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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Velená Tsosie,

10 Plaintiff,

11 v.

12 N.T.U.A. Wireless LLC, et al.,

13 Defendants.
14

No. CV-23-00105-PHX-DGC

ORDER

15
16 Plaintiff Velená Tsosie brings this action against her employer, Defendant NTUA
17 Wireless, and her former supervisor, Defendant Walter Haase, and his wife. Doc. 1.
18 Defendants move to dismiss the complaint under Rule 12(b)(1). Doc. 8. The motion is
19 fully briefed and no party requests oral argument. For reasons set forth below, the Court
20 will deny the motion.

21 **I. Background.**

22 Defendant NTUA Wireless (“Wireless”) provides internet, telephone, and data
23 communication services in and around the Navajo Nation. Doc. 1 ¶ 7; Doc. 11-1 at 10.
24 Wireless is a Delaware limited liability company, owned by Commnet Newco and Navajo
25 Tribal Utility Authority (“NTUA”). Doc. 1 ¶¶ 4, 6. Commnet Newco is also a Delaware
26 limited liability company and the managing member of Wireless. *Id.* ¶ 6; Doc. 11-1 at 6.
27 NTUA is a tribal enterprise of the Navajo Nation. Doc. 1 ¶ 6.
28

1 Defendant Walter Haase is the general manager of NTUA and served on the board
2 of Wireless until April 2022. *Id.* ¶ 8. Plaintiff is the general manager of Wireless and
3 reports directly to the Wireless board. *Id.* ¶ 4.

4 Plaintiff’s claims arise from a working dinner that occurred in March 2022, while
5 Plaintiff reported to Defendant Haase. *Id.* ¶¶ 8, 13. The complaint alleges that Defendant
6 Haase made unwelcome suggestive comments to Plaintiff (*id.* ¶¶ 14, 16-17, 20), and
7 initiated unwelcome physical contact with Plaintiff (*id.* ¶¶ 15-17, 19-21). The complaint
8 alleges that Wireless conducted an inadequate investigation, issued a retaliatory press
9 release, and failed to sufficiently discipline Defendant Haase. *Id.* ¶¶ 22-25.

10 Plaintiff asserts claims for violation of Title VII of the Civil Rights Act of 1964,
11 violation of the Arizona Civil Rights Act, A.R.S. § 41-1463, assault, battery, and
12 intentional infliction of emotional distress. *Id.* ¶¶ 27-57. Defendants move to dismiss the
13 complaint on tribal immunity grounds. Doc. 8.

14 **II Legal Standards.**

15 Federal courts are courts of limited jurisdiction, “possess[ing] only that power
16 authorized by Constitution and statute[.]” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
17 U.S. 375, 377 (1994). Courts presume that a claim “lies outside this limited jurisdiction,
18 and the burden of establishing the contrary rests upon the party asserting jurisdiction[.]”
19 *Id.* (citations omitted); *see Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d
20 1189, 1197 (9th Cir. 2008) (same).

21 “A sovereign immunity defense is ‘quasi-jurisdictional’ in nature and may be raised
22 in . . . a Rule 12(b)(1) motion.” *Sato v. Orange Cnty. Dep’t of Educ.*, 861 F.3d 923, 927
23 (9th Cir. 2017). Such a motion may be either a factual or facial attack on jurisdiction. *See*
24 *Thornhill Publ’g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A
25 factual attack “disputes the truth of the allegations that, by themselves, would otherwise
26 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
27 Cir. 2004). A facial attack, like this one, asserts that the allegations in the operative
28 pleading, even when taken as true, are “insufficient on their face to invoke federal

1 jurisdiction.” *Id.* When considering a facial attack, the Court takes the allegations in the
2 complaint as true. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (citing *Wolfe v.*
3 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)).

4 **II. Analysis.**

5 Defendants argue that the Court lacks subject matter jurisdiction because Wireless
6 is entitled to tribal immunity as an arm of the Navajo Nation and has not waived tribal
7 immunity for Plaintiff’s claims. Doc. 8 at 3-11.¹

8 It is well-established that Indian tribes are immune from suit absent congressional
9 authorization or clear waiver. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)
10 (citation omitted); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014)
11 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)). “Tribes enjoy
12 immunity from suits on contracts, whether those contracts involve governmental or
13 commercial activities and whether they were made on or off a reservation.” *Kiowa Tribe*,
14 523 U.S. at 760. “Tribal sovereign immunity not only protects tribes themselves, but also
15 extends to arms of the tribe acting on behalf of the tribe.” *White v. Univ. of California*, 765
16 F.3d 1010, 1025 (9th Cir. 2014) (citations omitted).

17 The Ninth Circuit has adopted five factors for assessing whether an entity is an “arm
18 of the tribe” – (1) the method of creation of the entity, (2) the purpose of the entity, (3) the
19 structure, ownership, and management, including the tribe’s control over the entity, (4) the
20 tribe’s intent to share sovereign immunity, and (5) the financial relationship between the
21 tribe and the entity. *Id.* (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold*
22 *Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)); *see also Allen v. Gold Country*
23 *Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (“The question is not whether the activity
24 may be characterized as a business . . . but whether the entity acts as an arm of the tribe so
25 that its activities are properly deemed to be those of the tribe.”).

26 If the Court determines that Wireless is an arm of the Navajo Nation, Wireless is
27 entitled to tribal immunity. The Court will then inquire into whether Congress has

28 ¹ Defendants also note that Indian tribes and arms of tribes are not proper defendants
under Title VII, 42 U.S.C. § 2000e(b). *Id.* at 3-4.

1 abrogated or Wireless has waived its tribal immunity. If Wireless is not an arm of the
2 Navajo Nation, it is not entitled to tribal immunity and the Court has jurisdiction.

3 **A. Method of Creating Wireless.**

4 NTUA and Commnet Newco formed Wireless as a corporate entity under Delaware
5 law. Doc. 1 ¶ 4. NTUA holds a 51% interest in Wireless and Commnet Newco holds 49%.
6 Doc. 11-1 at 1. It is undisputed that NTUA enjoys tribal immunity as an enterprise of
7 Navajo Nation. Doc. 8 at 5-6; Doc. 11 at 11.

8 Defendants argue that the tribal immunity enjoyed by NTUA extends to Wireless.
9 Doc. 8 at 5-6. Defendants further argue that the Speaker of the Navajo Nation Council's
10 approval of the Wireless operating agreement shows the Tribe was involved in Wireless's
11 creation. *Id.*

12 District courts in this circuit have recognized that subsidiaries that are wholly owned
13 by an Indian tribe or an arm of the tribe enjoy tribal immunity. *See, e.g., Dine Citizens*
14 *Against Ruining Our Env't v. Bureau of Indian Affs.*, No. CV-16-08077-PCT-SPL, 2017
15 WL 4277133, at *3 (D. Ariz. Sept. 11, 2017), *aff'd*, 932 F.3d 843 (9th Cir. 2019) (“[I]t is
16 clear that Intervenor-Defendant Navajo Transitional Energy Company enjoys sovereign
17 immunity as an arm of the Navajo Nation. Established in 2013, NTEC is a wholly-owned
18 Navajo corporation organized pursuant to Navajo law.”); *Cadet v. Snoqualmie Casino*, 469
19 F. Supp. 3d 1011, 1015 (W.D. Wash. 2020) (“The Casino is wholly owned and operated
20 by the Tribe [and] was formed by the Tribe pursuant to the SEA Act, a resolution codifying
21 the Tribe’s authority over the Casino. Thus, the first *White* factor favors the Casino
22 functioning as an ‘arm of the Tribe.’”).

23 This case is different. NTUA does not wholly own Wireless, and Wireless was not
24 formed under the laws governing the Tribe. Other courts considering similar circumstances
25 have declined to confer tribal immunity. *See Somerlott v. Cherokee Nation Distribs., Inc.*,
26 686 F.3d 1144, 1150 (10th Cir. 2012) (“CND, a separate legal entity organized under the
27 laws of another sovereign, Oklahoma, cannot share in the Nation’s immunity from suit.”);
28 *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *3

1 (D. Or. Apr. 26, 2018) (“Defendant contends that because Redhawk’s parent
2 corporation . . . was incorporated under tribal law, and Redhawk is only one ‘layer’
3 removed . . . the method of creation factor weighs in favor of immunity. The first factor
4 in determining whether an entity is an ‘arm of the tribe,’ however, focuses solely on the
5 method of creation of the entity in question. Therefore, this factor weighs against a finding
6 that Redhawk is an ‘arm of the tribe.’”).

7 What is more, Wireless – the Delaware corporation – is the defendant in this case,
8 not NTUA. As a Delaware company, Wireless does not enjoy NTUA’s tribal immunity by
9 virtue of being partly owned by NTUA. *McCoy v. Salish Kootenai Coll., Inc.*, 785 F. App’x
10 414, 415 (9th Cir. 2019) (“[T]he first factor – the method of creation factor – weighs against
11 finding that the College is an arm of CSKT because this action is against the Montana
12 corporation, not the tribal corporation.”).² This factor weighs against immunity.

13 **B. Purpose of Wireless.**

14 Wireless was “formed for the purpose of engaging (directly or indirectly) in
15 providing data, internet and voice telephone services in and near the Navajo Nation, and
16 pursuing the same for its income and profit.” Doc. 11-1 at 15. The Federal Trade
17 Commission designated Wireless as an “eligible telecommunications carrier.” *Id.* This
18 status allows Wireless to provide affordable telecommunications services to low-income
19 consumers and receive subsidies from the federal government. *See* 47 U.S.C. § 254
20 (c)(3)(e); 47 C.F.R. § 54.201.

21 Although a for-profit business, Wireless builds on NTUA’s history of supplying the
22 Navajo Nation with modern utilities. *See* Doc. 8 at 6 (“The Navajo Tribal Utility Authority

23 _____
24 ² That the Navajo Nation Council approved NTUA’s operating agreement does not
25 alter this conclusion. Tribes and their business partners form entities under state law for a
26 variety of reasons. *See Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1112 (Ariz. 1989)
27 (“[A]n Indian corporation’s successful assertion of immunity . . . may deter persons or
28 entities from entering into contractual relationships with that Indian corporation or any
other Indian corporation. Non-Indians will undoubtedly think long and hard before
entering into business relationships with Indian corporations that are immune from suit.”);
Felix S. Cohen, 1 Cohen’s Handbook of Federal Indian Law § 21.02[2] (2019) (“Some
tribes have created separate businesses entities that are not immune from suit. This has
been a particularly useful tool for tribes operating off-reservation businesses. Any
judgments, however, are limited to assets held by that entity.”).

1 was created by the Navajo Tribal Council on January 22, 1959, in order to bring electric
2 power to Shiprock, Navajo Nation[.] The Authority has expanded into natural gas, water,
3 sewer utility operations, and telecommunications and information services as well as
4 increasing its electric services.”) (citing 21 N.N.C. § 1(A)).

5 Wireless’s purpose helps the Navajo Nation become “more self-sufficient, and
6 better positioned to fund their own sovereign functions, rather than relying on federal
7 funding.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014); *see Manzano v.*
8 *S. Indian Health Council, Inc.*, No. 20-CV-02130-BAS-BGS, 2021 WL 2826072, at *8
9 (S.D. Cal. July 7, 2021) (finding that providing health services weighs in favor of tribal
10 immunity); *Hunter*, 2018 WL 4171612, at *3 (finding that providing network security
11 services weighs in favor of tribal immunity). This factor favors immunity.

12 **C. Structure, Ownership, and Management of Wireless.**

13 Wireless is owned 51% by NTUA and 49% by Commnet Newco. Doc. 11-1 at 6.
14 But neither NTUA nor Commnet Newco has the authority to unilaterally act for or bind
15 Wireless. *Id.* at 27. Commnet Newco is the managing member and is responsible for active
16 management of Wireless, including operations and regulatory matters. *Id.* at 11; Doc. 11-
17 2 at 3-4.

18 The operating agreement provides that Wireless “shall be managed under the
19 direction of a Board” consisting of four directors. Doc. 11-1 at 23. NTUA and Commnet
20 Newco each appoint two directors with equal voting power. *Id.* at 23-24. The operating
21 agreement does not require that any director be a member of the Navajo Tribe.

22 Defendants contend that this corporate structure weighs in favor of finding that
23 Wireless is an arm of the Navajo Nation. Doc. 8 at 7-8. Courts, under similar
24 circumstances, have suggested otherwise. *See Breakthrough*, 629 F.3d at 1193 (finding
25 that the structure of an entity “weigh[ed] both for and against a finding of immunity” when
26 seven board members sat on the tribal council and the tribe chairperson chaired the entity,
27 but twelve directors and three officers were not tribal members); *People v. Miami Nation*
28 *Enters.*, 386 P.3d 357, 373 (Cal. 2016) (“Evidence that the tribe actively directs or oversees

1 the operation of the entity weighs in favor of immunity; evidence that the tribe is a passive
2 owner, neglects its governance roles, or otherwise exercises little or no control or oversight
3 weighs against immunity.”) (citation omitted). With Commnet Newco designated as the
4 managing member, this factor weighs slightly against immunity.

5 **D. Navajo Nation’s Intent to Share Sovereign Immunity.**

6 Defendants contend that “Wireless is providing services on the Navajo
7 Nation . . . consistent with NTUA’s statutory mandate to provide telecommunications
8 services,” showing that “NTUA intended to share its immunity with NTUA Wireless.”
9 Doc. 8 at 9. But the relevant inquiry concerns “the *tribe*’s intent with respect to the sharing
10 of its sovereign immunity.” *White*, 765 F.3d at 1025 (emphasis added) (citation omitted).
11 It is not clear that the Navajo Nation elected to share its immunity with Wireless.

12 The Speaker of the Navajo Nation Council allowed NTUA to waive NTUA’s
13 sovereign immunity for enforcement of the Wireless operating agreement. Doc. 11-1 at
14 37. The operating agreement provides: “*NTUA* hereby expressly waives any sovereign
15 immunity or similar protection that may apply to *NTUA* or of which *NTUA* may avail itself,
16 and further expressly waives any and all rights to litigate any matter related to this
17 agreement in the courts of the Navajo Nation[.]” Doc. 11-1 at 37 (emphasis added)
18 (cleaned up).

19 The operating agreement is silent on the Navajo Nation Council’s intent to share
20 sovereign immunity with Wireless. But the Tribe’s express waiver of NTUA’s immunity
21 in the operating agreement, and the fact that NTUA’s only partially owns Wireless, imply
22 that the Tribe did not intend to render Wireless immune. *Cf. Breakthrough*, 629 F.3d at
23 1193 n.15 (“[B]ecause the Casino is wholly owned by the Authority, it is logical to assume
24 that if the Tribe intended for the Authority to have immunity from suit, it also intended for
25 the Casino to have immunity.”). This factor weighs against immunity.

26 **E. Financial Relationship Between Navajo Nation and Wireless.**

27 The extent to which an Indian tribe relies on an entity “for revenue to fund its
28 governmental functions, its support of tribal members, and its search for other economic

1 development opportunities” determines whether the financial relationship between the
2 tribe and the entity favors tribal immunity. *Breakthrough*, 629 F.3d at 1195. And where
3 “a judgment against [an] entity would significantly impact the tribal treasury,” the entity is
4 more likely to enjoy tribal immunity. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170,
5 184 (4th Cir. 2019); *see, e.g., Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir.
6 2008) (“[T]he economic benefits produced by the casino inure to the Tribe’s benefit
7 because ACE’s articles of incorporation state that all capital surplus from the casino shall
8 be deposited in the Tribe’s treasury and because the Tribe, as the sole shareholder, enjoys
9 all of the benefits of an increase in the casino’s value.”).

10 An entity is less likely to enjoy immunity where a judgment against it would have
11 no financial effect on the tribe. *Hunter*, 2018 WL 4171612, at *5 (“There is no evidence
12 to suggest a suit against Redhawk would have any effect on the sovereign Tribe’s treasury,
13 because Redhawk is one step removed from Tribal management and control.”) (citations
14 omitted); *see also Hwal’Bay Ba: J Enters., Inc. v. Jantzen in & for Cnty. of Mohave*, 458
15 P.3d 102, 110 (Ariz. 2020) (“[W]e do not know whether GCRC’s revenues fund any
16 governmental functions of the Tribe or, if they do, the extent to which the Tribe depends
17 on GCRC revenues for these functions. . . . Thus, based on this record, the superior court
18 did not abuse its discretion by refusing to dismiss GCRC.”).

19 Defendants argue that “Wireless is financially coincident with the economic
20 operation of NTUA.” Doc. 8 at 9. They also argue that Wireless is a vehicle through which
21 NTUA achieves its statutory obligation to provide telecommunications services to the tribe.
22 *Id.* But there is no indication that profits generated by Wireless benefit the Navajo Nation.
23 Indeed, the Wireless operating agreement provides that profits are directly allocated
24 between NTUA and Commnet Newco. Doc. 11-1 at 18. Likewise, the agreement does not
25 indicate that losses reach the Navajo Nation. Losses are allocated between NTUA and
26 Commnet Newco. *Id.* And neither the operating agreement nor the management
27 agreement suggest a judgment against Wireless will reach the Navajo Nation.

28 This factor weighs against immunity.

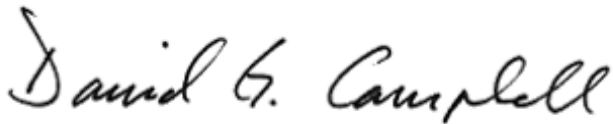
1 **F. Conclusion.**

2 “An entity asserting immunity as an arm of a sovereign tribe must show by a
3 preponderance of the evidence that it is, in fact, an arm of the tribe.” *McCoy v. Salish*
4 *Kootenai Coll., Inc.*, 334 F. Supp. 3d 1116, 1120 (D. Mont. 2018), *aff’d*, 785 F. App’x 414
5 (9th Cir. 2019) (cleaned up); *see also Williams*, 929 F.3d 170, 176-77 (4th Cir. 2019)
6 (“Unlike the tribe itself, an entity should not be given a presumption of immunity until it
7 has demonstrated that it is in fact an extension of the tribe.”). Stated differently, Defendants
8 must show that Wireless is “the kind of tribal entity, analogous to a governmental agency,
9 which should benefit from the defense of sovereign immunity.” *Breakthrough*, 629 F.3d
10 at 1184 (citation omitted).

11 Three of the five relevant factors weigh against immunity, and a fourth weighs
12 slightly in that direction. The Court accordingly concludes that Wireless is not “an arm of
13 [the Navajo Nation], acting as more than a mere business.” *Pink v. Modoc Indian Health*
14 *Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998).

15 **IT IS ORDERED** that Defendants’ motion to dismiss (Doc. 8) is **denied**.

16 Dated this 27th day of June, 2023.

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20 David G. Campbell
21 Senior United States District Judge
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