

1 David R. Jordan, Ariz. Bar No. 013891
2 *The Law Offices of David R. Jordan, P.C.*
3 1995 State Road 602
4 PO Box 840
5 Gallup, NM 87305-0840
6 (505) 863-2205
7 Fax: (866) 604-5709
8 Attorney for Plaintiff
9 djlaw919@gmail.com

6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA

8 **Velena Tsosie,**)
9 Plaintiff,) **No. 2:23-cv-0105-DGC**
10 vs.)
11 **N.T.U.A. Wireless, L.L.C., a Delaware**) **RESPONSE TO MOTION TO**
12 **Limited Liability Company; Walter**) **DISMISS**
13 **Haase and Jane Doe Haase, husband**)
14 **and wife,**)
15 Defendants.)

14 Plaintiff hereby responds to the motion to dismiss. For the reasons set forth herein,
15 the motion should be denied.

16 **A. Sovereign Immunity Is Waived.**

17 When NTUA Wireless was formed, the parties drafted the most comprehensive,
18 express waiver of sovereign immunity one could imagine. On May 20, 2016, the
19 Company and its members executed an “Amended and Restated Limited Liability
20 Company Agreement” (the “Agreement”). This document is attached hereto as Exhibit 1.

1 Paragraph 12.3 of the Agreement waived the sovereign immunity of the Navajo
2 Nation and selects this Court as the Court for resolution of disputes (paragraphs a-c are
3 bolded and all caps in the original):

4 **(a) EACH OF THE PARTIES HERETO HEREBY CONSENTS AND**
5 **SUBMITS TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF**
6 **THE STATE OF ARIZONA AND ANY UNITED STATES DISTRICT**
7 **COURT LOCATED IN THE STATE OF ARIZONA, AS WELL AS TO**
8 **THE JURISDICTION OF ALL COURTS TO WHICH AN APPEAL MAY**
9 **BE TAKEN FROM SUCH COURTS, FOR THE PURPOSE OF ANY SUIT,**
10 **ACTION OR OTHER PROCEEDING ARISING OUT OF, OR IN**
11 **CONNECTION WITH, THIS AGREEMENT OR ANY OF THE**
12 **TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY,**
13 **INCLUDING, WITHOUT LIMITATION, ANY PROCEEDING RELATING**
14 **TO ANCILLARY MEASURES IN AID OF ARBITRATION,**
15 **PROVISIONAL REMEDIES AND INTERIM RELIEF, OR ANY**
16 **PROCEEDING TO ENFORCE ANY ARBITRAL DECISION OR AWARD.**
17 **WITHOUT LIMITATION OF THE FOREGOING, NTUA HEREBY**
18 **EXPRESSLY WAIVES ANY SOVEREIGN IMMUNITY OR SIMILAR**
19 **PROTECTION THAT MAY APPLY TO NTUA OR OF WHICH NTUA**
20 **MAY AVAIL ITSELF, AND FURTHER EXPRESSLY WAIVES ANY AND**
21 **ALL RIGHTS TO LITIGATE ANY MATTER RELATED TO THIS**
22 **AGREEMENT IN THE COURTS OF THE NAVAJO NATION,**
INCLUDING ITS RIGHT (IF ANY) TO APPLY THE TRIBAL
EXHAUSTION DOCTRINE IN ANY PROCEEDING OR LITIGATION IN
ANY COURT REFERRED TO IN THE FIRST SENTENCE OF THIS
SECTION 12.3(A).

16 **(b) EACH PARTY HEREBY EXPRESSLY WAIVES ANY AND ALL RIGHTS**
17 **TO BRING ANY SUIT, ACTION OR OTHER PROCEEDING IN OR**
18 **BEFORE ANY COURT OR TRIBUNAL OTHER THAN THE COURTS**
19 **DESCRIBED IN SECTION 12.3(a) AND COVENANTS THAT SUCH**
20 **PARTY SHALL NOT SEEK IN ANY MANNER TO RESOLVE ANY**
21 **DISPUTE OTHER THAN AS SET FORTH HEREIN OR TO CHALLENGE**
22 **OR SET ASIDE ANY DECISION, AWARD OR JUDGMENT OBTAINED**
IN ACCORDANCE WITH THE PROVISIONS HEREOF.

20 **(c) EACH OF THE PARTIES HERETO HEREBY EXPRESSLY WAIVES**
21 **ANY AND ALL OBJECTIONS SUCH PARTY MAY HAVE TO VENUE,**

1 **INCLUDING, WITHOUT LIMITATION, THE INCONVENIENCE OF**
2 **SUCH FORUM, IN ANY OF SUCH COURTS. IN ADDITION, EACH OF**
3 **THE PARTIES CONSENTS TO THE SERVICE OF PROCESS BY**
4 **PERSONAL SERVICE OR ANY MANNER IN WHICH NOTICES MAY**
5 **BE DELIVERED HEREUNDER IN ACCORDANCE WITH SECTION 14.5.**

6 (d) Without limitation of the foregoing, NTUA acknowledges and agrees that this
7 Agreement is "a Limited Liability Company Agreement of NTUA Wireless, LLC"
8 within the meaning of and as referenced in clause (i) of the letter dated February
9 24, 2011 from Walter W. Haase, P.E., General Manager of the Navajo Tribal
10 Utility Authority, to the Honorable Johnny Naize, Speaker of the Navajo Nation
11 Council, announcing the grant of a waiver of the NTUA's sovereign immunity for
12 the enforcement of this Agreement.

13 By its own terms, the waiver covers "any suit, action or other proceeding arising
14 out of, or in connection with, this agreement or any of the transactions contemplated
15 hereby or thereby, including, without limitation, any proceeding relating to ancillary
16 measures in aid of arbitration, provisional remedies and interim relief, or any proceeding
17 to enforce any arbitral decision or award."

18 The Agreement goes further to state that it is "**BINDING UPON THE PARTIES**
19 **HERETO IN THE UNITED STATES, THE NAVAJO NATION AND**
20 **WORLDWIDE.**" § 12.1 (bold and all caps in original). As for enforcement, the
21 Agreement states, "**NONE OF THE PARTIES HERETO HAS AGREED WITH OR**
22 **REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS**
SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES." Thus, the
parties agreed that the scope of the sovereign immunity waiver would be "worldwide"
and "fully enforced in all instances."

1 The agreement notes that the Speaker of the Navajo Nation Council was notified
2 of the sovereign immunity waiver. §12.3(d).

3 The Agreement applies Delaware law. Exhibit A, p. 31, § 12.1. Under Delaware
4 law, the term “arising out of” is broadly construed to require some meaningful linkage
5 between the two conditions imposed in the contract. *Pac. Ins. Co. v. Liberty Mut. Ins.*
6 *Co.*, 956 A.2d 1246, 1257 (Del. 2008).

7 In this case, however, the language goes far beyond circumstances that “arise out
8 of” the contract. The parties agreed that no sovereign immunity would apply to bar “any
9 suit, action or other proceeding arising out of, or in connection with, this agreement or
10 any of the transactions contemplated hereby”. This is a broad discussion of possible
11 claims that fall within the scope of the waiver. It includes:

- 12 • Any proceeding that “arises out of” the Agreement; and
- 13 • Any proceeding that is connected with the Agreement; and
- 14 • Any proceeding that is connected with any of the transactions that are
15 “contemplated hereby”.

16 This last provision is probably the broadest, and it asks the Court to inquire as to
17 what transactions were contemplated by the Agreement. If a proceeding is connected
18 with a transaction that it is contemplated by the agreement, the waiver applies.

19 Plaintiff is the general manager of NTUA Wireless – its chief executive officer. In
20 the Agreement, numerous responsibilities are given to NTUA Wireless, and to Plaintiff in
21 her capacity as chief executive officer, which require her to report to the Board of
22

1 Directors. That is important to this case because, as is explained in the complaint, she was
2 directed as CEO to attend a meeting with the chairman of the board of directors
3 (Defendant Walter Haase) and representatives of Commnet Newco, LLC. Under the
4 Agreement, Commnet Newco, LLC is the “Managing Member”. Agreement, page 6,
5 Section 1.1.

6 The directors are given the full power to manage the Company, § 6.1(a), and
7 Defendant Haase is specifically named as one of the Company’s directors. §6.1(a).

8 Plaintiff’s direct position was created by the power given to the Company in
9 Section 6.4 of the Agreement. She receives delegations of authorities and duties from the
10 Board. As an officer, the Agreement required Petitioner as Company CEO to:

- 11 1. Deliver to each Member¹ audited consolidated and consolidating balance sheets
12 and statements of income and retained earnings and of cash flows. §9.1(a).
- 13 2. Submit to the Board an annual plan. §9.1(c).
- 14 3. Modify the annual plan in such detail as the board requests. §9.1(c).
- 15 4. Provide the Members tax information. §9.1(d).
- 16 5. Provide other information as reasonably requested. §9.1(d).

17 The dinner was a routine meal that preceded the monthly Business Development
18 meeting the following morning. Haase served in the dual capacity as Chairman of NTUA
19 Wireless’s Board of Directors and the general manager of NTUA. NTUA is one of the

20 ¹ Members are defined in Section 1.1 and Schedule A as Navajo Tribal Utility Authority and Commnet
21 Newco, LLC. Defendant Walter Haase is the Executive Director of NTUA and he was at the time the
22 Chairman of the Board of Directors of NTUA Wireless, the “Company”.

1 two Members of NTUA Wireless. Also in attendance was another NTUA Wireless Board
2 Member, John Champagne. The other Member of NTUA Wireless, Commnet Newco,
3 LLC, was represented by its CEO, Tom Guthrie, its CFO, Kim Rivera, and its Director of
4 Fiber Development, Rene Rogue.

5 Plaintiff has provided her declaration in connection with this response. *See* Exhibit

6 3. In her Declaration, she states:

7 4. On March 8, 2022, I was contacted at the last minute and directed by Walter
8 Haase to meet with board members and directors at a dinner in Phoenix, Arizona.
The following morning would be the monthly business development meeting.

9 5. At business development meetings, we discuss various matters that affect the
10 business of NTUA Wireless. This includes retail and enterprise sales overview,
11 fixed wireless projects, mobile networks, grant funding work sessions, business
development planning session, enterprise pricing, possible amendments to the
annual plan, Navajo Nation Telecom Regulations, etc.

12 6. Haase did not tell me why I was being asked to come to this dinner. I am aware
13 that dinners before the business development meeting are routine. Sometimes,
14 matters are addressed regarding to the business. Usually these are private
conversations that are done as asides from the dinner.

15 7. I went because there was an implication that it was mandatory as a part of my
16 responsibilities. I certainly felt obligated to be at the meeting because I saw it as a
business meeting. I understand that necessary business for the betterment of
NTUA Wireless has been discussed at prior meetings.

17 Plaintiff attended the meeting because she was the general manager of the
18 Company, and because she has responsibilities given to her under the Agreement to run
19 the Company and to report to its directors and members. This meeting is certainly
20 “contemplated” by the Agreement, and indeed is a necessary meeting for the operation of
21 the business as is required by the Agreement.
22

1 Defendants argue that the waiver is “for the enforcement of the operating
2 agreement.” Motion at p. 10. This is a very small part of a very large waiver. The parties
3 clearly intended a broad waiver covering a wide variety of claims. This is an express
4 waiver, and it covers this claim which arises out of conduct “contemplated” by the
5 Agreement.

6 **B. No Sovereign Immunity Exists For Defendants.**

7 Defendants make broad statements about what is or is not the “Navajo Nation” for
8 the purpose of Sovereign Immunity. Ultimately, the Navajo Nation vests the decision of
9 what falls within the scope of its sovereign immunity to the Council. The Council decides
10 what is or is not the “Navajo Nation”.

11 In the Navajo Nation Code, the Council listed what makes up the “Navajo
12 Nation”.

13 1 Navajo Nation Code § 552. Definitions.

14 For the purposes of this subchapter, “Navajo Nation” means:

- 15 A. The Navajo Nation Council;
16 B. The President, Navajo Nation;
17 C. The Vice–President, Navajo Nation;
18 D. The Delegates to the Navajo Nation Council;
19 E. The Certified Chapters of the Navajo Nation;
20 F. The Grazing Committees of the Navajo Nation;
21 G. The Land Boards of the Navajo Nation;
22 H. The Executive Branch of the Navajo Nation government;
I. The Judicial Branch of the Navajo Nation government;
J. The Commissions of the Navajo Nation government;
K. The Committees of the Navajo Nation Council;
L. The Legislative Secretary of the Navajo Nation Council;
M. The Enterprises of the Navajo Nation;

- 1 N. Navajo Community College;
- 2 O. The Kayenta Township and the Kayenta Township Commission.
- 3 P. Navajo Housing Authority
- 4 Q. Navajo Nation Gaming Enterprise
- 5 R. Tribal Gaming Enterprises

6 NTUA Wireless, LLC is not on the list.

7 Obviously, not everything touched by the Navajo Nation enjoys its sovereign
8 immunity. The Navajo Supreme Court has explained that in Navajo law, there is a
9 difference between “enterprises” and “entities”. The former group enjoys sovereign
10 immunity, the latter group does not.

11 In *Blaze Const., Inc. v. Crownpoint Inst. of Tech.*, No. SC-CV-35-96, 1997 WL
12 34676522 (Navajo Oct. 29, 1997), the Navajo Supreme Court found that the Crownpoint
13 Institute of Technology did not have sovereign immunity because it was not included in
14 the definition of “Navajo Nation” in 1 N.N.C. § 554 for immunity from suit purposes
15 during the relevant time period. Moreover, the Court held:

16 CIT reiterates that the Advisory Committee and the Navajo Nation Code
17 defined its predecessor, the Navajo Skill Center, as “an entity of the Navajo
18 Nation.” 15 N.N.C. § 1201 (1984–85 Supp.). See also, *Navajo Skill Center*
19 *v. Benally*, 5 Nav. R. 93 (1986) (finding Navajo Skill Center as an entity of
20 the Navajo Nation). This raises the question of whether under section 552
21 of the Sovereign Immunity Act, the terms “enterprise” and “entity” are
22 interchangeable. We conclude they are not.

23 The Navajo Nation Code differentiates between the terms enterprise and
24 entity. For example, this distinction is made at 1 N.N.C. § 501, where
25 Navajo Nation officials are required to use the term “Navajo Nation”: “The
26 President of the Navajo Nation and all departments, divisions,
27 agencies, *enterprises*, and *entities* of the Navajo Nation shall use the phrase
28 Navajo Nation in describing the lands and people of the Navajo Nation”
29 (emphasis added). Furthermore, the Navajo Nation Code specifically

1 establishes the “enterprises” of the Navajo Nation such as the Navajo Arts
2 and Crafts Enterprise, the Navajo Forest Products Industries, the Navajo
3 Agricultural Products Industry, the Navajo Nation Hospitality Enterprise,
4 the Navajo Engineering and Construction Authority, and DINETECHS
5 Enterprise. 5 N.N.C. §§ 1501–1991 (1995). CIT is not identified anywhere
6 in the Code as an enterprise of the Navajo Nation.

7 A prominent law dictionary also distinguishes between the two
8 terms. *Entity* is broadly defined as “[a] real being; existence.” *Black’s Law*
9 *Dictionary* 477 (5th ed. 1979). *Enterprise*, on the other hand, has a
10 narrower definition: “A venture or undertaking, especially one involving
11 financial commitment.” *Id.* at 476. For the reasons stated, CIT was not
12 covered by the Sovereign Immunity Act’s umbrella of “enterprises of the
13 Navajo Nation” in April 1995. 1 N.N.C. § 552(M)(1995).

14 *Blaze Const., Inc. v. Crownpoint Inst. of Tech.*, No. SC-CV-35-96, 1997 WL 34676522
15 (Navajo Oct. 29, 1997).

16 Like CIT, the NTUA Wireless has never been identified as an Enterprise of the
17 Navajo Nation. The Council did not adopt a plan of operation. By contrast, the Court will
18 note that Navajo Tribal Utility Authority did have a plan of operation approved by the
19 Council, and that plan was supplied by the Defendants as their Exhibit B. There is no
20 comparable plan adopted by NTUA Wireless, LLC.²

21 ² The Navajo Nation Council always adopts a plan of operation for its enterprises. *See*,
22 *i.e.*, 21 N.N.C. § 1, et seq. (plan of operation adopted for NTUA); 6 N.N.C. § 601, et seq.
(plan of operation adopted for Navajo Housing Authority); 5 N.N.C. § 1501, et seq. (plan
of operation adopted for Navajo Arts and Crafts Enterprise); 5 N.N.C. § 1601, et seq.
(plan of operation adopted for Navajo Agricultural Products Industry); 5 N.N.C. § 1651,
et seq. (plan of operation adopted for Native Broadcast Enterprise); 5 N.N.C. § 1701, et
seq. (plan of operation adopted for Navajo Nation Gaming Enterprise). The Council
usually, but not always, adopts a statute that says something similar to 5 N.N.C. § 1701
 (“The Navajo Nation, a federally-recognized Indian tribe, hereby establishes a Navajo
 Nation Gaming Enterprise as a tribal gaming enterprise of the Navajo Nation
 (Enterprise).”) Nothing similar exists for NTUA Wireless, LLC.

1 The parties agree that NTUA Wireless, LLC is a Delaware Limited Liability
2 Company. It was formed as a joint venture by NTUA Wireless and Commnet Newco,
3 LLC. The Navajo Council was advised of its formation, but the Council never took any
4 step to add NTUA Wireless to 1 Navajo Nation Code § 552, to adopt a plan of operation,
5 to adopt a statute establishing NTUA Wireless as an enterprise or to advise the world *in*
6 *any way* that NTUA Wireless is an enterprise. It also never opposed the sovereign
7 immunity waiver, even though it was plainly advised of the existence of the waiver.

8 This is important because Defendants do not analyze whether the Navajo Nation
9 itself considers NTUA Wireless to be an enterprise. As noted above, the Navajo Supreme
10 Court distinguishes “entities” from “enterprises” and focuses on whether the enterprise
11 was ever added to 1 N.N.C. § 552.

12 Defendants rely on non-Navajo law to examine five factors as to whether NTUA
13 Wireless is an “arm” of the Navajo Nation. Of course, absent from this analysis is
14 whether the Navajo Nation itself asserts sovereign immunity for NTUA Wireless. Putting
15 this aside, even Defendants’ five-part analysis fails.

16 The first question is the “method of creation” of NTUA Wireless. As agreed by
17 the parties, NTUA and Commnet jointly formed a Delaware Limited Liability Company
18 with an expansive waiver of sovereign immunity set in all bold in its creation documents.
19 This certainly reveals that the parties themselves did not see this entity as an “arm” of the
20 Navajo Nation.

1 The Court may want to distinguish the creation of NTUA Wireless from the
2 manner in which the Council created NTUA. NTUA is required to identify itself as an
3 “Enterprise of the Navajo Nation” in its corporate seal. 21 N.N.C. § 3. Thus, NTUA must
4 identify itself as an Enterprise in all formal matters requiring its seal. NTUA Wireless has
5 no such restriction.

6 The second question is “purpose”. In analyzing this question, Defendants focus on
7 the purpose of Navajo Tribal Utility Authority, not NTUA Wireless. The purpose of
8 NTUA Wireless is set forth in the Agreement at Section 3.1:

9 The Company is formed for the purpose of engaging (directly or indirectly)
10 in providing data, internet and voice telephone services in and near the
11 Navajo Nation, and pursuing the same for its income and profit, and the
12 Company may engage in any other business activity permitted under the
Act as the Board may determine from time to time. The Company has been
designated by the Federal Communications Commission as an ETC for the
Territory.

13 *See Exhibit 1.*

14 Two points can be made about the company’s own statement of its purpose. One is
15 that it is to provide services “in and near” the Navajo Nation. This means that its business
16 is by no means limited to the Navajo Nation. NTUA, by contrast, is limited by the Navajo
17 Nation Council to operate utilities “for the benefit of residents of the Navajo Nation.” 21
18 N.N.C. § 5(A)(1).

19 Second, the Board can alter the business of the company at any time. This power
20 is fully vested in the Board and is not given to the Council in any way. The court may be
21 interested to contrast this power to the power given to NTUA. NTUA does *not* have the
22

1 power to change its business plan at the discretion of the board. The Council set forth the
2 purposes of NTUA at 21 N.N.C. § 5. Changing its purposes requires an act of the Navajo
3 Nation Council.

4 The third question is “structure, ownership and management”. NTUA Wireless is
5 run by its board, in connection with the governing power of the Managing Member,
6 Commnet. NTUA Wireless adopted a management agreement which gives management
7 power to Commnet Newco, LLC, a Delaware limited liability company based in Atlanta.
8 Attached hereto as Exhibit 2 is the management agreement adopted by NTUA and
9 Commnet in 2016. In that agreement,

10 The Manager [Commnet Newco, LLC] will use commercially reasonable
11 efforts to operate and manage the Company in a manner consistent with the
12 annual Capital Budget and Operating Budget approved by the Company’s
13 Board of Directors.

14 [Commnet Newco, LLC] is responsible for supervising the day-to-day
15 operations of the Company consistent with this Agreement and each annual
16 Capital Budget and Operating Budget approved by the Board of Directors,
17 including without limitation managing the process of acquiring goods and
18 services from third-party vendors. Manager shall be responsible for training
19 Company staff in the provision of management support services.”

20 Thus, the company is being ultimately managed by an Atlanta based company
21 incorporated in Delaware. It is not controlled by NTUA, by the Navajo Council or by any
22 Navajo entity in any way. It is half owned by NTUA and half owned by Commnet
Newco, LLC. *See* Exhibit A, Schedule A.

The fourth question is the Navajo Nation’s intent. As noted above, this strongly
favors Plaintiff. The Council never adopted an enabling statute, never approved a plan of

1 operation and never added NTUA Wireless to 1 N.N.C. § 552. NTUA is co-owner of
2 NTUA Wireless, but it signed a comprehensive waiver of sovereign immunity. The only
3 connection between NTUA Wireless and the Navajo Nation Council is that the Council
4 was advised about the sovereign immunity waiver, and it took no steps to stop that
5 adoption. *See* Exhibit 1, §12.3(d).

6 The final question is the financial relationship between the Navajo Nation and
7 NTUA Wireless. The Council has taken no steps to assert its ownership of NTUA
8 Wireless. The only connection between NTUA Wireless and the Navajo government is
9 that NTUA itself is an owner of one-half of the enterprise. It should be noted that in
10 asserting that one-half ownership interest, NTUA signed off on a comprehensive
11 sovereign immunity waiver in the formation documents.

12 As the Court can see, the Council never adopted NTUA Wireless as a part of its
13 sovereignty, and it allowed NTUA to sign a comprehensive sovereign immunity waiver
14 in its formative documents. This action is not barred by sovereign immunity.

15 *The Law Offices of David R. Jordan, P.C.*

16 /s/ David R. Jordan

17

18

19

20

21

22