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Attorneys for Defendants Salish Kootenai College, Inc., and Salish Kootenai College Foundation and Robert Fouty, Jim Durglo, Rene Peirre, Ellen Swaney, Linden Plant, Tome Acevedo, Zane Kelly and Ernest Moran, Salish Kootenai College Board of Directors

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and SANDI OVITT, Relators and Plaintiffs, -vs- SALISH KOOTENAI COLLEGE, INC., AND SALISH KOOTENAI COLLEGE FOUNDATION, ROBERT FOUTY, JIM DURGLO, RENE PEIRRE, ELLEN SWANEY, LINDEN PLANT, TOME ACEVEDO, ZANE KELLY, ERNEST MORAN, Salish Kootenai College Board of Directors, and DOES 1-10, Defendants.	CV 12-181-M-DLC **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendants submit this reply in support of their Motion to Dismiss. Plaintiffs raise no reason this action should not be dismissed against all Defendants.

I. This Court lacks subject matter jurisdiction.

Plaintiffs' arguments that the Confederated Salish and Kootenai Tribes

("CSKT") have waived their sovereign immunity demonstrate a fundamental misunderstanding of tribal sovereignty. The "sue and be sued" clause in CSKT's Corporate Charter does not waive sovereign immunity for CSKT's actions as a constitutional government. Were Plaintiffs' assertions true, the universe of case law regarding tribal sovereign immunity would not exist.

Like most federally recognized tribes, www.bia.gov/FAQs, CSKT is organized under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461 *et seq. See* Mont. Office of Pub. Educ., Flathead Reservation Timeline 6, opi.mt.gov/pdf/IndianEd/IEFA/FlatheadTimeline.pdf (accessed Aug. 27, 2014). A tribe organized under the Act has two distinct facets: it operates as a governmental organization pursuant to § 16, 25 U.S.C. § 476, and it may also incorporate as a federally-chartered corporate entity pursuant to § 17, 25 U.S.C. § 477. A tribe's § 16 constitutional and § 17 corporate facets "are separate and distinct and may differ in the extent to which they possess tribal sovereign immunity." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, n. 17 (9th Cir. 1985) (internal quotation marks and citations omitted).

Importantly, a tribe can engage in economic and corporate activities as a § 17 corporation or, if those activities have a governmental function, as a § 16 entity pursuant to its Constitution, bylaws, and laws. *See e.g. Allen v. Gold Country*

Casino, 464 F.3d 1044, 1046-47 (9th Cir. 2006). Similarly, a tribe can establish a corporation in various ways: under state law, tribal law, or as a federally-chartered corporation under § 17. *Am. Vantage Cos., Inc. v. Table Mt. Rancheria*, 292 F.3d 1091, 1095 n. 1 (9th Cir. 2002); Atkinson & Nilles, *Tribal Business Structure Handbook* chs. II–III (2008 ed.).

Where a tribe's corporate charter contains a "sue and be sued" clause, the waiver of immunity extends, at most,[1] only to the tribe's actions as a § 17 corporation. Courts have "refused to read a waiver of immunity in the Section 17 corporate context as abrogating immunity for the tribe's governmental actions as a Section 16 entity." *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 982 (9th Cir. 2006) adopted in part, modified in part on reh'g, 519 F.3d 838 (9th Cir. 2008) amended and superseded on denial of reh'g, 540 F.3d 916 (9th Cir. 2008) and reinstated in part, superseded in part, 540 F.3d 916 (9th Cir. 2008). *Accord Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Native Am. Distribg.*, 546 F.3d at 1293; *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998); *Rosebud Sioux Tribe v. Val-U Const. Co. of S.D., Inc.*, 50

[1] It is not clear a "sue and be sued" clause in a corporate charter acts as a waiver of immunity even for the tribe's § 17 activities. *See Native Am. Distribg. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 n. 2 (10th Cir. 2008). The Tenth Circuit did not decide the issue because it determined the defendant corporation was formed by the Tribe acting under its § 16 powers and thus shared in the tribe's immunity.

F.3d 560, 563 (8th Cir. 1995).[2] Actions taken in a tribe's governmental capacity are protected by sovereign immunity unless the tribe or Congress expressly waived immunity, even if those actions occur in a commercial or "corporate" context. *See e.g. Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 760 (1998); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

A tribe's § 16 sovereign immunity extends to entities that act "as an arm of the tribe," including for-profit and non-profit corporations chartered under state and tribal law. *Allen*, 464 F.3d at 1046; *Cook*, 548 F.3d at 725 ("[T]ribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself."). Courts have recognized corporations similar to the College and Foundation as entities established pursuant to a tribe's § 16 powers. *E.g. Pink v. Modoc Indian Health Project*, 157 F.3d 1185 (9th Cir. 1998), cert.

[2] Plaintiffs cite *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989), for their assertion a "sue and be sued" clause in a tribe's corporate charter operates as broad waiver. This holding has been significantly limited by the Eighth Circuit. *See e.g. Hagen v. Sisseton-Wahpeton Community Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000) (holding a tribal community college a "sue and be sued" clause in its own charter was still entitled to sovereign immunity because it functioned as an arm of the tribe, not a mere business); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 582–84 (8th Cir.1998); *Val-U Const. Co. of S.D., Inc.*, 50 F.3d at 563. Plaintiffs also quote from *Marceau*, 455 F.3d 974, but fail to note that the Ninth Circuit not only found in that opinion that the corporation in question was a § 17 organization but also emphasized that the corporation's own charter—as opposed to the tribe's corporate charter—contained a "sue and be sued" clause. Moreover, that opinion was ultimately superseded by the opinion at 540 F.3d 916, in which the Ninth Circuit held that its holding the Blackfeet Tribe had waived tribal immunity "was in error" because "the tribal court must have the first opportunity to address all issues within its jurisdiction" and the tribal-member plaintiffs had failed to exhaust their tribal court remedies.

denied, 528 U.S. 877 (1999) (nonprofit health corporation entitled to sovereign immunity where it "served as an arm of the sovereign tribes, acting as more than a mere business"); *Hagen*, 205 F.3d at 1043 (community college); *Kendall v. Chief Leschi Sch., Inc.*, C07-5220 RBL, 2008 WL 4104021 (W.D. Wash. 2008) (corporation that operated a school district).

A. The Tribes have not waived their sovereign immunity.

Plaintiffs insist CSKT waived its sovereign immunity by including a "sue and be sued" clause in its Corporate Charter and referencing the Charter in a subsection of CSKT's Constitution and Bylaws. The reference in Art. VI, § 1(f) of the Constitution to a charter that had not even been issued yet (the Constitution was adopted in 1935, a year before the Charter) is insufficient to waive CSKT's § 16 sovereign immunity. A tribe's waiver of sovereign immunity must be "unequivocally expressed" and cannot be implied. *Allen*, 464 F.3d at 1047 (internal quotation marks and citation omitted).

Part 4 of the CSKT Laws Codified, titled "Tribal Governmental Immunity," demonstrates that the Constitution's reference to the Charter does not operate as a waiver of sovereign immunity as to all tribal corporations:

> The Confederated Salish and Kootenai Tribes, as a sovereign government and landowner, and its elected Tribal Council in either their official or personal capacity, as well as Tribal officers, agents and employees acting within the scope of their authority, share

> sovereign immunity from suit and may not be made parties defendant to a lawsuit without the express, written consent of the Tribal Council.

CSKT Laws Codified § 4-1-401. The Code then lists the limited areas in which CSKT has waived its governmental immunity. § 4-1-402. None of the exceptions to immunity in § 4-1-402(1) applies, and CSKT's immunity is not waived under subsection (2), which provides that "[b]usiness corporations owned, in whole or in part, by the Tribes are authorized to sue and be sued according to the term of their articles of incorporation or charter." The College and Foundation are non-profits, not business corporations, and their charters do not permit suit in federal court. The College's Articles of Incorporation filed with the Tribe waive immunity only for suits brought in Tribal Court. *See* doc. 16-1, Art. III(B). The Foundation's Articles do not contain a "sue and be sued" clause or any other waiver. *See* Ex. A, Articles of Incorporation of Salish Kootenai College Foundation, Inc. (May 24, 1988).[3]

B. The College and Foundation are tribal entities, and their incorporation with the State does not waive sovereign immunity.

Plaintiffs do not contest that the College and Foundation are tribal entities, acting on behalf of and as arms of CSKT; rather they claim incorporation with the state operates as a waiver of sovereign immunity. Dual incorporation

[3] Defendants' Counsel mistakenly filed an unfiled and incomplete version of the Foundation's Articles of Incorporation. The attached copy is the version on file with the Secretary of State. It contains no differences material to this case; it includes Arts. III-XI, an acknowledgment of the incorporators' signatures, the "Great Seal" and SOS Bar Code, a different font, one "of" instead of two in Art. XIII(2), and "benefit" as opposed to "benefits" in Article XIII(4).

(incorporation under state law as well as tribal law) is no bar to a finding that a corporation is a tribal entity. *See e.g. Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc) cert. denied 547 U.S. 1209 (Jun. 19, 2006). Although the incorporation of an entity only under state law can weigh against a finding that a corporation is a tribal entity entitled to tribal immunity, the factor is not dispositive. *White v. Univ. of Cal.*, 2014 WL 4211421, — F.3d — (9th Cir. Aug. 27, 2014) (adopting the balancing factors described by the Tenth Circuit in *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187-88 (10th Cir. 2010)); *Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 199 F.3d 1123, 1125 (10th Cir. 1999) ("[T]he mere organization of such an entity under state law does not preclude its characterization as a tribal organization as well."); *United States v. Crossland*, 642 F.2d 1113, 1114 (10th Cir. 1981) (same); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176 (D.S.D. 2012) (recognizing immunity of nonprofit created only under state law). Incorporating under state law does not satisfy the high threshold for expressly and unequivocally waiving immunity. *Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc.*, 658 N.E.2d 989, 994-95 (N.Y. 1995).

As discussed, the Ninth Circuit has already determined the College is a tribal entity functioning as an arm of CSKT. *Smith*, 434 F.3d at 1133–35. Although the

question there was whether CSKT had properly exercised jurisdiction over the plaintiff's claims, the Ninth Circuit applied the same analysis it uses to determine whether an entity shares in a tribe's immunity. The College charter's reference to the section in the CSKT Constitution that references CSKT's Corporate Charter is not an "unequivocal expression" of waiver of immunity. *Allen*, 464 F.3d at 1047. *See also Ransom*, 658 N.E.2d at 995 ("[T]he requirement of an express and unequivocal waiver of tribal sovereign immunity remains unsatisfied by mere incorporation by reference in the charter of the statutory power to sue and be sued."). It would be particularly inappropriate to find a waiver by reference that would contradict an express waiver in the same document which limits the waiver to tribal court.

The Foundation shares in CSKT's immunity because it is also a non-profit corporation "acting on behalf of the tribe." *White*, *10. It is helpful to analyze the six factors considered by the Tenth Circuit in *Breakthrough Management* and recently adopted by the Ninth Circuit in *White*[4]:

> (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting

[4] *White* does not mention *Breakthrough*'s sixth factor. *See White*, *11.

immunity to the entities

Breakthrough Mgmt., 629 F.3d at 1181. Although incorporated under state law, the Foundation's exclusive purpose is to benefit the College by performing functions that would otherwise be performed by the College itself: administering the College's endowment and grant funds, awarding scholarships, distributing funds to advance the College's objectives, and raising funds. In chartering the College, the Tribal Council did not give the College authority to waive tribal immunity to suit in federal court; the Tribal Council retained that power. CSKT Laws § 4-1-401. Accordingly, the creation of another corporation to fulfill some of the College's responsibilities cannot waive the tribal immunity shared in by the College. As already discussed, the Foundation's finances and structure are inextricably intertwined with the College, which in turn submits Foundation financial statements and trustee lists to the Tribal Council and is subject to the Council's regulation. Additionally, granting immunity to the Foundation serves the policies underlying tribal sovereign immunity. *Breakthrough Mgt.*, 629 F.3d at 1187–88 (listing example policies). CSKT's ability to provide access to higher education for American Indians, maintain quality education for workforce or further education, perpetuate the cultures of the Salish and Kootenai peoples, and increase individual and community capacity for self-reliance and sustainability requires that the

College be funded, and it is the Foundation that is responsible for that funding. Taking funds from the Foundation would take funds directly from CSKT's higher education efforts, interfering with its sovereign interests. Accordingly, the Foundation is "sufficiently identified with the tribe that [it] may be considered to be "tribal." *Smith*, 434 F.3d at 1133.

C. Tribal entities are akin to state agencies, not municipal corporations.

Contrary to Plaintiffs' unsupported assertion, a tribal corporation chartered to further a governmental purpose is akin to a state agency, not a municipal corporation. Unlike municipalities and counties, tribes and states are sovereigns and so are not "persons" under the False Claims Act. *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 128 (2003); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000); *United States v. Menominee Tribal Enters.*, 601 F. Supp. 2d 1061, 1068 (E.D. Wis. 2009); *United States ex rel. Howard v. Shoshone Paiute Tribes*, 2012 WL 6725682 (D. Nev. 2012). Where a corporation functions as an arm of a tribe, it shares in the tribe's sovereign immunity, just as a state agency shares in the state's.

D. Tribes can assert sovereign immunity against FCA claims.

The United States may sue tribes or states when properly exercising its superior sovereign powers. *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861

(9th Cir. 1986). But states and tribes may assert sovereign immunity against FCA claims because it is their identity as sovereigns that exempts them from the FCA's definition of "persons." *Vermont Agency of Natural Resources*, 529 U.S. at 779; *Howard* , 2012 WL 6725682; *Menominee Tribal Enters.*, 601 F. Supp. 2d at 1068.

II. Plaintiffs' request for discovery should be denied.

Jurisdictional discovery should only be granted where "pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union Local No. 498, United Food and Com. Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (internal quotation marks and citations omitted). Here, the facts are not disputed. Plaintiffs make legal arguments regarding immunity but do not contest that the College and Foundation are arms of CSKT. Their articles of incorporation and Operating Agreement[5] adequately demonstrate the College and Foundation are arms of CSKT, and no amount of discovery will change that result. *See Chief Leschi Sch., Inc.*, 2008 WL 4104021 (denying further jurisdictional discovery in FCA case against tribal corporation operating a school district); *Johnson v. Mitchell*, No. CIV S–10–1968 GEB GGH PS, 2012 WL 1657643, *7 (E.D. Cal.

[5] The Court may consider evidence beyond the pleadings because Defendants' challenge to the Court's subject matter jurisdiction is factual. "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Coalition for a Sustainable Delta v. F.E.M.A.*, 711 F. Supp. 2d 1152, 1157-58 (E.D. Cal. 2010) (citations omitted).

May 10, 2012) (holding that jurisdictional discovery need not be allowed if the request merely seeks a "fishing expedition"). No discovery is necessary to decide the legal questions raised.

Nor should the Court allow Plaintiffs to conduct a fishing expedition in hopes some fact will be uncovered that would allow them to state a claim upon which relief can be granted. *See Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004) ("district courts need not condone the use of discovery to engage in 'fishing expedition[s].'"). Plaintiffs' failed to state a claim for which relief can be granted in federal court, and they are not entitled to use the discovery process to develop a new complaint.

III. The Individual Defendants must be dismissed.

Plaintiffs confuse an "official capacity" claim, which is not permitted against a tribal official, with an "individual capaci[ty claim] under the FCA for actions taken in the course of [the individual's] official duties." *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1124–25 (9th Cir. 2007). As the Ninth Circuit explained in 2008:

> Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. In these cases the sovereign entity is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Applying this principle to tribal rather than state immunity, we have held that a plaintiff cannot

> circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.

Cook, 548 F.3d at 727 (internal quotation marks and citations omitted).

The Court cannot assess whether any individual action was within an Individual Defendant's scope of authority because Plaintiffs have alleged only that the Individual Defendants are members of the College's Board of Directors. As admitted by Plaintiffs (*see* Pls.' Br. at 33 ("The named individuals are in charge of the SKC and the Foundation and are therefore the individuals who are responsible for the improper actions that are committed")), the Individual Defendants have been sued *because of* their official capacity. Thus the suit is fundamentally against CSKT and sovereign immunity applies.

IV. The State law claims should be dismissed.

The remaining claims should be dismissed for the reasons already discussed. First, sovereign immunity protects Defendants against these claims. Second, because tribal court jurisdiction over the state law claims is "unquestionably colorable," Plaintiffs should be required to bring their state law claims in tribal court. *Marceau*, 540 F.3d at 921.

Additionally, Plaintiffs fail to refute Defendants' arguments concerning the employment-related claims and blacklisting and defamation claims.

Conclusion

Contrary to Plaintiffs' suggestion, the court in *Ebeid ex rel. U.S. v. Lungwitz* refused "to jettison the particularity requirement" of Rule 9(b) for FCA claims. 616 F.3d 993, 998–99 (9th Cir. 2010). By lumping all the defendants together, Plaintiffs have failed to give them notice of any particular alleged misconduct or meet the minimum standard established in *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007).

Accordingly, Defendants request the Court dismiss this case from federal court. To the extent Plaintiffs may have claims for damages personal to them, CSKT Tribal Court is the appropriate forum to address those claims.

DATED this 29th day of August, 2014.

WORDEN THANE P.C.

/s/ Martin S. King
Martin S. King

CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, excluding the caption and certificate of compliance is 3,248.

WORDEN THANE P.C.

/s/ Martin S. King
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