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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MICHAEL WHITTLE,

Plaintiff,

vs.

ZIMS HOT SPRINGS, A BUSINESS
ENTERPRISE OF THE NEZ PERCE
TRIBE,

Defendant.

Case No. 2:21-cv-303-BLW

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
F.R.C.P. 56(d) MOTION TO
CONTINUE HEARING TO
CONDUCT DISCOVERY**

Plaintiff, MICHAEL WHITTLE, (hereinafter "Plaintiff") by and through his attorney Melanie Baillie of the law firm JAMES, VERNON & WEEKS, P.A., submits his opposition to Defendant Zims Hot Spring's (hereinafter "Defendant") Motion for Summary Judgment to dismiss Plaintiff's complaint. For the reasons set forth herein, Plaintiff requests the Court deny the Defendant's motion.

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Plaintiff alternatively moves this Court pursuant to Federal Rule of Civil Procedure (F.R.C.P.) 56(d) for an order continuing the hearing on the Defendant's Motion for Summary Judgment so that discovery can be conducted. As more fully set forth in the Declaration of Melanie Baillie submitted herewith, there are specific reasons why discovery is necessary in order for Plaintiff to present facts essential to show that this Court has subject matter jurisdiction in this case.

I. INTRODUCTION

The issue of whether this Court has subject matter jurisdiction is not as simple as the Defendant urges. Defendant claims simply that a tribe is not a citizen of any state, the case must be dismissed, and that is where the inquiry ends. Not so fast.

Plaintiff Michael Whittle acknowledges that the Nez Perce Indian Tribe, like all federally recognized tribes (hereinafter "The Tribe"), enjoys broad sovereign immunity. Plaintiff further acknowledges that as a result of that sovereign immunity, a Tribe is not considered a citizen of any state. However, the Tribe's sovereign immunity is not without bounds. Moreover, the Defendant in this case, Zims Hot Springs, is not synonymous with the Tribe as the Defendant urges.

As more fully set forth below, upon information and belief, Zims Hot Springs is a long standing privately operated, for-profit business enterprise, operating in New Meadows, Idaho. It is a business entity that was created under and governed by Idaho law. The business has continuously operated since at least May of 2011, long before the Tribe took ownership of the business enterprise. Declaration of Melanie Baillie (hereinafter "Baillie Declaration"); Exhibit 1; Exhibit 2; Exhibit 3; Exhibit 4. Moreover, Defendant's principal place of business is exclusively within the boundaries of the State of Idaho, outside of the Nez Perce Reservation whose boundaries are also exclusively within the State of Idaho. Baillie Declaration; Exhibit 5; Exhibit 6.

Plaintiff urges this Court to deny Defendant's Motion for Summary Judgment/Dismissal or, in the alternative, pursuant to F.R.C.P. 56(d), to continue Defendant's Motion to allow Plaintiff to discover additional facts supporting his contention that the Defendant: 1) is not an arm of the Tribe, 2) does not do business outside of the State of Idaho, 3) was formed pursuant to Idaho law, and 4) is not entitled to enjoy tribal sovereign immunity.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is only warranted if the movant shows there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F.R.C.P. 56(a).

I. DISCUSSION

"Plaintiff bears the burden to establish subject matter jurisdiction by a preponderance of the evidence." *United States ex rel. Solis v. Millennium Pharmaceuticals, Inc.*, 885 F.3d 623, 625 (9th Cir. 2018) (citing *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 569 (9th Cir. 2016)). To address whether the Court has subject matter jurisdiction when a Tribe's interests are implicated necessarily requires the Court to engage in a two-part analysis. First, the Court must address an entity's citizenship, which is the issue raised by the Defendant in its motion. The second issue is whether an entity enjoys immunity from suit. Both principles – citizenship and immunity – are inextricably intertwined and directly related to determining whether subject matter jurisdiction exists in this case. *Pistor v. Garcia*, 791 F.3d 1104, 1110-11 (finding tribal sovereign immunity to be "quasi-jurisdictional" and challenging the court's subject matter jurisdiction is a "a proper vehicle for invoking sovereign immunity from suit."); *see also Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 721-26 (9th Cir. 2008) (analyzing diversity jurisdiction and sovereign immunity of a tribal business enterprise).

A. Zims Hot Springs Is a Citizen Of Idaho

For purposes of citizenship, a tribal business entity is a citizen of the state where it has its principal place of business. *Cook*, 548 F.3d at 724. It is irrelevant whether the entity is incorporated or not. *Id.* at 726 n.5. While a tribal business entity that was formed pursuant to the laws of the Tribe is not a citizen of a state merely because its incorporation occurred inside that state or because it is physically present there, it is well established that it is considered a citizen of the state in which it primarily conducts its business activities. *Id.* at 724.

In the *Cook* case, the Defendants moved to dismiss the matter based on a lack of diversity jurisdiction. *Cook*, 548 F.3d at 721. The Defendants argued that the ACE Casino, a business entity incorporated under tribal law, was a citizen of California because the Tribe's headquarters were in California. *Id.* at 723. Since Plaintiff was a citizen of California, diversity would have been destroyed. *Id.* at 723. However, the Court found that it did have jurisdiction based on diversity. *Id.* at 724. The Court found that ACE Casino, formed pursuant to tribal law, was a citizen of Nevada because the entity's principal place of business was located in that state. *Id.* at 723. The Court distinguished the citizenship of a tribal business entity from that of the "Indian tribe or an unincorporated arm of a tribe," which the Court recognized are not citizens of any state. *Id.* at 722-24. Since ACE Casino was a citizen of Nevada, the Court had subject matter jurisdiction based on diversity of citizenship. *Id.* at 724.

In this case, Defendant Zims Hot Springs was not even formed under tribal law. There is no evidence in the record that it is currently ran or operated pursuant to Nez Perce tribal law. Rather, the business enterprise was formed many years prior to the Tribe's ownership of it, it was formed pursuant to Idaho law, and its primary (and only) place of business is solely within the state of Idaho.

On May 11, 2011, a Certificate of Assumed Business Name was issued for “Zims Hot Springs,” authorizing it to do business within the State of Idaho pursuant to Idaho Code (I.C.) § 53-504.¹ Baillie Declaration; Exhibit 1. It is unlawful to conduct business within the State of Idaho under an assumed business name unless a certificate of assumed business name has been issued by the Secretary of State. I.C. § 30-21-805. By conducting business within the State under an assumed business name, the owner of the business subjects itself to the jurisdiction of the State. I.C. § 5-514(a). An assumed business name remains in effect upon filing until it is cancelled. I.C. § 30-21-807.

Upon purchase of the business from the prior owners, the Tribe has simply maintained that status of the business as it has always been under Idaho law. Exhibit 2. To be sure, two state liens were leveled against the business from the Department of Labor. Baillie Declaration; Exhibit 7; Exhibit 8; Exhibit 9. It provides services to the general public and operates in Adams County, Idaho, where it has always operated. Baillie Declaration; Exhibit 10. Although the Tribe has its own business code, there is no evidence that it has reorganized Zims Hot Springs under its code. Even if it had, under the *Cook* analysis, it would still be a citizen of Idaho as long as it was doing business within the state. *Cook*, 548 F.3d at 723.

Defendant Zims Hot Springs contends that this Court lacks diversity jurisdiction over this case because “an unincorporated Indian tribe is not a ‘citizen’ of any state.” Defendant’s Brief in

¹ I.C. § 53-504, was repealed by S.L. 2015, ch. 251, § 3, which was codified as I.C. § 30-21-805, the Idaho Uniform Business Organizations Code. The text of the statute is as follows:

- (a) Any person who proposes to or intends to transact business in Idaho under an assumed business name shall, before beginning to transact business, deliver to the secretary of state for filing a certificate of assumed business name in a form prescribed by the secretary of state.
- (b) A separate certificate of assumed business name must be filed for each assumed business name a person uses.

I.C. § 30-21-805. Filing of Certificate Required.

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Support of Motion for Summary Judgment/Dismissal, 3 ¶ 22-23 (citing *Am. Vantage Companies v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe*, 966 F. Supp. 2d 876 (D. Ariz. 2013)). However, Plaintiff has named the business entity Zims Hot Springs as the defendant in this action – not the Nez Perce Tribe.

This Court has diversity jurisdiction over Zims Hot Springs because it is a business entity whose principal place of business is within the State of Idaho and the Plaintiff is a resident of the State of Washington. Baillie Declaration. Since complete diversity exists and the amount in controversy is satisfied, this Court has subject-matter jurisdiction.

B. Zims Hot Springs Is Not Entitled to Assert the Tribe’s Sovereign Immunity

Defendant Zims Hot Springs is not an arm of the Nez Perce Tribe because it is a business entity that is separate and distinct from the Tribe with an identity of its own. As such, Defendant Zims Hot Springs cannot avert this Court’s diversity jurisdiction over this case, nor can it assert the defense of sovereign immunity from suit.

“Federal courts typically lack subject-matter jurisdiction over Indian tribes absent congressional authorization or a waiver from the tribe” because they have long possessed sovereign immunity from suit.² *Cadet v. Snoqualmie Casino*, 469 F. Supp. 3d 1011, 1014 (W.D. Wash. 2020) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) and *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)). However, “[a] tribe’s sovereign immunity extends to a tribal [business] enterprise *only* if that enterprise ‘functions as an arm of the tribe.’” *Id.* (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006)) (emphasis added). The relevant question is “whether the entity acts as an arm of the tribe so that its activities are

² “Tribal sovereign immunity is a quasi-jurisdictional issue that, if invoked at the Rule 12(b)(1) stage, must be addressed and decided.” *Pistor*, 791 F.3d at 1115.

properly deemed to be those of the tribe.” *Allen*, 464 F.3d at 1046. To determine if a tribal business enterprise is an “arm of a tribe,” the Ninth Circuit considers five different factors:

(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.

Id. at 1014-15 (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014)).

As analyzed below, consideration of these factors reveals that Defendant Zims Hot Springs is not an arm of the Nez Perce Tribe.

1. Factor One: The Method of Creation of the Economic Entity

A business enterprise that “is wholly owned and operated by the Tribe and is organized and operated pursuant to the Tribe’s laws” weighs in favor of finding the business an arm of the tribe. *Cadet*, 469 F. Supp. 3d at 1015. In *Cadet*, the Snoqualmie Tribe argued that a casino was an arm of its tribe. *Id.* at 1013. The Tribe provided a copy of its Snoqualmie Entertainment Authority Act of 2006 (SEA Act), which “place[d] the power over affairs of the Casino in the hands of the Snoqualmie Entertainment Authority, whose members are the elected members of the Snoqualmie Tribal Council.” *Id.* at 1015.

The SEA Act also provided that the Tribe resolved to develop the Casino on the Tribe’s initial reservation, and it would be operated by the Tribe. *Cadet*, 469 F. Supp. 3d at 1015. Since the Casino was formed by the Tribe pursuant to its own tribal law, and a resolution codified the Tribe’s authority over the Casino, the Court found this factor favored a finding that the Casino was an arm of the Tribe. *Id.*; *see also Cook*, 548 F.3d at 721 (involving a casino on tribal land that was organized under tribal corporate law and under an intergovernmental agreement between the tribe and the state of Nevada); *see also Allen*, 464 F.3d at 1046 (involving a casino created under the

federal Indian Gaming Regulatory Act (IGRA), aimed at promoting tribal independence and economic sustainability, as well as a tribal ordinance, and an interstate gaming compact between the tribe and the state of California).

However, a business enterprise that is created pursuant to state law as opposed to tribal law, weighs in favor of finding that the enterprise is not an arm of the tribe. *Redsleeve Golf, LLC v. Sequoyah Nat'l Golf Club, LLC*, 13 Am. Tribal Law 203, 210 (Cherokee Ct. of the E. Band of Cherokee Indians 2014).³ In *Redsleeve Golf, LLC*, the court determined that this factor weighed against finding the enterprise to be an arm of the tribe because the enterprise “was not created as an enterprise, entity, or incorporated under the Cherokee Code, but was created as a limited liability corporation under the North Carolina Limited Liability Act.” *Id.*

Pursuant to the laws of North Carolina, a limited liability company is distinct from its owners, and the business in this case was solely owned by the tribe. *Redsleeve Golf, LLC*, 13 Am. Tribal Law at 210. Further, North Carolina law allows a limited liability company “to sue and be sued in its own name,” and once its “created, it cannot become another entity such as a government or governmental agency.” *Id.* As a result, this factor weighed against a finding that the business enterprise was an arm of the tribe. *Id.*

Unlike the entity in *Cadet*, Defendant Zims Hot Springs was not created pursuant to tribal law. Rather, Defendant Zims Hot Springs was formed under the laws of the state of Idaho. The only record recognizing Defendant Zims Hot Springs is a Certificate of Assumed Business Name, which was filed with the Secretary of State for the State of Idaho on May 23, 2011. Baillie Declaration; Exhibit 1; Exhibit 2. Furthermore, there is no such tribal law under which the Nez

³ In this case, the court applied the factors from the Tenth Circuit Court of Appeals to determine if the business enterprise was an arm of the tribe. *Id.* at 208, 210-12. Five of the six factors are identical to those of the Ninth Circuit Court of Appeals, the sixth of which is “(6) whether the purposes of tribal sovereign immunity are served by granting them immunity.” *Id.* at 208.

Perce Tribe was given the power to own or operate Defendant Zims Hot Springs like that discussed in *Cadet*. Additionally, Defendant Zims Hot Springs was not formed by the Nez Perce Tribe, nor was it developed on the Tribe's reservation, like the business was in *Cadet*. Rather, Defendant Zims Hot Springs was developed by individuals other than the Nez Perce Tribe on non-reservation land in New Meadows, Idaho, over 100 miles from the Tribe's reservation. Exhibit 1; Exhibit 5; Exhibit 6. Lastly, the Tribe's authority or ownership over Defendant Zims Hot Springs was not codified, like in *Cadet*, by any law, including any tribal law. These facts support the conclusion that Defendant Zims Hot Springs is not an arm of the Tribe.

Like in *Redsleeve Golf, LLC*, Defendant Zims Hot Springs was created under the laws of the State of Idaho and developed on non-reservation land in New Meadows, Idaho by two individuals who do not appear to be members of the Tribe. Baillie Declaration; Exhibit 1; Exhibit 6. The Certificate of Assumed Business Name for Defendant Zims Hot Springs was filed with the Secretary of State for the State of Idaho, and appears to have been adopted by the Nez Perce Tribe because it is still active. Baillie Declaration; Exhibit 1; Exhibit 2. Thus, Defendant Zims Hot Springs, like in *Redsleeve Golf, LLC*, was formed under Idaho law, and is still operated under the laws of Idaho, even while under the Nez Perce Tribe's alleged ownership. In light of these facts, this factor weighs against finding Defendant Zims Hot Springs to be an arm of the Tribe.

Since Defendant Zims Hot Springs is a business entity formed, operated, and maintained under the laws of Idaho on non-reservation land, this factor weighs against finding Defendant Zims Hot Springs to be an arm of the Nez Perce Tribe.

2. Factor 2: The Purpose of the Economic Entity

A business enterprise created for the purpose of generating revenue “for the Tribe to promote tribal prosperity and self-sufficiency” weighs in favor of finding the enterprise an arm of

the tribe. *Cadet*, 469 F. Supp. 3d at 1016. In *Cadet*, this factor weighed in favor of finding the Casino an arm of the tribe because it was created pursuant to a federal law that “intended to promote tribal self-sufficiency.” *Id.* at 1015. Further, this federal law restricted the use of the net revenues generated by the Casino to be used only “to fund tribal operations, promote a tribe’s general welfare or economic development, or to donate to charity or to help fund local government agencies.” *Id.* at 1016. Since the purpose of the Casino was to generate “revenue for the Tribe to promote tribal prosperity and self-sufficiency,” this factor weighed in favor of finding the Casino an arm of the tribe. *Id.*

However, a business enterprise that is simply created for the purpose of generating a profit weighs against finding the enterprise an arm of the tribe. *Redsleeve Golf, LLC*, 13 Am. Tribal Law at 210. In *Redsleeve Golf, LLC*, this factor weighed against finding the enterprise (a golf course) an arm of the tribe because “the only purpose stated in the [enterprise]’s operating agreement [was] to ‘acquire, own, manage, operate and to do all activities necessary or incidental to the operation of a golf course, and consistent therewith to engage in any activities as are incident thereto.’” *Id.* Further, the resolution passed by the tribe that authorized the creation of the enterprise “did not contain any purposes or objectives other than the construction of a golf course.” *Id.* Since the purpose of the enterprise did not affect the tribe, this factor weighed against finding the enterprise an arm of the tribe. *Id.*; see also *Allen*, 464 F.3d at 1046 (suggesting “a mere revenue-producing tribal business” would likely weigh against finding such a business to be an arm of a tribe).

Unlike in *Cadet*, where the business was formed to generate revenue for the tribe, here, Defendant Zims Hot Springs was not formed to generate revenue for the Nez Perce Tribe. Rather, Defendant Zims Hot Springs was not created by the Tribe, nor was it created pursuant to laws intended to promote tribal prosperity and self-sufficiency. Defendant Zims Hot Springs was simply

formed under the laws of the state of Idaho that have no relation to the economy or prosperity of the Nez Perce Tribe. Furthermore, Defendant Zims Hot Springs was not formed under any laws that restrict the net revenue to be used by the Tribe for its own operations, general welfare, or economic development. These facts weigh against finding Defendant Zims Hot Springs to be an arm of the Tribe.

As was the case in *Redsleeve Golf, LLC*, Defendant Zims Hot Springs was similarly created to generate profits. Like in *Redsleeve Golf, LLC*, there is no evidence that Defendant Zims Hot Springs operates for purposes or objectives other than the profits generated by operating a hot springs facility. The Nez Perce Tribe is simply engaged in acquiring, owning, managing, operating, and doing all activities that are necessary or incidental to operating a hot springs facility, but there is no purpose specific to the Tribe's prosperity or self-sufficiency. Unlike in *Redsleeve Golf, LLC*, where a tribal resolution was passed authorizing the creation of the business enterprise, here, there is no evidence that the Nez Perce Tribe passed any tribal resolution to acquire Defendant Zims Hot Springs. Rather, the Nez Perce Tribe simply acquired Defendant Zims Hot Springs from the prior owners and has since operated the same hot springs facility for the public to patronize for its profit, absent any purpose specific to the Tribe itself. Exhibit 3; Exhibit 4; Exhibit 1; Exhibit 2. Defendant Zims Hot Springs is simply a "mere revenue-producing" business. *Allen*, 464 F.3d at 1046.

These facts similarly show that Defendant Zims Hot Springs is a business entity separate and apart from the Nez Perce Tribe – not an arm of the Tribe.

3. Factor 3: The Structure, Ownership, and Management of the Economic Entity

If a business enterprise is owned and operated by a tribe, this factor weighs in favor of finding the enterprise an arm of the tribe. *Cadet*, 469 F. Supp. 3d at 1016. In *Cadet*, the tribe's own Gaming Act, as well as the federal IGRA, provided that "the sole proprietary interest in and

responsibility for the conduct of any [g]aming [o]peration” or gaming activity lies with the tribe. *Id.* Further, the tribe’s SEA Act confirmed the Tribal Council’s “ownership, management, and supervisory authority over” gaming on behalf of the tribe itself. *Id.* As a result, this factor weighed in favor of the Casino functioning as an arm of the tribe. *Id.*

However, it is unlikely that a business enterprise will be considered an arm of a tribe if the structure, ownership, and management does not lie solely with a tribe. *Redsleeve Golf, LLC*, 13 Am. Tribal Law at 210-11. In *Redsleeve Golf, LLC*, the court found this factor to weigh in favor and against finding the business to be an arm of the tribe because the tribe did not have complete control or discretion over the operation of the business. *Id.* at 210. Although, the operating agreement of the business required a board of directors nominated by the Principal Chief of the tribe and approved by the tribe’s Tribal Council, the board of directors were not required to be enrolled members of the tribe. *Id.* at 210-11. And while the directors usually were enrolled members of the tribe, non-enrolled members could be future directors. *Id.* at 211. Further, although, the plaintiff alleged that the business reported to the council members of the tribe, the business denied that allegation. *Id.* Since the amount of control the tribe actually had over the business was “questionable,” this factor weighed both for and against a finding that the business was an arm of the tribe. *Id.* at 210.

Admittedly, like in *Cadet*, Defendant Zims Hot Springs has provided some evidence that it is “owned, managed and controlled by the Nez Perce Tribe.” Declaration of Samuel N. Penney, 2 ¶ 6. However, Plaintiff has not been provided the opportunity at this stage of the litigation to discover facts that suggest Defendant Zims Hot Springs is owned, managed, and controlled by any other individuals or entity with the Nez Perce Tribe. Additionally, unlike in *Cadet*, the Nez Perce

Tribe did not pass, or present evidence that it did, any tribal law codifying its sole ownership, management, and supervisory authority over Defendant Zims Hot Springs.

Like in *Redsleeve Golf, LLC*, Defendant Zims Hot Springs has not presented evidence that the business is owned and operated solely by the Nez Perce Tribe. Nor has Defendant Zims Hot Springs provided any evidence that there is any requirement that it be owned or operated solely by the Tribe. Rather, like in *Redsleeve Golf, LLC*, it appears that the employees and agents of Defendant Zims Hot Springs may be non-members of the Tribe and that the Tribe, as at least one of the owners and operators of this business, has the discretion to permit non-members to be employed there. As such, it is likely that this factor weighs against a finding that the Defendant Zims Hot Springs is an arm of the Tribe, and at best, it is similarly “questionable” as to how much control the Nez Perce Tribe has over the operation of Defendant Zims Hot Springs at this stage of the litigation. *Redsleeve Golf, LLC*, 13 Am. Tribal Law at 210.

As discussed above, this factor should similarly weigh against Defendant Zims Hot Springs being an arm of the Nez Perce Tribe. In the alternative, Plaintiff seeks to conduct discovery as to the management, operation, supervisory authority, and discretion over the affairs of Defendant Zims Hot Springs.

4. Factor 4: Intent as to Sharing Tribal Sovereign Immunity with the Economic Entity

If a tribe broadly grants sovereign immunity to all of its business enterprises, the tribe likely intended to extend its sovereign immunity to the business enterprise at issue. *Cadet*, 469 F. Supp. 3d at 1016. In *Cadet*, the Tribe’s Judiciary Act specifically stated, “that ‘all [t]ribal agencies, committees, departments, entities, or employees of any kind shall be immune from suit for any acts or omissions done during the performance of [t]ribal duties.’” *Id.* (quoting Judiciary Act § 10.0, at 63). Such a broad grant of immunity revealed the tribe’s intent to share its sovereign

immunity with all of its entities, including the Casino that was sued. *Id.* The court also noted that such a finding was consistent with one of the purposes of sovereign immunity, which is to protect the tribe's treasury. *Id.* As such, this factor weighed in favor of finding the Casino an arm of the tribe. *Id.*

If a tribe takes actions inconsistent with exerting or sharing its sovereign immunity, this factor will likely weigh against finding a business enterprise an arm of the tribe. *Redsleeve Golf, LLC*, 13 Am. Tribal Law at 211. In *Redsleeve Golf, LCC*, the tribe passed a resolution that authorized the creation of the business enterprise, guaranteed its financing for construction, and “approved a limited waiver of sovereign immunity for the” loans it took out. *Id.* However, it did not allow the enterprise “the right to exert the defense of sovereign immunity,” and “[t]he right to execute a limited waiver was not granted to the [enterprise] as has been done for other enterprises or entities in the” tribal code. *Id.* As a result, the court stated it was “clear there was no express intent to extend sovereign immunity to the” enterprise. *Id.*

Unlike in *Cadet*, where the tribe provided statutory evidence that it intended to broadly grant sovereign immunity to its entities, the Nez Perce Tribe appears to have no similar provision. Although, the Nez Perce Tribe has a statute providing sovereign immunity to itself and its officers and employees, there is no evidence or statutory provision that Plaintiff has discovered that broadly grants sovereign immunity to its business entities that are not otherwise formed under Tribal law. *See Nez Perce Tribal Code 1-1-47(a)*. Further, the Nez Perce Tribe has not provided any evidence that it ever intended to extend its sovereign immunity to its entities, or specifically, Defendant Zims Hot Springs. Absent any grant of sovereign immunity, narrow or broad, the Nez Perce Tribe's sovereign immunity does not extend to Defendant Zims Hot Springs.

Like in *Redsleeve Golf, LLC*, the Nez Perce Tribe has similarly not engaged in actions consistent with sharing its sovereign immunity to Defendant Zims Hot Springs. The Tribe has not provided any documentation or other evidence showing its intent to extend its sovereign immunity to its business entities that are not formed under the Tribal Code. Additionally, discovery will reveal whether Zims Hot Springs has purchased liability insurance, an action inconsistent with the Nez Perce Tribe's intent or expectation that Defendant Zims Hot Springs enjoys its own sovereign immunity. Further evidence shows the Idaho Department of Labor filed two liens against the business, Defendant Zims Hot Springs, not the Nez Perce Tribe, on December 20, 2019, and June 19, 2020, both of which were filed after the Nez Perce Tribe asserts that it purchased Defendant Zims Hot Springs in December of 2018. Declaration of Samuel N. Penney, 2 ¶ 5; Baillie Declaration; Exhibit 7; Exhibit 8; Exhibit 9. These liens also suggest that Defendant Zims Hot Springs, is an entity separate from the Tribe itself, and that it is subject to civil liability for its unlawful conduct, that are inconsistent with the purpose and protection of sovereign immunity.

Since the Nez Perce Tribe did not intend for its sovereign immunity to extend to Defendant Zims Hot Springs, and because the facts show that Defendant Zims Hot Springs has taken actions inconsistent with an ability to assert sovereign immunity, this factor shows Defendant Zims Hot Springs is a business enterprise separate and apart from the Nez Perce Tribe, not an arm of it.

5. Factor 5: Financial Relationship between Economic Entity and the Tribe

If a business enterprise's "net revenues go solely to the Tribe and must be used" to promote tribal prosperity and self-sufficiency, then this factor weighs in favor of finding the enterprise an arm of the tribe. *Cadet*, 469 F. Supp. 3d at 1016. In *Cadet*, the net revenues produced by the Casino went solely to the tribe and had to be used for the tribe's prosperity and self-sufficiency as dictated

by the federal IGRA. *Id.* As a result, this factor weighed in favor of finding the Casino an arm of the tribe. *Id.*

In *Redsleeve Golf, LLC*, the court found this factor to weigh for and against a finding that the business enterprise was an arm of the tribe. *Redsleeve Golf, LLC*, 13 Am. Tribal Law at 211. The court recognized that the tribe provided financing and guaranteed a \$9.5 million loan to the business enterprise, transferred land for the business enterprise, and contributed about \$4 million to the enterprise's ongoing operations, all of which weighed in favor of finding the enterprise an arm of the tribe. *Id.* However, the tribe was "not dependent on the operation of the [enterprise] to fund its programs or support economic development and an adverse judgment against the [enterprise] would be only against the assets of the [enterprise], and not against" those of the tribe. *Id.* Further, "the operating agreement restrict[ed] the manager from confessing a judgment or incurring any debt other than the original debt for construction approved by" the tribal resolution. *Id.* The court determined that this evidence ensured the tribe's assets and treasury "would not be at risk," and weighed against finding the enterprise an arm of the tribe. *Id.* As such, this factor weighed in favor and against such a finding. *Id.*

Unlike in *Cadet*, where the net revenues of the casino were required by law to go to the tribe and to be used for its prosperity and self-sufficiency, here there is no such requirement. The laws of Idaho, under which Defendant Zims Hot Springs was formed, do not require the net revenues to go to the Nez Perce Tribe, or any other individual or entity. Rather, Defendant Zims Hot Springs appears to have complete discretion as to how its net revenues are allocated, and the Nez Perce Tribe has produced no evidence indicating otherwise, nor has the Nez Perce Tribe shown that all of the net revenues of Defendant Zims Hot Springs go to it in the absence of any such requirement.

Unlike in *Redsleeve Golf, LLC*, there is no evidence that the Nez Perce Tribe has provided any funding or incurred any debts to create, operate, or maintain Defendant Zims Hot Springs. Rather, Defendant Hot Springs was created and funded by individuals other than the Nez Perce Tribe. Baillie Declaration; Exhibit 1; Exhibit 2. Further, the Nez Perce Tribe has not provided any evidence that it is dependent upon the revenues of Defendant Zims Hot Springs to fund its programs or to remain economically sustainable and self-sufficient. Nor is there any evidence that any harm to the finances of Defendant Zims Hot Springs or any adverse judgment against it would in any way affect the Nez Perce Tribe. Rather, the evidence shows that Defendant Zims Hot Springs is a business entity that is separate and apart from the Nez Perce Tribe.

Since the net revenues and other finances of Defendant Zims Hot Springs are independent of the Nez Perce Tribe's, and because it provided no funding and incurred no debt to create or operate Defendant Zims Hot Springs, this factor shows Defendant Zims Hot Springs is an entity separate and apart from the Nez Perce Tribe, not an arm of it.

6. Conclusion: Defendant Zims Hot Springs is Not an Arm of the Nez Perce Tribe.

As analyzed above, each of the factors weigh against finding Defendant Zims Hot Springs to be an arm of the Nez Perce Tribe at this stage of the litigation.

C. In The Alternative, Additional Discovery Is Required To Determine The Interrelationship Of The Tribe To The Entity.

As established above, at this stage in the litigation, the evidence shows that Defendant Zims Hot Springs is not an arm of the Nez Perce Tribe. However, to more fully and comprehensively understand what type of business entity Defendant Zims Hot Springs actually is, what the relationship is between the Defendant and the Tribe, the purpose of the purchase, the agreement

between the purchaser and the seller, and even whether there are additional entities involved with the business, additional discovery is required.

Furthermore, the Declaration of Samuel N. Penney, the Chairman of the Nez Perce Tribal Executive Committee, does not establish that the Nez Perce Tribe is the sole or only owner, manager, or controller of Defendant Zims Hot Springs. *See generally* Declaration of Samuel N. Penney in Support of Defendant's Motion for Summary Judgment/Dismissal. If the Nez Perce Tribe owns, operates, or controls Defendant Zims Hot Springs with another individual or entity that is a citizen of the State of Idaho or elsewhere, Defendant Zims Hot Springs would more properly be considered an unincorporated association, partnership, or other business entity. Such facts, if discovered, would support a finding that this Court can properly assert diversity jurisdiction over this case.

Finally, it would necessarily follow a finding that Defendant Zims Hot Springs is not an "arm" of the Nez Perce tribe, that it is not entitled to assert the Tribe's sovereign immunity. If it is not entitled to assert sovereign immunity and can sue and be sued, then this Court can properly assert subject matter jurisdiction over this case. In *Cook*, the Ninth Circuit Court of Appeals recognized that "[a]n Indian tribe or an *unincorporated arm of a tribe* is not a citizen of any state." 548 F.3d at 722 (citing *Am. Vantage Cos.*, 292 F.3d at 1098) (emphasis added). However, it also recognized that for a tribal business enterprise to be considered an arm of the tribe such that diversity jurisdiction does not exist, or to properly assert the defense of sovereign immunity, the court must consider the five different factors analyzed above. *Id.* (recognizing that "an unincorporated arm of a tribe is not a citizen of any state" within its analysis of whether diversity jurisdiction existed); *Cadet v. Snoqualmie Casino*, 469 F. Supp. 3d 1011, 1014-15 (W.D. Wash.

2020) (recognizing the five factors considered in the Ninth Circuit to determine if a tribal business enterprise is an “arm of the tribe” such that sovereign immunity extends to it).

At this stage of the litigation, as analyzed above, the evidence shows that Defendant Zims Hot Springs is not an arm of the Nez Perce Tribe, and thus, Defendant’s Motion for Summary Judgment/Dismissal should be denied. However, in the alternative, Plaintiff urges this Court to defer or deny Defendant’s Motion in order to allow Plaintiff to discover facts sufficient for this Court to exercise subject matter jurisdiction over this case.

IV. CONCLUSION

As the Supreme Court of the United States acknowledged in its majority opinion in *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, the assertion of sovereign immunity, especially in the context of tort victims, is harmful. 523 U.S. 751, 758 (1998). “In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.” *Id.* And as the dissenting opinion similarly acknowledged, extending sovereign immunity to off-reservation commercial conduct is “unjust.” *Id.* at 766 (Stevens, J., dissenting). “This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity.” *Id.*

As the Court has acknowledged, tort victims like Plaintiff are prevented from recovering for the injuries they sustain from the tortious conduct of business enterprises like Defendant Zims Hot Springs if they are afforded the defense of tribal sovereign immunity. While it is also recognized that only Congress or the Tribe can put limits on its immunity, there are circumstances under which it simply does not exist. In this case, Defendant Zims Hot Springs is not an arm of the Nez Perce Tribe. The Tribe purchased the business entity only approximately two months prior

to Plaintiff's visit and terrible injuries resulting from the negligence of the Defendant's employee. Defendant Zims Hot Springs is clearly a business entity separate and apart from the Tribe and should be treated as such.

Each of the factors analyzed above weigh against finding Defendant Zims Hot Springs to be an arm of the Nez Perce Tribe, but rather that it is a business entity separate and apart from the Tribe and thus, it cannot assert the defense of sovereign immunity. Further, Defendant Zims Hot Springs was formed in Idaho, operates in and under the laws of Idaho, and has its principal place of business in Idaho. Thus, Defendant Zims Hot Springs is a citizen of Idaho for purposes of establishing diversity jurisdiction. Therefore, this Court has subject-matter jurisdiction over this case. Alternatively, Plaintiff asks this Court to deny the motion to allow discovery to occur in order to obtain additional evidence and information related to the issues.

DATED this 12th day of November, 2021.

JAMES, VERNON & WEEKS, P.A.

By: 

Melanie Baillie
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of November, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel/parties of record as follows:

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A handwritten signature in dark ink, appearing to read 'Melanie Baillie', is written over a horizontal line.

Melanie Baillie, ISB#4476