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

<p>STEPHEN McCOY, Plaintiff, vs. SALISH KOOTENAI COLLEGE, INC. d/b/a SALISH KOOTENAI COLLEGE, Defendant.</p>	<p>CV 17-88-M-DLC PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS</p>
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Relief Requested

The Plaintiff Stephen McCoy (“McCoy”) submits the following Response Brief in opposition to the Defendant’s Motion to Dismiss. As set forth below, the evidence demonstrates that the Defendant Salish Kootenai College, Inc. (“SKC”) is not an arm of the Confederated Salish and Kootenai Tribes (“CSKT”) under the factors set forth in *White*; therefore, the SKC is an employer subject to Title VII of the Civil Rights Act of 1964.

Factual and Procedural Background

On June 26, 2017, McCoy filed his Complaint against the SKC. (Doc. 1.) McCoy, a former Director of Academic Success of the SKC with over 23 years of employment with SKC, alleged that the SKC subjected to him to sex-based harassment, including isolating McCoy from other employees of SKC, making allegations and insinuations that McCoy was involved in an improper romantic relationship with and/or made romantic advances to personnel of entities with which SKC conducts business, removing of McCoy from his positions as Coordinator of the Achieving the Dream grant and Inter-Campus Coordinator, and subjecting McCoy to unwarranted discipline. (Id at ¶ 7.) McCoy further alleged that due to this pervasive and continuous harassment, he was forced to resign from his employment with SKC on December 16, 2016. (Id at ¶ 10.) McCoy alleged

that this harassment and hostile work environment constituted sex-based discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Montana Human Rights Act. (Id at ¶¶ 2, 15-22.)

After being served with the Complaint, the SKC moved this Court for a scheduling order for jurisdictional discovery, alleging that the Court lacked jurisdiction over McCoy's claims because it is an arm of the CSKT and is therefore not subject to Title VII claims. (Doc. 4).

Standard

The Salish Kootenai College, Inc. ("SKC") moved to dismiss McCoy's claims based on an alleged lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In doing so, the SKC alleges that it is not an "employer" as defined by 42 U.S.C. § 2000e(b), and therefore this Court lacks subject matter jurisdiction. The determination of whether SKC falls outside the definition of a Title VII "employer" is intertwined with the merits of the Title VII claim. See *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir. 1983) ("Normally, the question of jurisdiction and the merits of an action will be considered intertwined, where, as here, 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief'") (citation omitted).

In ruling on a jurisdictional motion involving factual issues which also go to the merits, such as this one, the district court should utilize the standard applicable to summary judgment motions. Therefore, the party moving to dismiss for lack of subject matter jurisdiction should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.

Pederson v. U.S., 1990 U.S. Dist. LEXIS 2454, *8 (D. Mont. 1990) (citing *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983)). Unless the party moving to dismiss can meet this standard, “the jurisdictional facts **must be determined at trial** by the trier of fact.” *Id* (emphasis added).

Argument

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment, stating that is unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex ...” 42 U.S.C. § 2000e-2. In defining the term “employer”, Title VII excludes Indian tribes from the statutory definition of employers subjected to Title VII. 42 U.S.C. §2000e(b). This exclusion of Indian tribes also extends to businesses which serve as an arm of an Indian tribe. *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998).

In determining whether an entity is an arm of an Indian tribe, the Court utilizes a five-factor test adopted by the Ninth Circuit in *White v. University of California*. 765 F.3d 1010, 1025 (9th Cir. 2014). The five *White* factors are: “(1) the method of creation of the [entity]; (2) [the entity’s] purpose; (3) [the entity’s] structure, ownership, and management, including the amount of control the tribe has over the [entity]; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the [entity].” *Id.*, (quoting *Breakthrough Mgmt. Grp., Inc., v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).

For the reasons set forth below, applying the facts to each factor of the *White* test demonstrates that the Salish Kootenai College, Inc. (“SKC”) is not an arm of the Confederated Salish and Kootenai Tribes (“CSKT”). Therefore, SKC falls within Title VII’s definition of an “employer” and its *Motion to Dismiss* must be denied.

First *White* Factor – The method of creation of the SKC.

The method of creation of the SKC strongly weighs in favor of determining that it is not an arm of the CSKT and is therefore subject to Title VII.

In determining whether an entity is an arm of a tribe, several courts have focused on the law under which the entity was formed, with formation under state law weighing against supporting the conclusion that the entity is not an arm of the

tribe. See *NLRB v. Chapa De Indian Health Program*, 316 F.3d 995, 1000 (9th Cir. 2003) (concluding that entity formed under the laws of the state of California as a California non-profit corporation was not an arm of the tribe); *People v. Miami Nation Enterprises*, 386 P.3d 357, 372 (Cal. 2016); *Uniband, Inc. v. Comm’r*, 140 T.C. 230, 252-253 (TC 2013) (concluding that business was incorporated under the laws of Delaware supported the finding that the business was not an arm of the tribe); compared to *Breakthrough Mgmt. Grp., Inc., v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (concluding that formation of entity under tribal law supported the finding that the entity was an arm of the tribe).

It cannot be disputed that the SKC is a Montana non-profit corporation formed under the laws of the state of Montana. On June 9, 1978, Articles of Incorporation were executed creating the Salish Kootenai Community College, Inc., under which it denominated itself “A Montana Corporation.” Ex. 1 p. 2. These Articles of Incorporation were filed with the Montana Secretary of State on September 12, 1978, and the Montana Secretary of State issued a certificate of incorporation to the Salish Kootenai Community College, Inc. on the same day, pursuant to the authority vested in him under the laws of the state of Montana. *Id* at 1. As unequivocally stated in the Articles themselves, the incorporators acted as citizens of the United States of America and sought to incorporate pursuant to and under the authority of the laws of the state of Montana. *Id* at 2.

Thereafter, on March 7, 1983, the SKC filed Articles of Amendment with the Montana Secretary of State, formally changing the name of the Montana non-profit corporation from Salish Kootenai Community College, Inc. to Salish Kootenai College, Inc. Ex. 2. Further evidence that SKC is an entity formed under the laws of the Montana is provided by each and every annual report filed by SKC with Montana. On each and every annual report filed by SKC with Montana, under the heading “State/Country of Incorporation” the SKC has listed “Montana” as the jurisdiction under which it was incorporated. Ex. 3.

It is true that the CSKT also established an entity pursuant to tribal law which it also called the Salish Kootenai Community College, Inc. (Ex. 4); however, this entity is factually and legally distinct from the named party in this matter, the Montana Salish Kootenai Community College, Inc. which amended its name to Salish Kootenai College, Inc. This is first demonstrated by a comparison of the Articles of Incorporation for each entity. As discussed above, the incorporators of the SKC expressly stated that they acted as citizens of the United States of America and sought to incorporate pursuant to and under the authority of the laws of the state of Montana. Ex. 1 at 2. In comparison, the incorporators of the tribal entity stated that they were incorporating under CSKT tribal laws and were incorporating as citizens of the CSKT.

Similarly, Article III of each set of Articles of Incorporation are distinctly different, with Article III of the Montana corporation making no reference to CSKT and stating generally that the Montana corporation has the power to sue or be sued, whereas Article III of the tribal corporation makes several distinct references to CSKT and reserves several rights with CSKT, including the right to dissolve the corporation, and states that the tribal corporation may only be sued or sue in tribal court. (Ex. 1 p. 3-4; Ex. 4 p. 2-3). Perhaps more importantly, Article VIII of the tribal corporation reserves several distinct rights and powers to the CSKT, while no such article exists anywhere within the Articles of Incorporation of the Montana corporation. (Ex. 4 p. 6; Ex. 1). Lastly, the names of both the incorporators and the initial board of directors differ for each corporation. (Ex. 1 p. 6-7; Ex. 4 p. 6-7.)

Not only are the two entities factually distinct, they are also legally distinct. Pursuant to Montana law, a non-profit corporation organized by a tribe under the laws of the tribe is considered a “foreign corporation.” Montana Code Annotated § 35-2-114. However, as described previously, the SKC (the named-Defendant in this lawsuit) has continually filed its annual report stating that it is a Montana corporation, and not a foreign corporation organized under the laws of the CSKT. Furthermore, the SKC has previously admitted that the corporate document formally amending the name of the corporation to Salish Kootenai College, Inc.

was only filed with the Montana Secretary of State for the Montana corporation. (See *Cain v. Salish Kootenai College, Inc.*, (Case No. 12-181-M-BMM), Doc. 92-11 pg. 23-24).

As established above, the SKC (the named Defendant in this lawsuit) was formed under the laws of the state of Montana, and operates as a Montana non-profit corporation. As such, its method of creation supports the conclusion that it is not an arm of the CSKT and is therefore an employer subject to Title VII.

Second White Factor – The SKC’s purpose.

The stated purpose of the SKC also weighs in favor of finding that the SKC is not an arm of the tribe.

In determining whether an entity’s stated purpose supports finding the entity to be an arm of the tribe, courts have looked to whether the entity’s stated purpose was for the financial benefit of the tribe and to aid in tribal self-governance.

Breakthrough, 629 F.3d at 1192. In the event the entity’s stated purpose meets this threshold, it must also be determined the degree to which the entity actually serves the stated purpose. *Miami Nation Enterprises*, 386 P.3d at 372.

The SKC’s purpose as stated in its Articles of Incorporation clearly establishes that the SKC was neither created for the financial benefit of CSKT or to aid in CSKT self-governance. Ex. 1. The following constitutes a verbatim recitation of the purposes enumerated in the SKC’s Articles of Incorporation:

To provide post secondary educational opportunities for residents of the Flathead Indian Reservation in the following areas: 1. Vocational Training, 2. College Transfer Programs, 3. Occupational Training, 4. Community Service, 5. Indian Culture and History, 6. Adult Basic Education.

To measure the needs, talents, and aspirations of the residents of the Flathead Indian Reservation and provide a comprehensive program in recognition of the desires of the Flathead Indian Reservation Community.

To promote and conduct such research and development activities as deemed necessary to the efficient provision of post secondary educational opportunities on the Flathead Indian Reservation.

To provide technical assistance to tribal agencies and institutions to assist these agencies improve program effectiveness.

Ex. 1 p. 3-4.

These stated purposes neither reference the CSKT, nor do they state any purpose that could be construed as concerning the financial benefit of the CSKT or CSKT self-governance. In fact, rather than discussing purposes in service of the CSKT, the Articles of Incorporation set forth purposes in service of a geographic location, namely the Flathead Indian Reservation. The Flathead Indian Reservation is home to many people who are neither Native Americans nor enrolled tribal members of the CSKT, a fact admitted to previously by SKC. (See *Cain v. Salish Kootenai College, Inc.*, (Case No. 12-181-M-BMM), Doc. 92-11 pg. 34-35).

Additionally, to the extent the SKC argues that its stated purpose is for overriding benefit of the CSKT, financial or otherwise, the facts demonstrate that

the SKC does not **actually** serve such a purpose. First, as a non-profit organization, it is axiomatic that the SKC is not a business which is incorporated to produce profits and/or direct financial benefits to the CSKT. To the extent that it could argue that CSKT derives a financial benefit because the SKC employs CSKT Tribal members, such an argument is not borne out by the actual employment numbers. For instance, SKC's 2005 President's Report sets forth the SKC's employment demographics, listing 204 full-time employees, of which 61 are CSKT Tribal members, meaning less than 30% of the SKC's employees Tribal members. Ex. 5, p. 7. These numbers have remained roughly consistent since the 2005 Report. Ex. 6, SKC 2016 Fact Book, p. 18.

Similarly, to the extent the SKC argues that its purpose is to benefit the CSKT through the education of Tribal members, the facts demonstrate that the majority of the students educated at the SKC are not CSKT Tribal members. For instance, in 2015 the SKC prepared a report wherein it provided a breakdown of the student body. Ex. 7, SKC 2015 Annual Report. Pursuant to this report, the SKC had a total student body of 801. Of those 801 students, 585 were enrolled members of an Indian tribe or a descendant of an Indian tribe, while only 39% (or at most 228 students) were CSKT Tribal members or descendants. *Id.* at p. 14. As such, at most 28% of the entire SKC student body were affiliated with CSKT, with the majority being non-affiliated. A review of SKC's 2005 President's Report

provides a similar percentage of students affiliated with CSKT (28%). Ex. 5 p. 7. Moreover, to the extent that the SKC argues that serving a general purpose of educating Native American students is sufficient to satisfy the factors under *White*, it should be noted the SKC has repeatedly had a student body with less than 50% tribal member enrollment. Ex. 8, Excerpts of CSKT Annual Reports.

As demonstrated above, the SKC's purpose is neither for, nor directly related, to the financial benefit of the CSKT or to its self-governance. While CSKT Tribal members may derive benefit from the SKC as both faculty and students, they represent a minority of the people deriving such a benefit served by SKC. Therefore, its stated purpose supports the conclusion that it is not an arm of the CSKT and is therefore an employer subject to Title VII.

Third *White* Factor – The SKC's structure, ownership, and management, including the lack of control the CSKT has over the SKC.

As the SKC operates independently of the CSKT, the SKC's structure, ownership and management support weighs in favor of finding that the SKC is not an arm of the tribe.

In determining whether an entity's structure, ownership, and management, including the amount of control the tribe has over the entity supports finding the entity to be an arm of the tribe, "[r]elevant considerations include the entity's formal governance structure, the extent to which it is owned by the tribe, and the

entity's day-to-day management.” *Miami Nation Enters.*, 386 P.3d at 373.

“Evidence that the tribe is a passive owner, neglects its governance roles, or otherwise exercises little or no control or oversight weighs against immunity.” *Id.*

Whether the Tribal Council Members are also members of the entity at issue can be instructive. *Breakthrough*, 629 F.3d at 1193.

Here, both the structure of SKC and the lack of control exercised by the CSKT weigh against finding the SKC to be an arm of the tribe.

First, the Articles of Incorporation for the SKC contain no reference to CSKT control over the corporation, or any powers reserved to the CSKT. Ex. 1. Additionally, the SKC admits that the CSKT does nothing to control day-to-day activities and also concedes that such independence from Tribal control is required for accreditation. Exhibit 9, *Defendant’s Response to Plaintiff’s First Discovery Requests*, Interrogatory 5.

SKC’s choice of accreditation critically defeats the claim that it is an arm of the Tribe. The SKC seeks and obtains its accreditation under the auspices of the Northwest Commission on Colleges and Universities (hereafter NWCCU). SKC has apparently maintained the same accreditation since June 18, 1984. Ex. 10. The NWCCU requires that the organization “has sufficient *organizational and operational independence* to be held accountable and responsible for meeting the Commission’s Standards and Eligibility Requirements.” See NWCCU

Accreditation Handbook (January 2017 Edition), <http://www.nwccu.org/wp-content/uploads/2016/02/Accreditation-Handook-2017-edition.pdf>, pg. 19

(emphasis added). Such standards include adherence to ethical standards in all operations and relationships, academic freedom protecting constituencies from inappropriate internal and external influences, pressures, harassment, and discrimination. *Id.*, pg. 19, 26. Similarly, the institution must adhere to policies that prohibit conflict of interest on the part of members of the governing board and employees. *Id.*, pg. 25. These expectations apply, even when an entity is “supported by or affiliated with social, political, corporate or religious organization.” *Id.* Perhaps most importantly, the SKC has repeatedly stated, under penalty of perjury, that no governance decisions of the organization are reserved to (or subject to approval by) members, stockholders, or persons other than the governing body. Ex. 11, SKC 2011 Form 990 p. 6; Ex. 12, SKC 2012 Form 990 p. 6; Ex. 13, SKC 2013 Form 990 p. 6; Ex. 14, SKC 2014 Form 990 p. 6; Ex. 15, SKC 2015 Form 990 p. 6.

Similarly, the structure of the SKC, as evidenced by its Organizational Chart, demonstrates the CSKT’s lack of control and oversight. Ex. 16. The CSKT is listed nowhere within the SKC’s Organizational Chart. Furthermore, the SKC admits that SKC Board Members are not required to be members of the CSKT Tribal Council and that a CSKT Tribal Council member was never on the SKC Board during the years the SKC received federal grants. (See *Cain v. Salish*

Kootenai College, Inc., (Case No. 12-181-M-BMM), Doc. 92-11 pg. 30-31). The SKC has similarly admitted that becoming an administrative member of the SKC does not require Tribal Council membership, and that none of the current administrative members of the SKC are Tribal Council members. (*Id.*).

While the SKC argues that the CSKT and CSKT Tribal Council has power over the SKC's actions, in the voluminous number of documents it has provided, it is unclear whether the CSKT ever stopped, changed, vetoed or otherwise prohibited any of the SKC's actions. Instead, it appears that the SKC independently handles and approves all decisions, both major and minor. For instance, the SKC Board Minutes from June 16, 2017 show the Board unilaterally approving the 2017-2018 budget, as well as an across-the-board salary increase. This conforms with the SKC's has affirmatively stated that no group other than its governing body may make decisions affecting its governance.

Fourth White Factor –

The intent of sharing CSKT's sovereign immunity with the SKC.

The facts demonstrate that the CSKT's sovereign immunity is not shared with the SKC and the CSKT did not intend on sharing its sovereign immunity with SKC. Therefore, this factor weighs strongly in favor of finding that the SKC is not an arm of the tribe.

When the articles of incorporation creating the entity are silent as to a tribe's intent in sharing its sovereign immunity, this factor will generally weigh against finding that the entity is an arm of the tribe. See *Breakthrough*, 629 F.3d at 1193-1194; *Miami Nation Enterprises*, 386 p.3d at 372. Additionally, actions outside of the incorporating documents can be utilized to determine the intent to share a tribe's sovereign immunity. *Miami Nation Enterprises*, 386 p.3d at 372.

In the present case, the Articles of Incorporation for the SKC make no mention of the sharing of sovereign immunity with the CSKT. Ex. 1. In fact, as discussed previously, these Articles of Incorporation contain no direct reference to the CSKT. Furthermore, the sole provision regarding suits by and against the SKC (Article III(c)), in no way limits the entity's ability to be sued or references immunity, either directly or indirectly. This silence weighs heavily against finding the SKC to be an arm of the CSKT.

This finding is further supported by SKC's own actions. First, the SKC Policy Manual expressly states that the SKC can be sued in Federal Court. Exhibit 17 p. 11. Next, the SKC has executed several documents assuring that is subject to, and will be compliant with, all Federal statutes relating to nondiscrimination. For instance, in its application for the IHS PINE Grant, the SKC assured that it would comply with all Federal statutes relating to nondiscrimination. Ex. 18 p. 10.

Similarly, the SKC applied for, was awarded, and executed a contract for the “Cultural Resources Management Services, Storage and Maintenance at Libby Dam and Lake Koocanusa Montana” Project with the U.S. Department of the Army. Ex. 19. Included in the contract is an “Equal Opportunity” clause which states, among other things, that the SKC will comply with Executive Order 11246 and if it fails to comply with Executive Order 11246, it agrees that sanctions as provided in Executive Order 11246 may be assessed against it. *Id.* at p. 55-56. Executive Order 11246 prohibits contractors performing work under a government contract from engaging in discrimination in employment and provides that in the event it engages in such discriminatory conduct, proceedings under Title VII of the Civil Rights Act may be instituted against it. Executive Order 11246, §§ 202, 209.

These acts by the SKC constitute, at the very least, an implicit acknowledgment that the SKC does not share in the CSKT sovereign immunity. These acts, combined with the Articles of Incorporation’s silence as to an intent to share in CSKT’s sovereign immunity, support the conclusion that SKC cannot meet the fourth factor of the *White* test, and is not an arm of the CSKT and is therefore an employer subject to Title VII.

Fifth White Factor – The financial relationship between CSKT and SKC.

The lack of the required financial relationship between the SKC and the CSKT weighs in favor of finding that the SKC is not an arm of the tribe.

Under “arm of the tribe” analysis, “the starting point for analyzing the financial relationship between the entity and the tribe is whether a judgment against the entity would reach the tribe’s assets.” *Miami Nation Enterprises*, 386 p.3d at 373. In doing so, courts consider the extent the tribe “depends ... on the [entity] for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities.” *Breakthrough*, 629 F.3d at 1195.

The facts clearly demonstrate that a judgment against the SKC would not reach the CSKT’s assets, and further that the CSKT does not depend on revenue from the SKC to fund its governmental functions, support its tribal members or otherwise in the CSKT’s search for economic development opportunities. First, the SKC has previously acknowledged that it is the entity primarily responsible for any judgment or liability assessed against it, and that the CSKT generally does not pay for the debts, judgments, or obligations of the SKC. (See *Cain v. Salish Kootenai College, Inc.*, (Case No. 12-181-M-BMM), Doc. 92-11 pg. 12, 25).

Second, it cannot be credibly argued that the CSKT depends on SKC for revenue to fund the CSKT governmental functions, support its tribal members or otherwise create economic opportunities. As a non-profit organization, it stands to reason that SKC funds cannot be utilized to fund the CSKT. Furthermore, as discussed previously, to the extent that it could argue that CSKT derives a

significant financial benefit because the SKC employs CSKT Tribal members, such an argument is not borne out by the actual employment numbers. For instance, SKC's 2005 President's Report sets forth the SKC's employment demographics, listing 204 full-time employees, of which 61 are CSKT Tribal members, meaning less than 30% of the SKC's employees Tribal members. Ex. 5 p. 7. These numbers have remained roughly consistent since the 2005 Report. Ex. 6 p. 18. Additionally, SKC's *Brief* concedes this point, as it does not provide any example of how the SKC provides revenue to the CSKT or how the CSKT otherwise depends in SKC revenue, and instead discusses ways in which it believes the SKC is funded by CSKT. (See Doc. 13, p. 32-35). These facts are in stark contrast to the facts in *Breakthrough*, where the court found that 100% of the entities revenue went to the tribe, supporting the conclusion that the entity was an arm of the tribe. 629 F.3d at 1194-1195.

The evidence is clear that rather than either party being dependent on the other, the parties share a contractual relationship with one another. For example, the SKC leases the land upon which it operates the college from the CSKT. Ex. 20 – SKC Land Lease. Pursuant to the terms of the original lease, the rental rate of the property was “based upon comparative commercial leases in the Pablo area.” *Id* p. 1. Furthermore, similar to many arms-length contracts between parties, the lease contains an attorney fee provision. *Id* p. 8. It stretches the imagination to

believe that a subsidiary arm of an organization would contract to recover attorney fees from itself in the event that it breaches an obligation imposed or agreed to by itself. This contractual relationship is further demonstrated by the various memorandums of agreement/understanding that the parties frequently entered into, wherein one party agrees to provide services and the other party agrees to provide payment or other consideration for the services provided, just as any other contract. See e.g. Ex. 21, Assorted MOU/MOAs.

Additionally, contrary to the SKC's implication that it is dependent on the CSKT for its funding, financial reports prepared on behalf of the SKC have repeatedly demonstrated that the SKC's most significant funding sources are federal grants and contracts, and student tuition and fees. See e.g. Ex. 22, 2004 Financial Report p. 9-10; Ex. 23, 2008 Financial and Auditor's Report p. 7-9; Ex. 24, 2010 Financial Statements and Independent Auditor's Report p. 7-8; Ex. 25, 2012 Financial Statements and Independent Auditor's Report p. 6 and 9; Ex. 26, 2014 Audited Financial Statements p. 10-11; Ex. 27, 2016 Audited Financial Statements p. 10-11. This is also borne out by the SKC's IRS filings.

The facts set forth above demonstrate that the CSKT is not dependent on the SKC's revenue, that the SKC is not dependent on the CSKT, and that the relationship of the parties is primarily one governed by contracts between the

parties, and weigh heavily in favor of finding that the SKC is not an arm of the CSKT.

Conclusion

As fully set forth above, applying the facts of this case to the five *White* factors demonstrates that the Salish Kootenai College, Inc. is not an arm of the Confederated Salish and Kootenai Tribes. As the Salish Kootenai College, Inc. is not an arm of the Confederated Salish and Kootenai Tribes, it is not excluded from the definition of “employer” under Title VII of the Civil Rights Act of 1964. Therefore, this Court has subject matter jurisdiction over the Plaintiff Stephen McCoy’s claims against the Defendant Salish Kootenai College, Inc. and the Defendant’s *Motion to Dismiss* (Doc. 12) should be denied.

Statement of Related Case

Issues similar to those raised herein are also currently being litigated before Judge Morris in *Cain v. Salish Kootenai College, Inc.* (Case No. 12-181-M-BMM).

DATED this 16th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word is 4910 words long, excluding the Caption, Certificate of Service and Certificate of Compliance.

TIPP COBURN SCHANDELSON PC

By: /s/ Torrance L. Coburn
Torrance L. Coburn

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of March, 2018, a copy of the foregoing document was served on the following persons by the following means:

1, 2, 3 CM/ECF

1. Martin S. King
Jori Quinlan
2. Michael G. Black
3. John T. Harrison
Rhonda R. Swaney

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