No. 22-12669-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AQuate II, LLC,

Plaintiff-Appellant,

v.

Jessica Myers, et al.,

Defendants-Appellees.

BRIEF OF APPELLEES

On Appeal from the United States District Court
For the Northern District of Alabama
No. 5:22-cv-00360-AKK

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APPELLEES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1.1-26.1.3, undersigned counsel for Defendants-Appellees Jessica Myers and Kituwah Services, LLC furnishes the following Corporate Disclosure Statement and Certificate of Interested Persons and states as follows:

1. Kituwah Services, LLC is a limited liability company wholly owned by Kituwah Global Government Group, LLC. Kituwah Global Government Group, LLC is a wholly owned and operated economic instrumentality of the Eastern Band of Cherokee Indians. No publicly traded corporation owns 10% or more of Kituwah Services, LLC's or Kituwah Global Government Group, LLC's stock.

2. Defendants-Appellees have not identified any additional person or entity that should be added to the Certificate of Interested Persons set out in Appellant's opening brief.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees do not believe oral argument is necessary, especially given the deferential standard of review applicable to pertinent aspects of the District Court's decision. Appellees are available for oral argument if it would be helpful to the Court's consideration of the issues in this matter.

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Alabama (the "District Court") had subject matter jurisdiction based on 28 U.S.C. § 1331 because Appellant AQuate II, LLC's ("AQuate") claims arose under federal law and under 28 U.S.C. § 1332 because the matter in controversy exceeds $75,000.00, exclusive of interest and costs, and there is complete diversity among the parties. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because AQuate timely appealed the District Court's final order dismissing the case.

STATEMENT OF THE ISSUES

First, did reversible error occur when the District Court dismissed AQuate's trade secrets claims against Appellee Kituwah Services, LLC ("Kituwah") by concluding that Kituwah had not waived sovereign immunity because AQuate's allegations are not based on Kituwah's participation in the 8(a) program nor relevant to the 8(a) program's requirements?

Second, did reversible error occur where the District Court followed federal principles of tribal sovereignty and declined to exercise federal jurisdiction over a dispute between intra-tribal factions making competing claims to tribal leadership?

Third, did the District Court commit a clear abuse of its discretion when: (1) it followed established case law regarding the existence of a forum selection clause between the parties to shift the burden to AQuate to establish that the tribal court named in that clause was not an available and adequate forum, and (2) the District Court determined that AQuate failed to overcome that burden?

STATEMENT OF THE CASE

Nature of the Case

The issues before the Court arise out of an archetypical trade secrets claim—a company alleges trade secret misappropriation to stifle legitimate competition, pursuing claims regarding a former employee who has not worked for the purportedly injured company in more than five years.

Instead of competing fairly for a government contract, AQuate instead seeks to attack its competitor by asserting trade secret claims without basis. But the Court need not reach the merits of such claims (or rather, lack thereof) because those claims are barred by sovereign immunity and, as to Appellee Jessica Myers ("Myers"), *forum non conveniens*.

AQuate and Kituwah submitted competing bids for a United States Navy contract to provide security services aboard U.S. Navy Sea-Based X-Band Radar-1 ("SBX-1") —a semi-submersible platform vessel that is involved in missile defense. After the deadline for bids on the SBX-1 contract passed, AQuate sued, alleging trade secret misappropriation by Kituwah and Myers, current employee of Kituwah and one-time employee of AQuate, as well as breach of contract by Myers.

AQuate's trade secret claims are substantively meritless, but the District Court never reached the merits of those claims. Rather, it properly dismissed AQuate's claims against Kituwah because Kituwah is entitled to sovereign immunity. The District Court correctly observed that the limited waiver of sovereign immunity required for Kituwah to participate in the Small Business Administration's ("SBA") § 8(a) Business Development Program did not extend to AQuate's claims because those claims are not based on Kituwah's participation in the 8(a) program and do not involve allegations that Kituwah violated the 8(a) program's requirements.

AQuate's remaining breach of contract claim against Myers is subject to a dispute resolution agreement between AQuate and Myers, which includes a forum selection clause. That forum selection clause states:

> The tribal court of the Alabama-Quassarte Tribal Town shall be the exclusive venue for litigation arising out of [Myers'] employment. If there is no tribal court in existence, then the CFR Court for the geographic region where [Myers] works shall be the exclusive venue for litigation arising out of [Myers'] employment.

Because AQuate failed to meet its burden of demonstrating that the agreed-to forum was unavailable or inadequate, the District Court properly dismissed the claim based on *forum non conveniens*.

Ultimately, AQuate disputes the legitimacy of the Alabama-Quassarte Tribal Town ("AQTT") Tribal Court. Putting aside the fact that its own agreement names that same court as the exclusive forum for dispute resolution, the underlying basis for AQuate's resistance to the AQTT Tribal Court is a clash between factions with competing claims to tribal leadership. That is a conflict over which federal courts do not have jurisdiction. Under this backdrop, the District Court properly declined to involve itself in intra-tribal affairs, as required of federal courts.

Because the District Court did not commit clear error nor abuse its discretion, Kituwah asks this Court to affirm the District Court's dismissal in full.

Statement of Facts

Background

AQuate[1] was the incumbent contractor on a government contract for services aboard the SBX-1.[2] (Docket Entry ("D.E.") 1 ¶ 8.) The government awarded the SBX-1 contract to AQuate in 2012 and again in 2017.[3] (*Id.* ¶ 9.)

Myers began working for AQuate and other AQTT entities in 2013. Myers signed several documents when she worked with the AQTT entities including AQuate's Code of Business Conduct and Ethics, an AQuate Agreement to Protect Company-Sensitive Information, and AQ Tribal Employee Handbook. It is undisputed that AQuate drafted these documents.

Myers left AQuate in the fall of 2017. Myers now works as the Director of Administration for appellee Kituwah, a tribal entity formed in 2019 to engage in minority set-aside government contract work.

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[1] AQuate is one of several tribal entities that AQTT owns. (D.E. 30 Ex. F.) AQuate Corporation is another AQTT-entity. (*Id.*, Ex. C at 2.) Though affiliated through common ownership, AQuate is separate and distinct from AQuate Corporation. (*Compare id.* Ex. F *with id.* Ex. G.)

[2] Because Appellees' motion to dismiss was based in part on Fed. R. Civ. P. 12(b)(6), the Court must presume the facts of the complaint to be true. *See Brophy v. Jiangbo Pharms., Inc.*, 781 F.3d 1296, 1301 (11th Cir. 2015).

[3] AQuate Corporation won the SBX-1 contract in 2012. (D.E. 30 Ex. H.) In 2017, AQuate II, LLC won renewal of the five-year SBX-1 contract.

The SBX-1 contract awarded to AQuate in 2017 ended in September 2022. (D.E. 1 ¶ 9.) On February 22, 2022, the Military Sealift Command, the U.S. Navy's provider of ocean transportation to the Department of Defense, issued solicitation number N3220522R0007 (the "Request for Proposals" or "RFP") for the follow-on contract, generally providing maritime security officers, or "MSOs," aboard the SBX-1. (*Id.* ¶ 10.) The RFP required bidders to submit their proposals by March 18, 2022. (D.E. 8-1 at 2.) The RFP stated that only 8(a) contractors are eligible for award; 8(a) contractors are those subject to the requirements of the SBA 8(a) business development program. (*Id.* at 73.) Both AQuate and Kituwah are 8(a) contractors.

On March 3, 2022, Myers sent LinkedIn messages to several AQuate employees working on the SBX-1 contract. Myers told them that her employer planned to bid on the SBX-1 contract and asked for their salary information. Myers has also explained that she communicated with current AQuate employees about potential employment with Kituwah, and asked about their salary information. (*Id.* at 157-58.) The current AQuate employees' identities are not secret; they have profiles on LinkedIn. (*Id.* at 157.) Myers does not have a non-solicitation or other agreement that would prevent her from talking to those individuals about job opportunities. And, according to the AQ Tribal Employee Handbook and AQuate's general manager, it is appropriate for AQuate employees to discuss their own

salaries. (D.E. 30 Ex. C. at 17.). Further, AQuate has not alleged that Myers ever received any salary information from AQuate employees.

AQuate's Motion for Preliminary Injunction

On May 20, 2022, AQuate moved for a preliminary injunction, seeking to enjoin Kituwah and Myers from using or disclosing any AQuate trade secret or confidential or proprietary information.[4] (D.E. 17.) After the parties briefed the issues, the District Court granted Defendants' Motion to Dismiss and denied AQuate's Motion for a Preliminary Injunction as moot. (D.E. 40.)

The District Court's Decision to Dismiss AQuate's Claims

On July 25, 2022, the District Court issued its Order and Memorandum Opinion granting Defendants' Motion to Dismiss. (D.E. 39, 40.)

i. *AQuate's claims against Kituwah and its trade secret claims against Myers are dismissed based on sovereign immunity and Rule 19.*

The District Court dismissed AQuate's claims against Kituwah because the District Court does not have jurisdiction over Kituwah due to its sovereign immunity as a tribal entity. In concluding this, the District Court analyzed the 8(a) program, noting that participation in the program "requires tribal entities to adopt 'express sovereign immunity waiver language, or a 'sue and be sued' clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all

[4] The same day, Defendant-Appellees filed a Motion to Dismiss. (D.E. 18.)

matters relating to SBA's programs, including, but not limited to, 8(a) BD program participation, loans, and contract performance.'" (D.E. 39 at 6 (citing 13 C.F.R. § 124.109(c)(1)).) With these requirements in mind, the District Court correctly determined that it did not have jurisdiction over Kituwah, and AQuate's claims against Kituwah were dismissed because:

> AQuate's claims are not based on Kituwah's participation in the 8(a) program and do not involve allegations that Kituwah violated any of the 8(a) program's requirements. … [S]ince the "essence" of AQuate's complaint is not related to the 8(a) program itself or its requirements, Kituwah's 8(a)-required waiver of sovereign immunity does not apply to AQuate's claims. *See Applied Sciences*, 2020 WL 2738243 at 5.

(*Id.* at 8.)

Because Kituwah has immunity, the District Court determined that it "cannot accord complete relief" to AQuate on its trade secret claims in Kituwah's absence, because a judgment against Myers alone would "necessarily be inadequate to afford complete relief or prejudicial to Kituwah." (*Id.* at 11.) Accordingly, the District Court dismissed AQuate's trade secret claims against Myers under Rule 19, finding Kituwah a necessary and indispensable party to AQuate's trade secrets claims. (*Id.* at 10-11.)[5]

[5] Appellant does not dispute the application of Rule 19 and thus has conceded to the District Court's ruling on this point.

Additionally, the District Court noted that the trade secret claims were likely due to be dismissed on statute of limitations grounds:

> A party must file Alabama Trade Secrets Act claims less than two years – and federal claims less than three years – "after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." Ala. Code § 8-27-5; 18 U.S.C § 1836(d). During the hearing on the initial motion for a preliminary injunction, plaintiff's counsel conceded that AQuate knew of Myers's alleged misappropriation of trade secrets as far back as September 2017, when she allegedly took copies of sensitive documents upon her resignation. AQuate, then, had until September 2020 to timely file suit, but failed to do so until March 2022.

(*Id.* at 12, n.4.)

ii. *AQuate's breach of contract claim against Myers is dismissed based on the doctrine of forums non conveniens.*

As part of her employment with AQuate, Myers executed a dispute resolution policy document that includes:

> The tribal court of the Alabama-Quassarte Tribal Town shall be the exclusive venue for litigation arising out of [Myers'] employment. If there is no tribal court in existence, then the CFR Court for the geographic region where [Myers] works shall be the exclusive venue for litigation arising out of [Myers'] employment.

(D.E. 36-1.)

Analyzing this provision, the District Court correctly held that "*absent clear evidence from AQuate to the contrary*, the [C]ourt finds that the AQTT Tribal Court is an available and adequate forum for AQuate to litigate its breach of contract claim against Myers." (D.E. 39 at 16) (emphasis added). The District Court appropriately

dismissed AQuate's breach of contract claim against Myers "with leave to refile in the parties' bargained-for forum – the Alabama-Quassarte Tribal Town Court." (*Id.*)

District Court's Decision Rejecting AQuate's Motion for Reconsideration

Ten days after the District Court dismissed AQuate's claims, AQuate filed an emergency Motion for Reconsideration. (D.E. 41.) With its motion, AQuate asserted:

> The only competent evidence before the court regarding the existence of any Alabama-Quassarte Tribal Court is that there is no such forum, and there is currently no mechanism for creating one.

(*Id.* ¶ 4.)

AQuate's authority for this statement was Famous Marshall ("Marshall"), a tribal member at odds with Wilson Yargee, who he asserts is the impeached former chief of AQTT. (D.E. 38 at 1.) This intra-tribal dispute underlies this dispute, as discussed further below. This affidavit was filed with AQuate's reply supporting its failed Motion for Preliminary Injunction, leaving Defendant-Appellees without the opportunity to rebut these self-serving assertions. Marshall submitted that: "There is no court of the Alabama-Quassarte Tribal Town" and "[t]he Constitution and Bylaws of the Alabama-Quassarte Tribal Town do not provide for the creation of any court." (D.E. 41 ¶ 4 (citing D.E. 38 at 4-5).) Notably, the "Constitution and Bylaws of the Alabama-Quassarte Tribal Town" were not filed with this affidavit.

The first time this document appeared was with AQuate's filing for reconsideration. (*Id.* Ex. A.)[6]

In response to this Motion for Reconsideration, the District Court entered an order denying AQuate's motion:

> AQuate has not presented any newly discovered evidence or identified any controlling precedent that requires a different result. The court will therefore not entertain AQuate's attempt to relitigate the alleged illegitimacy of the tribal court through a Rule 59(e) motion.

(D.E. 46 at 2.)

Standards of Review

Generally, when a complaint is dismissed, the appellate court's review is confined to the plaintiff's complaint and its attached exhibits and/or incorporated documents. *See, e.g.*, *Lewis v. Victor-Adam*, 520 Fed. Appx. 932, 933 (11th Cir. 2013). However, when subject matter jurisdiction is at issue, as it is here, the court is "permitted to look at all of the evidence presented, including affidavits and testimony relating to a motion for preliminary injunction." *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1253 (11th Cir. 2009) (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) ("In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a

[6] This document purporting to be the AQTT constitution was apparently ratified on January 10, 1939, making its existence far from "newly discovered."

preliminary injunction may not be considered. But when a question of the . . . Court's jurisdiction is raised . . . the court may inquire by affidavits or otherwise, into the facts as they exist.")).

This Court reviews a district court's dismissal on sovereign immunity and/or Rule 19 grounds *de novo*. *Rotte v. United States*, 701 F. App'x 894, 895 (11th Cir. 2017) (citing *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 843 (11th Cir. 2013)).

Further, this Court "may only reverse a district court's dismissal based on *forum non conveniens* if it constitutes a clear abuse of discretion." *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1288 (11th Cir. 2009) (citing *Membreno v. Costa Crociere S.P.A.*, 425 F.3d 932, 935-36 (11th Cir. 2005)). A district court abuses its discretion when the court fails to apply the proper legal standard or to follow proper procedures in making its determination. *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1303 (11th Cir. 2008). It is well settled that abuse of discretion review is "extremely limited" and "highly deferential." *Aldana*, 578 F.3d at 1288 (citation omitted). When this Court employs the abuse of discretion standard, it "must affirm unless [it] find[s] that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Id.* (citing *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc)).

Finally, this Court "may affirm the District Court on any ground supported by the record, regardless of whether the District Court relied on it." *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1324 (11th Cir. 2017) (citing *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1234 (11th Cir. 2010)). This may include the time-barred nature of the claims.[7]

SUMMARY OF THE ARGUMENT

Before the Court is a classic trade secret dispute: a company, disgruntled with the legitimate efforts of a competitor, alleges trade secret misappropriation in an effort to shut down its competitor under the guise of allegedly improper behavior by a long-removed former employee. But the twist is that the true impetus for AQuate's disgruntled state is the existence of an intra-tribal dispute: two factions purport to be the appropriate leadership of the tribe, and the SBX-1 bid dispute is a pawn in AQuate's efforts to ensure that its chosen faction ultimately wins that contest. This intra-tribal dispute is not properly before the Court, and was appropriately dismissed by the District Court.

Shifting to the legal claims made by AQuate and putting aside the insufficient –and time-barred–allegations of trade secret misappropriation, AQuate's attempt to use a lawsuit to compete with Kituwah cannot proceed in the federal courts, which

[7] The District Court noted that the trade secret claims were likely due to be dismissed on statute of limitations grounds. (D.E. 39 at 12, n.4.)

are without jurisdiction to hear such a dispute. Instead, AQuate's claims are barred by sovereign immunity and *forum non conveniens*.

First, the District Court did not commit reversible error in its determination that Kituwah did not waive its sovereign immunity because the instant dispute does not fall within the scope of the SBA 8(a) waiver provision. The District Court appropriately determined that the purported trade secret issues at issue here "are not based on Kituwah's participation in the 8(a) program and do not involve allegations that Kituwah violated any of the 8(a) program's requirements." (D.E. 39 at 8.)

Second, Appellant argues that the District Court committed reversible error when it recognized the "District Court of Alabama-Quassarte Tribal Town" as a legitimate court of AQTT. Opening Brief of Appellant ("App. Br.") at 23. But the District Court instead found that AQuate failed to meet its burden of demonstrating that "transfer to the bargained-for forum is unwarranted" in part because the District Court's review did "not reveal any basis to suggest that" the orders furnished by Defendants bearing the heading "In the District Court of Alabama-Quassarte Tribal Town" were "fraudulent or were otherwise created for the purpose of deceiving [the Court] or creating a fake forum." (D.E. 39 at 14-15.) Failing to refute the clear language of the dispute resolution policy, AQuate ultimately disputes the legitimacy of the AQTT Tribal Court. AQuate's contentions—including its outside-the-record statements that a legitimate AQTT Tribal Court now exists—stem from a dispute

within the AQTT about who legitimately leads the tribe. This is precisely the type of conflict over which federal courts do not have jurisdiction. The District Court did not commit reversible error in acknowledging its lack of jurisdiction.

Third, the District Court properly recognized the existence of a valid forum-selection clause in the contract between AQuate and Myers. Because of this forum-selection clause, the District Court correctly assigned the burden to AQuate to establish that the forums in this clause were not adequate or available. Not only did AQuate fail to meet its burden as to the AQTT Tribal Court, it also failed to explain why the secondary forum named in the forum-selection clause (the CFR Court) was not adequate and available, and instead improperly pursued its claims before the District Court. Thus, the District Court did not abuse its discretion in holding the parties to their agreed-upon forum.

Finally, and belatedly, AQuate points to the purported AQTT constitution to argue that the AQTT Court was not an adequate and available forum. However, both this argument and the purported AQTT constitution are not properly before the Court, as AQuate declined to raise them in response to the motion to dismiss until its Motion for Reconsideration, closing the door to consideration by the District Court and this Court.

Because the District Court did not err, much less clearly err, and did not abuse its discretion, this Court should affirm the District Court's dismissal.

ARGUMENT

I. In response to Kituwah's motion to dismiss, AQuate's argument regarding the AQTT constitution was first presented to the District Court in its emergency motion for reconsideration and thus this Court should decline to consider it.

AQuate asserts that "[i]t is undisputed that the *Constitution and By-Laws of the Alabama-Quassarte Tribal Town Oklahoma (Ratified January 10, 1939)* contained no provision for a valid tribal court." App. Br. at 26. But this is only "undisputed" because AQuate raised this argument in response to Kituwah's motion for dismissal for the first time in its Motion for Reconsideration–which was denied. Additionally, the purported AQTT constitution was not presented to the District Court before it was filed with the Motion for Reconsideration. This argument is not properly before this Court, as it was not properly before the District Court.[8]

The Eleventh Circuit refrains from considering new evidence and arguments raised in motions for reconsideration when those arguments and evidence could have been made in prior briefing, but were not:

> After the district court rejected that argument and sanctioned the Elliott group for its damages claims, the group offered some additional arguments in support of its motion to reconsider and in its briefing to this Court.

[8] In AQuate's Reply in Support of its Motion for Preliminary Injunction, AQuate stated: "There is no AQTT court system, and no provision for one in AQTT's constitution." (D.E. 37 at 1.) No further discussion of the AQTT constitution followed and the purported constitution was not attached to this filing.

> The Elliott group could have made those arguments in response to the sanctions motions, but it did not. So those arguments were not properly before the district court on a motion to reconsider. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009 ("A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment. This prohibition includes new arguments that were previously available, but not pressed.") (citation and quotation marks omitted). And they are not properly before this Court. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1325 (11th Cir. 2012) ("[I]f a party hopes to preserve a claim, argument, theory, or defense on appeal, she must first clearly present it to the district court, that is, in such a way as to afford the district court an opportunity to recognize and rule on it.") (quotation marks omitted); *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1352 (11th Cir. 2009) (Where "[t]he district court did not consider [an] argument because it was not fairly presented . . . we will not decide it."); *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1292 (11th Cir. 2003) (per curiam) ("As a general rule, we do not consider arguments raised for the first time on appeal.").

EMI Sun Vill., Inc. v. Catledge, 779 F. App'x 627, 640 (11th Cir. 2019).

Because the District Court denied the motion for reconsideration, noting "AQuate has not presented any newly discovered evidence or identified any controlling precedent that requires a different result,"[9] the arguments regarding the AQTT constitution and the submission of the purported constitution itself are not properly before this Court and should not be considered.

Even if the document AQTT submitted purporting to be the AQTT constitution could be considered, it would not provide sufficient factual basis for the

[9] The District Court's order denying the motion for reconsideration further stated: "The court will therefore not entertain AQuate's attempt to relitigate the alleged illegitimacy of the tribal court through a Rule 59(e) motion." (D.E. 46 at 2.)

Court to conclude that the District Court abused its discretion in dismissing Appellant's claims against Myers. The purported constitution is over eighty years old and was submitted to the District Court by AQuate with no context, such as any explanation for how it is appropriately interpreted under AQTT law. The District Court had no basis to conduct "first impression"-style interpretation of the meaning of AQTT's constitution. This circumstance could not provide a better practical example of why "[j]urisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts." *See In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003).

II. The District Court did not err in its determination that Kituwah is entitled to sovereign immunity.

Appellant argues that the District Court committed reversible error in its determination that Kituwah did not waive its sovereign immunity because the instant dispute does not fall within the scope of the SBA 8(a) waiver provision. But the District Court appropriately determined that the issues at play here—run-of-the-mill business tort claims asserted by a company against its former employee and her new, competitive employer—"are not based on Kituwah's participation in the 8(a) program and do not involve allegations that Kituwah violated any of the 8(a) program's requirements." (D.E. 39 at 8.)

"The party seeking to defeat sovereign immunity has the burden of showing that the tribal entity 'expressly and unmistakably waived its right to sovereign immunity.'" (*Id.* at 5 (citing *Furry v Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1234 (11th Cir. 2012).) In the Amended Complaint, AQuate makes no assertions that Kituwah has waived its immunity. (*See generally* D.E. 13.) This alone warrants affirmation of the District Court's dismissal.

Kituwah is a tribal entity wholly owned and organized by the Eastern Band of Cherokee Indians (the "Tribe").[10] (D.E. 18-1 ¶¶ 6-8; *see also* D.E. 13 ¶ 1.) Kituwah was organized under tribal statute—specifically, under the Eastern Band of Cherokee Indians Code Limited Liability Company Chapter ("LLC Chapter"). *See* EASTERN BAND OF CHEROKEE INDIANS CODE, Ch. 55B, § 55B-1.[11] The LLC Chapter provides that "the tribe, exercising its inherent sovereignty, operating in its corporate form" has the "purposes, powers, and duties" as provided in the statute or by tribal law. *Id*. The LLC Chapter under which Kituwah was organized emphasizes that immunity is not waived by the Tribe nor any organized LLC:

[10] Kituwah Services, LLC is wholly owned by Kituwah Global Government Group LLC. (D.E. 18-1 ¶ 8.) In turn, Kituwah Global Government Group, LLC is wholly owned by the Tribe and was organized thereby under the LLC Chapter. (*Id*. ¶ 7.)

[11] Available at https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=PTIICOOR_CH55BLILICO.

> By the adoption of this chapter, the Tribe does not waive its sovereign immunity or consent to suit in any court or forum, whether federal, tribal, or state. Neither the adoption of this chapter, nor the organization of any limited liability company hereunder, shall be construed to be a waiver of the sovereign immunity of the Tribe or a consent to suit against the Tribe in any court.

Id. § 55B-1.4. To the extent any Tribal LLC enacts a limited waiver of sovereign immunity, it must be approved by the Kituwah Economic Development Board. *Id*. § 55B-2.3(6). Kituwah's limited waiver, as approved by the Kituwah Economic Development Board, is found in its organizational documents:

> The **United States Federal Courts are hereby designated as being among the courts of competent jurisdiction for all disputes or other matters relating to this Company's involvement in programs of the Small Business Administration, including but not limited to, 8(a) Business Development program participation, loans, and contract performance.** Simply stated, the Company hereby specifically consents to "**sue or be sued**" within the jurisdiction of the Federal Court System of the United States. This article to be cited as approval and authority that except as specifically set forth herein, nothing contained here is intended to, nor shall it be construed to, waive the sovereign immunity of (i) the Eastern Band of Cherokee Indians ("Tribe"), (ii) any affiliate or agency thereof or (iii) any official acting on behalf of the Tribe, or such affiliate or agency, and within the scope of his or her official authority.

(D.E. 18-2 Ex. 1 at 4, ¶ 6) (emphasis added.)

This limited waiver of sovereign immunity is narrowly tailored to the requirements of the SBA. Specifically, Kituwah participates in one of SBA's business development programs, known as the "8(a) program." *See* The Small Business Act §§ 7(j) & 8(a), 15 U.S.C. §§ 636(j)(10) & 637(a). "The operation of

the 8(a) program is described, and prescribed, [in part by] 15 U.S.C. §§ 636(j)(10) and 637(a) [and] by 13 C.F.R. § 124." *Apex Constr. Co v. United States*, 719 F. Supp. 1144, 1154 (D. Mass. 1989). To participate in the 8(a) program, a tribal business entity's organizing document **must** contain:

> express sovereign immunity waiver language, or a **'sue and be sued'** clause which **designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including but not limited to 8(a) BD program participation, loans, and contract performance.**

13 C.F.R. § 124.109(c)(1) (emphasis added); *see also Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs. LLC*, No. 2:19-cv-575, 2020 U.S. Dist. LEXIS 94435, at *14 (E.D. Va. Mar. 30, 2020). Thus, Kituwah's limited waiver provision is virtually identical to the limited waiver the SBA requires.

Kituwah has implemented the SBA's required language to effectuate a limited sovereign immunity waiver solely to avail itself of the 8(a) program. Kituwah had made the limitations of this prescribed waiver abundantly clear by immediately following the SBA-required language with a reassertion of its sovereign immunity. (D.E. 18-2 Ex. 1 at 4, ¶ 6.) Accordingly, this limited waiver is narrowly tailored only to "8(a) Business Development program participation, loans, and contract performance." *See, e.g., Applied Scis.*, 2020 U.S. Dist. LEXIS 94435, at *14-17.

Were one to accept Appellant's assertion that the "correct question" is whether AQuate's dispute with Appellees is "related to" Kituwah's "involvement in

programs of the Small Business Administration" (App. Br. at 23), the answer to this question is clearly "no." AQuate's displeasure with its former employee Myers and her alleged misappropriation of trade secrets in no way is relevant to the SBA's management of its 8(a) program. This is a run-of-the-mill dispute between competitors, and one that has no bearing on Kituwah's compliance with the SBA's requirements surrounding the 8(a) program.

AQuate's interpretation distorts the intent behind the SBA's requirement of such a waiver—to ensure that the government can enforce the 8(a) program requirements on participating entities. *Applied Scis.*, 2020 U.S. Dist. LEXIS 94435, at *15-16 (explaining that SBA-required waivers are applicable when dealing specifically with violations of the SBA 8(a) program participant requirements). AQuate attempts to bridge the divide between the purpose of the waiver and its claims by arguing that "the impetus for all of AQuate's claims against Kituwah is Kituwah's solicitation and use of AQuate's trade secrets … to bid against AQuate for SBA § 8(a) government contract work." AQuate's interpretation would lead to a much broader waiver than the SBA needs or requires. For example, tribal entities would no longer have sovereign immunity over claims alleging that they submitted a bid printed on stolen paper or delivered a bid with a car that was running on illegally siphoned gas. This logical conclusion of AQuate's desired interpretation

cannot be within the meaning of the SBA's required "sue and be sued" clause and claims of this sort do not fall within the scope thereof.

Though AQuate cites cases purporting to speak to the waivers of tribal sovereign immunity "under similar language" (App. Br. at 18-19), none relate to the instant dispute. *See, e.g.*, *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000) (addressing the distinct legal issue of when an arbitration clause functions as an implied waiver of sovereign immunity); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) (same). Not only do these cases address a legal issue different than the one before the Court, that question was answered by the Supreme Court of the United States after *Ninigret* and *Sokaogan Gaming* were decided. *See C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001).

The most relevant case, *Applied Sciences*, "maps squarely onto the instant case" as recognized by the District Court. (D.E. 39 at 8.) In *Applied Sciences*, the plaintiff non-governmental party brought a complaint against the defendant tribal entity. *Applied Scis.*, 2020 U.S. Dist. LEXIS 94435, at *2-3. The complaint made breach of contract and other allegations pertaining to the business dispute between the parties. *Id*. at *3. The tribal entity had implemented an SBA-required waiver:

> The Company may sue and be sued in the Navajo Nation Courts and the United States Federal Courts for all commercial matters related to the Small Business Administration's programs, includ[ing] but not

> limited to 8(a) Business Development program participation, loans and contract performance."

Id. at *14-15.

The court found that the claims were not sufficiently related to the 8(a) program, even noting that "[t]hough some of the contracts [defendant purchased from plaintiff] were federal contracts awarded pursuant to the SBA 8(a) Program, the essence of [plaintiff's] complaint has nothing to do with these particular contracts." *Id*. at *16. The defendant had not waived immunity and the plaintiff's complaint was dismissed. *Id*. at *16-17.

AQuate seeks to rely on *Rassi* and *Hunter* (App. Br. at 19-20), but *Applied Sciences* clarifies the distinguishing factors in those cases, as the District Court noted:

> As Plaintiff points out, some courts have interpreted the SBA-required waivers broadly. *See Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288, 292-92 (D. Me. 2014) (holding that the sue and be sued clause includes matters relating to an employee's claim of retaliation under the False Claims Act and Title VII because it is a matter which relates to the entity's 8(a) program participation); *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *6 (D. Or. Apr. 26, 2018), report and recommendation adopted, No. 6:17-CV-0962-JR, 2018 WL 4169019 (D. Or. Aug. 30, 2018) (holding that when a tribal organization waives sovereign immunity as required by the SBA 8(a) program, that language is sufficiently broad to grant federal courts jurisdiction over employment related matters). These two cases however, are distinguishable in that both cases involve matters dealing with the SBA, particularly, a violation of SBA 8(a) program participation requirements. *See Rassi*, 69 F. Supp. 3d at 292-92 (indicating that complying with FCA and Title VII is required for SBA

> program participation); *See Hunter*, 2018 WL 4171612, at *6 (noting that the SBA prohibits discrimination in employment).
>
> Here, . . . [the plaintiff's] breach of contract claims are neither related to [the defendant's] participation in the SBA 8(a) program nor [] deal with [the defendant's] contract performance relating to the SBA 8(a) program. . . . Therefore, Plaintiff's claims are not included in [the defendant's] waiver of sovereign immunity which is limited to matters dealing with the SBA.

(D.E. 39 at 7-8 (citing *Applied Sciences*).)

Accordingly, as in *Applied Sciences*, "since the 'essence' of AQuate's complaint is not related to the 8(a) program itself or its requirements, Kituwah's 8(a)-required waiver of sovereign immunity does not apply to AQuate's claims" and the District Court properly dismissed AQuate's claims against Kituwah. (*Id.* at 8.)

AQuate's attempt to stretch the SBA waiver beyond its limits is further highlighted by the fact that the alleged misappropriation involves the SBX-1 contract–a contract that is not an SBA contract, but rather, a Navy contract set aside for 8(a) companies. For 8(a) contracts, SBA's role is limited to determining whether Kituwah (or another entity) is an eligible SBA 8(a) entity and performing various 8(a) program administration functions. SBA's role, however, does not involve policing two private litigants regarding private issues. Kituwah has met SBA's requirements and continues to do so, and AQuate does not allege that its "trade secrets" had anything to do with Kituwah's SBA 8(a) eligibility. That there may be a competitive dispute as to the circumstances surrounding one bid for a Navy

contract is far beyond the gatekeeping and administrative functions of the SBA and its eligibility determinations. The District Court did not commit clear error by concluding that Kituwah has not waived its sovereign immunity for the claims brought against it by AQuate.

III. The District Court did not err by declining to resolve underlying intra-tribal disputes.

AQuate maintains that the AQTT Tribal Court named in the forum-selection clause does not actually exist and was instead "fabricat[ed]" by the "former chief of AQTT" to "misappropriate assets of AQTT and [ ] improperly take control of the tribe." (D.E. 37 at 2.) Thus, Appellant argues that the District Court committed reversible error when it recognized the "District Court of Alabama-Quassarte Tribal Town" as a legitimate court of the Alabama-Quassarte Tribal Town. App. Br. at 23. But the District Court made no such determination. Rather, the District Court reviewed the record before it and found that AQuate failed to meet its burden of demonstrating that "transfer to the bargained-for forum is unwarranted" in part because the District Court's review did "not reveal any basis to suggest that" the orders furnished by Defendants bearing the heading "In the District Court of Alabama-Quassarte Tribal Town" were "fraudulent or were otherwise created for the purpose of deceiving [the Court] or creating a fake forum." (D.E. 39 at 14-15.) Immediately following this statement, the District Court added, "And, frankly, given the principles of comity that undergird tribal sovereignty, the court is exceedingly

hesitant to weigh in on whether this tribal court is, as AQuate alleges, illegitimate." (*Id.* at 15-16.) The District Court merely concluded that the parties' forum-selection clause precluded it from resolving their dispute.

Appellees must preface their next point by noting that it is not appropriate to expand the record at this stage with information supplied by counsel in footnotes. *See, e.g.*, App. Br. at 23-24, n.5. However, even were such a review appropriate, Appellant appears to concede that an AQTT Tribal Court is an available and adequate forum. *Id.* (noting "a tribal court of the AQTT may now exist[.]"). Contrary to AQuate's argument that the issue on appeal is whether the District Court selected the correct tribal court at the time of its decision, the actual issue is whether *the District Court* was the right forum for the dispute. The District Court properly determined it was not, and even if Appellant concedes there is now an AQTT Tribal Court, the District Court still is not the proper forum, so no remand is necessary.

Appellant additionally asserts that the District Court based its conclusion on the agreed-to forum selection clause between AQuate and Myers, as well as on copies of "two purported orders of an illegitimate District Court of Alabama-Quassarte Tribal Town. Doc. 39 at 15-16." App. Br. at 24. Again, this is incorrect. The District Court based its conclusion on the agreed-to forum selection clause, and accepted federal principles regarding the avoidance of deciding intra-tribal leadership disputes. (D.E. 39 at 15-16.)

Finally, AQuate argues that the District Court and Appellees failed to acknowledge "the undisputed fact" that the AQTT constitution "contained no provision for the creation of a tribal court or other judicial system." App. Br. at 24; *see also* App. Br. at 15. But AQuate raised this argument in response to Kituwah's motion for dismissal for the first time for reconsideration, and thus it cannot be considered by this Court. *See supra* Argument, Section I.

Failing to refute the clear language of the dispute resolution policy, AQuate ultimately disputes the legitimacy of the AQTT Tribal Court. Putting aside the fact that an agreement Appellant drafted names that court, the underlying basis for AQuate's resistance to the AQTT Tribal Court is the clash between intra-tribal factions for claim to tribal leadership. And that is exactly the sort of conflict over which federal courts do not have jurisdiction.

"Indian tribes are distinct, independent political communities retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (internal quotation marks and citations omitted). Due to this unique status, certain issues are inherently reserved for resolution through purely tribal mechanisms due to the privilege and responsibility of sovereigns to regulate their own internal affairs—and courts consistently confirm the impropriety of federal courts dictating answers to such questions. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 323-36 (1978) ("Jurisdiction to resolve

internal tribal disputes and to interpret tribal constitutions and laws lies with the Indian tribes and not the district courts."). Examples of such issues include the resolution of competing claims to tribal leadership. *See, e.g., In re Sac & Fox Tribe of Miss. In Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 767 (8th Cir. 2003) (finding a lack of jurisdiction to resolve an internal tribal leadership dispute between competing factions); *see also Motah v. United States*, 402 F.2d 1 (10th Cir. 1968) (and cases cited). Additionally, as federal courts agree, "[a]s long as a tribal forum is arguably in existence, as a general matter, we are bound . . . to defer to it." *Basil Cook Enters. Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997); *see also Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

AQuate would have this Court do exactly what these authorities prohibit by analyzing the AQTT constitution to determine if the AQTT Tribal Court is legitimate. The District Court recognized this, and wisely declined to refrain from making such a determination, contrary to AQuate's assertions.

IV. The District Court did not commit a clear abuse of discretion in its determination that the parties' bargained-for forum was an available and adequate forum in which AQuate may litigate its claims against Myers.

The District Court determined that the AQTT Tribal Court is an adequate and available forum for AQuate to litigate its breach of contract claim against Myers, and the forum agreed upon by AQuate and Myers. (D.E. 39 at 13-16.) The District Court did not err in this determination, let alone commit a clear abuse of discretion.

AQuate no longer favors the AQTT Tribal Court, but that does not alter the reality that the parties' agreement designated it the appropriate forum. Where, as here, parties have agreed to a forum, they cannot later challenge that preselected forum because it no longer suits them. *See, e.g.*, *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 64 (2013).

In its Opinion, the District Court recognized the existence of a valid forum-selection clause in the contract between AQuate and Myers. Because of this forum-selection clause, the District Court properly attached no weight to AQuate's choice of forum and noted, "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." (D.E. 39 at 13 (citing *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49, 63 (2013).) "Basically, 'forum-selection clauses should control except in unusual cases.'" (*Id.* at 14 (citing *Atl. Marine*, 571 U.S. at 63).) The District Court determined that the dispute resolution agreement applied to the claims at issue (not just claims brought only while Myers is an active employee), that the claim "indisputably arose in the workplace," and thus "AQuate's instant breach of contract claim [fell] squarely within the ambit of the dispute resolution policy."[12] (*Id.* at 14-15.)

[12] Appellant has not disputed this holding. Thus, Appellant concedes that if the named forum is adequate and available, the asserted claims belong in that forum.

AQuate has the burden to establish that the AQTT Tribal Court is not adequate or available. (*Id.* at 13 (citing *Atl. Marine*, 571 U.S. at 63).) AQuate argues that the "only competent evidence before the court regarding the existence of any Alabama-Quassarte Tribal Court is that there is no such forum," citing a self-serving affidavit from Famous Marshal describing an intra-tribal dispute and claiming that no AQTT Tribal Court exists. (D.E. 41 ¶ 4 (citing D.E. 37 at 2; D.E. 38 at 4-5).) In contrast, though it is not Appellees' burden, Appellees have provided evidence sufficient to demonstrate the adequacy and availability of the AQTT Tribal Court, most importantly through the language of the agreement itself, which expressly designates that court as the exclusive forum through orders from that court itself. (D.E. 31-1, 31-2.)

As part of its argument that the AQTT Tribal Court is not adequate or available, AQuate notes that the language of the forum-selection clause "expressly recognized the possibility that the selected forum may not exist." App. Br. at 24. The forum-selection clause states: "If there is no tribal court in existence, **then the CFR Court for the geographic region where [Myers] works shall be the exclusive venue for litigation** arising out of [Myers'] employment." (D.E. 36-1 (emphasis added).) Thus, even if AQuate had successfully demonstrated the inadequacy and unavailability of the AQTT Tribal Court (which it did not), it would next be tasked with proving that the designated CFR Court was also inadequate and

unavailable. Therefore, before AQuate could appropriately turn to the District Court, it needed to prove that not one, but two, forums named in the dispute resolution clause are not adequate and available. Even if there were no tribal court in existence, the District Court would still have been correct in declining to exercise its jurisdiction.

The cases AQuate cites do not change the fact that AQuate has the burden to establish that the AQTT Tribal Court is not adequate or available; rather, they buttress the appropriateness of the AQTT Tribal Court as a forum for the breach of contract dispute between AQuate and Myers.

For example, *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes* is a different case than this one. 78 F. Supp. 2d 589 (E.D. Tex. 1999), *aff'd in part, rev'd in part and remanded*, 261 F.3d 567 (5th Cir. 2001). First, the court considered the existence of the tribal court only because the parties disputed whether plaintiff had to exhaust its remedies in tribal court—an issue that typically arises when a non-tribal defendant wishes to avoid tribal court jurisdiction. *Id.* at 595. Here, the tribal plaintiff agreed to the forum selection clause naming the tribal court, mooting any question of exhaustion of remedies. *See id.; see also Larson v. Martin*, 386 F. Supp. 2d 1083, 1087-88 (D.N.D. 2005) ("when the negotiating parties have agreed to an appropriate forum, exhaustion of tribal remedies is not required") (citing *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995)); *Fox*

Drywall & Plastering, Inc. v. Sioux Falls Constr. Co., 2012 WL 1457183, at *10-11 (D.S.D. Apr. 26, 2012) (collecting cases). Further, *Comstock* predates *Atlantic Marine*, which clarifies that parties must be held to the agreed-upon forum. *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 63 (2013) ("a valid forum-selection clause should be given controlling weight in all but the most exceptional cases" and where the plaintiff defies the forum-selection clause, "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted") (cleaned up).

Second, the factual record here is different from *Comstock*. The District Court wisely did not wade into tribal matters, and the District Court did not need to do so, as explained in *Comstock*. There, the tribal court was not included in an information clearinghouse on tribal justice systems. *Comstock*, 78 F. Supp. at 598. That absence led to further investigation of the tribal court's status. *Id.* But here, the AQTT Tribal Court is listed in the clearinghouse—a fact that likely would have ended the *Comstock* court's inquiry.[13] The *Comstock* court also clarified that the federal courts

[13] *Id*. ("Under federal law, the Department of the Interior is required to maintain an information clearinghouse on tribal justice systems.*")*; *see also Tribal Courts*, TRIBAL COURT CLEARINGHOUSE, available at http://www.tribal-institute.org/lists/justice.htm#Oklahoma (recognizing AQTT tribal court in Alabama-Quassarte Tribal Town as a tribal court) (last visited Jan. 26, 2023); *United States v. Denezpi*, 2019 WL 295670, at *2 (D. Colo. Jan 23, 2019) (citing the Tribal Law and Policy Institute's Tribal Court Clearinghouse for tribal court information).

should not opine on tribal law, including weighing in on "allegations that the tribal court was created in contravention of tribal law." 78 F. Supp. at 596.

The other cases cited by AQuate are similarly unavailing–most significantly because they point to situations in which there was clear evidence that a forum categorically did not exist. *See, e.g.*, *BP Marine Americas, a Div. of BP Expl. & Oil Corp. v. Geostar Shipping Co. N.V.*, No. CIV. A. 94-2118, 1995 WL 131056, at *11 (E.D. La. Mar. 22, 1995) (noting that the "High Court in New York" does not exist). That factual scenario conflicts with the reality of the case before the Court today. As the District Court correctly observed, where a forum selection clause exists, the burden is on AQuate to prove that the forum is not available or adequate. AQuate has failed to make this argument, and to the extent its argument relies on the premise that the AQTT constitution does not provide for a forum, that argument is improperly raised here and cannot be considered.

Additionally, in *Inetianbor*, the Eleventh Circuit concluded that the District Court had not committed clear error by finding that an arbitral forum was unavailable where, unlike here, plaintiff presented numerous pieces of evidence regarding the unavailability of the forum, including a letter from the Tribe itself noting that it did not authorize arbitration. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014). And, perhaps most significantly, there was no intra-tribal dispute underlying the dispute in *Inetianbor*. Like *Inetianbor*, AQuate's remaining authority

does little to support its argument, and in many cases support Appellees' arguments. *See Jackson v. Payday Fin., LLC*, 764 F.3d 765, 776 (7th Cir. 2014) (noting that a forum selection clause is presumptively valid and that the presumption can only be overcome if the resisting party shows the clause is unreasonable); *ORI, Inc. v. Lanewala*, No. 99-2402-JWL, 1999 WL 1423068, at *4 (D. Kan. Nov. 30, 1999) (finding that a clause stating venue shall be proper only in "the Overland Park, Kansas court house" is too ambiguous to constitute a waiver of defendant's right to remove to federal court because "the only court sitting in Overland Park, Kansas is the Overland Park, Kansas Municipal Court, which is clearly without jurisdiction to hear this action"); *BP Marine Ams. v. Geostar Shipping Co., N.V.*, No. CIV. A. 94-2118, 1995 WL 131056, at *11 (E.D. La. Mar. 22, 1995) (finding that a forum selection clause designating the "High Court in New York" is ambiguous because the "High Court in New York" does not exist).

For all these reasons, the District Court appropriately concluded that the existence of the forum selection clause in the agreement between AQuate and Myers shifted the burden to AQuate to prove that the forum was not available or adequate. Because AQuate failed to carry that burden, the District Court did not error when it dismissed AQuate's claims under *forum non conveniens*.

CONCLUSION

The District Court did not err in dismissing all claims against Appellees. This Court should affirm the District Court's decision in its entirety.

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CERTIFICATE OF COMPLIANCE

1. This brief complied with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,574 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type selection requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2023, I filed a copy of the foregoing brief with the Clerk of Court using the Appellate CM/EFC system, which system thereby electronically served the same on Appellant's counsel of record.

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