

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JEANETTE SCOTT,)
)
)
Plaintiff,)
)
)
v.)
)
)
AHTNA ENGINEERING SERVICES,) CASE #4:24-cv-00541-SRB
LLC, d/b/a ADVANCIA + AHTNA)
JOINT VENTURE,)
And)
ADVANCIA TECHNOLOGIES, LLC,)
d/b/a ADVANCIA + AHTNA JOINT)
VENTURE)
)
)
Defendants.

**REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT
ADVANCIA TECHNOLOGIES, LLC'S RULE 12(b)(1) MOTION TO DISMISS**

Defendant Advancia Technologies, LLC (“Advancia” or “Defendant”), by and through its undersigned counsel, submits this Reply Memorandum in Further Support of Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction.

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I. INTRODUCTION

Plaintiff Jeannette Scott (“Scott”) does not dispute that subject-matter jurisdiction cannot be forfeited or waived or that the Court has an independent duty to assess such jurisdiction even without challenge by any party. *See Mot. to Dismiss Mem.*, Doc. 196 at pg. 10 (citing cases). Scott also does not dispute that removal does not waive tribal sovereign immunity, that Advancia affirmatively asserted its immunity in its answer, or that that immunity can be asserted at any time in litigation, even on appeal *sua sponte*. *See id.* at pg. 11 (same). Further, Scott also does not dispute that the Forest County Potawatomi Community (“Tribe”), a federally recognized Indian tribe, chartered, wholly owns, controls, receives net revenue from, and conferred its sovereign immunity on Potawatomi Business Development Corporation (“PBDC”), which in turn did and does all that with Advancia pursuant to PBDC’s express tribally conferred authority to establish subsidiaries for necessary flexibility in business development, diversification, and economic benefits for the Tribe. *See Doc. 196 at ¶¶ 5-9, ¶ 13.* Nor is there any express and unequivocal waiver of Advancia’s sovereign immunity for Scott’s claims, anywhere. Given all that, Scott cannot meet her burden to avoid Advancia’s immunity from suit based on unfounded arguments about state-law organization, applying six relevant factors, lack of immunity for another entity, waiver through litigation conduct or a “sue and be sued” clause.

II. ARGUMENT

Scott does not dispute the long-settled and repeatedly reaffirmed law that tribal sovereign immunity extends to off-reservation commercial activities. *Michigan v. Bay*

Mills Indian Cmty. (“*Bay Mills*”), 572 U.S. 782, 797-803 (2014). Nor does Scott dispute the governing Eighth Circuit law that a corporate entity created, funded, and controlled by an Indian tribe is “an arm of the tribe[.]” *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *see Amerind Risk Mgmt. Corp. v. Malaterre* (“*Amerind*”), 633 F.3d 680, 684 (8th Cir. 2011). *Compare* Doc. 196 at pg. 11 with Doc. 201 at pg. 14. Also, the sovereign immunity for an arm of the tribe can only be abrogated by a clear and express congressional law or by clear and unequivocal waiver by the tribe. *Kiowa Tribe of Oklahoma v. Manuf. Techs., Inc.*, 523 U.S. 751, 754 (1998). Scott agrees that this immunity is a “‘threshold jurisdictional matter’ and a ‘jurisdictional prerequisite’” that can be asserted at any time, even for the first time by the court on appeal *sua sponte*. *Amerind*, 633 F.3d at 686 (*quoting Hagen*, 205 F.3d at 1044). Doc. 201 at pgs. 10, 24. And Scott does not dispute that once the issue of tribal sovereign immunity is raised, she “bear[s] the burden of proving that either Congress or [Advancia] has expressly and unequivocally waived tribal sovereign immunity.” *Amerind*, 633 F.3d at 685-86; Doc. 196 at pg. 11. Accordingly, consistent with Advancia’s prior assertion of this defense and the Court’s prior deferral of it, Doc. 36 at pg. 16; Doc. 39 at 3 n.1, Scott must—and cannot—establish a clear waiver of immunity by Congress or Advancia.

A. Advancia’s Organization Under State Law Does Not Preclude Its Sovereign Immunity Since the Method of Creation Is Just One of Five or Six Relevant Factors and the Authority on Which Scott Relies for That Argument Carries No Weight.

Scott initially tries to avoid Advancia’s sovereign immunity by asserting a categorical exception for “twice-removed” state-chartered entities. Doc. 201 at pgs. 12-15.

That effort fails for several reasons. First, Scott agrees that six factors should be considered to determine if tribal sovereign immunity applies to subordinate economic entities, under which no single factor is dispositive. *Compare id.* at pgs. 11-12 with Doc. 196 at pg. 12. That makes sense since the arm-of-the-tribe test is “a qualitative, holistic framework[.]” *Mestek v. Lac Courte Oreilles Cnty. Health Ctr.*, 72 F.4th 255, 260 (7th Cir. 2023), and treating one factor as dispositive constitutes reversible error. *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort* (“*BMG*”), 629 F.3d 1173, 1187, 1191 & n.13 (10th Cir. 2010). Indeed, contradicting Scott’s attempt to use one factor to avoid all others, *BMG* pointed out that “there is no threshold determination to be made in deciding whether economic entities qualify as subordinate economic entities entitled to share in a tribe’s immunity.” *BMG*, 629 F.3d at 1181. Rather, under *BMG*, review of all factors in this framework is required. *Id.* And in this holistic framework, factors 3 and 5, for example, on financial relationship, structure, ownership, and control, “may often matter more” than factor 1 on how the entity was created. *Ransom v. Great Plains Finance, LLC*, 148 F.4th 141, 148-49 (3rd Cir. 2025). Scott also does not dispute that “tribal immunity is a matter of federal law and is not subject to diminution by the States.” Doc. 201 at pg. 11 (quoting *Bay Mills*, 572 U.S. at 789). The fact that other Eighth Circuit cases have addressed tribal entities organized under federal and tribal law, *e.g.*, *Amerind*, 633 F.3d at 685; Doc. 201 at pg. 14 (citing other cases), cannot make state-law corporate organization usurp this governing federal law.

Second, Scott misplaces reliance on *Somerlott v. Cherokee Nation Distributors*, 686 F.3d 1144 (10th Cir. 2012). *Somerlott*'s discussion of tribal sovereign immunity was dicta since that issue was not preserved for appeal. *Somerlott*, 686 F.3d at 1150. Also, that dicta and the wholly nonbinding concurrence contradict *BMG*, *Mestek*, and *Ransom* by erroneously making one factor dispositive. *See supra*. More significant, *Somerlott* predates *Bay Mills*, which reaffirmed that Indian tribes' "special brand" of sovereign immunity is not limited by state law or like immunity for "other sovereigns[.]" *Bay Mills*, 572 U.S. at 789, 798, 800; *contra Somerlott*, 686 F.3d at 1149 n.3. Finally, other courts have rejected *Somerlott*'s dicta on which Scott relies¹ and have held that state-chartered companies can be entitled to tribal sovereign immunity.² That includes a state-chartered LLC subsidiary of a tribal corporation, like Advancia, which was created to further governmental

¹E.g., *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019); *Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288, 291 (D. Me. 2014); *Ito v. Copper River Ass'n*, 547 P.3d 1003, 1021 (Alaska 2023); *Lustre Oil Co. LLC v. Anadarko Mins., Inc.*, 527 P.3d 586, 589-91 (Mont. 2023); *Great Plains Lending, LLC v. Dep't. of Banking*, 259 A.3d 1128, 1143 (Conn. 2021); *State ex rel. Workforce Safety & Ins. v. Cherokee Servs. Grp.*, 955 N.W.2d 67, 73 (N.D. 2021); *People ex rel Owen v. Miami Nation Enter.*, 386 P.3d 357, 372-74 (Cal. 2016);
[https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040571556&pubNum=0004645&originatingDoc=I9af4aa0040811ef9ea396245aa79833&refType=RP&fi=co_pp_sp_4645_372&originationContext=document&transitionType=DocumentItem&ppcid=54dba035fb8f49fbac8e86b0dc3d8728&contextData=\(sc.Keycite\) - co_pp_sp_4645_372](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040571556&pubNum=0004645&originatingDoc=I9af4aa0040811ef9ea396245aa79833&refType=RP&fi=co_pp_sp_4645_372&originationContext=document&transitionType=DocumentItem&ppcid=54dba035fb8f49fbac8e86b0dc3d8728&contextData=(sc.Keycite) - co_pp_sp_4645_372) *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 928, 935-36 (N.Y. 2014).

²*McCoy v. Salish Kootenai College, Inc.*, 785 Fed. Appx. 414, 415 (9th Cir. 2019); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188-89 (9th Cir. 1998); *Rassi*, 69 F. Supp. 3d at 291-92; *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Board* ("J.L. Ward"), 842 F. Supp. 2d 1163, 1176 (D.S.D. 2012); *Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995).

objectives. *See Rassi*, 69 F. Supp. 3d at 289-92; Ex. 1(B), Doc. 196-1 at pg. 17; Ex. 1(C), Doc. 196-1 at pgs. 20, 22, (arts. IV, VIII); Ex. 1(E), Doc. 36-1 at pgs. 32, 36-37 (arts. I, IX-X).

Finally, Scott's additional authority for this response cannot save it. As noted above, *J.L. Ward* supports Advancia's immunity as a state-organized entity. *See supra* n.2. *Stathis v. Marty Indian School Board, Inc.*, 560 F. Supp. 3d 1283 (D. S.D. 2021), confirms this and also considers all six *BMG* factors to identify a “subordinate economic entity[,]” which Advancia certainly is, as explained below. *See Stathis*, 560 F. Supp. 3d at 1293-94. *Stathis'* distinction from *Somerlott* for a dissolved state corporation is not material since Advancia, like that corporation, “shares a close relationship with the Tribe[,]” as explained below. *See id.* at 1296. As a result, Scott cannot avoid her burden to satisfy the multi-factor arm-of-the-tribe test regarding Advancia's immunity.

B. Scott Cannot Avoid Advancia's Immunity as an Arm of the Tribe Since the Tribe Created Advancia to Advance Its Economic Development, Extended Immunity to Advancia, and Wholly Owns, Controls, and Receives Revenues from Advancia.

Considering all the *BMG* factors, Scott cannot refute Advancia's immunity. First, the creation method under state law is not dispositive, as explained above, and only partly weighs against immunity since Advancia is not unduly removed from the Tribe exercising its powers of self-government. The General Council resolution which established PBDC did so “in the best interest of the Tribe” to “enable the Tribe to realize significant economic benefits through business development and diversification[.]” Doc. 196-1 at pg. 17. Based on that, the Tribe “adopted and approved” PBDC's charter “to engage in business

diversification” and authorized PBDC to form “subsidiary entities” to provide “necessary flexibility[,]” while the Tribe retained control over PBDC’s board and budget. *Id.* No additional council resolution was needed to form Advancia, since the resolution establishing PBDC expressly contemplated such subsidiary entities. *Id.* In turn, PBDC’s charter confirms that it is “100% owned and controlled by” the Tribe, with authority to charter, delegate to, and govern subordinate entities. Doc. 196-1 at pg. 20 (arts. II, IV(B)). Meanwhile, Advancia’s operating agreement confirms its tribal connection and that “the affirmative vote, approval, or consent of” PBDC is required for many major actions. Doc. 36-1 at 32, 33 (§§ 1.2, 3.5(A)-(J)). All those aspects of Advancia’s creation method support its immunity.

Second, Scott mischaracterizes Advancia’s purpose based on its prior operating agreement. Ex. 1(E), Doc. 196-1 at pg. 32. Under Advancia’s current operating agreement, it “was formed for the purpose of engaging in any and all lawful acts or activities permitted by the laws of Oklahoma.” Doc. 36-1 at pg. 32 (§ 1.1). However, that must be read consistent with key limits in that operating agreement and PBDC’s charter since “[r]evenue distribution is critical to resolving how the second factor weighs.” *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 654 (E.D. Va. 2019). Namely, Advancia’s budget, allocations, and distributions are all determined by PBDC while PBDC’s charter mandates that 80% of its net profits are distributed to the Tribe and its members. *See* Ex. 1(E), Doc. 36-1 at pgs. 33-34 and 37 (§ 3.2, 3.5(F) and art. X). In that context, Advancia’s stated purpose of engaging in lawful acts (like any company should) must be understood as providing

revenue for the Tribe and its members and to implement PBDC's tribally endowed authority to charter subordinate entities. Ex. 1(C), Doc. 196 at pg. 20 (art. IV). PBDC's mandatory distribution percentage contrasts with a business which paid only 1 to 3.6% of revenue to its tribe, *Solomon*, 375 F. Supp. 3d at 654-55. And, as Scott admits, one purpose for the Tribe's formation of Advancia, via the PBDC, was to "provide the necessary flexibility while maintaining the Tribe's sovereign immunity from suit." Doc. 201 at pg. 16. This factor also supports Advancia's immunity.

Third, Advancia's structure, ownership, and management, including tribal control, also supports Advancia being an arm of the Tribe. Scott objects that Advancia is owned by PBDC, not the Tribe, and is managed by a manager, rather than PBDC or the Tribe. Doc. 201 at pgs. 16-17. But this objection overlooks that Advancia is structured as a single-member LLC, which is wholly owned and controlled by the Tribe through PBDC, and that PBDC's Chairman, who is a member of the Tribe, is PBDC's member representative for Advancia. Doc. 36-1 at pg. 32 (§§ 1.1-1.3). Also, PBDC's Board of Directors is appointed by the Tribe, a majority of the Board is required to be tribal members, and at least one PBDC Director must be a member of the Tribe's Executive Council. Ex. 1(D), Doc. 196-1 at pg. 25 (art. 3, § 3). PBDC through that Board controls Advancia's manager, budget, allocations, distributions, operating agreement amendments, dissolution, and all major decisions, including appointment and replacement of the manager "at any time . . . for any reason[.]" Ex. 1(E), Doc. 36-1 at pgs. 33-34, 37 (§§ 3.1-3.6, 11.1 & art. X). The Tribe,

therefore, through its members on PBDC's Board, significantly controls Advancia, so this factor also favors immunity.

Fourth, the Tribe expressly and directly intended to (and did) confer its sovereign immunity on Advancia. Doc. 36-1 at pgs. 36-37 (§ 9.1). Scott responds that the Tribe had no such intent because PBDC established and conferred immunity on Advancia. Doc. 201 at pg. 17. But that overlooks all the tribal intent directly expressed for subordinate entities in the resolution and charter establishing PBDC discussed above. *See* Doc. 196-1 at Exs. 1(C)-(D). This factor thus supports immunity.

Fifth, the financial relationship between Advancia and the Tribe also supports immunity. Scott asserts that the Tribe is not directly connected to Advancia, and all Advancia's profits pass through an intermediary and may be diminished by PBDC's salaries and expenses. Doc. 201 at pg. 18. But every business' profits are diminished by salaries and expenses, so that cannot preclude a material financial relationship. Instead, as explained above for factors 2 and 3, Advancia's profits are allocated and distributed as determined by PBDC's Board, a majority of which is members of the Tribe, and 80% of PBDC's profits from Advancia and otherwise are distributed to the Tribe and its members via PBDC. This contrasts with where "the tribe barely received any revenue[.]" *Williams*, 292 F.3d at 181. Also, as explained for factor 1, the Tribe specifically established PBDC to provide for economic development and diversification, including via subsidiaries, so the Tribe depends on Advancia for revenue. Further, Scott's argument that Advancia's insurance may cover this claim to protect the Tribe, Doc. 201 at pg. 18, merely reinforces

the Tribe's economic connection with Advancia. There also is no "insurance coverage" exception to sovereign immunity. For all these reasons, litigation against Advancia significantly impacts the Tribe and its members via the PBDC. *See Williams*, 292 F.3d at 184-85. This factor thus supports Advancia's immunity.

Sixth, applying immunity to Advancia furtherers the purposes of tribal sovereign immunity, by protecting the Tribe's coffers and supporting its economic development via diversified subordinate entities. *See Williams*, 929 F.3d at 185; *BMG*, 629 F.3d at 1187-88. Scott opposes this based on the *Somerlott* concurrence, Doc. 201 at pgs. 18-19. But as explained above, that carries no current weight. Scott also disputes this factor based on Advancia's participation in a joint venture, suggesting that any private corporation could abusively hide behind tribal entities. *Id.* at pg. 19. That is absurd, since private non-tribal entities fail all factors for immunity and remain subject to suit. Therefore, properly considered, this factor also supports Advancia's sovereign immunity.

Finally, Scott cannot avoid all the above based on *Hunter v. Redhawk Network Security, LLC*, 2018 WL 4171612 (D. Or. 2018), *report & recomm. adopted*, 2018 WL 4169019 (D. Or. 2018). Doc. 201 at pgs. 20-21. Unlike that case, the evidence discussed above shows that this suit will affect the Tribe's treasury, since increased costs to Advancia reduce distributions that PBDC may make to itself, which in turn are required to be mostly paid to the Tribe and its members.

C. Scott Cannot Establish that Any of a “Sue and Be Sued” Clause, SBA Program Terms, or Litigation Conduct Expressly and Unequivocally Waive Immunity for Her Claims.

Scott does not dispute her burden to prove an express and unequivocal immunity waiver by Congress or Advancia, *compare* Doc. 201 at pg. 24 (citing *Amerind*, 633 F.3d at 685-86) *with* Doc. 196 at pg. 11, or that such waivers “cannot be implied and are . . . strictly construed in favor of the Tribe[.]” with “a strong presumption against waiver[.]” Doc. 196 at pgs. 13-14 (quoting *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) and *Grondal v. United States*, 37 F.4th 610, 617 (9th Cir. 2022)). Scott therefore cannot overcome all those bars based on the facts here.

First, Scott cannot rely on the general “sue and be sued” immunity-waiver regulatory prerequisite to support her claims, Doc. 201 at pgs. 21-23, since such a clause “does not operate as a general waiver of . . . immunity from suit.” *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.*, 50 F.3d 560, 563 (8th Cir. 1995). Relatedly, Scott misplaces reliance on *AQuate II LLC v. Myers* (“*AQuate*”), 100 F.4th 1316 (11th Cir. 2024), Doc. 201 at pg. 22, since claims there were under trade secrets laws on the basis that the tribal entity “stole trade secrets to boost its [SBA 8(a) program] bid[.]” *AQuate*, 100 F.4th at 1319, 1321. While that expressly “relat[ed] to SBA’s programs” under 13 C.F.R. § 124.109(c)(1), Scott’s claims only concern her employment and do not relate at all to the SBA program, participation, loans, or contract performance, *see* Doc. 18. That inapplicable regulation condition thus cannot constitute an explicit congressional or unequivocal tribal waiver.

Second, Scott cannot establish clear congressional or tribal waivers for age-discrimination claims based on cases finding that SBA contract immunity waivers allow claims for racial and handicap discrimination and retaliation. *See* Doc. 201 at pgs. 22-23; *Rassi*, 69 F. Supp. 3d at 292 and *Hunter*, 2018 WL 4171612 at *7. Those cases do not overcome the above SBA limit. Also, unlike those cases, Scott only still asserts age-discrimination claims, Doc. 18 at Counts I-III; Doc. 161 at 2. Also, Scott implicitly concedes that the SBA compliance condition about age discrimination does not encompass the 8(a) program or state law. *See* Doc. 196 at pgs. 15-16 (citing authorities).

Finally, Scott cannot establish express immunity waiver via litigation defense. Advancia's immunity is, as Scott concedes, a ““threshold jurisdictional matter”” and a “jurisdictional prerequisite”” that can be asserted at any time, even for the first time by the court on appeal, *sua sponte*. *Amerind*, 633 F.3d at 686 (citing *Hagen*, 205 F.3d at 1044). Scott identifies no authority that tribal sovereign immunity is waived by actions Advancia has taken in this case. For example, as Scott concedes, removal to federal court does not waive tribal sovereign immunity. Doc. 201 at pg. 23; *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1015-16 (9th Cir. 2016); *Contour Spa at Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1208 (11th Cir. 2012).

The cases that Scott cites undermine her assertion of waiver by litigation conduct. *Rupp v. Omaha Tribe*, 45 F.3d 1241, 1244-45 (8th Cir. 1995), concerned a tribal plaintiff, which Advancia is not. Moving for summary judgment in defense of a claim does not make a party a plaintiff. By Scott’s logic, any tribal entity that defends itself on any basis other

than immunity by that effort waives its immunity. But that turns settled and certain law on its head. *See Amerind*, 633 F.3d at 686; *Am. Indian Agric. Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985). In turn, in *McLendon v. United States*, 885 F.2d 627 (9th Cir. 1989), the tribe did not waive immunity by defending a breach of lease claim even though the lease resulted from settlement of an earlier tribal lawsuit which had waived immunity. *Id.* at 633. Here, there was no prior litigation by Advancia like that by the tribe in *McLendon*. Indeed, in *Amerind*, the tribe itself filed the action, failed to assert immunity at all before the district court, and did not even raise immunity in its appellate brief, and the Eighth Circuit itself *sua sponte* directed the parties to address that issue. *Amerind*, 633 F.3d at 684. All that supports retention and protection of Advancia's sovereign immunity in this case.

III. CONCLUSION

Scott cannot meet her burden of avoiding Advancia's status as an arm of the Tribe. Scott also cannot meet her burden of establishing any action by Congress leading up to this case or any action by Advancia in this case which has expressly and unequivocally waived Advancia's sovereign immunity regarding Scott's claims. Consequently, Scott's claims must be dismissed.

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Respectfully submitted,
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