No. 17-024.

In The

Supreme Court of the Yuma Indian Nation

YUMA INDIAN NATION,

Appellee,

v.

THOMAS SMITH & CAROL SMITH

Appellants,

On Writ of Certiorari to the Supreme Court of the Yuma Indian Nation

BRIEF FOR APPELLANTS

Team 116

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES CASES:

UNITED STATES COURTS OF APPEAL CASES:

STATE COURT CASES:

FEDERAL STATUTES:

TRIBAL STATUTES:

QUESTIONS PRESENTED

1. While federal courts defer to tribal courts' interpretations of their own jurisdiction, the validity of tribal court jurisdiction is a federal question under 28 U.S.C. § 1331, thus properly before a federal district court. The contracts at issue include choice of forum language suggesting no need to exhaust tribal court remedies before proceeding to federal court on the jurisdictional questions. Does the YIN have the exclusive right to determine whether the Smiths are properly under tribal court jurisdiction, or can this question be before the Federal District Court of Arizona?

2. Sovereign immunity does not preclude suits against tribal entities when those entities clearly waive such immunity, or if a tribal employee's actions exceed the scope of her delegated authority. A clear waiver may be found when a tribe initiates a suit, or a tribal corporation consents to being sued; or if a tribal employee exceeds her delegated authority. The YIN initiated a suit against the Smiths, the YIN EDC's charter authorizes it to "be sued," and the EDC employees did not have the authority to defame the Smiths. Are the Smiths' claims against these parties barred by sovereign immunity?

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Thomas Smith began working with the Yuma Indian Nation (YIN) as a financial advisor for the Nation's economic development efforts in 2007. R. at 1. Per the terms of his contract, Thomas Smith had to maintain "absolute confidentiality regarding any and all tribal communications and economic development plans." *Id.* The contract contained a choice of forum provision, stating that "any and all disputes arising from the contract [are] to be litigated in a court of competent jurisdiction." *Id.* The parties signed the contract at Thomas Smith's place of business in Phoenix, Arizona. *Id.* Thomas Smith is also a resident of Phoenix. *Id.*

For the next ten years, Thomas Smith provided financial advice to the Nation almost daily through email and telephone communication with high ranking tribal officials, as well as the CEO of the Nation's Economic Development Corporation (EDC), Fred Captain, and EDC accountant Molly Bluejacket. *Id.* Thomas Smith also made quarterly reports for the YIN Tribal Council that he presented in person on the reservation. *Id.*

The YIN is incorporated under Section 17 of the Indian Reorganization Act (IRA). 25 U.S.C. § 477 (2012); R. Supp. at question 4. The YIN founded the EDC in 2009 as "a wholly owned subsidiary of the Nation and as an 'arm of the tribe.'" *Id.* Its purpose is to explore and develop commercial opportunities for the Nation both on the reservation and in southwestern Arizona in general. *Id.* The EDC's corporate charter includes language authorizing it "to sue and be sued." *Id.* at 2.

Thomas Smith, acting with "written permission from the Nation's Tribal Council," "signed a contract with his sister," Carol Smith, for her services as a licensed stockbroker both

to the EDC and to the Nation. *Id.* The contract Carol Smith signed in 2010 is identical to Thomas Smith's 2007 contract, but it further includes a provision that "both parties are to comply with the YIN-Thomas contract." *Id.* Carol Smith is a resident of Portland, Oregon, which is also her primary place of business. *Id.*

Unlike Thomas Smith, Carol Smith conducted all of her work for the Nation via her brother in the form of email, telephone, and written communication. *Id.* The only direct communication she had with the EDC or the Nation is through the monthly billing statements she sends to the EDC CEO, Fred Captain. *Id.* Carol Smith has only visited the reservation twice, and both times were for vacation purposes. *Id.* While she did not have significant direct contact with the Nation, Thomas Smith did forward tribal communications to her with some regularity. *Id.*

The EDC began considering the potential viability of unrestricted marijuana cultivation and use as an economic development engine in 2016, with the occasional help of Thomas Smith. *Id.* The Smiths morally oppose marijuana cultivation, and did not want to be involved. *Id.* Subsequently, Thomas Smith told the Arizona Attorney General that the Nation planned to begin cultivating marijuana for unrestricted use, which resulted in the Nation receiving a cease and desist letter from the Arizona Attorney General in relation to recreational marijuana. *Id.*

STATEMENT OF THE PROCEEDINGS

The YIN Tribal Council sued Thomas and Carol Smith in YIN Tribal Court for "breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality," seeking liquidated damages as specified in the contract. *Id.* at 3. The Smiths made special appearances, both to file identical motions to dismiss for the YIN Court's lack of personal and subject matter jurisdiction over them, and, alternately, to have the Federal District Court of

Arizona determine whether tribal jurisdiction was proper. *Id.* Both motions were denied by the trial court. *Id.* The Smiths then answered and counterclaimed for defamation and monies owed, continuing under their existing special appearances. *Id.* The Smiths then impleaded the EDC, its CEO, and its accountant, in both their individual and official capacities. *Id.* The trial court dismissed all claims and counterclaims on sovereign immunity grounds. *Id.* The Smiths then filed an interlocutory appeal asking the YIN Supreme Court to decide certain issues, and to order a stay of the suit at the trial level. *Id.*

SUMMARY OF THE ARGUMENT

The Smiths do not need to exhaust their remedies in the YIN Tribal Court before they are entitled to a determination in federal district court regarding whether subject matter and personal jurisdiction are proper. The language in the contracts between the YIN and Thomas Smith, and Thomas and Carol Smith, respectively, includes a forum selection clause allowing for a "court of competent jurisdiction" to hear any litigation arising from the contracts. Such language, however, has previously been held by the Eighth Circuit Court of Appeals to preclude the necessity of exhaustion in tribal court because the contracting parties agreed a suit could be filed in "a" court of competent jurisdiction rather than specifically in tribal court. *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995). Therefore, this Court should stay the proceeding and allow the Smiths to appeal to the Federal District Court of Arizona for a determination of whether subject matter and personal jurisdiction is proper in YIN Tribal Court.

In the alternative, the YIN Tribal Court does not have personal jurisdiction over Carol Smith because the Nation's contacts with her fall short of satisfying the Nation's statutory standard. YIN Tribal Code § 1-104 (2)(a) gives the Nation personal jurisdiction over persons who "transact[ ], conduct[ ], or perform[ ] any business or activity within the reservation, either in person or by agent or representative, for any civil cause of action or contract . . . ." Unlike Thomas Smith, Carol Smith has never conducted any business on the YIN Reservation, has had almost no business-related contact with the Nation, and is not a resident of the YIN Reservation or the State of Arizona. Furthermore, because Carol Smith is a non-Indian living outside of the YIN Reservation, the Nation's jurisdiction over her is limited to instances that satisfy one of the two *Montana v. United States* exceptions. Because neither *Montana*

exception applies, the YIN Tribal Court lacks sufficient jurisdictional contacts to assert personal jurisdiction over Carol Smith.

The YIN, YIN EDC, and EDC employees Fred Captain and Molly Bluejacket incorrectly assert that the Smiths' claims against them are barred by sovereign immunity. First, sovereign immunity does not bar the Smiths' official capacity claims against the EDC employees Captain and Bluejacket because these employees acted outside of the scope of their delegated authority when they breached the contract and defamed the professional reputation of the Smiths. The Smiths' individual capacity claims against these employees are also not precluded by sovereign immunity. In these individual capacity claims, Captain and Bluejacket are the actual parties in interest, rather than the YIN. Thus, as individuals, they are not entitled to the protection of sovereign immunity. Further, the Smiths' claims against Captain and Bluejacket are not precluded under the doctrine of qualified immunity. The defense of qualified immunity is not available when the actions of government employees violate clearly established rights of which a reasonable person would have been aware. By baselessly defaming the Smiths, the EDC employees violated a clearly established right of which they should have been aware.

Sovereign immunity does not preclude the Smiths' claims against the EDC as an entity. The "sued and be sued" language in the EDC's charter expressly waives the right to sovereign immunity for suits relating to its corporate endeavors. Since the Smiths' claims against the EDC relate to corporate, rather than political, activities they are not barred by sovereign immunity.

Lastly, the Smiths' counterclaims against the YIN itself are not barred by sovereign immunity because these counterclaims sound in recoupment. By initiating a suit against the

Smiths, the YIN expressly waived the defense of sovereign immunity for counterclaims in recoupment. The Smiths counterclaims against the YIN meet the elements for recoupment because they arise out of the same transaction as the original suit, seek the same type of relief, and do not seek an amount in excess of that sought by the YIN.

ARGUMENT AND AUTHORITIES

I. THE YIN SUPREME COURT SHOULD STAY THE PROCEEDING PENDING A JURISDICTIONAL DETERMINATION FROM THE FEDERAL DISTRICT COURT OF ARIZONA, OR, ALTERNATELY, THE YIN DOES NOT HAVE PERSONAL JURISDICTION OVER CAROL SMITH.

While civil plaintiffs in tribal courts must typically exhaust tribal remedies before being able to appeal jurisdictional claims to federal court, there are exceptions. *See generally Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). One such exception pertains to choice of forum language in contract disputes. *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995). Because of the choice of forum language in the disputed contracts, the Smiths are not required to exhaust their possible remedies in YIN Tribal Court before appealing to the Federal District Court of Arizona on their jurisdictional claims. In the alternative, the YIN Tribal Court does not have personal jurisdiction over Carol Smith because it does not have sufficient evidence to satisfy any of the Nation's statutory personal jurisdiction categories. *See* YIN Tribal Code § 1-104 (2)(a) (2005).

The United States federal courts apply a *de novo* standard of review for questions of whether tribal court jurisdiction is proper. *See, e.g.*, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311(9th Cir. 1990). The YIN Tribal Code makes no declaration of a different standard of review, and, per YIN Tribal Code § 1-110, if the YIN Code and case law are silent on the issue, federal statutory and case law applies. *FMC*, 905 F.2d at 1311. This Court should stay the proceeding pending a determination by the Federal District Court of Arizona, or, in the alternative, rule that the YIN Tribal Courts do not have personal jurisdiction over Carol Smith.

A. The YIN Supreme Court Should Stay the Proceedings Pending a Decision from the Federal District Court of Arizona because the Smiths' Subject Matter Jurisdiction Challenges are Properly Before that Court.

The Smiths need not exhaust their remedies in the YIN Tribal Court because the choice of forum language in the contracts being disputed indicates that suits arising from the contract may be litigated in "a court of competent jurisdiction." R. at 1. The U.S. Supreme Court has recognized that whether tribal civil adjudicatory jurisdiction is proper is a federal question under 28 U.S. § 1331, but the Court deferred to tribal court jurisdictional determinations until all tribal court remedies are exhausted. *Nat't Farmers Union Ins. Cos.*, 471 U.S. at 856. The Smiths may appeal to the appropriate federal district court for a decision on whether tribal jurisdiction is proper because choice of forum language in contracts is an exception to the typical tribal court remedy exhaustion requirement. *See FGS Constructors, Inc.*, 64 F.3d at 1233. Thus, this Court should stay the proceeding in YIN Tribal Court pending the outcome in the Federal District Court of Arizona.

1. Tribal exhaustion doctrine does not have to be met if there is choice of forum language in the contract.

The U.S. Supreme Court requires that tribal courts first be allowed to evaluate challenges to their jurisdiction because of the federal interest in supporting tribal self-governance. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856. The Court reaffirmed this position in *Iowa Mutual Insurance Co.,* stating that "at a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." 480 U.S. at 16. Additionally, the Court recognized that this policy also promotes judicial economy by allowing federal courts to rely on a fully developed record from the tribal court. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856-7. The doctrine of comity, the reciprocal

beneficial relationship between sovereigns, also supports the primacy of tribal court interpretations of their own jurisdictional laws. *See Iowa Mutual Ins. Co.,* 480 U.S. at 15 fn. 5.

Nevertheless, the U.S. Supreme Court and the federal circuit courts recognize that there are exceptions to the tribal remedy exhaustion requirement set forth in *National Farmers Union Insurance Cos.* and *Iowa Mutual Insurance Co.*. The Court in *National Farmers Union Insurance Cos.* identified three foundational exceptions to the exhaustion requirement: first, that exhaustion is not required if the assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith;" if the "action is patently violative of express jurisdictional prohibitions; or, lastly, "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." 471 U.S. 845, 856 n. 21 (internal quotations omitted). Essentially, if for some reason exhausting tribal court remedies is unfair or the tribal court is claiming jurisdictional authority it clearly does not have, then exhaustion is not required. *See id.*

Subsequent federal circuit courts have identified additional exceptions to the tribal court exhaustion requirement, including cases involving choice of forum clauses in contracts. The case on point for contractual disputes pertaining to choice of forum is *FGS Constructors, Inc.*. *See generally* 64 F.3d 1230. In that case, a subcontractor sued a consulting firm employed by the tribe, the tribe, and the BIA for breach of contract. *See id.* at 1232. The contract contained a choice of forum provision that stated "[i]n the event there is any dispute between the parties arising out of this agreement, it shall be determined in the Oglala Sioux Tribal Court or other court of competent jurisdiction." *Id.* at 1233. The Eighth Circuit held that because of this forum selection clause, "the [Oglala Sioux] Tribe agreed that disputes need not be litigated in tribal court." *Id.* Therefore, unlike in the preceding U.S. Supreme Court cases *National*

Farmers Union Insurance Cos. and *Iowa Mutual Insurance Co.*, "the district court . . . had no significant comity reason to defer this . . . litigation first to the tribal court," even though the Eighth Circuit agreed that the federal court did not have exclusive subject matter jurisdiction over this federal question. *Id.*

The rule in *FGS Constructors, Inc.* should be applied here because the contracts between the YIN and the Smiths contain almost identical choice of forum clauses as those in *FGS Constructors, Inc.*. The two contracts at issue both contain the same clause: "any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." R. at 1, 2. The "court of competent jurisdiction" language that was determinative in *FGS Constructors, Inc.* is also present in the Smiths' contracts. 64 F.3d at 1233. Thus, the Smiths should not be forced to exhaust tribal court remedies before having their claims heard in federal court.

2. The Federal District Court of Arizona can properly hear questions of tribal subject matter jurisdiction.

The U.S. Supreme Court has held that, due to federal plenary power over Indians, "[t]he question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331." *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 852. Furthermore, in *Iowa Mutual Insurance Co.*, the Court affirmed the *National Farmers Union Insurance Cos.* decision in relation to federal question jurisdiction, and then held that the validity of tribal jurisdiction is still a justiciable argument under diversity jurisdiction. 480 U.S. at 16. While the Court has held that tribes should have "the first opportunity to evaluate the factual and legal bases for the challenge," tribes do not necessarily have exclusive jurisdiction over what civil cases are heard in their courts. *Nat'l Farmers Union Ins. Cos.*, 471

U.S. at 856. Rather, it is merely due to the principle of comity and the general federal policy to "support tribal self-government" that tribes are the first court to evaluate whether their civil adjudicatory jurisdiction is proper. *Id.*

The question of whether the YIN has valid jurisdiction is properly before the Federal District Court of Arizona under federal question jurisdiction because the Smiths are challenging the lawsuit brought against them in the Nation's tribal court for lack of subject matter jurisdiction. The Smiths are non-Indians transacting with an Indian tribe under a contract which does not specify that contractual disputes must be brought in tribal court. R. at 1-2. Subsequently, like the petitioners in *National Farmers Union Insurance Cos.* and *Iowa Mutual Insurance Co.*, the Smiths are questioning the validity of the Nation's subject matter jurisdiction over the dispute as it pertains to both Thomas and Carol Smith individually. R. at 3. Because the U.S. Supreme Court has determined that whether tribal jurisdiction is proper is a federal question, the Smiths' interlocutory appeal to the Federal District of Arizona is proper per 28 U.S.C. § 1331.

B. In the alternative, the YIN Court System does not have sufficient contacts with Carol Smith to establish personal jurisdiction.

A tribe can only exert jurisdiction over non-Indians living off-reservation under exceptional circumstances. *See Montana v. U.S.*, 450 U.S. 544 (1981). Absent sufficient evidence to support either one of the statutory methods by which the Nation has personal jurisdiction over an individual, or one of the two exceptions from *Montana*, the YIN does not have personal jurisdiction over a non-member residing off-reservation. See YIN § 1-104 (2005). The YIN fails to prove any such exceptional circumstance, and, as a result, the YIN does not have personal jurisdiction over Carol Smith.

1. YIN Code § 1-104(2)(a) controls determinations of tribal court personal jurisdiction.

Section 1-104 of Title 1 of the YIN Tribal Code governs determinations of personal jurisdiction in YIN Court. It states, in relevant part:

> [s]ubject to any limitations expressly stated elsewhere in this Code, the Courts of the Tribe shall have jurisdiction over the following persons: (a) [a]ny person who transacts, conducts, or performs any business or activity *within the reservation,* either in person or by agent or representative, for any civil cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud.

YIN Code § 1-104 (2)(a) (2005) (emphasis added).[1] U.S. Supreme Court jurisprudence in *National Farmers Union Insurance Cos.* and *Iowa Mutual Insurance Co.* indicates that tribal law should be applied first to determine whether the case is properly before that tribal court because it promotes federal interests in efficiency and tribal self-determination. *Nat'l Farmers Union Ins. Cos.*, 471 at 856-7; *Iowa Mut. Ins. Co.*, 480 U.S. at 15-16. Subsequently, the YIN Tribal Code governs so long as tribal law is sufficient to answer the questions at bar. YIN Code § 2-111 (a)-(c) (2005).

Carol Smith has never transacted, conducted, or performed any business within the YIN Reservation, therefore the Nation does not properly have jurisdiction over her. Carol Smith, unlike Thomas Smith, is not a resident of Arizona. R. at 1, 2. Rather, Carol Smith lives and works in Oregon, and has only been to the YIN Reservation twice, both times recreationally. R. at 2. In contrast, Thomas Smith has daily contact with members of the Nation and employees of the EDC, in addition to going onto the reservation to give quarterly reports to the Tribal

[1] See Appendix 1 for the full language of the statutory provision, including the additional means of establishing personal jurisdiction in YIN Tribal Court.

Council. R. at 1. Carol Smith, on the other hand, has never been to the YIN Reservation for business, and communicates her advice to the Nation and to the EDC solely through her brother. R. at 2. While she does bill the EDC for her services, the fact that she has never "conduct[ed], transact[ed], or perform[ed] any business or activity within the reservation" means that the YIN Tribal Court does not properly have personal jurisdiction over her. As such, she cannot be sued in YIN tribal court.

2. The Montana *exceptions do not apply to Carol Smith.*

Tribal civil adjudicatory jurisdiction over non-members off-reservation is very limited. Commercial dealings, including signing contracts, are a form of off-reservation activity for which tribes may exert civil adjudicatory jurisdiction. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). Nevertheless, the U.S. Supreme Court in *Strate v. A-1 Contractors* held that tribal civil adjudicatory jurisdiction cannot exceed tribal civil regulatory jurisdiction for the purposes of non-member activity off-reservation. 520 U.S. 438, 453 (1997). Therefore, the test from *Montana* governs both types of civil jurisdiction. 450 U.S. at 565-66. As a result, the *Montana* test governs whether the YIN properly has civil adjudicatory jurisdiction over Carol Smith.

Under the holding in *Montana*, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The U.S. Supreme Court recognized two exceptions to this rule. *Id.* at 565-66. The first is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* The second exception is that a tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its

reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

Carol Smith did not enter into a consensual commercial relationship with the YIN because she merely signed a contract with her brother, not the Nation. R. at 2. Without further evidence of the language of the contract, and without further evidence of an agency relationship between Thomas Smith and the YIN, Thomas Smith cannot speak on behalf of the Nation, and he contracted with his sister to gain additional advice from a securities investment perspective. R. at 1-2. This argument is further supported by the fact that Carol Smith never communicated directly with the Nation, and instead worked directly with her brother. *Id.* Further, the fact that Carol Smith billed the EDC for her assistance to her brother is not strong evidence that she actually had a working relationship with the Nation or the EDC, but merely that she knew it was the correct account to bill. As a result, Carol Smith does not have a consensual business relationship with the YIN.

The second *Montana* exception fails because Carol Smith has not been working on the YIN Reservation. In order to meet the second exception, the conduct must be by "non-Indians on fee lands within the reservation." 450 U.S. at 566. Carol Smith does not and has never worked on the YIN Reservation. R. at 2. She has only been on the YIN Reservation twice, and both visits were recreational. *Id.*

As a result, the second *Montana* exception cannot control because even if there was evidence that her conduct had a direct effect on the "political integrity, the economic security, or the health and welfare of the tribe," Carol Smith has never worked within the bounds of the YIN Reservation. *Montana*, 450 U.S. at 566; R. at 2. Thus, because the YIN does not have civil regulatory jurisdiction over the off-reservation activities of non-Indians, the Nation does

not have civil adjudicatory jurisdiction either. *See Strate*, 520 U.S. at 453. Further, the plain language of the second *Montana* exception indicates that it specifically applies to regulation of nonmember owned fee land within a tribe's reservation. *See* 450 U.S. at 566. Thus, because Carol Smith does not live or work within the bounds of the YIN Reservation, the actions in question here cannot fulfill the requirements of the second *Montana* exception. Therefore, because no *Montana* exception applies and there is insufficient evidence to support proper statutory personal jurisdiction under the YIN Tribal Code, the YIN Tribal Courts do not properly have personal jurisdiction over Carol Smith.

II. NEITHER SOVEREIGN IMMUNITY NOR ANY OTHER TYPE OF IMMUNITY PROTECTS THE YIN, THE YIN EDC, OR THE EDC EMPLOYEES FROM THE SMITHS' CLAIMS.

While the doctrine of sovereign immunity shields tribal governments from litigation in certain circumstances, there are definite limits regarding how far this protection reaches. This case represents an example of claims against tribal entities that extend beyond the protection of sovereign immunity. Sovereign immunity provides no protection for the Smiths' claims against the EDC employees in their official capacity because the actions giving rise to the case at bar were beyond the scope of their delegated authority. Moreover, sovereign immunity also represents no bar to the Smiths' individual capacity claims against the EDC employees because the employees, rather than the Nation, are the actual parties in interest. Finally, qualified immunity constitutes no bar to the Smiths' claims against the employees of the YIN EDC because the actions of the employees violated clearly established rights of which a reasonable person would have been aware. In its *de novo* review, this Court should decide that neither sovereign immunity, nor any form of personal immunity, bars the Smiths' claims. *E.g.*, *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002)

Similar to other sovereigns, Indian tribes possess sovereign immunity from suit. This immunity, however, has limits. Specifically, Congress may abrogate tribal sovereign immunity, or a tribe may waive this immunity. *See Kiowa Tribe of Okla.*, 523 U.S. at 754. When Congress chooses to abrogate tribal sovereign immunity, its intention to do so must be "unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). If a tribe chooses to waive its sovereign immunity, it must do so "clearly." *See Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 489 U.S. 505, 509-10 (1991). If either of these conditions is met, then the Smiths must prevail on this issue. For the Appellees to prevail, they must establish that Congress has not abrogated their sovereign immunity from suit in this case, and that this immunity has not been waived by the Nation.

A. The Smiths' claims against Captain, Bluejacket, and the EDC are not barred by sovereign immunity or any personal immunity defense.

The sovereign immunity possessed by a tribe may extend to corporations chartered under its laws when the articles of incorporation specifically provide that the entity is immune from suit. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014). As with a tribe itself, a tribal corporation may waive this sovereign immunity and consent to be sued. *See Linneen*, 276 F.3d at 492. Some courts have held that employees of tribally owned businesses may also be entitled to sovereign immunity from suit when they are acting within the scope of their official duties. *See Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498, 503 (Conn. 2002). The application of sovereign immunity directly to the actions of individual tribal employees in their official capacities, however, has never been endorsed by the U.S. Supreme Court. Further, the U.S. Supreme Court recently ruled that sovereign immunity does not protect tribal employees

when they are sued in an individual capacity. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017).

1. Neither sovereign immunity nor qualified immunity bar the Smiths' claims against the YIN EDC employees.

In limited circumstances, employees of tribally owned businesses, acting in their official capacities, may be covered by tribal sovereign immunity or qualified immunity. Sovereign immunity, however, does not cover employees of tribal businesses when they are "acting as an individual or outside the scope of those powers that have been delegated to him." *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010). Recently, the U.S. Supreme Court clarified that even when the actions giving rise to the suit occurred during the course and scope of their employment, individual capacity suits against tribal employees are not barred by sovereign immunity. *See Lewis,* 137 S. Ct. at 1288. Generally, the U.S. Supreme Court has ruled that governmental employees are not entitled to qualified immunity if their actions violate clearly established rights "of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

a. Sovereign immunity does not bar the Smiths' claims.

Tribal sovereign immunity does not shield employees of tribal businesses when they are acting outside the scope of their delegated authority, or if they are sued in an individual capacity. *See Lewis*, 137 S. Ct. at 1288; *see also Burrell*, 603 F.3d at 832. Sovereign immunity will only cover employees of tribal businesses if the actions giving rise to the suit are within the scope of the employees delegated authority. *See Burrell*, 603 F.3d at 832. Even if an employee is acting within the scope of her employment during the events in question it is not "sufficient to bar a suit against that employee on the basis of sovereign immunity." *Lewis*, 137

S. Ct. at 1288. Additionally, sovereign immunity does not protect employees sued in an individual capacity because "the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Id.*

In *Burrell*, the Tenth Circuit Court determined that tribal officials being sued as individuals for discrimination were immune from suit due to tribal sovereign immunity. *See Burrell*, 603 F.3d at 827-8. In that case, the Governor of the Santa Ana Pueblo was sued as an individual relating to an incident in which the plaintiff alleged that he was wrongfully denied due compensation for the termination of a lease which he had with the tribe. *See id.* at 829. The court concluded that the tribal official was entitled to sovereign immunity, primarily due to the extremely broad nature of the authority that was delegated to him in his role as Governor. *See id.* at 832, 835. The court ruled that the question of immunity "hinges on the breadth of official power the official enjoys." *Id.* at 832. In *Burrell*, extensive evidence was presented at the trial court proving that as Governor of the pueblo, he was delegated very expansive authority. *See id.* For example, another high-ranking tribal official described the role of Governor in the following manner: "you're the commander-in-chief. You're also the dogcatcher. You're also a marriage counselor. You hold about any position, I guess I would say, within the tribe." *Id.* at 833.

In the recent U.S. Supreme Court case of *Lewis v. Clarke*, the Court ruled that sovereign immunity does not protect tribal employees when they are sued in an individual capacity. 137 S. Ct. at 1288. This is because the individual, rather than the tribe, is the real party in interest. *See id.* Thus, the analysis turns on whether the tribe or the individual is the real party in interest. *See id.* at 1290. In making this determination, courts must look to whether the remedy sought is against the individual or the tribe. *See id.* In *Lewis*, the Court found that a tribal employee

was not entitled to sovereign immunity because the suit was brought against him for his personal actions and the suit would not "require action by the sovereign or disturb the sovereign's property." 137 S. Ct. at 1291 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949)).

In this case, the Smiths' official capacity claims against EDC employees Fred Captain and Molly Bluejacket are not barred by sovereign immunity because the actions giving rise to the suit exceeded their delegated authority. Unlike the expansive authority delegated to the tribal official in *Burrell*, the EDC employees' authority is much more limited. The EDC's charter provides that the purpose of the corporation is to create and develop "economic endeavors." R. at 1. Additionally, the YIN Tribal Code provides that "[t]he chief executive officer and chief financial officer [of tribal corporations] have specified duties." YIN Code § 11-111, Subdiv. 3, Num. 10 (2005). The YIN Tribal Code lists these duties at § 11-305, and they consist primarily of bringing into effect the resolutions of the corporation's board of directors. *See* YIN Code § 11-305, Subdiv. 2 (2005).[2] Thus, as CEO of the EDC, Captain's authority is limited by the authority delegated under the corporate charter. As an accountant for the corporation, Bluejacket's delegated authority is even more limited than that of Captain. Bluejacket's authority is constrained to matters relating to accounting. The authority delegated to these employees is a far cry from the broad and unenumerated authority delegated to the tribal official in *Burrell*.

Captain and Bluejacket exceeded their delegated authority, and as such thy are not protected by sovereign immunity against the Smiths' official capacity claims. The EDC charter

[2] See Appendix for full statutory duties of the CEO.

does not contain any provision that would delegate the authority to these employees to withhold the money owed to the Smiths under the contracts. *See* YIN Code § 11-305 (2005). Further, the charter certainly does not delegate the authority to impugn and defame the Smiths' professional skills. Breach of contract and defamation are violations of tribal, federal, and state law, and the corporate charter certainly does not delegate the authority to violate the law. Thus, given that the EDC employees acted outside of their delegated authority, the Smiths' official capacity claims against them are not barred by sovereign immunity.

Furthermore, the Smiths' individual capacity claims against the EDC employees are not barred by sovereign immunity because the employees are the real parties in interest. The Smiths are seeking damages for defamation against these employees in their individual capacities. This claim relates directly to the personal actions of the employees, and the resolution of this claim in the Smiths' favor would not directly implicate the Nation. Captain and Bluejacket acted as individuals when they personally chose to impugn and defame the Smiths. The Smiths' individual capacity claims seek damages only from Captain and Bluejacket, rather than from the Nation itself. Thus, this claim does not implicate the property of the Nation as a sovereign. Given that the remedy sought for these individual capacity claims would be enforced against Captain and Bluejacket as individuals, they are the real parties in interest. Since Captain and Bluejacket are the real parties in interest, the individual capacity suits are not barred by sovereign immunity.

b. Qualified immunity does not bar the Smiths' claims.

Employees of governmentally owned entities are not entitled to qualified immunity when their actions violate clearly established rights of which a reasonable person would have been aware. *See Harlow*, 457 U.S. at 818. In *Harlow*, the U.S. Supreme Court ruled that the

defense of qualified immunity is not available when a government employee "knew or reasonably should have known" that their actions violate a clearly established right, or if the employee took the actions with malicious intent to harm an established right. *Id.* This defense must be asserted by the employee seeking immunity. *See id*.

In this case, the Smiths' claims against the EDC employees are not barred by qualified immunity, because these employees knew or should have known that their actions would violate the clearly established rights of the Smiths. It is unquestioned that individuals have a clearly established right to be free from actions that baselessly impugn and defame their professional reputations. Captain and Bluejacket knew or reasonably should have known that such a right exists. Further, given that this right is so well-established, it is difficult to understand how that these EDC employees could have made these allegations without having malicious intent. Since the EDC employees acted with knowledge—or maliciousness—to violate the rights of the Smiths, they are not entitled to the defense of qualified immunity.

2. Sovereign immunity does not bar the Smiths' claims against the YIN EDC

Courts have recognized that tribal corporations that are chartered by tribes organized under Section 17 of the Indian Reorganization Act (IRA) waive their sovereign immunity when the charter includes language that the corporation is authorized to "sue and be sued." 25 U.S.C. § 477 (2012); *see, e.g.*, *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989); *see Linneen*, 276 F.3d at 492. While the U.S. Supreme Court has not addressed this issue, several U.S Circuit Courts of Appeal have determined that "such 'sue and be sued' clauses waive immunity with respect to a tribe's corporate activities." *Linneen*, 276 F.3d at 492; *see also Rosebud Sioux Tribe*, 874 F.2d at 552 (One method in which express waiver may be made is by a provision allowing the tribe "to sue or be sued," found in the tribe's corporate

charter). This waiver of immunity by tribal corporations, however, does not constitute a waiver of sovereign immunity by the tribal government. *See Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998).

Rosebud Sioux Tribe is instructive in this case. In that case, a tribe brought a breach of contact claim against a contractor for damages relating to a contract for an irrigation project. *See Rosebud Sioux Tribe*, 874 F.2d at 552-3. The contractor counterclaimed against the tribe seeking the remainder of the money owed on the contract. *See id.* at 553. The contractor won the counterclaim at trial and the tribe appealed arguing that the counterclaim was barred by sovereign immunity. *See id.* The tribe in this case was incorporated under Section 17 of the IRA, and the court found that the language in the charter allowing the tribe to "sue or be sued" constituted an express waiver of immunity for the purposes of the tribe's corporate activities. *See id.* at 552-3.

In this case, the EDC (the corporate arm of the Nation) has expressly waived its sovereign immunity to this suit because its charter provides that it is authorized to "sue and be sued." R. at 2. Just like the tribe in *Rosebud Sioux Tribe*, the YIN is incorporated under Section 17 of the IRA. R. Supp. at question 4. Moreover, the EDC's specific corporate charter expressly allow it to "sue and to be sued." R. at 2. Further, the contract that Thomas Smith signed with the YIN included a provision relating to the litigation of "any and all disputes arising from the contract." R. at 1. The fact that the contract directly contemplates that litigation relating to this contract may occur evidences the fact that the corporate arm of the Nation waived its sovereign immunity. In sum, the Smiths' counterclaims against the EDC are not barred by sovereign immunity because the EDC expressly waived this immunity by virtue of the "sue and be sued" provision contained within its charter.

B. The Smiths' counterclaims against the YIN are not barred by sovereign immunity.

Although tribal governments possess common law sovereign immunity from suit, this immunity may be abrogated by an act of Congress, or waived by the tribal government. *Kiowa Tribe of Okla.*, 523 U.S. at 754. To constitute a valid waiver of immunity by the tribe, such a waiver must be clearly expressed. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). While a waiver of sovereign immunity by a tribe must be clear, courts have ruled that when a tribe initiates a lawsuit, it effects a limited waiver of sovereign immunity for counterclaims that sound in recoupment. *See, e.g.*, *Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093, 1099 (9th Cir. 2017); *Berrey v. Asarco Inc.*, 439 F.3d 636, 643 (10th Cir. 2006).

For a counterclaim to sound in recoupment it must 1) arise out of the same transaction or occurrence of the original claim; 2) seek the same kind of relief as the plaintiff; and 3) not seek an amount in excess of that sought by the plaintiff. *See Bull v. United States*, 295 U.S. 247, 261 (1935); *see also Berrey*, 439 F.3d at 643. The U.S. Supreme Court holds that when the federal government brings suit, it effects a limited waiver of sovereign immunity for counterclaims in recoupment. *See Bull*, 295 U.S. at 260-3. Courts have extended this application of the recoupment doctrine to the sovereign immunity of Indian tribes as well. *See Berrey*, 439 F.3d at 643 (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); *see also Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota*, 50 F.3d 560, 562 (8th Cir. 1995).

In *Berrey v. Asarco Inc.*, a tribe brought a claim against a private corporation for damages relating to environmental contamination allegedly caused by mining activities carried

out by the corporation on tribal land under leases issued by the tribe. 439 F.3d at 643. The corporation counterclaimed against the tribe for damages, alleging that the tribe contributed to the harm, and that the corporation was entitled to indemnification by the tribe because it had approved the leases. *See id.* The tribe filed a motion to dismiss the counterclaim, arguing that it was barred by sovereign immunity. *See id.* The district court dismissed the motion, and the tribe appealed. *See id.* On appeal, the Tenth Circuit determined that by bringing suit, the tribe had affected a limited waiver of sovereign immunity for counterclaims sounding in recoupment. *See id.* The court arrived at this conclusion by applying the doctrine of recoupment as it applies to federal sovereign immunity. *See id.* at 643.

It is a well-settled principle that when the United States brings suit against a private entity, it waives its sovereign immunity for counterclaims in recoupment. *See Bull*, 295 U.S. at 260-3. Given that tribal sovereign immunity is often deemed to be "coextensive with the immunity of the United States," the Tenth Circuit determined that the doctrine of recoupment applies to tribes as it does to the federal government. *Berrey*, 439 F.3d at 643; *see also Quinault Indian Nation*, 868 F.3d at 1100. In *Rosebud Sioux Tribe v. A & P Steel, Inc.*, the Eighth Circuit came to an identical conclusion, ruling that by initiating a lawsuit a tribe waives it sovereign immunity for counterclaims, so long as the counterclaims sound in recoupment. *See* 874 F.2d at 552-3.

A counterclaim against a tribe must meet three elements to sound in recoupment. First, the counterclaim must arise out of the same transaction or occurrence as the original suit. *See Bull*, 295 U.S. at 261-2. Generally, this requirement will be met if the same evidence is needed to prove or disprove both the original claim and the counterclaim. *See Berrey*, 439 F.3d at 646. Second, the counterclaim must seek the same type of relief as the original claim. *See Quinault*

Indian Nation, 868 F.3d at 1100. This requirement is met if both the claim and counterclaim are seeking monetary damages. *See Berrey*, 439 F.3d at 646. Third, the counterclaim must not seek an amount in excess of the amount sought in the original claim. *See id.* Thus, the recovery for a defendant's counterclaim in recoupment is limited by the amount sought by the plaintiff. *See id*.

The Smiths' counterclaims against the YIN are not barred by sovereign immunity, because they sound in recoupment. By initiating claims against the Smiths, the YIN effectively waived its sovereign immunity for counterclaims against itself that sound in recoupment. While the U.S. Supreme Court has never directly addressed this issue in the context of tribal sovereign immunity, this application of the recoupment doctrine is parallel to the manner in which the Court applies the doctrine to the United States. *See Bull*, 295 U.S. at 260-3. This approach is just, given that the sovereign immunity enjoyed by tribes is frequently described as coextensive to that of the United States. This parallelism between federal and tribal sovereign immunity has forced several federal circuit courts to conclude that when a tribe initiates a lawsuit against non-governmental entities, such as the Smiths, it constitutes a limited waiver of immunity for counterclaims in recoupment. *See Quinault Indian Nation*, 868 F.3d at 1099; *Berrey*, 439 F.3d at 643; *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota*, 50 F.3d 560, 562 (8th Cir. 1995). Thus, this Court should follow the sound reasoning of these circuit courts and rule that the YIN affected a limited waiver of immunity when it brought this suit.

The Smiths' counterclaims against the YIN satisfy the elements for recoupment. First, these counterclaims arose out of the same transaction and occurrences as the claims brought against them by the YIN. Both parties' claims arise from a dispute regarding the contracts entered into by the YIN and the Smiths. The dispute centers on whether such contracts were

breached by either party and in what manner. The evidence needed to establish that the Smiths breached their contracts and their corresponding fiduciary duties is identical to the evidence needed to establish that the YIN still owes money on said contracts. To prove or disprove each parties' claims requires the same witnesses and the same material evidence. Therefore, given that the same evidence is needed to establish each parties' claims, these claims arose out of the same transaction and occurrences such that the first element of recoupment is met.

Second, the Smiths' counterclaims seek the same type of relief as the YIN. Namely, both parties are seeking monetary damages stemming from the contracts. The YIN is seeking monetary relief relating to an alleged breach of contract and violation of fiduciary duties, and the Smiths seek monetary relief for the money owed on the contracts as well as relief for the damage to their professional reputations. This requirement would not be met if the Smiths were asking for non-monetary relief such as injunctive or declaratory relief. Given, however, that both parties are asking for monetary relief, the second element of recoupment is satisfied.

Third, the Smiths are not seeking an amount in excess of that sought by the YIN. The Smiths recognize that since their counterclaims lie in recoupment, their recovery will be limited to the amount sought by the YIN against them. The Smiths merely pray that they recover up to the amount that is being sought against them. Thus, the third element for recoupment is satisfied. Because the Smiths' counterclaims arose out of the same transaction and occurrences as the claims of the YIN, seek the same type of relief as the YIN, and do not seek an amount in excess of that sought by the YIN, these claims sound in recoupment. Given that the Smiths' counterclaims sound in recoupment, they are not barred by the sovereign immunity of the YIN.

CONCLUSION

For the foregoing reasons, this Court should grant the interlocutory appeal to the Federal District Court of Arizona, and allow the counterclaims and third-party claims to proceed to trial on the merits.

APPENDIX

YIN Tribal Code §1-104:

1. As used in these jurisdictional provisions, the word "person" shall include any individual, firm, company association, corporation or other entity.

2. Subject to any limitations expressly stated elsewhere in this Code, the Courts of the Tribe shall have jurisdiction over the following persons:

a. Any person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud.

b. Any person who owns, uses, or possesses any property within the reservation, for any civil cause of action prohibited by this Code or other statute of the Tribe arising from such ownership use or protection.

c. Any person who commits a tortious act on or off the reservation or engages in tortious conduct within the reservation, either in person or by agent or representative, causing harm within the reservation for any civil cause of action arising from such act or conduct.

d. Any Indian who commits a criminal offense prohibited by this Code or other statute of the Tribe, by his/her own conduct or the conduct of another for which he/she is legally accountable, if:

i. The conduct occurs either wholly or partly within the reservation; or

ii. The conduct which occurs outside the reservation constitutes an attempt or conspiracy to commit an offense within the reservation; or

iii. The conduct which occurs within the reservation constitutes an attempt or conspiracy to commit in another jurisdiction an offense prohibited by this Code or other statute of the Tribe and such other jurisdiction.

3. Any person for whom the Tribal Courts may constitutionally exercise jurisdiction.

4. None of the foregoing bases of jurisdiction is exclusive, and jurisdiction over a person may be established upon any one or more of them as applicable.

YIN Tribal Code § 11-305, Subdivisions 1 and 2:

Subdivision 1. Presumption; modifications. Unless the articles, the bylaws, or a resolution adopted by the board and not inconsistent with the articles or bylaws, provide otherwise, the chief executive officer and chief financial officer have the duties specified in this Section.

Subdivision 2. Chief executive officer. The chief executive officer shall:

1. Have general active management of the business of the corporation;

2. When present, preside at all meetings of the board and of the shareholders;

3. See that all orders and resolutions of the board are carried into effect;

4. Sign and deliver in the name of the corporation any deeds, mortgages, bonds, contracts or other instruments pertaining to the business of the corporation, except in cases in which the authority to sign and deliver is required by law to be exercised by another person or is expressly delegated by the articles or bylaws or by the board to some other officer or agent of the corporation;

5. Maintain records of and whenever necessary, certify all proceedings of the board and the shareholders; and

6. Perform other duties prescribed by the board.