitled to tribal sovereign immunity from Somerlott's suit.

As shown above, each of the *BMG* factors, including the sixth factor of granting sovereign immunity to serve the policies underlying sovereign immunity, are satisfied by the district court's factual findings. CND is clearly a subordinate economic entity of the Nation. The relationship is established by a Legislative Act of the Nation. The ownership is exclusively by the Nation through its wholly - owned holding company CNB. The purpose of CND is to further the Nation's use

of economic development to achieve self-sufficiency, cultural autonomy and a strong tribal government. The Principal Chief has direct control over the managers of CND. The Nation and CND share the same exclusive manner of waiving sovereign immunity - acts of two of the Nation's three constitutional branches of government. The financial relationship is clear and direct. Finally, there can be no doubt, nor does Somerlott urge any, that sovereign immunity for CND protects the Nation's monies, procures tribal cultural autonomy, preserves tribal self-determination and advances tribal self-government and self-sufficiency. Accordingly, CND was a subordinate economic entity of the Nation. The district court's recognition of CND's tribal sovereign immunity was supported by the factual record, consistent with *BMG* and not reversible error.

E. Somerlott's attempt to defeat sovereign immunity is unsupported by applicable authority, premised on arguments not made below, and fails to show reversible error in light of the district court's factual findings and the *BMG* factors.

Rather than attack any of the district court's findings as clearly erroneous or legally deficient for any other reason, or address the arm-of-the-tribe factors used by other courts, Somerlott instead urges three arguments in her attempt to defeat sovereign immunity. None are successful.

Initially, Somerlott raises for the first time on appeal an argument that since a tribal corporation and "tribal sub-committee" organized under the Oklahoma Indian Welfare Act, 25 USC. §503, are immune, because CND is not such an

OIWA corporation, it is not immune.[4] That argument fails here for at least two reasons. First, since the argument was not made in the district court, it should not be considered on appeal. As this Court explained in *Turner v. Public Service Co. of Colorado*, 563 F.3d 1136, 1143 (10th Cir. 2009);

> Absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal. *Donald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002). [The appellant] "may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory," even if the new theory "falls under the same general category as an argument presented at trial." Id. (internal quotation marks omitted) (*quoting Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721-22 (10th Cir. 1993).

Second, the OIWA argument is unsupported by any decisional law. Somerlott offers no case holding that corporate organization under the OIWA is a condition precedent to sovereign immunity. Neither *Native American Distributing v. Seneca - Cayuga Tobacco Company*, 546 F.3d 1288 (10th Cir. 2008) nor *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), cited by Somerlott, so hold. The right to self-government of the Cherokee Nation is not diminished by the fact that the Nation did not reorganize under OIWA. The Nation will possess an inherent right to self-government that is reorganized by legal authorities and supported by federal policy. *Wheeler v. U.S. Dept of Interior, Bureau o f Indian Affairs*, 811 F.2d 549, 550 (10th Cir. 1987). Surely , sovereign immunity of

[4] Somerlott does not identify where she raised the argument in the district court, as required by 10th Cir. R. 28.2(C)(2).

wholly-tribal-owned entities whose purpose is the very strengthening of that self-government is included in such an inherent right.

Next, Somerlott argues, after recognizing "that the mere organization of an Indian tribal entity under state law does not necessarily preclude its characterization as a tribal organization as well" (Aplt. Br. 16), if the entity "is a mere business, generating income for the tribe, then it should not" [be entitled to sovereign immunity]. (Aplt. Br. 17). Although she does not define "a mere business", show how under the facts found by the district court CND would fit such a definition, or explain how the "mere business" moniker fits into any subordinate economic entity analysis, Somerlott does cite six decisions. All are inapplicable.

Myrick v. Devil's Lake Sioux Mfg. Corp., 718 F. Supp. 753 (D.N.D. 1989), offered by Somerlott, did not involve sovereign immunity. Further, the defendant corporation there was only partially tribally-owned and hence clearly distinguishable from the facts here.[5]

[5] Indeed, another case cited below by Somerlott, but not on appeal, *Thomas v. Choctaw Management/Services*, 313 F.3d 910, 911 (5th Cir. 2002), confirmed that the issue in *Myrick* was not sovereign immunity by pointing out that *Myrick*, with its "partially owned company" incorporated under state law is inapposite to a *Title* VII analysis where the enterprise is wholly-owned by the tribe.

Likewise, *Cano v. Cocopah Casino*, 2007 U.S. Dist. Lexis 54377 (D. Ariz. 2007) did not involve sovereign immunity, nor did it even hold that the ADEA actually applied to the tribe.

Although Somerlott claims that three decisions provide "where a state-formed entity operates as a mere business, arm-of-the-tribe immunity should not apply", (Aplt. Br. 19) none of those decisions so hold. See *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *N.L.R.B. v. Chapa De Indian Health Program*, 316 F.3d 995 (2003). In fact, none of those decisions actually discussed arm-of-the-tribe or subordinate economic entity based sovereign immunity. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000) is likewise useless for Somerlott. No state-law-formed entity was involved there, nor did the court identify factors to distinguish between a "arm-of-the-tribe" and a "mere business". Further, *Hagen* does not teach that that based on the facts found by the district court and applied to the *BMG* factors, CND is a "mere business" for which sovereign immunity is unavailable. In the end, Somerlott offers no decisional law defeating CND's sovereign immunity.

Somerlott also argues that sovereign immunity, apparently otherwise available, is destroyed if others are unaware of it. She claims that "[a]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". (Aplt. Br. 18) Not surprisingly, no authority is offered for Somerlott's assertion. Accordingly, it should be rejected out of hand and in light of *BMG*, is certainly no grounds for reversal.

Finally, Somerlott argues, again on appeal for the first time, that CND *might* have lost its sovereign immunity because of a "sue and be sued clause" not referenced through a record citation. Since she failed to make the argument below, it should be precluded on appeal. *Turner*, 563 F.3d at 1143. Because there is no record reference to such a waiver, the argument likewise fails. Finally, the carefully chosen words in Somerlott's brief demonstrate that not even she asserts that such an unexplained document is a legally effective waiver. ("Ms. Somerlott **suggests** that this sue and be sued clause in the governing documents **may** serve to waive any sovereign immunity;" Aplt. Br. 20, emphasis added).

PROPOSITION II: Somerlott's second proposition assigning error in the district court's finding that CND is exempt from the ADEA fails because no such finding of exemption was made.

Somerlott's second proposition of error should be rejected because it is premised on a decision that the district court did not make. She claims, at Aplt. Br. 20, that "the Court erred in finding that CND/CNDI are exempt from the ADEA, when congressional enactment of the ADEA serves as evidence of its intent to include them." The district court made no such finding of ADEA exemption, as

the absence in Somerlott's brief of a record citation to such a finding confirms. [6] While CND sought dismissal of Somerlott's ADEA claim on the grounds that it is exempt from the ADEA, in addition to dismissal on sovereign immunity grounds (Aplt. App. 74-77) , the district court did not address the ADEA exemption argument in its Order of Dismissal, much less dismiss the ADEA claim on the basis of such an exemption. It is a general rule, of course, that a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Lyons v. Jefferson Bank and Trust*, 994 F.2d 716, 721 (10th Cir. 1993). [7] Since there was no finding of exemption, there could be no reversible error inherent in such a finding. The proposition asserting error premised on a non-existent ruling should be rejected.[8]

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[6] Somerlott fails to provide a citation to the record identifying where this ruling was made, as required by 10th Cir. R. 28.2(C)(2).

[7] This Court has recognized an exemption to the general rule when an assertion of sovereign immunity is first made on appeal. *Farmers Ins. Co., Inc. v. Hubbard*, 869 F.2d 565, 570 (10th Cir. 1989) (citing *Garcia v. Board of Education of Socorro Consolidated School District*, 777 F.2d 1403, 1406 (10th Cir. 1985)). That circumstance is not present here. Sovereign immunity was first raised below, by CND's claim of sovereign immunity. It is Somerlott, in opposing sovereign immunity, that is raising objections initially on appeal.

[8] Dismissal of the ADEA claim on the basis of the *exemption* from the ADEA recognized by this Court in *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) would have been appropriate if the district court had reached the issue. (Aplt. App. 76-77; 292-294) . Contrary to Somerlott's suggestion (Aplt. Br.21), this Court in *Cherokee Nation* did not require that the tribal business enterprise must operate on tribal property for the exemption to apply. *Cherokee Nation* did not indicate that tribal property was involved, much less issue-determinative.

Somerlott's lengthy discussion of the SBA guidelines (Aplt. Br. 22-25) are rendered legally irrelevant to this appeal due to her failure to develop that argument in the District Court.[9] Accordingly, it should not be considered.

The discussion of "The Corporate Veil" in Somerlott's second proposition of error is equally defective. That discussion, which deals with an express exemption for Indian Tribes from Title VII's definition of employer[10], seems to be premised on her mistaken belief that the district court dismissed the Title VII claim because of that exemption, which exemption Somerlott has admitted has been judicially read to include entities of tribes. ("Nevertheless, jurisprudence has stretched the definition [of Indian tribes exempt from employer status under Title VII] to include corporations that are owned by the Tribe". Aplt. App. 276) A cursory reading of the order of dismissal demonstrates that the district court neither considered nor adjudicated CND's Title VII exemption argument.[11] It should not be considered on appeal. *Singleton,* 428 U.S. at 120. Accordingly, Somerlott's "Corporate Veil"

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[9] Although Somerlott referenced an "8a corporation" in the next to final sentence of her Response to Motion to Dismiss (Aplt. Apr. 286), she neither offered any authority nor developed any argument as to the SBA's applicability to the sovereign immunity issue. Vague, arguable references to a point in the district court proceedings do not preserve the issue on appeal. *Lyons*, 994 F.2d at 721.

[10] 42 U.S.C. §2000(b) provides that: 'The term employer ….. does not include …. an Indian tribe.'

[11] Somerlott fails to provide a citation to the record identifying where this ruling was made, as required by 10th Cir. R. 28.2(C)(2).

argument has no utility in this appeal of dismissal on the ground of tribal sovereign immunity.[12]

PROPOSITION III: Somerlott failed to show that the district court abused its discretion in denying her Rule 59(e) motion.

A. Standard of Review.

Contrary to Somerlott's assertion (Aplt. Br. 30), the issue for review is not the denial of discovery. Rather, the issue is the denial of a motion seeking Rule 59(e) relief. Since review is sought of an order denying a Rule 59(e) motion, the district court's order is reviewed for an abuse of discretion in applying Rule 59(e). *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992). Under the abuse of discretion standard, a district court's decision will not be distributed unless the appellate court has a definite firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. That is to say, this Court will not alter a district court's decision unless it can be shown that the court's decision was an arbitrary, capricious, whimsical or manifestly unreasonable judgment. *Wright ex rel. Trust Co. of Kansas v. Abbott Labs*, 259 F.3d 1226, 1236 (10th Cir. 2001).

[12] No case cited by Somerlott supports her claim that because CND was a wholly-tribal-owned state entity it loses the tribal exemption available under Title VII. The only case cited by her involving a wholly-tribal-owned state entity, *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999) recognized the exemption. None of the other cases offered by Somerlott involved tribes.

B. Grounds for Relief pursuant to Rule 59(e).

Grounds for relief from a judgment under Rule 59(e) include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *See, Servants of Paraclete v. Does*, 204 F.3d 1005, 1012, (10th Cir. 2000). When utilizing a Rule 59(e) motion to submit additional evidence, the "movant must show either that the evidence is newly discovered [or] if the evidence was unavailable at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence. *Campbell*, 962 F.2d at 1523 (internal quotation omitted). Additionally, the movant must show that the additional evidence would affect the outcome. *See, Wright* 259 F.3d at 1236, ("[f]ailure to add materials to a record cannot rise to an abuse of discretion when the materials in question have no effect on the outcome."); *Jacobs v. Electronic Data Systems Corp.*, 240 F.R.D. 595, 599 (M. D. Ala. 2007), (movant must show that the additional evidence would serve an useful purpose); see also *Kustom Signals, Inc. v. Applied Concept*, Inc., 181 F.R.D. 489, 493 (D. Kan 1998) (the evidence sought to be used would not alter the court's finding and therefore did not provide grounds for reconsideration of the Order).

C. The record before the district court on the Rule 59(e) motion.

Somerlott fails on appeal to establish how she met those Rule 59(e) tests in the district court. Somerlott's motion, unsupported by either a brief or any citation to authority, in essence complained that the granting of the motion to dismiss prior to her counsel's filing of a motion to compel discovery after her counsel abrogated a discovery agreement gives rise to the "newly discovered evidence" ground for vacation of the order of dismissal. However, the unrebutted record in the district court demonstrates that the financial statements whose production Somerlott's counsel claims to have desired to compel existed prior to the order of dismissal, her counsel knew of them, and that her counsel failed to make a diligent effort to discover them.

The record before the district court, including an unanswered affidavit from CND's counsel, established that:

1) CND's motion to dismiss was fully briefed on January 7, 2010.

2) Somerlott's previously-filed motions to compel production remained pending at that time.

3) Those motions to compel were resolved by an agreement of the parties announced to the court on February 4, 2010 in which CND would produce financial statements **after the entry of an Agreed Protective Order by the court**. (Aplee. Supp. App. 20, ¶13)

4) The parties produced a proposed agreed protective order to the court, which the court rejected due to certain deficiencies. (Aplee. Supp. App. 20, ¶14)

5) On February 25, 2010, CND's counsel provided to Somerlott's counsel, Paula Phillips, a revised Agreed Protective Order addressing the court's concerns. (Aplee. Supp. App. 20, ¶14; 41-51)

6) On February 26, 2010, Ms. Phillips wrote to CND's counsel breaching her agreement that the financial statements would be produced only after entry of an Agreed Protective Order by stating "at this time, we will not be joining in any motions with respect to the confidentiality of your documents." (Aplee. Supp. App. 53)

7) On that same day, CND's counsel e-mailed John Zelbst, Somerlott's co-counsel with whom CND's counsel announced to the court the agreement to produce financial statements subject to an Agreed Protective Order:

> Please confirm to me that plaintiff is now reneging on the agreement to join us in seeking an agreed to protective order (which will be more favorable to the plaintiff than the one previously submitted) to the financial statements, as you and I represented to the Court. If that is indeed the case, then we will need to inform the court that plaintiff no longer intends to honor her agreement on the protective order and get the financial statement issue before this court for resolution, unless you and I can agree to the same treatment for the financial statements as we did for the amount of the percentage of revenue generated off of tribal land." (Aplee. Supp. App. 56)

8) The next day Mr. Zelbst responded that he was "out of the loop and I'm sorry that I can't help on this." (Aplee. Supp. App. 56)

9) Ms. Phillips did not contact CND's counsel and his suggestion that Somerlott set the financial statement issue for hearing remained unanswered. (Aplee. Supp. App. 20, ¶17)

10) In her Rule 59(e) Motion, Somerlott acknowledged that she had not filed a motion to compel before the court's April 16 order of dismissal, offered no excuse for her failure to do so, provided no evidence that she had acted diligently to file a motion to compel after CND's counsel on February 26 suggested that she do so, and offered no factual explanation as to how the financial statements would establish the Order of Dismissal's error. (Aplt. App. 354-362)

11) After the defendant's response, containing CND counsel's affidavit and the email of February 26, 2010 inviting Somerlott's counsel to set the financial statement issue for hearing, and raising her failure to demonstrate the financial statement's relevancy to attacking the order of dismissal, Somerlott chose not to file a reply brief, contradict CND counsel's affidavit and email, or submit any other evidentiary materials.

When the time to file a reply brief expired with no brief being filed, the district court denied the motion by finding that Somerlott had failed to diligently seek to discover evidence:

> Plaintiffs' Motion is not based on the discovery of new evidence or based on an unsuccessful but diligent effort to discover evidence. To the contrary, plaintiff received ample opportunity for discovery in this case but failed to act diligently in pursuing any outstanding discovery requests, in carrying out the parties' agreement regarding document production, and in complying with the Court's directions regarding the terms of an agreed protective order. (Aplt. App. 400)

The court further explained:

> According to defendant's unanswered response brief, plaintiff's counsel thereafter refused to cooperate in correcting these deficiencies [noted by the Court in the proposed Agreed Protective Order]. As a consequence, the Court proceeded to issue its ruling on April 16, 2010, without any further submissions. Accordingly, plaintiff cannot legitimately complain that she was denied a fair opportunity to submit relevant evidence or that relief from the judgment is necessary to prevent injustice. (Aplt. App. 401)

The Court went on to note that Somerlott failed to demonstrate the relevancy of the financial statements to a showing of error in the Order of Dismissal required for relief under Rule 59(e):

> In addition, plaintiff merely argues that the unproduced financial records are 'necessary for the evaluation of the facts.' See Motion ¶12. She does not allege or attempt to show that the records would reveal any error in the Court's jurisdictional ruling. Therefore, the Court finds no basis for relief from its prior decision and judgment. (Aplt. App. 401)

D. Somerlott fails to establish that the district court abused its discretion in finding that she did not act diligently to obtain the CND's financial statement or that the financial statement would show the dismissal to be erroneous.

Somerlott's argument on appeal does not demonstrate a clear abuse of discretion by the district court in denying her Rule 59(e) motion based on the record before that court. Somerlott does not dispute that almost six weeks elapsed between CND counsel's statement that she should set the financial statement issue for hearing if she deemed the material relevant to the order of dismissal. Somerlott does not deny that her counsel made no contact with CND's counsel after that statement by CND's counsel. Instead, she states "counsel for Ms. Somerlott was in the process of preparing a Supplemental Motion to Compel, when on April 16, the Court entered its Order dismissing her claim." (Aplt. Br. 32) She identifies nothing in the district court record explaining how that six week delay constitutes diligence. Although Somerlott (Aplt. Br. 32) chastises the district court for committing "an abuse of discretion" by promoting "the kind of dilatory tactics employed here by defendants", she fails to point to anything in the record explaining why her counsel did nothing when CND's counsel told her to set the matter for hearing after she refused to approve the revised proposed protective order drafted by CND.[13]

[13] If the conduct of a respondent to discovery necessitates a Motion to Compel, the requester of the discovery must protect himself by timely proceeding with the

Finally, Somerlott offers nothing demonstrating that based on the record before the district court, the district's court abused its discretion by finding that "[s]he does not allege or attempt to show that the records would reveal any error in the Court's jurisdictional ruling." That finding provides additional grounds for denial of the Rule 59(e) motion since denial is appropriate where movant has not shown the granting of Rule 59(e) relief to allow additional information would change the order. *Wright* 259 F.3d at 1235-36. All that Somerlott offered in her three page motion, unaccompanied by a brief, was the statement that "[t]hese records being necessary for evaluation of the facts of the case". That ambiguous claim, which is far less than an assertion that the records will demonstrate reversible error in a particularly described way, is simply insufficient to demonstrate an abuse of discretion by the District Court.

The record below does not create a definite, firm conviction that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances created by Somerlott's counsel. Somerlott has not shown that the denial of the Rule 59(e) motion for the reasons expressed by the district court was an arbitrary, capricious, whimsical or manifestly unreasonable judgment.

Motion to Compel. If he fails to do so, he acts as his own peril. *Wells v. Sears Roebuck and Co.*, 203 F.R.D. 240, 241 (S.D. Miss. 2001).

Since Somerlott has failed on appeal to demonstrate from the record before the district court that the denial of her Rule 59(e) motion constituted an abuse of discretion, the order of dismissal should be affirmed.

CONCLUSION

Because of Somerlott's failure to carry her burden of demonstrating reversible error, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 7303 words.

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/S/ Graydon Dean Luthey, Jr.
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of foregoing Appelles' Response 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 Anti Virus Corporation Edition version 10.0.0.359. Virus Definition File Dated: 3/1/2006 rev. 6, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellees' Response Brief was furnished through (ECF) electronic service to the following on this 11th day of March, 2011:

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