COA No. 84628-1-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

RICHARD HOWSON,

Appellant,

v.

SIMILK, INC., d/b/a SWINOMISH GOLF LINKS, a Washington Corporation,

Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This appeal concerns the limits to "arm of the tribe" immunity. Missing from Respondent Similk Inc.'s 72-page brief is a response to two flaws in its argument for dismissal. First, no court has extended "arm of the tribe" immunity to a Tribe's purchase of an existing corporation created under State law by non-tribal members. Second, Similk's *amended* Articles of Incorporation expressly confirmed "the corporation shall have the same powers as an individual to do all things necessary and convenient to carry out its business and affairs as granted to corporations under the laws of the State of Washington." (Articles of Amendment ¶ 1; CP 165).

A fundamental corporate power under the Washington Business Corporation Act is the ability to sue and be sued. RCW 23B.03.020(2)(a). Had the Swinomish Tribe intended Similk to be an arm of the tribe, it would have amended the Articles of Incorporation to grant

corporate powers under the Swinomish code, not Washington law.

Respondent argues in essence that it may sue – but not be sued – in Superior Court. Under Article 4 Section 6 of the Washington Constitution, Superior Courts have a constitutional mandate to exercise jurisdiction over all corporations doing business in Washington State. Const. art. 4 § 6. Appellant Richard Howson respectfully requests the Court to uphold this mandate, reverse the trial court's dismissal for lack of jurisdiction, and remand this case for trial.

I. THE WHITE FACTORS WEIGH STRONGLY AGAINST IMMUNITY.

The dispute in this case is not over the test for arm of the tribe immunity. Both parties agree that the Ninth Circuit's opinion in White v. Univ. of California, 765 F.3d 1010 (9th Cir. 2014) provides the five relevant factors:

- The method of creation of the economic entity;

- Its purpose;
- Its structure, ownership, and management by the Tribe;
- The Tribe's intent in sharing immunity; and
- The financial relationship between the Tribe and the entity.

White, 765 F.3d at 1025.

Instead, the parties dispute the weight the trial court gave to each of these factors. This Court on de novo review appropriately examines and weighs these factors independently.

Three facts should guide the Court's analysis. First, the Tribe purchased a 30-year old private corporation already subject to Washington law; it did not create an immune entity. Second, the Tribe intended Washington law to continue controlling the corporation's activities – as evidenced in the amended Articles of Incorporation.

And third, golf is not an essential governmental function. It is a sport and a leisure activity. It does not

share the same relevance and importance as governance, health care or housing. Equating a Golf Course with these core functions of tribal self-governance diminishes their significance and accomplishment.

Similk's commercial Golf Course does not share the Tribe's sovereign immunity. It is not an arm of the Tribe.

A. The Swinomish Tribe Purchased Similik; It Did Not Create It As An Immune Entity.

Every case that Similk cites in favor of corporate immunity involves an entity that a Tribe formed – either under Tribal or State law. See, e.g., Response Brief at 22-23). None addresses the Tribe's purchase of an existing corporation that non-tribal members created and operated without immunity under State law.

Courts ruling on this fact pattern reach the same conclusion: "An Indian tribe's purchase of a corporation's stock does not normally confer tribal immunity on the corporation." McNally CPA's & Consultants, S.C. v. DJ

Hosts, Inc., 277 Wis. 2d 801, 806, 692 N.W.2d 247, 250 (Wis. Ct. App. 2004); Uniband, Inc., v. C.I.R., 140 T.C. 230, 253 (2013) (stock purchase did not transform "Uniband from a mere business holding into a tribal agency"); Hunter v. Redhawk Network Sec., LLC, 6:17-CV-0962-JR, 2018 WL 4171612, at *3 (D.Or. Apr. 26, 2018), report and recommendation adopted, 6:17-CV-0962-JR, 2018 WL 4169019 (D.Or. Aug. 30, 2018) ("because Redhawk existed as a separate entity from the Tribe, it does not enjoy the same sovereign immunity").

To distinguish these rulings, Similk argues that the corporation's 30-year existence under Washington law became irrelevant once the Tribe purchased it.

> These facts alone – arising decades before Tribal ownership – do not bar Similk from presently sharing the Tribe's immunity because they must be analyzed in context. As soon as the Tribe became the sole owner, it shifted Similk's purpose to a distinctly tribal character and expanded the use of the Swinomish Golf Links beyond "purely business activities"....

(Response Brief at 45-46).

When did this transformation occur? The moment the Tribe purchased Similk's stock? When it amended the Articles of Incorporation? When the Tribe took over managing the Golf Course? Although it wants to avoid admitting this, the Tribe asserts that Similk was a Washington corporation subject to Superior Court jurisdiction one minute and an immune tribal entity the next. This is a critical – and untenable – abrogation of State sovereignty and jurisdiction.

When a Tribe creates a corporation under Tribal or State law, it arguably has the power to imbue the entity with sovereign immunity as an arm of the Tribe. The corporation begins its existence as an immune tribal entity. The Tribe then has the power to waive immunity if necessary to conduct business.

On the other hand, when a Tribe purchases an existing State-chartered corporation with non-tribal

owners, it acquires an entity that has no immunity or tribal status. Any assertion of "arm of the tribe" immunity must extinguish existing jurisdiction – depriving a State court of jurisdiction that once exercised. This occurs regardless of whether a legal claim exists against the corporation at the time.

Neither the Washington Legislature nor the Swinomish Tribe may take away jurisdiction once established.

> Among other things, jurisdiction is a fundamental building block of law. Our state constitution uses the term "jurisdiction" to describe the fundamental power of courts to act. Our constitution defines the irreducible jurisdiction of the supreme and superior courts. It also defines and confines the power of the legislature to either create or limit jurisdiction. *See* Wash. Const.. art. IV, § 4 (defining the power of the supreme court), § 6 (defining the power of the superior courts), § 30(2) (explicitly giving the legislature the power to provide for jurisdiction of the Court of Appeals). Our constitution recognizes and vests jurisdiction over many types of cases in the various courts of this State. Wash. Const. art. IV, §§ 1, 4, 6, 30. Superior courts have original jurisdiction in

> the categories of cases listed in the constitution, which the legislature cannot take away.

ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n, 173 Wn.2d 608, 616, 268 P.3d 929 (2012). The trial court erred by ceding its jurisdiction.

In response Similk raises technical objections. First, it argues that Mr. Howson "relies on a bright-line test advanced by the Tenth Circuit in Somerlott v. Cherokee Nation Distributors, 686 F.3d 1144 (10th Cir. 2012)." (Response Brief at 23). This is neither accurate nor persuasive. In his opening brief, Mr. Howson cited the concurring opinion in Somerlott to explain why the Swinomish Tribe cannot metamorphize an independent private Washington corporation into an immune arm of the tribe.

Both at trial and on appeal, Mr. Howson contends under White v. Univ. of California, 765 F.3d 1010 (9th Cir. 2014), that Similk's 30-year history as a non-tribal, private

corporation bears directly on its lack of immunity today. (9/30/22 Plaintiff's Response at 7; CP 224) ("Similk, Inc. was incorporated in 1983 under Washington law and Similk provides no evidence to suggest that at its formation in 1983 it was financially or otherwise connected to the Tribe").

Nor does Mr. Howson argue for a "bright-line" test. Instead, under the five factors in White, a Tribe's purchase of a pre-existing private corporation weighs heavily against immunity.

> Neither the Supreme Court nor the Ninth Circuit has decided whether an existing company acquired by a tribe enjoys tribal sovereign immunity. However, McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc., 277 Wis.2d 801, 806, 692 N.W.2d 247, 250 (Wis. Ct. App. 2004), provides a persuasive argument that such an organization does not. "When the sole facts are that an Indian tribe purchases all of the shares of an existing for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation." Id.

Hunter v. Redhawk Network Sec., LLC, 6:17-CV-0962-JR, 2018 WL 4171612, at *2 (D.Or. Apr. 26, 2018).

After weighing the White factors, the Magistrate Judge in Hunter concluded the purchased corporation was not immune.

> Weighing all the factors together, Redhawk is not an "arm of the tribe" for purposes of asserting sovereign immunity against plaintiff's suit. Redhawk existed before the PBDC acquired it, and is incorporated under state law. Although the purpose of Redhawk is to help diversify Tribal assets in order to gain more revenue for the Tribe, such is the case with any for-profit tribal corporation and that factor alone is not dispositive. In addition, a suit against Redhawk would not reach any other Tribal assets beyond the PBDC's investment in Redhawk itself.

Hunter, 2018 WL 4171612, at *5.

As the concurrence explained in Somerlott, once a State corporation acquires the power to sue and be sued, a subsequent purchase will not shield the corporation from the State laws that created it. Somerlott, 686 F.3d at 1156 (corporation is "an artificial being that may exercise only

those privileges the law confers upon it, either expressly, or as incidental to its very existence") (Gorsuch, J., concurring).

Second, Similk argues that the Restatement of Laws of American Indians supports immunity here. (Response Brief at 28-29). This is incorrect. The Restatement recognizes immunity only for "a corporation or other business formed *pursuant to state law by an Indian tribe or a tribe-created entity*..." Restatement § 54(a). Here, a Washington couple, non-tribal members, created Similk with full powers to sue and be sued under Washington law. RCW 23B.03.020(2)(a). It began existence fully subject to Washington law.

Furthermore, the case Similk cites in support – Ransom v. St. Regis Mohawk Education & Community Fund Inc., 658 N.E.2d 989 (1995) – involved a non-profit created by the St. Regis Mohawk Tribe. "Tribal subagencies and corporate entities *created by the Indian*

Nation to further governmental objectives, such as providing housing, health and welfare services, may also possess attributes of tribal sovereignty, and cannot be sued absent a waiver of immunity." Ransom, 658 N.E.2d at 992 (emphasis added).

The Swinomish Tribe did not create Similk to further governmental objectives. Instead, it purchased the Golf Course as a commercial venture.

B. The Tribe Intentionally Retained Similk's Corporate Powers Under Washington Law.

The second flaw in Similk's argument is that amending the Articles of Incorporation somehow transformed it into an immune arm of the Tribe. For example, Similk asserts:

> [T]he Tribe as sole shareholder of Similk demonstrated its intent to extend the Tribe's sovereignty to Similk by amending the Articles of Incorporation to require that the enterprise "at all times" be operated "for the benefit of, and to carry out the purposes of [the Swinomish Tribe]." CP 139, 165.

(Response Brief at 60).

Yet the next sentence in the amended Articles reads: "The corporation shall have the same powers as an individual to do all things necessary and convenient to carry out its business and affairs as granted to corporations *under the laws of the State of Washington.*" (Amended Articles of Incorporation; CP 165) (emphasis added). This sentence did not appear in the original Articles. The Tribe added it to confirm and retain the corporation's powers under State law.

Does any other Tribal entity rely on the laws of the State of Washington to carry out its governmental functions? If amending the Articles could confer immunity -- and it does not, then adopting Washington law in the amended Articles undermines immunity to Washington law. The Articles reconfirm Similk's power to sue and be sued in Washington courts. And the Corporation's activities remain subject to Washington law. People v.

Miami Nation Enterprises, 2 Cal. 5th 222, 250, 386 P.3d 357, 375, 211 Cal. Rptr. 3d 837, 858 (2016) ("immunity must not become a doctrine of form over substance").

C. Golf Is Not An Essential Governmental Function.

Third, a Golf Course does not have the same governmental significance as a housing agency, a college or a repatriation committee. As the Ninth Circuit found in White,

> The whole purpose of the Repatriation Committee, to recover remains and educate the public, is core to the notion of sovereignty. Indeed, preservation of tribal cultural autonomy [and] preservation of tribal self-determination, are some of the central policies underlying the doctrine of tribal sovereign immunity.

White v. Univ. of California, 765 F.3d 1010, 1025 (9th Cir. 2014). Golf is not at the core of the notion of sovereignty.

In its Response Brief, Similk labors to portray the Golf Course as something more.

> Unlike a generic, non-tribal commercial venture with solely a financial objective, Swinomish

> Golf Links provides myriad benefits to the Tribe and its members in a coordinated and holistic way: it facilitates the physical and mental well-being of Swinomish members in a culturally important place for the Tribe and provides a setting for Tribal leaders to advance the Tribe's governmental and business objectives, while all revenues generated by the golf course inure entirely to the benefit of the Tribe as a whole.

(Response Brief at 52). Yet it remains a Golf Course, open to the public, operating as it has since 1928.

Regardless of the financial and health benefits from the sport, Golf is not a core governmental activity nor is it essential to federal, state, or tribal sovereignty.

In sum, the trial court erred by concluding the White factors established immunity. A private Golf Course, purchased by the Swinomish Tribe, did not become an arm of the tribe, entitled to sovereign immunity.

II. SIMILK DID NOT HAVE IMMUNITY TO WAIVE.

Finally, Mr. Howson does not argue that Similk had immunity but somehow waived it. To the contrary, Similk was, and remains, a Washington corporation subject to

Washington law. It never obtained immunity from this Court's jurisdiction.

CONCLUSION

For 30 years, Washington courts exercised jurisdiction over Similk, Inc., a Washington corporation. The Swinomish Tribe did not extinguish this jurisdiction when it purchased the corporation's stock. Because the Skagit County Superior Court erred as a matter of law by concluding that Similk is immune from State court jurisdiction, Appellant Richard Howson respectfully requests this Court to reverse the trial court's dismissal and remand this case for trial.

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DATED this 23rd day of June, 2023.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Appellant's Reply Brief to:

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