IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1) EAGLESUN SYSTEMS PRODUCTS, INC.,

Plaintiff,

v.

2) ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS,

Defendant.

Case No. 13-CV-00438-CVE-PJC

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITH COMBINED MOTION TO STRIKE AND BRIEF IN SUPPORT

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INTRODUCTION

AVCP is a foreign corporation created under the law of the State of Alaska and not the laws of any federally-recognized Indian tribe. Under the binding precedent of the Tenth Circuit Court of Appeals, this Court's inquiry as to sovereign immunity should end there. *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149-50 (10th Cir. 2012). While there is arguably contrary authority, such authority was decisively rejected by the Tenth Circuit. Most of AVCP's cited authority does not involve sovereign immunity but the application of a particular federal law to Indian Country. Sensing that its claim of sovereign immunity is fatally undermined by *Somerlott*, AVCP first attempts to suggest that it is a federally recognized Indian tribe. This novel approach is not shared by the United States government which publishes a list of all federally recognized tribes pursuant to a Congressional mandate. Moreover, AVCP does not acknowledge that if it could be deemed a tribe, that it would be the first Indian tribe ever to be created under and subject to the law of any of the states of the United States. In addition, the doctrine of issue preclusion bars AVCP's assertion of sovereign immunity, as it had a full and fair opportunity to litigate the question in 2004 and did not even request certiorari to the United States Supreme Court. Further, the contract contains two separate waivers of sovereign immunity. Even if this Court could be persuaded that AVCP possesses sovereign immunity, AVCP still cannot obtain dismissal of the claims because two independent waivers of sovereign immunity are present within AVCP's contracts with ESP.

STANDARD OF REVIEW

If a Fed. R. Civ. P. 12(b)(1) motion attacks the plaintiff's complaint on its face (i.e., the legal sufficiency of the complaint), the court is required to consider the allegations of the complaint as true. *See, e.g., RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990),

However, factual attacks on subject matter jurisdiction, go "beyond the allegations in the complaint and challenge the facts upon which subject matter jurisdiction depends." *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). This Court has discretion to hold a limited evidentiary hearing to resolve jurisdictional facts. *E.F.W. v. St. Stephens Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001) (trial courts have discretion to consider affidavits and a limited evidentiary hearing regarding a factual attack on subject matter jurisdiction). An evidentiary hearing is not needed, because the motion to dismiss should be denied on the basis of Tenth Circuit precedent, or alternatively, on the plain language of the contracts at issue.

FACTS PRECLUDING DISMISSAL

1. AVCP is a state corporation created by and subject to the law of the State of Alaska. [Exhibit 1, AVCP Certificate and Articles of Incorporation 1977]. The State of Alaska is a sovereign separate and apart from any of the federally recognized tribes which participate in AVCP. Furthermore, AVCP, as an Alaska corporation, is a legal entity that is separate and apart from its owners. *Eagle Air, Inc. v. Corron and Black/Dawson and Company of Alaska, Inc*., 648 P.2d 1000, 1003 (Alaska 1982). AVCP maintains a registered agent with the State of Alaska. [Exhibit 2, Change of Registered Agent]. AVCP also files Biennial Reports as required by Alaska law. [Exhibit 3, Biennial Report].

2. AVCP is not a federally recognized Indian tribe. *See* 78 Fed. Reg. 26384 (May 6, 2013).[1] AVCP does not appear within the Secretary of the Interior's list of federally recognized Indian tribes.

3. The Supreme Court of the State of Alaska determined that AVCP, an Alaska corporation, does not possess the sovereign immunity of the tribes which it may serve. *Runyon ex rel. B. R. v. Association of Village Council Presidents*, 84 P.3d 437 (Alaska 2004). AVCP did

[1] Available at http://www.gpo.gov/fdsys/pkg/FR-2013-05-06/pdf/2013-10649.pdf (last visited November 19, 2013)

not appeal the holding of *Runyon* further, and did not petition the United States Supreme Court. [Exhibit 7, Westlaw Graphical History[2]]. As a result, the decision of the Alaska Supreme Court remained unchallenged, until its present motion to dismiss.

4. AVCP also owns and operates businesses (for profit). Presumably, these profits fund in part AVCP's social services. [Exhibit 4, Hotel Management Contact Info]. For example, AVCP owns and operates a hotel. As a result, the statement made without authority by AVCP in its brief that, "any liability imposed upon AVCP would come directly from funds allocated for the purpose of administering and distributing benefits to the member tribes" is not true. AVCP is also a major shareholder of a bank. [Exhibit 5, Native American Bank Shareholder List].

5. Even if this Court were to find that AVCP holds sovereign immunity, AVCP's contract with ESP contains two independent waivers of sovereign immunity. The parties agreed to arbitrate any disputes arising from or related to the contracts. Section 6.8 provides:

> 6.8 Arbitration: Between the parities all disputes arising out of or relating to this Agreement, or a material breach thereof, including disputes regarding arbitrability, will be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association as supplemented by the Computer Guide, if then in existence, and judgment upon the award rendered by the arbitrator may be entered in any Court having jurisdiction thereof. The parties shall jointly request the American Arbitration Association to submit a panel of three arbitrators, each of which is listed on the Computer Arbitration panel and at least one of which shall be an attorney in good standing. This agreement does not create any rights in any third parties. ESP shall keep all records and data obtained from NANDSS confidential.

[Complaint, Ex. 1, 2008 Contract].

6. In addition to the arbitration clause, AVCP and ESP agreed that any equitable relief need not be brought in arbitration, but could be requested in any Court of competent

[2] The Westlaw Graphical History would note if a petition for certiorari was filed by AVCP.

jurisdiction. Section 10 of the 2013 Contract provides:

> Licensee further agrees that monetary damages would not be a sufficient remedy for an ongoing violation of the Confidentiality Provisions, nor would arbitration be an effective process for the prevention or relief thereof, and so ESP shall be entitled to seek specific performance and injunctive or other equitable relief from a court of competent jurisdiction, and the Licensee further agrees to waive any requirement of the securing or posting of any bond in connection with such action. Such remedy shall further not be deemed to be the exclusive remedy of the ESP but shall be in addition to all other remedies available under the provisions of this Agreement or at law or equity.

[Complaint, Ex. 2, 2013 Contract].

7. In addition, AVCP had legal counsel review and negotiate terms of the contract with ESP prior to its execution by Mr. Naneng. [Exhibit 6; E-Mail from Nicole Franklin, Esq.] AVCP employs two in-house legal counsel, Carol Brown and Nicole Franklin. As set forth below, Mr. Naneng's subjective and now convenient intent as to sovereign immunity is irrelevant to the language used by the contract. However, in the event that the Court does consider Mr. Naneng's affidavit, it should also consider whether AVCP's counsel was aware of the arbitration clause and dispute resolution provisions within the contracts. Furthermore, ESP's intent in negotiating the contract, negotiating an arbitration clause, and obtaining a separate sovereign immunity waiver as to equitable claims was certainly to obtain relief in some neutral forum in the event that AVCP violated the terms of the contract.

MOTION TO STRIKE

The Declaration of Myron Naneng attached as Exhibit 1 to AVCP's motion to dismiss contains reference to his subjective intent in signing the contracts with ESP. Pursuant to Oklahoma law, the Court may not consider parol evidence such as Mr. Naneng's affidavit in interpreting the contract.

When interpreting a written contract, a court seeks "to give effect to the intention of the parties as expressed in the unequivocal language they have employed." *British Int'l. Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 342 F.3d 78, 82 (2d Cir. 2003) (citation omitted). "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." 15 O.S. § 154. The affidavit may not be considered by the Court due to the parol evidence rule. *Mid-America Corp. v. Miller*, 1962 OK 123, 372 P.2d 14, 18 (parol evidence rule is a substantive rule of law rather than of evidence); 15 O.S. § 137. Parol evidence may not be introduced which would vary, modify, or contradict the terms of an executed written agreement. *Ollie v. Rainbolt*, 1983 OK 79, 669 P.2d 275, 279. In this instance, the Affidavit of Mr. Naneng seeks to state that even though he executed a contract which provides for a dispute resolution mechanism, that he did not mean to consent to the dispute resolution mechanism, i.e. that he did not mean it. The evidence of intent contradicts the plain language of the contract and should not be considered by this Court.

Accordingly, ESP respectfully requests that the Court strike paragraph 13 of Exhibit 1 attached to AVCP's motion to dismiss.

ARGUMENT AND AUTHORITY

I AVCP is not a federally-recognized Indian tribe.

AVCP is not found within the U.S. Department of the Interior's list of federally-recognized Indian tribes. 78 Fed. Reg. 26384 (May 6, 2013). That is because AVCP is not a federally recognized Indian-tribe, as it is a corporation created under state-law.[3] Conversely, all of the Indian tribes which participate in AVCP are found within the list, and are federally recognized Indian tribes. AVCP's motion incorrectly suggests that because it is treated as a tribe

[3] AVCP's brief does not explain how an Indian tribe can be created under the law of any of the states. Furthermore, AVCP does not find another example of an Indian tribe which is organized pursuant to and under the laws of a state, because no such examples exist.

under certain statutes that it is a federally-recognized Indian tribe. However, none of the Acts of Congress cited actually confer recognition upon any tribe or AVCP. AVCP cites no authority for this proposition beyond merely re-stating Congress' plenary power over Indian affairs and its power to grant federal recognition by statute. As a matter of comparison, Congress also authorizes tribes to be treated as states for the purpose of certain statutes, yet no litigant would ever seriously suggest that Indian tribes are therefore constituent member states of the United States and entitled to a requisite number of senators and presidential electoral votes. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1377(e); 40 C.F.R. 131.8; 42 (certification criteria for tribal treatment as a state); Safe Drinking Water Act, 42 U.S.C. § 300j–11; 40 C.F.R. 142.72(a) (certification criteria for tribal treatment as a state); Clean Air Act, 42 U.S.C. 7601(d)(2) and 7602(r).

AVCP does not even acknowledge that Congress provides for a specific record of tribes which possess federal recognition of their status. The Federally Recognized Indian Tribe List Act provides Indian tribes may obtain federal recognition by: (1) an Act of Congress; (2) "the administrative procedures set forth in part 83 of the Code of Federal Regulations" through the Secretary of the Interior; or (3) a decision of a United States court. 25 U.S.C. § 479a. A recognized tribe is placed on the Department of the Interior's List of Federally Recognized Tribes. 25 U.S.C. §§ 479a(3), 479a–1; 25 C.F.R. 83.5(a). The List is updated annually. 25 U.S.C. § 479a-1. AVCP is absent from the list of federally recognized tribes. As a result, the Secretary of the Interior and the United States government do not maintain a government to government relationship with AVCP, and this Court should not hold that AVCP is its own independent, self-governing, Indian tribe.

In addition, AVCP's citations to specific statutes as recognizing AVCP as an Indian tribe is unavailing, as those are not statutes which provide federal recognition to Indian tribes. One example cited by AVCP is simply incorrect: 25 U.S.C. § 450b(e) has been interpreted to exclude non-profit regional corporations such as AVCP. *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). In other instances, AVCP's cited authority does not support what is stated within the brief. For example, 25 U.S.C § 458aaa(b) does not reference AVCP or any Alaska native village, for profit corporation, or nonprofit corporation. ESP does not dispute that AVCP carries out some social services, or that the federal government may treat it like an Indian tribe or tribal consortium for some purposes. However, with regard to Indian tribes, "federal recognition" is a term of art, and if the United States government recognized AVCP as an Indian tribe, it would now appear on the Federal Register pursuant to the Federally Recognized Tribe List Act enacted in 1994.

Under the relevant Alaska statutes, AVCP has the power to sue and be sued, complain and defend, in its corporate name. AS 10.20.011(2). In addition, AVCP is organized to "have and exercise all powers necessary to effect the purposes for which the corporation is organized." AS 10.20.011(17). AVCP's corporate purposes include that within its, "operation and affairs .... so as to have the maximum participation of persons of various races, national origins, and economic and social backgrounds and without discrimination because of race, color, creed, national origin, religion or status of life." [Exhibit 1, AVCP Articles of Incorporation, Art. III (e).]. Furthermore, AVCP's purpose includes seeking to benefit the entire Bethel region rather than solely its Indian tribe constituents. [*Id*. at Art. III(a)]. AVCP files regular reports with the Secretary of State of the State of Alaska in order to retain its corporate status. [Exhibit 3, Biennial Report]. AVCP also registers a service agent with the State of Alaska, specifically to receive summons and

notice of a lawsuit when it is sued. [Exhibit 2, Agent Change]. AVPC is a state-law corporation, not an Indian tribe.

II AVCP is not entitled to tribal sovereign immunity as an arm of an Indian tribe or tribes.

a. Tribal sovereign immunity protects a Tribe from being haled into court absent consent, thereby protecting tribal treasuries.

The doctrine of tribal sovereign immunity bars a plaintiff's claims against an Indian tribe, or to wholly owned business enterprises of a federally recognized Indian tribe. AVCP is a state-law corporation subject to having its charter revoked by the State of Alaska. AVCP is not a sovereign nation, with an inherent right of self-government. *See Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir. 1987); *Wheeler v. United States Department of Interior*, 811 F.2d 549 (10th Cir. 1987). Courts have long recognized that Indian tribes possess common law immunity from lawsuits. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). "Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 507 (1991). Sovereign immunity has been applied to numerous types of tribal organizations and agencies. *See, e.g., White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 656-57 (Ariz. 1971) (subordinate economic organization involved in the timber industry); *Graves v. White Mountain Apache Tribe*, 570 P.2d 803 (Ariz.Ct.App. 1977); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz.Ct.App. 1983) (commercial farming venture).

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Supreme Court held that tribes enjoy sovereign immunity from civil suits on contacts, whether the contracts involve governmental or commercial activities, and whether they were

made on or off a reservation. The Northern District of Oklahoma has further held that a business development authority of a tribe is entitled to the defense of sovereign immunity. *See Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131 (N.D. Okla. 2001). In that case, Multimedia Games, a Texas corporation, sued the Miami Tribe of Oklahoma Business Development Authority for various violations of the Oklahoma Deceptive Trade Practices Act. The Court held:

> A tribe's sovereign status is directly related to its ability to generate revenues through the regulation of commercial activities on the reservation. The ability to contract as an economic entity impacts the tribe's fiscal resources by binding or obligating the funds of the tribe. It follows that corporate contractual provisions are actually economic matters which directly affect a sovereign's right of self government. In this way, the business entity is simply the tribe's alter ego; and thus, the real party in interest is the tribe because the vulnerability of the tribe's coffers is at issue when contracting in a commercial environment.

Multimedia Games, 214 F. Supp. 2d at 1135. AVCP's only realistic claim to sovereign immunity is based upon whether it can be said to be a subordinate economic entity of a federally recognized Indian tribe.

b. Tribal sovereign immunity extends to most economic entities which are wholly-owned by a federally recognized Indian tribe.

Under most circumstances a tribe's sovereign immunity extends to corporate and economic entities created by Indian tribes to further governmental objectives. *Kiowa Tribe*, 523 U.S. at 757-59; *Breakthrough Mgmt. Group v. Chukchansi Gold Casino*, 629 F.3d 1173, 1183 (10th Cir. 2010), *cert. dismissed*, 132 S.Ct. 64 (2011) ("BMG"); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008); *Multimedia Games, Inc.*, 214 F. Supp. 2d at 1135.

> 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. 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'' as well as to "Executive Branch policies and judicial opinions." 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."

BMG, 629 F.3d at 1183 (footnote and citations omitted). However, AVCP is not a tribe. AVCP is not a tribally-created entity. AVCP is an entity created by individual incorporators under and pursuant to the laws of the State of Alaska, and the test enunciated by the Circuit in *BMG* for subordinate entities of a tribe or tribes is not to be utilized in an analysis of AVCP.

III Binding precedent of the Tenth Circuit requires this Court to deny AVCP's motion to dismiss because the economic subsidiary test may not be applied to a corporation created under state-law even when wholly controlled by Indian tribes.

AVCP in its current status is a state corporation that formed in 1977, and not reformed thereafter under the law of any tribe. In the Tenth Circuit, any corporation formed under state law, whether owned by one or multiple Indian tribes, or operated as an arm of the tribe, is not entitled to claim sovereign immunity. The *Somerlott* decision states:

> Thus, the subordinate economic entity test is inapplicable to entities which are legally distinct from their members and which voluntarily subject themselves to the authority of another sovereign which allows them to be sued. See Okla. Stat. tit. 18, § 2004(B)(1) ("A limited liability company formed under this act is a separate legal entity...."); id. § 2003(1) ("Each limited liability company may ... [s]ue, be sued, complain and defend in all courts...."). This approach is consistent with the traditional treatment of the sovereign immunity of the United States.… The court can identify no reason to depart from this principle here. Accordingly, CND, a separate legal entity organized under the laws of another sovereign, Oklahoma, cannot share in the Nation's immunity from suit, and it is not necessary to apply the six-factor BMG test.

Somerlott v. Cherokee Nation Distributors, Inc., 686 F.3d 1144, 1149-50 (10th Cir. 2012). The United States does not possess sovereign immunity when it owns or acts through corporations

created under separate sovereigns. *Id*. *citing Panama R. Co. v. Curran*, 256 F. 768, 771–72 (5th Cir. 1919) (*citing Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. 904, 907–908 (1824); *Salas v. United States*, 234 F. 842, 844–45 (2d Cir. 1916). AVCP is a corporation created by the law of the State of Alaska and subject to Alaska law. AVCP complies with a registered agent requirement. AVCP complies with annual reports to the Secretary of State of the State of Alaska. AVCP could re-incorporate under tribal law, but has never chosen to do so. AVCP is subject to the law of another sovereign, and as such its immunity cannot be greater than the United States which recognizes that it loses immunity when the U.S. government acts through a corporation created under state or foreign law. *Somerlott*, 686 F.3d at 1150.

AVCP does not adequately distinguish *Somerlott*. AVCP supposes that *Somerlott* should not be applied because AVCP is a nonprofit corporation which performs social services, and because AVCP was incorporated under state law by reason of obtaining funding for social services. [Motion to Dismiss at p. 10]. These factors are irrelevant to *Somerlott* and cannot be used to distinguish the holding therein. AVCP never acknowledges that tribal immunity is co-extensive, and not greater than, the sovereign immunity of the United States government. AVCP does not acknowledge that the United States government does not possess sovereign immunity when it acts through a state-law corporation. The Defendant in *Somerlott* is actually similar to AVCP in that Cherokee Nation Distributors, as a wholly owned tribal entity, participated in business (like AVCP's hotel or bank investments), but then used profits to fund social services. *Id*. AVCP provides no compelling reason to distinguish *Somerlott*. As a result, this Court must properly apply the holding and deny the motion to dismiss.

The Supreme Court of Alaska came to a similar conclusion as the Tenth Circuit, though on different grounds. In reviewing AVCP's formation and claim of sovereign immunity, the

Alaska Supreme Court rejected AVCP's claim of tribal sovereign immunity in holding that AVCP's presence in the lawsuit did not subject its member tribes' treasuries to a judgment. The Alaska Court also rejected an analysis of additional factors and held:

> This case does not require us to refine these other factors because the most important factor, the financial relationship between AVCP and the villages, gives a clear answer. Under Alaska law, the fifty-six villages of AVCP, the members of a nonprofit corporation, "are not ... liable ... on [the corporation's] obligations." Any judgment against AVCP will be paid out of the Association's coffers alone. Even if they fall short, the villages' assets will be safe from execution. This legal insulation makes clear that AVCP is not an arm of the villages. The villages therefore are not the real parties in interest to this lawsuit. And AVCP is not entitled to the protection of the villages' tribal sovereign immunity.

Runyon ex rel. B.R. v. Association of Village Council Presidents, 84 P.3d 437, 441 (Alaska 2004). AVCP did not challenge the holding of *Runyon* by requesting review by the U.S. Supreme Court. The motion to dismiss also does not explain AVCP's failure to re-incorporate or reform under tribal law after the holding of *Runyon*. It stands to reason that if AVCP's reason for forming under state law is to be considered by the Court, that its failure to reform under tribal law after an adverse decision of that state's highest court should be an equally valid consideration. This is especially true because in *Runyon* the Alaska Supreme Court held out the proposition that native groupings such as AVCP were formed under state law precisely to avoid confusion regarding tribal law and sovereign immunity, and that such state law corporations could more easily contract with the outside world. *Id.*

AVCP only offers three cases in support of the proposition, in direct contravention of *Somerlott*, that a corporation created under state law may possess a tribe's sovereign immunity. The case of *Ransom v. St. Regis Mohawk Educ. & Comty. Fund, Inc.* involves a nonprofit corporation created under District of Columbia law. 635 N.Y.S.2d 116 (1995). *Ransom* offers little analysis as to why a corporation's method of creation under state law is not a dispositive

factor. *Ransom* neither considers nor recognizes that its holding confers on tribal sovereignty greater sovereign immunity than is available to the United States. AVCP recognizes that *Pink v. Modoc Indian Health Project, Inc*., 157 F.3d 1185 (9th Cir. 1998) only stands for the proposition that an entity created under state law may be treated as an Indian tribe for the purpose of Title VII and hence exempt from the federal statute. The only language within *Pink* relating to a defense of sovereign immunity is a re-affirmation that a tribe would not lose sovereign immunity when it operates outside of Indian Country. *Id*. at 1189. The District for South Dakota's recent decision in *J.L Ward* directly contradicts the holding of *Somerlott* and is specifically disapproved of by the Tenth Circuit Court of Appeals. *J.L. Ward Assoc.'s, Inc. v. Great Plains Tribal Chairmen's Health Bd*., 842 F.Supp.2d 1163 (D.S.D. 2012). Also of note, the District for South Dakota recently confirmed the arbitration award between the parties, while maintaining jurisdiction over the case, thereby affirming that an arbitration clause remains a waiver of sovereign immunity. *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Bd*., 2013 WL 5424954, *2 (D.S.D. September 25, 2013).

IV **Issue preclusion prevents AVCP from claiming sovereign immunity.**

AVCP is precluded from raising a sovereign immunity defense due to the holding of *Runyon*. AVCP had a full and fair opportunity to litigate whether or not it was entitled to sovereign immunity, and it lost. AVCP did not appeal the Supreme Court of Alaska's ruling to the United States Supreme Court as was its right. Issue preclusion therefore operates to prevent re-litigation of this issue, even though ESP was not a party to the Alaska lawsuit and appeal.

"[T]he doctrine of collateral estoppel, also known as issue preclusion, 'attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.'" *B-S Steel of Kansas, Inc. v. Texas Indus., Inc*., 439 F.3d 653, 662 (10th Cir. 2006) (*quoting Arizona v. California*, 530 U.S. 392, 414

(2000) (internal quotation omitted). "The doctrine precludes a court from reconsidering an issue previously decided in a prior action where (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Id.* (*quoting Estate of True v. C.I.R.*, 390 F.3d 1210, 1232 (10th Cir. 2004)). "Issue preclusion prevents relitigation of facts and issues actually litigated and necessarily determined in an earlier proceeding between the same parties or their privies." *Nealis v. Baird*, 1999 OK 98, ¶ 51, 996 P.2d 438; *see also, Spradling v. City of Tulsa*, 198 F.3d 1219, 1222 (10th Cir. 2000) ("According to the law of collateral estoppel, 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'") (*quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980)); *Miller v. Miller*, 1998 OK 24, 956 P.2d 887, 896. The contract between AVCP and ESP requires the application of Oklahoma law. [Complaint, Ex. 2, 2013 Contract].

ESP seeks to invoke issue preclusion even though it was not a party to the *Runyon* lawsuit. When invoking non-mutual issue preclusion in this context, also known as nonmutual collateral estoppel, a litigant seeks "to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Atkinson Haskins, et al. v. Vector Securities, Inc.*, 2011 OK CIV APP 42, ¶ 8, 255 P.3d 453 *citing Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979). *See also, Lee v. Knight*, 1989 OK 50, ¶ 8, 771 P.2d 1003; *Cities Service Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶ 14, 980 P.2d 116, 125.

In this setting, AVCP's defense of sovereign immunity in this suit is exactly the same as its claim of sovereign immunity in *Runyon*. The issue was litigated to a conclusion as noted by the Supreme Court of Alaska's opinion in *Runyon*, and the determination that sovereign immunity was not present was essential to the result, without which the result would have been opposite as the Alaska courts would not have possessed subject matter jurisdiction. Finally, AVCP did have a full and fair opportunity to litigate in Alaska as noted by its participation in the litigation.

V AVCP waives any immunity to all claims through arbitration.

The presence of the arbitration clause in each contract between AVCP and ESP results in a waiver of sovereign immunity. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998); *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). The United States Supreme Court has held:

> The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration.

C & L Enterprises, Inc., 532 U.S. at 422. The arbitration clause in this matter found at Section 6.8 of the parties' 2008 contract unequivocally consents to confirmation of an award, "in any Court having jurisdiction thereof." [Complaint at Ex. 1, 2008 Contract § 6.8].

AVCP wishes to apparently create a new defense for which it cites no authority but which would surely be adopted anytime an Indian tribe wished to avoid an arbitration clause. As stated above in the motion to strike, AVCP's latest defense violates the parol evidence rule and Oklahoma law of contract interpretation. The intention of the parties must be ascertained based upon the whole contract, and the intent of the parties will be given effect if it can be done within

the bounds of the law. 15 O.S. § 157 ("The whole of a contract is to be taken together, so as to give effect to every part…."). This Court cannot allow AVCP to merely submit an affidavit contradicting the unambiguous terms of the contract so as to avoid the implication of the contract. Such a defense would constitute an invitation for fraud and would result in a similar affidavit being filed anytime a contracting party sought to compel arbitration or to confirm an arbitration award. Mr. Naneng's affidavit also does not explain or acknowledge that AVCP was represented by legal counsel for the negotiation and execution of the contracts. [Fact No. 7 above].

AVCP's stated "lack of intent" to waive sovereign immunity is also more than likely untrue. Indeed, AVCP's in-house legal counsel requested and received changes to the draft submitted by ESP. [*Id*.] ESP can hardly be punished for the potential negligence of AVCP's in-house attorneys if Mr. Naneng did not know what he was doing. Or, as is more likely, AVCP's counsel are highly competent and fully aware of the Supreme Court's holdings in *Kiowa Tribe* and *C&L Enterprises*, and hence AVCP via its legal team was aware that its president executed an independent sovereign immunity waiver, even if Mr. Naneng was personally and inexplicably unaware of that fact.

In addition, the parties' arbitration clause specifically requires the Rules of the American Arbitration Association. Rule R-7(b) of the AAA Commercial Arbitration Rules, provides that an arbitration is to be treated as an agreement independent of the other terms of the contract. The AAA Rules further contemplate the confirmation of an arbitration award in a Court of law. Mr. Naneng's affidavit is insufficient to overcome the clear intent of the clause and of the incorporated rules. The arbitration clause is an independent waiver of sovereign immunity.

VI **AVCP waived any sovereign immunity it may possess to equitable claims.**

ESP and AVCP agreed that ESP would have the right to seek equitable relief in any court, a right separate from and in addition to the parties' rights of arbitration. The pertinent language from Section 10 of the 2013 Amendment and Contract attached to the Complaint sets forth, "ESP shall be entitled to seek specific performance and injunctive or other equitable relief from a court of competent jurisdiction.." [Complaint, Ex. 2, 2013 Contract]. This is a specific sovereign immunity waiver for all equitable claims and relief available to ESP. Magic words are not required for a waiver of sovereign immunity to be effective. *Rosebud Sioux Tribe v. Val–U Constr. Co. of S.D.*, 50 F.3d 560, 563 (8th Cir. 1995); *Sokaogon Gaming Enter. v. Tushie–Montgomery Ass'n*, 86 F.3d 656, 660 (7th Cir. 1996) (sovereign immunity may be waived without even using the words "sovereign immunity"). In the provision at issue, ESP bargained for and received the right to go into Court to stop violations of the confidentiality provisions of the contract (which is subject of the Complaint) as well as to seek any other equitable remedy related thereto.

VII Alaska law allows a non-profit corporation to sue or be sued, and hence waives any sovereign immunity that the corporation may otherwise possess.

It is unquestioned that an Alaska corporation may sue or be sued, and that the Articles of Incorporation for AVCP provide it with all corporate powers under Alaska law. AS. 10.20.011(2); Exhibit 1, Certificate and Articles of Incorporation. The Tenth Circuit maintains that a "sue or be sued" clause in a tribe's corporate charter may be a waiver of sovereign immunity, but not as to the constitutional tribe. The Tenth Circuit held, "Therefore, the consent to suit clause in the corporate charter of the Mescalero Apache Tribe, Inc. in no way affects the sovereign immunity of the Tribe as a constitutional or governmental entity." *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). This was due in part to the Tribe and Tribe, Inc., being separate and distinct entities, while the plaintiff

dealt only with the Tribe and not with the corporate entity. The Tenth Circuit noted that most other courts had dealt with the issue similarly. *Id*. *citing Gold v. Confederated Tribes of the Warm Springs Indian Reservation*, 478 F.Supp. 190, 196 (D.Ore. 1979); *Boe v. Fort Belknap Indian Community*, 455 F.Supp. 462, 463-64 (D.Mont. 1978), *aff'd*, 642 F.2d 276 (9th Cir. 1981); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127, 1136 (D.Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151, 170-75 (Alaska 1977). In this instance, AVCP does not have a constitutional tribe, it is not self-governing, and does not have any powers of self-government. AVCP is a service organization, it is a non-profit, but it is not a recognized government unto itself.

CONCLUSION

AVCP is not an Indian tribe. AVCP is not entitled to sovereign immunity which would exceed that of the United States. AVCP is therefore, under the law of this Circuit, not sovereign because it is incorporated under the law of the State of Alaska. AVCP has had at least nine (9) years since the ruling in *Runyon* to change its method of incorporation if it wished to obtain immunity, but it has not done so. Furthermore, the issue of AVCP's immunity was fully litigated in the Alaska Supreme Court to a decision resulting in a published decision. Issue preclusion mandates that it not be re-litigated because AVCP had a full and fair opportunity before the Alaska courts. Nevertheless, if the Court is somehow persuaded that AVCP is entitled to immunity, then the motion to dismiss still fails because the contracts between the parties contain two independent waivers of sovereign immunity. Accordingly, the motion to dismiss should be denied.

Dated: November 21, 2013

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of Notice of Electronic Filing to the Following ECF registrants:

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