

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

LESLIE ROMERO,)	Case No. 5:16-cv-05024-JLV
)	
Plaintiff,)	
)	
v.)	PLAINTIFF’S BRIEF IN
)	RESPONSE TO DEFENDANT’S
WOUNDED KNEE, LLC d/b/a SIOUX-PREME)	MOTION TO DISMISS
WOOD PRODUCTS, a South Dakota limited)	
liability company, and WOUNDED KNEE)	
COMMUNITY DEVELOPMENT)	
CORPORATION, a South Dakota corporation,)	
)	
Defendants.)	

COMES NOW Plaintiff, Leslie Romero, by and through her attorney of record, Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, LLP, and respectfully submits this Brief in Response to Defendant’s Motion to Dismiss (Doc. 55), filed by one of the two Defendants, Wounded Knee Community Development Corporation (“WKCDC”).

FACTS

A. Leslie Romero exhausted all tribal remedies, going above what was required.

The underlying facts of this case are indicated in the Complaint. In addition to those listed in the Complaint, Plaintiff met with the then president of the Oglala Sioux Tribe, Brian Brewer about her complaint. *See* Affidavit of Leslie Romero, ¶ 5. President Brewer determined that the WKCDC was not a part of the Tribe, and encouraged Plaintiff Romero to sue the WKCDC to hold them accountable. *Id.*

Plaintiff Romero also pursued her claim with the OST Tribal Employment Rights Office (“TERO”), working with Cordelia White Elk and Buffy Red Fish. *Id.* at ¶ 6. TERO determined

the WKCDC was not a part of the Tribe and instructed Plaintiff Romero to file a charge of discrimination with the EEOC. Affidavit of Leslie Romero, ¶ 7.

Plaintiff Romero appropriately came to TERO to report her claim of discrimination. After receiving a complaint, TERO determines whether the complainant's employer is an arm of the Tribe. If the complainant's employer is an arm of the Tribe, TERO would investigate the complaint. Then, the TERO commissioners would determine the issue in an administrative hearing before the TERO commission board. TERO does not handle complaints against any OST district's CDCs, as they are not a part of the Tribe. TERO determined Plaintiff Romero exhausted her tribal remedies, and her only next option was to file a charge with the EEOC. TERO determined this charge could not be handled within the Tribe because CDCs are not arms of the Tribe. TERO does not direct sexual harassment victims to tribal court, but rather the EEOC.

Plaintiff Romero also pursued her claim with Tatewin Means, the then OST Attorney General. Affidavit of Leslie Romero, ¶ 8. Tatewin Means instructed Plaintiff Romero to file a charge of discrimination with the EEOC, and that there was no need to file in tribal court as it would end up in federal court anyway. *Id.*

B. EEOC Investigation

Plaintiff filed her Charge of Discrimination with the EEOC on April 26, 2013. (Doc. 1-2.) The Notice of Charge of Discrimination was sent and mailed to "Sioux Preme Wood Products / Wounded Knee CDC at P.O. Box 200, Manderson, SD 57756" on April 30, 2013. (Doc. 1, Exhibit 2, Notice of Charge of Discrimination.) The Notice advised a position statement was due June 10, 2013. The EEOC Intake Case Log indicates on July 19, 2013, "very overdue PS [position statement]". On July 25, 2013, the EEOC investigator spoke with Lori

Mesteth on behalf of Wounded Knee CDC and faxed her the Charge of Discrimination. (Doc. 52-3, EEOC Intake Case Log,) (Doc. 52-4, Fax Cover Sheet and Charge of Discrimination) The EEOC Intake Case Log documents numerous telephone calls with various agents of Wounded Knee CDC. *Id.* On August 7, 2013, Mark St. Pierre, on behalf of Wounded Knee CDC and using the email address, "WKCDC <woundedkneecdc@gmail.com>", sent the EEOC investigator a position statement. (Doc. 52-5, Position Statement.) The position statement was written on "Wounded Knee Community Development Corporation" letterhead that identifies Mark St. Pierre as the CEO. Notably, there is no mention of tribal involvement or sovereign immunity in the position statement.

On March 20, 2014, the EEOC investigator sent a letter to Mark St. Pierre requesting additional information. (Doc. 52-6, March 20, 2014 RFI.) One question specifically inquired:

4. In regards to Wounded Knee Community Development Corporation, provide the following information:

 - e. Is Wounded Knee Community Development Corporation tribally owned? If yes, provide names/titles of the individuals who own Wounded Knee Community Development Corporation. Provide the name of the tribe.

(Doc. 52-6, March 20, 2014 RFI.) The EEOC Investigator called Lori Mesteth on April 3, 2014 and the investigator's notes reflect, "there was a board meeting on [Roby?] and they gave the document to their attorney to respond to RFI. R needs an extension. I granted an extension until April 10th. She will relay this to the attorney that the RFI is due April 10th. She will let the attorney know that I need his/her contact info. As well." (Doc. 52-3, EEOC Intake Call Log.) Wounded Knee CDC responded to the request for information on April 7, 2014 by way of letter on "Wounded Knee Community Development Corporation" letterhead and signed by Charlotte Black Elk, "Consultant to the Board of Directors". (Doc. 52-7, April 7, 2014 Letter.) There is

no response to the question of whether Wounded Knee CDC is tribally owned and no mention of tribal involvement or sovereign immunity. *Id.*

On August 21, 2014 and September 17, 2014, the EEOC investigator wrote to Charlotte Black Elk advising her response was insufficient and that that each and every question in the request for information needs to be fully answered. (Doc. 52-8, August 21, 2014.) (Doc. 52-9, September 17, 2014 Letter.) The EEOC investigator also spoke with Charlotte Black Elk on October 7, 2014, reiterated each question needed a response and granted an extension of time. (Doc. 52-3, EEOC Intake Call Log.) On October 29, 2014, John Hussman contacted the EEOC investigator, advised he was the executive director and would answer the request for information. *Id.* John Hussman requested the EEOC investigator email him so he could respond via email. *Id.* The EEOC investigator emailed John Hussman on October 29, 2014 per his request and they exchanged emails through November 21, 2014. (Doc. 52-10, October 29, 2014-November 21, 2014 email string.) Attached to one of those emails is “Responses to Correspondence dated September 17, 2014”. (Doc. 52-11, Responses.) **The response to the question of whether Wounded Knee CDC is tribally owned is “no”.** *Id.*

On October 5, 2015, Wounded Knee CDC copied the EEOC on a letter to Plaintiff’s attorney. (Doc. 52-12, October 5, 2015 Letter.) Wounded Knee CDC alleged Plaintiff was not a Wounded Knee CDC employee but instead an employee of Wounded Knee, LLC. The letter fails to mention any tribal involvement or sovereign immunity. Mr. Ecoffey signed this letter. On November 30, 2015, Wounded Knee CDC sent another letter to the EEOC and this letter was signed by all the board members. (Doc. 52-13, November 30, 2015 Letter.)

C. The “mystery” articles of incorporation

WKCDC has never, and in fact refuses, to demonstrate that the new, mystery “Articles of Incorporation of Wounded Knee District Community Development Corporation” (Doc. 43-2), first disclosed when filed on September 28, 2017, was ever drafted, discussed, approved or passed, signed or filed by the WKCDC. WKCDC likely refuses to answer any questions regarding that document, or substantiate it in anyway, because it is not a valid document. Even if it were, however, there are several areas of the mystery articles of incorporation worth noting.

First, Article III, § 3.1, claims the WKCDC is itself a federally-recognized American Indian Tribe. It is axiomatic that this cannot be so, unless this language is used figuratively to mean it is an arm of the Oglala Sioux Tribe. But, the section goes on to state that the WKCDC has a “distinct and separate existence from that of the Tribe”. The section goes on to state WKCDC “is created by and for” the Wounded Knee District. This section admits that the Wounded Knee District created WKCDC, which implies it was not created by the OST tribal council itself.

Section 3.2 merely indicates that WKCDC vests *itself* with the sovereign immunity of the Tribe. There is no indication that the Tribe itself vested its sovereign immunity upon WKCDC. It seems more likely that these mystery articles of incorporation were drafted for the Tribal Council to consider and was rejected. It is telling that WKCDC has never (and refuses to) provide any information whatsoever about the document, including any resolution passed by the Tribe, any charter, minutes discussing the document either among the WKCDC board or the Tribal Council, or anything else that would validate the document.

Nothing within the mystery articles of incorporation indicate that the Tribe retains any control whatsoever of WKCDC. To the contrary, the articles indicate its purposes are to promote

the WKCDC (Article V), and it retained all powers for itself, leaving none for the Tribe (Article VII). WKCDC even empowered itself to enter into contracts with the Oglala Sioux Tribe or the Wounded Knee District (Article VII, § 7.4), suggesting it is separate and distinct from the Tribe (including the Wounded Kneed District of the Tribe).

The mystery articles give all management control to its board of directors (not the Tribe). Article VIII, § 8.1. While this section indicates officers will be elected, there is no evidence indicating any elections were ever held. Frank Ecoffey's affidavit concedes that the board is made up of four members, while Article VIII, § 8.1 indicates there "shall" be seven directors elected. Even by WKCDC's own submitted facts, these Articles are not in effect or are at least not followed.

Article VIII, § 8.6 suggest Bylaws exist, yet WKCDC has failed to submit those to the Court or to Plaintiff. It seems likely that WKCDC failed to disclose its bylaws because it may verify that the Tribe has no control in how WKCDC's board members are chosen.

D. The mystery articles of incorporation are not valid.

For the first time on September 21, 2017, WKCDC disclosed that it was a tribal business organization when it attached these mystery articles to the Affidavit of Defendant WKCDC Board President Frank Ecoffey (Doc. 43). The mystery articles cannot be valid, and should not be considered in the Court's determination.

Tribal nonprofit corporations engaging in any business in South Dakota must follow SDCL Chapters 47-22 to 47-28.

SDCL § 47-22-3 Applicability to foreign corporations.

The provisions of chapters 47-22 to 47-28, inclusive, relating to foreign corporations shall apply to all foreign nonprofit corporations doing or engaging in any business in this state for a purpose or purposes for which a corporation might be organized under this chapter.

The mystery articles of incorporation cannot be valid, as at least one natural person must act as an incorporator by delivering the articles of incorporation to the South Dakota Secretary of State.

SDCL § 47-22-5 Incorporators--Articles of incorporation.

One or more natural persons of the age of majority may act as incorporators of a corporation by delivering to the secretary of state the articles of incorporation for such corporation. Delivery may be made by electronic transmission if and to the extent permitted by the Office of the Secretary of State. If the document is filed in typewritten or printed form and not transmitted electronically, the Office of the Secretary of State may require one exact or conformed copy to be delivered with the document.

The mystery articles list no incorporators at all. Moreover, no incorporator delivered the mystery articles to the South Dakota Secretary of State. As anyone can see by searching the public Secretary of State's website, the mystery articles are not on file. There is no certificate of incorporation on file either, which would signify the mystery articles were not delivered to the Secretary of State or did not conform to law.

47-22-12 Articles of incorporation--Endorsement and filing by secretary of state--Issuance of certificate of incorporation.

One original and one exact or conforming copy of the articles of incorporation shall be delivered to the secretary of state. If the secretary of state finds that the articles of incorporation conform to law, when all fees have been paid as prescribed in chapter 47-28, he shall:

- (1) Endorse the word "filed" on the original and the copy and the month, day, and year of filing;
- (2) File the original in his office; and
- (3) Issue a certificate of incorporation to which he shall affix the copy.

The certificate of incorporation, together with the copy of the articles of incorporation affixed thereto, shall be returned to the incorporators or their representative.

Only after the Secretary of State's office issues a certificate of incorporation may the corporate existence begin. The certificate is the conclusive evidence that the incorporators complied with the law and the entity is in fact incorporated under Chapter 47-22.

47-22-13 Commencement of corporate existence--Certificate as conclusive evidence of compliance--Exceptions.

Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter, except as against the state in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

WKCDC also cannot argue that the mystery articles validly amended its original Articles of Incorporation on file with the Secretary of State. A corporation may amend its articles only as required by SDCL § 47-22-16 or 47-22-17.

47-22-15 Procedure for amendment.

Amendments to the articles of incorporation shall be made in the manner provided by § 47-22-16 or 47-22-17.

The first option for amending articles, found in SDCL § 47-22-16, does not apply, as there are no members in WKCDC. SDCL § 47-22-17 applies in this scenario, and required any amendment to be adopted at a board meeting and after receiving a majority vote of the directors. WKCDC has never produced any meeting minutes or any other evidence indicating any such mystery-articles-amendment was ever voted upon or passed.

47-22-17 Procedure in absence of members entitled to vote--Adoption of amendment by board of directors.

Where there are no members, or no members entitled to vote on an amendment to the articles of incorporation, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

Moreover, the chairman of the board of directors is required to sign the amendment to the articles. SDCL § 47-22-19. WKCDC has never produced or indicated there is such a signed document, and the mystery articles (which is obviously not an amendment) is not signed by anyone. Nor is there any indication in the mystery articles that indicate “the amendment so adopted” as required by SDCL § 47-22-19(2). The mystery articles also do not indicate a

statement setting forth the date of the meeting at which the amendment was adopted, that a quorum was present, nor that the amendment received a majority vote. SDCL § 47-22-19(4).

SDCL § 47-22-19 Articles of amendment--Contents of articles.

An original and an exact or conforming copy of the articles of amendment shall be executed by the chairman of the board of directors, by the corporation's president, or by another of its officers or, if the corporation has not been formed, by an incorporator, and shall set forth:

- (1) The name of the corporation;
- (2) The amendment so adopted;
- (3) If there are members entitled to vote thereon:

(a) A statement setting forth the date of the meeting of members at which the amendment was adopted, that a quorum was present at such meeting, and that such amendment received at least a majority of the votes entitled to be cast by members present or represented by proxy at such meeting; or

(b) A statement that such amendment was adopted by a consent in writing signed by all members entitled to vote with respect thereto;

(4) If there are no members, or no members entitled to vote thereon, a statement of such fact, the date of the meeting of the board of directors at which the amendment was adopted, and a statement of the fact that such amendment received the vote of a majority of the directors in office.

Moreover, the mystery articles (which are not articles of amendment) were not delivered to the Secretary of State's office as required. No certificate of amendment to adopt the mystery articles were issued, as a visit to the public Secretary of State's website can confirm.

SDCL § 47-22-20 Delivery to secretary of state--Fees--Endorsement and filing--Issuance of certificate of amendment.

The original and the copy of the articles of amendment shall be delivered to the secretary of state. If the secretary of state finds that the articles of amendment conform to law, when all fees have been paid as prescribed in chapter 47-28, he shall:

- (1) Endorse the word "filed" on the original and the copy and the month, day, and year of filing;
- (2) File the original in his office; and
- (3) Issue a certificate of amendment to which he shall affix the copy.

The certificate of amendment, together with the copy of the articles of amendment affixed thereto, shall be returned to the corporation or its representative.

Only after the certificate of amendment is issued does the amendment become effective.

47-22-21 Effective date of amendment.

Upon the issuance of the certificate of amendment by the secretary of state, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly.

Furthermore, WKCDC Board of Director President Frank Ecoffey admitted in an affidavit (Doc. 43, ¶ 1, 3) that WKCDC was incorporated in the manner indicated on the Secretary of State's website. Significantly, President Ecoffey never claimed that these true Articles of Incorporation were amended or otherwise not still valid. He is likely confused in his affidavit when stating in ¶ 5 that the "WKCDC as a tribally chartered business contain [sic] several sovereign immunity clauses at Article III of the tribal Articles of Incorporation . . ." as this suggests the very same business can have two articles of incorporation – one filed with the State that does not claim sovereign immunity, and one (unsigned, undated, unapproved, and unfiled with or by anyone including the Tribe) that is somehow simply a "tribal Articles of Incorporation".

Finally, SDCL § 47-22-53 gives each corporation the "power to sue and be sued, complain and defend, in its corporate name." This corporation and corporate name referenced is that which is properly on file with the Secretary of State.

E. Defendant WKCDC does not have tribal sovereign immunity

In *Wright v. Melbert Prairie Chicken*, 1998 SD 45; 579 N.W.2d 7, 9, the South Dakota Supreme Court recognized that Indian tribes generally enjoy a common-law immunity from suit. Such tribal sovereignty has been extended to tribal officers acting in their representative capacities and within their scope of authority. *Id.* In *Wright*, the defendants serving on the Rapid City Indian Health Board, a private nonprofit corporation chartered by the State of South Dakota, argued sovereign immunity should be extended to them. *Id.* This Board was authorized to

operate health care programs by three local tribes. *Id.* The Board's main purpose was to promote the health care and operation of quality health care programs for Indian people. *Id.*

The *Wright* court recognized that if an entity is a tribal organization, it does not necessarily follow that it enjoys the same sovereign immunity as the tribes it serves. *Id.*

Although no set formula is dispositive, in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: the entity is organized under the tribe's laws or constitution rather than Federal law; the organization's purposes are similar to or serve those of the tribal government; the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the subentity has the 'power to bind or obligate the funds of the [tribe].' The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.

Id. at 9-10, citing *Ransom v. St. Regis Mohawk Educ. & Comm. Fund., Inc.*, 86 N.Y.2d 553, 658 N.E.2d 989, 992-93, 635 N.Y.S.2d 116 (NY 1995).

In *Seaport Loan Prods., LLC v. Lower Brule Community Dev. Enter. LLC*, 981 N.Y.S.2d 638 (Sup.Ct.N.Y. 2013), the court discusses tribal businesses and whether they have sovereign immunity of their own. "Tribal businesses 'have no inherent immunity of their own,' and enjoy immunity only to the extent the tribe's immunity is extended to them." *Id.*, citing *Am. Prop. Mgmt. Corp. v. Superior Court*, 206 Cal.App. 4th 491, 500, 141 Cal. Rptr. 3d 802 (Cal. Ct. App. 2012). Determining whether a tribal business enjoys sovereign immunity "requires a comprehensive, fact-based analysis utilizing the factors set forth in *Ransom* to determine whether the company functions as an arm of the Tribe." *Id.* The *Ransom* factors were used by the South Dakota Supreme Court in *Wright* and listed above.

“[T]he burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe.” *Seaport Loan Prods., LLC v. Lower Brule Community Dev. Enter. LLC*, 981 N.Y.S.2d 638 (Sup.Ct.N.Y. 2013), citing *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 109 AD3d 80, 87, 968 N.W.Sd 271 (4th Dep’t 2013)(quoting *Gristede’s Foods, Inc. v. Unkechaug Nation*, 660 F.Supp. 2d 442, 466 (E.D.NY 2009).

In *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040 (8th Cir. 2000), the Eighth Circuit considered whether the defendant was immune from suit. Very importantly, the Sisseton-Wahpeton Sioux Tribe **had chartered** the College as a nonprofit corporation, **and this fact was undisputed**. *Id.* at 1042, 1043. The plaintiffs had filed discrimination charges with the Equal Employment Opportunity Commission (“EEOC”) and state human rights commission. *Id.* The EEOC found the defendant to be an Indian tribe. *Id.* The plaintiffs filed discrimination complaints in federal district court, and the College did not answer the complaints. *Id.* The court granted the plaintiffs’ motion for default and set the matter for a jury trial on damages. *Id.* Then the College entered an appearance and filed a motion to dismiss based upon immunity. *Id.*

Significantly, the parties agreed that the facts regarding immunity were undisputed (very unlike the situation *sub judice*). “Because the facts are undisputed,” the Eighth Circuit addressed the College’s argument that it was immune from suit. *Id.* at 1043.

The College argued that because it was chartered¹, funded, and controlled by the Tribe, and therefore it is a tribal agency. *Id.* at 1043. These facts were undisputed. *Id.* The Eighth Circuit found the College served as an arm of the tribe “and not as a mere business”. *Id.*

¹ Plaintiff cannot emphasize enough that in the *Hagen* case, the parties agreed the College was chartered by the Tribe. There is no such stipulation in the case *sub judice*, and no evidence whatsoever that WKCDC was chartered by the Tribe.

In *J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F.Supp. 2d 1163 (D.S.D. 2012), the federal district court reviewed the decisions in *Hagen, Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998), and *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-671 (8th Cir. 1986). The court found that in those three cases, the Eighth Circuit “considered critical to the issue of entitlement to sovereign immunity that the organizations served as ‘arms of the tribe’ and were established by tribal councils pursuant to the councils’ powers of self-government.” *J.L. Ward* at 1170; *See also Native Am. Council of Tribes v. Weber*, No. Civ. 09-4182, 2010 U.S. Dist. LEXIS 48969, 2010 WL 1999352, at *9 (D.S.D. 2010)(“For a tribal agency to have sovereign immunity, the agency must be established by a tribal council pursuant to its powers of self-government and serve as an arm of the tribe.”) The *J.L. Ward* court found that these cases provided guidance, but did not establish a specific test or list of factors for court to consider when determining whether an entity immune due to tribal sovereignty. *Id.* at 1173. The district court then went on to adopt the factors discussed in *Wright* and *Ransom* (listed above). The district court characterized these factors as the “subordinate economic entity” analysis. *Id.* the district court indicated that it analyzes a claim of sovereign immunity based upon the factors set forth in *Wright*. *Id.* at 1176.

In *Giedosh v. Little Wound Sch. Bd., Inc.*, 995 F.Supp. 1052, 1057 (D.S.D. 1997), the defendant school board was authorized by, organized under the law of, and chartered by the Oglala Sioux Tribe. The school board was established by authority of a tribal resolution of the Tribal Council. *Id.* The school board’s members were democratically elected. *Id.* The board was tribally chartered. *Id.* The Oglala Sioux Tribe was allowed to, for good reason, step in and assume the operation of the school. *Id.* The board was required to comply with tribal

regulations and ordinances. *Id.* The EEOC in the *Giedosh* case also found the school board to be an Indian tribe. *Id.* at 1058, FN 8.

F. The Sovereign Immunity Factors under the Subordinate Economic Entity

Analysis

1. Whether WKCDC is organized under the tribe's laws or constitution rather than Federal law;

Plaintiff propounded discovery requests to WKCDC, some of which are discussed below.

Doc. 60, Ex. 2. WKCDC failed to object or respond in any way.

INTERROGATORY NO. 3: Explain in detail when, where, and by whom the Articles of Incorporation of Wounded Knee District Community Development Corporation² you attached to your recent motion were discussed, proposed, drafted, passed or approved, signed, filed, sent, and kept.

WKCDC has waived any right to prove it actually did draft, discuss, pass/approve, sign, or file the mystery articles of incorporation. WKCDC did just enough to create a factual question, then refused to engage in Court-ordered discovery to verify the information it placed before the Court.

Frank Ecoffey's affidavit (Doc. 43), ¶ 3, admits that "Wounded Knee District Community Development Corporation incorporated under the laws of the State of South Dakota as a non-profit 503(c)(4) for federal tax purposes, later amending its Articles of Incorporation changing its name to Wounded Knee Community Development Corporation on February 2, 2011." He goes on to claim the WKCDC was "chartered by the Oglala Sioux Tribe". Surely, if such a charter existed, WKCDC would have submitted it to the Court. Plaintiff Romero's Request for Production No. 5 requested the charter, but WKCDC failed to respond or object. Plaintiff Romero's Request for Admission No. 20 asked WKCDC to admit no charter was issued

² The "Articles of Incorporation of Wounded Knee District Community Development Corporation you attached to your recent motion" referenced here refer to the "mystery articles" as discussed in this brief.

by the Tribal Council, which is deemed admitted due to WKCDC's lack of response or objection.

In addition, Plaintiff propounded an interrogatory (No. 11) asking the laws under which the WKCDC was organized. The WKCDC failed to object or respond in anyway. The WKCDC has waived its opportunity to dispute this factor.

In summary, the only valid Articles of Incorporation are those on file with the Secretary of State. Those true Articles do not mention sovereign immunity, and they indicate the WKCDC was incorporated under the laws of South Dakota.

2. Whether WKCDC's purposes are similar to or serve those of the tribal government;

The true Articles of Incorporation indicate the purpose for which the corporation is organized. Such purpose is listed as for "charitable, religious, social, educational and scientific purposes as specified in Section 501(c)(3) of the Internal Revenue Code . . ." Such a charitable purpose is not similar to the purposes of the OST. (See Affidavit of Sara Frankenstein, Exhibit 1).

3. Whether the WKCDC's governing body is comprised mainly of tribal officials;

The Tribe's officials are available on its website, and none of WKCDC's board members are also tribal officials. Plaintiff Romero's Request for Admission No. 29 asked WKCDC to admit its governing body is not comprised of mainly tribal officials. By failing to respond or object, WKCDC has admitted that request. There is no evidence that the WKCDC board members are mainly tribal officials.

4. Whether the Tribe has legal title or ownership of property used by the organization;

The Lakota Times published an article about WKCDC starting up. See Affidavit of Leslie Romero, Exhibit C. The article describes the WKCDC as being the first time a “locally owned” manufacturing company opened on the Pine Ridge Reservation in living memory. As indicated in the article, WKCDC remodeled their buildings with scrap materials from Scull Construction. *Id.* The company came about following a year of planning and development between WKCDC, Summit Ridge Wood Design, and Nathan Barton of Professional Land Arts of Rapid City. *Id.* “[F]inancial resources” “came from a variety of individuals and groups including a USDA RBEG grant, the SD Community Foundation, the OST Workforce Investment Act program (WIA), Jim Scull of Scull Construction, Hochunk Inc., and Stanley Crooks at SMSC.” *Id.* As reported, the “community has a majority ownership” of the operation. *Id.*

While Plaintiff would not normally resort to news article for evidence in a brief such as this, Defendants have refused to provide discovery despite the Court’s order. The WKCDC has provided no evidence that the Tribe has legal title or ownership of property it uses. Moreover, WKCDC failed to respond or object to Plaintiff’s Request for Admission No. 30 asking for an admission that the Tribe does not have legal title or ownership of the property WKCDC used. This fact should be deemed admitted.

5. Whether tribal officials exercise control over the administration or accounting activities of WKCDC;

If the mystery articles are to be believed, even they indicate no tribal control over the administration and accounting activities of WKCDC. WKCDC provided no evidence that the Tribe exercises control of the administration or accounting activities of the WKCDC. Moreover, the WKCDC failed to object or respond to Plaintiff’s Requests for Admission Nos. 31 and 32, and thereby admit the same.

6. Whether the tribe's governing body has power to dismiss members of the WKCDC's governing body.

Article VIII, § 8.6 of the mystery articles suggest Bylaws exist, yet WKCDC has failed to submit those to the Court or Plaintiff. It seems likely that WKCDC failed to disclose its bylaws, as it may verify that the Tribe has no control in how WKCDC's board members are chosen or dismissed.

Even if the mystery articles are valid, Article VIII, § 8.7 answers the question. Section 8.7 indicates board members may be removed "by an absolute majority vote of the remaining Board of Directors." Moreover, the WKCDC failed to answer Request for Admission No. 33, thereby admitting that the Tribal Council does not have power to dismiss members of the WKCDC's board. WKCDC fails to meet factor six.

7. Whether WKCDC generates its own revenue;

The mystery articles of incorporation indicate WKCDC retains full control of everything, including its finances. Any contributions to WKCDC are fully controlled by WKCDC itself. Article XXI, § 21.1. All "proceeds from the activities" of WKCDC "shall be utilized solely" to promote WKCDC. Article XXIV, § 24.1. WKCDC has submitted nothing whatsoever indicating WKCDC does not generate its own revenue. Moreover, the WKCDC failed to answer or object to Request for Admission No. 34 asking for an admission that WKCDC generated its own revenue. WKCDC failed to meet factor seven.

8. Whether a suit against WKCDC will impact the Tribe's fiscal resources;

There is simply nothing within the mystery articles that indicate a suit against WKCDC will impact the Tribe's fiscal resources. The WKCDC has put forth no evidence of the same. Numerous requests for admission, including No. 35, failed to answer to object or admitting the Tribe will not pay any judgment against the WKCDC. WKCDC failed to meet factor eight.

9. Whether WKCDC has the power to bind or obligate the funds of the Tribe.

As the factors indicate, “the vulnerability of the tribe’s coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.” As indicated above, the WKCDC has put forth no evidence supporting this factor, and all evidence is to the contrary. Request for Admission No. 37 asked the WKCDC to admit it lacks the power to bind or obligate the funds of the Tribe, and the WKCDC failed to answer or object. WKCDC fails to carry its burden on this factor as well.

G. The valid Articles of Incorporation

On November 18, 2009, Wounded Knee District Community Development Corporation filed its Articles of Incorporation with the South Dakota Secretary of State. *See* Affidavit of Sara Frankenstein, Ex. 1. Article V states that “[a] vacancy in the board of directors may be filled by a majority vote of the remaining directors. . .” *Id.* Article VI references abiding by South Dakota law regarding indemnifying directors. *Id.* There were four initial directors on the board. *Id.* Its corporate ID number was NS014176. There is nothing in the Articles of Incorporation that suggest tribal sovereignty, that indicate the Tribe is involved, that indicate the entity was actually incorporated under some other jurisdiction’s laws, or anything else supportive of WKCDC’s argument.

After the name change, WKCDC had the corporate ID number NS014178 as well. The two names are simply two different versions of the name for the same entity. In like token, the articles of incorporation for the originally-named entity were the same, as the entity did not change, only the name.

H. WKCDC had no excuse for not providing discovery.

Tribal entities that voluntarily provide some information relevant to the immunity determination “waive their immunity with respect to all information.” *Cash Advance & Preferred Cash Loans v. Colo. ex rel. Suthers*, 242 P.3d 1099, 1115 (Colo. 2010); *see also United States v. James*, 980 F.2d 1314, 1320 (tribe’s production of some relevant documents from a particular agency functions as a limited waiver of immunity with respect to all relevant documents from the agency). When a tribal entity provides some documents relevant to the issue of immunity, “the tribal entities have explicitly and unequivocally waived sovereign immunity for the limited purpose of determining whether the tribal entities are arms of the tribe.” *Cash Advance* at 1115. As such, there is no excuse for Defendant WKCKC to refuse to engage in discovery as ordered by the Court.

I. WKCDC’s Motion to Dismiss and Brief in Support

WKCDC provided no evidence to support its assertions about the U.S. Department of Agriculture designating the Oglala Sioux Tribe a “Round II Empowerment Zone”, nor any evidence supporting its other factual assertions on Doc. 56, page 3. For instance, WKCDC provided zero evidence that the Tribe chartered an empowerment zone, or that it “became” the Wounded Knee District Community Development Corporation.

Next, on Doc. 56, page 3, WKCDC takes the leap stating “[t]he Articles of Incorporation of the Wounded Knee District Community Development Corporation outline the status of the tribal corporation . . .” describing the mystery articles. Here, WKCDC simply ignores the actual and valid Articles of Incorporation on file with the Secretary of State and referred to by Frank Ecoffey in his affidavit. WKCDC does a bait-and-switch here, referring to the valid set of Articles in Frank Ecoffey’s affidavit, then discussing the mystery articles in the brief without noting they are separate and distinct documents. Worse, WKCDC footnoted the reference to the

mystery articles in footnote 7 of page 3, and footnote 7 states “Articles of Incorporation were amended on February 2, 2011. . .” This statement could only be meant to mislead. The valid and filed Articles of Incorporation were, in fact, amended with the Secretary of State on February 2, 2011 (Affidavit of Sara Frankenstein, Exhibit 1). But, the mystery articles were *not* amended. WKCDC goes on to mislead by stating in footnote 7 that “[t]he Articles have not yet been revised to reflect the change in the corporation’s name.” In that sentence, WKCDC is clearly discussing the mystery articles not being revised to show the “District” word having been dropped from the entity’s name. WKCDC is either extremely sloppy in its briefing at best, or outright trying to mislead the Court. The February 2, 2011, amendment was to the *original, valid Articles*, filed with the Secretary of State November 18, 2009, as clearly reflected in the Secretary of State’s filings. The February 2, 2011 amendment was *not* to the mystery articles, which were never filed with the Secretary of State (nor were they signed, dated, voted on, filed with the Tribe, or anything else). The manner in which WKCDC briefs this issue, including its use of footnote 7, should be carefully scrutinized, as it is not factual and is misleading.

Next, WKCDC takes further factual leaps with no supporting evidence whatsoever. Doc. 56, p. 4, states “Defendant WKCDC as a tribal entity and arm of the Oglala Sioux (OST) tribal government and organized as a chartered corporation under the OST Constitution and Bylaws.” There is no evidentiary support that WKCDC is an arm of the Tribe, was organized as a chartered corporation, or that it was organized under the OST Constitution and Bylaws. Again, WKCDC has failed to produce any charter. The mystery articles are apparently not filed with any tribal office.

Next, WKCDC cites Chapter 44 of the OST Business Code. The undersigned obtained a current copy of Part 3 of Chapter 44, and it is attached to Affidavit of Sara Frankenstein, Ex. 2. The WKCDC omitted significant portions of Chapter 44 relevant to the discussion.

In § 44-3-1.03, “‘Charter’ means the charter of a tribal entity, and includes approved Articles of incorporation.” WKCDC has never suggested any articles of incorporation were approved by the Tribe.

WKCDC omitted much of the definition of “Tribal entity” so as not to convey that a tribal entity is also one that is “controlled by the Tribe, the Tribal Council, a District or its authorized governing body.” “For purposes of this Title, an entity shall be deemed to be controlled if the majority of its Directors are chosen, selected or appointed by the controlling party of [sic] if there are no directors and the controlling party appoints officers or employees of such entity.” § 44-3-1.03. There is no evidence that the WKCDC board of directors was appointed by the Tribe.

Significantly, Subpart 3.2 governs “Creation and Regulation of a Tribal Entity”. The first requirement is a “Tribal Entity Charter”, as referenced in § 44-3-1.08. This provision states “The charter for a tribal entity shall set forth . . .”, then goes on to name eight things required in the tribal entity charter. Finally, § 44-3-1.08(b) states that “[a] true, correct and complete copy of the charter of a district entity shall be delivered to the Tribal Secretary.” Again, WKCDC has provided no proof that there has ever been a charter issued nor that it is on file with anybody. A tribal entity cannot exist without a tribal charter, and WKCDC has failed to meet the very first requirement. The same is required of non-profits. § 44-3-1.09(a).

J. Plaintiff Romero is attempting to obtain affidavits from Tribal officials

Because the WKCDC has flatly refused to engage in the Court-ordered discovery, Plaintiff has attempted to obtain affidavits from a number of Tribal officials regarding the factors listed above and tribal exhaustion. This process is lengthy, as any affidavits and the facts therein must be approved by the Tribe's various committees and attorneys. If Plaintiff has not put forth enough facts herein and the Court is inclined to grant the WKCDC's motion to dismiss, Plaintiff requests the opportunity to depose or obtain affidavits from Tribal officials. Such discovery should have come from the WKCDC, which claims it is part of the Tribe itself. Defendants are in default and defying Court orders, and it has been extremely difficult to obtain facts from the Tribe. Therefore, more time is needed to provide the Court with facts when the opposing party will not engage in discovery.

K. WKCDC did not brief the issue of tribal court exhaustion and has waived the issue.

The WKCDC failed to brief the issue of exhausting tribal remedies. Therefore, it has waived this argument.

While no response should be necessary to an issue not brief by the WKCDC, Plaintiff Romero has put forth her affidavit, which indicates she has indeed exhausted her tribal remedies. Title VII applies to entities that are not an arm of the Tribe, and therefore this case is properly before this Court.

L. The other Defendant has never moved to dismiss and is still in default.

The other Defendant, Wounded Knee, LLC d/b/a Sioux-Preme Wood Products, has never moved to dismiss and is still in default. The Court should not consider dismissing that Defendant.

CONCLUSION

The WKCDC has failed to meet its burden to prove it is an arm of the Tribe. WKCDC has refused to engage in Court-ordered discovery, severely limiting Plaintiff in her ability to fully brief this issue. If Plaintiff has not put forth enough facts to defeat the WKCDC's motion to dismiss, Plaintiff requests additional time to supplement this brief with affidavits or deposition transcripts from Tribal officials, and until the Court rules on Plaintiff's pending motion for sanctions. The WKCDC has waived any argument regarding tribal exhaustion. The other defendants, Wounded Knee, LLC, has never moved for dismissal and thus should not be dismissed.

Dated: April 25, 2018.

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