No. 15-35001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAWN CAIN, Relator; et al., Plaintiffs - Appellants, v. SALISH KOOTENAI COLLEGE, INC.; et al., Defendants - Appellees.	Appeal D.C. No. 9:12-CV-00181-BMM District of Montana, Missoula

APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees Salish Kootenai College, Inc. ("College") and Salish Kootenai College Foundation, Inc. ("Foundation") submit the following corporate disclosure statements. Because the College and Foundation are not "nongovernmental" corporate parties, they believe the statements are not required. However, because their status is in dispute, they state as follows:

1. Respondent Salish Kootenai College, Inc. is a non-profit tribal corporation chartered under the laws of the Confederated Salish and Kootenai Tribes and incorporated under the laws of the State of Montana. As a non-profit corporation, the College issues no stock and is not otherwise owned or controlled by any corporation or entity other than the Confederated Salish and Kootenai Tribes.

2. Respondent Salish Kootenai College Foundation, Inc. is a non-profit corporation incorporated under the laws of the State of Montana. As a non-profit corporation, Salish Kootenai College Foundation issues no stock and is not otherwise owned or controlled by any corporation or entity other than the Confederated Salish and Kootenai Tribes.

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JURISDICTIONAL STATEMENT

Generally, Appellees agree with Appellants' jurisdictional statement. However, the district court did not have jurisdiction under 28 U.S.C. § 1345. A qui tam suit under the False Claims Act is not "commenced by" the United States when, as here, it is filed and pursued only by private party relators. *See U.S. ex rel. State of Wis. v. First Fed. Sav. & Loan Assn.*, 248 F.2d 804, 808 (7th Cir. 1957); *U.S. ex rel. Felton v. Allflex USA, Inc.*, 989 F. Supp. 259 (1997); *Alaska v. Abbott Labs.*, No. 3:06-CV-0267-RRB, 2007 WL 7538021, at *3 (D. Alaska Jan. 22, 2007). Plaintiffs' False Claims Act claims did invoke federal question jurisdiction under 28 U.S.C. § 1331.

ISSUES PRESENTED FOR REVIEW

1. Whether Appellants failed to state a claim upon which relief can be granted against the College and its Board Members because the College is not a "person" subject to suit under the False Claims Act.

2. Whether the district court lacked subject matter jurisdiction because the College shares in the sovereign immunity of the Confederated Salish and Kootenai Tribes ("Tribes") and neither the Tribes nor the College waived that immunity.

3. Whether Plaintiffs should have been allowed to conduct further jurisdictional discovery.

STATEMENT OF THE CASE

The Confederated Salish and Kootenai Tribes ("Tribes") are a federally recognized tribe governed pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* The Tribes adopted Bylaws and a Constitution under § 16 of that Act in 1935, and then adopted a Corporate Charter under § 17 of the Act in 1936. (Vol. 1, SER at 47-64.) The Tribes' present-day home is the Flathead Indian Reservation, located in northwest Montana. (http://www.cskt.org/.)

Appellees and Defendants are Salish Kootenai College ("College"), Salish Kootenai College Foundation ("Foundation"), and College Board Members Jim Durglo, Rene Peirre, Ellen Swaney, Linden Plant, Tom Acevedo,[1] Zane Kelly, and Ernest Moran ("Board Members") (collectively "the College Defendants").

The Tribes chartered and "declare[d] the establishment" of the College in 1977 pursuant to a resolution of the Tribal Council. (Vol. I, ER at 277.[2]) The College was organized and incorporated under tribal law as "Salish Kootenai Community College." (Vol. I, ER at 69–75, 274–276, 277; Vol. 2, ER at 57.) The Tribal Council resolution chartering the College provides that the College was established pursuant to the Tribes' § 16 powers as a constitutional government and that the College was intended to meet the higher educational needs of tribal

[1] Mr. Acevedo's first name is misspelled in the caption as "Tome."
[2] Appellants filed an "appendix" with two volumes, but it is referred to in this brief as Excerpts of Record or "ER.")

members and tribal employees. (Vol. I, ER at 277.) The Tribes further resolved that the College would be governed by a seven-person board appointed by the Tribal Council. (Vol. I, ER at 277.)

The College's tribal Articles of Incorporation, filed the same day the Resolution was passed, provide that the College is a "tribal corporation" formed pursuant to the Tribe's § 16 powers in order to "provide post-secondary educational opportunities for residents of the Flathead Indian Reservation" and "to measure the needs, talents, and aspirations of the residents of the Flathead Indian Reservation and provide a comprehensive program in recognition of the desires of the Flathead Indian Reservation Community." (Vol. I, ER at 69–70.) The tribal Articles also provide that the College may "sue and be sued in Tribal Court." (Vol. I, ER at 70.)

In 1978, the College was also incorporated with the State of Montana. (Vol. I, ER at 275; Vol. II, ER at 4–10.) The articles of incorporation filed with the Secretary of State include among the College's general powers the power to sue and be sued. (Vol. II, ER at 6.) The provision does not include the limitation to tribal court that is contained in the tribal Articles. (Vol. II, ER at 6.)

The College does business as "Salish Kootenai College," and, in 1983, it amended its state Articles of Incorporation to reflect that. (Vol. I, ER at 274–276; Vol. II, ER at 3, 57.) It did not amend its tribal articles to reflect the name change,

but it is widely recognized as the same corporation. (Vol. I, ER at 275; Vol. II, ER at 57, 210, 211; *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1134–35 (9th Cir. 2006) (en banc) ("*Smith (en banc)*"); *Smith v. Salish Kootenai Coll.*, 4 Am. Tribal Law 90 (Salish-Kootenai Ct. of Appeals Feb. 17, 2003) ("*Smith (tribal court)*".) The College continues to pursue its mission as a tribal college. (Vol. 1, SER at 67.) The Board Members have all been directors of the College.[3]

Appellants Fawn Cain, Tanya Archer, and Sandi Ovitt (collectively, "Appellants") are former employees of the College. Their Complaint, which was filed under seal on October 29, 2012, alleges against all the College Defendants three claims arising under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and three state law claims—blacklisting, breach of the implied covenant of good faith and fair dealing in an employment contract, and defamation. (Vol. I, ER 15–37.) The Complaint generally alleges that the College Defendants made false representations to the federal government in applying for and reporting on certain grant monies and then retaliated against Appellants for investigating or complaining about the alleged false representations.

The United States declined to intervene in this *qui tam* action on September

[3] Although not relevant here because the district court's dismissal of all claims against the Foundation on separate grounds has not been appealed, College executives separately incorporated the Foundation under state law to administer certain endowments and grants for the benefit of the College and the students, to award scholarships to the College's students, and to make grants that advance the higher educational objectives of the College. (Vol. 1, SER at 39-46.)

3, 2013. (Vol. 2, SER at 83-90.) Nearly nine months later, on May 23, 2014, the Complaint was served on the President of the College, Robert DePoe. (Vol. 1, SER at 68.) Summons were also issued to the Foundation's Registered Agent, Angelique Albert, at the College's address, and to each College Board Member, also at the College's address. (Vol. 2, SER at 69-82.)

The College Defendants moved to dismiss the Complaint in its entirety on June 27, 2014, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. (Vol. I, ER at 39-40; Vol. I, ER at 43–68.) In relevant part, they argued the claims were barred because the College is a tribal entity that functions as an arm of the Tribes and the Board Members were sued only in their official capacities. Accordingly, the College is not a "person" subject to suit under the False Claims Act, and it is also immune from suit because neither the Tribes nor Congress have waived sovereign immunity for this action. The College Defendants relied on the Ninth Circuit's determination in *Smith (en banc)*, 434 F.3d at 1134–35, among other authority, that the College is a "tribal entity" that functions as "an arm of the tribe." (Vol. I, ER at 43–68.)

After briefing, oral argument, and simultaneous supplemental briefing by the parties and the Tribes as amicus curiae,[4] as well as jurisdictional discovery, the district court granted the College Defendants' motion to dismiss. It dismissed the

[4] Because Appellants did not include the College Defendants' or Tribes' supplemental briefs, they are included in the Supplemental Excerpts of Record. (Vol. 1, SER at 7-38.)

claims against the College and the Board Members in their official capacities with prejudice on the grounds that the College shares in the Tribes' sovereign status and so is not a "person" subject to suit under the False Claims Act (Vol. II, ER at 218, 220–221) and on the grounds that the College shares in the Tribes' sovereign immunity and that immunity has not been waived (Vol. II, ER at 204–215).

The district court did not decide whether the Foundation is also a tribal entity, but dismissed the claims against the Foundation with prejudice on the grounds that it appeared the Appellants could prove no set of facts that would render the Foundation liable for the claims in the Complaint since the Foundation had nothing to do with the grants at issue in the Complaint. (Vol. II, ER at 224–25.) The district court further determined that although the Board Members had been sued in their official capacities, the Plaintiffs might yet be able to articulate claims against them in their individual capacities, and therefore granted Plaintiffs leave to file an amended complaint.[5] (Vol. II, ER at 215.)

SUMMARY OF THE ARGUMENT

Appellants do not appeal the district court's dismissal of the claims against

[5] For procedural background, Appellants did file an amended complaint in the district court. They again named the College and Foundation as defendants even though the claims against them had been dismissed with prejudice and no leave to amend had been granted as to them. (Vol. II, ER at 230–268.) Appellants then filed a notice of this appeal. (Vol. II, ER at 269–71.) The College Defendants moved to stay the case in district court to the extent jurisdiction had not automatically transferred to the Ninth Circuit, and the motion was granted. (Vol. 1, SER at 1-6; Vol. II, ER at 270.) The parties then stipulated to a Rule 54(b) motion to certify the dismissal of the claims against the College Defendants as a final judgment for the purposes of appeal, and that motion was also granted. (Vol. II, ER at 273–285.)

the Foundation. Nor do they appeal the district court's determination that the Board Members were sued in their official, not their individual, capacities. Accordingly, this appeal concerns only whether the College shares in the Tribes' sovereign status for purposes of being subject to suit under the False Claims Act, whether the College shares in the Tribes' sovereign immunity and whether such immunity has been waived, and whether additional jurisdictional discovery should have been granted.

1. As already determined in *Smith (en banc)*, the College is a tribal entity that functions as an arm of the Tribes. As such, the College shares in the Tribes' sovereign status and is not a "person" subject to suit under the False Claims Act.

Appellants mistakenly rely on state sovereignty law to assert that the College is not a tribal entity. But when determining whether a tribal entity shares in a tribe's sovereign immunity or sovereign status, the Ninth Circuit employs a distinct arm-of-the-tribe analysis. The arm-of-the-tribe analysis, which the Ninth Circuit used in *Smith (en banc)*, *White*, *Allen*, *and Pink* is the appropriate test for determining whether the College is subject to suit under the False Claims Act.

As held by the district court, the College satisfies each factor of the arm-of-the-tribe analysis. It is well established under tribal sovereignty law, including *Smith (en banc)*, that neither the College's corporate status nor its dual incorporation under both tribal and state law bar it from being an arm of the Tribes.

Defendants have pointed to no intervening authority that would call *Smith (en banc)* into question now, and both *Smith (en banc)* and the facts here clearly demonstrate that the College functions as an arm of the Tribes. Appellants' late-raised evidentiary arguments do not change this analysis.

Accordingly, the College and its Board Members in their official capacities are not subject to suit under the False Claims Act and those claims were properly dismissed with prejudice. Because the only federal claims asserted by Appellants must be dismissed with prejudice, and considering that the tribal court has exclusive subject matter jurisdiction over the state law claims, the district court lacked subject matter jurisdiction over the remaining claims and properly dismissed them with prejudice.

2. As an arm of the Tribes, the College also shares in the Tribes' sovereign immunity unless Congress or the Tribes have waived that immunity. Appellants have shown no waiver of sovereign immunity in state or federal court. Moreover, their speculation that sovereign immunity might have been waived in documents not in the record is irrelevant because a waiver of sovereign immunity would not change the non-person status of the College under the False Claims Act.

3. Further discovery would be futile. Even if the College or Tribes had waived sovereign immunity, the College would still not be a "person" under the False Claims Act. Accordingly, the Court should affirm the district court's decision

to dismiss with prejudice the False Claims Act claims against the College and the Board Members.

STANDARDS OF REVIEW

A district court's conclusion that it lacks subject matter jurisdiction is reviewed de novo, as are questions of statutory interpretation, tribal sovereign immunity, and stare decisis. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Am. Vantage Cos., Inc. v. Table Mt. Rancheria*, 292 F.3d 1091, 1094 (9th Cir. 2002), as amended on denial of reh'g (July 29, 2002); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993), as amended on denial of reh'g (Sept. 30, 1993). Denial of jurisdictional discovery is reviewed for an abuse of discretion. *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003).

ARGUMENT

I. The College shares in the Tribes' sovereign status and therefore is not a "person" subject to suit under the False Claims Act.

The district court properly determined that the College is not a "person" that is subject to suit under the False Claims Act because it is a tribal entity that functions as an arm of the Tribes. Accordingly, the claims brought under the False Claims Act were properly dismissed against the College and the Board Members, who were sued only in their official capacities.

A. States and state agencies and tribes and tribal entities are not

subject to suit under the False Claims Act.

Although a defendant may also be able to raise a sovereign immunity defense to a False Claims Act claim, a court should first determine whether the statute applies in the first place—that is, whether the defendant is a "person." *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) ("*Vermont*"). If the defendant is not a "person," the court need not reach the issue of sovereign immunity nor determine whether that immunity has been waived. *Parker v. Franklin County Community Sch. Corp.*, 667 F.3d 910, 925 (7th Cir. 2012) ("We don't need to address state sovereign immunity where we can resolve the issue by examining whether the defendants are 'persons' under § 1983.").

In *Vermont*, the United States Supreme Court determined that states and state agencies are not "persons" subject to suit under the False Claims Act. 529 U.S. at 779–80. The Court held:

> The relevant provision of the [False Claims Act], 31 U.S.C. § 3729(a), subjects to liability "[a]ny person" who, inter alia, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." We must apply to this text our longstanding interpretive presumption that "person" does not include the sovereign.

Id. at 780 (citations omitted). Because the "sovereign" is not a "person," "the False Claims Act does not subject a State (or state agency) to liability." *Id.* at 787–88.

As held by the district court, the same reasoning—that "[w]e must apply . . .

our longstanding interpretive presumption that 'person' does not include the sovereign"—applies to tribes and tribal entities. Because a tribe is a sovereign, the False Claims Act does not subject to liability a tribe or a tribal entity that shares in the tribe's sovereign status. Indeed, the Ninth Circuit just recently held that a tribe is not a person under the False Claims Act:

> The district court correctly concluded that the Tribe, like a state, is a sovereign that does not fall within the definition of a "person" under the FCA. [*Vermont*, 529 U.S. at 778–87] (applying the "longstanding interpretive presumption that 'person' does not include the sovereign," to be "disregarded only upon some affirmative showing of statutory intent to the contrary"). As the district court explained, "the same historical evidence and features of the FCA's statutory scheme that failed to rebut the presumption for the states in *Stevens*, here similarly fail to rebut the presumption for sovereign Indian tribes.

Howard ex rel. U.S. v. Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, No. 13-16118, 2015 WL 3652509, at *1 (9th Cir. June 15, 2015) (unpublished).

The district courts that have considered this issue have also applied *Vermont*'s holding that a sovereign is not a "person" to tribal entities. The district court for the Western District of Washington held that "[a]s a sovereign, the Puyallup [Tribe of Indians], like the State of Vermont, are free from suit under [the Federal Claims Act]" and that the tribe's sovereign status "extends to subordinate entities of a tribe when the entity exists to perform 'acts as an arm of the tribe.'" *Kendall v. Chief Leschi Sch., Inc.*, No. C07-5220 RBL, 2008 WL 4104021, at *1

(W.D. Wash. Sept. 3, 2008) (citations omitted). Thus the court held that Chief Leschi School, Inc., a corporation that operates a school district for the Puyallup, was not a "person" subject to suit under the False Claims Act. *Id.* Likewise, in *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061, 1068 (E.D. Wis. 2009), the district court held that Menominee Tribal Enterprises, "the principal business arm of the Menominee Tribe of Wisconsin," was not subject to liability under the Act. "[J]ust as Congress 'must do something more' to indicate that a sovereign state may be sued, it must do so if it intends a sovereign tribe to be sued." *Id.* These conclusions are consistent with tribal sovereignty law, which recognizes that tribal entities that function as arms of the tribe share in the tribe's sovereign status and sovereign immunity.

B. Whether the College shares in the Tribes' sovereign status must be determined in the context of tribal, not state sovereignty.

Appellants do not dispute that the Tribes are a sovereign and therefore not a person under the False Claims Act. But they urge the Court to apply an Eleventh Amendment arm-of-the-***state*** analysis to determine whether the College functions as an arm of the Tribes. This is the wrong test because the College's sovereign status must be determined in the context of tribal, not state sovereignty.

State and tribal sovereignty share some common ground. Like a state, a tribe is a sovereign entity. *Mich. v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (Indian tribes are "separate sovereigns"); *Howard*, 2015 WL 3652509, at

*1. And like a state, a tribe possesses sovereign immunity from suit to the extent that such immunity has not been waived by Congress or the tribe. *Kiowa Tribe v. Mfg. Techs., Inc*., 523 U.S. 751, 760 (1998). Similar to the way a state's sovereign status and sovereign immunity extend to state agencies that act as arms of the state, *Vermont*, 529 U.S. at 780, a tribe's sovereign status and sovereign immunity extend to tribal entities that act as arms of the tribe, e.*g. White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998).

Despite these similarities, tribal sovereignty is not co-extensive with the sovereignty of the states:

> [W]e distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the "mutuality of ... concession" that "makes the States' surrender of immunity from suit by sister States plausible." **So tribal immunity is a matter of federal law and is not subject to diminution by the States**.

Kiowa Tribe, 523 U.S. at 756 (internal citations omitted) (emphasis added). Courts and parties must look to federal common law specific to tribal sovereignty, as it has been abrogated from time to time by Congressional action, to analyze issues related to tribal sovereignty. *Okla. Tax Commn. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991).

1. A tribe's sovereign status and sovereign immunity extend to tribal officials who are sued in their official capacities and to tribal entities that act as arms of the tribe.

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Commn.*, 498 U.S. at 509 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). A tribe established under the Indian Reorganization Act of 1934, like the Confederated Salish and Kootenai Tribes, operates as a governmental organization pursuant to § 16 of the Act, 25 U.S.C. § 476, and may also incorporate as a federally-chartered corporate entity pursuant to § 17, 25 U.S.C. § 477. A tribe can engage in economic and corporate activities as a § 17 corporation or, if those activities have a governmental function, as a § 16 governmental 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).

"[A]bsent a clear waiver by the tribe or congressional abrogation," an Indian tribe is immune from suit for actions taken in its § 16 capacity, even if those actions occur in a commercial or "corporate" context. *Kiowa Tribe*, 523 U.S. at 760; *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). Additionally, as sovereigns, tribes are not "persons" qualified to sue or be sued under certain statutes, including 42 U.S.C. § 1983 and the False Claims Act. *Inyo County v. Paiute–Shoshone Indians*, 538 U.S. 701, 708–12 (2003) (§ 1983);

Howard, 2015 WL 3652509, at *1 (False Claims Act). *See also Pink*, 157 F.3d at 1188 (a tribal entity is a "tribe" and therefore not an "employer" under Title VII).

Both a tribe's sovereign status and its sovereign immunity extend to tribal officials sued in their official capacities, *AVI Casino Enters., Inc.*, 548 F.3d at 727, and to any entity that "acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Allen*, 464 F.3d at 1046; *White*, 765 F.3d at 1025 ("Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe."); *Pink*, 157 F.3d at 1188 (nonprofit corporation that "served as an arm of the sovereign tribes, acting as more than a mere business" was properly considered a "tribe").

It is well established that nonprofit and for-profit corporations chartered under state or tribal law, or dually incorporated, can be arms of a tribe and thus share in the tribe's sovereign status and sovereign immunity. *AVI Casino Enters., Inc.*, 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."); *Smith (en banc)*, 434 F.3d at 1134–35 (Salish Kootenai College, incorporated under both tribal and state law, is a tribal entity); *Pink*, 157 F.3d at 1188 (nonprofit corporation was a "tribe" for purposes of Title VII); *Chief Leschi Sch., Inc.*, 2008 WL 4104021 (corporation that operated a school district was an arm of the tribe). As the en banc court noted in *Smith*, "tribes may govern themselves through entities other than formal tribal

leadership." 434 F.3d at 1133. A tribe can conduct governmental activities through an unincorporated entity or by establishing a federally-chartered § 17 corporation or a corporation under state or tribal law.[6] *Am. Vantage Cos.*, 292 F.3d at 1095 n. 1 (9th Cir. 2002). Although the incorporation of an entity under state law can weigh against a finding that it is a tribal entity, that factor is by no means dispositive. *White*, 765 F.3d at 1025–26 (holding that corporation incorporated under California law was entitled to sovereign immunity); *Smith (en banc)*, 434 F.3d 1134–35.

To determine whether a corporation or other entity is an "arm of the tribe," the Ninth Circuit

> examine[s] several factors including: "(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; and (5) the financial relationship between the tribe and the entities.

White, 765 F.3d at 1025 (citing *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187-88 (10th Cir. 2010)). The Ninth Circuit employs this analysis to determine whether an entity is a tribal entity for the purpose of sovereign immunity, *id.* and *Allen*, 464 F.3d at 1046, and for the

[6] There is no such thing as "an IRA section 16 corporation" that is registered with the Department of the Interior. (App. Br. 18-1 at 20.) Unlike a federally chartered §17 corporation, a corporation established pursuant to a tribe's § 16 powers is not registered or chartered with the Department of the Interior.

purpose of tribal subject matter jurisdiction, *Smith (en banc)*, 434 F.3d at 1134–35. The analysis is also used to determine whether an entity shares in a tribe's sovereign status in statutory inquiries. *Pink*, 7 F.3d at 1188 (determining whether an entity is a "tribe" and therefore does not fall within the definition of an "employer" subject to suit under Title VII); *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1080–81 (9th Cir. 2001) (Age Discrimination in Employment Act does not apply to tribal housing authority that functions as an arm of the tribal government). The arm-of-the tribe analysis is likewise the appropriate test to determine whether an entity is a "sovereign" and therefore not a "person" subject to suit under the False Claims Act.

2. The arm-of-the-tribe analysis used in tribal sovereignty cases is the proper standard for determining whether a tribal corporation is subject to suit under the False Claims Act.

In *Vermont*, the Court observed that there is a "virtual coincidence of scope" between the "statutory inquiry [into] whether States can be sued under [the False Claims Act]" and "the Eleventh Amendment inquiry [into] whether unconsenting States can be sued [under the False Claims Act]." *Vermont*, 529 U.S. at 779–80. Accordingly, many circuits, including the Ninth Circuit, employ the Eleventh Amendment arm-of-the-state analysis to determine whether a state agency is a "person" under the False Claims Act. *Stoner v. Santa Clara County Off. of Educ.*, 502 F.3d 1116, 1121–22 (9th Cir. 2007); *United States ex rel. Lesinski v. S. Fla.*

Water Mgmt. Dist., 739 F.3d 598, 601–02 (11th Cir. 2014) *cert. denied sub nom. Lesinski v. S. Fla. Water Mgmt. Dist.*, 134 S. Ct. 2312 (2014); *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579–80 (4th Cir. 2012)**;** *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006); *United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 401–02 (5th Cir. 2004).

But the Eleventh Amendment does not apply to tribes, and the test for whether a tribal entity shares in the tribe's sovereign immunity is different from the Eleventh Amendment test for whether a state agency shares in a state's sovereign immunity. *Compare U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall ("DMJM")*, 355 F.3d 1140, 1147 (9th Cir. 2004) and *White*, 765 F.3d at 1025. Accordingly, the Eleventh Amendment arm-of-the-state analysis is not the test for determining "whether unconsenting [***tribes***] can be sued [under the False Claims Act]." In order for the test for whether an entity is a "person" under the False Claims Act to share a "virtual coincidence of scope" with the question of whether the "unconsenting [sovereign] can be sued," *Vermont*, 529 U.S. at 779–80, courts must apply tribal sovereign immunity law when the defendant is a tribal entity. *Vermont*, 529 U.S. at 779–80. Accordingly, the proper test here is the arm-of-the-tribe analysis employed in *White*, *Allen*, *Pink*, *Smith (en banc)*, and other tribal sovereignty cases.

3. Appellants' reliance on state sovereignty cases is misplaced.

Because tribal sovereignty is *sui generis*, Appellants' comparisons to state sovereignty are inapt. For example, functional or direct liability for any money judgment rendered against the agency is the "primary factor" in the Eleventh Amendment analysis. *Stoner*, 502 F.3d at 1122–23. In contrast, "the financial relationship between the tribe and the entities" is only one of several factors the Ninth Circuit considers in determining whether a tribal entity shares in a tribe's sovereign immunity. *White*, 765 F.3d at 1025.

Additionally, state sovereign immunity typically does not extend to corporations. *DMJM*, 355 F.3d at 1147 ("[W]e decline the invitation to expand state sovereign immunity dramatically by extending it to corporate actors."); *Del Campo v. Kennedy*, 517 F.3d 1070, 1074 (9th Cir. 2008) (same). However, as discussed above, "the settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *AVI Casino Enters., Inc.*, 548 F.3d at 725; *White*, 765 F.3d at 1026 ("We have previously rejected the Plaintiffs' alternative argument that a tribe's decision to incorporate waives its sovereign immunity."). The ordinary presumption of "personhood" that arises from an entity's incorporation must be tempered by the Supreme Court's express instruction in *Vermont* that courts must apply the longstanding interpretive presumption that the term "person" does not include a

sovereign and the long standing presumption that tribal corporations may share in a *tribe*'s sovereign status.

Contrary to Appellants' argument, *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 134 (2003), does not stand for the proposition that a tribal corporation may not share in a tribe's sovereign status under the False Claims Act. The Court's holding that the term "person" includes counties, municipalities, and municipal and private corporations is unsurprising and inapplicable here because it is based on Eleventh Amendment immunity. *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1140-41 (9th Cir. 2002) (counties and municipalities do not share in a state's sovereign immunity); *Del Campo*, 517 F.3d at 1074 (corporations and private entities may not share in a state's sovereign immunity). It is the "common understanding" in the context of state sovereignty that such entities do not share in the state's sovereignty. *Menominee Tribal Enters.*, 601 F. Supp. 2d at 1068.

"There is no such common understanding in this case—Indian tribes, with sovereign immunity, certainly cannot be sued in the same fashion as counties or cities," *id.*, and corporations that act as arms of the tribe share in the tribe's sovereign immunity, *White*, 765 F.3d at 1025; *Allen*, 464 F.3d at 1046-47. *Chandler*, a state sovereignty case, did not alter this presumption. Thus, the *Menominee* court determined that Menominee Tribal Enterprises, a business enterprise, shared in the tribe's sovereign status, and the *Chief Leschi Sch., Inc.*

court determined that a corporation that operated a school district for the tribe was a "sovereign" under the False Claims Act because it acted as an arm of the tribe. *Menominee Tribal Enters.*, 601 F. Supp. 2d at 1068; *Chief Leschi Sch., Inc.*, 2008 WL 4104021, *1. A corporation acting as an arm of a tribe shares in the sovereign status of the tribe and is not a "person" under the False Claims Act.

C. The College is a tribal entity that functions as an arm of the Tribes.

1. The Ninth Circuit, already decided this issue, and its decision is entitled to stare decisis.

The Ninth Circuit Court of Appeals, has already determined that the College is a tribal entity that functions as an arm of the Tribes. *Smith (en banc)*, 434 F.3d at 1133–35. The court held the College is "sufficiently identified with the tribe that [it] may be considered 'tribal.'" *Id.* at 1133. Accordingly, it "is a tribal entity and, for purposes of civil tribal court jurisdiction, may be treated as though it were a tribal 'member.'" *Id.* at 1135. The Ninth Circuit "[did] not disagree" with the district court's holding that the College is "an arm of the Tribe," and it noted with approval the Montana Supreme Court's identification of the College as "a tribal governmental agency" and the Tribal Court of Appeals' conclusion that "SKC is a tribal entity closely associated with and controlled by the Tribes." *Id*. at 1134 (citing *Smith (district court)*, 2003 WL 24831272, *3; *Bartell v. Am. Home Assurance Co.*, 49 P.3d 623, 624 (Mont. 2002); *Smith (tribal court)*, 4 Am. Tribal

Law 90).

Although "[w]hether an entity is a tribal entity depends on the context in which the question is addressed," the en banc court explicitly modeled its analysis on the "analogous" arm-of-the-tribe standard employed by the courts in *Hagen v. Sisseton-Wahpeton Community Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (sovereign immunity); *Pink* (Title VII), and *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) (Indian Self-Determination Act). *Smith (en banc)*, 434 F.3d at 1133–34. *See also Smith (district court)*, 2003 WL 24831272, *3 (relying on the same standard). As discussed above, this is the same analysis used in tribal sovereign immunity cases and therefore also applies to the statutory inquiry under the False Claims Act.

Because the factual and legal inquiry regarding the College's status in *Smith* and the College's status in the current matter is the same, the *Smith* decision is entitled to *stare decisis* here. Nothing about the particular allegations in the complaint affect this analysis. The arm-of-the-tribe analysis is all about the College, which is the same entity that it was in 2006 when *Smith* was decided.

As held by the Supreme Court:

> The doctrine of stare decisis imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their

change have special force.

Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 (1980) (footnote omitted). This caution is all the more fitting when the scope of a separate sovereign's sovereignty is at issue. Here, the Tribal Council itself, expressly invoking its powers as a § 16 government, chartered the College to serve the Tribes and advance the interests of tribal members and the Tribes themselves. (Vol. I, ER at 69-70.) Accordingly, the College's "power [is] derived directly from the Tribes' sovereign authority." *White*, 765 F.3d at 1025. Both the College and the Tribes have long considered the College's status settled as a matter of law. (Vol. I, ER at 52-53, 129; Vol. 1, SER at 12, 29-30.) As held by the Tribal Court of Appeals, to determine that the College is not a tribal entity "would be to deny both the fundamental nature and identity of the college." *Smith (tribal court)*, 4 Am. Tribal Law 90.

2. Even if not entitled to stare decisis, the en banc Smith decision is highly persuasive.

Even if stare decisis did not apply, the *Smith (en banc)* decision is still "strong persuasive authority" favoring the conclusion that the College is a tribal entity that shares in the Tribes' sovereignty and sovereign immunity. *Baker*, 6 F.3d at 638. Appellants' contention that the "tribal status of [the College] was not

contested in *Smith*" is patently false.[7] (App.Br. 18-1 at 11.) Smith contested the tribal status of the College before the Tribal Court, the Tribal Court of Appeals, the federal district court, a Ninth Circuit panel, and the Ninth Circuit sitting en banc. And each court, except for the Ninth Circuit panel—which assumed that the College was a tribal entity—found that the College was indeed a tribal entity.

Smith (en banc) is also strongly persuasive because the en banc panel considered and rejected most of the arguments Appellants make here. Like Appellants, Smith argued that the College cannot be a tribal entity because it is incorporated in Montana, under Montana nonprofit corporation law. *See* Smith's App. Br., 2003 WL 22724261, *16. The Ninth Circuit rejected this argument, recognizing that the College is dually incorporated and that dual incorporation is no bar to finding that a corporation is a tribal entity. *Smith (en banc)*, 434 F.3d at 1129; *see also supra at 15-16.*

Similarly, Smith argued that he had sued "the Montana corporation[—]the corporation that was chartered by the State of Montana and incorporated by seven

[7] For example, on appeal to the Ninth Circuit, Smith tried to distinguish his case from *Hagen*, in which the Eighth Circuit held that a tribal college was an arm of the tribe:

> The district court cited *Hagen* as an example of a tribal college being held to be an arm of the tribe. It is factually distinguishable from the instant case because there the college's status as a tribal entity was not disputed, Here, SKC's status is challenged and the facts differ because SKC was not chartered by the Tribes, is not an arm of the Tribes, was not directly responsible to the Tribes, and does not limit its services to tribal members. Hagen relied on other discrimination cases (*Dillon* and *Pink*) where the definition of "Indian tribe" is broadly construed.

Smith's App. Br., 2003 WL 22724261, *20–21.

individuals, not the tribe"—as opposed to the Salish Kootenai *Community* College, chartered under tribal law. Smith's Reply Br., 2003 22724264, * 7. The Ninth Circuit rejected this argument as well, recognizing that the "two" corporations are one and the same and the tribal entity does business under the name "Salish Kootenai College." *Smith*, 434 F.3d at 1129.

Finally, Smith argued that "the record is void of any evidence of whether the land on which SKC is headquartered is or is not alienated fee land." Smith's Reply Br., 2003 22724264, * 7. But again the Ninth Circuit rejected his argument, adopting the judicial notice taken by the Tribal Court of Appeals and holding that the college is "located on tribal lands within the reservation and serves the [Tribes]." *Smith*, 434 F.3d at 1135. *See also Smith*, 4 Am. Tribal Law 90 n. 4 (taking judicial notice that the College is located on tribal land).

3. Appellants waived their argument that the facts underlying the *Smith (en banc)* decision might have changed by failing to raise it until supplemental briefing.

The briefing and oral argument before the district court concerned various meritless arguments that Appellants have abandoned,[8] a few legal arguments which

[8] Many of Appellants' arguments on appeal are virtually unrecognizable from those they raised to the district court in their response brief to the College Defendants' motion to dismiss and at oral argument. Appellants have abandoned the primary argument in their response brief that the Tribes waived sovereign immunity entirely in the 1930s. (Vol. I, ER at 87-93; Vol. I, ER at 89–96.) They have also abandoned their contention that because they sued as "relators" on behalf of the United States, sovereign immunity cannot act as a shield against the False Claims Act claims. (Vol. I, ER at 97–99) And they have abandoned their insistence at oral argument that although the College *is* a tribal entity, it does not share in the Tribe's sovereign status or sovereign

are addressed here, and the status of the Foundation. Appellants never argued that the facts upon which the Ninth Circuit relied in *Smith (en banc)* might have changed until the last brief filed with the district court, a supplemental brief following the regular briefing schedule, oral argument, and jurisdictional discovery. Although the College Defendants relied on *Smith (en banc)* from the beginning (Vol. I, ER at 52–53), and the district court judge suggested he was also relying on *Smith (en banc)* by ordering production only of documents related to the Foundation (Vol. I, ER at 148–149), and in his comments at oral argument (Vol. I, ER at 159–160, 168–169, 173, 234), Appellants did not question the factual basis of *Smith (en banc)* until the College Defendants had no opportunity to respond.

Appellants waived these arguments by failing to raise them before the supplemental briefing stage. *Miller v. California*, 355 F.3d 1172, 1179 n. 4 (9th Cir. 2004) (declining to address an issue because the district court did not consider it since it was raised for the first time in a supplemental brief); *Personal Elec. Transports, Inc. v. Office of U.S. Tr.*, 313 Fed. Appx. 51, 52 (9th Cir. 2009) (affirming the district court's holding that a party waived an argument by failing to raise it in the party's opposition to the Trustee's motion to dismiss); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F.Supp.2d 1125, 1132 (C.D. Cal. 2011). *See also Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208,

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immunity because it is § 17 corporation. (Vol. I, ER at 220–21, 227, 234–35.)

212 (9th Cir. 1987) (under Rules 59 and 60 of the Federal Rules of Civil Procedure, evidence is not "newly discovered" if it "could have been discovered with reasonable diligence").

All the "evidence" Appellants point to now has been available throughout the pendency of this case. At any time before and since they filed this suit in 2012, Appellants could have accessed Montana's cadastral mapping system through the state website (http://svc.mt.gov/msl/mtcadastral/), the College's Year Seven Report to the Northwest Commission on Colleges and Universities (NWCCU) on the College's website (*see* http://www.skc.edu/nwccu-accredidation/), and the College's state Articles of Incorporation through the Montana Secretary of State (https://otc.cdc.nicusa.com/ Public2.aspx?portal=montana&organization=SOS). Additionally, Appellants could have but did not request the College's Bylaws at any time, including when the Court asked at oral argument if Appellants needed any other discovery. (Vol. I, ER at 244-247, and Vol. I, ER at 266.)

Regardless, even if the Court considers Appellants' late-raised evidentiary arguments, the district court's decision is still correct.

4. The facts relied on by the Ninth Circuit in *Smith (en banc)* are before the Court in this case as well.

The facts relied on by the Ninth Circuit in *Smith* are in the record in this case as well. The en banc court noted that the College was chartered by the Tribes, who "continue to exercise some control over the institution"; its board members are

"selected by and subject to removal by the Tribal Council"; the College is described as a "tribal corporation" in its tribal Articles of Incorporation; it is incorporated under both tribal and state law; it has been identified as a "tribal governmental agency" by the Montana Supreme Court; it is recognized as a tribal entity by the Tribal Court of Appeals; and its mission is "to provide quality postsecondary educational opportunities for Native Americans and "to promote and help maintain the cultures of the Confederated Tribes of the Flathead Indian Nation." *Smith*, 434 F.3d at 1129–35. Each of these findings is supported by the current district court record and public case law. (*Bartell*, 49 P.3d at 624; *Smith*, 4 Am. Tribal Law 90; Vol. I, ER at 274–276, 277; Vol. II, ER at 3–10, 57; Vol. 1, SER at 67.)

The fact that the relevant provisions of the College's Bylaws have not changed since *Smith (en banc)* was decided is evidenced by the statute governing tribal community colleges, which requires a majority of the board of directors to be Indians. 25 U.S.C. § 1804. It is also evidence by the College's 2013 report to the Northwest Commission on Colleges and Universities, which notes that the College's Directors are appointed by the Tribal Council for terms of three years and are required to be enrolled members of the Confederated Salish and Kootenai Tribes. (Vol. II, ER at 92).

Additionally, this Court may take judicial notice of the fact that prior courts

have taken judicial notice that the College is located on tribal trust land, as well as the fact that the United States' current official title records for land held in trust for the Tribes reflect that the College enjoys a perpetual lease of tribal trust land, with the annual lease rental waived. *See* Doc. 29, Mot. for Judicial Notice and attached Title Status Report, Doc, 29-1. The Court may also take judicial notice of the geographical location of the College on the Flathead Reservation. Docs. 29 and 29-2. It is immaterial that the College also owns land in its own name.

5. The facts before the Court sufficiently support the district court's decision that the College is not a "person" and is entitled to share in the Tribes' sovereign immunity.

The facts that are before the Court satisfy the Ninth Circuit's present-day arm-of-the-tribe analysis as enunciated in *White*, 765 F.3d at 1025.

First, the College was chartered under tribal law by the Tribal Council by means of a resolution pursuant to the Tribes' § 16 powers as a constitutional body. (Vol. I, ER at 69–75, 274–276, 277; Vol. 2, ER at 57.) Similarly, the nonprofit health corporation in *Pink* and the Repatriation Committee in *White* were "created by resolution of each of the Tribes, with [their] power derived directly from the Tribes' sovereign authority." *White*, 765 F.3d at 1025; *Pink*, 157 F.3d at 1187. The subsequent dual incorporation under state law did not affect the College's status as a tribal corporation. The College's method of creation thus supports a finding that the College is an arm of the Tribes.

Second, the "whole purpose of the [College] is core to the notion of sovereignty." *White*, 765 F.3d at 1025. This is demonstrated by the resolution chartering the College, the College's tribal Articles of Incorporation, and the College's mission statement, and is reflected in the decisions of the Montana Supreme Court, Tribal Court of Appeals, federal district court, and en banc panel. The Tribes specifically created the College to meet the "tremendous need for educational programs beyond high school," to provide those services on the reservation, so tribal members would not be required to uproot and move away, and to "upgrade the skills and competencies of [the Tribal Council's] employees." (Vol. I, ER at 277.)

Education has repeatedly been held to be a sovereign function. *E.g. Stoner*, 502 F.3d at 1124 (holding high school district and county office of education was not a "person" under the False Claims Act); *Hagen*, 205 F.3d at 1042 (a nonprofit corporation chartered by the tribe "to provide post-secondary education to tribal members" is entitled to share in the tribe's sovereign immunity); *Chief Leschi Sch., Inc.*, 2008 WL 4104021, at *1 (corporation operating school district for a tribe is an arm of the tribe). Indeed, even in the context of state sovereignty, state colleges and universities are regularly identified as "arms of the state" that share in the state's sovereign status or sovereign immunity. *E.g. U.S. ex rel. King v. Univ. of Texas Health Sci. Ctr.-Houston*, 544 F. Appx. 490 (5th Cir. 2013) *cert. denied*, 134

S. Ct. 1767 (2014); *Takle v. Univ. of Wisconsin Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005); *DMJM*, 355 F.3d at 1145; *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 717-18 (10th Cir. 2006); *U.S. ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 402 (5th Cir. 2004); *United States ex rel. Ruotsinoja v. Bd. of Governors of the Colo. State Univ. Sys.*, 43 F. Supp. 3d 1190 (D. Colo. 2014); *United States v. Solinger*, 457 F.Supp.2d 743, 755 (W.D. Ky. 2006); *U.S. ex rel. Burlbaw v. Regents of New Mexico State Univ.*, 324 F. Supp. 2d 1209, 1211 (D.N.M. 2004).

Additionally, "essential elements" of the College's mission are to "Perpetuate the Cultures of Confederated Salish and Kootenai Peoples" and "Increase Individual and Community Capacity for Self Reliance and Sustainability." (Vol. 1, SER at 67.) "[P]reservation of tribal cultural autonomy [and] preservation of tribal self-determination, are some of the central policies underlying the doctrine of tribal sovereign immunity." *White*, 765 F.3d at 1025 (internal quotation marks and citation omitted).

Third, the College's "structure, ownership, and management, including the amount of control the tribe has over" the College, support the district court's finding that the College is a tribal entity. *White*, 765 F.3d at 1025. In order for the College even to be eligible for the Tribally Controlled Colleges and Universities Assistance Program, it is required by law to be "tribally controlled" and "governed

by a board of directors . . . a majority of which are Indians." 25 U.S.C. § 1804. Additionally, as provided in the resolution chartering the College, the Tribal Council itself appoints the College's board. (Vol. I, ER at 277.) The College also reports directly to the Tribal Council. Although the College's Bylaws, which are cited throughout the en banc *Smith* opinion as well as the underlying opinions, are not in the record, both the College's 2005 and 2012 Operating Agreements with the Foundation demonstrate that the College still annually submits audited financial statements and a list of the Foundation's officers and Trustees to the Tribal Council. (Vol. I, ER at 152; Vol. 1, SER at 65-66.)

Even the evidence produced by the Appellants demonstrates that board members are still required to be tribal members, the College continues to report regularly to the Tribal Council, and the College remains closely associated with the Tribe. (*See* 2013 Report to the Northwest Commission on Colleges and Universities (NCCU), Vol. II, ER at 16, 17, 18, 19, 25, 29, 32, 35, 36, noting, for example: the "Salish Kootenai College operates under the charter and authority of the Confederated Salish & Kootenai Tribes"; its Board of Directors are all enrolled members of the Tribes; the College President reports annually to the Tribal Council; department heads from tribal departments of the tribal government are an integral part of the College's strategic planning process; the College maintains a tribal preference hiring policy; the Tribes depend on SKC "to provide the means

for increasing self-reliance, self-determination, and community well-being"; the College is the "center of social, economic, and cultural development on the Reservation" and "the educational hub for the community"; "the perpetuation of the languages, histories, and life ways of the peoples of the Flathead Indian Reservation is an important component of SKC's mission"; and the College aims to maintain "academic programs and supports leading to graduation of CSKT tribal members" and support "community development on the Flathead Indian Reservation through community outreach events and projects that increase community well-being.") The evidence provided by Appellants gives no reason to doubt that the College remains, as noted in *Smith (en banc)*, closely associated with and controlled by the Tribes. Indeed, the College continues to enjoy perpetual leases of tribal trust land and to provide tribal college services on the Flathead Reservation. *See Mot. for Jud. Notice*, Doc. 29, 29-1, 29-2.

Fourth, the Tribes clearly intended the College to share in the Tribes' sovereign status. *White*, 765 F.3d at 1025. The Tribes expressly created the College pursuant to their § 16 powers as a constitutional government; the Tribal Council retained the power to appoint the Board; and the College was created to pursue purposes fundamental to tribal sovereignty. Under tribal sovereignty law, these factors support extending the tribe's sovereign status and sovereign immunity to the College. *See Pink*, 157 F.3d at 1187; *Hagen*, 205 F.3d at 1042. Additionally,

the Tribal Council expressly limited the College's power to sue and be sued to Tribal Court, and tribal Ordinance 54A continues to limit the power of tribal corporations to sue and be sued to tribal court. (Vol. I, ER at 70, 279.) The Tribes' intent is also evident in the fact they have defended the College's status as a tribal entity in both *Smith* and the present case.

Finally, although the College is not funded exclusively by the Tribes, there is a close financial relationship between them. *White*, 765 F.3d at 1025. If a monetary judgment were awarded against the College, it would necessarily interfere with the inherent authority and ability of the Tribes to provide adequate educational services to tribal members and others attending the College.

Each of the *White* factors is satisfied by the evidence before the Court, and each supports a finding that the College is an arm of the Tribes.

D. Even a waiver of sovereign immunity would not change the College's status as a sovereign.

As a tribal entity that functions as an arm of the Tribes, the College shares in the sovereign status of the Tribes and is not a "person" subject to suit under the False Claims Act. It is irrelevant for the statutory analysis whether there has been a waiver of sovereign immunity. Even a waiver of sovereign immunity would not make the College a "person." *See Parker*, 667 F.3d at 925; *U.S. ex rel. King v. Univ. of Texas Health Sci. Ctr.-Houston*, 544 F. Appx. 490 (5th Cir. 2013) *cert. denied*, 134 S. Ct. 1767 (2014) (holding Texas state university hospital is an arm of

the state and thus not a "person" who could be liable under the False Claims Act despite university's authority to sue and be sued in its own name); *Davis v. Abercrombie*, CIV. 11-00144 LEK, 2013 WL 5204982, *13 (D. Haw. 2013) (noting that waiver of sovereign immunity does not make a sovereign or its agencies "persons" under § 1983) (citing cases). *See also Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008) (holding that tribal housing authority is a tribal entity for purposes of subject matter jurisdiction regardless of a sue and be sued clause in its corporate charter which the Ninth Circuit had previously identified as a waiver of sovereign immunity). A sovereign that has waived its absolute immunity from suit is still a sovereign. A state or tribe cannot waive the Congressional intent that sovereigns are not subject to suit under the False Claims Act.

Appellants' remaining arguments go only to whether there was a waiver of sovereign immunity to suit in federal or state court. Since this is irrelevant to the statutory inquiry, the Court's analysis should end here because the False Claims Act claims are the only federal claims that have been pled and supplemental jurisdiction should be declined over the state law claims, which the Appellants can raise in tribal court.

II. Although the Court need not reach the issue, sovereign immunity has not been waived for suit in federal or state court.

As a tribal entity that functions as an arm of the Tribes, the College also

shares in the Tribes' sovereign immunity if that immunity has not been clearly waived by Congress or the Tribe. "[A] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

A. The general power to "sue and be sued" in Montana state law and the College's state Articles of Incorporation is not an unequivocal waiver of sovereign immunity.

The tribal resolution establishing the College does not include a waiver of sovereign immunity, and the College's tribal Articles of Incorporation only provide that the College has the power to "sue and be sued in tribal court." (Vol. I, ER at 70, 277.) The College's state Articles of Incorporation provide that the College has the power to "sue and be sued" (Vol. II, ER at 6) and Montana's non-profit corporation statutes includes the corporation's power to "sue and be sued," Mont. Code Ann. § 35-2-118(1)(a).

As held by the district court (Vol. II, ER at 210–12.), the general "sue and be sued" language in the College's state Articles of Incorporation and in the state's nonprofit corporation statutes is not a clear and unequivocal waiver of sovereign immunity in state or federal court. *Hagen*, 205 F.3d at 1044 (holding tribal community college entitled to sovereign immunity despite sue and be sued provision in college's charter); *Wright v. Colville Tribal Enters. Corp.*, 147 P.3d 1275, 1283 (Wash. 2006) (same); *Ransom v. St. Regis Mohawk Educ. &*

Community Fund, Inc., 658 N.E.2d 989, 994–95 (N.Y. 1995) (incorporating under the laws of a state, thus qualifying the tribe to do business in the state, does not satisfy the high threshold for expressly and unequivocally waiving immunity); *Robles v. Shoshone–Bannock Tribes*, 876 P.2d 134, 136 (Idaho 1994) (sue and be sued clause does not mean suit against tribal corporation may proceed in state rather than tribal court). The general "sue and be sued" language is contradictory to the limited power to sue and be sued in tribal court that is expressed in the College's tribal Articles of Incorporation and tribal Ordinance 54A, governing tribal corporations. (Vol. I, ER at 70, 279.) Accordingly, the general language is ambiguous at best and the narrower language of the College's other governing documents controls.

The Ninth Circuit's discussion of a sue and be sued clause in *Marceau (2006)* is easily distinguished.[9] In that case, the Ninth Circuit held that "sue and be sued" language may sometimes operate as a waiver of tribal sovereign immunity. *Id.* at 981. But in contrast to the general language in the College's State Articles of Incorporation, the Enabling Ordinance of the Blackfeet Housing Authority at issue in *Marceau (2006)* stated:

The Council hereby gives its irrevocable consent to allowing the

[9] *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978–81 (9th Cir. 2006) opinion adopted in part, modified in part on reh'g, 519 F.3d 838 (9th Cir. 2008) opinion amended and superseded on denial of reh'g, 540 F.3d 916 (9th Cir. 2008) and opinion reinstated in part, superseded in part, 540 F.3d 916 (9th Cir. 2008) ("*Marceau (2006)*").

> Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

Id. at 978 (citing Blackfeet Tribal Ordinance No. 7, art. V, § 2 (Jan. 4, 1977).) This language contrasts starkly with the boilerplate language in the College's State Articles. Unlike here, the Blackfeet Ordinance was specifically approved by the tribe's tribal council, was specific as to the types of actions that sovereign immunity was being waived for, and expressly limited the tribe's liability for any money judgment. It was, in other words, express and unequivocal.

Moreover, the Ninth Circuit cautioned that a sue and be sued clause must be considered in the "context" in which it is found. The court noted that the Blackfeet Housing Authority, unlike the College here, was established pursuant to § 17 of the Indian Reorganization Act, which permits tribes "to form corporate organizations—business corporations through which they could enter the world of commerce." *Id.* at 981. The court contrasted § 17 corporations to entities established pursuant to a tribe's § 16 powers, recognizing that "[w]hile performing sovereign acts, a tribe . . . enjoyed immunity as a sovereign." *Id.* Thus, "[t]he designation of an entity as a Section 16 or Section 17 organization affects how we interpret any waiver of immunity." *Id.*

Whereas the Blackfeet Housing Authority's specific sue and be sued

language should be read "in light of the purpose of Section 17," *id.* at 982, the College's general language must be read in the context of the Tribes' powers pursuant to § 16. In this context, the general power to sue and be sued contained in state law and in the College's state Articles of Incorporation is not a clear waiver of sovereign immunity in state and federal court. The College is a dually incorporated entity, and the more specific language contained in its tribal Articles of Incorporation governs. Accordingly, the College may only be sued in tribal court.

B. Section 25 of Tribal Ordinance 54A is not an unequivocal waiver of immunity.

Although Appellants suggest that § 25 of Tribal Ordinance 54A, adopted in 2005, somehow retracted the sovereign immunity of the College, the ordinance is in no way so drastic and unequivocal. First, Ordinance 54A continues to limit the power of tribal corporations to sue and be sued to tribal court. (Vol. 1, ER at 279.) Section 25 does not expand that power. (Vol. 1, ER at 299–300.) Thus it is irrelevant to a suit brought in federal court. Second, any tribal member can incorporate a tribal corporation under Tribal Ordinance 54A to perform any kind of business—not all tribal corporations are entities created and controlled by the Tribal Council to perform a governmental function. The College was not merely "authorized" by the Tribal Council (Vol. I, ER at 297); the Tribal Council itself "established" and "chartered" the College to perform a governmental function

(Vol. I, ER at 277). It is not clear from the ordinance that § 25 applies to tribal corporations that were created by the Tribal Council to function as arms of the tribe. In any case, the Tribal Council clearly limited the College's power to sue and be sued to tribal court (Vol. I, ER at 70), and the College's tribal Articles of Incorporation state that the College is incorporated "pursuant to and in conformity with Ordinance 54A," which includes § 25 (Vol. I, ER at 69–70).

Finally, even if § 25 could be read to require governmental corporations to amend their articles of incorporation to add the words "§ 25" or else lose the right to assert sovereign immunity in any court, that would not waive the College's sovereign status or affect the statutory inquiry under the False Claims Act.

III. Further discovery in this case would be futile.

The district court did not abuse its discretion in denying further discovery. *Harris Rutsky*, 328 F.3d at 1135. Appellants had multiple opportunities to request any documents they wanted. Now, the only evidence they request are contracts, commercial documents, or minutes of the College Board that might show a waiver of sovereign immunity. Such evidence would be irrelevant since the College is not subject to suit under the False Claims Act, regardless of any waiver of sovereign immunity. Appellants point to no evidence that could change that conclusion.

CONCLUSION

The district court properly determined that the College is a tribal entity that

functions as an arm of the Tribes and that as such, it is not a "person" subject to suit under the False Claims Act. The court also properly concluded the College shares in the Tribes' sovereign immunity and that Appellants failed to show any clear and unequivocal waiver of immunity from suit in state or federal court. The district court did not abuse its discretion in declining to grant further jurisdictional discovery because it is irrelevant for the purposes of the statutory inquiry under the False Claims Act whether sovereign immunity was waived. Because the Board Members were sued only in their official capacities, the claims were properly dismissed against them as well as the College. Appellants do not appeal the district court's dismissal of the claims against the Foundation or the district court's determination that the Board Members were sued in their official, not their individual, capacities.

The College Defendants therefore request that the Court affirm the decision of the district court.

STATEMENT OF RELATED CASES

Appellee is unaware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains (no more than 14,000 for a principal brief, 7k for reply, including headings, footnotes, & quotations, but NOT corporate disclosure

statement, TOC, citations, Statement re oral argument, addendum containing statutes, rules or regs, and any certificates) words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word 2007 using a proportionally spaced typeface, Times New Roman, and 14-point font.

Dated this 19th day of August 2015.

WORDEN THANE, P.C.

By: s/ Martin S. King
Attorney for Defendants-Appellees
Date: August 19th, 2015

ADDENDUM TO DEFENDANTS'-APPELLEES' ANSWERING BRIEF

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31 U.S.C. § 3729. False claims.

(a) Liability for certain acts.--
(1) In general.--Subject to paragraph (2), any person who--
(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3730(h) Relief from retaliatory actions.

(1) In general.–Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action

under this section or other efforts to stop 1 or more violations of this subchapter.

25 U.S.C. § 1804. Eligible Grant Recipients [under the Tribally Controlled Colleges or Universities Grant Program].

To be eligible for assistance under this subchapter, a tribally controlled college or university must be one which--
(1) is governed by a board of directors or board of trustees a majority of which are Indians;
(2) demonstrates adherence to stated goals, a philosophy, or a plan of operation which is directed to meet the needs of Indians;
(3) if in operation for more than one year, has students a majority of whom are Indians; and
(4)(A) is accredited by a nationally recognized accrediting agency or association determined by the Secretary of Education to be a reliable authority with regard to the quality of training offered; or
(B) according to such an agency or association, is making reasonable progress toward accreditation.

Fed. R. Evid. 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) Taking Notice. The court:
(1) may take judicial notice on its own; or
(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
(d) Timing. The court may take judicial notice at any stage of the proceeding.
(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

CERTIFICATE OF SERVICE

This is to certify that on August 19th, 2015, a copy of the foregoing brief and other material was filed electronically with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All counsel for participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system to the following counsel of record:

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