COA No. 84628-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD HOWSON, Appellant

v.

SIMILK, INC. d/b/a/ SWINOMISH GOLF LINKS,
Respondent

BRIEF OF RESPONDENT

Brian C. Gruber WSBA #32210
Anna E. Brady WSBA #54323

Attorneys for Similk, Inc. d/b/a Swinomish Golf Links,
Respondent
Ziontz Chestnut
2101 4th Avenue, Ste. 1230
Seattle, WA 98121
Phone: 206-448-1230

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

When the Swinomish Indian Tribal Community ("Tribe") purchased Appellee Similk, Inc. d/b/a Swinomish Golf Links ("Similk" or "Swinomish Golf Links") in 2013, it immediately modified the state law corporation's purpose to operate for the benefit of and to serve the purposes of the Tribe. Additional changes were soon made to fully integrate Similk with the finances and management of the Swinomish Casino & Lodge ("Casino") and to place the governance of Swinomish Golf Links under the control of the Tribe's governing body, the Swinomish Indian Senate. Collectively, these actions demonstrated the Tribe's intent to extend its immunity from suit to Similk.

Swinomish Golf Links occupies land that is culturally and historically important to the Swinomish people. In addition, the Tribe has transformed Similk from its prior focus on operating a golf course under non-tribal ownership to serve numerous Tribal purposes. Swinomish Golf Links is an amenity of the Casino and provides marketing opportunities and revenue for the Tribe's

most important enterprise. It enables the Tribe to foster health and wellness among its members and employees and engage with the local community. For Tribal leaders, Swinomish Golf Links is a venue for important business and governmental interactions.

Similk is treated as a department of the Casino's operating budget and is dependent on the Tribe for its capital improvement funding. In addition to these financial linkages, Similk and Casino management are integrated through an agreement whereby the Casino provides all important management services for Similk, and governance of Similk is overseen by Tribal boards appointed by the Swinomish Senate.

The Tribe's pervasive control of Similk, interlinked finances, and their common purpose demonstrate the requisite close relationship for Similk to qualify as an arm of the Tribe – and therefore be shielded by the Tribe's immunity from suit – under the applicable five-factor test in *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014). Neither the Tribe nor Similk has acted explicitly or unequivocally to waive

sovereign immunity. Accordingly, Similk has maintained its immunity from suit, and the trial court's order dismissing this case for lack of subject matter jurisdiction should be affirmed.

I. ISSUE PRESENTED BY APPELLANT'S ASSIGNMENTS OF ERROR.

Did the trial court correctly apply a multi-factor analysis to determine that the Swinomish Tribe's sovereign immunity bars Appellant Howson's suit against Appellee Similk, notwithstanding its incorporation by a previous owner under state law, because Similk is a wholly owned enterprise of the Tribe that is integrally connected with the Tribe through identity of purpose and exclusive Tribal control of its management and finances, therefore functioning as an arm of the Tribe for which immunity from suit has never been waived?

//

///

II. COUNTERSTATEMENT OF THE CASE.

A. The Swinomish Indian Tribal Community and the Swinomish Senate.

The Swinomish Indian Tribal Community is a federally recognized Indian tribe occupying the Swinomish Indian Reservation, which is located on Fidalgo Island in Skagit County. Clerk's Papers (CP) 137. The Tribe is a present day political successor-in-interest to certain of the tribes and bands that signed the Treaty of Point Elliott, *United States v. Washington*, 459 F. Supp. 1020, 1039, 1041 (W.D. Wash. 1978), and which inhabited since time immemorial the Tribe's ancestral homelands including the Skagit and Samish river basins, the coastal areas surrounding Skagit, Padilla, and Fidalgo bays, Saratoga Passage, and numerous islands including Fidalgo, Camano, Whidbey, and the San Juan Islands.[1]

The Tribe is a signatory to the 1855 Treaty of Point Elliott, 12 Stat. 927, which established the Reservation. CP 137. The Tribe and its more than 1,000 enrolled members are governed by

[1] Swinomish Indian Tribal Community website, 'The Swinomish People': https://swinomish-nsn.gov/who-we-are/the-swinomish-people.aspx (last visited May 23, 2023).

an 11-member Senate elected by the Swinomish people in accordance with the Swinomish Constitution and By-Laws. *Id*. at 137-38. The mission of the Swinomish Senate includes protecting and enhancing the quality of life for Swinomish members by providing a combination of economic opportunity and a safety net of social services, protecting the culture and traditional practices of the Swinomish people, and exercising the powers of self-government secured by the Treaty of Point Elliott. *Id*. at 138.

B. The Tribe's Purchase of Similk and Amendment of the Articles of Incorporation to Unify Similk's Purpose with the Tribe's.

In September 2013, the Tribe purchased all shares of Similk from a group of private owners. *Id*. at 138. The transaction placed about 215 acres of land, including what was then named Similk Golf Course, under Tribal ownership. *Id*. The same day, the Tribe acquired adjacent and nearby upland and tideland property in and along Similk Bay in a related transaction. *Id.* The tidelands and upland portions of the

acquired properties are of deep cultural and historical significance to the Tribe because of their location within the Swinomish Reservation as established in the 1855 Treaty of Point Elliott. *Id*. at 139. The Tribe envisioned that the golf course property would be an economic enterprise closely connected to the Swinomish Casino & Lodge; provide an opportunity for Swinomish members – both youth and adults – to improve their health, fitness, and general well-being; further important goals related to the Tribe's culture and history; and provide an attractive location for Tribal leaders to host elected officials, conduct tribal business, and build government-to-government relationships. *Id*. at 139, 141-42. Soon after purchase, the Tribe renamed the golf course Swinomish Golf Links. *Id*. at 140.

The same month that the Tribe purchased Similk, the newly appointed Swinomish Golf Links Board of Directors amended Similk's Articles of Incorporation to state that "the Corporation shall be operated at all times for the benefit of, and

to carry out the purposes of, it[s] Shareholder, Swinomish Indian Tribal Community, a tribal government organized under federal law." *Id*. at 139-41, 165. The same amendments established a requirement for Tribal approval of key aspects of governance, including amendment of Similk's bylaws and development of a plan of distribution upon dissolution. *Id*. at 167.

A fundamental attribute of Swinomish as a federally recognized tribe is its inherent sovereign immunity, which shields the Tribe from being sued without its consent. The Swinomish Senate places the utmost importance on the Tribe's sovereign immunity and works carefully to preserve this foundational legal element of the Tribe. As a result, any waiver of immunity must be presented to the Senate for consideration and explicit authorization in a written resolution or ordinance adopted in a formal Senate meeting. *Id*. at 140; *see, e.g.,* Swinomish Tribal Code § 16-05.050 ("The Gaming Enterprise

shall not waive the Tribe's sovereign immunity in the absence of Senate authorization.").[2]

When the Tribe purchased Similk there was never any intent on the part of the Senate to waive or otherwise limit the Tribe's sovereign immunity from suit, either generally or as an underlying legal framework applicable to ongoing operations at Swinomish Golf Links. If the Senate had intended to waive or limit the Tribe's immunity in the course of or subsequent to its acquisition of Similk, it would have required an explicit waiver or limitation adopted by the Senate in a written resolution or ordinance. CP 140. No such resolution or ordinance was ever considered, much less adopted.

The Tribe treats the land on which Swinomish Golf Links is located as it would property that is owned in fee simple by the Tribe or that is held in trust for the Tribe by the United States. *Id*. at 139. Tribal staff carry out land ownership and management

[2] The Swinomish Tribal Code is available at the following website: https://swinomish.org/government/tribal-code.aspx.

activities for Swinomish Golf Links land as they would carry out similar applicable activities for the Tribe's fee simple and trust lands. *Id*. Recent examples of the Tribe's treatment of the golf course in the same manner as Tribal or trust property include the responses to vandalism of nearly every green of Swinomish Golf Links in 2018 and flooding of the northern portion of the golf course in recent years. *Id*. at 87. In both instances, tribal leaders, staff, and attorneys were involved in addressing the problems. *Id*.

C. Similk and the Tribe's Intertwined Governance, Management and Finances, and the Tribe's Use of Swinomish Golf Links for Tribal Purposes.

The Tribe is the sole shareholder of Similk and, through the Swinomish Senate, appoints the Swinomish Golf Links Board of Directors for oversight, decision-making, and reporting to ensure Similk's accountability to the Tribe. The Swinomish Golf Links Board consists of five directors, all of whom are either Swinomish Senators, Swinomish employees, or enrolled Swinomish members. *Id*. at 84, 140-41. Directors are appointed

by the same process the Senate uses to appoint all other Tribal governmental committees and boards. *Id*. at 140-41. The Swinomish Golf Links Board works closely with the Tribe's Gaming Enterprise Management Board, which sets policies concerning the structure, activities, personnel, and finances of the Casino and, by extension, Swinomish Golf Links. *Id*. at 84. Thus, for all intents and purposes, the intertwined governance and management results in Similk being treated as a department of the Casino. *Id.*

All full-time, non-seasonal employees of Swinomish Golf Links are employees of the Casino. *Id*. at 85. These include the course superintendent and director of golf, who are responsible for the day-to-day management of Swinomish Golf Links. As Casino employees they report directly to the CEO of the Casino. *Id.* They also regularly provide information to the Swinomish Golf Links Board and Gaming Enterprise Management Board to assist the boards in fulfilling their oversight role of Swinomish Golf Links. *Id*. at 84-85.

From the outset of the Tribe's ownership of Similk and the golf course, the Tribe's intent was to place management of golf course operations under the control of the Tribe through the Casino, which is wholly owned by the Tribe and provides essential financial support for Tribal government services, programs, and economic self-sufficiency. *Id*. at 83-85. At the start of 2014, a contract for professional consulting services was in place between Similk and the Tribe d/b/a Swinomish Casino & Lodge. *Id*. at 85. By May 1, 2014, less than a year after the purchase of Similk, Swinomish Golf Links and the Casino significantly expanded this relationship by executing a Management Services Agreement ("MSA") in which the Casino became the "Management Company" of golf course operations. *Id*. Under the MSA, which incorporates the earlier professional services contract, Swinomish Golf Links pays the Casino a monthly management fee (currently $30,000) in exchange for a wide range of professional services that effectively provide full management of golf course operations, including accounting,

human resources, corporate governance, legal, recordkeeping, marketing, financial services, information technology, and advertising, strategy and management services relating to the promotion of Swinomish Golf Links. *Id*. In addition to professional services, the Casino often provides basic maintenance for golf course facilities as well as assistance with major infrastructure issues as described below. *Id*.; *see also id*. at 101-18 (MSA).

Swinomish Golf Links is integrated with and dependent on the financial resources of the Tribe for its commercial viability in multiple ways. First, Swinomish Golf Links is treated as a department under the operating budget of the Tribe's wholly owned Casino, which ultimately reflects and bears responsibility for any profit or shortfall from the golf course's financial performance. CP 86. Integration with the Casino supports, among other things, essential operations of Swinomish Golf Links through professional management services such as payroll, human resources, and accounting at below-market rates. *Id*.

Independent of the ongoing financial integration of Swinomish Golf Links operations with the Casino, the Tribe itself contributes $250,000 annually to Swinomish Golf Links for capital expenses. *Id*. at 87. This contribution demonstrates the Senate's treatment of and long-term investment in the golf course property as a Tribal asset. Indeed, the Tribe was aware that it would need to provide financial support to Swinomish Golf Links even before the Tribe purchased Similk. When the Swinomish Senate approved the purchase in August 2013, it also committed funds to operate the golf course for the remainder of 2013. *Id*. at 87, 124.

As intended, Swinomish Golf Links operates in part as an amenity of the Casino. *Id*. at 83, 86, 139. The public-facing website for Swinomish Golf Links is located at swinomishcasinoandlodge.com/golf, as a menu tab within the main Casino website and includes information on booking tee times, prices, rules of the course, contact information, maps, and golf lessons. *Id*. at 86; *see* Swinomish Casino & Lodge Home

Page, https://www.swinomishcasinoandlodge.com/ (last visited May 19, 2023). Internet users who enter "swinomishgolflinks.com" in their browser are automatically re-routed to the Casino website's page for the golf course, and a search for "Swinomish Golf Links" leads to the same website. CP 86; https://www.swinomishcasinoandlodge.com/golf/ (last visited May 13, 2023).

In addition to changing the name of the golf course from Similk Golf Course to Swinomish Golf Links after acquiring Similk, the Tribe licensed the trademarked Swinomish name and feather logo used by the Casino for use on Swinomish Golf Links' promotional and public-facing materials. CP 86, 140. This coordinated marketing approach illustrates the integration of the golf course and the Casino as jointly managed Tribal enterprises.

Id. at 120, 122.

The Tribe uses Swinomish Golf Links to advance important purposes of the Tribe, consistent with the requirement of the amended Articles of Incorporation providing that Similk "shall be operated at all times for the benefit of, and to carry out the purposes of it[s] Shareholder, Swinomish Indian Tribal Community, a tribal government organized under federal law." *Id*. at 139, 165. The Tribe's acquisition of Swinomish Golf Links greatly facilitated the Tribe's effort to provide healthy, outdoor opportunities to Swinomish youth through the Tribe's Youth Center program. *Id*. at 141; *see also id*. at 143, 212-17 (Senate reopening Swinomish Golf Links on April 30, 2020, to provide safe, outdoor recreation opportunities for Swinomish members,

Reservation residents, and others during the early days of the COVID-19 pandemic). The Tribe's goals for promoting and encouraging physical exercise, health, well-being, and recreation are further advanced by Similk's membership program, which provides golfing opportunities to Swinomish members and Swinomish Tribal employees at substantially reduced rates. *Id*. at 142, 201-05. Finally, several Tribal leaders, including the current Chairman and Vice Chairman, often utilize Swinomish Golf Links to conduct Tribal business and build relationships with other elected leaders and business leaders. *Id*. at 142-43. The golf course provides a meeting place for governmental discussions and planning, including meeting with leaders from other sovereign tribal nations. *Id*. at 142-43.

D. Procedural History.

Plaintiff Richard C. Howson filed a complaint in Skagit County Superior Court on August 15, 2022, alleging that he was injured while operating a golf cart during a round of golf at Swinomish Golf Links in August 2021. *Id*. at 2-3. Howson seeks

damages to compensate for, among other things, physical injuries, medical expenses, pain and suffering, and lost income that he alleges were sustained as a result of Similk's negligence. *Id*. at 4-6.

Similk filed a motion to dismiss for lack of subject matter jurisdiction on September 19, 2022. *Id*. at 7-82. Following a hearing on October 6, 2022, the trial court issued an oral ruling granting the motion. Verbatim Report of Proceedings (VRP) 22-25. Applying the applicable legal framework agreed by the parties, *i.e.*, the five-factor test in *White*, VRP 22, the court evaluated each factor in light of the undisputed factual record. The court found that the first factor – the method of creation of a tribal entity – was "fairly equal on both sides." VRP 23. However, it determined that the four remaining factors – purpose of the entity, its structure, ownership, and management, intent with respect to sharing immunity, and financial relationship – all favored Similk's immunity from suit. VRP 23-25.

After carefully weighing the five *White* factors, the court summarized its ruling as follows:

> I find that Plaintiff has not proved the Defendants [sic] either have no immunity or that they have waived it. The factors weigh in favor of a finding of sovereign immunity. There has not been an explicit or unequivocal waiver, so the motion to dismiss is granted.

VRP 25. The court also issued a written order dismissing the case pursuant to CR 12(b)(1). CP 263-64. Howson filed a notice of appeal on October 19, 2022.

ARGUMENT

I. APPLICABLE LAW.

A. Standard of Review and Burden of Proof.

The trial court's dismissal of a claim under CR 12(b)(1) is reviewed *de novo*. *Long v. Snoqualmie Gaming Comm'n*, 7 Wn. App. 2d 672, 679, 435 P.3d 339 (2019) (citing *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 111, 147 P.3d 1275 (2006); *Outsource Servs. Mgmt. LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807-08, 292 P.3d 147 (2013)).

When a defendant requests dismissal under CR 12(b)(1) on the basis of tribal sovereign immunity, "the party asserting jurisdiction has the burden of proving the other party has no immunity or waived it." *Id.* (citing *Outsource Servs. Mgmt.*, 172 Wn. App. at 807). Shifting this burden in any way would, as this Court has observed, "stand[] tribal immunity law on its head by ignoring [the plaintiff's] burden of showing subject matter jurisdiction." *Id.* at 688 (citing *Outsource Servs. Mgmt.*, 172 Wn. App. at 807); *see also Wright*, 159 Wn.2d at 119-20 (Madsen, J., concurring); *Tonasket v. Sargent*, 830 F. Supp. 2d 1078, 1082 (E.D. Wash. 2011) ("The burden of proof in a Rule 12(b)(1) motion [involving tribal sovereign immunity] is on the party asserting jurisdiction.").

B. Tribal Sovereign Immunity, the Five-Factor *White* Test for Extending a Tribe's Immunity to a Tribal Entity, and the High Bar for Waiver.

Washington "[c]ourts have long recognized that 'tribal immunity is a matter of federal law and is not subject to diminution by the States.'" *Foxworthy v. Puyallup Tribe of*

Indians Ass'n, 141 Wn. App. 221, 226 (2007), *as amended* (Oct. 30, 2007) (quoting *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 756 (1998)). As such, "Washington courts must and do apply federal law to resolve whether tribal sovereign immunity applies." *Long*, 7 Wn. App. 2d at 681; *see also Auto. United Trades Org. v. State*, 175 Wn.2d 214, 226, 285 P.3d 52 (2012) ("Whether tribal sovereign immunity applies is a question of federal law.").

A federally recognized Indian tribe is immune from suit in state and federal court absent an express and unequivocal waiver or congressional abrogation. *Auto. United Trades Org.*, 175 Wn.2d at 226 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); *Kiowa*, 523 U.S. at 754). The protections of tribal sovereign immunity extend to "suits involving both 'governmental and commercial activities,' whether conducted 'on or off a reservation.'" *Wright*, 159 Wn.2d at 112 (plurality opinion) (quoting *Kiowa*, 523 U.S. at 754-55, 760); *accord Foxworthy*, 141 Wn. App. at 226. The "broad principle"

governing tribal immunity from suit established by the U.S. Supreme Court have been repeatedly reaffirmed. *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). In *Bay Mills*, the Court reiterated its rejection in *Kiowa* of the plaintiff's request that "this Court [] confine tribal immunity to suits involving conduct on 'reservations or to noncommercial activities.' We said no." *Id.* (quoting *Kiowa*, 523 U.S. at 758).

Tribal sovereign immunity extends to tribal business activities if a tribal enterprise is determined to be an "arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). "The question is not whether the activity may be characterized as a business . . . but whether the entity

acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Id*. "[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *Cook v. AVI Casino Enter.*, 548 F.3d 718, 725 (9th Cir. 2008).

In determining whether a tribal entity is entitled to sovereign immunity as an "arm of the tribe," and thus immune from suit, the applicable federal law is the Ninth Circuit's *White* ruling, which established the five-factor test as follows:

> "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."

765 F.3d at 1025 (quoting *Breakthrough Mgmt. Grp., Inc. v. Chuckchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)) (directing courts to "examine several factors"); *see also McCoy v. Salish Kootenai College*, 334 F. Supp. 3d 1116, 1120 (D. Mont. 2018), *aff'd* 785 Fed. Appx. 414 (9th Cir. 2019) (applying *White* to "determine whether a business functions as an 'arm of the tribe' such that it is entitled to sovereign immunity"); *Cadet v. Snoqualmie Casino*, 469 F. Supp. 3d 1011, 1014-17 (W.D. Wash. 2020) (applying the *White* factors to determine that a tribal casino functioned as an arm of

the tribe and was therefore immune from suit); *Cain v. Salish Kootenai College*, No. CV-12-181-M-BMM, 2018 WL 2272792, at *1 (D. Mont. May 17, 2018) ("*White* instructs courts to employ a multi-factor analysis").

Here, the parties agreed in the proceedings before the trial court that *White* provides the applicable multi-factor test for determining whether Similk is immune from suit in the same manner as the Swinomish Tribe. *See* CP 16-27 (Similk's Motion to Dismiss applying *White* factors); *id*. at 226-31 (Howson's Response Brief applying *White* factors); VRP 11 (Howson's trial counsel stating "we agree the five-factors test is applicable here. . . . We think that we addressed all of the factors in the case."); VRP 22 (trial court noting the parties' "agreement that the test is set forth in *White v. University of California* and that the Court has to weigh those five factors"). On appeal, however, Howson for the first time identifies and relies on a bright-line test advanced by the Tenth Circuit in *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144 (10th Cir. 2012). Opening Br.

at 1, 9-14. But tellingly, Howson also still applies the five-factor *White* test, conceding that *White* "established the test for deciding whether an entity is immune as a[n] [sic] 'arm of the tribe[.]'" Opening Br. at 18; *see also id.* at 19-30 (applying *White* factors).

Notwithstanding a tribal entity's immunity from suit, a tribe may waive its own or a tribal entity's sovereign immunity in whole or in part through a clear and unequivocal waiver. "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). A court may only find waiver of a tribe's sovereign immunity under strict rules and circumstances: "[i]t is settled that waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed'" either by the tribe itself or through congressional abrogation. *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *U.S. v. Testan*, 424 U.S. 392, 399 (1976)); *see also Wright*, 159 Wn.2d at 112; *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 876, 929 P.2d 379 (1996); *Long*, 7 Wn.

App. 2d at 681 ("Absent a tribe's express waiver of immunity or congressional abrogation, that tribe may not be sued in state or federal court.").

C. The Bright-Line Test in *Somerlott* Is Not Applicable, and the Restatement Instructs That Sovereign Immunity Is Preserved Here.

Neither *Somerlott*, which Appellant cites in support of his argument – raised for the first time on appeal[3] – that a state law corporation can never be immune from suit as an arm of a tribe, nor the Restatement of the Law of American Indians ("Restatement," attached herewith as Appendix 1), undermines the applicability of the *White* five-factor test in this case.

[3] Pursuant to RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." Because Appellant could have, but did not, raise below a bright-line rule based on the jurisdiction of incorporation, the Court should exercise its discretion and decline to review that argument here. *See, e.g., Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.") (citing RAP 2.5(a)); *Linblad v. Boeing Co.*, 108 Wn. App 198, 207, 31 P.3d 1 (2001) ("We will not review an issue, theory, argument, or claim of error not presented at the trial court level.") (citing RAP 2.5(a)).

Somerlott's bright-line test is dicta, relies on a distinguishable Oklahoma state law governing limited liability companies, and has never been applied outside of the Tenth Circuit in place of a multi-factor "arm of the tribe" test. Furthermore, contrary to Appellant's characterization, the Restatement's summary of current law indicates that immunity is maintained where, as in Washington, the state law under which a tribal entity is incorporated enables the tribal entity to sue or be sued, rather than clearly rendering it subject to suit.

In *Somerlott*, the Tenth Circuit affirmed the district court's dismissal of federal employment discrimination claims against a tribal entity because the plaintiff-appellant failed to preserve a specific issue for appeal. *See* 686 F.3d at 1147, 1150. Nonetheless, the court opined in dicta that the "subordinate economic entity[4] test [for extension of tribal sovereign

[4] The Tenth Circuit uses the term "subordinate economic entity" while the Ninth Circuit uses "arm of the tribe" to refer to a tribal entity that enjoys the tribe's immunity from suit. *Compare*

immunity] is inapplicable to entities which are legally distinct from their members and which voluntarily subject themselves to the authority of another sovereign which allows them to be sued." *Id.* at 1149-50. The court's ruling did not rely on such analysis, however, and therefore the discussions by the *Somerlott* majority and concurrence of the inapplicability of the test to a tribal entity LLC created under state law are therefore dicta. *See Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288, 291 (D. Me. 2014) (noting "the Tenth Circuit's discussion of sovereign immunity in *Somerlott* was dicta"); Restatement § 54, rptrs. note to cmt. c (2023) (same).

Somerlott is also distinguishable from the instant case because, unlike Washington law, the Oklahoma law under which the tribal entity LLC was created affirmatively "allow[ed the entity] to be sued." 686 F.3d at 1150 (citing Okla. Stat. tit. 18, § 2003(1)). The Oklahoma Limited Liability Company Act

---

Breakthrough Mgmt. Grp., 629 F.3d at 1181 *with White*, 765 F.3d at 1025.

provided that "'[e]ach limited liability company *may* . . . sue, be sued, complain and defend in all courts[.]'" *Id*. (quoting Okla. Stat. tit. 18, § 2003(1)) (emphasis added, internal modifications normalized). In contrast, the Washington Business Corporation Act provides in the "General powers" section that, "[u]nless its articles of incorporation provide otherwise, every corporation has the . . . *power* . . . [t]o sue and be sued, complain, and defend in its corporate name." RCW 23B.03.020 (emphasis added).

This precise difference in legislative text is emphasized by the Restatement to distinguish between: (a) tribal entities incorporated under a state law that "*clearly renders* the corporation or business association subject to suit" (resulting in no sovereign immunity), Restatement § 54, cmt. c; and (b) tribal entities created under a state law that "*merely enables* a corporation to sue or be sued, without mandating that it be subject to suit" (sovereign immunity is retained*)*. *Id*., rptrs. note to cmt. c (emphasis added). As an example of the latter circumstance, the Restatement cites *Ransom v. St. Regis Mohawk*

Education & Community Fund, Inc., 658 N.E.2d 989, 992 (1995), which held that a tribal entity retained its immunity from suit where it was incorporated under District of Columbia law with "power to sue and be sued" language – identical to the Washington statute. (Internal modifications normalized.)

The Ninth Circuit and state supreme courts across the country have either rejected *Somerlott*'s bright-line test outright or have done so implicitly by adopting a multi-factor test for determining whether a tribal entity is an arm of the tribe entitled to immunity in which no single factor is dispositive – including in cases where the tribal entity was incorporated under state law. Indeed, the seminal *White* case involved a tribal entity incorporated under California law. 765 F.3d at 1025; *White v. Univ. of California*, No. C 12-10978 RS, 2012 WL 12335354, at *4 (N.D. Cal. Oct. 9, 2012). The Ninth Circuit in *McCoy* affirmed the district court's finding of immunity for the Confederated Salish and Kootenai Tribe (CSKT) college incorporated under state law, holding that, while incorporation

under state law weighed against immunity, the other four *White* factors outweighed it and favored immunity:

> *Even though the College is incorporated under Montana law*, the record demonstrates that CSKT has significant control over the College and that the College is structured and operates for the benefit of CSKT. Because a *proper weighing* of the *White* factors demonstrates . . . that the College is an arm of CSKT, the College is entitled to tribal sovereign immunity.

785 Fed. Appx. at 415 (emphases added). In another Ninth Circuit case involving CSKT's tribal college, the court emphatically concluded that "*White* provides the appropriate test for determining whether the College is an arm of the Tribe," *i.e.*, "whether the College shares the Tribe's sovereign immunity." *United States ex. rel. Cain v. Salish Kootenai College, Inc.*, 862 F.3d 939, 944-45 (9th Cir. 2017). Thus, the Ninth Circuit has repeatedly rejected the type of bright-line test for state-incorporated tribal entities that Appellant urges based on *Somerlott* and reaffirmed *White*'s five-factor, arm-of-the-tribe test, which requires wholistic consideration of all factors.

Recently, the Montana Supreme Court considered – and rejected – whether to adopt the bright-line test from *Somerlott* to "categorially bar" as a matter of law the immunity of an LLC created by a Montana tribe under Delaware law. *Lustre Oil Co. v. Anadarko Minerals, Inc.*, 527 P.3d 586, 589 (Mont. 2023). After surveying relevant case law, the court explained the value of applying a multi-factor analysis:

> These cases demonstrate the importance of examining the circumstances of each case *rather than utilizing a single-inquiry test to analyze tribal sovereign immunity*. The courts examined the relationship between the Tribes and their sub-entities and how they work together to promote tribal self-governance, determining the relationships reflected an extension of sovereign immunity.

Id. at 590 (emphasis added); *see also id.* at 591 ("a court considering a jurisdictional challenge should examine all the circumstances to determine whether an entity is an arm of a tribe that shares its sovereign immunity"); *id.* at 604 ("reject[ing] *Somerlott*'s reasoning and conclusion. … Whether an entity is a tribal entity depends on the context in which the question is

addressed.") (McKinnon, J., specially concurring). The *Lustre* court concluded that the five *White* factors "provide useful guidance" and applied them to the facts of the case, though the court declined to adopt the *White* test as the "precise test for determining whether a tribe's economic entity is entitled to share the tribe's sovereign immunity." *Id*. at 591.

In a 2016 decision addressing the arm of the tribe immunity analysis, the California Supreme Court did not consider *Somerlott* but developed its own five-factor test mirroring the *White* test: "[i]n setting forth the five factors of the arm-of-the-tribe test, we emphasize that *no single factor is universally dispositive*. … Each case will call for fact-specific inquiry into all the factors[.]" *People v. Miami Nation Enters.*, 386 P.3d 357, 374 (Cal. 2016) (emphasis added). Finally, as discussed below, a majority of justices of the Washington Supreme Court in *Wright* favored a multi-factor test over a single-factor, bright-line test. *See* 159 Wn.2d at 116-3 (opinions of Madsen, J., concurring, and Johnson, C., J., dissenting).

Indeed, counsel for Similk has identified no state supreme court that has adopted *Somerlott*'s dicta or developed its own bright-line test based on incorporation of a tribal entity under state law.

D. The Washington Supreme Court's Splintered Decision in *Wright* Supports a Multi-Factor Test Rather Than a Bright-Line Rule.

Appellant inexplicably fails to cite, let alone address, existing Washington law regarding tribal sovereign immunity generally and the application of such immunity to an arm of a tribe specifically.

The germane case on this issue is the Washington Supreme Court's 2006 plurality ruling in *Wright*, which preceded *White* by eight years. 159 Wn.2d 108. The *Wright* court considered whether the sovereign immunity of the Confederated Tribes of the Colville Reservation extended to a tribal corporation, a subsidiary corporation, and a supervisory agent such that a former employee's suit against the tribal corporate defendants was barred. *Id*. at 109-11. A clear majority of the court – six of the nine justices – held that the Colville Tribes' sovereign

immunity extended to and protected the corporate defendants from suit. *See id*. at 114-26 (opinions of Sanders, J., lead, and Madsen, J., concurring).

A different majority of the court – five of the nine justices – recognized a multi-factor test as the appropriate legal standard for determining whether a tribe's sovereign immunity extends to protect an arm of the tribe from suit. The concurrence concluded "there are several factors that other courts considering this question have found useful" and expressly endorsed "adopt[ing] the reasoning of these courts[.]" *Id*. at 117 (Madsen J., concurring). In the same vein, the dissent[5] observed that "[c]ourts have adopted various factors in deciding whether corporations are tribal entities and are entitled to immunity[,]"

[5] Notably, the dissent did not affirmatively find that the Colville Tribes' sovereign immunity failed to protect the tribal corporate defendants; instead, it found the factual record insufficient for an appellate court to determine whether tribal sovereign immunity extended to the tribal corporate defendants, and would have remanded the case to the trial court for additional fact-finding. *Id*. at 128

citing another state supreme court's three-factor test and enumerating the 11 factors recognized by the tribal corporate defendants in *Wright*. *Id*. at 130-31 (Johnson, J., dissenting).

Thus, in spite of the plurality posture of *Wright*, a majority of the court arrived at a multi-factor test for whether tribal sovereign immunity extends to an arm of a tribe as a precedential principle of Washington State law. As the Washington Supreme Court has held: "A principle of law reached by a majority of the court, even in a fractured opinion, is not considered a plurality but rather binding precedent." *In re Det. of Reyes*, 184 Wn.2d 340, 346, 358 P.3d 394 (2015) (citing *Wright v. Terrell*, 162 Wn.2d 192, 195-96, 170 P.3d 570 (2007) (per curiam)).

For its part, the lead opinion in *Wright* stated that "[w]hether or not tribal sovereign immunity protects a particular tribal business depends on the nature of the enterprise and its relation to the tribe[,]" indicating that the lead opinion shared the view that at least these two factors are relevant to this analysis. 159 Wn.2d at 113. Nonetheless, the lead opinion – subscribed to

by a minority of four justices – found dispositive the fact that the tribal corporation and its subsidiary were created under Colville Tribal law, and, with that statement, purported to "adopt a bright-line rule" that "[t]ribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own laws." *Id*. at 114 n.3, 113-14. However, the proposition that a tribally owned corporation created under tribal law *is* protected by sovereign immunity does not mean that a tribally owned corporation created under state law is automatically *not* protected by sovereign immunity – and the latter circumstance was not before the *Wright* court.

Referencing only a 1994 law review article,[6] the lead opinion posited that "a tribe may waive the immunity of a tribal

---

[6] The lead opinion's reliance on the article for the cited principle is dubious, as the article does not address state law incorporation by a tribe, let alone any consequences that could arise for tribal sovereign immunity. In fact, the article describes the prevailing legal standard for arm-of-the-tribe immunity as a multi-factor test, where "[n]o one item is determinative." *See* W. Vetter, *Doing Business With Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction,*

enterprise by incorporating the enterprise under state law, rather than tribal law[,]" but that comment was dicta because the tribal corporation in *Wright* was not incorporated under state law. *Id*. at 115. At most, the dicta suggested only that incorporation under state law permissively *may* involve a waiver of immunity, not that such incorporation necessarily constitutes a waiver. Any proposition by the lead opinion that state law incorporation of a tribal corporation alone constitutes a waiver of immunity misstates current law, as recognized and applied by Appellant below. *See* CP 221 (citing *White*, 765 F.3d at 1025); *see also* Part I.C, *supra* (discussing Restatement § 54).

The Ninth Circuit clearly established a multi-factor test as the standard for determining arm-of-the-tribe immunity in *White*, several years after *Wright* was issued. 765 F.3d at 1025. Appellee has been unable to locate any cases, in any jurisdiction,

---

36 Ariz. L. Rev. 169, 173, 176 (1994); *see also Breakthrough Mgmt. Group*, 629 F.3d at 1176 (citing, *inter alia*, Vetter at 176-79 as a basis for the five-factor test later adopted by *White*).

that rely on *Wright* to apply the alleged "bright-line rule" advanced by the lead opinion. To the contrary, the Colorado Court of Appeals discussed at length how on this point the *Wright* lead opinion is undermined, outnumbered, and wrong on the law. *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, 205 P.3d 389, 405 (Colo. App. 2008). The Colorado appellate court was "persuaded by the position of a majority of justices in *Wright* that the *Wright* plurality's bright-line test is too restrictive[,]" instead noting that "most courts that have established or adopted tests for determining whether organizations are arms of tribes look to a series of factors[.]" *Id*.

While *Wright* did not chart an unobstructed path for future courts to follow regarding the test for determining whether a tribal entity is an arm of a tribe, the case nonetheless instructs that (1) Washington courts should apply a multi-factor test, and (2) a single-factor, bright-line rule is not the law in Washington.

As the Washington Supreme Court has elsewhere counseled, "[w]hether tribal sovereign immunity applies is a

question of federal law." *Auto. United Trades Org.*, 175 Wn.2d at 226; *see also Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018) (reversing a Washington Supreme Court ruling that tribal sovereign immunity did not apply and cautioning that "[d]etermining the limits on the sovereign immunity held by Indian tribes is a grave question"). Accordingly, the appropriate legal standard to apply here is the Ninth Circuit's five-factor *White* test, as Appellant conceded, the parties mutually agreed, and the trial court held below. *See* CP 16-27, 226-31; VRP 11, 22.

II. THE SWINOMISH TRIBE'S SOVEREIGN IMMUNITY EXTENDS TO SIMILK AS AN ARM OF THE TRIBE.

The trial court correctly dismissed Appellant's complaint because Similk, as a wholly owned and fully integrated enterprise of the Tribe, is an arm of the Tribe and is thus shielded from suit by the Tribe's sovereign immunity.

Upon purchasing Similk, including the golf course then known as Similk Golf Course, and adjacent tidelands in 2013,

the Tribe asserted control of golf course operations and management through a systematic and comprehensive management scheme and financial arrangement intended to ensure that the renamed Swinomish Golf Links would be operated for the benefit of the Tribe and to achieve the purposes of the Tribe as mandated by Similk's newly amended Articles of Incorporation. The Tribe's control of Similk is comprehensive, and the golf course serves many Tribal purposes – commercial, governmental, and health-related – aimed at benefiting the Tribe and its members. Financial ties between the Tribe, Casino, and Similk are pervasive, and the management and governance structure evidence the Tribe's oversight and control of every major aspect of golf course operations. The Tribe's control – and associated responsibilities – were highlighted when vandalism in 2018 and more recent flooding required immediate and coordinated Tribal responses. Through these interconnections, the Tribe has manifested an intent to extend its sovereign

immunity to Similk, and has never manifested a contrary intent by clearly and unequivocally waiving that immunity.

Application of the five *White* factors to Similk demonstrates – as the trial court held – that Similk is a Tribal entity that functions as an arm of the Tribe and therefore enjoys the Tribe' sovereign immunity from suit. *See* VRP 22-25.

A. Similk's Amended Articles of Incorporation Require It To Operate for the Benefit of the Tribe and To Meet Tribal Purposes.

The first *White* factor directs the Court to consider "the method of creation of … [tribal] economic entities" such as Similk. 765 F.3d at 1025. Although Similk was incorporated under Washington law by the Morgan-Turner family some three decades before the Tribe purchased it in 2013, *see* Opening Br. Appx. B (describing history of the golf course), this history must be viewed in the context of the Tribe's actions following acquisition. Most notably, the Tribe immediately amended Similk's Articles of Incorporation to establish a new primary purpose of "operat[ing] at all times for the benefit of, and to carry

out the purposes of, it[sic] Shareholder, Swinomish Indian Tribal Community." CP 139, 165.

Contrary to Appellant's arguments, creation of an entity under state law does not preclude its characterization as an arm of the tribe immune from suit. *See Cain*, 2018 WL 2272792 at *2; *McCoy*, 785 Fed. Appx. at 415 ("Even though the college is incorporated under Montana law …. the College is entitled to tribal sovereign immunity"); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1175-76 (D.S.D. 2012) (holding state-incorporated nonprofit corporation created by 16 tribes was entitled to sovereign immunity). Moreover, state law incorporation need not disfavor immunity even on the first *White* factor. *See Manzano v. S. Indian Health Council*, No. 20-cv-02130-BAS-BGS, 2021 WL 2826072, at *6 (S.D. Cal. July 7, 2021). After surveying case law that it described as "indeterminate on this point," the *Manzano* court ultimately held that, notwithstanding incorporation under state law, the first *White* factor favored the

tribal entity's claim of sovereign immunity. *Id.* at *6-7 "Because the majority of the case law does not consider state incorporation detrimental to tribal status, the Court concludes that [the entity's] incorporation under state law does not mean its method of creation weighs against its claim to sovereignty." *Id*. at 7.

As discussed in detail above, neither *Somerlott* nor the Restatement support application of a bright-line test would exclude Similk from the Tribe's immunity. *See* Part I.C. The *Somerlott* court's (and concurrence's) opinions on this issue are dicta, and Appellee has identified no court that has adopted the bright-line test *Somerlott* articulates; rather, numerous courts have rejected it. Further, the Restatement distinguishes between the statutory text underlying *Somerlott*, which affirmatively subjected an LLC to suit ("may be sued"), and statutory text in other states, which merely enables a tribally owned state law corporation to agree to be sued ("power to be sued"). Restatement § 54, rptrs. note to cmt. c. The applicable Washington legislative text falls into the latter category. *See*

RCW 23B.03.020(2)(a). Thus, contrary to Appellants' representation, Opening Br. at 10-12, the Restatement in fact supports immunity for Similk.

This is not a case, as Appellant suggests, where Similk is improperly depriving Washington courts of a claim that was once justiciable in that judicial forum. Opening Br. at 10 ("Tribe cannot confer immunity on an existing corporation already subject to State court jurisdiction"), 19 (same), 21 ("eras[ing] . . . ability to sue and be sued"), 21 ("extinguish[ing] State court jurisdiction"). Appellant's tort claim against Similk is wholly dissimilar to the creditor claims at issue in *McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc.*, 692 N.W.2d 247, 251 (Wis. Ct. App. 2004), in which immunity would have shielded the defendant corporation from claims that pre-existed its purchase by a tribe. There, the consequence of finding immunity would have been that "all pre-existing creditors lost their right to sue or to continue a suit . . . upon the [tribe's] stock purchase." *Id*. No such inequity is presented here, as the incident giving rise to

Appellant's alleged injuries occurred years after the Tribe's purchase of Similk when Appellant knowingly played a round at Swinomish Golf Links. *McNally CPA's* is also distinguishable because, unlike the trial court here, that court found that "none of the factors" synthesized from multiple arm-of-the-tribe cases "appreciably weigh in favor of [the tribal entity enjoying sovereign immunity]." *Id.* at 252.

Appellant paints an unduly narrow picture of Similk as a corporation created under state law without any tribal affiliation and then attempts to knock down this strawman by declaring he "has found no precedent for conferring tribal immunity onto [such a] corporation." Opening Br. at 14. However, it is hardly surprising that there was no tribal involvement in the incorporation of Similk by non-tribal individuals 30 years before the Tribe's purchase or that they created it under state law. *Id.* at 14, 19. 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 Swinomish Golf Links beyond "purely business activities," as Appellant argues, to encompass Tribal health, facilitation of government and business relationships of Tribal leaders, and revenue generation as an amenity of the Casino for critical Tribal governance and social services.

Finally, the location of the golf course is immaterial to the immunity question because tribal sovereign immunity applies both on and off reservations. *See Breakthrough*, 629 F.3d at 1191 n.13 ("in evaluating these factors, we need not decide whether [tribal entity defendants] are located on Indian lands"); Restatement § 54 (state law corporation may be immune as an arm of a tribe "when engaged in business enterprises within or outside of Indian country"); *see also Kiowa*, 523 U.S. at 758. Extending the Tribe's immunity to Similk need not "give this Court pause," Opening Br. at 14, but rather would be a well-grounded conclusion under the balanced and wholistic

application of *White*'s five-factor test to the current status and operation of Similk. *See Lustre Oil Co.*, 527 P.3d at 590 (emphasizing "importance of examining the circumstances of each case rather than utilizing a single-inquiry test to analyze tribal sovereign immunity"); *Miami Nation Enters.*, 386 P.3d at 374 ("no single factor is universally dispositive"); *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-cv-0962-JR, 2018 WL 417612, at *3 (D. Or. Apr. 26, 2018) (Magistrate's Findings and Recommendation) (discussing *Somerlott*'s bright-line rule but determining that fact of tribal entity's formation under state law "alone is not dispositive" and analyzing the four other *White* factors), *adopted by* J. McShane, 2018 WL 4169019 (D. Or. Aug. 30, 2018).

In sum, Similk's method of creation must be analyzed in its present context because the entity has, since the Tribe's purchase and immediate amendment of the Articles of Incorporation, materially shifted to reflect the purposes of and to benefit the Tribe regardless of the jurisdiction under which it was

incorporated. The first *White* factor thus favors a finding that Similk is an arm of the Swinomish Tribe.

B. Similk Serves Important Tribal Commercial, Governmental, and Health Purposes.

The second *White* factor directs the Court to consider the "purpose" of tribal economic entities to determine whether an entity such as Similk is entitled to sovereign immunity. 765 F.3d at 1025. Where tribally owned entities exist in whole or in part to promote the wellness of tribal people, or even to raise awareness of Native American issues, courts have held those purposes to tip the balance in favor of immunity. *See White*, 765 F.3d at 1025 (finding sovereign immunity for tribally controlled committee with purpose to "recover [Native American] remains and educate the public"); *Cain*, 2018 WL 2272792 at *2 (finding sovereign immunity for tribal college, one purpose of which was to "'upgrade the skills and competencies of tribal employees'" (internal modification normalized)); *Manzano*, 2021 WL

22826072 at *7-8 (finding sovereign immunity for clinic with purpose of providing healthcare services to tribal communities).

Shortly after the Tribe's purchase of Similk, the Tribe expressly repurposed the entity to benefit the Tribe and carry out Tribal purposes. *See* CP 139, 165. Thus, the unambiguous purpose of Similk is to always conduct its operations for the benefit of the Tribe and its members. Similk implements this charge by using Swinomish Golf Links to broadly benefit the Tribe's commerce, members' well-being, and its elected leaders' governmental relationships.

Swinomish Golf Links serves a commercial purpose by drawing guests to the Casino, much like the Casino's lodge rooms and suites, entertainment venues, restaurants, and RV park. Courts have long recognized that gaming and related enterprises promote tribal economic development, self-sufficiency, and strong tribal governments. *See Bay Mills*, 572 U.S. at 792-93; *Allen*, 464 F.3d at 1047 ("With the Tribe owning and operating the Casino, there is no question that these

economic and other advantages inure to the benefit of the Tribe."); *Cadet*, 469 F. Supp. 3d at 1016 ("It is clear that the Casino generates revenue for the Tribe to promote tribal prosperity and self-sufficiency."). Certainly, "tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues." *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring) (internal quotation omitted).

In addition to the economic purpose, the Tribe uses Swinomish Golf Links to promote the wellness of its membership and enhance Tribal youth programs. The Swinomish Golf Links Board recognized this purpose of Simlik when it adopted a resolution in 2014 stating that "the Tribe is committed to providing benefits to its members and employees that promote and enable physical activity and skills, exercise and recreation, enjoyment of the outdoors, and general health and well-being," and established a program offering significantly reduced fees to play golf at Swinomish Golf Links. CP 14, 201-

05. The Swinomish Golf Program and the Youth Center Program enable several dozen adult and youth Tribal members to regularly play golf and engage in healthy, outdoor activities at Swinomish Golf Links. CP 141-42.

Finally, Tribal leaders frequently utilize Swinomish Golf Links as a place to conduct business and build relationships with elected leaders, the business community, and non-profit organizations. This is accomplished through private outings, offering rounds of golf as part of intergovernmental leadership events, and hosting community charity events. CP 87-88, 136, 142-43, 207-10.

Appellant focuses solely on the previous narrow purpose of Similk under non-tribal ownership before 2013, namely the for-profit operation of a golf course. Opening Br. at 21-22. Yet this ignores the veritable sea change in purposes that the Tribe imparted to Similk by amending the Articles of Incorporation following purchase, broadening its charge to include a wide range of governmental, health, and recreation benefits for Tribal

leaders, members, and employees. To be sure, Similk provides commercial benefits to the Tribe and the Tribe's most important commercial enterprise, but Appellant's comparison of Similk to a McDonald's franchise misses the mark entirely. Opening Br. at 23. 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.

Taken together, these facts establish a "very clear record of the broad benefits that the golf course has for the tribe." VRP 24. The extensive benefits for the Tribal government and membership support a finding under the second *White* factor that Similk enjoys the Tribe's sovereign immunity.

C. Similk Is Fully Owned by the Tribe, and Its Governance and Management Are Controlled by the Swinomish Senate and the Swinomish Casino.

The third *White* factor concerns "the structure, ownership, and management" of the tribal entity, "including the amount of control the tribe has over the entit[y.]" 765 F.3d at 1025. This factor strongly favors Similk's assertion of immunity.

All aspects of the governance of Similk are under the control of the relevant boards and overseen by Swinomish Senate. Similk's sole shareholder is the Tribe, which controls operations through (1) the Casino's comprehensive management of Swinomish Golf Links and (2) the Swinomish Senate's appointment and oversight of the Swinomish Golf Links Board of Directors. The Board, which serves as both Similk's governing body for purposes of state law obligations and the official Tribal board accountable to the Swinomish Senate, consists of five members who are either elected Tribal officials, Tribal employees, or enrolled Tribal members. *See* CP 22, 84,

140-41. The Senate-appointed Casino CEO oversees operations of Swinomish Golf Links and must comply with the policies established by the Senate and Tribe's Gaming Enterprise Management Board, also appointed by the Senate. The Casino CEO as well as the superintendent and director of golf of Swinomish Golf Links regularly report and provide information to both Boards in their oversight function. The Boards in turn report directly to the Senate, which has decision-making authority over the Casino and Swinomish Golf Links. *Id*. at 22, 84-85.

While day-to-day operations of Swinomish Golf Links are handled by the superintendent and director of golf, both are employed by the Casino and report to the Casino CEO. Since the Tribe's purchase of Similk, the Casino has managed Swinomish Golf Links. Under the MSA in place from the first year of Tribal ownership, the Casino serves as the "Management Company" and is responsible for providing comprehensive management services to Similk, including accounting, personnel,

legal, marketing, information technology, and various financial services, all of which are vital to Similk's successful functioning. *Id*. at 85, 101-18.

Appellant is plainly incorrect in asserting that after the Tribe's purchase, "the managers changed, but the structure, ownership, and management of the Golf Course continued unchanged." Opening Br. at 23. In fact, as detailed above, *everything* about the management and structure of Swinomish Golf Links – as well as its purpose and finances – changed once the Tribe assumed ownership, with all management, supervision and reporting delegated to a hierarchy of Tribal employees and elected Tribal leaders, instead of a small group of non-tribal individual shareholders.

Rather than addressing the undisputed comprehensive management services that the Casino provides for Swinomish Golf Links, Appellant instead focuses on Paragraph 7 of the MSA regarding "Relationship of the Parties," arguing that it indicates Similk is an independent entity from the Tribe and

exercises powers under state law. Opening Br. at 25-26 (quoting CP 106). This argument fails here as it did below, *see* CP 226; VRP 24, because the legal independence described is inherent in the separate corporate existence of Similk, and because Paragraph 7 appears intended mainly as a legal disclaimer against any claims that the wide array of management services the Casino provides to Swinomish Golf Links establishes an employer-employee relationship. *See, e.g.*, CP 106 ("The Parties are acting as independent contractors and independent employers."); *id.* ("[Similk] will not provide fringe benefits, including health insurance benefits, or any other employee benefit, for the benefit of the [Casino] or its employees."). Further, the relationship between Similk and the Tribe is necessarily informed by the pervasive management function of the Casino and integration of Swinomish Golf Links' decision-making into the Tribe's governance structure, both of which support finding that Similk is an arm of the Tribe.

The high degree of integration in governance, control, and management of Similk by the Tribe is also apparent from Swinomish Golf Link's public-facing information: from golf course marketing to the Tribal website[7] where Swinomish Golf Links is listed as one of the Tribe's enterprises. *See* CP 140, 189. Specifically, after changing the golf course's name from Similk Golf Course to Swinomish Golf Links, the Tribe licensed the trademarked Swinomish name and feather logo image used by the Casino for all Swinomish Golf Links promotional and public-facing materials. *Id*. at 86, 122, 140, 187, 189,

The Tribe treats Similk as a component of the Tribe and provides $250,000 in annual capital funding to support the enterprise. The Swinomish Senate and Tribal staff also support Swinomish Golf Links when need arises. *Id*. at 87, 127, 141.

Where there is a high degree of interconnection between an entity and a tribe as owner, courts have found sufficient

[7] Swinomish Indian Tribal Community Home Page: https://swinomish-nsn.gov (last visited May 1, 2023).

control to extend and share the tribe's sovereign immunity. In *Cain*, the court recognized that "[d]eep interconnections exist between the College and the Tribe," including the fact that the tribe had named the College, defined the College's purposes, prescribed the College's duties and powers, and treated the College as a component of the tribe. 2018 WL 2272792 at *2-3. As with Similk, the tribe in *Cain* possessed the authority to appoint and remove members from the College's board of directors. *Id*. Each aspect of tribal control found in *Cain* – and more – exists here between the Tribe and Similk. Likewise, Tribal ownership, management, and control of Swinomish Golf Links mirror the facts in *Cadet*, where the court held that the third *White* factor favored immunity for a gaming enterprise because the tribe in that case had the sole proprietary interest in the enterprise and the tribe's ownership, management, and supervisory authority over the enterprise were exercised by the tribe's governing body. 469 F. Supp. 3d at 1016.

There is no question that the Tribe owns, manages, and

controls Swinomish Golf Links, thus the third *White* factor favors Similk's immunity from suit.

D. The Tribe Intended to Extend Immunity to Similk.

The fourth *White* factor is "the tribe's intent with respect to the sharing of its sovereign immunity[.]" 765 F.3d at 1025.

The Tribe extended its immunity from suit to Similk in two primary ways, fulfilling the intent factor. First, the Tribe amended Similk's Articles of Incorporation immediately after purchase to establish that Similk's overriding purpose was to carry out the Tribe's purposes "at all times." CP 139, 165. In so doing, it made Similk its own, cloaking Similk with one of the foundational attributes of the Tribe: sovereignty. Maintaining tribal sovereignty necessarily includes immunity from suit in order to protect tribal resources for the benefit of a tribe and its members. As the Chairman of the Swinomish Senate explained, the Senate had no intent to waive or otherwise limit the Tribe's inherent sovereign immunity as applied to Similk or the ongoing

operation of Swinomish Golf Links. *Id*. at 140. Indeed, had the Senate intended to limit or waive the Tribe's sovereign immunity with regard to Similk, doing so would have required an explicit limitation or waiver adopted by the Senate in a written resolution or ordinance. CP 140.

In contrast, the 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. Maintaining the Tribe's inherent sovereignty, and in particular its immunity from unconsented suit, is a central purpose of the Tribe because such immunity is essential to ensuring limited Tribal resources are available for the vital governmental services the Tribe provides to its members. *See* Swinomish Tribal Code § 3-08.040(C) (Tribe's sovereign immunity "serves an essential function in preserving limited Tribal resources necessary for the Tribe to govern and provide

governmental services"). CP 65.

The Tribe also demonstrated its intent to extend its sovereignty and immunity to Similk – again within months of purchasing all shares of Similk – by establishing comprehensive control over Similk's management and governance through the MSA and governance board structure. Establishing control and authority over a tribal entity is one of the ways tribes can demonstrate an intent to extend their immunity to the entity, and numerous actions of the Tribe to effectuate that intent speak loudly here. *See McCoy*, 334 F. Supp. 3d at 1123. As discussed above, the Tribe has structured governance, management, and other aspects of its control over Similk to advance Tribal purposes and benefit the Tribe. Extending the Tribe's immunity from suit is an inherent element of the Tribe's control, evidenced through the modification of Similk's purposes and powers in the Articles of Incorporation. As in the numerous cases finding extensions of tribal sovereign immunity over tribal casinos and other economic entities because they carry out purposes of the

tribes, the Swinomish Tribe's sovereign immunity extends to Similk because it, too, carries out the purposes of and is controlled by the Tribe. *See Bay Mills*, 572 U.S. at 791; *White*, 765 F.3d at 1025; *see also Cook*, 548 F.3d at 725-26.

Ignoring the amended Articles of Incorporation and close control exerted by the Tribe, Appellant claims that the Tribe could have taken several other actions to confer immunity on Similk. Opening Br. at 27-28. However, those steps were not necessary because the Tribe *did act* by conforming Similk's purpose to its own and asserting comprehensive control over operations and management at Swinomish Golf Links. A contextual application of the *White* factors makes clear the Tribe's actions amply demonstrated an intent to extend immunity – a fundamental attribute that infuses all of the Tribe's governance actions – to Similk within months of purchasing it. To be sure, the Tribe is not contending that buying shares of a multi-national corporation like Microsoft would confer tribal sovereign immunity on the corporation. *See* Opening Br. at 28

(quoting *McNally CPA's*, 692 N.W.2d at 250). Rather this case, like all arm-of-the-tribe cases, demands "examining the circumstances of each case rather than utilizing a single-inquiry test to analyze tribal sovereign immunity." *Lustre Oil Co.*, 527 P.3d at 356. Applying the *White* factors to a hypothetical where the only tribal action is acquisition of some Microsoft stock shares clearly results in no extension of tribal immunity to Microsoft, while a close review of the factual record in the present case demonstrates that the Tribe took numerous actions demonstrating its intent to shield Similk with its immunity from suit.

E. Similk's Interconnected Financial Relationship With the Tribe and Casino Supports Immunity.

The fifth *White* factor – "the financial relationship between the tribe and the entit[y]" – weighs heavily in favor of a finding of sovereign immunity. 765 F.3d at 1025.

Without a doubt, the most significant aspect of the financial relationship stems from the Tribe's purchase of Similk

and the tidelands adjacent to the golf course for more than $5,000,000. CP 171-72. The Swinomish Senate further recognized the need for Tribal financial support of Similk's operations since before the purchase was completed in September 2013 when it committed to funding golf course operations for the remainder of the year. *Id*. at 87.

Similk is also inextricably integrated into the financial functioning of the Casino. In addition to accounting, payroll, and other financial services the Casino provides to Similk under the MSA at below market rates, there is significant cash flow between the entities. Similk pays the Casino $30,000 per month for management services, and the Tribe invests $250,000 annually in capital expenses at Swinomish Golf Links. *Id*. at 85, 141. Similk is treated as a distinct department under the Casino's operating budget, and a Similk operating loss – or profit – would ultimately end up on the books of the Casino. *Id*. at 86. As the trial court found, these facts establish a high degree of financial integration that supports a finding of immunity. VRP 24-25.

Appellant argues that the trial court's finding of immunity based on financial integration is a bridge too far because it "would apply to the Tribe's purchase of any for-profit business in any location." Opening Br. at 30. But this contention both ignores the trial court's contextual analysis of the five *White* factors and is overbroad with respect to the financial relationship factor. As to the latter, a lesser degree of financial integration than is demonstrated by the undisputed facts in the present case may well be insufficient to confer immunity. *See Miami Nation Enters.*, 386 P.3d at 377-78 (discussing evidence suggesting that a very small percentage of revenue, possibly as low as 1%, flowed from the tribal entity defendant to the tribe). Likewise, Appellant's concern that tribes could purchase "multiple franchise stores in multiple states and avoid any litigation," thereby receiving a "financial windfall," Opening Br. at 30, is pure speculation and ignores the capacity of the *White* test to root out tribal entities lacking the requisite close nexus to qualify as an arm of a tribe. When viewed in context, the high degree of

financial interconnection between the Tribe and Similk is consistent with the close overall relationship between the Tribe and Similk demonstrated through application of the four other *White* factors.

There would exist some risk to the Tribe's treasury if Similk were found to be subject to suit notwithstanding the Tribe's immunity. There is no doubt that the Tribe has invested substantially in Similk, beginning with the initial purchase in 2013 and continuing to this day with the Tribe's annual capital investment. If Appellant's claims were allowed to proceed, Tribal investments in Swinomish Golf Links, revenue from golf course operations and marketing tie-ins with the Casino could be at risk. While Similk's finances may currently be tenuous and its financial benefits to the Tribe uncertain, it is clear that Similk and the Casino "interconnect financially," thereby supporting a finding of immunity. *Cain*, 2018 WL 2272792 at *4.

As Justice Madsen observed in her concurrence in *Wright*, even though "the immunity the tribe enjoys would prevent it

from being held legally responsible for any of the [tribal] corporations' obligations in any event, this is not the end of the inquiry. Any liability imposed on the corporations could still affect the tribe's finances." 159 Wn.2d at 123-24. Other courts have similarly recognized, in light of the challenges tribes often experience generating governmental income, that "[i]f a significant percentage of the entity's revenue flows to the tribe . . . this [financial relationship] factor will weigh in favor of immunity even if the entity's liability is formally limited." *Miami Nation Enters.*, 386 P.3d at 856; *see also Breakthrough*, 629 F.3d at 1194-95 (finding in favor of immunity on the financial relationship factor based on testimony that an adverse judgment causing "any reduction" in revenue would "reduce the Tribe's income" where 100% of the casino's revenue went to the tribe). Here, while the risk may be modest compared to tribal entities that generate more revenue, liability against Similk poses a risk to the Casino's, and therefore the Tribe's, financial resources.

In sum, the highly integrated financial relationship of Similk, the Casino, and the Tribe warrants a finding of immunity under the final *White* factor. *See Wright*, 159 Wn.2d at 124 ("Immunity of [a tribal corporation] directly protects the sovereign tribe's treasury and thus serves one of the primary purposes of sovereign immunity.") (Madsen, J., concurring).

F. Conclusion on Arm of the Tribe Analysis.

All five *White* factors support the trial court's ruling that the Tribe's sovereign immunity extends to Similk as an arm of the Tribe.[8] The ownership, governance structure, management, and financial integration with the Casino and the Tribe's

[8] Appellant's final argument is that Mr. Howson has no alternative to a tort suit in the Superior Court. Opening Br. at 31-32. However, unlike other civil rules, *e.g.,* CR 19, dismissal of claims under CR 12(b)(1) and the arm of the tribe analysis does not involve consideration of whether an alternative forum exists. *See Miami Nation Enters.*, 386 P.3d at 859 ("In every instance where some form of immunity bars suit, an alleged wrong will go without a remedy.") (collecting cases). Rather, the immunity analysis turns on whether, based on the record, a tribal entity "ha[s] a sufficiently close relationship to [its] respective tribe[] to warrant the protection of sovereign immunity." *Id.*

governing body is complete and essential to the continuing operations of Swinomish Golf Links. Accordingly, the Court should affirm the trial court's finding that Similk is immune from unconsented suit. VRP 25.

III. THE TRIBE HAS NEVER WAIVED SIMILK'S SOVEREIGN IMMUNITY FOR PURPOSES OF TORT CLAIMS IN STATE COURT.

After arguing in the trial court that Similk waived immunity, CP 219, 231, Appellant failed to challenge the trial court's ruling that "[t]here has not been an explicit or unequivocal waiver." VRP 25. Accordingly, as an initial matter, any challenge to the trial court on the waiver issue cannot be raised in Appellants' reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."). Notwithstanding Appellant's failure to raise waiver in the opening brief, Similk addresses the issue as follows.

Courts have established a high bar to finding waiver of tribal sovereign immunity, and Mr. Howson cannot satisfy the exacting standard. "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney*, 255 F.3d at 811. A tribe is immune from suit in state and federal court absent an unequivocal expression of waiver. *Santa Clara Pueblo*, 436 U.S. at 589.

Appellant's extremely limited waiver argument in the trial court first rested on Similk's obligation to purchase a liability insurance policy under the MSA. CP 219, 231. However, insurance coverage is a necessity due to the risk of liability from business activities in a modern economy, not an explicit decision to subject a tribal entity to proceedings in which liability could be established. *See Breakthrough*, 629 F.3d at 1195 n.16 (casting doubt on whether insurance policies protecting the tribal entity defendant weigh against a finding of immunity).

Second, Appellant argued below that Similk had waived its immunity by acknowledging in the Articles of Incorporation

the powers granted to Similk – and all other Washington state law corporations – which include the power to sue and be sued in the courts of Washington state. CP 219. Appellant never explained how such an indirect reference to a general state law could qualify as an explicit waiver without an officer of Similk – acting pursuant to authority delegated by a written resolution or ordinance of the Swinomish Senate – expressly acting to effect such a waiver. "A 'sue and be sued' provision that authorizes a tribal entity to consent to suit does not constitute a waiver of immunity absent evidence that a tribal official has invoked that power." *Wright*, 159 Wn.2d at 121 n.7 (Madsen, J., concurring). Moreover, Appellant conceded before the trial court that *White* forecloses an argument that waiver can be found by incorporating under state law. CP 221. Accordingly, Appellant never demonstrated express and unequivocal waiver under either theory, and the trial court's ruling on waiver should be affirmed.

CONCLUSION

With a clear Tribal purpose established by the amended

Articles of Incorporation and thoroughly integrated management, governance, and finances from the inception of Tribal ownership in 2013, Similk is controlled by and functions as an arm of the Swinomish Tribe and shares the Tribe's immunity, barring Appellant's lawsuit. Further, because neither Similk nor the Tribe have taken any action explicitly or unequivocally waiving sovereign immunity, the trial court's order dismissing this case under CR 12(b)(1) should be affirmed.

Pursuant to RAP 18.17(b), (c)(2), the undersigned certifies that the Brief of Respondents contains 11919 words excluding the sections specified in the rule.

Respectfully submitted this 24th day of May, 2023.

Brian C. Gruber WSBA #32210
Anna E. Brady WSBA #54323
Ziontz Chestnut
2101 4th Avenue, Suite 1230
Seattle, WA 98121
Phone: 206-448-1230
Fax: 206-448-0962
bgruber@ziontzchestnut.com

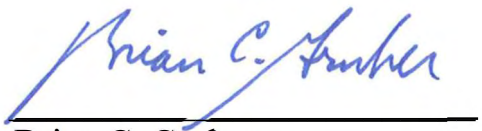
abrady@ziontzchestnut.com

Attorneys for Similk, Inc. d/b/a Swinomish Golf Links

DECLARATION OF DOCUMENT FILING AND SERVICE

I, Brian C. Gruber, declare under penalty of perjury under the laws of the State of Washington, that on this 24th day of May, 2023, I caused the foregoing Brief of Respondent to be filed in the Court of Appeals, Division I, and a true and correct copy of the same to be served electronically on the parties via the Appellate Court's Electronic Filing Portal.

Dated this 24th day of May, 2023.



Brian C. Gruber
WSBA No. 32210

APPENDIX 1

Restatement of the Law of American Indians § 54

Restatement of the Law - The Law of American Indians | March 2023 Update

Restatement of The Law of American Indians

Chapter 4. Tribal Economic Development

SUBCHAPTER. *2— INDIAN TRIBES AS ECONOMIC ACTORS*

§ 54 Sovereign Immunity of Corporations and Other Business Associations Formed by Indian Tribes Pursuant to State Law

(a) A corporation or other business association formed pursuant to state law by an Indian tribe or a tribe-created entity with sovereign immunity has sovereign immunity from suit when engaged in business enterprises within or outside of Indian country only if:

(1) the state law under which the corporation or business association is formed does not render the entity subject to suit;

(2) the tribe or a tribe-created entity with sovereign immunity controls the corporation or business association by, for example, holding power to appoint or discharge its governing body;

(3) the tribe or a tribe-created entity with sovereign immunity owns the corporation or business association; and

(4) either:

(A) a substantial portion of the net revenues earned by the corporation or business association inures to the tribe; or

(B) the corporation or business association is, pursuant to state law, not for profit and provides government services to the tribe or its members.

(b) A corporation or other business association with sovereign immunity under subsection (a) will nevertheless be subject to suit if its sovereign immunity is expressly abrogated by Congress or by properly authorized tribal waiver.

Comment:

a. Corporate form immaterial. As set forth in Comment *a* to § 53, an Indian tribe or a tribal entity with sovereign immunity may form a corporation or other business association that has sovereign immunity. The act of incorporating the entity, whether pursuant to state or tribal law, does not alone deprive the entity of tribal sovereign immunity.

b. Commercial or governmental purpose immaterial. As set forth in Comment *b* to § 53, there is no "commercial activity" exception to tribal sovereign immunity. This is true whether a tribe engages in an economic enterprise through a corporation or other business association created pursuant to tribal law or pursuant to state law.

c. State law rendering corporation or business association subject to suit. If a state law under which a tribe or a tribal entity forms a corporation or other business association clearly renders the corporation or business association subject to suit, the corporation or business association will lack sovereign immunity. Otherwise, a state corporation or other business association formed by an Indian tribe or tribal entity with sovereign immunity will have sovereign immunity only if the conditions set forth in Comment *d*, and either Comment *e* or Comment *f*, are met.

d. Tribal ownership and control. A corporation or other business association formed by an Indian tribe or other tribal entity pursuant to state law will not have sovereign immunity unless the tribe, or a tribal entity with sovereign immunity, owns and controls the corporation or business association. The requisite ownership and control may be satisfied under the standards set forth in Comments *c* and *d* to § 53.

e. Generation of tribal governmental revenues. Except as provided in Comment *f*, a corporation or other business association formed by an Indian tribe or other tribal entity pursuant to state law will not have sovereign immunity unless a substantial portion of the net revenues generated by the corporation or other business association inures to the tribe. The requisite allocation of net revenues to the tribe may be satisfied under the standards set forth in Comment *e* to § 53.

f. Nonprofit corporation providing governmental services. If state law does not clearly render a corporation subject to suit (see Comment *c*) and an Indian tribe or tribal entity with sovereign immunity from suit owns and controls the corporation (see Comment *d*), a nonprofit corporation formed by an Indian tribe or a tribal entity pursuant to state law will have sovereign immunity if the corporation provides governmental services, such as health or education services, to the tribe or tribal members.

Reporters' Notes

*Comment a. Corporate form immaterial.*A tribe may engage in economic enterprises by forming corporations or other business associations under tribal law, and those entities will have sovereign immunity from suit if certain conditions are met. See § 53. Use of a corporate form under state law likewise will not, by itself, deprive a corporation or other business association established by an Indian tribe of sovereign immunity. Numerous courts have held that state corporations or other business associations formed by Indian tribes to generate tribal governmental revenues and further tribal governmental goals have sovereign immunity. E.g., Cain v. Salish Kootenai Coll., Inc., 2018 WL 2272792, at *4 (D. Mont. May 17, 2018) (tribal college incorporated under tribal law and state law immune from suit as arm of tribe; "fact that the Tribe avoids liability for any judgment against the College due to the fact the College operates as a corporation with a separate legal status" does not preclude sovereign immunity); Rassi v. Fed. Program Integrators, LLC, 69 F. Supp. 3d 288 (D. Me. 2014) (Maine limited-liability company owned by IRA Section 17 corporation to promote tribal economic development and reservation employment has sovereign immunity); J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163 (D.S.D. 2012) (South Dakota nonprofit corporation formed by 16 tribes to interact with federal agencies for purpose of administering health services for tribal members has sovereign immunity); Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 658 N.E.2d 989, 993 (N.Y. 1995) (District of Columbia nonprofit corporation formed by tribe to contract for and provide social services to tribal members has sovereign immunity). See also EEOC v. Navajo Health Found.-Sage Mem'l Hosp., Inc., 2007 WL 2683825 (D. Ariz. Sept. 7, 2007) (nonprofit corporation formed under Arizona law by eight Navajo chapters to serve the medical needs of tribal members considered "Indian tribe" not subject to federal employment-discrimination claims); Giedosh v. Little Wound School Bd., Inc., 995 F. Supp. 1052 (D.S.D. 1997) (same for nonprofit corporation organized under state law to administer tribal school). The Ninth Circuit, citing *Ransom*, has pointed out that "a tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so." Am. Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091, 1099 (9th Cir. 2002), as amended on denial of reh'g (July 29, 2002) (citing, inter alia, Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 658 N.E.2d 989, 994-995 (N.Y. 1995) (holding that nonprofit corporation formed by Indian tribe under state law has sovereign immunity)). But see Somerlott v. Cherokee Nation Distribs., Inc., 686 F.3d 1144, 1149-1150 (10th Cir. 2012) (entities formed under state law "which are legally distinct from their members and which voluntarily subject themselves to the authority of another sovereign

which allows them to be sued" lack sovereign immunity) (dicta); see also id. at 1155-1156 (Gorsuch, J., concurring) (suggesting that if a tribe forms a corporation or business association under state law, the entity will not have sovereign immunity) (dicta).

Comment b. Commercial or governmental purpose immaterial. The sovereign immunity of corporations and other business associations formed by Indian tribes and other tribal entities does not turn on whether the purpose of the corporation or business association is "commercial" or "governmental." See § 53, Comment *b* and Reporters' Note thereto. This is no less true for corporations or other business associations formed by Indian tribes or other tribal entities under state law. See *Rassi*, 69 F. Supp. 3d at 291 (Maine limited-liability company formed under 25 U.S.C. § 477 (now codified at § 5124) to work as subcontractor for federal construction projects and thereby generate reservation employment opportunities and revenues for Penobscot Nation has sovereign immunity); *J.L. Ward Assocs., Inc.*, 842 F. Supp. 2d at 1177 (South Dakota nonprofit corporation formed by 16 tribes to interact with federal agencies for administration of health services for tribal members has sovereign immunity). See also Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1187 (9th Cir. 1998) (nonprofit corporation formed to administer health services for tribes considered an "Indian tribe" not subject to federal employment-discrimination claims). But see Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 495 (7th Cir. 1993) (in case involving application of federal law to employment matter, describing the reservation health clinic owned and operated by an Indian tribe at issue in Smart v. State Farm Ins. Co., 868 F.2d 930 (7th Cir. 1989) as a "routine activit[y] of a … service character …, rather than of a governmental character").

Comment c. State law rendering corporation or business association subject to suit. As in the case of tribal law governing tribal corporations or other business associations (see Comment *g* to § 53 and related Reporters' Note) or tribal housing authorities (see Comment *c* to § 51 and related Reporters' Note), state law governing corporations or other business associations may render such entities subject to suit. See generally A. Craig Carter, *Is Sue and Be Sued Language A Clear and Unambiguous Waiver of Immunity?*, 35 St. Mary's L.J. 275 (2004) (discussing construction of "sue and be sued" language in state laws governing corporations and other business associations). If an Indian tribe or other tribal entity invokes such a state law to form a state corporation or other business association, the entity will not have sovereign immunity. See *Somerlott*, 686 F.3d at 1150 (suggesting that Oklahoma limited-liability company formed by tribal corporation would not have sovereign immunity under Oklahoma law, citing and quoting Okla. Stat. tit. 18, § 2003(1) ("Each limited liability company may … [s]ue, be sued, complain and defend in all courts ….")) (alterations in original) (dicta). On the other hand, if state law merely enables a corporation to sue or be sued, without mandating that it is subject to suit, the state law will not deprive such a corporation formed by an Indian tribe of sovereign immunity. See *Ransom*, 658 N.E.2d at 992 (holding that nonprofit corporation formed by tribe under law of the District of Columbia had sovereign immunity; the D.C. law provided that nonprofit corporations "shall have power … [t]o sue and be sued, complain and defend, in its corporate name"). See also William C. Canby, Jr., American Indian Law in a Nutshell 121-122 (7th ed. 2020) ("[I]ncorporation of a tribal subentity under state laws enabling corporations to sue and be sued does not waive immunity") (citing Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 658 N.E.2d 989, 993-995 (N.Y. 1995)).

Comment d. Tribal ownership and control. As in the case of corporations or other business associations formed under tribal law (see Comments *c* and *d* to § 53 and related Reporters' Notes), corporations or other business associations formed under state law will not have sovereign immunity unless such an entity is owned and controlled by an Indian tribe or by a tribal entity with sovereign immunity. Courts that have found state corporations or other business associations to have tribal sovereign immunity have pointed to such tribal ownership and control as dispositive factors. See *Rassi*, 69 F. Supp. 3d at 291-292 (corporation formed under 25 U.S.C. § 477 (now codified at § 5124) was sole member of Maine limited-liability company, appointed the company's board of directors, "and permanently reserved for itself seats on the board for at least two of its own board members"); *J.L. Ward Assocs., Inc.*, 842 F. Supp. 2d at 1176 (nonprofit corporation "governed almost exclusively by tribally-elected presidents or chairpersons"); *Ransom*, 658 N.E.2d at 993 ("under its by-laws, [the corporation's] governing body may only be comprised of elected Chiefs of the Tribe"). The California Court of Appeal rejected arguments that a California limited-liability company was imbued with tribal sovereign immunity when the company was wholly owned by a separate California limited-liability company and not a tribal entity with sovereign immunity. See Am. Prop. Mgmt. Corp. v. Superior Court, 141 Cal. Rptr. 3d 802, 805 (Ct. App. 2012). Courts have similarly held that Alaska Native Corporations, private corporations formed under state law and owned by individuals in accord with the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1610-1629h (2018),

do not have sovereign immunity. See Aleman v. Chugach Support Servs., 485 F.3d 206, 213 (4th Cir. 2007); Pearson v. Chugach Gov't Servs., Inc., 669 F. Supp. 2d 467, 469 n.4, 474 n.13 (D. Del. 2009).

Comment e. Generation of tribal governmental revenues. As in the case of corporations or other business associations formed under tribal law (see Comment *e* to § 53 and related Reporters' Note), corporations or other business associations formed under state law should have sovereign immunity if, in addition to meeting the requirements of ownership and control by an Indian tribe or a tribal entity with sovereign immunity (see Comment *d*), a substantial portion of the net revenues generated by the entity inure to the tribe. See *Rassi*, 69 F. Supp. 3d at 291 (tribe formed Maine limited-liability company "to generate income for the Penobscot Nation, in lieu of a tax base").

Comment f. Nonprofit corporation providing governmental services. A nonprofit corporation that is owned and controlled by an Indian tribe or by a tribal entity with sovereign immunity, which does not generate net revenues for the tribe (see Comment *e*), may have sovereign immunity if the corporation provides governmental services for the tribe, such as health or education services to tribal members. See *J.L. Ward Assocs., Inc.*, 842 F. Supp. 2d at 1176 (nonprofit corporation's provision of "health care and related services to tribal members and member Indian tribes" viewed as "closer to the functions of a tribal government than a business"); *Ransom*, 658 N.E.2d at 993 (nonprofit corporation "was established to enhance the health, education and welfare of Tribe members, a function traditionally shouldered by tribal government"). See also *Rassi*, 69 F. Supp. 3d at 291 (tribe formed Maine limited-liability company "to advance its governmental objectives of creating employment opportunities on the Penobscot reservation"). But see Runyon v. Ass'n of Vill. Council Presidents, 84 P.3d 437 (Alaska 2004) (nonprofit Alaska corporation formed by 56 Alaska Native villages to provide social services to tribal members did not have sovereign immunity in tort claim brought by parents of child allegedly injured in Head Start program; determinative factor was whether liability for a judgment would be imposed directly upon the tribes).

ZIONTZ CHESTNUT

May 24, 2023 - 4:08 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84628-1
Appellate Court Case Title:	Richard Howson, Appellant v. Similk Inc. d/b/a Swinomish Golf Links, Respondent
Superior Court Case Number:	22-2-00639-3

The following documents have been uploaded:

- 846281_Briefs_20230524154849D1746312_3946.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Response Brief 5.24.2023 FINAL.pdf

A copy of the uploaded files will be sent to:

- abrady@ziontzchestnut.com
- chazzard@ziontzchestnut.com
- mail@robeynambalaw.com
- philip@burifunston.com

Comments:

Sender Name: Laura Bartholet - Email: lbartholet@ziontzchestnut.com
Filing on Behalf of: Brian Cammiade Gruber - Email: bgruber@ziontzchestnut.com (Alternate Email:)

Address:
2101 4th Avenue, Suite 1230
Seattle, WA, 98121
Phone: (206) 448-1230

Note: The Filing Id is 20230524154849D1746312