

CASE NO. 15-35001

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

FAWN CAIN, Relator; et al., Plaintiffs - Appellants,

v.

SALISH KOOTENAI COLLEGE, INC.; et al., Defendants - Appellees.

On Appeal from the United States District Court for the District of Montana
United States District Court Case No. CV-12-181-GF-BMM

APPELLANT'S BRIEF

David B. Cotner
Trent N. Baker
Jason A. Williams
DATSOPOULOS, MacDONALD & LIND, P.C
201 West Main Street, Suite 201
Missoula, Montana 59802
Telephone: (406) 728-0810
Email:dcotner@dmlaw.com
tbaker@dmlaw.com
jwilliams@dmlaw.com

Attorneys for Plaintiffs - Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

JURISTICTIONAL STATEMENT.....1

STATEMENT OF ISSUES.....2

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT.....5

STANDARD OF REVIEW.....7

ARGUMENT.....7

 1. The District Court Should have Allowed Plaintiff’s to Conduct
 Further Jurisdictional Discovery.....7

 2. SKC is Not an Arm of The Tribe.....13

 a. SKC is Not an Arm of the Tribe Under the Direct or Functional
 Liability Test Applicable to the False Claims Act13

 b. SKC is Not an Arm of the Tribe Under *Smith v. SKC*19

 c. SKC is Not an Arm of the Tribe Under *White v. University of
 California*22

 3. SKC Waived Sovereign Immunity26

CONCLUSION31

CERTIFICATE OF COMPLIANCE.....33

CERTIFICATE OF SERVICE.....34

TABLE OF AUTHORITIES

Cases

<i>Am. W. Airlines, Inc. v. GPA Group, Ltd.</i> , 877 F.2d 793, 801	
(9th Cir. 1989)	7, 11
<i>American Property Management Corp. v. Superior Court</i> , 206 Cal.	
App. 4th 491, 502, 141 Cal. Rptr. 3d 802, 810 (Cal. App. 4th Dist. 2012)	17
<i>Bartell v. Am. Home Assurance Co.</i> , 2002 MT 145, 310 Mont. 276,	
49 P. 3d 623, 624 (Mont. 2002).....	17
<i>Boschetto v. Hansing</i> , 539 F.3d 1011, 1020 (9th Cir. 2008).....	7
<i>Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort</i> ,	
629 F.3d 1173, 1187 (10th Cir. 2010).....	15
<i>Brunette v. Dann</i> , 417 F. Supp. 1382, 1385 (D. Idaho 1976).....	24
<i>Butcher's Union Local No. 498 v. SDC Inv., Inc.</i> , 788 F.2d 535, 540	
(9th Cir. 1986).	7
<i>Chapman v. Krutonog</i> , 256 F.R.D. 645, 649 (D. Haw. 2009).....	8
<i>Cook Cnty. v. U.S. ex rel. Chandler</i> , 538 U.S. 119, 122 (2003).....	12
<i>Cook v. AVI Casino Enters.</i> , 548 F.3d 718, 726 n.6 (9th Cir. 2008).....	23, 24
<i>David Robles v. Shoshone-Bannock Tribes</i> , 125 Idaho 852 at p. 854(1994),	24
<i>Dille v. Council of Energy Resource Tribes</i> , 801 F.2d 373, 376	
(10th Cir. 1986)	17

<i>Gold v. Federated Tribes of Warm Springs Indian Reservation,</i>	
478 F. Supp. 190, 196 (D. Oregon 1979)	24
<i>Hess v. Port Auth. Trans-Hudson Corp.</i> , 513 U.S. 30 (1994)	15
<i>Kenai Oil & Gas, Inc. v. Department of Interior</i> , 522 F. Supp. 521, 528	
(D. Utah 1981),	24
<i>Kiowa Tribe v. Mfg. Technologies, Inc.</i> , 523 U.S. 751, 754, 758 (1998)	14, 22
<i>Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency,</i>	
440 U.S. 391 (1979)	15
<i>Laub v. U.S. Dep't of the Interior</i> , 342 F.3d 1080, 1093 (9th Cir. 2003)	6, 10
<i>Linneen v. Gila River Indian Cmty.</i> , 276 F.3d 489, 492 (9th Cir. 2002)	6
<i>Marceau v. Blackfeet Hous. Auth.</i> , 455 F.3d 974, 981 (9th Cir. 2006); <i>opinion</i>	
<i>adopted in part, modified in part on reh'g</i> , 519 F.3d 838	
(9th Cir. 2008); <i>opinion amended and superseded on denial of reh'g</i> ,	
540 F.3d 916 (9th Cir. 2008)	23, 24
<i>Pan Am. Co. v. Sycuan Band of Mission Indians</i> , 884 F.2d 416, 419	
(9th Cir. 1989).	22
<i>Parker Drilling Co. v. Metlakatla Indian Community</i> , 451 F. Supp. 1127, 1136-37	
(D. Alaska 197S)	24
<i>Regents of the University of California v. Doe</i> , 519 U.S. 425 (1997),	15
<i>Rosebud Sioux Tribe v. A & P Steel, Inc.</i> , 874 F.2d 550, 552	24

<i>Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.</i> , 328 F.3d 1122, 1135 (9th Cir. 2003).....	6, 8
<i>Smith v. Salish Kootenai Coll.</i> , 434 F.3d 1127, 1135 (9th Cir. 2006).....	5, 6, 11, 17, 18
<i>Stoner v. Santa Clara County Office of Educ.</i> ,502 F.3d 1116, 1122-1123 (9th Cir. Cal.2007).....	5, 15
<i>Takle v. Univ. of Wisc. Hosp. & Clinics Auth.</i> , 402 F.3d 768, 770 (7th Cir. 2005).	21
<i>Terracom v. Valley Nat'l Bank</i> , 49 F.3d 555, 562 (9th Cir. 1995).	7
<i>United Mine Workers of America v. Gibbs</i> , 383 U.S. 715 (1966).....	1
<i>United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency</i> , 745 F.3d 131 (4th Cir. 2014)	21
<i>University of R.I. v. A.W. Chesterton Co.</i> , 2 F.3d 1200, 1210 (1st Cir. 1993)	21
<i>Vt. Agency of Natural Resources v. United States, ex rel. Stevens</i> , 529 U.S. 765, 787-88 (2000)	12
<i>White v. Univ. of Cal.</i> , 765 F.3d 1010(9th Cir.2014)	5,6,15, 19,20,22

Statutes

25 U.S.C § 1804	20
28 U.S.C. § 1291	1
28 U.S.C. § 1345,.....	1

28 U.S.C. § 1367	1
31 U.S.C. § 3730(b)(1)	1
31 U.S.C. § 3729	1, 12
31 U.S.C. § 3729(a)(1)(A), 3730(h)	12
Fed. R. App. P. 4(a)(1)(A)	1
Fed. R. Civ. P. 54(b).	1
Mont. Code Ann. § 35-2-118	25
Mont. Code Ann. §§ 35-2-113 through 1402	25

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1345, 31 U.S.C. §§ 3730(b)(1) and 3732 because Relators, Plaintiffs and Appellants sought remedies on behalf of the United States for violations of False Claims Act, 31 U.S.C. § 3729 *et seq.* (“FCA”), by Defendants that can be found, reside and transact business in the District of Montana. The district court had supplemental or pendent jurisdiction over related State and common law claims under 28 U.S.C. § 1367 and *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b). The district court certified as a final judgment for the purposes of appeal, the portion of the district court’s December 3, 2014, order (Doc. 46)¹ that dismissed claims against the Salish Kootenai College, Inc. (“SKC”), Salish Kootenai College Foundation (“Foundation”), and against Jim Durglo, Rene Peirre, Ellen Swaney, Linden Plant, Tome Acevedo, Zane Kelly, and Ernest Moran in their official capacities members of the SKC’s Board of Directors. (Doc. 48). Appellants timely filed a Notice of Appeal on January 2, 2014 (Doc. 41). See Fed. R. App. P. 4(a)(1)(A).

¹ Citations to “Doc. __” refer to the corresponding district court docket entry and, when specified, page numbers in such citations refer to the district court’s ECF pagination.

STATEMENT OF ISSUES

1. Whether Plaintiffs should have been allowed to conduct further jurisdictional discovery.
2. Whether SKC is an arm of the Confederated Salish Kootenai Tribes (“Tribe”).
3. Whether SKC waived sovereign immunity.

STATEMENT OF THE CASE

Relators, Plaintiffs and Appellants Fawn Cain, Tanya Archer, and Sandi Ovitt (“Plaintiffs”) are Montana residents who were employed by SKC as instructors, clinical coordinators, mentors and grant managers. Plaintiffs’ employment duties included instruction of clinical externships, coordination of lab activities, and presentation of data for purposes of acquiring federal grant funding. (Doc. 1 at 18, Doc. 39 at 2). SKC terminated their employment contracts in 2012. *Id.*

The Department of Health and Human Services (“DHHS”) and Indian Health Service (“IHS”) provided funds to SKC through two separate grant programs. DHHS and IHS provided a Pathways into Nursing Education (“PINE”) grant to increase nursing education, recruitment, and training of American Indian and Alaska Native students. DHHS provided a separate Nursing Workforce Diversity (“NWD”) grant to support projects that increase nursing education for

persons from disadvantaged backgrounds. Both grants required SKC to provide progress reports on students.

Plaintiffs filed the complaint on October 30, 2012. (Doc. 1). The Defendants are SKC, the Foundation, and eight individuals who served on the SKC board of directors, Jim Durglo, Rene Peirre, Ellen Swaney, Linden Plant, Tome Acevedo, Zane Kelly, and Ernest Moran. Plaintiffs allege that Defendants violated the FCA federal whistleblower provisions, and Montana state laws. *Id.* IHS conditioned award of grant monies on the full-time enrollment of American Indian and Alaska Native students in health-related professions who intend to work in underserved communities. *Id.* Plaintiffs allege that Defendants knowingly submitted false reports, misrepresented attrition numbers, inflated grades of failing students, and retained failing students in order keep grant monies coming from DHHS and IHS. *Id.* Plaintiffs seek specific monetary damages under the FCA and compensatory and punitive damages under Montana law. (Doc. 1-1).

Defendants moved to dismiss Plaintiffs complaint on June 27, 2014, on the basis that tribal sovereign immunity bars all of the claims. (Doc. 15). The Tribe filed an amicus curiae brief on September 16, 2014. (Doc. 30). The district court conducted a hearing on Defendants' motion on September 29, 2014. (Doc. 34). The district court ordered SKC to produce some additional founding documents

and tribal ordinances but did not allow discovery. *Id.* The district court also ordered supplemental briefing on the issues raised at the hearing. *Id.*

The district court dismissed with prejudice Plaintiffs' claims against SKC the individual defendants in their official capacities as members of the SKC Board of Directors for lack of subject matter jurisdiction. (Doc. 39 at 30). The district court dismissed the Plaintiffs' claims against the Foundation for failure to state a claim. *Id.* The district court dismissed with prejudice Plaintiffs' complaint against SKC and the Foundation. *Id.* The district court dismissed without prejudice the Plaintiffs' complaint against the individual defendants, and granted Plaintiffs leave to file an amended complaint against the individual defendants in their personal capacities. *Id.* at 31.

Plaintiffs filed an amended complaint on December 18, 2014, asserting claims against existing and new individual defendants in their personal capacities. (Doc. 40). The Plaintiffs filed a notice of appeal on January 2, 2014. (Doc. 41). The district court granted the Defendants' motion to stay on January 8, 2014. (Doc. 44). The district court, on February 5, 2015, certified as a final judgment for the purposes of appeal, the portion of the district court's December 3, 2014, order (Doc. 46) that dismissed claims against the Salish Kootenai College, Inc. ("SKC"), Salish Kootenai College Foundation ("Foundation"), and against Jim Durglo, Rene

Peirre, Ellen Swaney, Linden Plant, Tome Acevedo, Zane Kelly, and Ernest Moran in their official capacities members of the SKC's Board of Directors. (Doc. 48).

SUMMARY OF ARGUMENT

1. The district court ordered SKC to produce some documents relating to its formation but Plaintiffs were not allowed to conduct further jurisdictional discovery. Even the limited documents obtained by the Plaintiffs contain evidence that SKC is not an arm of the Tribe under the factors considered by the district court or the test the district court should have used. This evidence precludes dismissal of Plaintiffs' claims against SKC and Plaintiffs should have been allowed to conduct discovery into the jurisdictional issues.

2. The appropriate analysis to determine whether a SKC is an arm of the Tribe for purposes of the FCA is whether the Tribe would be directly or functionally liable for a judgment against SKC. *See Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1122-1123 (9th Cir. Cal.2007). The district court erred when it applied a different standard. The district court improperly relied upon a finding that SKC's status as an arm of the Tribe had already been adjudicated in *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006). This district court also erred when it stated without further explanation that SKC also satisfies the arm of the tribe analysis in *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir.2014). The tribal status of SKC was not contested in *Smith*. *White* should

not apply to claims under the FCA. The limited documents obtained by the Plaintiffs reveal evidence that the Tribe would not be directly or functionally liable for a judgment against SKC, that facts relied on in *Smith* are no longer accurate, and that SKC does not satisfy the factors analyzed in *White*.

3. Even if SKC were found to be an arm of the Tribe, it is still subject to suit under the FCA because SKC waived sovereign immunity. SKC was incorporated only under Montana state law and not under tribal law. The SKC Articles of Organization/Incorporation filed with the Montana Secretary of State provide that SKC may sue and be sued, without limitation to tribal court.

STANDARDS OF REVIEW

A district court's decision to deny jurisdictional discovery is reviewed for an abuse of discretion. *See Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003). A district court's conclusions that it lacks subject matter jurisdiction and questions of tribal sovereign immunity are reviewed de novo. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002).

ARGUMENT

1. The District Court Should have Allowed Plaintiff's to Conduct Discovery Regarding Jurisdiction

"A district court is vested with broad discretion to permit or deny [jurisdictional] discovery." *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093

(9th Cir. 2003) (reversing denial of jurisdictional discovery where there was a “reasonable probability” that the outcome of the motion to dismiss would be different with such discovery, and without it, plaintiff’s evidence “may [have been] insufficient” to establish jurisdiction). Such discovery “should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.” *Id.* (quoting *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986)). A court may deny jurisdictional discovery only “when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.” *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (quoting *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 n.24 (9th Cir. 1977)).

It is appropriate for a court to grant jurisdictional discovery where there is more than a “hunch that it might yield jurisdictionally relevant facts.” *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). It is also appropriate for a court to grant jurisdictional discovery where there is more than “bare allegations in the face of specific denials.” *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 562 (9th Cir. 1995). District courts within the Ninth Circuit, in the context of personal jurisdiction, require a plaintiff to establish a “colorable basis” before granting jurisdictional discovery, and this basis is something less than a *prima facie*

showing, but requires ‘some evidence’ tending to establish jurisdiction. *Chapman v. Krutonog*, 256 F.R.D. 645, 649 (D. Haw. 2009). A decision to deny jurisdictional discovery may be considered an abuse of discretion. *Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., supra*.

Here, the Defendant’s supported their Motion to Dismiss (Doc. 15) with Brief (Doc. 16) which referenced various documents including founding documents the Articles of Incorporation for a tribal corporation called “Salish Kootenai Community College Inc.” (Doc. 16-1). In response, the Plaintiffs pointed out that available records indicate that SKC is a registered as a Montana corporation and pointed to other evidence tending to indicate that SKC was not a tribal entity and may have waived its sovereign immunity. (Doc. 21 at 19-20). The Plaintiffs asserted that they should be allowed to conduct discovery prior to dismissal of any claims, including an opportunity to obtain contracts and agreements of SKC relevant to the issue of waiver. (Doc. 21 at 25-27).

Defendants acknowledged in their Reply Brief that incorporation under state law can weigh against finding a corporation is a tribal entity entitled to immunity. (Doc. 26 at 7). Defendants attached as an exhibit the Foundation’s Articles of Incorporation filed with the Montana Secretary of State (Doc. 26-1), but did not disclose SKC’s Articles and opposed jurisdictional discovery as unnecessary and a mere “fishing expedition.” (Doc. 26 at 11-12). The Tribe appeared as amicus,

filed a brief supporting dismissal and provided the district court with one of the Tribe's ordinances in support of its position. (Docs. 30 and 30-1).

The district court recognized that jurisdictional discovery was warranted, but limited that discovery to ordering production by the Foundation only of documents that court or the Foundation believed were relevant. (Doc. 32). The Foundation provided certain documents. (Doc. 33). SKC was not ordered to produce any documents and did not do so.

The district court subsequently held a hearing and Plaintiffs were for the first time and without advance notice, given the opportunity to request documents, (Hearing Transcript (September 29, 2014), 68:1-25; 92:19-94:17) which the court ordered SKC to produce. (Doc. 34). SKC produced some of those documents and added additional documents, including an affidavit (Doc. 35-1), that it believed would support its position. (Doc. 35). Plaintiffs did have the opportunity to address those documents in a supplemental brief limited to 20 pages. (Doc. 34). Plaintiffs did not have the opportunity to obtain additional or follow-up discovery based upon those documents and did not have the opportunity to address those documents in oral argument.

Those documents included, for the first time, the SKC Articles of Incorporation filed with the Montana Secretary of State (Doc. 35-4) and other documents which raised serious issues and further questions regarding the status of

SKC as an arm of the Tribe. Plaintiffs Supplemental Brief raised those issues (Doc. 38), which are addressed below, supported them with some additional records available to the public (Doc. 38-1 and 38-2), and urged the Court to allow further discovery (Doc. 38 at 3, 8-9, and 20). The district court considered the request for jurisdictional discovery and recognized that “Plaintiffs have been stymied in their investigation of the claims against Defendants,” but declined to allow additional discovery based on its opinion that no amount of discovery could overcome the bar imposed by tribal sovereign immunity.” (Doc. 39 at 27).

This is a case like *Laub*, where there is a “reasonable probability” that the outcome of the motion to dismiss would be different with discovery, and without it, Plaintiffs’ evidence was deemed insufficient to establish jurisdiction. Here there is evidence, cited below, that suggests SKC is either not an arm of the Tribe or that SKC waived any immunity. There is a reasonable probability that additional discovery, also detailed below, would provide further evidence on those points.

For example, Section 25 of Ordinance 54A (Doc. 35-3 at 22-23) provides Tribal consent to waivers of sovereign immunity by tribal corporations, and to the extent SKC is determined to be a tribal corporation, SKC contracts, commercial documents and minutes of the Board are relevant and discoverable on that jurisdictional issue. Plaintiffs did not have that document when allowed by the district court to request documents.

There is evidence that statements in *Smith*, relied upon by the district court regarding the status of SKC as a tribal entity, are factually incorrect. For example, the district court relied upon statements about SKC bylaws, but those have not been produced. The district court relied on statements about tribal ownership of SKC land (Doc. 39 at 9), but Montana State property records indicate that the Tribe and SKC own land separately. (Doc. 38-1). Plaintiffs should have been allowed to inquire into these matters and others detailed below, before having their claims against SKC dismissed.

A court may deny jurisdictional discovery only “when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.” *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (quoting *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 n.24 (9th Cir. 1977)).

This is not a case where Plaintiffs rely on a mere hunch that may yield jurisdictionally relevant facts, or where Plaintiffs make bare allegations in the face of specific denials. Plaintiffs have established at least ‘some evidence’ supporting jurisdiction, and under the circumstances the district court’s decision to deny jurisdictional discovery should be reversed as an abuse of discretion.

2. SKC is Not an Arm of the Tribe

a. SKC is Not an Arm of the Tribe Under the Direct or Functional Liability Test Applicable to the False Claims Act

The FCA provides a cause of action against “any person” who engages in certain fraudulent conduct, including “knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval” to an officer, employee, or agent of the United States, or who retaliates against one who investigates or reports such fraudulent conduct. 31 U.S.C. §§ 3729(a)(1)(A), 3730(h) . The Act does not define the term “person.” In *Vt. Agency of Natural Resources v. United States, ex rel. Stevens*, 529 U.S. 765, 787-88 (2000), the Supreme Court held that a sovereign state or unincorporated state agency which is an arm of the state does not constitute a “person” subject to liability under the Act. But the Court also noted that corporations, by contrast, are “presumptively covered by the term ‘person.’” *Id.* at 782; see also 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] . . . the word[] ‘person’ . . . include[s] corporations”). The Court subsequently applied the latter presumption and held that municipal corporations like counties are ‘persons’ subject to suit under the FCA. *Cook Cnty. v. U.S. ex rel. Chandler*, 538 U.S. 119, 122 (2003).

First of all, SKC is not a tribal entity and should not be afforded more protection under the FCA than counties and municipal corporations which clearly play a greater governmental role in their States, than SKC does with respect to the Tribe, but are still subject to suit under the FCA because they meet the definition of “persons.” SKC is merely a Montana corporation formed only under Montana state law and is thus more similar to counties and municipal corporations. The Tribal Charter (Doc. 35-2) and Tribal Articles (Doc. 16-1) are for Salish Kootenai Community College Inc., not the entity named in this case. The Defendants confirmed that there are “no further amendments” to these documents. (Doc. 35-1, ¶ 5). An entity called Salish Kootenai Community College Inc. was subsequently incorporated under Montana law in 1978 (Doc. 35-4) and later amended its Articles of Incorporation on file with the State of Montana to change its name to Salish Kootenai College Inc. (Doc. 35-1, ¶ 4). That entity, SKC, is the named defendant in this case and it is not a tribal corporation.

Defendants concede that SKC is not an Indian Reorganization Act (“IRA”) section 17 corporation registered with the Department of the Interior. (Doc. 35-1, ¶ 6). SKC does not contend it is an IRA section 16 corporation registered with the Department of the Interior. The Tribe’s Flathead Reservation Corporation Ordinance No. 54A, under which Tribal corporations are organized, requires that in order to be considered a Tribal Corporation and avail itself of the Tribes

sovereign immunity, its articles must reference Section 25 of that Ordinance, which also authorizes tribal corporations to waive sovereign immunity and providing any recovery is limited to the assets of the corporation. (Doc# 35-3, pp. 22-23). None of the articles or amendments of SKC (or the tribal entity Salish Kootenai Community College Inc.) reference Section 25 of ordinance 54A.

Even if SKC were a tribal entity, Tribes should not be afforded greater protection under the FCA than States and the analysis regarding whether an entity is an arm of the tribe should be the same as the analysis regarding whether an entity is an arm of the state. The doctrine of tribal sovereignty itself has been criticized as out of date and the United States Supreme Court has questioned “the wisdom of perpetuating the doctrine,” where it is unnecessary “to protect nascent tribal governments from encroachments by States,” and “extends beyond what is needed to safeguard tribal self-governance.” *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 758 (1998).

In their dissent, Justices Stevens, Thomas and Ginsburg observed:

the rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?

Id., at 765. There is no requirement in the FCA that tribes, tribal entities be treated any differently or that the arm of the tribe analysis be different from the arm of the state analysis.

In determining whether an entity is entitled to sovereign immunity as an "arm of the tribe," the Ninth Circuit examine 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 v. Univ. of Cal.*, 765 F.3d 1010, 1025-26 (9th Cir.2014) (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

These cases do not apply the factors in the context of the FCA and they do not comport with the factors used by the Ninth Circuit and the Supreme Court in FCA cases analyzing whether a state agency is an arm of the state. *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1122-1123 (9th Cir. Cal.2007). *Stoner* cites the *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) and *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979) as "**well-established**" law that the primary factor in the arm-of-the-state analysis is

whether the state would be directly or functionally liable for any money judgment rendered against the agency.

The same factors should control in this case and neither the Tribe nor SKC asserted that the Tribe would be functionally or legally liable for any judgment against SKC. The evidence suggests it would not. The Tribe's Flathead Reservation Corporation Ordinance No. 54A, under which Tribal corporations are organized, provides that any recovery against such a corporation is limited to the assets of the corporation. (Doc. 35-3, pp. 22-23). SKC balance sheet and financial documents suggest adequate assets, resources and sources of income separate from the Tribe. (Doc. 38-2 at 8-10). That is at least sufficient information to warrant further discovery on the matter.

The district court should have declined to adopt the test proposed by Defendants and instead determined that SKC failed to satisfy the well-established test requiring a showing that the Tribes would be directly or functionally liable for any money judgment rendered against SKC or the individual defendants acting in their official capacities. Plaintiffs request this Court reverse the district court's Order and remand the case with instructions that any 'arm of the tribe' analysis should be conducted under the well-established test applied by Ninth Circuit and the Supreme Court in FCA cases.

b. SKC is Not an Arm of the Tribe Under *Smith v. SKC*

SKC also fails the ‘arm of the tribe’ analysis proposed by Defendants and adopted by the district court. The district court wrongly relied upon this Court’s decision in *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127 (9th Cir. 2006), to determine SKC is a tribal entity and therefore immune. Actually, *Smith* stands for the proposition that because of the different policy questions and statutory language involved, “[w]hether an entity is a tribal entity depends on the context in which the question is addressed.” *Id.* at 1133 (citing *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 376 (10th Cir. 1986) (stating that “the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration”); and see *American Property Management Corp. v. Superior Court*, 206 Cal. App. 4th 491, 502, 141 Cal. Rptr. 3d 802, 810 (Cal. App. 4th Dist. 2012) (citing *Smith*). The context in *Smith* was entirely different than in this case, as that case concluded SKC was a tribal entity for purposes of civil tribal court jurisdiction. *Id.*, at 1134-35 (emphasis added).

Further, the Court in *Smith* stated: “[e]ven though the Tribes do not fund the college, SKC has been identified as a “tribal governmental agency.” *Id.*, at 1134. In making that statement, it appears that the Court relied on a record before the Tribal Court of Appeals, the district court, and *Bartell v. Am. Home Assurance Co.*, 2002 MT 145, 310 Mont. 276, 49 P. 3d 623, 624 (Mont. 2002). None of those cases are

FCA cases. The Court in *Bartell* stated that the parties stipulated to SKC's status as a tribal entity. *Bartell*, ¶ 3. None of these cases properly analyzed this issue in the context of an FCA claim.

Moreover, many of factual bases referenced in *Smith* at 1134, and relied upon by the district court in this case appear to be incorrect. *Smith* asserts and the district court accepted (Doc. 39 at 9) that SKC is located on tribal lands, but Montana State property records indicate that the Tribe and SKC own land separately. (Doc. 38-1). *Smith* asserts and the district court accepted (Doc. 39 at 9) that SKC is incorporated under tribal and state law, but as set forth above there is no such entity incorporated under tribal law. *Smith* asserts and the district court accepted (Doc. 39 at 9) that SKC is described in its articles of incorporation as “[a] tribal corporation,” created by the Tribe, and SKC may sue and be sued in its corporate name in tribal court. Actually, the SKC Articles refer to the entity as “A Montana Corporation” and provide that it may sue and be sued in its corporate name without any limitation to tribal court. (Doc. 35-4 at 3-4).

Plaintiffs were not provided a copy of SKC's bylaws, so cannot conclusively disprove the related statements made in *Smith* and relied upon by the district court, regarding control by the Tribal Council. But evidence suggests that the level of control is less than represented. The Tribe noted that SKC is required to maintain independence from the Tribes by having a separate board. (Doc. 30, p. 14, n.2).

SKC has alleged no requirement that the president and other officers that manage SKC be members of the Tribes, and Plaintiffs are aware of none. The SKC/Foundation Operating Agreement provides that SKC is an independent institution of higher learning. (Doc. 33-8, p. 1). At a minimum, this evidence is sufficient to justify the Court's reversal of the district court decision and remand for further jurisdictional discovery prior to any decision on Defendant's motion to dismiss of Plaintiffs' claims against SKC and the Board Members in their official capacities.

c. SKC is Not an Arm of the Tribe Under *White v. University of California*

For the reasons set forth above, Plaintiffs dispute that the factors used by this Court in *White*, supra, should apply in this case. However, even if *White* does apply, the district court erred when it stated without any analysis that SKC is an arm of the tribe under the following factors:

(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.

765 F.3d 1025-26.

First, SKC is a corporation formed under Montana law only. As set forth above, the Tribal Charter (Doc. 35-2) and Tribal Articles (Doc. 16-1) are for Salish

Kootenai Community College Inc., not the entity named in this case. The Defendants confirmed that there are “no further amendments” to those tribal documents. (Doc. 35-1, ¶ 5). Salish Kootenai Community College Inc. was incorporated under Montana law in 1978 (Doc. 35-4) and later amended its Articles of Incorporation on file with the State of Montana to change its name to Salish Kootenai College Inc. (Doc. 35-4 at 1; Doc. 35-1, ¶ 4). That is the entity named in this case and it is not a tribal corporation.

Again, SKC is not an IRA section 17 corporation registered with the Department of the Interior (Doc. 35-1, ¶ 6) and SKC does not contend it is an IRA section 16 corporation. Ordinance 54A, governing Tribal corporations, requires tribal entities subject to the Tribes sovereign immunity to reference Section 25 of the Ordinance in their articles. (Doc 35-3 at 22-23). None of the SKC articles or amendments reference Section 25 of the Ordinance. For these reasons SKC fails the first factor under *White*.

The second factor, the purpose of SKC is education. While Defendants have asserted tribal purposes, the reality is that admission to SKC is not limited to American Indian students. SKC has a preference for admission of 51% American Indian students, but that preference is not limited to members of the Tribe. Tribally Controlled Community College Act, 25 USC § 1804. This purposes are

not sufficiently identified with the Tribe to satisfy this element or convey arm of the tribe status based on this element alone.

While education of its residents is certainly a function and purpose of state government, a number of state colleges and universities and related entities have been held to not be arms of the state for purposes of the FCA. *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131 (4th Cir. 2014); *University of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1210 (1st Cir. 1993) (U.R.I. held not an arm of state in part because its funds are not “merged with [] the general fund, . . .”); *Takle v. Univ. of Wisc. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005).

SKC fails the third and fifth factors because the Tribe has limited control over SKC, and the entities are financially independent. The SKC board may be appointed by the Tribal Council, but any control stops there. The Tribe notes that SKC is required to maintain independence from the Tribes by having a separate board. (Doc. 30, p. 14, n.2). SKC has alleged no requirement that the president and other officers that manage SKC or be members of the Tribe, and Relators are aware of none. The SKC/Foundation Operating Agreement provides that SKC is an independent institution of higher learning. (Doc. 33-8 at 1). SKC owns property separate from the Tribe. (Doc. 33-2). SKC has assets, and revenue

streams separate from the Tribe. (Doc. 33-1 at 8-10, 13). SKC independently sought tax exempt status from the IRS. (Doc. 35-4 at 6).

SKC fails the fourth factor because it was not organized as a tribal entity and does not reference Section 25 of Ordinance 54A in its articles. That same section of the Ordinance demonstrates that even if SKC were a tribal entity it is free to waive sovereign immunity and the Tribe is not liable for any judgments against it. In fact, SKC has waived any immunity, as set forth below.

Again, Plaintiffs do not believe the *White* factors should apply here. Even if those factors did apply, the limited information provided by SKC and the Foundation show that SKC cannot meet these factors. At a minimum, Plaintiffs have not provided all the information necessary to thoroughly analyze those factors, and their claims should not be subject to dismissal until they are allowed to conduct additional jurisdictional discovery.

3. SKC Waived Sovereign Immunity

Even if the Court determined that SKC is arm of the Tribes entitled to sovereign immunity, SKC would still be subject to suit if it waived that immunity. *See Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waiver of the SKC's immunity may be expressed by either the Tribe or SKC. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

Defendants initially provided only the Articles of Incorporation filed by Salish Kootenai Community College Inc. with the Tribe, which contained a limited waiver to sue and be sued in Tribal court. (Doc. 16-1). After the hearing, SKC disclosed finally disclosed its Articles of Incorporation and amendments filed with the Montana Secretary of State. The Montana Articles of SKC contained an unlimited waiver to sue and be sued, were filed after the Articles that Salish Kootenai Community College Inc. filed with the Tribe, and stated that SKC had the power:

To sue and be sued; to contract and be contracted with; to act as Trustee under and trust incidental to the principal objects of the Corporation; to receive, hold administer and expand funds and property subjects to such trust; to borrow money, contract debts and to do all the above in its Corporate name. Articles of Incorporation, Article III(c), September 12, 1978.

The language in the SKC Articles of Incorporation is similar to the language that was discussed by this Court in *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 981 (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). In *Marceau* the Court found that the “sue and be sued” provision, in connection with its ability to contract, acted as an unequivocal waiver of an alleged immunity by a tribal agency. *Id.*

After looking at other jurisdictions’ approaches to addressing the waiver of immunity with “sue and be sued” clauses, this Court held in *Marceau* that the “sue

and be sued” was a waiver because it expressly permits suit on “any contract, claim or obligation arising out of its activities.” *Id.* Moreover, the phrase “arising out of its activities” signals that the “sue and be sued” clause opens the door to liability that was not necessarily the product of negotiation, but arose by virtue of the Housing Authority’s conduct. *Id.* In *Cook v. AVI Casino Enters.*, this Court again acknowledged that a “sue and be sued” clause waives tribal immunity and that the *Marceau* analysis has not been disavowed nor rejected. *Cook v. AVI Casino Enters.*, 548 F.3d 718, 726 n.6 (9th Cir. 2008).

A number of other courts have found that similar “sue and be sued” clauses act as an express waiver of sovereign immunity. *David Robles v. Shoshone-Bannock Tribes*, 125 Idaho 852 at p. 854(1994), citing *Brunette v. Dann*, 417 F. Supp. 1382, 1385 (D. Idaho 1976) (sue and be sued provision in a corporate charter constitutes consent to suit); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (sue and be sued provision in a corporate charter is an express waiver of immunity) (8th Cir. 1989); *Gold v. Federated Tribes of Warm Springs Indian Reservation*, 478 F. Supp. 190, 196 (D. Oregon 1979) (holding that a corporate “sue and be sued” waiver does not apply to actions of the tribe as a government but does apply to the tribal corporation); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1136-37 (D. Alaska 1978) (sue and be sued provision constitutes a consent to suit against the tribal corporation); *Kenai Oil &*

Gas, Inc. v. Department of Interior, 522 F. Supp. 521, 528(D. Utah 1981), aff'd, 671 F.2d 383 (10th Cir. 1982) (a sue and be sued provision in the charter of a tribal corporation waives any immunity it would otherwise have).

Here, SKC is not even a tribal corporation. The only formation documents for a corporation of that name are filed with the Montana Secretary of State. Also, the SKC Articles state that entity is organized pursuant to Title 15, Revised Codes of Montana. (Doc. 35-4 at 3). Subsection “e” of the SKC Articles state that the corporation shall “have, enjoy and exercise all of the rights, powers and privileges which are now or which may be hereafter conferred upon non-profit Corporations organized under the same statutes, or any amendments thereof, as this Corporation.” (Doc. 35-4 at 4).

The current version of Montana’s Nonprofit Corporation statutes can be found in Mont. Code Ann. §§ 35-2-113 through 1402. Mont. Code Ann. § 35-2-118 lists the general powers of a nonprofit corporation and states in relevant part:

- (1) Unless its articles of incorporation provide otherwise, a corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:
 - (a) to sue and be sued, complain, and defend in its corporate name;

Mont. Code Ann. § 35-2-118.

The SKC Articles indicate that the entity can sue and be sued without limitation to any court, and state that the entity is organized under Montana law

and pursuant to the foregoing statute. SKC has waived any sovereign immunity it had and has acknowledged that it can be treated as an individual and would thus meet the “person” standard under the FCA.

CONCLUSION

For the above reasons, Plaintiffs respectfully request the Court hold that SKC is not a tribal entity subject to tribal sovereign immunity either because it is not an arm of the tribe or because it waived any sovereign immunity it had, and reverse the portion of the district court’s December 3, 2014, order (Doc. 46) that dismissed claims against SKC and against Jim Durglo, Rene Peirre, Ellen Swaney, Linden Plant, Tome Acevedo, Zane Kelly, and Ernest Moran in their official capacities members of the SKC’s Board of Directors.

DATED this 18th day of June, 2015.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Trent N. Baker
Trent N. Baker
Attorneys for Relators-Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with Fed. R. App. P. 27 and 32 by being double spaced, written in proportionately-spaced Time New Roman 14-point typeface, and containing 6,997 words.

/s/ Trent N. Baker

Trent N. Baker

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following counsel of record, by the means designated below, this 18th day of June, 2015.

1, 2, 3 ECF

_____ U.S. Mail

_____ Fedex

_____ Hand-Delivery

_____ Facsimile

1. Megan Dishong
Assistant United States Attorney
PO Box 8329
Missoula, MT 59807
2. Martin S. King
Matthew J. Cuffe
Worden Thane P.C.
111 North Higgins, Ste 600
PO Box 4747
Missoula, MT 59806-4747
3. John T. Harrison
Ranald McDonald
Confederated Salish and Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855

/s/ Trent N. Baker

Trent N. Baker