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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

At issue is the subject matter jurisdiction over claims brought by Relators, Plaintiffs and Plaintiffs Fawn Cain, Tanya Archer, and Sandi Ovitt ("Plaintiffs") under the False Claims Act ("FCA") against 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 (collectively "individual defendants") in their official capacities members of the SKC's Board of Directors for manipulation of student grades and making misrepresentations to the United States regarding those grades and other matters in order to obtain and maintain federal funding.

Not at issue is whether Plaintiffs' effectively named the individual defendants in their individual capacities. That issue need not be addressed by this Court because the District Court allowed the Plaintiffs to amend their complaint to name the individual Defendants in their individual capacities in a manner which would satisfy the District Court. The District Court retains jurisdiction over the individual defendants in their individual capacities and whether the amended complaint is adequate in that respect is not an issue on appeal. The Plaintiffs filed an amended complaint more clearly asserting such claims. The amended complaint includes SKC and the Foundation in recognition of this appeal and so as not to waive any claims in advance of this appeal. Plaintiffs do not intend to pursue the claims against the Foundation. The issue of whether the individual

defendants are also liable in their official capacities will depend on this Court's ruling with respect to the status and immunity of SKC.

Plaintiffs assert that SKC and the individual defendants acting in their official capacities are subject to liability under the FCA because SKC is not an arm of the Confederated Salish and Kootenai Tribes ("Tribes") entitled to share the Tribes' sovereign immunity, and regardless, SKC has waived its sovereign immunity. Defendants argued below that SKC is an arm of the Tribes and has not waived its sovereign immunity. Defendants now argue that any waiver of sovereign immunity by SKC is irrelevant because, as an arm of the Tribes, SKC is a sovereign and therefore not a "person" under the FCA. Plaintiffs counter that the FCA applies to an Indian tribe (and an arm of the tribe) under Ninth Circuit precedent. Plaintiffs maintain that SKC is not an arm of the Tribes, waived any immunity, and that SKC's waiver precludes finding SKC to be an arm of the Tribes.

BURDEN OF PROOF

A party seeking to establish in personal jurisdiction generally has the burden of establishing the jurisdictional facts, but when opposing a motion to dismiss based upon a lack of jurisdiction, which motion is submitted on affidavits plus other discovery materials, a plaintiff need only make a prima facie showing of jurisdictional facts. *Data Disc, Inc. v. Systems Tech. Assoc., Inc*., 557 F.2d 1280,

1285 (9th Cir. 1977); *see also Sheridan v. Garrison*, 415 F.2d 699, 709 (5th Cir. 1969). A similar procedure is appropriate for subject matter jurisdiction. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1131-1132 (D. Alaska 1978). Relief from the usual burden of proof is especially appropriate in this case because Plaintiffs were not allowed to conduct necessary discovery and the majority of relevant and discoverable information was within the possession and control of the Defendants.

ARGUMENT

A. The FCA Applies to Indian Tribes and Tribal Entities

Defendants assert that the primary issue on appeal is whether SKC is a "person" subject to suit under the FCA. Appellees' Answering Brief p. 9-12. They rely on a trio of cases addressing whether a tribe or tribal entity is a "person" subject to suit under the FCA. Two are district court cases. *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061, 1068 (E.D. Wis. 2009); *Kendall v. Chief Leschi Sch., Inc.*, No. C07-5220 RBL, 2008 WL 4104021, at *1 (W.D. Wash. Sept. 3, 2008). The third is a recent unpublished memorandum from this Court. *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). Each of these cases merely extend the holding of United States Supreme Court that the definition of "person" in the FCA does not apply to

states or state agencies because of the "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) ("*Stevens*"). The Court also analyzed the history and application of the FCA and determined that it does not contain "some affirmative showing of statutory intent" to authorize suits against the states by private parties." *Id*. at 781.

However, simply shifting application of *Stevens* from states to Indian tribes and thus omitting them from application of the FCA or other federal statutes which are generally applicable to "persons" conflicts with a longstanding rule in the Ninth Circuit that federal laws of general applicability are presumed to apply with equal force to Indian tribes. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (holding that a commercial farming enterprise wholly owned and operated by the Coeur d'Alene Indian Tribe could be subject to the regulations in the Occupational Safety and Health Act) ("*Coeur d'Alene")*. This rule is rooted in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), in which the Supreme Court stated that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id*. at 116 (holding that Indian-owned lands were subject to taking upon the payment of just compensation).

After a careful analysis and reconciliation of the foregoing cases and related precedent, Judge Michael Fitzgerald of the United States District Court for the District of California found that presumption of applicability in *Coeur d'Alene* remains the law of this Circuit, subject to the three exceptions stated therein:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC, 2014 U.S. Dist. LEXIS 89022, *48-49 (C.D. Cal. May 27, 2014) ("*Great Plains Lending"*)(finding applicable to Indian tribes the word "person" in the Consumer Financial Protection Act ("CFPA"), Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, codified at 12 U.S.C. §§ 5481-5603).

The case for application of the FCA to the Tribes pursuant to *Coeur d'Alene* is even stronger in this case than application of the CFPA in *Great Plains Lending* because the FCA's purpose of preventing fraud against the United States only regulates interactions with the federal government and cannot reasonably be said to touch "exclusive rights of self-governance in purely intramural matters" or "abrogate rights guaranteed by Indian treaties." *See Coeur d'Alene*, 751 F.2d at 1116. And, here there is no reference to tribes in the FCA, unlike the CFPA, which similarly does not define "persons" to include Indian tribes, but explicitly

includes Indian tribes in its definition of "State," 12 U.S.C. § 5481(27), and empowers "States" to enforce the CFPA's provisions. *See Great Plains Lending* at *35-37. The FCA is a statute of general applicability which should be applied to Indian tribes pursuant to this Court's ruling in *Coeur d'Alene.*

B. SKC is Not an Arm of the Tribes

Defendants repeatedly state that SKC is a Section 16 corporation under 25 U.S.C. § 461 ("Indian Reorganization Act"), but Defendants admit that SKC was a separate corporate entity incorporated under state law and allegedly also incorporated under tribal law. Appellees' Ans. Br., 3(Aug. 19, 2015). Plaintiffs point out that there are no tribal articles of incorporation, tribal articles of amendment or assumed business name designation for SKC. Appellants' Opening Br., 13(June 18, 2015). Regardless, a separate corporate entity created under tribal and state is not a tribal government corporation under Section 16. *Gavle v. Little Six*, 534 N.W.2d 280, 284 (Minn. Ct. App. 1995). Indeed, a corporation like SKC may be regarded as neither a Section 16 or Section 17 corporation, and its status should be determined by the facts of the case. *Parker Drilling Co.,* 451 F. Supp. 1127 at 1135. This Court recognizes a distinction between tribes acting as business entities and as sovereign, governmental entities, and that a tribe's "constitutional and corporate entities [are] separate and distinct" and "differ in the

extent to which they possess tribal sovereign immunity." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 866 (9th Cir. 1984).

Other facts showing an entity is not a Section 16 corporation include: formation of a separate economic entity, not subject to tribal governmental control, incorporated under tribal law and not merely as an authorized tribal activity; a board of directors separate from the tribal government, which exercises full managerial control over the corporation or is permitted to act outside the control of tribal officials; the ability to conduct business off of the reservation; broad corporate powers and declared purposes that include non-governmental activities; and protection of tribal property from judgments entered against the corporation. *Gavle*, 534 N.W.2d at 284; and *see Dixon v. Picopa Constr. Co*., 160 Ariz. 251, 256-58, 772 P.2d 1104, 1109-11 (Ariz. 1989).

Here, Defendants admit that SKC is a separate economic and corporate entity created under the laws of the State of Montana, and they allege that entity was also created under tribal law. Appellees' Ans. Br. 3(Aug. 19, 2015); see also Appx. Vol. II, 57 (June 23, 2015). Defendants admit that it has a separate board directors, and though they assert that the board members are appointed by the tribal council, it is the separate board which manages SKC outside the control of tribal officials. Appellees' Ans. Br., 27-28. There is no allegation or evidence that SKC's business activities are limited to the reservation. It accepts students from

all over the country and offers degrees programs and academic coursework at numerous off-campus sites. Appx. Vol. II, 58, 61-63 (June 23, 2015). There is no dispute that SKC has broad corporate powers which exceed those Defendants have argued are governmental in nature. *See* generally Appx. Vol. II, 58- 198 (June 23, 2015). Defendants admit that SKC holds assets, including real property, separate from those of the Tribes. Appellees' Ans. Br., 29; *see* also Appx. Vol. II, 61-63 (June 23, 2015). Defendants have now alleged that SKC leases property from the Tribe but has not produced that lease. Appellees' Ans. Br., 29. Holding assets in a separate entity and occupying land as a lessee create protections for of tribal property from judgments entered against SKC. The lease provisions may contain further liability protections. The ordinances under which Tribal entities are contain liability protections. SKC may have insurance which provides further liability protections but Plaintiffs have not had the opportunity to discover that information. *See Dixon, supra.*

C. *Smith* is Not Controlling Precedent

Application of stare decisis in not appropriate in every case, especially where there are neither new factual circumstances nor a new legal landscape. *Or. Natural Desert Ass'n v. United States Forest Serv*., 550 F.3d 778, 786 (9th Cir. 2008). Stare decisis is most important in cases involving property and contract rights, where reliance interests are involved. *Payne v. Tennessee*, 501 U.S. 808,

828 (1991). It is not applicable where prior rulings are based on assumption or non-litigated issues. *Sakamoto v. Duty Free Shoppers, Ltd*., 764 F.2d 1285, 1288 (9th Cir. 1985). Stare decisis requires the issue be "squarely addressed" in a prior decision. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

Defendants assert the status of SKC as a tribal entity was conclusively determined by *Smith v. Salish Kootenai Coll*., 434 F.3d 1127 (9th Cir. 2006), and that issue is stare decisis. However, *Smith* acknowledges 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 and issue in *Smith*, whether SKC was a tribal entity for purposes of civil tribal court jurisdiction in a personal injury matter, was different from this case. *Smith*, at 1134-35 (emphasis added).

Here, the context is entirely different from *Smith*. This case is about whether SKC can be held responsible for manipulating and misrepresenting student grades

in order to defraud the federal government. There are also different facts and law at issue. The law is the FCA, which was not at issue in *Smith*. The facts include articles of incorporation which contain a waiver of immunity, something which was not addressed in *Smith* and is relevant to an "arm of the tribe" analysis, as set forth below. Therefore, *Smith* should not be considered stare decisis and this case should be remanded for further discovery and an appropriate analysis of SKC's status as an alleged arm of the Tribes under the facts and law of this case.

D. SKC's Waiver is Relevant and Shows it is Not an Arm of the Tribe

Defendants assert that waiver is irrelevant because the SKC is not a "person" for purposes of the FCA . Defendants offer no authority binding on this Court to support that assertion. Even if SKC were and arm of the Tribes, Defendants' reliance on *Parker* as support for that assertion is misplaced, and *Parker* is a 42 U.S.C. § 1983 ("§ 1983") case which demonstrated the necessity of a robust "arm of the state" analysis in determining whether a school is a "person" under that statute. *Parker v. Franklin County Cmty. Sch. Corp*., 667 F.3d 910, 926 (7th Cir. 2012) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989)). Neither *Parker* nor *Will* address the FCA, and *Will* recognized the interrelationship between the scope of §1983 and the scope of the U.S. Const. amend. XI ("Eleventh Amendment") and found that the issue of a State's wavier or consent to suit is relevant t to the application of § 1983. *Will*, 491 U.S. at 66-67 ("We cannot

conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent") (emphasis added).

Parker also highlighted the import of evaluating the economic separation between the Tribes and SKC. *Parker*, 667 F.3d at 926-28. However, Plaintiffs were not allowed to conduct discovery regarding the economic separation between SKC and the Tribes. Plaintiffs obtained and presented publicly available information indicating that SKC holds assets independently from the Tribes and is financially independent from the Tribes. Appx. Vol. II, 61-63 (June 23, 2015).

Defendants next rely on an unpublished per curiam opinion, *United States ex rel. King v. Univ. of Texas Health Sci. Ctr.*, 544 Fed. Appx. 490 (5th Cir. Tex. 2013), as authority for the proposition that the issue of waiver is irrelevant. However, the Fifth Circuit's analysis specifically considered the defendant's ability to sue or be sued and found that it weighed against it in an "arm of the state" analysis under the FCA. *Id*. at 498.

This Court also performs an Eleventh Amendment arm of the state analysis under §1983 considering the following factors: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate

status of the entity. *Mitchell v. Los Angeles Community College Dist*., 861 F.2d 198, 201 (9th Cir. 1988).

Here, Plaintiffs were not allowed to conduct discovery on the issue of waiver or other factors relevant to an arm of the tribe analysis. Plaintiffs were able to obtain and present evidence sufficient to make a prima facie case for subject matter jurisdiction, by showing that SKC was financially independent, most SKC students were not members of the Tribe, SKC consented to sue and be sued without limitation to tribal courts, hold property separately from the Tribes, and the named Defendant entity is incorporated under Montana law not tribal law. Appx. Vol. II, 3-10 (June 23, 2015). Defendants have supplemented the record with additional information relevant to one of these factors, admitting that SKC owns property separate from the Tribes and leases property from the Tribes. Appellees' Ans. Br., 29. This further supports a conclusion that SKC is a separate entity from the Tribes not intended or entitled to share in the Tribes sovereign immunity.

CONCLUSION

For the above reasons, Plaintiffs respectfully request the Court hold that the FCA is a federal law of generally applicability which applies to Indian tribes and tribal entities, 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 district court's dismissal of claims against SKC and against Jim Durglo, Rene Peirre, Ellen Swaney, Linden Plant, Tom Acevedo,

Zane Kelly, and Ernest Moran in their official capacities as members of the SKC's Board of Directors.

DATED this 2nd day of September, 2015.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Trent N. Baker
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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 3,550 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 2nd day of September, 2015.

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