

1 Specially appearing before this Court and without waiving its sovereign immunity from
2 suit, Defendant Navajo Health Foundation–Sage Memorial Hospital, Inc. (“Sage Memorial”),
3 hereby files its Reply in support of its December 20, 2021, Motion to Dismiss. In their opposition,
4 Plaintiffs attempt to characterize Sage Memorial as a standalone hospital without ties to the
5 Navajo Nation or the Nation’s Chapters it serves. This characterization is false; Sage Memorial
6 is tied both to the Nation and the Chapters through oversight, representation, and service, and—
7 by virtue of operating under tribal self-determination agreements with the federal Indian Health
8 Service (IHS) (something only tribes and tribal organizations may do)—is fundamentally a tribal
9 health organization carrying out essential governmental health care services for the Nation and its
10 citizens.

11 **I. THE ARIZONA SUPREME COURT DID NOT SET OUT A NEW ARM-OF-THE-**
12 **TRIBE TEST, BUT RATHER ARTICULATED ONE ALREADY ESTABLISHED.**

13 Plaintiffs insist that the ruling in *EEOC v. Navajo Health Found.–Sage Mem’l Hosp., Inc.*,
14 2007 WL 2683825, at *1 (D. Ariz. Sept. 7, 2007) was effectively overruled by *Hwal’Bay Ba: J*
15 *Enters., Inc. v. Jantzen*, 248 Ariz. 98, 458 P.3d 102 (2020) (*Hwal’Bay*). *Hwal’Bay* did not
16 overrule *EEOC* and did not announce a new rule. Instead, the *Hwal’Bay* Court adopted its test
17 from *People ex rel. Owen v. Miami Nation Enters.*, 2 Cal. 5th 222, 244 (2016)—which itself was
18 “a modified version of the Tenth Circuit’s [*Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold*
19 *Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010)] test.” That test was not new either, as it
20 adopted factors from *Native American Distributing v. Seneca–Cayuga Tobacco Co.*, 546 F.3d
1288 (10th Cir. 2008), which predated *EEOC*. The *EEOC* Court conducted a substantively similar
inquiry for Sage Memorial, analyzing its method of creation, purpose, and the level of control

1 exerted over it by the Navajo Nation. The *EEOC* Court's consideration of Sage Memorial's
2 creation, control by Chapter members, and status as a tribal organization under the Indian Self-
3 Determination Act are the operative factors here, and changes since *EEOC* have been marginal.

4 **II. SAGE MEMORIAL IS A TRIBAL HEALTH ORGANIZATION PROVIDING**
5 **GOVERNMENTAL SERVICES, NOT A FOR-PROFIT, PRIVATE HOSPITAL.**

6 Sage Memorial is not a private business, as Plaintiffs assert; it is a tribal organization, a
7 governmentally created entity acting on behalf of its Member Navajo Chapters to deliver essential
8 governmental health services to members of the Navajo Nation. It was sanctioned by the Navajo
9 Nation and is an entity eligible under the self-determination tools of the Indian Self Determination
10 and Education Assistance Act (ISDEAA), 25 U.S.C. § 5301 et seq., to step into the shoes of the
11 tribe and contract with the Indian Health Services. In carrying out these health care
12 responsibilities, Sage Memorial is cloaked with the tribe's sovereign immunity.

13 1. Sage Memorial's Non-Profit Status Does Not End the Sovereign Immunity Inquiry.

14 Plaintiffs cite to dicta from one outlier case, *Somerlott v. Cherokee Nation Distribs., Inc.*,
15 686 F.3d 1144, 1150 (10th Cir. 2012), to argue that incorporation *per se* defeats subordinate status.
16 *Hwal'Bay* makes no mention of this opinion, and it is clear from the numerous cases on this issue
17 that state incorporation is not the sole determinant. Tribes frequently use state business
18 organization methods for tribal enterprises, and often for non-profit incorporation. *See EEOC* at
19 *3 (stating that state non-profit incorporation does not affect tribal status) (citing *Giedosh v. Little*
20 *Wound Sch. Bd. Inc.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997); *Pink v. Modoc Indian Health*
Project, Inc., 157 F.3d 1185, 1189 (9th Cir. 1998)); *White v. Univ. of Cal.*, 765 F.3d 1010, 1026
(9th Cir. 2014) (state incorporation did not waive immunity); *Matyascik v. Arctic Slope Native*

1 *Ass'n, Ltd.*, No. 2:19-CV-0002-HRH, 2019 WL 3554687, at *4 (D. Alaska, Aug. 5, 2019)
2 (rejecting same); *Manzano v. S. Indian Health Council, Inc.*, No. 20-CV-02130-BAS-BGS, 2021
3 WL 2826072, at *7 (S.D. Cal. July 7, 2021) (“Because the majority of the case law does not
4 consider state incorporation detrimental to tribal status . . . incorporation under state law does not
5 mean its method of creation weighs against its claim to sovereignty.”). While method of entity
6 creation is relevant, it must be assessed in context. A non-profit entity that delivers essential
7 health care, that participates as an arm of a sovereign tribe in federal health care programs that
8 only tribes and tribal organizations are eligible at the direction of a tribe, and that carries out
9 essential governmental functions must be analyzed differently than a for-profit corporation.

10 Further, unlike in *Miami Nation Enters.*, 2 Cal. 5th at 246, where the tribe purchased an
11 existing company and left non-Indian management and profit structures in place, Sage Memorial
12 as a non-profit corporation was founded to confer the former Presbyterian hospital to tribal control
13 as the entity was already serving the Chapters that absorbed it. Incorporation transformed and
14 created a tribal healthcare entity, severing the church’s governance and control altogether.

15 2. Sage Memorial’s Purpose is to Provide Essential Governmental Health Care Services,
16 not to Carry Out Commercial Activity.

17 Plaintiffs are incorrect that Sage Memorial fails to “promote tribal or economic
18 development, preserve cultural autonomy or fund governmental services.” Resp. at 8. Plaintiffs
19 fundamentally misunderstand the nature of tribal organizations under ISDEAA and gloss over the
20 remaining analysis supplied by the Arizona Supreme Court for this factor. Sage Memorial does
not “solely engage[] in commercial activity” by “operating a hospital as a nonprofit corporation.”
Id. Instead, Sage Memorial provides federally guaranteed, governmental healthcare services via

1 governmental agreements only available to tribes and tribal organizations. Sage Memorial,
2 through its operations, unquestionably “funds governmental services,” namely, health care.

3 The *Hwal’Bay* Court did not reduce this factor to a binary “commercial versus non-
4 commercial” or “profit versus non-profit” inquiry, nor did it limit legitimate tribal interests to only
5 cultural or economic development interests. The *Hwal’Bay* Court instead said that “if the
6 [entity’s] purpose is to further goals of tribal self-governance, even if the entity also has a
7 commercial purpose, this factor weighs in favor of immunity.” 248 Ariz. at 105. Here, Sage
8 Memorial operates under the very federal self-governance law intended to further those goals.
9 Noble Decl. ISO Mot. to Dismiss (“Noble Decl.”), Ex. C. In addition, “a court should examine
10 both the entity’s declared purpose ‘and the degree to which the entity actually serves that purpose’
11 to determine whether ‘its activities [are] sufficiently germane to tribal self-governance.’” *Id.*
12 (quoting *Miami Nation Enters.*, 211 Cal.Rptr.3d at 837). Plaintiffs fail to account for this analysis;
13 the facts and context demonstrate that Sage Memorial is not simply a commercial hospital. Sage
14 Memorial provides federal healthcare services to Navajo citizens as promised by law and treaty.

15 Indeed, a private commercial hospital would be ineligible for ISDEAA funds. Sage
16 Memorial is only eligible to step into the shoes of the Navajo Nation to contract with the IHS
17 under ISDEAA because it meets the definition of a “Tribal organization,” which requires it to be:

18 any legally established organization of Indians which is controlled, sanctioned, or
19 chartered by such governing body or which is democratically elected by the adult
20 members of the Indian community to be served by such organization and which
includes the maximum participation of Indians in all phases of its activities:
Provided, That in any case where a contract is let or grant made to an organization
to perform services benefiting more than one Indian tribe, the approval of each such
Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

1 25 U.S.C. § 5304(l). Under the express terms of the ISDEAA, then, Sage Memorial must be
2 “controlled, sanctioned, or chartered” by some form of tribal government (here, the Chapters and
3 ultimately the Nation) to take over IHS programs and must carry out these programs “for the
4 benefit of Indians because of their status as Indians” *Id.* § 5321; *see* Noble Decl., Exs. A, B.

5 Plaintiffs further argue that Sage Memorial does not provide profits to the Navajo Nation
6 or Chapters, but that argument is ludicrous because the ISDEAA prohibits that very action. Sage
7 Memorial may not pass any payments or proceeds back to the Navajo Nation or Chapters. Instead,
8 program funding and program income, including all third-party income, must be used only “to
9 further the general purposes of the contract” *id.* § 5325(m), i.e., the governmental service of
10 providing healthcare. *See also* Noble Decl., Ex. C, art. III, § 6 and 25 U.S.C. §§ 1641(c)(1)(B) &
11 (d)(2)(A). Sage Memorial has lost whatever “private” character it may have had by way of its
12 designation as an ISDEAA tribal contractor.

13 3. Board Directors are Named by Chapters and Directors are Tribal Members.

14 Plaintiffs make much ado of the claim that not each Member Chapter has a direct
15 geographic representative on Sage Memorial’s Board of Directors. In fact, there is no requirement
16 in *Hwal’Bay* that all Chapters must have a local representative in order to qualify as an arm of the
17 tribe. Sage Memorial’s bylaws require that the five permanent board members be named from
18 the Chapters and that each member be a voting Chapter member. All permanent board members
19 were so named, and the one temporary member was named from among Chapter members by the
20 Board, as provided in the bylaws. Noble Decl., Ex. A. All Directors are Navajo and the Board
provides ultimate direction and control of the entity; as it is for any corporation, Directors do not

1 handle day-to-day operations. The all-Navajo Board named by the Chapters evidences tribal
2 control. *See, EEOC* at *2 n.2 (finding that Sage Memorial’s previous board of ten members,
3 including two non-Indian members, did not affect arm-of-the-tribe status).

4 Plaintiffs also ignore *Hwal’Bay*’s command to determine “whether the entity represents the
5 tribe in any capacity” which Sage Memorial unquestionably does for purposes of ISDEAA—a
6 factor Arizona courts found significant in both *White Mountain Apache Indian Tribe v. Shelley*,
7 107 Ariz. 4, 8, 480 P.2d 654, 658 (1971) and *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian*
8 *Cmty.*, 138 Ariz. 378, 381 (Ct. App. 1983). *See Noble Decl.*, Ex. B, at 46–47.

9 4. Chapters Intend to Share Immunity By Operating Sage Memorial, and Insurance
10 Coverage is Immaterial.

11 Plaintiffs argue extensively that Sage Memorial’s procurement of insurance and the
12 absence of any explicit immunity language in its organic documents are significant. *Resp.* at 10–
13 11. Plaintiffs mischaracterize dicta from the *Hwal’Bay* Court, which observed that it would be
14 “less inclined to conclude that an entity shares a tribe’s immunity if the tribe itself did not intend
15 this result.” 248 Ariz. at 105, 458 P.3d at 109. The Court said “intent is reflected not only by
16 declarations but by actions” and proposed that one example of one such action was procurement
17 of liability insurance. *Id.* The Court did not say that liability insurance is itself dispositive or even
18 significant for the immunity question, and courts have not found it dispositive. *See Breakthrough*
19 *Mgmt.*, 629 F.3d at 1196 n.16 (“We also are not convinced by BMG’s contention that the
20 Authority and Casino’s insurance policies protect the Tribe from being financially responsible for,
or harmed by, an adverse judgment against them, and weigh against a finding of immunity”);
Evans v. McKay, 869 F.2d 1341, 1347 (9th Cir. 1989) (holding former ISDEAA insurance

1 requirement did not show intent to waive immunity). Tribal insurance purchase is common and
2 is not a clear waiver of sovereign immunity. Unconvincingly, Plaintiffs seek to underscore their
3 argument by attaching casualty insurance policies where immunity is not a factor, such as nuclear
4 incident, kidnap/ransom, theft/robbery, and terrorism policies. Resp. Exs. A5.1-A5.4 & A6.

5 Sage Memorial reiterates that its Member Chapters have, in fact, acted to confer immunity
6 by authorizing Sage Memorial to contract on their and the Navajo Nation’s behalf under ISDEAA.
7 Other courts have agreed that this shows intent to share immunity. *See Manzano*, 2021 WL
8 2826072, at *9 (concluding that despite no express statement of intent to share immunity in record,
9 ISDEAA authorizing resolutions expressed intent). Given the identical backdrop of ISDEAA, the
10 Court should conclude that the Chapters’ authorizations bring Sage Memorial within the ambit of
11 their immunity and that the presence of insurance does not tilt the scales for this factor.

12 5. Sage Memorial’s Funds are Tribal Funds Allocated for Health Care that are Burdened
13 by Litigation and Legal Costs, Resulting in Fewer Governmental Services.

14 Plaintiffs also make much of insurance by arguing that Sage Memorial has financial
15 “separation” from the Navajo Nation, incorrectly asserting that paying out costly lawsuits “does
16 not impact the Navajo Nation whatsoever Nor would the Navajo Nation Government suffer
17 if it revoked Sage’s authority” to carry out ISDEAA IHS healthcare functions on its behalf. Resp.
18 at 11. This is not the case—these costs burden the ability of this tribal healthcare provider to
19 provide services, increase burdens on limited federal funding, and lessen program income
20 available for operations.

Sage Memorial acknowledges that the Navajo Nation would not be directly liable to pay
for an adverse judgment against Sage Memorial—this is the purpose of any corporate entity of

1 course. But the inquiry does not end there, because where “tribal assets are not directly at risk,
2 the court must consider whether enforcement of any judgment against the entity would ‘effectively
3 strike a blow against the tribal treasury’ due to the tribe’s heavy dependence on entity revenues to
4 fund governmental functions.” *Hwal’Bay*, 248 Ariz. at 106 (quoting *Miami Nation Enters.*, 2 Cal.
5 5th at 248). The funding Sage Memorial receives through its ISDEAA agreements is a portion of
6 the Navajo Nation’s tribal shares, which are tribal funds used to carry out governmental functions.

7 Under the ISDEAA, Sage Memorial is entitled to an amount not less than what IHS “would
8 have otherwise provided for the operation of the programs or portions thereof for the period
9 covered by the contract” in addition to certain administrative contract support costs. 25 U.S.C.
10 § 5325(a)(1). Plaintiffs correctly note that this money does not flow to the Navajo Nation
11 government—nor can it, given that program funds and any third-party income are restricted to use
12 for the program itself. *See id.* § 5325(m). The *Miami Nation Enterprises* Court believed this
13 significant—where federal law curtails an entity’s ability to profit share and income must be
14 reinvested in the tribe, as is the case for tribal gaming, this suggests economic subordination.
15 2 Cal. 5th at 255, 386 P.3d at 378. Here, as discussed *supra* in Part II.2, the ISDEAA funds and
16 any program income must be used for the program’s purposes only. If the larger Navajo Nation
17 ran the hospital, its treasury would also not profit from these tribal shares due to these restrictions,
18 but this does not weigh against immunity.

19 Contrary to Plaintiffs’ assertions, the tribal hospital could not continue to operate on
20 third-party funds if was not a tribal entity. First, for example, it would not receive any tribal
shares or administrative costs, which would reduce its funding by nearly \$20.8 million a year.

1 Noble Decl., Ex. C, at 37. It would also lose important benefits, such as access to cheaper
2 federal supply and property, *see* 25 U.S.C. § 5324(f), (k); leasing payments paid to the hospital
3 for its facilities, *id.* § 5324(l); the ability to access the federal reimbursement rates for Medicaid
4 (which are higher than state rates); funding for Purchased and Referred Care (which tribal
5 providers use to pay other healthcare providers for services it cannot offer, such as specialist
6 services or complex care); and status as part of the Public Health Service with coverage under
7 the Federal Tort Claims Act, *id.* § 5321(d). If Sage Memorial became private, it could not
8 continue to provide services to its 40,038 patients, 99% of whom are IHS beneficiaries and
9 38,000 of whom are Indian and receive federal care at no cost. Noble Decl. ¶ 13.

10 6. Sage Memorial Promotes Navajo Culture As Well As Self-Determination.

11 Plaintiffs summarily dismiss that Sage Memorial supports no federal policies of cultural
12 autonomy, self-determination, or protection of tribal assets. Sage Memorial is a vehicle that the
13 Member Chapters have used to assert community control and self-determination over Navajo
14 health care operations for almost fifty years. Other courts have concluded in a similar context:

15 Providing adequate health care to their constituents—a group that suffers
16 disproportionately from certain diseases and has a lower life expectancy than other
17 Americans—is a very real concern for sovereign Indian tribes. The sixteen tribes
18 created Great Plains to represent the health care interests of their members to the
19 federal government and to participate in the establishment of health care programs
20 unique to the tribes’ needs. By engaging in these activities, Great Plains promotes
the preservation of tribal cultural autonomy and tribal self-determination, two of the
federal policies behind tribal sovereign immunity.

19 *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen’s Health Bd.*, 842 F. Supp. 2d 1163, 1177
20 (D.S.D. 2012) (footnotes omitted). Further, Sage Memorial staff are 73% Indian, and 72%
Navajo, providing jobs and economic development throughout its community. With a 95% Indian

1 patient base, Sage Memorial also ensures that its communities have access to health care. These
2 facts support federal policies of self-determination, which in turn supports a finding that Sage
3 Memorial enjoys sovereign immunity as an arm of the Navajo Nation and its Member Chapters.

4 **III. CONCLUSION**

5 For the reasons set forth herein, Defendant Sage Memorial requests that the Court grant its
6 Motion to Dismiss and dismiss Plaintiffs' claims in their entirety.

7 Respectfully submitted this 9th day of February, 2022.

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