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:tbaker@dmllaw.com
jwilliams@dmllaw.com

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

FAWN CAIN, TANYA ARCHER, and SANDI OVITT, Relators and Plaintiffs, vs. **SALISH KOOTENAI COLLEGE, INC., et al**., Defendants.	Cause No.: CV 12-181-M-BMM **RELATORS AND PLAINTIFFS' RESPONSE TO MOTION TO DISMISS**

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I. RELIEF REQUESTED

Relators' and Plaintiffs' submit the following Response Brief in opposition to Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and (6). As set forth below, the Motion to Dismiss should be denied because the Salish Kootenai College ("the College") has unequivocally and publicly indicated that they can be sued in Federal Court and there is substantial evidence that does not comply with the *White* factors and shows that the College did not follow the Confederated Salish Kootenai Tribes' ("CSKT") policies regarding tribal corporations.

II. INTRODUCTION

Plaintiffs United States of America ex rel. Fawn Cain, Tanya Archer, and Sandi Ovitt ("Plaintiffs/Relators") filed this action seeking to hold the College liable pursuant to the Federal False Claims Act, Title 31, United States Code, Section 3729, et seq, by reason of the Defendants' knowingly submitting claims and representations which they knew were false to the U.S. Department of Health and Human Services ("USDHHS"), Indian Health Service ("IHS"), Division of Grants Management or, in the alternative, made, caused to be made or used false records or statements to submit or support such claims. This fraudulent conduct resulted in the United States government paying unwarranted grant money to the Defendants.

The IHS conditioned award of grant monies upon the enrollment of full-time AI/AN nursing students in the Associates of Science in Nursing ("ASN") and Bachelors of Science in Nursing ("BSN") programs. Grant monies were to be used

to pay the College for student tuition and associated expenses. For the College to remain eligible for receipt of grant monies, ASN/BSN students were required to maintain full-time enrollment in the nursing program until completion of the course of study for which the monies were provided. The students were also required to maintain an acceptable level of academic standing.

If ASN/BSN students failed to maintain an acceptable level of academic standing or withdrew from the program before graduating, all grant monies were to be repaid to the United States within three years of failure to comply. The Defendants were required to notify the IHS Project Officer immediately if any scholarship recipient failed to take a full-time course load or remain in good academic standing. Unfortunately, a substantial number of the students that were granted scholarships did not maintained full-time course load or remain in good academic standing.

The Defendants misrepresented or failed to disclose high attrition numbers in their communications with IHS and they misrepresented the actual numbers of students who had failed, withdrawn or were otherwise unable to satisfy course requirements. The Defendants inflated, modified and curved student grades to reflect a higher passage and retention rate than what was actually achieved by their ASN/BSN nursing students. The Defendants concealed from IHS that approximately 25-30 students had failed or withdrawn, approximately 25-35% of those enrolled.

The Plaintiffs/Relators investigated, discussed and reported complaints and concerns regarding Defendants' fraudulent modification and misrepresentation of retention and passage rates pursuant to 31 U.S.C. § 3730(h) . As a result of their protected activity, Defendants and their agents discharged, demoted, threatened, harassed and otherwise discriminated against Plaintiffs/Relators in the terms and conditions of their employment, ultimately terminating their employment and canceling their contracts in or around May, 2012.

The Plaintiffs/Relators brought this action to hold the Defendants liable for their actions of defrauding the United States government of the money they paid the Defendants and for taking retaliatory actions against the Plaintiffs/Relators.

III. STANDARD

The standard for dismissal under Rule 12(b) is well established. "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995) (quoting *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1990); See also *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006 (applying Rule 12 to False Claims Act). The complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

"…[U]nder Ninth Circuit law, "any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed

on the merits.'" *United States ex rel. McCarthy v. Straub Clinic & Hosp., Inc.*, 140 F. Supp. 2d 1062, 1067 (D. Haw. 2001) ; (citing *Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999. see also *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976 (superseded by statute on other grounds) (stating that where federal statute provides basis for subject matter jurisdiction and plaintiffs' substantive claims, "a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous").

"For motions to dismiss under Rule 12(b)(1), unlike a motion under Rule 12(b)(6), the moving party may submit affidavits or any other evidence properly before the court . . . . It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000).

IV. ARGUMENT

A. THE COURT HAS SUBJECT MATTER JURISDICTION

The United Supreme Court has clearly stated that the FCA's term "person" clearly applies to corporations and organizations:

> "A corporation has been declared to be not only a person, . . . but to be capable of being considered an inhabitant of a state, and even of being treated as a citizen, for all purposes of suing and being sued".
> *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 125-26 (2003).

Ultimately, the phrase "persons," could not have been limited toward private individuals, "or even private corporations would be outside the FCA's coverage." *Id*., at 128. The FCA applies to corporations and municipalities just as it would to individuals. The College and the individuals are all liable for their fraudulent activity against the United States.

In *Stephens* the US Supreme Court determined that respondent relator had standing to bring suit in federal court on behalf of respondent United States under the FCA, but that the FCA did not subject petitioner to liability in the action. The term "person" in the FCA did not include states for purposes of qui tam liability. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786, 120 S. Ct. 1858, 1870 (2000).

However, in *Chandler* the US Supreme Court held that the FCA term "person" included local governments when the statute was enacted, and the subsequent amendment did not redefine such liability. The county, as a recipient of federal funding, was clearly able to abuse federal spending and was thus subject to the FCA remedy that sensibly applied to prevent such abuse. *Chandler*, 538 U.S. 119, 128.

The history of the *Chandler* case is insightful and relevant to this case. After the US Supreme Court issued its ruling on *Stevens*, the district court in *Chandler* reaffirmed an earlier holding that municipal governments were included in the term "person" under the FCA, but held that under Stevens, the amended treble damage provision is "essentially punitive in nature," and "the county is immune from the imposition of punitive damages, which are mandatory if liability is found under the FCA." *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 118 F.Supp.2d 902, 903 (N.D.Ill. 2000).

The court of appeals for the Seventh Circuit reversed. *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 277 F.3d 969 (7th Cir. 2000). It held that a local government is a "person" for purposes of the FCA and that they are subject to treble damages in qui tam lawsuits. The court of appeals first concluded that Congress intended the term "person" to include local governmental units when it enacted the FCA in 1863. The court found that, by the time of the FCA's enactment in 1863, both "private and municipal corporations [unlike States] were presumptively included within the meaning of 'person,'" and therefore local governments (unlike States) were intended to be a "person" under the original FCA. *Chandler v. Hektoen Institute*, 277 F.3d at 974. The US Supreme Court agreed with the Seventh Circuit's ruling and held the county liable under the FCA.

The US Supreme Court and the Ninth Circuit Appellate Court found that in determining whether a corporation was a person subject to the FCA depended on the

corporations "general enjoyment of the capacity to sue and be sued." *Chandler*, 538 U.S. 119, 125; *United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 943 (9th Cir. 2017). The Ninth Circuit explained that the US Supreme Court differentiated between two court cases, *Chandler* and *Stevens*, because of "[t]he key distinction that drove the Court to apply opposite presumptions in *Stevens* and *Chandler* was the municipality's ability to sue and be sued." *United States ex rel. Cain v. Salish Kootenai Coll., Inc*., 862 F.3d 939, 943 (9th Cir. 2017); citing *Chandler*, 538 U.S. 119, 125-126.

1. THE COLLEGE WAIVED ITS IMMUNITY AND IS ABLE TO SUE AND BE SUED

The Ninth Circuit Appellate Court has held that "[w]e thus hold that Indian tribes may consent to suit without explicit Congressional authority. At least three other circuits have so held. See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) (en banc), cert. granted on other issues, 449 U.S. 820, 101 S. Ct. 71, 66 L. Ed. 2d 21 (1980), restored to calendar, 101 S. Ct. 3156, 69 L. Ed. 2d 1003 (1981); *Fontenelle v. Omaha Tribe of Neb*., 430 F.2d 143, 147 (8th Cir. 1970); *Maryland Cas. Co. v. Citizens Nat'l Bank of W. Hollywood*, 361 F.2d 517, 520-21 (5th Cir.), cert. denied, 385 U.S. 918, 87 S. Ct. 227, 17 L. Ed. 2d 143 (1966)." *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981) .

"The "sue and be sued" language such as set forth in the Shoshone-Paiute tribal ordinance has been recognized as constituting an "unequivocally expressed"

waiver of sovereign immunity." *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987), citing *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d at 671.

The Plaintiffs/Relators argue that the College waived its immunity in its incorporating documents. This assertion was challenged by the Defendants. However, the Policy Manual for the Salish Kootenai College produced by the Defendants explicitly states that the College has the power "[t]o sue and be sued, complain and defend, in its corporate name in Tribal Court **and/or Federal Court.**" (emphasis added) Salish Kootenai College Policy Manual Section I 100(b). See Exhibit "A." The Policy Manual further states that this power to sue and be sued, amongst others, was given to the College by the College's Articles of Incorporation. *Id*.

The Policy Manual is not just an internal document, but is also made available to the general public. A search on the web has provided an identical Policy Manual from November of 2016. See Exhibit "B." Again, this policy manual clearly indicates that the College has the powers to sue and be sued in Federal Court.

Not only does this provision contain a "sue and be sued" clause, but specifically identifies Federal court as a jurisdiction in which the College is subject to suit. This will preclude the argument that the sue and be sued clause is only applicable to tribal court situations. The language and publication goes beyond the incorporating documents, as the College is taking a public and affirmative stance in

its Policy Manual that the College does not and never had immunity. This situation makes the College similar to that of a municipality that is independent from a state which may enjoy immunity. As stated above, the ability to sue and be sue is what makes the College subject to the FCA's person definition. In addition, the public statement certifies that the College is subject to suit in Federal Court.

The analysis of whether the College is an arm of the tribe is unnecessary because the US Supreme Court has stated the FCA allows for suit against corporations or municipalities that can sue and be sued. See *Chandler*, 538 U.S. 119, 125-126, Similar to the *Chandler* case, the College is eligible to sue and be sued.

The College has made an express waiver of any sovereign immunity that may apply by unequivocally expressing in their Policy Manual that they have the ability to sue and be sued in Federal Court. Such express waiver is similar to those found in court cases where it was ruled that the entity has waived any immunity that they may have been afforded.

The Ninth Circuit made an assumption that the College had not waived its immunity and, therefore, there was the need to apply the arm of the tribe analysis that is found in the *White* case. However, discovery in this case has produced an unequivocal waiver of any immunity that the College may have been afforded. In addition, the College's own documents assert that this waiver existed from inception as part of its articles of incorporation. As the incorporating documents of the College

allow them to sue and be sued, this Court should follow the direction provided in the *Chandler* case and find that there is subject matter jurisdiction for the College.

2. THE FEDERAL GOVERNMENT ALREADY TREATS THE COLLEGE AS A POLITICAL SUBDIVISION AND NOT THE TRIBE ITSELF.

The term "person" has remained unchanged in the FCA since its passage, and therefore has the same meaning today it had in 1863. As the US Supreme Court stated in *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978), the term "person" presumptively included municipal corporations.

"Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S. Ct. 40, 46 (1907). "A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State." *Trenton v. New Jerse*y, 262 U.S. 182, 189-90, 43 S. Ct. 534, 537-38 (1923); citing *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534; *United States v. Railroad Company*, 17 Wall. 322, 329, *New Orleans v. Clark*, 95 U.S. 644, 654; *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U.S. 307; *Commissioners v. Lucas*, 93 U.S. 108, 114.

The US Supreme Court has already held that political subdivisions are subject to the FCA. *Chandler*, 538 U.S. 119, 128. Discovery has shown that the Federal Government is treating the College as a political subdivision and not the CSKT itself. The Defendants indicated that:

> "Likewise, in regards to the Internal Revenue Service, the Tribes have designated the College a "political subdivision" of the Tribes so that the IRS's list of "political subdivisions of tribes" found at Revenue Procedure 84-36 includes Salish Kootenai Community College, along with Salish Kootenai Housing Authority."

College's Response to Plaintiffs' First Discovery Requests, INT No. 13.

This case is distinguishable from the *Stevens* case because the Vermont Agency was not separate from the state, but an agency of the state. In this case, the College is a political subdivision with its own corporate formation, tax obligations and governing board.

The Defendants and the government have already indicated that the College is a political subdivision. As the College waived any immunity that they may have had, the *Chandler* case makes it clear that the College is liable under the FCA.

B. THE COLLEGE SHOULD BEAR THE BURDEN OF PROVING SOVEREIGN IMMUNITY

Should this Court conclude that the above waiver is not sufficient to find subject matter jurisdiction, the College still does not enjoy the sovereign immunity of the CSKT. Similar to immunity claimed by a state, tribal sovereign immunity must be proven by the entity asserting it. In *ITSI*, the Ninth Circuit explained why

it is both permissible and warranted to place the burden of proof for establishing arm-of-the-state status on the entity claiming immunity. The court observed that sovereign immunity is not a true jurisdictional bar; a court is not required to raise and resolve immunity on its own motion, and it may be expressly waived or forfeited by failure to assert. *ITSI TV Prods. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993). The court concluded that an assertion by an entity that it is an arm of the state, "whatever its jurisdictional attributes, should be treated as an affirmative defense." *Id.* "Like any other such defense," arm-of-the-state status "must be proved by the party that asserts it and would benefit from its acceptance." *Id.*

Moreover, "fairness" requires placing the burden on the entity claiming immunity, especially where "a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state." (*Id*. at p. 1292) In that instance, knowledge of the "true facts" will lie within the knowledge of the entity, which "ought to bear the burden of proving the facts that establish its immunity...." *Id.* The same reasoning applies where an entity asserts that a suit against it is in effect a suit against a tribe. That entity should bear the burden of proving its arm-of-the-tribe status.

In the present case, the College cannot meet this burden. The College has not acted as a tribal corporation, has not followed tribal incorporation procedure, are independent from the CSKT and purpose are not geared toward a tribal purpose.

C. THE COLLEGE IS NOT AN ARM OF THE TRIBE UNDER THE *WHITE* FACTORS

Should the Court not find the College is a political subdivision or expressly waived sovereign immunity, the College still does not meet the arm of the tribe analysis. The Appellate Court made it clear that when looking at the arm of the tribe analysis, *Smith v. Salish Kootenai Colleg*e is not relevant. The Appellate Court stated:

> "Contrary to the decision below, *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (*en banc*), doesn't control this question. In *Smith*, we were considering whether the Tribal Court had jurisdiction over tort claims brought by a non-tribal member against the College. *Id*. at 1128. *Smith* was not deciding whether the College is a sovereign entity. That the *Smith* court drew upon several cases discussing tribal sovereign immunity is insufficient to make *Smith* controlling precedent in this context."

United States ex rel. Cain v. Salish Kootenai Coll., Inc., 862 F.3d 939, 943 (9th Cir. 2017).

"In determining whether an entity is entitled to sovereign immunity as an "arm of the tribe," we 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 (9th Cir. 2014) (citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).

1. THE COLLEGE DID NOT FOLLOW TRIBAL CORPORATION PROCEDURES

The only incorporating documents for the College are with the Secretary of State of Montana. The College failed to incorporate or amend the articles of incorporation under the CSKT's Corporation Office. A Salish Kootenai Community College ("Community College") was incorporated with the CSKT, but the Community College is not a named party to this case. The College's failure to follow through with appropriate tribal corporate formation documents is a shows that the College is not an arm-of-the tribe. As the College is only registered under Montana law, the College cannot use the sovereign immunity of the CSKT.

Courts and scholars have held that a tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law. *William V. Vetter, Doing Business With Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 173 (1994). For example, tribal sovereign immunity did not protect "a nonprofit Alaska corporation consisting of fifty-six Alaska Native villages in the Bethel area." *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 438 (Alaska 2004). In other words, the Alaska tribes waived immunity by incorporating the tribal enterprise in question under Alaska law, rather than their own tribal law.

The situation here is exactly the same. The College could have incorporated under tribal law, as did the Community College. However, the College failed to follow the tribal protocols and therefore is not an arm of the tribe.

a. The Salish Kootenai Community College is not a named party to the case

The Defendants try to merge the Community College documents with that of the College. However, the discovery responses show that the College did not follow the appropriate procedure to organize the College under Tribal law. However, the College did take the appropriate steps to organize under Montana State Law.

In response to a request for the production of documents, the Defendants produced the Community College's board minutes from September 17, 1981. See Exhibit "C." The Community College's Board, without prior authorization from the CSKT, voted on its own to change the name. Board members stated the reason for the change was fund raising. *Id*. The Community College did not want the public to think they "are getting funds to run the College from the community." *Id*. This statement reflects that the College is asserting their independence from the CSKT for financial reasons.

The Community College's Board members also recognized the proper way to change the name "would involve, to start with, contacting Northwest Association of Schools and Colleges and **changing our state and tribal charter**." The Board of

Directors for the Community College knew what needed to be done for an effective name change of the tribal entity yet failed to do so.

The Community College's Board did effectuate a name change under state law by changing the state Articles of Incorporation on September 17, 1983. See Exhibit "D." This was confirmed in the Discovery Responses under Request for Admission No. 1:

> "Please admit that the Salish Kootenai College did not file anything regarding the name change with the Confederated Salish Kootenai Tribe when it changed its name from Salish Kootenai Community College to Salish Kootenai College."
>
> "Response: **The College admits that it does not appear to have filed a certificate of amendment with the Tribes' corporate records office.**"

College's Response to Plaintiffs' First Discovery Requests, RFA No. 1.

The Community College Board even reached out to the Northwest Association of Schools about the change. The Defendants' Second Supplemental Responses provides that on March 29, 1982 a letter was written from the College President to the Northwest Association of Schools and Colleges. *College's Second Supplemental Response to Plaintiffs' First Discovery Requests*, RFP No. 9.

Clearly, the Community College's Board was aware of the steps that needed to be taken to effectuate a name change with the CSKT yet took no action with the CSKT. Instead the Board took multiple actions with other entities to effectuate the name change. This is an affirmation by the College that they were aware of what

needed to be done and only acted on what they believed was the appropriate steps to assure they were a state corporation but not a tribal corporation.

The documents and actions provide that there are two entities that are functioning. The first being the Community College which has corporate organizing documents with both Montana and CSKT. The second entity, and the one that is named in the lawsuit, is the College. The College was never organized under CSK law, and exists only under Montana state law.

b. The College acted as if it were a state corporation only and may have been dissolved under tribal law

The College has operated in its state acting capacity since 1983. During this time the Defendants annually filed their State of Montana Annual Report. On every single annual report, after the College changed its name and amended its articles of incorporation, it lists the State/County of Incorporation as Montana. See Exhibit "E." In the description of the business the majority of years it is reported as "Education – General." *Id*.

Conversely, when asked about the College's annual reports, the College provided only two CSK Corporate Office documents. See Exhibit "F." These reports were for year 2003 and 2015. The College provided other documents, but there is no indication that these were ever submitted to the CSKT's Corporate Office. What is more telling is that with the 2003 records a letter from the CSKT indicates the Tribal Corporate Office issued a Notice of Involuntary Dissolution to the College.

See Exhibit "G." No additional records were provided regarding the Dissolution status. Clearly, the College was not acting as if it was a tribal corporation, but one that was only registered under the State. Even after receiving the notice of dissolution, the College did not attempt to make additional Tribal Corporate Office filings until 2015.

Moreover the filing for 2003 clearly lists Salish Kootenai Community College, Inc., and not that of the Salish Kootenai College. The Defendants are trying to tie both the College and the Community College as one entity, but their actions show otherwise Again there has never been an official filing for the creation of the College with the CSKT. The Defendants even as late as 2003 were still dealing with the Community College as it relates to CSK Tribal issues.

c. The College did not follow its own incorporating documents and therefore have waived their ties to the CSKT

For sake of argument, assuming that the Community College and the College are treated the same (which this assumption is not admitted to here or the rest of this brief), the Articles of Incorporation for the Community College state that pursuant to Article VII, the "Community College corporation shall file, within the time prescribed by this ordinance, an annual report setting forth:

A. The current address of the central office
B. A brief statement of the character of business in which the corporation is engaged.
C. The names and addresses of the directors and officer of the corporation.

D. A statement, expressed in dollars, of the amount of the annual operating budget including income from grants, tuition gifts, and interests from endowment funds.
E. A statement indicating the total number of Tribal members enrolled as full-time and part-time students and the total number of non-tribal full-time and part-time students.
F. A copy of the audits and evaluations of the various programs administered by the corporation. Salish Kootenai Community College Articles of Incorporation, Article VII. See Exhibit "H."

However, the College only provided three years in which an annual report was physically generated. Only two of those years were filed with the CSK Corporate Office, 2003 and 2015 discussed above. Moreover, the filing significantly lacked the required statements and information. As the Community College did not follow through with its Tribal incorporating documents, the College's Tribal filing is ineffective. The College should not be able to claim protection from the CSKT sovereign immunity when it has so blatantly not failed to follow CSKT's requirements.

2. **THE COLLEGE'S SELF-STATING PURPOSE CLAIM IS NOT BEING CARRIED OUT IN ITS FUNCTIONS.**

The second factor under the *White* test is purpose. While Defendants have asserted tribal purposes, the reality is the College's purpose focuses on geographical areas and is not limited to American Indian students. These purposes are not sufficiently identified with the Tribes to satisfy this element.

a. Articles of Incorporation are not tribally oriented but geographical

In addition, the Articles of Incorporation of the Community College do not specify that they are for Tribal education. The Articles state "[t]o provide post-secondary opportunities for residents of the Flathead Indian Reservation…" *College's Response to Plaintiffs' First Discovery Requests*, RFA No. 13. The College in their discovery response went on to state "The College admits that the Articles do not state that the purpose is to provide secondary education to "Native Americans," but many "residents of the Flathead Indian Reservation" are "Native Americans…" *Id*. The College admits that tribal membership is not a requirement for enrollment in classes. *College's Response to Plaintiffs' First Discovery Requests*, RFA No. 11.

As there are residents that reside in the Flathead Indian Reservation that are not tribal its purpose was purely geographical instead of a particular group of people they were serving. Clearly a local college is going to have the purpose of providing post-secondary opportunities to those that are closest to them geographically. As the purpose is for a geographical purposes instead of a tribal purposes, the College does not fulfill the purpose element of the Tribe.

Further, 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).

b. The enrollment numbers reported by the College have been less than 50% tribal enrollment

The Defendants were asked to provide the annual reports for the College. In response they provided the annual reports provided by CSKT. In some of the reports it lists the breakdown of enrollment in the College based on tribal membership for the year. For the years 2006 through 2008 it was reported that tribal enrollment was below a 50% mark. See Exhibit "I"

Year	Total Enrollment	Tribal Member
2006	1,743	823
2007	1,743	712
2008	1,600	715

Even the College's own President's report for 2005 indicates that the College was less than two thirds Native American enrollment. The report indicates that there were 1,500 total enrolled students of which 877 were "Indian Students." See Exhibit "J." The College has indicated that it is a tribal focused college, yet the numbers that have been reported do not reflect the level of focus claimed by the College.

The Defendants provided information that appears to contradict its position that they are focused on Native American education. Under the *White* factors the purpose element is not met as they are geographically interested and the numbers reported by the College show that tribal enrollment is not the motivating purpose.

3. THE CSKT IS NOT IN CONTROL OF THE COLLEGE

In arm-of-the-state as in arm of-the-tribe cases, courts must examine whether in form and in practice the entity is under the sovereign's substantial, actual control (suggesting the entity is an arm of the sovereign), or whether instead it is essentially independent (suggesting it is not). *Alaska Cargo Transp. v. Alaska R.R. Corp*., 5 F.3d 378, 381 (9th Cir. 1993).

a. The College controls and manages its own operations

In their discovery responses the Defendants state "The College admits that Tribal Council does not directly manage, control, or direct the day-to-day affairs of the College-duties it has delegated to the College's Board of Directors…" *College's Response to Plaintiffs' First Discovery Requests*, RFA No. 3. The College then goes on to state that in 1987, ten years after they claimed the College was founded, the CSKT Tribal Council delegated to the College Board all powers necessary to affect any purpose for which the College is organized. However, their documentation shows that the board was already independent and making unilateral actions prior to this date. As discussed above, the Community College Board autonomously voted

to change the name of the corporation. The Board then took steps to incorporate the College with the state, yet took no action to incorporate the College with the Tribe.

In addition, the College references a 2003 filling with the Tribal Corporation Office, but that document indicates that the CSKT was going to dissolve the College. If the CSKT was in control of the College, it would not have taken actions to dissolve the College for non-compliance issues. See Exhibit "G."

The College also took actions completely independent from the CSKT. The College developed its own Policy Handbook. See Exhibit "K." The College also voted on whether Board members would remain on the board independently from the CSKT. *Id*. In this case, it appears that a board member was going to be away from the Pablo area and was going to be in Bozeman. The College Board voted and agreed that they would not keep this individual as a board member while she was away. *Id*. This type of action taken by the College undermines the argument that the CSKT Council is the entity responsible for retention of board members.

In addition, the Defendants argue that the CSKT Tribal Council had power over the College's actions. However, in the vast amount of documents they provided it was unclear on whether the CSKT Tribal Council ever stopped, changed, vetoed or otherwise prohibited any of the College's actions. Essentially, the College had full control over itself and has not provided any pinpoint citations to when the CSKT took action that was out of the College's control.

The College also admits that there was never a CSKT Tribal Council member on the Board of the College during the years in which the College received federal grants. *College's Response to Plaintiffs' First Discovery Requests*, RFA No. 6. Nor is a CSKT Tribal Council member an administrative member (meaning President, Vice President or Dean of Students) to the College. C*ollege's Response to Plaintiffs' First Discovery Requests*, RFA No. 8.

The Defendants also stated that the College's Board of Directors "delegates duties relating to day-to-day operations and decisions to the College President whom they hire to fulfill those duties. The President further delegates some decision-making and daily operational duties to other employees." *College's Response to Plaintiffs' First Discovery Requests*, Int No. 9. In essence, the control of the College is done through the College's Board of Directors and the President. There may be a reporting system that is in place with the CSKT, however, merely reporting is not controlling.

Clearly, the College's Board is separate and not under the actual control of the CSKT. As there has been no indication that the College is under the control of the CSKT, the control factor under the *White* analysis is not met.

b. The accreditation of the College evidences that the College is independent from the CSKT.

The College admits in its discovery that "[t]o be accredited, the college must have a governing board and, "[e]ven when supported by or affiliated with … political

… organizations," **must operate with "appropriate autonomy**." *College's Response to Plaintiffs' First Discovery Requests*, RFA No. 3. The College's membership with the North West Commission on Colleges and Universities ("NWCCU") is predicated on the fact that they are not controlled by another entity.

It is unclear on how many years the College was part of the NWCCU as there is evidence that the College either lost its accreditation or was somehow not part of NWCCU. The 2013 Annual report from the CSKT indicates that "SKC was reaccredited by the Northwest Commission on Colleges and Universities (NWCCU) following a self-study and site visit in fall 2013." See Exhibit "L."

"Thus the Board is primarily responsible for managing, controlling, and directing the affairs of the College as required by accreditation standards and Congress through the TCCUA…" *College's Response to Plaintiffs' First Discovery Requests*, RFA No. 3. The College has not shown that the CSKT is anything more than an entity to which reports are to be made. A Montana corporation has a similar duty to report to the state on a regular basis through annual reports. However, the mere reporting action does not make a Montana corporation an arm of the state.

c. The College is not part of the CSKT's education department

The CSKT has established an Education Department. The Education Department is separate from the College. The College may work with the Education Department on many issues, but as the Education Department is

separate it would be duplicative to allow both the College and the Education Department the same status from the tribe.

d. The College controlled which programs are taught to enrolled students

The College is in control of which programs they teach to the enrolled students. The College without CSKT supervision controls what programs are available at the College. The College Board meetings demonstrate that the College is free to control what is being offered by the College.

4. THE CSKT DOES NOT TREAT THE COLLEGE AS AN ARM OF THE TRIBE BUT AS A CONTRACTUAL RELATIONSHIP

a. The College asserts that it is not part of the CSKT

When asked about who would be responsible for liabilities of the College in discovery, the College stated that the CSKT would be only liable for College actions "on matters related to collaborative or joint projects between the College and the Tribes or Tribal departments." *College's Response to Plaintiffs' First Discovery Requests*, Int. No. 3. This type of statement demonstrates the College views the CSKT as liable with the College only when they are working on joint projects and in very limited situations.. This belief is also demonstrated by the CSKT as some of the annual reports of the CSKT do not include information about the College.

b. The CSKT does not provide legal indemnification to the College

During Discovery the Defendants were asked about what indemnification, legal support, financial reimbursement or other protections the CSKT provides the College. The response provided by the College was "[t]he Tribes do not provide any legal indemnification to the College." *College's Response to Plaintiffs' First Discovery Requests*, Int. No. 8. In regards to legal support, the College indicated that they occasionally received legal assistance from the CSKT's legal department, but "at least since 2005, the College has typically retained its own counsel, consulting with Legal Department only on an informal and occasional basis." *Id*.

c. The College and the CSKT have a contractual relationship with each other.

The College and the CSKT have a contractual relationship with each other. This includes the land that the College is operating on. The original lease between the College and the CSKT was dated September 12, 1980. See Exhibit "M." The Lease indicates that the rental rate of the property "is based upon comparative commercial leases in the Pablo area." *Id*. The CSKT was not giving a discount to the College for the land, but market rate. The CSKT also assured that they were holding the College to a contractual relationship by including an arbitration provision and attorney fee provision. *Id*. Later the College built a new building on CSKT land, and the CSKT again required a leasehold mortgage in the amount of $100,000 for the project to occur. See Exhibit "N."

On a different lease that covered the "Tribal Library," the President of the College, asked the CSKT to waive the lease that the College had to pay for the Tribal Library because the College was staffing the library. See Exhibit "O." The CSKT was still requiring a lease from the College when the College was staffing the facility. In addition, the President wanted to classify the library as a College Library instead of the Tribal Library.

The Defendants also indicated that the "[t]he Tribes and various tribal departments also frequently enter into MOAs or MOUs with the College, which often include financial payments from the Tribes to the College in furtherance of the collaborative projects. (See e.g. MOAs/MOUs, bates –numbered SKC 001095-1106, 001125-001135, 001218-001221, 001476-001485, 002012-002013, and 31253-31264, and General Ledgers, bates –numbered SKC031038-31072.)

The Tribes also make payments to the College on behalf of individual tribal members. This occurs through the Tribal Education Department's Higher Education Scholarship program, through departmental programs like DHRD programs for low-income students, or in response to direct requests from tribal members to Tribal Council. The College credits students' accounts for these payments." *College's Response to Plaintiffs' First Discovery Requests*, Int. No. 2. What the Defendants are characterizing as funds going to the College from the CSKT appear more to be contractual relationships in which one entity provides services and the other provides payments. Clearly this is not a financial funding of the College by the CSKT.

As the College asserts its own independence and there is no control of the CSKT over the College this is clearly not a case where the College should be considered an arm of the tribe.

5. **THE COLLEGE'S FINANCING IS INDEPENDENT FROM THE CSKT AND MAINTAINS ITS OWN FINANCING.**

Many courts have held that the financial factor is the most important factor when evaluating whether an entity is an arm of the tribe. When considering whether an entity is an arm of the tribe for purposes of tribal sovereign immunity, the court in *Runyun* found that "the entity's financial relationship with the tribe is... of paramount importance -- if a judgment against it will not reach the tribe's assets or if it lacks the power to bind or obligate the funds of the [tribe],' it is unlikely that the tribe is the real party in interest. On the other hand, the court found that the entity may be an arm of the tribe if it would be legally responsible for the entity's obligations." *Johnson v. Harrah's Kan. Casino Corp*., No. 04-4142-JAR, 2006 U.S. Dist. LEXIS 7299, at *19 (D. Kan. Feb. 23, 2006); citing *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 440-41 (Alaska 2004).

In the present case, the record has been made clear that the CSKT will not be liable for the damages found in the complaint. During discovery it was asked "[p]lease identify what entity, insurance, or institution provides financial payments on behalf of the Salish Kootenai College if a judgment, collection matter, lien, or liability is asserted against Salish Kootenai College…" In response to this question

the Defendants responded, "[a]s a non-profit corporation, the College is primarily responsible if a judgment, collection matter, lien, or liability is asserted against it." *College's Response to Plaintiffs' First Discovery Requests,* Int. No. 3. The Defendants went on to identify two insurance policies that would cover them in cases of liability. *Id*.

The College is making the representation that the CSKT will not be financially impacted by this action or others against the College. The important financial factor, as it relates to liabilities, is not satisfied under the *White* analysis.

a. The College asserted that the Tribe would not be liable in this case

The Defendants went on to state that the CSKT would not be liable in this situation and could only identify "two narrow areas" in which the Tribe would theoretically be liable for the College's actions. The "two narrow areas" are 1) where the CSKT receives a grant and passes it through the College and 2) on matters related to collaborative or joint projects between the College and the CSKT. *College's Response to Plaintiffs' First Discovery Requests*, Int. No. 3.

In the present case, it was not the CSKT that made the application, but the College. See Exhibit "P." The Defendants identified grants that pass through CSKT. However, the pass through grants are only limited to: IMLS, Bridging the Divide, TREES, Food and Fitness, Native Plants, and Historical Preservation. *College's*

Response to Plaintiffs' First Discovery Requests, Int. No. 8. These are grants not related to the action at hand.

The Defendants also acknowledge that the CSKT does not pay for any of the College's debts, judgments or obligations. *College's Response to Plaintiffs' First Discovery Requests*, RFA No. 2.

b. The Foundation administers the finances of the College

The Foundation, which was organized only under Montana state law and not tribal law (*College's Response to Plaintiffs' First Discovery Requests*, RFA No. 20), "solicits donations and gifts for the College and serves as trustee for the College's endowment, raising, holding, investing, and otherwise managing endowment funds, as well as some land and other capital assets… and administers scholarships… [and] has historically administered some grants related to the endowment or capital campaigns for the College." *College's First Supplemental Response to Plaintiffs' First Discovery Requests*, Int. No. 12.

The Foundation was registered with the state of Montana in May of 1988. The Board of Directors meetings do not indicate when the Board moved to establish the Foundation. Of note, however, is that the April 1988 Minutes are substantially different in form from all other months' Board's minutes. However it was the President of the College that signed at the incorporator. See Doc. 26-1, Articles of Incorporation.

The Defendants included Confidential audits for the years 2005 and 2006. *College's First Supplemental Response to Plaintiffs' First Discovery Requests*, RFP. No. 19. The audits show that for the investments held by the Foundation was over **116 times** that of what the College held for investments for 2005 and **160 times** what the College held for investments for 2006. Moreover, the investment value of the Foundation is substantial. Exhibit "Q" and "R" to be submitted upon approval of Plaintiffs' Motion to File under Seal. Meanwhile the Foundation had zero liabilities. Clearly, the Foundation is acting as the financial resource for the College. It is unclear on why additional years were not provided as this information would be relevant about the financial relationship between the College and the Foundation.

The Defendants point to their relationship with the CSKT as the main financial support. However, it is clear that a majority of the financial support in fact stem from the Foundation's investments.

As the Foundation was established to manage the finances of the College, the CSKT had little to nothing to do with the finances of the College. Moreover, the College asserts that the CSKT would not be liable for the obligations of the College. This factor weighs in finding that the College is not an arm of the CSKT.

CONCLUSION

The College is subject to suit under the FCA as they are a political subdivision which is a person under the FCA. The College has also waived any immunity that it may have been afforded. As the College can sue and be sued, the US Supreme Court

indicates that subject matter jurisdiction is proper. In addition, the College cannot demonstrate that it meets the *White* factors to be considered an arm of the tribe.

For the foregoing reasons, the Court should deny Defendant's Motion to Dismiss in its entirety and permit additional discovery to commence.

DATED this 5th day of February, 2018.

DATSOPOULOS, MacDONALD & LIND, P.C.

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

CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, excluding captions, certificates of service and compliance, table of contents, table of authorities, and exhibit index is 7914.

DATSOPOULOS, MacDONALD & LIND, P.C.

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