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IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA, MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and  
SANDI OVITT,

Relators and Plaintiffs,

-vs-

SALISH KOOTENAI COLLEGE, INC.,  
SALISH KOOTENAI COLLEGE  
FOUNDATION, ROBERT FOUTY,  
individually, JIM DURGLO, individually,  
RENE PEIRRE, individually, ELLEN  
SWANEY, individually, LINDEN PLANT,  
individually, TOME ACEVEDO,  
individually, ZANE KELLY, individually,  
ERNEST MORAN, individually, LUANA  
ROSS, individually, CARMEN TAYLOR,  
individually, ELAINE FRANK,  
individually, LISA LACKNER HARMON,  
individually, REBEKKAH HULEN,  
individually, DAWN BENSON,  
individually, and DOES 1-10,

Defendants.

CV 12-181-M-BMM

**REPLY BRIEF IN SUPPORT  
OF SALISH KOOTENAI  
COLLEGE'S MOTION TO  
CERTIFY ORDER  
DISMISSING COLLEGE AS  
FINAL JUDGMENT**

Defendant Salish Kootenai College (“the College”) submits this reply brief in support of its motion requesting that the Court certify its May 17, 2018 Order as a final judgment for purposes of appeal, pursuant to Fed. R. Civ. P. 54(b).

Plaintiffs argue that certification would create piecemeal litigation and would not materially advance the termination of this litigation. However, their arguments do not withstand scrutiny and are directly contrary to the arguments they made when they requested certification of the Court's previous order dismissing the College.

The College's motion to certify the dismissal of the College as final will be moot if the Court grants the Individual Defendants' Motion to Dismiss, as all issues could then be appealed to the Ninth Circuit. However, if the Court denies the Individual Defendants' motion in whole or in part, the College's motion to certify should be granted.

**I. The Court should certify its second dismissal of the College on jurisdictional grounds for the same reasons it certified its initial dismissal of the College on jurisdictional grounds.**

As Plaintiffs previously argued and this Court already found, it is proper to certify the dismissal of the College as a final judgment under Rule 54(b) because the case is complex, it involves factually and legally separate issues, and denial of certification would risk staggered litigation at considerable cost to the parties and the Court. (Doc. 48 at 4–5.) As before, no just reason exists to delay an appeal in this case. Rather, justice requires that any appeal be taken immediately. (*Id.*)

As the Court will remember, Plaintiffs' claims against the College were previously dismissed for lack of subject matter jurisdiction based on the Court's

holding that the College is an arm of the Confederated Salish and Kootenai Tribes (“Tribes”) and therefore shares in the Tribes’ sovereignty. In the same order, the Court granted Plaintiffs leave to amend their Complaint against the members of the College’s Board of Directors. (Doc. 39.) Plaintiffs appealed the dismissal of the College to the Ninth Circuit (doc. 41) and filed a stipulated motion for Rule 54(b) certification (doc. 46), which this Court granted (doc. 48). The Ninth Circuit heard the appeal and remanded the issue for further discovery. (Doc. 78.) After extensive discovery, this Court again dismissed the College for lack of subject matter jurisdiction. (Doc. 108.) As before, the Court held that the College is an arm of the Confederated Salish and Kootenai Tribes and therefore cannot be sued under the False Claims Act. (Doc. 108.)

The same reasons that weighed in favor of certifying the initial jurisdictional order weigh in favor of certifying the most recent jurisdictional order. As Plaintiffs “expressly acknowledge[d] and admit[ted]” in the stipulated motion they filed seeking certification of the Court’s December 2014 Order, “the nature of the claims at issue is such that appeal from the Order . . . will not result in piecemeal appeals.” (Doc. 46 at 3–4.)

The same circumstances and claims are at issue now. Like the December 2014 Order, the May 2018 Order “addressed jurisdictional, sovereignty and pleading matters regarding the parties rather than the merits of Plaintiff-Relators’

claims,” and certification of the order as final is warranted because “[t]he claims asserted against all of the parties are interrelated.” (Doc. 46 at 4.) As Plaintiffs previously stipulated: “If appeal is not taken at this time, the result could be a staggered litigation of nearly identical issues, at great cost and expense to the parties and District Court. On the other hand, if appeal is taken now, then Plaintiffs-Relators may litigate their claims against whichever defendants have been adjudicated as the appropriate defendants by the Ninth Circuit Court of Appeals.” (Doc. 46 at 4.)

The Court agreed with the Plaintiffs’ and Defendants’ arguments in favor of Rule 54(b) certification, holding that an immediate appeal was just and appropriate because of the complex nature of the parties and legal issues and to avoid the risk of staggered litigation. (*See* doc. 48 at 4–5.)

There is no justification for distinguishing the current circumstances from those that gave rise to the Court’s initial Rule 54(b) certification, and the same arguments made by the parties and the same conclusions reached by the Court again apply.

## **II. Certification would not create piecemeal litigation.**

Plaintiffs argue now that certification would result in piecemeal litigation. However, as before, the opposite is true. Unless this Court also grants the Individual Defendants’ pending motion to dismiss—in which case this motion

would be moot—delaying appeal of the dismissal of the College would result in piecemeal and duplicative litigation involving the same issues and witnesses. The merits of this case have not yet been addressed. But if an appeal of the Court’s dismissal of the College were only taken, and potentially granted, after disposition of the merits of the claims against the Individual Defendants, the parties and Court would face the prospect of having to re-litigate the merits of the case a second time, this time against the College.

Plaintiffs claim without any explanation that “[r]esolution of the claims against the individuals may obviate the need for any appeal regarding dismissal of the College” (doc. 115 at 4), but it is just as likely that a resolution of the claims against the Individual Defendants would *not* “obviate the need for any appeal” of the dismissal order. For example, if Plaintiffs failed to prove their case against the Individual Defendants or were unable to execute on a potential judgment against any Individual Defendants who were found liable, Plaintiffs would likely seek recovery from the College, requiring an appeal of the dismissal order. If the Ninth Circuit were to reverse the dismissal at that time, the merits of the case would be before this Court a second time, needlessly duplicating the Court’s and parties’ efforts.

Certifying the dismissal of the College and staying the case against the Individual Defendants would allow the jurisdictional issues to be finally resolved

so that the correct parties could proceed to litigate the merits of the case, streamlining the litigation of this matter and advancing termination of this case.

**III. Certification would materially advance termination of this litigation.**

Plaintiffs claim that certification would not materially advance termination of this litigation because the appellate process can take several months. However, Plaintiffs ignore the fact that if they appeal the dismissal of the College *after* the merits of the case are litigated against the Individuals, the same schedule would come into play at that time. If the dismissal order were reversed, the merits of the case would have to be re-litigated, this time against the College, pushing the termination of this litigation back even further. Certifying the order as final is the step that would materially advance the termination of this litigation.

**IV. Certification is necessary to protect the rights of the College and the Tribes.**

Certification is also necessary to protect the rights of the College and the Tribes. The College has been dismissed from this matter because it shares in the sovereign status of the Tribes, and this Court lacks jurisdiction to adjudicate the claims against the College. Accordingly, if the case proceeds on the merits against the Individual Defendants before the dismissal order is considered by the Ninth Circuit, the College will not be a party to that litigation.

Instead, the Plaintiffs will litigate the claims solely against the College's current and former employees and board members, in their individual capacities. In

the event the Plaintiffs were successful against any Individual Defendant, the College would not have had the opportunity to defend its interests in the lawsuit. Accordingly, if Plaintiff were then to appeal the dismissal of the College, it would need to relitigate the exact issues that had already been decided among different parties, posing the risk that the second litigation would arrive at inconsistent results.

Certification of the dismissal of the College is appropriate to determine the appropriate defendants and avoid duplicative and protracted litigation.

DATED this 26th day of July 2018.

WORDEN THANE P.C.

/s/ Martin S. King  
Martin S. King

### **CERTIFICATE OF COMPLIANCE**

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, as counted by the undersigned's word processing software and excluding the caption and certificate of compliance, is 1,342.

WORDEN THANE P.C.

/s/ Martin S. King  
Martin S. King