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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOAN WILSON and PAUL FRANKE, M.D., Plaintiffs, v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM; ANDREW TEUBER; and ROALD HELGESEN, Defendants.	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY [Dkt.74]** Case No. 3:16-cv-00195-TMB

At Docket 74 plaintiffs move for entry of an extraordinarily vague order granting unspecified jurisdictional discovery.[1] But because sovereigns are shielded from suit (including discovery), jurisdictional discovery requests made in response to sovereign immunity motions to dismiss are disfavored.[2] Under the higher burden of proof that applies in this context, the party seeking to establish jurisdiction must state with specificity the facts that discovery would produce and make a compelling showing that discovery is necessary.[3] Because plaintiffs' showing falls well short of this heightened standard. The motion should be denied.

A. Standard of Review

"'In the context of a Rule 12(b)(1) motion to dismiss on the basis of tribal sovereign immunity, the party asserting subject matter jurisdiction has the burden of proving its existence, i.e. that immunity does not bar the suit.'"[4] Courts generally deny jurisdictional discovery where "'it is clear that further discovery would not demonstrate facts sufficient

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[1] *See* Docket 74 at 26-27 (motion) and Docket 74-1 at 2 (proposed order) ("IT IS HEREBY ORDERED that Plaintiffs' Cross-Motion for Jurisdictional Discovery is GRANTED.").

[2] *See, e.g., Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) ("Indian tribes… are immune from lawsuits or court process in the absence of congressional abrogation or tribal waiver. As with absolute, qualified and Eleventh Amendment immunity, tribal sovereign immunity is an *immunity from suit* rather than a mere defense to liability[.]") (emphasis in original) (internal citations and quotations marks omitted).

[3] *See, e.g., Davila v. United States*, 713 F.3d 248, 264 (5th Cir. 2013).

[4] *Alaska Logistics, LLC v. Newtok Vill. Council*, 357 F. Supp. 3d 916, 923 (D. Alaska 2019) (internal quotation marks omitted) (quoting *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015)).

to constitute a basis for jurisdiction,'"[5] or where the discovery request is "based on little more than a hunch that it might yield jurisdictionally relevant facts."[6]

When sovereign immunity is at issue, the plaintiff's burden of proof "is greater . . . because immunity is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery."[7] Under this heightened standard, the plaintiff "must *specifically indicate* 'what facts additional discovery could produce that would affect

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[5] *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (quoting *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977)).

[6] *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008); *see, e.g., Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1188–91 (10th Cir. 2010) (affirming district court's denial of request for jurisdictional discovery with regard to a Rule 12(b)(1) motion on the issue of tribal sovereign immunity because the plaintiff "failed to convince [the court] of its legal entitlement to jurisdictional discovery").

[7] *Davila*, 713 F.3d at 264; s*ee also Burlington*, 509 F.3d at 1090; *cf. Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V.*, 899 F.3d 1081, 1094 (9th Cir. 2018) ("Because of the 'delicate balance between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or a sovereign agency's legitimate claim to immunity from discovery,' jurisdictional discovery in FSIA cases 'should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.'") (quoting *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1088 (9th Cir. 1999)); *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) ("In order to avoid burdening a sovereign that proves to be immune from suit, . . . jurisdictional discovery should be carefully controlled and limited . . . ."); *Karen L. v. State Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 953 P.2d 871, 879 (Alaska 1998) ("'Discovery is itself one of the burdens from which defendants are sheltered by the immunity doctrine.'") (quoting *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1430 (D.C. Cir. 1987)); Wright & Miller, 8 Fed. Prac. & Proc. Civ. § 2008.3 (3d ed. 2019) ("[S]overeign immunity offers protection against having to litigate, not only being subject to a judgment.").

[the court's] jurisdictional analysis."[8] By requiring specific and compelling factual justification for discovery requests in this context, courts ensure that tribal sovereign immunity is preserved.[9]

B. Plaintiffs Fail to Meet Their Heightened Burden of Identifying Specific, Jurisdictionally Relevant Facts That Discovery Would Produce.

Plaintiffs' only justification for their cursory motion is their theory that "information in the Southcentral Litigation case" indicates that ANTHC is managed by a board of directors, not directly by its constituent tribes,[10] and that this "information" contradicts ANTHC's position in the present case. Plaintiffs request an opportunity to conduct discovery into this unspecified "information" because they speculate it will show that "ANTHC is not controlled by the tribes, and is instead an 'independent entity' whose Board members have an 'undivided loyalty to ANTHC that is not subordinate to any duty owed to SCF or any other entity.'"[11]

This is a red herring. The merits of plaintiffs' tribal control arguments are not at issue in this motion—those arguments are thoroughly addressed and refuted in defendants'

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[8] *Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1180 (Alaska 2017) (emphasis added) (quoting *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 872 n.21 (Alaska 2014)).

[9] *See id.* at 1179; *see also Gibbs v. Plain Green, LLC*, 331 F. Supp. 3d 518, 525 (E.D. Va. 2018) (staying jurisdictional discovery in tribal sovereign immunity matter not only serves financial interests of tribe, but also "the interests of judicial economy").

[10] Docket 74 at 26.

[11] *Id.* at 26-27 (quoting Docket 60 at 12, 14 (ANTHC's Opposition to Southcentral Foundation's Motion for Summary Judgment)).

reply in support of its motion to dismiss.[12] For purposes of plaintiffs' discovery motion, the only relevant question is whether plaintiffs met their heightened burden of justifying jurisdictional discovery. By failing to identify any specific, jurisdictionally relevant facts that discovery would produce, plaintiffs did not meet, or even approach meeting, that burden.

Plaintiffs do not specify at all what evidence they expect to discover. Instead, they misconstrue the Civil Rules and attempt to incorporate by reference "information" found in six filings totaling 244 pages from the *Southcentral Litigation*, a separate case involving entirely different issues brought by a different party.[13] Plaintiffs rely on *TD Ameritrade, Inc. v. Matthews* and *Lee v. City of Los Angeles*, both involving Rule 12(b)(6) motions, for the proposition that "documents incorporated by reference [may] be considered in the context of a motion to dismiss under Rule 12."[14] But *Matthews* and *Lee* merely state that when considering Rule 12(b)(6) motions, courts can consider documents that are referenced in and incorporated into the complaint without converting the motion to a

[12] *See* Docket 78 (Defs' Reply Memorandum in Support of Motion to Dismiss).

[13] Docket 74 at 16-17 (attempting to incorporate Dockets 31, 35, 60, 74, 99, and 104 in the *Southcentral Litigation* by reference).

[14] *Id.* at 17 n.56. *N.b.*, defendants' jurisdictional arguments in their Motion to Dismiss are filed under Civil Rule 12(b)(1), not under Rule 12(b)(6). Plaintiffs' cases are inapposite and have no bearing on the Rule 12(b)(1) standard, under which plaintiffs cannot rest on their pleadings when challenged, but must affirmatively prove that jurisdiction exists. *See* Section A, *supra*.

summary judgment motion, if the documents are either (a) "properly submitted" with the plaintiff's complaint or (b) are subject to judicial notice.[15]

Here, plaintiffs try something entirely different. They seek to incorporate into their opposition over two hundred pages of filings from an entirely different case during Rule 12(b)(1) motion practice. To the extent plaintiffs are attempting to incorporate evidence from these filings, they have no authority for doing so. To the extent plaintiffs are attempting to incorporate arguments contained in these filings, this practice "is forbidden" in order to prevent parties from evading page limits and to ensure that their arguments address the circumstances of the case at hand.[16] The motion at bar demonstrates why. It is not possible for defendants to respond in this opposition to 244 pages of filings from

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[15] *TD Ameritrade, Inc. v. Matthews*, No. 3:16-CV-00136-SLG, 2018 WL 3451463, at *1 (D. Alaska July 16, 2018) ("When reviewing a Rule 12(b)(6) motion, a court considers only the pleadings and documents incorporated into the pleadings by reference, as well as matters on which a court may take judicial notice.") (citing *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008)); *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001) (On a 12(b)(6) motion, "a court may consider material which is properly submitted as part of the complaint" or may take judicial notice of matters of public record without converting the motion to dismiss into a motion for summary judgment) (citations and internal quotation marks omitted).

[16] *Norfleet v. Walker*, 684 F.3d 688, 690–91 (7th Cir. 2012) (Posner, J.); *see also Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003) (compiling cases); *Exec. Leasing Corp. v. Banco Popular de P.R.*, 48 F.3d 66, 67–68 (1st Cir. 1995) ("If counsel desires our consideration of a particular argument, the argument must appear within the four corners of the brief filed in this court.") (citation and quotations marks omitted); *DeSilva v. DiLeonardi*, 181 F.3d 865, 866–67 (7th Cir. 1999) (incorporation of an argument "by reference amounts to a self-help increase in the length of the appellate brief . . . . [I]ncorporation is a pointless imposition on the court's time. A brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.") (internal citation omitted).

another case containing multiple, entirely unspecified, and almost indisputably irrelevant arguments made in that case.

Even if plaintiffs' attempt to incorporate the *Southcentral Litigation* pleadings were permissible, plaintiffs have failed to identify specific facts in those filings that would be the proper subject of discovery.[17] The fact that ANTHC is managed on a day to day basis not by any one tribe or tribal organization, but instead by "a 15-member Board of Directors," is hardly in dispute. It is required by § 325(b), ANTHC's bylaws, and the Alaska Corporations Code.[18] Similarly, the duties owed by ANTHC's directors to the corporation are matters of law, not fact.[19] No discovery is needed.[20]

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[17] *See* Docket 74 at 5-6 (citing ANTHC's and Southcentral Foundation's interpretations of § 325 of Public Law 105-83 and describing these legal interpretations as "facts"); *id.* at 16 (citing ANTHC's interpretation of § 325 and principals of corporate governance law and describing these legal interpretations as "evidence provided to this Court"); *id.* at 16-17 (citing six separate docket entries containing 244 pages of text).

[18] Section 325(b), Pub. L. No. 105-83, § 325(b), 111 Stat. 1598 (1997) ("[ANTHC] shall be governed by a 15-member Board of Directors"); AS 10.06.450(a) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors…").

[19] *See*, *e.g.*, *Dena' Nena' Henash v. Ipalook*, 985 P.2d 442, 445 (Alaska 1999) ("'A corporate officer or director stands in a fiduciary relationship to his corporation.'") (quoting *Alvest, Inc. v. Superior Oil Corp.*, 398 P.2d 213, 215 (Alaska 1965)).

[20] Moreover, no discovery is needed on Count I, the FCA retaliatory discharge claim against the individual defendants, because the statute does not allow for the claim to be brought against individuals, or Count II, plaintiffs' tort claim, which is barred by 25 U.S.C. § 5321(d), the ISDEAA provision requiring tort claims against ANTHC to be brought under the Federal Tort Claims Act. These are straightforward questions of law. No discovery is needed to resolve these issues.

Douglas Indian Association[21] and *Stevens*[22] are instructive. In *Douglas Indian Association,* the plaintiff argued that jurisdictional discovery was needed because, *inter alia*, "tribal officials may have acted *ultra vires*."[23] But because the plaintiffs failed to allege "*any specific actions* taken by the officials or *any specific documents* that would resolve 'the question of whether [the tribal officials] acted inside or outside the scope of their authority from the tribe," the Alaska Supreme Court affirmed the superior court's denial of jurisdictional discovery.[24] In *Stevens*, the plaintiffs asserted that jurisdictional discovery was needed but did not establish "what facts they [sought] to develop through discovery" or the jurisdictional relevance of the documents they sought to obtain.[25] The District Court for the Eastern District of California denied their request, holding that the plaintiffs' "conclusory belief discovery will enable them to demonstrate subject matter jurisdiction is not sufficient for the court to grant jurisdictional discovery or an evidentiary hearing."[26]

Plaintiffs' jurisdictional discovery motion is similarly conclusory. Plaintiffs assert that "ANTHC possesses all of the information necessary for discovery on this issue," but

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[21] 403 P.3d 1172, 1179–80 (Alaska 2017).

[22] *Jamul Action Comm. v. Stevens*, No. 2:13-cv-01920-KJM-KJN, 2014 WL 3853148, at *12 (E.D. Cal. Aug. 5, 2014).

[23] 403 P.3d at 1179.

[24] *Id.* at 1179–80 (emphasis added).

[25] 2014 WL 3853148, at *11–12.

[26] *Id.* at *12 (citation omitted).

do not specify what this "information" might be or where it might be found. Plaintiffs "not only want to conduct a fishing expedition, they want to conduct discovery in order to find the lake in which to conduct the fishing expedition."[27] This is plainly deficient.[28]

C. Conclusion

Defendants put forth evidence, including affidavit and documentary evidence, supporting Rule 12(b)(1) dismissal.[29] Plaintiffs do not controvert or contest the admissibility, sufficiency, or relevance of defendants' evidence, and do not proffer any material countervailing evidence of their own. They move for jurisdictional discovery but fail to support the motion with any specific facts that discovery might produce or by demonstrating why additional discovery would provide a basis for limiting ANTHC's tribal sovereign immunity. Under these circumstances, "permitting jurisdictional discovery would undermine the purposes of the sovereign immunity doctrine."[30] Plaintiffs' motion for discovery should be denied.

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[27] *Mills v. Maine*, 118 F.3d 37, 51 (1st Cir. 1997).

[28] *See White v. Univ. of California*, 765 F.3d 1010, 1025 (9th Cir. 2014) ("Given [the] undisputed facts, the district court properly concluded that the Repatriation Committee was an 'arm of the tribe' for sovereign immunity purposes and, *given only speculative arguments*, did not abuse its discretion in denying the Plaintiffs further discovery on the question.") (emphasis added); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1190 (10th Cir. 2010) ("BMG's conclusory assertion that jurisdictional discovery was necessary seems almost like an attempt to use discovery as a fishing expedition rather than to obtain needed documents to defeat the tribal immunity claim.") (citation and internal quotation marks omitted).

[29] *See generally* Docket 51–1 to 51–8; Docket 52, 52–1 to 52–4.

[30] *Everette v. Mitchem*, 146 F. Supp. 3d 720, 723 (D. Md. 2015).

DATED April 26, 2019, at Juneau, Alaska.

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