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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 Velená Tsosie,
14 Plaintiff,

15 V.

16 NTUA Wireless, LLC, a Delaware Limited
17 Liability Company; Walter Haase and Jane
18 Doe Haase, husband and wife,
19 Defendants.

2:23-cv-0105-DGC

**MOTION TO DISMISS FOR LACK
OF JURISDICTION**

20 Defendants, pursuant to Fed. R. Civ. P. 12(b)(1), hereby move for dismissal of
21 Plaintiff's Complaint. This motion is supported by the accompanying Memorandum of
22 Points and Authorities and all matters of record.

MEMORANDUM OF POINTS AND AUTHORITIES

23 Plaintiff's Complaint makes it clear that NTUA Wireless is a tribal entity that
24 functions as an arm of the Navajo Nation. NTUA Wireless therefore shares in the Navajo
25 Nation's sovereign status and is not an employer subject to suit under Title VII. Plaintiff
26 brings this action against Defendants based on a purported waiver of the sovereign
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1 immunity of the Navajo Nation in an operating agreement between NTUA and Commnet
2 Newco, LLC. However, the waiver of sovereign immunity in that agreement could not
3 conceivably apply to any of Plaintiff's claims. Thus, the Navajo Nation's sovereign immunity
4 has not been waived and Plaintiff's case must be dismissed for lack of jurisdiction.
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6 **I. Standard for Dismissal under Rule 12(b)(1)**

7 The Federal Rules of Civil Procedure provide for dismissal of an action for lack of
8 subject matter jurisdiction. *See* Fed.R.Civ.P. 12(b)(1). As a court of limited jurisdiction, the
9 federal court is presumed to lack subject matter jurisdiction unless the party asserting
10 jurisdiction establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
11 (1994); *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003). Thus, on a Rule 12(b)(1)
12 motion to dismiss, Plaintiff has the burden of proving the existence of the court's subject
13 matter jurisdiction. *Kokkonen*, 511 U.S. at 377. A lack of jurisdiction may be shown by either
14 attacking a complaint's allegations as facially insufficient or disputing the allegations that
15 would otherwise support it. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).
16 In the former case, all allegations of material fact are taken as true. *Ojo v. Farmers Grp., Inc.*,
17 565 F.3d 1175, 1183 (9th Cir. 2009).
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21 A sovereign immunity challenge is a defense properly raised under Fed.R.Civ.P.
22 12(b)(1). *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011). Where principles of
23 sovereign immunity are at play, the plaintiff "bears the burden of pointing to such an
24 unequivocal waiver of immunity." *Levin v. United States*, 663 F.3d 1059, 1063 (9th Cir. 2011)
25 (*quoting Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983)). It is well settled that Indian
26 tribes as sovereign entities are generally immune from suit. *Santa Clara Pueblo v. Martinez*, 436
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1 U.S. 165, 173 (1977). “Indian tribes enjoy immunity because they are sovereigns pre-dating
2 the constitution, and immunity is thought necessary to preserve autonomous tribal
3 existence.” *U.S. v. State of Or.*, 657 F.2d 1009, 1013 (9th Cir. 1981) (*citing U.S. v. U.S. Fidelity*
4 *& Guaranty Co.*, 309 U.S. 506, 512-13 (1940)).

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6 A tribe’s waiver of immunity must be clear. *C & L Enter., Inc. v. Citizen Band*
7 *Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (*quoting Oklahoma Tax Comm’n v. Citizen*
8 *Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). A waiver of tribal sovereign
9 immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo*, 436
10 U.S. at 58-59; *see also, Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006)
11 (suggesting that a tribe’s implied willingness to submit to federal lawsuits does not waive
12 tribal sovereign immunity).
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15 This motion will demonstrate the Plaintiff’s allegations of jurisdiction are facially
16 insufficient to overcome Plaintiff’s burden to establish jurisdiction.

17 **II. Analysis**

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19 The Court lacks subject matter jurisdiction here because NTUA Wireless is a tribal
20 entity that functions as an arm of the Navajo Nation. NTUA Wireless shares in the Navajo
21 Nation’s sovereign status and is not an “employer” that is subject to suit under Title VII.
22 Plaintiff bears the burden of demonstrating some unequivocal waiver of the Navajo Nation’s
23 sovereign immunity. Plaintiff attempts to do this in her Complaint, but fails.
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25 **A. NTUA Wireless is an arm of the Navajo Nation.**

26 Title VII prohibits employers from engaging in discriminatory practices. However,
27 Indian tribes are not “employers” who may be sued under Title VII because they are
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1 excluded from the statutory definition of “employer.” 42 U.S.C. § 2000e(b) (“The term
2 ‘employer’ ... does not include (1) ... an Indian tribe...”). An entity that functions as an arm
3 of a tribe “falls within the scope of the Indian Tribe exemption of Title VII.” *Pink v. Modoc*
4 *Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998). In *Pink*, the Ninth Circuit held
5 the plaintiff could not bring suit under Title VII against her former employer, a nonprofit
6 corporation organized by two tribes to provide health services to tribal members. *Id.* The
7 corporation was excluded from the reach of Title VII because it “served as an arm of the
8 sovereign tribes, acting as more than a mere business.” *Id.*

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11 Whether an entity is an arm of a tribe “turns on several factors” adopted by the
12 Ninth Circuit in *White v. University of California*. 765 F.3d 1010, 1025 (9th Cir. 2014). *See also*
13 *United States ex rel. Cain v. Salish Kootenai College*, 862 F.3d 939, 944 (9th Cir. 2017). The *White*
14 factors “includ[e]: “(1) the method of creation of the [entity]; (2) [its] purpose; (3) [its]
15 structure, ownership, and management, including the amount of control the tribe has over
16 the entit[y]; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and
17 (5) the financial relationship between the tribe and the entit[y].” *Id.* (quoting *White*, 765 F.3d
18 at 1025).

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21 Also relevant are “[t]he policies underlying tribal sovereign immunity and its
22 connection to tribal economic development, and whether those policies are served by
23 granting immunity to the economic entities.” *Breakthrough Mgt. Grp., Inc. v. Chukchansi Gold*
24 *Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). These policies “include protection of
25 the tribe’s monies, as well as preservation of tribal cultural autonomy, preservation of tribal
26 self-determination, and promotion of commercial dealings between Indians and non-
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1 Indians.” *Id.* (internal quotation marks and citations omitted); *White*, 765 F.3d at 1025
2 (“Indeed, ‘preservation of tribal cultural autonomy [and] preservation of tribal self-
3 determination,’ are some of the central policies underlying the doctrine of tribal sovereign
4 immunity.”) (quoting *Breakthrough*, 629 F.3d at 1187).

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6 As discussed below, a proper weighing of the factors demonstrates NTUA Wireless is
7 an arm of the Navajo Nation and therefore not an “employer” under Title VII.

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9 1. Method of Creation of NTUA Wireless

10 Perhaps ironically, the first factor is the only factor that could weigh against a finding
11 that NTUA Wireless is an arm of the Navajo Nation. As Plaintiff alleges, it is a Delaware
12 Limited Liability Company. Doc. 1 ¶ 4. However, the Court must consider all five factors;
13 no single factor is conclusive of whether an entity is an arm of a tribe. *See, e.g., McCoy v. Salish*
14 *Kootenai Coll., Inc.*, No. 9-17-cv-00088-DLC, 2019 WL 6185959 (Mem.) (9th Cir. Nov. 20,
15 2019) (unpublished decision) (affirming the District of Montana’s dismissal even though the
16 first factor weighed against finding that Kootenai College was an arm of the Indian Tribe).

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18 That said, this factor should not be construed as entirely negative with regard to
19 NTUA Wireless being an arm of the Navajo Nation. Plaintiff specifically alleges that
20 Defendant Walter Haase, NTUA General Manager and CEO, wrote to “the Honorable
21 Johnny Naize, Speaker of the Navajo Nation Council, announcing the grant of a waiver of
22 the NTUA’s sovereign immunity for the enforcement of this [operating] agreement.” Doc. 1
23 ¶ 11, subpara. (d). This shows that the Navajo Nation Council was directly involved in the
24 creation of NTUA Wireless and specifically authorized a waiver of NTUA’s sovereign
25 immunity for the enforcement of NTUA Wireless LLC’s operating agreement. It also shows
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1 that NTUA was directly and necessarily involved in the formation of NTUA Wireless, and
2 NTUA is particularly alleged by Plaintiff to be a “tribal enterprise organized under the laws
3 of the Navajo Nation.” Doc. 1 ¶ 6. As a matter of law, the “enterprises of the Navajo
4 Nation” are specifically within the definition of “Navajo Nation” for the purposes of the
5 Navajo Nation Sovereign Immunity Act, 1 N.N.C. § 552(M) (attached as Exhibit A for
6 convenience), and NTUA is an “enterprise” of the Navajo Nation. *See* 21 N.N.C. § 2
7 (attached as Exhibit B). NTUA Wireless is simply a specialized extension of NTUA.
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10 2. Purpose of NTUA Wireless

11 The second *White* factor weighs in favor of finding that NTUA Wireless is an arm of
12 the Navajo Nation because NTUA Wireless’s purpose and activities, as alleged by Plaintiff,
13 are among NTUA’s statutory purposes.
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15 Plaintiff’s Complaint grants that NTUA Wireless was formed “to engage in various
16 wireless communications business on the Navajo Nation.” Doc. 1 ¶ 7. This is entirely
17 consistent with NTUA’s stated purpose as expressed in its enabling legislation contained in
18 the Navajo Nation Code. “The Navajo Tribal Utility Authority was created by the Navajo
19 Tribal Council on January 22, 1959, in order to bring electric power to Shiprock, Navajo
20 Nation, (New Mexico). The Authority has expanded into natural gas, water, sewer utility
21 operations, and telecommunications and information services as well as increasing its electric
22 services.” 21 N.N.C. § 1(A) (2010) (Ex. B). Engaging in telecommunications business on the
23 Navajo Nation is among the enumerated purposes of NTUA. *See* 21 N.N.C. § 5(A) (Ex. B).
24 Specifically, NTUA is tasked to “operate, maintain, and promote existing utility systems
25 furnishing electric, gas, water, sewer utility services, generation, and telecommunications and
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1 information services ... for the benefit of residents of the Navajo Nation, including the
2 establishment, ownership, operation and maintenance of electric generating,
3 telecommunications and information services on or off the Navajo Reservation,” 21 N.N.C.
4 § 5(A)(1) (Ex. B), and to “provide utility generation, telecommunications and information
5 services on a non-profit basis and at reasonable cost to residents of the Navajo Nation
6 consistent with the economical operation of the Enterprise.” 21 N.N.C. § 5(A)(6) (Ex. B).

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8 Thus, Plaintiff’s Complaint alleges the key facts necessary to weigh this factor in
9 favor of NTUA Wireless being an arm of the Navajo Nation. The purpose of NTUA
10 Wireless, as alleged by Plaintiff, is to provide telecommunications services on the Navajo
11 Nation. This purpose is not merely consistent with NTUA’s statutory purpose, it embodies
12 it. NTUA Wireless is not merely some money-making or experimental commercial venture
13 for the Navajo Nation or NTUA. It is an arm of the Navajo Nation conducting business for
14 the welfare of the Navajo people pursuant to a statutory mandate of the Navajo Nation
15 Council. The second *White* factor is undoubtedly in favor of finding that NTUA Wireless is
16 an arm of the Navajo Nation.
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20 3. Structure, Ownership, and Management of NTUA Wireless

21 Plaintiff’s Complaint again alleges the facts that require weighing the third *White*
22 factor in favor of finding that NTUA Wireless as an arm of the Navajo Nation, as NTUA
23 Wireless and NTUA are deeply interconnected.
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25 With regard to ownership, the Complaint alleges that NTUA Wireless “is a limited
26 liability company that is owned and controlled by two members: Commnet Newco, LLC, a
27 Delaware limited liability (“Commnet”) and Navajo Tribal Utility Authority, a tribal
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1 enterprise organized under the laws of the Navajo Nation (“NTUA”).” Doc. 1 ¶ 6. In other
2 words, NTUA, a tribal entity, is an owner of NTUA Wireless. This weighs in favor of
3 finding that NTUA Wireless is an arm of the Navajo Nation.
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5 Concerning management, Plaintiff alleges that Defendant Walter Haase was, at the
6 time of the incident alleged in the Complaint, a member of the board of directors of NTUA
7 Wireless. Doc. 1 ¶ 8. He is also “the General Manager of NTUA, making him the Chief
8 Executive Officer of that entity.” Doc. 1 ¶ 8. Plaintiff also alleges that she, as manager and
9 CEO of NTUA Wireless, Doc. 1 ¶ 4, was under Mr. Haase’s “superior position in the
10 corporate structure.” Doc. 1 ¶ 18.
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12 Thus, Mr. Haase is in charge of NTUA, and participated in the management of
13 NTUA Wireless at the same time, and was “superior” to the Plaintiff by virtue of being on
14 the NTUA Wireless Board of Directors. This demonstrates a deep connection between
15 NTUA Wireless and NTUA weighing in favor of finding that NTUA Wireless is an arm of
16 the Navajo Nation.
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18 4. The Navajo Nation’s Intent Regarding Sharing Sovereign Immunity 19 with NTUA Wireless

20 Plaintiff’s Complaint, yet again, demonstrates and assumes the Navajo Nation’s intent
21 to share its sovereign immunity with NTUA Wireless. Plaintiff’s Complaint alleges that
22 “Paragraph 12.3 of the [NTUA Wireless Operating] Agreement waives the sovereign
23 immunity of the Navajo Nation and selects this Court as the Court for resolution of
24 disputes.” Doc. 1 ¶ 11. A review of the passages cited by Plaintiff show that, more
25 particularly, it is NTUA that is waiving its sovereign immunity: “NTUA HEREBY
26 EXPRESSLY WAIVES ANY SOVEREIGN IMMUNITY...” Doc. 1 at 3, lines 12-13.
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1 Plaintiff's Complaint assumes that sovereign immunity applies to NTUA Wireless and that a
2 waiver of said immunity is needed. But a waiver of tribal sovereign immunity "cannot be
3 implied but must be unequivocally expressed," *Santa Clara Pueblo*, 436 U.S. at 58-59, and the
4 language cited by Plaintiff provides for no waiver of immunity by NTUA Wireless itself.
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6 Furthermore, the intent to share sovereign immunity with NTUA can be seen in
7 other facts alleged in the Complaint. First, NTUA Wireless is alleged to engage in business
8 "on the Navajo Nation." Doc. 1 ¶ 7 (emphasis added). NTUA Wireless is not alleged to be
9 engaged in providing wireless communications services anywhere else. Second, as discussed
10 above, NTUA Wireless' alleged activities are totally consistent with NTUA's statutory
11 purposes. The facts that NTUA Wireless is providing services on the Navajo Nation and
12 doing so consistent with NTUA's statutory mandate to provide telecommunications services
13 indicates that NTUA intended to share its immunity with NTUA Wireless and that NTUA
14 Wireless is, with respect to the fourth *White* factor, an arm of the Navajo Nation.
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17 5. Financial Relationship Between the Navajo Nation and NTUA
18 Wireless

19 NTUA Wireless and NTUA are financially interconnected. As Plaintiff alleges,
20 NTUA is an owner of NTUA Wireless and NTUA is a tribal enterprise organized under the
21 laws of the Navajo Nation. Doc. 1 ¶ 6. NTUA is directed by statute to provide
22 "telecommunications and information services on a non-profit basis and at reasonable cost
23 to residents of the Navajo Nation consistent with the economical operation of the
24 Enterprise," 21 N.N.C. § 5(A)(6) (Ex. B), which is exactly what Plaintiff alleges NTUA
25 Wireless does. The "economical operation" of NTUA Wireless is financially coincident with
26 the economical operation of NTUA. While Plaintiff's Complaint does not allege any other
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1 financial details concerning NTUA Wireless, this factor weighs in favor of Defendants in the
2 absence of any contrary allegations.

3 Defendants have shown that a proper application of the *White* factors supports a
4 finding that NTUA Wireless qualifies as an arm of the Navajo Nation and therefore not an
5 “employer” under Title VII. Additionally, the above discussion shows that the “policies
6 underlying tribal sovereign immunity and its connection to tribal economic development”
7 are served by “granting immunity to the economic entit[y]” of NTUA Wireless. *Breakthrough*
8 *Mgt. Grp.*, 629 F.3d at 1187. As such, NTUA Wireless is immune from suit pursuant to
9 federal law and the Navajo Nation’s Sovereign Immunity Act.

12 **B. The waiver of sovereign immunity in NTUA Wireless’s Operating**
13 **Agreement has no connection with Plaintiff’s Claims.**

14 Plaintiff cites a substantial portion of NTUA Wireless’s operating agreement,
15 apparently in the hope of demonstrating that some waiver of immunity applies to her claims.
16 However, the waiver of immunity cited by Plaintiff has no connection with her claims
17 against NTUA Wireless. Recalling that a waiver of tribal sovereign immunity “cannot be
18 implied but must be unequivocally expressed.” *Santa Clara Pueblo*, 436 U.S. at 58-59, this
19 waiver of immunity has no connection to Plaintiff. Plaintiff is not alleged to be a member of
20 NTUA Wireless, LLC. The only members of NTUA Wireless LLC, as alleged by Plaintiff,
21 are NTUA and Commnet Newco, LLC.

24 As explained above, the waiver of the NTUA’s sovereign immunity was “for the
25 enforcement of this [operating] agreement.” Doc. 1 ¶ 11, subpara. (d). That is, NTUA as a
26 member of the NTUA Wireless, LLC waived its immunity from suit for the purpose of
27 Commnet Newco, LLC’s rights to enforce the operating agreement. Neither the Plaintiff
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1 specifically nor the office of General Manager of NTUA Wireless are mentioned in
2 connection with this waiver of immunity. The Navajo Nation's willingness to submit to a
3 federal lawsuit between the members of NTUA Wireless, LLC does not imply a waiver of
4 immunity for claims by employees of either NTUA Wireless, or NTUA, or the Navajo
5 Nation. *See Allen*, 464 F.3d at 1047. Even if some such implication could be found, any
6 waiver of tribal sovereign immunity must be unequivocally expressed. *Santa Clara Pueblo*, 436
7 U.S. at 58-59.
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10 Because NTUA Wireless is an arm of the Navajo Nation, and there is no waiver of
11 the Navajo Nation's sovereign immunity applicable to Plaintiff's claims, this Court lacks
12 jurisdiction over Plaintiff's claims.

13 **III. Conclusion**

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15 For the foregoing reasons, this Court lacks subject matter jurisdiction over Plaintiff's
16 claim against Defendants. Applying the *White* factors, there is no doubt that NTUA Wireless
17 is an arm of the Navajo Nation. Acting as a tribal sovereign entity, NTUA created NTUA
18 Wireless to further its statutory mandate to provide utility service, particularly wireless
19 telecommunication services on the Navajo Nation. NTUA owns and controls NTUA
20 Wireless. NTUA Wireless's management overlaps and involves the participation of NTUA's
21 management. And, Plaintiff alleges and assumes that a written waiver of sovereign immunity
22 by NTUA in NTUA Wireless, LLC's operating agreement allows her to file her suit in
23 federal court. However, Plaintiff is not a member of NTUA Wireless, LLC. No waiver of
24 immunity contained in the operating agreement has anything to do with her or her claims,
25 and there is no other applicable waiver of immunity that would sustain the jurisdiction of
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1 this Court. Accordingly, Defendants respectfully request that this Court dismiss Plaintiff's
2 Complaint pursuant to Fed. R. Civ. P. Rule 12(b)(1).

3 Respectfully submitted this 30th day of March, 2023.

4
5 By /s/ Joshua M. Montagnini
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9 **CERTIFICATE OF SERVICE**

10 I hereby certify that on the 30th day of March, 2023, I electronically filed the
11 foregoing document with the Clerk of the Court using the CM/ECF system which will send
12 notification of such filing to the following:

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