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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

AQUATE II, LLC, *Plaintiff,* v. **JESSICA TEDRICK MYERS, ET. AL.,** *Defendants.*	Case No. 22-360-AKK Judge Abdul K. Kallon

DEFENDANTS' REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS

Defendants respectfully reply in support of their Renewed Motion to Dismiss and show as follows:

I. The doctrine of sovereign immunity requires dismissal.

AQuate is pursuing business tort claims against its former employee and her new employer. AQuate incorrectly asserts that its claims relate to Kituwah's SBA 8(a) certification. But the SBX-1 contract is not an SBA contract. The only role the SBA has is determining whether Kituwah is an eligible SBA 8(a) entity.

AQuate argues that AQuate's claims are among those "relating to" 8(a) program participation. (Doc. 27 at 3.) But AQuate's interpretation would stretch Kituwah's waiver well beyond its 8(a) qualification to reach ordinary business activities that merely relate to set-aside contracts. Here, just as in *Applied Sciences & Information Systems, Inc. v. DDC Construction Services, LLC*, the essence of AQuate's claims have nothing to do with the SBA program. *See* 2020 U.S. Dist.

LEXIS 94435, at *16 (E.D. Va. Mar. 30, 2020).[1] 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.

Next, although AQuate alludes to damages against Ms. Myers, there is no question that this case is about enjoining Kituwah's bid on the SBX-1 contract. A tribe is the real party in interest where, as here, an action brought against an employee in his or her individual capacity requires involvement "by the sovereign or disturb[s] the sovereign's property." *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017) (quotation omitted). In *Lewis*, the Court explicitly held that "the judgment [against the employee] will not operate against the Tribe" nor "'require action by the sovereign or disturb the sovereign's property." 137 S. Ct. at 1292.

Further, the *Ex Parte Young* doctrine applies only to prospective relief for ongoing violations of federal law by Ms. Myers. Thus, if the doctrine were to apply at all, it applies only to Count III and Ms. Myers. But the analysis does not stop there, as it is well established that *Ex Parte Young* cannot be used as a vehicle for obtaining relief that would "require affirmative actions by the sovereign or disposition of unquestionably sovereign property." *Dawavendewa v. Salt River*

[1] The cases Plaintiff cites actually support Kituwah's position. *See Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288 (D. Me. 2014); *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 U.S. Dist. LEXIS 148249 (D. Or. Apr. 26, 2018). These cases began with an allegation that the defendant discriminated against the plaintiff. The SBA program requires participating entities to have anti-discrimination policies. Those disputes are contemplated by the limited waiver because they involve program requirements.

Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1160 (9th Cir. 2002). If AQuate prevails, it would restrict Kituwah's economic activity and control of its business interest—this is squarely in the category of claims that must be dismissed for intruding on sovereign interests. *See, e.g.*, *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 281-82 (1997). It makes no difference that AQuate has named Ms. Myers because "many actions of a sovereign are performed by individuals," but that does not mean that a suit can proceed against an official when the "real claim" is against a sovereign Indian tribe. *Dawavendewa*, 276 F.3d at 1161.

For essentially these same reasons, even if Ms. Myers was amenable to suit, Kituwah is a necessary and indispensable party. Plaintiff's cited case law supports this: a "business entity is simply the tribe's alter ego; and thus, the real party in interest is the tribe because the vulnerability of the tribe's coffers is at issue when contracting in a commercial environment." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1135 (2020). Unlike in *Multimedia Games*, AQuate's claims directly impact Kituwah's business relationships and contracts; any judgment against Ms. Myers necessarily reaches Kituwah's coffers.

II. AQuate cannot pursue its claims against Ms. Myers in this forum.

Defendants' motion explained that any litigation between AQuate and Ms. Myers arising out of her employment must take place in the tribal court of the Alabama-Quassarte Tribal Town. (*See* Attachment A, filed under seal.) In

response, AQuate argues that no such court exists. (Doc. 27 at 11.) But it does, and it is the same one that enjoined Famous Marshall from acting on Plaintiff's behalf. (*See* Attachment B.)

AQuate argues that its claims are not within the scope of the clause and that convenience and other factors require the dispute to remain in this Court. But AQuate's claims are within the scope of the clause because AQuate alleges that Ms. Myers improperly retained documents when her employment ended. (Doc. 13, ¶¶ 11-16.) Moreover, the case AQuate cites in support of its argument about convenience actually supports Ms. Myers because it says "[a]n adequate forum need not be a perfect forum" and instead need only be neither "clearly unsatisfactory" or provide "no remedy at all." *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001). A forum remains adequate even where a party faces "some inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts." *Id.* Moreover, it is well settled that "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 64 (2013). The Court should hold AQuate to its bargained forum.

III. The statutes of limitations are fatal to AQuate's trade secrets claims based on 2017 documents.

AQuate's response misses Defendants' point entirely. Defendants asked the Court to dismiss any misappropriation claims based on the allegation that Ms. Myers took proprietary documents in 2017. (Doc. 18, p. 13.) AQuate admitted in open court that it knew the facts on which its allegation is based **in 2017**. Even if the statute of limitations did not begin to run until discovery (doc. 27, p. 13), discovery occurred 2017. AQuate's 2022 claims come well after limitations period for the Alabama and Defend Trade Secrets Acts. 18 U.S.C. § 1836(d); Ala. Code. § 8-27-5.

AQuate argues that the alleged misappropriation is "ongoing." (Doc. 27, p. 13.) That does not help its case. The Defend Trade Secrets Act says that "continuing misappropriation constitutes a single claim of misappropriation." 18 U.S.C. § 1836(d). Both acts say that the limitations period starts when the misappropriation could have reasonably been discovered. 18 U.S.C. § 1836(d); Ala. Code. § 8-27-5. If AQuate knew that Ms. Myers took trade secrets in 2017, then they were on notice of a potential problem five years ago. It is too late for those claims now.

IV. Conclusion

For the reasons set forth above, Defendants respectfully request that the Court grant their motion.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this the 31st day of May 2022, I served the foregoing upon all counsel of record via this Court's CM/ECF system:

/s/ W. Brad English
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