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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

Christi El-Meligi, a single woman; Netrishia Dalgai, a single woman,)	Case No.: S0100CV202100183
)	
Plaintiffs,)	PLAINTIFFS' RESPONSE TO
v.)	DEFENDANT'S MOTION TO DISMISS
)	
Navajo Health Foundation – Sage Memorial Hospital, Inc., an Arizona corporation; ABC Corporations I-X; Jane Does I-X,)	
)	
Defendants.)	

Plaintiffs, by and through counsel, hereby file their Response to Defendant Sage Memorial Hospital's (hereinafter "Sage") Motion to Dismiss and request the Court to deny said Motion because Sage fails to satisfy the six-part test of tribal control recently announced by the Arizona Supreme Court in *Hwal'Bay Ba: J Enterprises, Inc. v. Jantzen*, 248 Ariz. 98, 104 (2020) (hereinafter "*Hwal'Bay*"). This Response is supported by the following Memorandum of Points and Authorities, the declarations of Plaintiffs and accompanying exhibits.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Rule 12(b)(1) Standard.**

3 Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a motion to dismiss
4 for lack of subject-matter jurisdiction. A Rule 12(b)(1) motion may be either facial, where the
5 inquiry is confined to the allegations in the complaint, or factual, where the court is permitted
6 to look beyond the complaint to extrinsic evidence. *Wolfe v. Strankman*, 392 F.3d 358, 362
7 (9th Cir.2004). On a facial challenge, all material allegations in the complaint are assumed
8 true, and the question for the court is whether the lack of federal jurisdiction appears from the
9 face of the pleading itself. *See Wolfe*, 392 F.3d at 362; *Thornhill Publishing Co. v. General*
10 *Telephone Electronics*, 594 F.2d 730, 733 (9th Cir.1979). When a defendant makes a factual
11 challenge “by presenting affidavits or other evidence properly brought before the court, the
12 party opposing the motion must furnish affidavits or other evidence necessary to satisfy its
13 burden of establishing subject-matter jurisdiction.” *Safe Air For Everyone v. Meyer*, 373 F.3d
14 1035, 1039 (9th Cir.2004). In the absence of a full-fledged evidentiary hearing, disputes in
15 the facts pertinent to subject-matter are viewed in the light most favorable to the opposing
16 party. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir.1996). The disputed facts related to
17 subject-matter jurisdiction should be treated in the same way as one would adjudicate a
18 motion for summary judgment. *Id.*

18 **B. Factual Background.**

19 Plaintiff Christi El-Meligi, a nontribal member, served as Defendant Sage’s Chief
20 Executive Officer initially by a third-party management company from September 26, 2013
21 until the termination of her employment on October 4, 2021. (Declaration of Christi El-
22 Meligi, Exhibit A, ¶1). Plaintiff Netrisha Dalgai, a tribal member, served as Defendant
23 Sage’s Chief Operating Officer initially by a third-party management company from January
24 2016 until the termination of her employment on October 4, 2021. (Declaration of Netrisha
25 Dalgai, Exhibit B, ¶1). CEO El-Meligi and COO Dalgai, along with two independent
contractors, were responsible for the day-to-day operation of Sage pursuant to Section V, ¶1-

1 5 of Sage’s Bylaws prior to their termination in October 2021. (*Id.*; Attachment 1 to Exhibit
2 A – Sage Bylaws).

3 Sage was founded, developed, and built in 1930 by the Presbyterian Board of Home
4 Missions. The hospital and healthcare campus are located in Ganado, Arizona and the land on
5 which the hospital is located was deeded by the United States of America to the Woman’s
6 Board of Home Missions of the Presbyterian on February 4, 1920 in fee simple. The current
7 hospital which resides on the mission’s land was built in 1963 along with other buildings that
8 make up the current healthcare campus, many of which are 100 years old. Healthcare has
9 been provided on the land as Sage Memorial Hospital for over 100 years. (See Exhibits A and
10 B, ¶2).

11 The Presbytery handed the hospital over to Sage to operate as a private entity and Sage
12 was incorporated pursuant to the laws of the State of Arizona on October 24, 1978. (See
13 Exhibits A and B, ¶3; Attachment 3 to Exhibit A - Sage Articles of Incorporation). It is a
14 hospital licensed by the Arizona Department of Health Services and is required to comply
15 with all Arizona statutes. Even though the hospital is managed by an all Navajo Board of
16 Directors, it has never been the intent or desire for the organization to be incorporated or
17 registered with the Navajo Nation Business Regulatory Office as a Navajo entity. Sage is not
18 registered or certified (incorporated) with the Navajo Nation Division of Economic
19 Development and is not listed on the Business Regulatory Department business resource list.
(See *Id.* ¶3; Attachment 4 to Exhibit A – Navajo business regulations source list).

20 In 2003 the Board of Directors and hospital executives made the decision to contract
21 with the United States Government to increase the organization’s funding as Sage was
22 experiencing financial difficulty. In order to have the ability to enter into a contract with the
23 U.S. Government’s department of Indian Health Services (“IHS”), a healthcare entity must
24 obtain the tribe’s authorization known as “tribal designation.” Each tribe has its own process
25 for granting this authorization. The Navajo Nation requires an entity to obtain written support
from the communities where it will be providing healthcare. These communities are known as

1 Chapters on the Navajo Nation. Sage successfully obtained the support in the form of
2 resolutions from each Chapter indicating that the Chapters were in support of Sage receiving
3 authorization for Sage to enter a contract with IHS which would provide the extra funding
4 which Sage desperately needed. (See Exhibits A and B, ¶4).

5 These authorizations are typically long term since the contracts entered into between
6 the healthcare organizations (Sage) and the U.S. Government (IHS) are for three-year
7 increments. Sage first obtained a contract with IHS in 2009, over thirty years after it was
8 incorporated in the State of Arizona. Even though Sage had not obtained authorization from
9 the Navajo Nation Council or entered into its first contract with IHS to receive funding, Sage
10 provided healthcare to the community as a continuation of the Presbytery's mission. (See
11 Exhibits A and B, ¶5).

12 The Navajo Nation is governed by Legislative, Executive, and Judicial Branches, and
13 its 110 subordinate local "Chapters," each a unit of local government. 26 N.N.C §2(6); 2
14 N.N.C. §1. Although Sage's Bylaws stated that Sage's eight (8) Chapters (Ganado, Wide
15 Ruins, Kinlichee, Cornfields, Greasewood Springs, Steamboat, Nazlini, and Klagetoh) are to
16 recommend candidates for the Board of Directors, (Bylaws at Art. III), the eight Chapters are
17 currently not represented by a selective representative from each chapter. Currently, there are
18 five (5) Board members – Delores Noble, Veronica Clark, and Andrew Simpson reside in the
19 Steamboat chapter area; Maybelle Kelewood resides in the Kinlichee chapter area; and Aaron
20 Long resides in the Klagetoh chapter area. The Chapters have long been requesting they each
21 have a representative on the Board of Directors from each of the eight Chapters, but the
22 Board has not complied with their requests. The Chapters have also requested the Board
23 provide reports to them, but this has not occurred. Consequently, the eight Chapters do not
24 collectively govern Sage. (See Exhibit A, ¶6 and Exhibit B, ¶5).

24 **C. Standard of Review.**

25 "Indian tribes as 'domestic dependent nations,' are immune from lawsuits in state and
federal court, unless that immunity is waived by the tribe or abrogated by Congress... Sovereign

1 immunity applies to a tribe's commercial and government activities, conducted both on and off
2 the reservation." *Hwal'Bay* at 102. The Arizona Supreme Court noted that it had not established
3 a definitive test to identify when tribal subordinate organizations are "arms of the tribe" and no
4 nationwide consensus exists on the appropriate inquiry. The *Hwal'Bay* Court was guided by the
5 California Supreme Court decision in *People v. Miami Nation Enters.*, 211 Cal.Rptr.3d 837, 386
6 P. 3d 357, 366-368 (2016) which extensively analyzed the various tests utilized by various
7 courts under "arms of the tribe" doctrine.¹

8 The Arizona Supreme Court stated subordinate economic organizations of tribes also
9 have sovereign immunity, if, but only if, they meet a six-factor test of tribal control. The
10 Court's six factors are (1) the entity's creation and business form, (2) the entity's purpose, (3)
11 the business relationship between the tribe and the entity, (4) the tribe's intent to share immunity
12 with the entity, (5) the financial relationship between the entity and the tribe, and (6) whether
13 immunizing the entity furthers federal policies underlying sovereign immunity. *Hwal'Bay* at
14 104-106. The entity (Sage) has the burden of proving, by a preponderance of the evidence, that
15 it is a tribe's subordinate economic organization for sovereign immunity purposes. *Id.* at 102.

16 Sage relies on a fourteen year-old case which previously held Sage "as an arm of a
17 sovereign Indian tribe" in *E.E.O.C. v. Navajo Health Found.-Sage Mem'l Hosp., Inc.*, 2007 WL
18 2683823 at *1 (D.Ariz. Sept. 7, 2007). The issue in that case was whether the Defendant fell
19 within the "Indian Tribe" exemption from Title VII. In concluding the Navajo Nation exercises
20 sufficient control over the hospital to render it a tribal entity for purposes of Title VII, Judge
21 Campbell relied upon the facts presented to him in that case that Sage's Board of Directors

22 ¹ In *Miami Nation*, the defendants included several tribal business entities affiliated with two
23 federally recognized tribes that were allegedly involved in illegal lending practices. (*Miami*
24 *Nation, supra*, 2 Cal.5th at p. 230, 211 Cal.Rptr.3d 837, 386 P.2d 357). The California
25 Supreme Court held that these affiliated entities were not immune from suit as "arms of the
tribe" under a newly devised five-factor test that "takes into account both formal and
relationship aspects between tribes and their affiliated entities" and placed the burden of
proof on the entity claiming immunity. (*Ibid.*)

1 included one representative from each of eight Chapters. However, as Plaintiffs' Declarations
2 reveal, unlike the factual situation Judge Campbell found significant on the issue of control in
3 2007 in his ruling, all eight Chapters are not currently represented by a member from each of the
4 eight Chapters, demonstrating limited control by each of the eight Chapters. Moreover, Judge
5 Campbell did not apply the six-factor test recently announced by the Arizona Supreme Court in
6 *Hwal'Bay* and his ruling predated the influential Tenth Circuit decision in *Breakthrough*
7 *Management Group, Inc. v. Chukchansis Gold Casino and Resort*, 629 F.3d 1173 (10th Cir.
8 2010). Consequently, because the Arizona Supreme Court established a new test in *Hwal'Bay*
9 under Arizona state law, this Court is now required to evaluate each of the six-factors to
10 determine whether Sage is "an arm of the tribe" for tribal immunity analysis under state law.

11 **D. Based upon the Six-Factors Announced *Hwal'Bay*, Sage Does Not Have**
12 **Derivative Immunity and This Court Therefore Has Subject Matter**
13 **Jurisdiction.**

14 **1. Sage's Creation and Business Form Clearly Demonstrate it is Not a**
15 **Subordinate Economic Organization.**

16 This Court must consider "who created the entity, under what authority, and the entity's
17 structural form" under the first *Hwal'Bay* factor. In considering the "method of creation of
18 the economic entities," courts focus on the law under which the entities were formed.
19 *Breakthrough* at 1191. Formation under tribal law weighs in favor of immunity. *Miami*
20 *Nation, supra*, 2 Cal.5th at p. 245, 211 Cal.Rptr.3d 837, 386 P.2d 357. Sage is not registered
21 or certified (incorporated) with the Navajo Nation Division of Economic Development and is
22 not listed on the Business Regulatory Department business resource list. (Exhibits A and B, ¶3
23 and Attachment 4 to Exhibit A).

24 The *Hwal'Bay* Court noted that incorporation weighs heavily against a finding the
25 corporation is a subordinate economic organization because incorporation established the entity
as "separate and distinct" from the tribe and furthers a policy underlying sovereign immunity by
insulating the tribe's assets from corporate liability. *Id.* at 104-105. Although Sage cites cases
on pages 7-8 of its Motion which have held state incorporation is not detrimental to a tribal

1 immunity, these cases are inapposite because they disagree with key language from *Hwal'Bay*
2 which warns that incorporation weighs heavily against finding sovereign immunity.

3 Indeed, it is undisputed that Sage was formed under state law in Arizona as opposed to
4 laws governing the tribe. Sage was incorporated as an Arizona corporation pursuant to
5 Arizona's corporation statutes in 1978 and has remained an Arizona corporation through the
6 present. The general powers of an Arizona corporation are outlined in A.R.S. § 10-302.
7 Pursuant to that section, each corporation **has the power to sue and be sued** and defend in
8 its corporate name.

9 In *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1154 (10th Cir.
10 2012), the Tenth Circuit noted that "United States sovereign immunity does not extend to its
11 sub-entities incorporated as distinct legal entities under state law." 686 F.3d at 1150. In
12 applying the same principle to tribal sovereign immunity, the court declined to apply the "arm
13 of the tribe" factors, and instead stated that the "separate legal entity organized under the laws
14 of another sovereign...cannot share in the [tribe's] immunity from suit." *Id.* The subordinate
15 economic entity test is inapplicable to entities organized under state law, because such entities
16 are under the authority of the state under which they are incorporated, not an Indian tribe. *Id.*
17 at 1149–50; *see also, Miami Nation Enters.*, 211 Cal.Rptr.3d 837, 386 P.3d 357, 372 (2016)
18 ("creation of a separate legal entity pursuant to *state law*, rather than tribal law, weighs
19 heavily against a finding that an entity related to an Indian tribe is an arm of the tribe
20 protected by sovereign immunity"); *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d
21 596, 602-04 (N.D. 1983); *Wright v. Prairie Chicken*, 579 N.W.2d 7, 10 (S.D. 1989).

22 Based on the above, the Court should find this factor weighs in favor of finding Sage
23 is not an arm of the tribe.

24 **2. Sage's Purpose Does Not Dictate that it is a Subordinate Economic** 25 **Organization Entitled to Tribal Immunity.**

The second *Hwal'Bay* factor focuses on "whether the entity exists solely as a profit-
making venture that merely generates revenue for the tribe or its members, or whether it

1 assists the tribe in carrying out its governmental functions, such as promoting tribal or
2 economic development, preserving cultural autonomy, or funding governmental services.”
3 *Hwal’Bay* at 105. Sage serves neither purpose. “If the entity’s purpose is solely to engage in
4 commercial activity, this factor weighs against immunity.” *Id.* Sage solely engages in
5 commercial activity, *i.e.*, operating a hospital as a nonprofit corporation. Article IV of its
6 Articles of Incorporation states its initial business: “Said corporation is organized
7 exclusively for charitable, scientific, educational, old age homes, and charitable hospitals,
8 including for such purposes the making of distributions to organizations that qualify as
9 exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the
10 corresponding provisions of any future U.S. Internal Revenue Law).” (See Exhibit A,
11 Attachment 3).

12 There is no language in Sage’s Articles of Incorporation or bylaws which indicate
13 Sage is to promote tribal or economic development, preserve cultural autonomy or fund
14 governmental services. Moreover, it is clear that Sage does not exist solely as a
15 profitmaking venture which generates revenue for the tribe or its members. (See Exhibit A,
16 ¶7, Exhibit B, ¶6).

17 Indeed, none of Sage’s revenue is provided to the tribe. From the federal
18 government’s annual budget, a certain amount is allotted to each IHS Area office which
19 then divides this funding to allot to each tribe based upon the population of the area. The
20 funds are allotted to IHS area offices located throughout the United States to fund
21 healthcare for qualified tribal members; the Navajo Area Office is the office which provides
22 funding for healthcare to Sage. These area offices divide monies up between any IHS
23 government run and owned hospitals or healthcare facilities and any private facilities which
24 contract with IHS for funding (known as 638 facilities). These facilities must meet the
25 qualifications of P.L. 93-638 to be able to enter what is known as an ISDEAA (Indian Self
Determination Education Assistance Act) contract with IHS. The funds do not belong to and

1 are not "given" to the Navajo Nation, they are allotted or "given" to the IHS Area Office
2 which provides the funding to Sage. (Exhibit A, ¶8, Exhibit B, ¶7).

3 Plaintiffs do not deny that Sage is the vehicle under which funds to provide healthcare
4 to Navajo Nation tribal members. However, the Navajo Nation itself receives none of Sage's
5 revenues and its articles and bylaws contain no language about tribal economic development
6 or preserve cultural autonomy. Moreover, denying immunity to Sage would not hinder tribal
7 cultural autonomy and self-determination because Sage was created for commercial reasons,
8 *i.e.*, to operate a hospital. This factor favors no tribal immunity or is neutral.

9 **3. The Business Relationship Between the Navajo Nation and Sage**
10 **Demonstrates Sage is Not Economically Subordinate to the Navajo Nation.**

11 Under this factor, the court examines the structure, management, and ownership of the
12 entity. Relevant considerations include the entity's formal governance structure, the extent to
13 which it is owned by the tribe, and the entity's day-to-day management. Although Sage does
14 have five Navajo Board members, the Sage Board meets only quarterly and occasionally has
15 special Board meetings to cover specific topics on an agenda. Moreover, as noted earlier, all
16 eight Chapters are not represented on Sage's Board, which has long been the subject of
17 serious disagreement between Sage's Board and the absent Chapters. (Exhibit A, ¶9, Exhibit
18 B, ¶8).

19 Prior to their termination, Plaintiffs were responsible for the day-to-day operations of
20 Sage, along with two non-tribal member independent contractors. As noted in *Hwal' Bay*, "If
21 the tribe retains some ownership and formal control of the entity but has contracted out its
22 management, this factor may weigh either for or against immunity." Here, the Sage Board
23 exercises little or no control over the day-to-day operations of Sage, but contracted out its
24 management to Razaghi Healthcare in early 2008. Subsequently, the day-to-day operations
25 were supervised by Plaintiffs and two other independent contractors after Razaghi
Healthcare's management contract was terminated in August 2018. Essentially, the Board
has not operated the day-to-day operations since at least 2008. (Exhibit A ¶10, Exhibit B,

¶9). Because the Board exercises little or no control over Sage's day-to-day operations, Plaintiffs submit this weighs against immunity.

4. The Evidence Clearly Demonstrates the Tribe Did Not Intend to Share Its Immunity with Sage.

Under the fourth *Hwal'Bay* factor, the Court looks to declarations and actions which demonstrate an intent to share the Tribe's immunity. The Court should be less inclined to conclude that an entity shares a tribe's immunity if the tribe itself did not intend this result. *Id.* at 105. The *Hwal' Bay* Court specifically noted that an entity's obligation to indemnify and hold the tribe harmless for the entity's tort liability, or the procurement of liability insurance protecting the tribe and entity from the entity's negligence, evidences the tribe's expectation that the entity would be responsible for its torts. *Id.*

Here, the record is devoid of evidence demonstrating the tribe's intent. Sage's Articles of Incorporation and its Bylaws are silent as to the tribe's intent to share its immunity with Sage.

Moreover, the fourth factor strongly factors against a finding of tribal immunity for Sage. The *Hwal'Bay* Court emphasized that if an entity purchases liability insurance which protects the tribe from negligence, this is evidence of the tribe's expectation that Sage would be responsible for its torts. It is undisputed Sage has always maintained its own insurance policies to protect itself from liability just as any private healthcare facility in any metropolitan city would be required to do. Sage receives protection for malpractice for its medical staff through the United States FTCA through an executed contract with IHS. It has also maintained a separate malpractice insurance for its medical staff. Additionally, Sage maintains Directors' and Officers' liability insurance and the policy provides employment practices liability coverage. The Navajo Nation in no way provides any insurance or coverage in the event of liability to benefit Sage. (Exhibit A, ¶11, Exhibit B, ¶10; Attachment 5 to Exhibit A, Sage Insurance Policies).

1 Sage's procurement of extensive liability insurance coverage and the absence of any
2 intent of the Navajo Nation to share its immunity with Sage heavily favors a finding that Sage
3 is not entitled to tribal immunity.

4 **5. The Financial Relationship Between Sage and Its Member Chapters** 5 **Weighs Against Sovereign Immunity.**

6 The fifth *Hwal'Bay* factor looks to "whether the tribe's assets are protected from
7 judgments" or "whether enforcement of any judgment...would 'effectively strike a blow
8 against the tribal treasury' due to the tribe's heavy dependance on entity revenues to fund
9 governmental functions." *Hwal'Bay* at 106 (quoting *Miami Nation Enters.*, 2 Cal.5th at 248).

10 As *Hwal'Bay* noted when discussing *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 258
11 (1989), extending immunity to Sage is not necessary to protect tribal assets due to the
12 existence of liability insurance. As noted in Section 4 above, Sage carries Directors and
13 Officers Liability insurance and its insurance policy includes employer practices liability
14 insurance. (Exhibits A and B). Consequently, Sage's claim on page 14 of its Motion that
15 "judgments against Sage Memorial would be paid from funds it otherwise must use to
16 provide governmental healthcare services...Monetary suits against Sage Memorial would
17 strike a blow to the Navajo Nation's share of funds for providing services to its members," is
18 simply specious.

19 Indeed, if Sage found itself in any type of litigation and had to pay a settlement, the
20 Navajo Nation Government would have absolutely no business relationship, no obligation
21 and no liability regarding Sage's business dealings or operations. Sage has lost many legal
22 cases and/or paid many settlements over the years. This does not impact the Navajo Nation
23 whatsoever. Sage is a private business. (Exhibit A, ¶12, Exhibit B, ¶11).

24 Sage has absolutely no financial relationship with the Navajo Nation. As noted above,
25 none of Sage's funds received from IHS or any of its additional third-party funding sources
are provided to the Navajo Nation. Nor would the Navajo Nation Government suffer if it
revoked Sage's authority (tribal designation for the purpose of contracting with IHS) to

1 contract with IHS for funding which is utilized to augment Sage’s funding for its operations.
2 Should Sage or the Navajo Nation revoke Sage’s authorization which would result in the
3 termination of Sage’s contract with IHS, the funds that are allocated and given to Sage as part
4 of the contract would simply be redistributed to the other Navajo Area healthcare facilities to
5 be utilized within their organizations to continue ongoing healthcare services to the Navajo
6 people. Although Sage contends that if it lost funds through a legal settlement or termination
7 of its IHS contract, the patients in Sage’s service area would no longer be able to receive
8 healthcare, this is false as Sage would still continue to operate regardless of its funding
9 source. IHS funds allocated to the Navajo Area Office are based on population of the area as
10 a whole, therefore, the amount the Navajo Area IHS Office receives remains the same and is
11 not given back to the U.S. Government. If one of the IHS contracts is terminated with one of
12 the healthcare facilities on the Navajo Nation, the funds it receives are redistributed to the
13 other area healthcare facilities. Sage would continue to operate if it lost its tribal designation
14 from the Navajo Nation based upon its collections from third-party revenue. (Exhibit A, ¶13,
15 Exhibit B, ¶12).

16 Because none of Sage’s revenues flows to the Navajo Nation and a judgment against
17 Sage would not affect the tribal treasury, this factor weighs in favor of a finding of no tribal
18 immunity for Sage. “Arm of the tribe” tribal immunity here would not affect the Navajo
19 Nation’s financial interests and is a factor against a finding of tribal immunity.

20 **6. Whether Immunizing Sage Furthers Federal Policies Underlying Sovereign 21 Immunity.**

22 For the sixth *Hwal’Bay* factor, the Court simply observed: “Although policies
23 underlying sovereign immunity are embedded in the other five factors, a court should still
24 separately consider whether recognizing immunity for the entity would further those
25 policies.” *Hwal’Bay* at 106. Those policies include: “[p]rotection of tribal assets, preservation
of cultural autonomy, preservation of tribal self-determination, and promotion of commercial
dealings between Indians and non-Indians.” *Dixon v. Picopa Const. Co.*, 160 Ariz. 251, 258

1 (1989). Plaintiffs submit none of those policies would be furthered by granting Sage tribal
2 immunity. Due to insurance coverage, the Navajo Nation's tribal assets are protected,
3 granting immunity will not preserve cultural autonomy or tribal self-determination and would
4 not promote dealings between Indians and non-Indians.

5 Indeed, the majority of the *Hwal'Bay* factors which the Arizona Supreme Court
6 established to determine whether an entity is a subordinate economic organization of a tribe
7 weigh heavily against granting tribal immunity. Sage was incorporated and operates under the
8 laws of the State of Arizona on private Arizona land and was never incorporated with the
9 Navajo Nation. (Factor 1). Because it is incorporated under Arizona state law, "that fact
10 'weighs heavily' against a finding it is a subordinate economic organization... This is so
11 because incorporation establishes the entity as 'separate and distinct' from the tribe, may
12 imply a waiver of immunity, and itself furthers a policy underlying sovereign immunity by
13 insulating the tribe's assets from corporate liability." *Hwal'Bay* at 104-105.

14 Sage's Bylaws state the Board is to be Navajo tribal members and are to be nominated
15 and recommended by the Navajo Nation Chapters within Sage's service area. However, the
16 Board of Directors has not been provided full representation to all eight Chapters for over a
17 decade. The entire Board consists of five (5) members and the Bylaws have not established
18 enough Board seats for each of eight Chapters to have representation. The current Board of
19 Directors reside in only three of the eight Chapter areas. Therefore, other than Sage's request
20 from the eight Chapters for a supporting resolution for the purpose of contracting with IHS,
21 all of the Chapters do not control Sage. There is a paucity of evidence that the purpose for
22 which Sage was formed was to promote tribal or economic development or preserve cultural
23 autonomy, although it is a vehicle for receiving funding from IHS to fund healthcare for tribal
24 members as a commercial, non-profit operation. "If an entity's purpose is solely to engage in
25 commercial activity, this factor weighs against immunity." *Hwal'Bay* at 105. Consequently,
Factors 2 and 3 weigh in favor of finding Sage is not a subordinate economic organization
entitled to tribal immunity.

1 Sage's Articles of Incorporation and Bylaws reflect no intent to share the Navajo
2 Nation's tribal immunity. (Factor 4). As noted in *Hwal'Bay*, one of the primary purposes of
3 tribal immunity is to protect the tribal treasury. It is undisputed Sage has procured
4 malpractice and Directors' and Officers' liability insurance and thus any judgment against
5 Sage will not "effectively strike a blow against the tribal treasury." *Hwal' Bay* at 106. Thus,
6 *Hwal'Bay* Factors 4 and 5 "weigh heavily" against finding Sage is a subordinate economic
7 organization of the Navajo Nation because it would not be liable for any judgment against
8 Sage.

9 **E. Conclusion**

10 For the reasons set forth herein, Plaintiffs request the Court deny Defendant's Motion
11 to Dismiss. As demonstrated above, most of the *Hwal'Bay* factors weigh heavily in favor of
12 a finding of no tribal immunity for Sage.

13 DATED this 28th day of January 2022.

14 SCHLEIER LAW OFFICES, P.C.

15 /s/ Tod F. Schleier

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