No. 22-12669-A

In the

United States Court of Appeals

For the

Eleventh Circuit

AQuate II, LLC

Plaintiff/Appellant

vs.

Jessica Myers, et al.,

Defendants/Appellees

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

Opening Brief of Appellant

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APPEAL NO. 22-12669-A
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Plaintiff/Appellant AQuate II, LLC, hereby submit the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1:

1. Alabama-Quassarte Tribal Town
2. AQuate II, LLC (Plaintiff-Appellant)
3. AQuate Corporation
4. Chancey, Emily J. (Counsel for Defendants-Appellees)
5. Clarke III, Frederick D. (Counsel for Plaintiff-Appellant)
6. Dorsey & Whitney LLP (Counsel for Defendants-Appellees)
7. Durocher, Vernle C. (Counsel for Defendants-Appellees)
8. Eastern Band of Cherokee Indians
9. Economic Development Authority for the Alabama-Quassarte Tribal Town
10. English, W. Brad (Counsel for Defendants-Appellees)
11. Kallon, Hon. Abdul K. (United States District Judge)

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12. Kappelman, Ben D. (Counsel for Defendants-Appellees)
13. Kituwah Economic Development Board
14. Kituwah Global Government Group, LLC
15. Kituwah Services LLC (Defendant-Appellee)
16. Maynard, Cooper & Gale, P.C. (Counsel for Defendants-Appellees)
17. Meyer, Therese L. Erickson (Counsel for Defendants-Appellees)
18. Myers, Jessica Tedrick (Defendant-Appellee)
19. Rumberger, Kirk & Caldwell, PA, P.C. (Counsel for Plaintiffs-Appellants)
20. Williams, Richard Scott (Counsel for Plaintiff-Appellant)

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CIP CERTIFICATION

The undersigned certifies that AQuate II, LLC, is not a publicly held company.

Respectfully submitted this 30th day of November, 2022.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument to aid the Court in its resolution of this appeal, which involves this matter of first impression: whether an SBA § 8(a) Business Development Program participant's improper solicitation and use of trade secrets in a bid for a § 8(a) set-aside government contract is "related to" that participant's involvement and participation in programs of the SBA.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction based on 28 U.S.C. § 1331 because Appellant AQuate II, LLC's ("AQuate") claims arise under the federal Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836(c) . The district also had subject matter jurisdiction based on 28 U.S.C. § 1332 the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and there is complete diversity of citizenship between the parties.

This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal seeks review of a final decision. The district court entered its final Order dismissing the case on July 25, 2022. Docket Entry ("Doc") 40. AQuate timely filed its notice of appeal on August 12, 2022. Doc. 43.

STATEMENT OF THE ISSUES

First, did reversible error occur when the district court dismissed Appellant AQuate's trade secrets claims against Appellee Kituwah Services, LLC ("Kituwah") by finding Kituwah had not waived any sovereign immunity with respect to AQuate's claims when: (1) Kituwah is a participant in the Small Business Administration's 8(a) Business Development Program; (2) the SBA required Kituwah to waive sovereign immunity for disputes "related to" SBA programs; (3) Kituwah's organizational documents waived sovereign immunity for disputes related to its involvement in SBA programs; and (4) AQuate alleges that Kituwah improperly solicited and then used AQuate trade secrets in a competitive bid for an SBA 8(a) set-aside government contract.

Second, did reversible error occur when the district court recognized the legitimacy and availability of an Alabama-Quassarte Tribal Town ("AQTT") court where the AQTT tribe's constitution and bylaws did not allow for the creation of a court system, and the tribe had not created any such court.

Third, did reversible error occur when the district court found that an AQTT tribal court was an available and adequate forum in which AQuate II, LLC could litigate its claims against Appellee Jessica Myers ("Myers") when: (1) there was no tribal court nor mechanism for creating one, and (2) the alleged alternative forum lacks jurisdiction to enter or enforce any judgments.

STATEMENT OF THE CASE

Nature of the Case

The issues before the court arise out of an archetypical trade secrets claim – a former employee joins a new employer and, together, they steals trade secrets from the former employer to usurp its business opportunities. In this case, both employers are Native American tribal companies submitting competing bids for a Small Business Administration § 8(a) set-aside government contract to provide armed security services aboard the Sea-Based X-Band Radar-1 ("SBX-1") – a semi-submersible platform vessel that operates as part of the U.S. Ballistic Missile Defense System to detect and intercept incoming warheads.

AQuate was the incumbent bidder for the SBX-1 contract, having served as prime contractor providing SBX-1 security services since 2012. Myers worked for AQuate from 2013 until 2017 with responsibilities over corporate security and business development. She had access to and knowledge of AQuate's SBX-1 contract terms, personnel, and bidding information and strategies, and she wrongfully took much of this information with her when she left AQuate's employ. Now she works for Kituwah.

Just before bids were due for the new SBX-1 contract, AQuate learned that Myers, on behalf of Kituwah, had been actively soliciting AQuate's SBX-1 employees for information regarding AQuate's compensation structure. During the

short pendency of the instant lawsuit, AQuate learned that Myers had been planning for months to pursue the SBX-1 contract and that she was soliciting additional AQuate trade secrets to "dump them into [Kituwah's] proposal" for the SBX-1 contract bid. This improperly solicited information included AQuate's staffing strategies, compensation structure, contract pricing processes and techniques, training information, overhead expenses, and even internal briefings regarding certain pricing strategies. All of this information was solicited by Myers in her official capacity as Director of Operations for Kituwah, for Kituwah's benefit, to give it a leg up in a competitive bid against AQuate for the 2022 SBX-1 contract.

Now, facing the potential consequences of illegally soliciting AQuate's trade secrets, Kituwah seeks to invoke the shield of tribal sovereign immunity – an immunity that Kituwah expressly waived as a participant in the Small Business Administration's § 8(a) Business Development Program. The district court erred regarding the immunity issue by dismissing AQuate's claims against Kituwah based upon a flawed reading of the Small Business Administration's (SBA) mandatory waiver, as well as the language of Kituwah's own waiver in its organizational documents where Kituwah consented to be sued in U.S. Federal Courts for all matters related to Kituwah's involvement in the SBA program.

Next, the district court dismissed AQuate's claims against Myers pursuant to a forum selection clause in a dispute resolution agreement she signed while

employed with AQuate. In doing so, the court expressly recognized the existence of an Alabama-Quassarte Tribal Town (AQTT) court system where no such court system existed and no mechanism for creating such a court system existed in AQTT's constitution and bylaws. Ironically, the district court refused to weigh in on the legitimacy of the alleged AQTT court system, yet found it to be an available alternative forum supporting dismissal of the claims against Myers.

AQuate, therefore, asks this Court to reverse the district court's dismissal order and remand this case for further proceedings because (1) it was clear legal error to find that Kituwah did not waive any sovereign immunity it had; (2) it was clear legal error to recognize the legitimacy of an AQTT court at a time when no such court existed under the constitution and bylaws of the tribe; and (3) it was a clear error of judgment to find an available alternative forum existed in which AQuate could bring any claims against Myers.

Statement of Facts

AQuate filed its initial Complaint in the Federal District Court for the Northern District of Alabama on March 18, 2022. Doc. 1. Then, on April 28, 2022, AQuate filed an Amended Complaint (Doc. 13) to add Kituwah Services, LLC. This was the operative Complaint when the trial court dismissed AQuate's claims on May 20, 2022 (Doc. 18). Except where otherwise indicated, the following facts are alleged in AQuate's Amended Complaint.

Background. AQuate is a tribal enterprise formed to compete for and perform federal government contracts as a participant in the § 8(a) Business Development Program of the Small Business Administration ("SBA"). Doc. 13 at ¶ 7. The 8(a) program was designed for small businesses owned or controlled by socially or economically disadvantaged individuals to enable them to compete fairly for government contracts. *See Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 358 (D.D.C. 1996). If qualified by the Small Business Administration, these businesses receive, among other advantages, "preferential awards of government contracts." *Id.* Specifically, the 8(a) program allows the government to "set aside" certain contracts to be awarded exclusively to 8(a) participants. *See* 15 U.S.C. § 637(a). *See also* Hugh B. McClean, *The Diversity Rationale for Affirmative Action in Military Contracting*, 66 Cath. U. L. Rev. 745, 746 (2017).

Since 2012, AQuate has served as the prime contractor providing armed security services aboard the Sea-Based X-Band Radar-1 vessel. Doc. 13 at ¶ 8. AQuate initially won the bid for the SBX-1 contract in 2012 and continued to provide services after winning the contract again in 2017. *Id.* at ¶ 9. AQuate's contract ended in September of 2022. *Id.* On February 22, 2022, the Military Sealift Command issued Solicitation No. N3220522R0007, seeking offers to provide qualified security services aboard the SBX-1 vessel commencing October 2022 for

a contract term of up to five years. *Id.* at ¶ 10. The SBX-1 contract is one specifically set aside for 8(a) program participants. *See* Doc. 39 at 6; Doc. 27 at 2; Doc. 10-1 at 2.

As AQuate and its partners[1] were preparing to submit a bid for the 2022 SBX-1 contract, Appellees Kituwah and Myers possessed, and continued to improperly solicit, AQuate trade secrets related to AQuate's bidding strategies for, and performance under, the 2012 and 2017 SBX-1 contracts. Doc. 13 at ¶¶ 16-23. Kituwah and Myers then took those trade secrets and "dumped them in" to a bid proposal to unfairly compete against AQuate for the 2022 SBX-1 contract. Doc. 37 at 4.

Myers worked for AQuate from 2013 through 2017 while AQuate was engaged in its initial SBX-1 contract and was preparing its bid to win the second SBX-1 contract. *Id.* at ¶ 11. Myers held several positions with AQuate and its affiliated entities, she held responsibilities over corporate security and business development, and she had access to and knowledge of AQuate's SBX-1 contract terms, personnel, and bidding information and strategies. *Id.* at ¶¶ 12-13. As an AQuate employee, Myers signed multiple agreements governing the use and disclosure of confidential, proprietary, and other sensitive information, including an

[1] Although not clear in the record below, AQuate teamed with another entity to submit a bid for the 2022 SBX-1 contract. AQuate participated as a follow-on contractor in accordance with SBA 8(a) rules.

AQuate Agreement to Protect Company-Sensitive Information. *Id.* at ¶ 14. These agreements imposed ongoing obligations upon Myers that extend past her last date of employment with AQuate and are currently in force. *Id.* at ¶¶ 14-15. The nondisclosure provisions of the agreements signed by Myers expressly provide that they shall remain in effect even after Myers's termination date. *Id.* at ¶ 15. Myers resigned from AQuate in September of 2017 after AQuate won the second SBX-1 contract. *Id.* at ¶ 16. Myers is currently employed as the Director of Administration for Kituwah Global Government Group ("KG3") (*see id.* at ¶ 17), and she works for KG3's wholly owned subsidiary, the Appellant Kituwah Services, LLC. *See* Doc. 18 at 10; Doc. 18-1 at ¶ 1.

KG3 was formed in 2019 for the purpose of engaging in tribal and minority set-aside government contract work. *Id.* at ¶ 17. Kituwah was subsequently formed in 2020 to further the purpose of KG3 and compete for government contracts as a participant in the SBA § 8(a) program. Doc. 18 at 3. As Kituwah's employee and agent, Myers developed and drafted Kituwah's bid proposal for the 2022 SBX-1 contract and submitted the bid in competition with AQuate. Doc. 13 at ¶ 18. *See also* Doc. 37 at 4.

Theft and Solicitation of Trade Secrets. As an AQuate employee with responsibilities over corporate security and business development, Myers had access to and knowledge of AQuate's SBX-1 contract terms, personnel, and bidding

information and strategies. *Id.* at ¶¶ 12-13. In violation of her agreements with AQuate, and in violation of state and federal trade secrets law, Myers took from AQuate copies of AQuate's SBX-1 contracts, proposals, personnel, and other security information. *Id.* at ¶ 16. Later, in the months leading up to the bid for the 2022 SBX-1 contract, Kituwah, through Myers, contacted several AQuate employees in an effort to solicit updated details about AQuate's SBX-1 employee compensation structure and to test the waters for potential AQuate employees who would provide additional trade secret information to Kituwah in advance of its bid. *Id.* at ¶ 19. *See also* Doc. 37 at 4.

Kituwah's improper solicitation efforts were successful. As revealed during this litigation, in multiple emails and text messages between Myers and former AQuate employee Roger Medrano, Kituwah and Myers solicited details about: AQuate's base compensation structure and processes and techniques for SBX-1 contract pricing and costs; internal briefings regarding AQuate's cost and pricing strategies; and AQuate's contract transition planning strategies, staffing strategies, and SBX-1 employee training information so that Myers could "dump them into the [SBX-1] proposal." Doc. 37 at 4

Kituwah's Immunity Waiver. As a tribal entity, Kituwah claimed sovereign immunity as a purported extension of the tribe. Doc. 18 at 3-4. In order to participate in programs of the SBA, however, a company owned by an eligible Native American

tribe must adopt as part of its articles of organization "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).

Kituwah LLC included such a "sue and be sued" clause in an April 20, 2021, amendment to its Articles of Organization, which provided:

> 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.

Articles of Organization of Kituwah Services, LLC (Doc. 18-2) at ¶ 6.

AQuate's dispute resolution agreement with Myers. As part of her employment with AQuate, Myers executed a dispute resolution policy document, which provides:

> The tribal court of the Alabama-Quassarte Tribal Town shall be the exclusive venue for litigation arising out of [Myers's] 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's] employment.

Doc. 36-1. This language expressly recognizes the possibility that the selected forum may not exist – a fact which both the district court and Appellees ignored. *Id. See*

also Doc. 39 at 14 (quoting only a portion of the agreement). Furthermore, the *Constitution and By-Laws of the Alabama-Quassarte Tribal Town Oklahoma (Ratified January 10, 1939)* contained no provision for the creation of a tribal court or other judicial, and no AQTT tribal court had been created by AQTT, at the time the district court dismissed AQuate's Complaint.[2] *See* Doc. 38 at 5; Doc. 41 at ¶ 4.

The dismissal of AQuate's trade secrets claims. On May 20, 2022, Appellee's jointly filed a *Defendants' Renewed Motion to Dismiss and Incorporated Brief* (Doc. 18)¸ seeking, in relevant part, a dismissal of all AQuate's claims on the basis of Kituwah's alleged sovereign immunity, and dismissal of AQuate's claims against Myers pursuant to the dispute resolution agreement. The trial court focused on the contractual nature of AQuate's claims against Myers to find that "the 'essence' of AQuate's complaint is not related to the 8(a) program itself or its requirements" and to hold Kituwah entitled to sovereign immunity. Doc. 39 at 8. As AQuate argued to the district court, however, this narrow reading of Kituwah's waiver cannot reconciled with its plain meaning. Preparing and proposing a bid for a government contract that was set aside for SBA § 8(a) participants fits squarely within the broad "related to" language of both the SBA-required waiver and

[2] Undersigned counsel has been informed that, during the pendency of this appeal, the AQTT is amending or has amended its constitution and bylaws to allow for the creation of an AQTT judiciary, and created a legitimate court of the tribal town.

Kituwah's written waiver in its organizational documents, and soliciting trade secret information from the employees of other § 8(a) competitors cannot be separated from Kituwah's involvement in the program. Doc. 27 at 1-6.

Because the court granted immunity to Kituwah, it also dismissed AQuate's trade secrets claims against Myers under Rule 19, finding Kituwah a necessary and indispensable party to AQuate's trade secrets claims. Doc. 39 at 11-12.

The dismissal of AQuate's claims against Myers under forum non conveniens. The district court declined to exercise jurisdiction over AQuate's breach of contract claims against Myers under the *forum non conveniens* doctrine, relying on language in the dispute resolution agreement declaring that the "tribal court of the Alabama Quassarte Tribal Town shall be the exclusive venue for litigation arising out of [Myers's] employment." Doc. 39 at 14. This finding ignored the subsequent clause of the agreement, which expressly acknowledged that such a court may not exist. Doc. 36-1 at 2. While Appellees attached a purported order of an alleged "District Court of the Alabama Quassarte Tribal Town" to their reply in support of their motion to dismiss (*see* Doc. 31-1), they failed to respond to AQuate's showing that AQTT did not, and could not, have a tribal court at that time because no mechanism for creating such a court existed in its constitution, and no such court had been created by the tribe. Doc. 27 at 11-12; Doc. 38 at 5.

The district court focused solely on the orders and, relying on "principles of comity," declared hesitancy to "weigh in" on the legitimacy of a tribal court. Doc. 39 at 15-16. Nonetheless, the district court "weighed in" in the very next sentence, finding that an AQTT tribal court both existed and was an available and adequate forum in which AQuate could litigate its claims against Myers. *Id.* at 16. As a result, the district court dismissed AQuate's remaining contract claim against Myers with leave to re-file in the AQTT court. *Id.*

AQuate's motion to reconsider. AQuate filed an emergency motion to reconsider on August 4, 2022, arguing that the district court committed manifest error in recognizing the existence and legitimacy of an AQTT court in contravention of AQTT's constitution and, by extension, committed further error in referring AQuate's claims against Myers to such a court. *See* Doc. 41. The district court denied the motion to reconsider on August 12, 2022. *See* Doc. 46.

Standard of Review

The Court reviews "de novo a district court's grant of a motion to dismiss based on sovereign immunity." *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). It reviews the district court's forum non conveniens dismissal for abuse of discretion and will affirm unless it finds that "the district court has made a clear error

of judgment, or has applied the wrong legal standard." *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1028 (11th Cir. 2014).

SUMMARY OF THE ARGUMENT

This is a classic case of trade secret misappropriation: a former employee starts a new job with a competitor of her former employer and then works with the competitor to steal and improperly solicit the valuable secrets of the former employer to gain a wrongful competitive advantage. The twist in this case is that the wrongdoer – Kituwah – is a tribal entity that, in certain contexts, may be entitled to sovereign immunity. However, the competition involves a federal government contract that was set aside for participants in the SBA's § 8(a) Business Development Program, which explicitly mandates a waiver of sovereign immunity for Native American participants.

AQuate's Trade Secret Claims. While Native American tribal entities may qualify to participate in the SBA's programs, including the 8(a) Business Development Program, they must waive sovereign immunity for "all matters relating to SBA's programs." Thus, to participate in the 8(a) program and bid for federal government contracts, Kituwah included an express waiver of sovereign immunity in its organizational documents, which designate the United States Federal Courts as competent forums for "all disputes or other matters relating to [its] involvement in programs of the SBA." The language of both the SBA-required waiver and

Kituwah's express waiver is patently broad, yet the district court interpreted it narrowly to reach only SBA program requirements and find Kituwah had not waived its immunity.

The district court committed clear, reversible error by reading additional restrictions into the broad "related to" language of these waivers and dismissing AQuate's trade secrets tort claims against Kituwah and Myers. Under either waiver, the use of stolen and improperly-solicited trade secrets to compete against another 8(a) program participant in a bid for 8(a) set aside work is clearly a matter relating to the SBA's programs and Kituwah's involvement in the SBA's 8(a) Business Development Program. The district court's ruling reads into these broad waiver, limitations and restriction that simply do not exist, and which cannot be reconciled with the waivers' plain language.

AQuate' Employee Dispute Resolution Clause. The district court further erred in dismissing AQuate's breach of contract claims against Myers. Myers signed a dispute resolution clause designating the tribal court of the Alabama-Quassarte Tribal Town as the exclusive forum for all disputes arising from Myers's employment. The catch, here, is that no AQTT court existed at the time Myers executed the agreement or at the time the district court dismissed AQuate's complaint. Thus, the district court committed two reversible errors in dismissing AQuate's contract claims against Myers.

First, the district court erred in recognizing the existence of an AQTT tribal court. Specifically, the district court relied on the Appellees' reference to a purported order of a self-proclaimed "District Court of the Alabama-Quassarte Tribal Town" to conclude that an available forum existed in which AQuate could bring its suit. AQTT did not create that court, however, and at the time of dismissal there was no mechanism in AQTT's constitution and bylaws to allow for the creation of such a court. This fact was undisputed in the trial court. Nonetheless, the court found that this court was an AQTT tribal court to which the claims could be referred, implicitly recognizing the legitimacy of this claimed tribal court to dismiss AQuate's claims. This was clear, reversible error, unsupportable by the undisputed facts and AQTT's constitution.

Second, the court compounded this error by finding the availability of an adequate, alternative forum for AQuate's breach of contract claim. By declaring the existence of an AQTT tribal court (which could not be legitimate under the laws of the tribe), the district court referred AQuate's remaining claim against Myers to a forum that, even if it existed, would not have jurisdiction to hear AQuate's claims and could not afford relief to the parties. Thus, the district court committed a clear error in judgment in dismissing AQuate's contract claim against Myers under the doctrine of forum non conveniens, which effectively deprived AQuate of any opportunity to seek relief.

ARGUMENT

I. The district court erred by finding Kituwah Services LLC is entitled to sovereign immunity with respect to AQuate II, LLC's claims.

Myers and Kituwah's misappropriation and use of AQuate's trade secrets to compete for 8(a) set-aside government contracts is activity directly "relating to [Kituwah's] involvement in programs of the Small Business Administration, including but not limited to, 8(a) Business Development program participation" for which Kituwah expressly and unmistakably waived any alleged immunity. Doc. 18-2 at ¶ 6.

In order to participate in the SBA's 8(a) Business Development Program and compete for 8(a) set aside government contracts, a company owned by an eligible Native American tribe must adopt as part of its articles of organization "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 Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288, 292 (D. Me. 2014); *Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC*, No. 2:19-CV-575, 2020 WL 2738243, at *5 (E.D. Va. Mar. 30, 2020) (recognizing this requirement).

Kituwah included such a "sue and be sued" clause in an April 20, 2021, amendment to its Articles of Organization, which provided for an even broader waiver of any immunity it may have had with respect to its "involvement" in SBA programs. Specifically, Kituwah agreed:

> 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.

Doc. 18-2 at ¶ 6 (emphasis added). Kituwah's organizational documents and the SBA expressly make Kituwah and its employees amenable to suit in the United States Federal Courts "for **all disputes** or other matters **relating to** [Kituwah's] **involvement in programs of the Small Business Administration**, including but not limited to, 8(a) Business Development program participation." *Id.* (emphasis added)

AQuate's disputes with the Defendants are directly related to their involvement in the 8(a) program by taking and soliciting AQuate's trade secrets for use as an 8(a) participant in a bid for government contract work set aside for SBA 8(a) participants. Kituwah's wrongful attempt to gain a leg up in its bid against AQuate for a federal government contract set aside for SBA 8(a) participants is "a

matter relating to SBA's programs" and unquestionably a dispute "relating to [Kituwah's] involvement in programs" of the SBA.

Here, the key phrase "relating to" must be interpreted very broadly for the phrase to have any legal relevance. As the Supreme Court has long recognized: "The ordinary meaning of these words is a broad one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). *See also United States v. McGarity*, 669 F.3d 1218, 1262 (11th Cir. 2012) (citing *Morales* and interpreting the phrase "relating to" broadly in another statutory context), *abrogated on other grounds as recognized by United States v. Rothenberg*, 923 F.3d 1309, 1336 (11th Cir. 2019); *John Doe, v. Securities and Exchange Commission*, No. 21-2537, 2022 WL 16936098, at *3 (2d Cir. Nov. 15, 2022) (recognizing breadth of "relating to" language in several additional contexts and noting that the phrase "is typically defined more broadly than a term such as 'arising out of'") (quoting *Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128 (2d Cir. 2001)). *Accord Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995) (interpreting "related to" language comprehensively to reach "all matters connected with" the object of the phrase).

Other circuits have no difficulty finding waivers of tribal sovereign immunity under similar language. For example, in *Ninigret Development Corporation v.*

Narragansett Indian Wetuomuck Housing Authority, the First Circuit considered the effect of a forum selection clause in a contract between two tribal entities, which designated a tribal council and arbitration board for "all claims, disputes and other matters . . . arising out of or relating to" the contract . 207 F.3d 21, 30 (1st Cir. 2000). The First Circuit found this clause contained "nose-on-the-face plain" language, "broadly relegating dispute resolution to arbitration." *Id.* at 31. Thus, despite the absence of "magic words" specifically addressed to tribal immunity, the court found the clause constituted a "direct, clear, and unavoidable" waiver of immunity. *Id.*[3] *See also Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) (finding an explicit waiver under similar contract language and observing: "To agree to be sued is to waive any immunity one might have from being sued.").

Unsurprisingly, the limited case law addressing tribal immunity waivers under 13 C.F.R. § 124.109(c)(1) have interpreted "relating to" very broadly. In *Rassi v. Federal Program Integrators LLC*, a district court found that a tribal 8(a) participant waived sovereign immunity by participating in the SBA's § 8(a) programs. 69 F. Supp. 3d at 292. Specifically, the court held that "[t]he regulation's requirement of

[3] The First Circuit's conclusion was further bolstered by a Tribal Ordinance authorizing, but not requiring, the defendant Authority to waive any sovereign immunity it might otherwise have for claims arising out of or related to its contracts or activities under the ordinance. *Id.* at 29 and n.6.

federal jurisdiction over 'all matters relating to . . . program participation' is sufficiently broad to encompass" plaintiff's tort claims under the False Claims Act as well as her claims for violation of the SBA-specific anti-discrimination regulations. *Id.* *See also Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *7 (D. Or. Apr. 26, 2018), report and recommendation adopted, No. 6:17-CV-0962-JR, 2018 WL 4169019 (D. Or. Aug. 30, 2018) (same, even though the defendant tribal organization had only applied for eligibility under the 8(a) program but not yet "reap[ed] any benefits" from 8(a) participation). Only one court declined to find a waiver of sovereign immunity, *see Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC*, No. 2:19-CV-575, 2020 WL 2738243, at *1, *5 (E.D. Va. Mar. 30, 2020), and that case is not instructive here because it dealt with a private contract that was not "related to" the SBA program.

In *Applied Sciences*, a tribal company entered into a private agreement with plaintiff to purchase plaintiff's rights under certain contracts, "some of which were federal contracts awarded pursuant to the SBA 8(a) Program." *Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC*, No. 2:19-CV-575, 2020 WL 2738243, at *1, *5 (E.D. Va. Mar. 30, 2020). When the tribal company failed to make payments to the plaintiff in accordance with the earn-out provisions of that contract, the companies entered into a settlement agreement, which the tribal company also breached. *Id.* at *1.

When plaintiff sued for breach of both the settlement agreement and the APA, the trial court found that the tribal company was entitled to the tribe's sovereign immunity[4] and that the immunity was not waived. *Id.* at *2-5. The court reasoned that, although some of the contract rights purchased by the tribal company flowed from contracts awarded through the SBA 8(a) program, plaintiff's complaint involved only claims for breach of payment obligations under its separate contract and settlement agreement with the tribal entity. *Id.* Thus, the *Applied Sciences* court reached the unsurprising conclusion that the "essence" of plaintiff's complaint had nothing to do with the specific SBA contracts, and therefore it did not "relat[e] to the SBA 8(a) program." *Id.* at *5.

Here, in stark contrast to *Applied Sciences*, the impetus for all of AQuate's claims against Kituwah is Kituwah's solicitation and use of AQuate's trade secrets, in violation of state and federal statutory torts, to bid against AQuate for SBA § 8(a) government contract work, as a § 8(a) Business Development Program participant.. *See, e.g.*, Doc. 13 at ¶¶ 16-18, 21-23. This is conduct "relating to" and inseparable from Kituwah's participation in the SBA 8(a) program itself, and it unquestionably

[4] The court recognized that "a tribally created entity is not given a presumption of immunity until it has demonstrated that it is in fact an extension or an 'arm of the tribe.'" *Applied Scis. & Info. Sys., Inc.*, 2020 WL 2738243, at *2 (quoting *Williams*, 929 F.3d at 176 and applying the same multi-factored test for determining immunity of the tribal entity).

relates to Kituwah's involvement in SBA programs. Indeed, Kituwah's involvement and participation in the SBA 8(a) program is a prerequisite for Kituwah to place a competitive bid for the SBX-1 contract in the first place. *See* Doc. 39 at 6; Doc. 27 at 2; Doc. 10-1 at 2.

The district court's holding that "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" does not comport with the above facts nor with the language of the regulation. Doc. 39 at 8. The SBA regulation is devoid of any language limiting the required waiver only to violations of the SBA program requirements. And, while the language includes a waiver of matters relating to "program participation," this language is included in a non-exhaustive list of items "including, but not limited to" such participation.

Moreover, when the district court relied upon *Applied Sciences* to find that "the 'essence' of AQuate's complaint is not related to the 8(a) program itself" (Doc. 39 at 8), it answered the wrong question. The district court apparently relied upon the contractual nature of one of AQuate's claims against Myers to find that the *Applied Sciences* case "maps squarely onto the instant case." *Id.* Yet, AQuate's claims against Kituwah and Myers are for their joint and several violations of state and federal statutory torts, much like the False Claims Act claims at issue in *Rassi*. *See* 69 F. Supp. 3d at 292.

The correct question is whether AQuate's dispute with Kituwah is "related to" Kituwah's "involvement in programs of the Small Business Administration," for which Kituwah expressly waived immunity as required in order to participate in SBA programs and to bid competitively on 8(a) set-side contracts. It is difficult to imagine how an 8(a) program participant's improper solicitation and use of trade secrets in a bid for a § 8(a) set-aside contract would not be "related to" that participant's involvement in the 8(a) program.

The district court's holding cannot be squared with AQuate's allegations or the pain language of 13 C.F.R. § 124.109(c)(1), nor with the broad waiver in Kituwah's own organizational documents. Accordingly, the dismissal of AQuate's claims against Kituwah should be vacated.

II. The district court committed clear error when it recognized the "District Court of Alabama-Quassarte Tribal Town" as a legitimate court of the Alabama-Quassarte Tribal Town.

The district court clearly erred when it expressly recognized a court of the Alabama-Quassarte Tribal Town because no such court existed and no mechanism for creating such a court existed in the Constitution and Bylaws of the Alabama-Quassarte Tribal Town.[5]

[5] Undersigned counsel has been informed that, since AQuate filed its notice of appeal, the Alabama Quassarte Tribal Town is amending or has amended its constitution to allow for the creation of an AQTT tribal court, and a tribal court of the AQTT may now exists. While it is possible that the district court may find this to be an legitimate and available forum on remand, the question now before the Court

The district court based its conclusion on a forum selection clause in the Alabama-Quassarte Tribal Town Companies Dispute Resolution Policy and copies of two purported orders of an illegitimate District Court of Alabama-Quassarte Tribal Town. Doc. 39 at 15-16. None of these documents support the court's recognition of this purported court as a legitimate and available forum of the Alabama-Quassarte tribe.

The dispute resolution policy provides:

> The tribal court of the Alabama-Quassarte Tribal Town shall be the exclusive venue for litigation arising out of [Myers's] 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's] employment.

Doc. 36-1. This language expressly recognizes the possibility that the selected forum may not exist – a fact which both the district court and Appellees failed to acknowledge. *See generally* Doc. 18 (Defendant's Renewed Motion to Dismiss and Incorporated Brief); Doc. 31 (Defendant's Reply in Support of Renewed Motion to Dismiss); Doc. 39 (Memorandum Opinion). Nor did the district court or Appellees acknowledge the undisputed fact that the *Constitution and By-Laws of the Alabama-Quassarte Tribal Town Oklahoma (Ratified January 10, 1939)* contained no provision for the creation of a tribal court or other judicial system. Doc. 27 at 11-

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is whether the district court erroneously recognized the legitimacy of a court, and found an available alternative forum existed, *at the time of dismissal*. *See Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 n.3 (11th Cir. 2001).

12; Doc. 38 at 5. This undisputed fact should have precluded the district court's finding of an available alternative forum, and it is diametrically opposed to the court's finding that such a court both (1) exists and (2) is an available alternative forum where AQuate must file its claims. *See* Doc. 39 at 15-16.

The district court's error is amplified by its own contradictory statements. First, the district court declined to acknowledge the AQTT Constitution and Bylaws (and the absence of any court-creation provisions therein) on the basis that "principles of comity" restrain the court from "weigh[ing] in on whether this tribal court is . . . illegitimate." Doc. 39 at 15-16. Yet in literally the next sentence, the court contradicts its own principles of comity and hesitancy to "weigh in" by assuming the legitimacy of the purported court to declare that "the AQTT Tribal Court is an available and adequate forum for AQuate to litigate its breach of contract claims against Myers." *Id.* at 16. These conclusions are contradictory to the AQTT Constitution and to reported case law that has addressed similar issues of tribal court legitimacy.

The case of *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, is illustrative, where the Fifth Circuit affirmed a district court's "ruling that the tribal court was not created in accordance with federally mandated procedures, [and] that the illegitimately formed tribal court could not exercise jurisdiction over the instant [contract] dispute." 261 F.3d 567, 575 (5th Cir. 2001). In the district

court case underlying the *Comstock* decision, the tribe supplied affidavits and letters from the clerk and judge of the purported tribal court, which that court held insufficient to establish the rightful existence or legitimacy of the court. *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 78 F. Supp. 2d 589, 599 (E.D. Tex. 1999), *aff'd in part, rev'd in part on other grounds and remanded*, 261 F.3d 567 (5th Cir. 2001). "The problem, as the court [saw] it, is a lack of authority within the tribal constitution to form a judiciary for the" tribe. *Id.* The Fifth Circuit affirmed, recognizing that exhaustion of remedies before a tribal court would be futile because no tribal court properly existed. *Comstock Oil*, 261 F.3d at 572-73.

It 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 such as the one improperly referenced by Appellants. The record is devoid of any evidence contrary to this fact. This district court cannot recognize the legitimacy of that court based solely on a forum selection clause that expressly recognizes that such a forum may not exist and copies of documents purporting to be orders of a court that cannot constitutionally exist under the laws of the sovereign it purports to represent. *See Comstock Oil & Gas, Inc.*, 78 F. Supp. 2d at 600. The district court committed reversible error when it "weighed in" on the legitimacy of an AQTT Court without any proof of the legitimate creation of the court. Moreover,

the trial court went beyond the Amended Complaint by taking into account a "factual finding" that had no basis in the record. Accordingly, the trial court's decision should be reversed to the extent it recognizes the alleged District Court of the Alabama-Quassarte Tribal Town as a legitimate judicial forum of the tribe.

III. District Court clearly erred when it found that an available and adequate forum existed in which AQuate II, LLC may litigate its claims against Jessica Myers.

No legitimate AQTT tribal court existed at the time of dismissal. Thus, there was no available and adequate alternative forum with jurisdiction to hear AQuate's claims against Myers. *See Satz*, 244 F.3d at 1282 n.3. The district court made a clear error of judgment by enforcing the forum selection clause and dismissing the case under forum non conveniens when the forum identified in the clause did not exist.

Comstock is instructive here, as well. As the Fifth Circuit recognized, "the illegitimately formed tribal court could not exercise jurisdiction" over the contract claims. 261 F.3d at 575. Although *Comstock* arose in an exhaustion-of-tribal-remedies context, the same result obtains in the forum selection context. Not too long ago, this Circuit held that an arbitration clause designating a Native American tribe as an exclusive arbitral forum was unenforceable because the tribe did not have an available arbitration system. *See Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014). Other courts in analogous circumstances also refuse to dismiss claims pursuant to a forum selection clause where those clauses identify

illegitimate forums or forums that do not have jurisdiction to hear the claims. *See, e.g.*, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 776 (7th Cir. 2014) (addressing the same Native America arbitral forum selection clause as *Inetianbor* and finding its designation of a forum that did not exist to be illusory and unreasonable); *ORI, Inc. v. Lanewala*, No. 99-2402-JWL, 1999 WL 1423068, at *1 (D. Kan. Nov. 30, 1999) (finding forum selection clause unenforceable because it selected a forum that "is clearly without jurisdiction to hear this action"); *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 *4 (E.D. La. Mar. 22, 1995) (refusing to enforce a forum selection clause designating a non-existent forum).

Here, the district court's dismissal of AQuate's claims against Myers futilely refers AQuate to an illegitimate forum with no jurisdiction to grant enforceable relief. And, if AQuate's claims were litigated in an illegitimate court, any relief obtained by AQuate against Myers could be challenged on the basis that the illegitimate forum lacked jurisdiction. *See, e.g.*, Ala. Code § 6-9-253 (1975) (Alabama Uniform Foreign-Country Money Judgments Recognition Act providing that "[a] court of this state shall not recognize a foreign-country judgment if . . . the foreign court did not have jurisdiction over the subject matter"); N.C. Gen. Stat. Ann. § 1C-1853 (same result under North Carolina Uniform Foreign-Country

Money Judgments Recognition Act). Thus, any purported "relief" awarded by an illegitimate forum would be unenforceable and inadequate.

Before the judge could dismiss AQuate's claims under *forum non conveniens*, it necessarily had to determine that an available alternative forum existed that could afford relief to AQuate at the time it dismissed AQuate's claims. *Satz*, 244 F.3d at 1282 n.3. Neither of these conclusions could be reached here, where there was no "tribal court of the Alabama-Quassarte Tribal Town" at the time of dismissal.

CONCLUSION

For the foregoing reasons, the Court should reverse the dismissal of AQuate's claims and remand for further proceedings.

CERTIFICATE OF COMPLIANCE

1. This brief complied with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,871 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 November 30, 2022, I filed a copy of the foregoing brief with the Clerk of Court using the Appellate CM/ECF system, which system thereby electronically served the same on Appellees' counsel of record:

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