No. 17-024

In The

Supreme Court of the Yuma Indian Nation

THOMAS SMITH & CAROL SMITH,
Petitioners,

v.

YUMA INDIAN NATION,
Respondent.

On Writ of Certiorari to
the Yuma Indian Nation Trial Court

BRIEF FOR PETITIONERS

Team 122

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QUESTIONS PRESENTED

1. Whether the Yuma Indian Nation courts lack personal and subject matter jurisdiction over the Smiths, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court?
2. Whether the Yuma Indian Nation, the YIN Economic Development Corporation, and the EDC CEO and accountant have waived their sovereign immunity from the Smiths' claims?

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDINGS

The Tribal Council of the Yuma Indian Nation ("YIN") filed suit against the Smiths in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality, and the YIN sought recovery of the liquidated damages amount set out in the contracts with the Smiths. R. at 3. The Smiths then filed to dismiss the YIN suit based on lack of personal jurisdiction and lack of subject matter jurisdiction. *Id*. The Smiths also filed, in the alternative, for the trial court to stay the suit while the Smiths pursue a ruling in Arizona federal district court as to whether the YIN tribal court has jurisdiction over the Smiths. *Id*. The trial court denied both of these motions, and then the Smiths counterclaimed against the YIN for monies due under their contracts and for defamation for impugning their professional skills. *Id*. The Smiths also impleaded Fred Captain, CEO of EDC, and Molly Bluejacket, the EDC accountant ("the EDC officers"). *Id*. The Smiths asserted same claims against the EDC officers that they asserted against YIN, and sued them in personal and business capacities. *Id*. The trial court dismissed all of these counterclaims against the YIN and these claims against the third-party defendants due to sovereign immunity. *Id*.

The Smiths then filed an interlocutory appeal in the YIN Supreme Court, and requested that the Court decide these issues and issue a writ of mandamus ordering the trial court to stay the suit. *Id*.

The YIN Supreme Court granted the interlocutory appeal. *Id*.

STATEMENT OF THE FACTS

The YIN is a tribe located within the state of Arizona. R. at 1. Mr. Thomas Smith lives and works in Phoenix, Arizona, and he is a certified financial planner and

accountant. *Id*. In 2007, Mr. Thomas Smith and the YIN signed a contract for the provision of as-needed financial services to the YIN regarding economic development issues. *Id*. In 2010, Mr. Smith signed a contract with his sister, Carol Smith, for provision of advice to himself, the tribe, and the newly established Economic Development Corporation ("EDC"), about stocks, bonds, and securities. R. at 2.

Mr. Smith communicates with the YIN through emails, telephone calls, and written reports. R. at 1. Mr. Smith only visits the YIN reservation four times a year when he presents his quarterly reports at Tribal Council meetings. *Id*. Ms. Carol Smith, the sister of Mr. Smith, lives and works in Portland, Oregon, and she has only visited the reservation twice for short periods of time. R. at 1-2.

The parties of the YIN-Thomas contract signed the contract at Mr. Smith's office in Phoenix. R. at 1. The YIN-Thomas contract includes language that provides for "any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." *Id*. It also says that Mr. Smith should maintain absolute confidentiality regarding any and all tribal communications and economic development plans. *Id*. The consulting contract between Mr. Smith and Ms. Smith was signed with the written permission of the YIN's Tribal Council, and it is identical to the YIN-Thomas contract. R. at 2. The contract between the Smith siblings includes a term that both parties are required to comply with the YIN-Thomas contract. *Id*. One of the requirements of both contracts is the maintenance of complete confidentiality regarding any and all tribal communications and economic development plans. R. at 1-2.

The YIN established the EDC in 2009 with a $10 million loan from the YIN's general fund. R. at 1. It was created as a wholly-owned subsidiary of the tribe, whose purpose was

"to create and assist in the development of successful economic endeavors." *Id*. The YIN also declared it an "arm-of-the-tribe" and wrote in the EDC's charter that the EDC, its board, and all employees should be protected by tribal sovereign immunity. *Id*.

EDC's board of directors was to be made up of five people experienced in business. *Id*. Three board members were required to be tribal citizens, and the rest were to be non-Indians or non-tribal citizens. *Id*. The Tribal Council initially selected the board of directors, but after the first selection board members would be elected by the rest of the board. *Id*. The Tribal Council retained the right to remove anyone with a 75% vote at any time. *Id*.

The EDC was authorized to buy and sell real property, but it had no power to borrow or lend money in the name of or on behalf of the YIN, and none of its debts could "encumber or implicate in any way" the YIN's assets. R. at 2. Fifty percent of EDC's net profits were to be paid to the YIN general fund, but so far, the EDC has only repaid the Nation $2 million. *Id*.

In 2016, the EDC began looking into the possibility of an economic development plan involving cultivating marijuana on the reservation, and conferred with Mr. Smith. *Id*. Ultimately, Mr. Smith informed his acquaintance, the Arizona Attorney General, of the YIN's marijuana operation plans. *Id*. The Arizona Attorney General then wrote the tribe a cease and desist letter. *Id*.

SUMMARY OF ARGUMENT

The YIN courts do not have the authority to rule over the defendants, because of jurisdiction and sovereign immunity.

First, the Yuma Indian Nation courts lack personal and subject matter jurisdiction over Mr. Smith and Ms. Smith. In a case such as this, where the defendants' alleged violation of duty of confidentiality would have occurred off-reservation, the tribal courts do not have jurisdiction over the defendants. Given this lack of jurisdiction, the Smiths are free to seek a ruling in the Arizona federal district courts. Even if the YIN were to have either personal or subject matter jurisdiction over the defendants, the forum selection clause in both of the contracts means that the general tribal exhaustion rule does not apply here. Therefore, the YIN trial court should stay this suit while the Smiths seek a ruling in federal district court.

Next, the Yuma Indian Nation, the YIN Economic Development Corporation, and the EDC CEO and accountant have waived their sovereign immunity from the Smiths' claims. The YIN generally waived its sovereign immunity in its contract with Mr. Smith. It also waived its immunity specifically against the Smiths' counterclaims in recoupment by its filing of the initial lawsuit. The YIN's sovereign immunity does not extend to the EDC because the tribe itself is not protected by immunity in this suit. Additionally, the EDC is not an arm-of-the-tribe and waived its own sovereign immunity through a "sue and be sued" clause in its commercial code. EDC's officers are also not protected by sovereign immunity to the extent they are being sued in their individual capacities.

ARGUMENT

I. THE YIN COURTS DO NOT HAVE PERSONAL AND SUBJECT MATTER JURISDICTION OVER MR. THOMAS SMITH AND MS. CAROL SMITH, AND THE TRIAL COURT SHOULD STAY THIS SUIT.

The YIN courts have neither subject matter jurisdiction nor personal jurisdiction over Mr. Thomas Smith and Ms. Carol Smith, and the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.

A. The YIN courts do not have personal and subject matter jurisdiction over Mr. Thomas Smith and Ms. Carol Smith.

The YIN courts do not have subject matter jurisdiction and personal jurisdiction over the defendants, because the defendants' relevant actions occurred off-reservation land.

For a tribal court to hear this case, it must have both subject matter jurisdiction and personal jurisdiction over the defendants. *Cohen's Handbook of Federal Indian Law* § 7.02[2] (2012) (hereinafter "Cohen's Handbook"). It would be insufficient if only subject matter jurisdiction or only personal jurisdiction is met.

The Supreme Court of the United States has consistently held that "absent express authorization by federal statute or treaty, tribal [adjudicative] jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contrs*., 520 U.S. 438, 445 (1997). For example, there are certain exceptions that satisfy subject matter jurisdiction when the conduct involved occurs on either Indian land or non-Indian land within a reservation:

> 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…[or] when that conduct

> threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. U.S., 450 U.S. 544, 565-566 (1981).

Furthermore, the Supreme Court of the United States has also held that a tribe lacks jurisdiction for an off-reservation crime, unless the regulation would be "essential to tribal self-government or internal relations." *Nevada v. Hicks*, 533 U.S. 353, 364 (2001).

In regards to personal jurisdiction, the Courts have held that an individual's contract with another party alone does not automatically establish sufficient minimum contacts in the other party's home forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985). Even when a party has entered a contract with a forum resident, personal jurisdiction is only satisfied if the resulting litigation results from alleged injuries that "arise out of or relate to" those activities. *Cohen's Handbook* § 7.02.

The breach of contract due to violation of duty of confidentiality that occurred in this case here happened through conduct that was both off-reservation and off of fee land. Mr. Smith allegedly violated his duty of confidentiality when he informed the Arizona Attorney General of the YIN's plans for a marijuana operation, but this alleged breach occurred outside of the boundaries of the YIN reservation. There is no indication it occurred anywhere other than in Phoenix, which is where Mr. Smith both works and lives. The only time Mr. Smith is even on the YIN reservation is when he presents his quarterly reports at the Tribal Council meeting. There is no indication that Mr. Smith had contacted his acquaintance, the Arizona Attorney General, during a Tribal Council meeting he attended. Therefore, Mr. Smith's alleged conduct occurred off-reservation and off of fee land. Ms. Smith was not even involved in informing the Arizona Attorney General, and thus, her conduct is not directly involved in the alleged breach of duty of confidentiality here. As

a result of the location of the defendants' activities, the YIN lacks subject matter jurisdiction for the defendants' crimes, given that regulating a breach of duty of confidentiality cannot be considered essential to tribal self-government or internal relations. *Hicks*, 533 U.S. at 364.

Respondents may respond that because the Smiths entered into a consensual contract with the YIN, the first of the two exceptions mentioned in *Montana* applies. That exception would suggest that because Mr. Smith and Ms. Smith both entered into consensual contracts with the YIN, the Tribe is also able to regulate their activities. However, that exception only applies to the conduct and activities of nonmembers on either Indian land or non-Indian land held in fee simple within a reservation. The exception does not apply to nonmember activities that occur outside a reservation. The nonmember activity in question here is the breach of duty of confidentiality, and it occurred off-reservation and off of fee land. Therefore, this aforementioned exception to the general rule on subject matter jurisdiction does not apply to this case here, because the relevant conduct was not on the type of land covered by this exception.

Additionally, because the defendants' alleged violation of duty of confidentiality occurred off-reservation, the tribal court also lacks personal jurisdiction over the defendants. The defendants' conduct occurred outside the tribal territory such that the defendants lacks "minimum contacts" with the forum sufficient to establish personal jurisdiction over them. The lack of minimum contacts means there is no personal jurisdiction. Furthermore, even if it were determined that the YIN courts do indeed have personal jurisdiction over the Smiths, the YIN courts would also need to have subject matter jurisdiction over the Smiths before this case could be heard in the YIN courts—and that element fails to be met.

As a result of the defendants' actions occurring off-reservation, the YIN courts have neither subject matter jurisdiction nor personal jurisdiction over the defendants.

B. The trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.

Even if the YIN were to have either personal or subject matter jurisdiction over the defendants, the forum selection clause in both the YIN-Thomas contract and the Thomas-Carol contract means that the general tribal exhaustion rule does not apply to this case here, and therefore, the YIN trial court should stay this suit while Mr. Smith and Ms. Smith seek a ruling in the Arizona federal district court.

It is true that in general, tribal court exhaustion is a mandatory, not just a discretionary, prerequisite to a federal court's exercise of its jurisdiction. *Burlington N. R. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991). This general rule has been consistently applied. In *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, the Supreme Court of the United States notes that while the question of whether a tribal court has adjudicative jurisdiction over a case is a federal question under federal common law that supports jurisdiction in the federal courts under 28 U.S.C. § 1331, a federal court is still required to stay its hand until after the Tribal Court in question has had a full opportunity to determine its own jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). This exhaustion rule respects the importance of tribal authority over the activities of non-Indians on reservation lands to tribal sovereignty. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

However, there exists several exceptions to the requirement for exhaustion of tribal court remedies. For example, four of these exceptions include where:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule.

Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc., 715 F.3d 1196, 1200 (9th Cir. 2013).

There has also been another exception to the exhaustion of tribal court remedies requirement, and it applies when the contract in question contains a dispute resolution clause specifying that litigation occur in a "court of competent jurisdiction." *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995).

The first four typical exceptions mentioned above do not apply to this case. First of all, the bad faith exception for excusing exhaustion has been interpreted to require the tribal court to have acted in bad faith. *Grand Canyon Skywalk Dev.*, 715 F.3d at 1201. There is no indication that the YIN courts have acted in bad faith, and it would be incorrect to assume otherwise.

Next, given how this appeal is centered around a jurisdiction question, there is also no clear violation of express jurisdictional prohibitions that is sufficient enough to satisfy the second exception. The exception requires an action with a very obvious violation. The case here is not clear enough to warrant this overriding of comity and respect for tribal sovereignty.

Then, the futility exception is only applied in very narrow circumstances. For instance, courts have held that it is inherently unfair to require exhaustion when a tribal court was not even operational until after a claim was filed. *Krepel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 623 (8th Cir.1997). The YIN courts system certainly operational, as

demonstrated by the procedural process through which this appeal arrived to the YIN Supreme Court.

Finally, the fourth exception deals with nonmembers' conduct on and within reservation land. As discussed earlier in this brief, the nonmembers' activities in this case here happened outside of YIN reservation land. Therefore, this case also does not satisfy the plain lack of tribal governance basis for avoiding exhaustion of tribal court remedies.

Nevertheless, the dispute resolution clause exception to exhaustion as illustrated in *Carlow* is applicable here. In that case, the wording of the contract was that "[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." *Carlow*, 64 F.3d at 1233. The court held the contract's language to mean that because the federal district court in the state where the tribe is located and the activity occurred qualifies as a "court of competent jurisdiction," the federal district court, in addition to the relevant tribal court, is indeed a proper procedural option for hearing the case. This is because the Tribe had essentially, through the language of the contract's forum selection clause, already agreed that disputes arising out of the contract do not have to be litigated in tribal court. *Id*. at 1233. Consequently, the parties in that case did not have to first exhaust their remedies in tribal court, and the federal district court did not have to stay its hand before acting. In the face of the dispute resolution clause in the contract, the tribal exhaustion doctrine does not apply.

Other cases, including *Enerplus Resources (USA) Corp. v. Wilkinson*, 865 F.3d (8th Cir.2017), further support this dispute resolution clause exception to the general exhaustion of tribal court remedies requirement. In that case, the court reviewed the district court's

decision to grant a preliminary injunction based on a forum selection clause in the contract agreement between the parties involved. *Id*. at 1094. The court decided to uphold the decision that a forum selection clause can mean there is no longer a need to apply the tribal exhaustion doctrine. *Id*. at 1097. The forum selection clause in that case specified that disputes arising under the contract would be litigated in federal court, not tribal court, and consequently, the tribal court did not have the right to determine its own jurisdiction in the first instance.

Here, the language of the YIN-Thomas contract includes language for "any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." The Thomas-Carol contract also includes this language, since it is identical to the YIN-Thomas contract. Even if the Thomas-Carol contract did not explicitly include this language, it includes a term that both parties must comply with the YIN-Thomas contract's terms. Therefore, the language in both contracts in this case is the same as the contract in *Carlow*.

As a result of the language of the contracts, the YIN have already agreed that disputes arising out of the contract do not have to be litigated in tribal court. The contract specifically mentions "a court of competent jurisdiction," and therefore, it cannot be understood to mean that this case necessarily must be litigated in the YIN courts. A "court of competent jurisdiction" must include the Arizona federal district court, since the YIN is located in southwest Arizona. Consequently, both the federal court system and the YIN court system are acceptable options for litigating this case.

Therefore, even though this suit has not yet been fully decided in the YIN court system and pursuing a ruling in Arizona federal district court would not comply with the

tribal exhaustion doctrine, the contracts' dispute resolution clauses mean that the federal court is still able to rule on the issues of personal jurisdiction and subject matter jurisdiction. The YIN trial court should stay this suit.

Respondents may respond that a forum selection clause still should not override the tribal exhaustion doctrine, for reasons such as comity and respect of tribal sovereignty. It is true that those are valid concerns. However, they are not dispositive for this case here. When an exception to the general requirement of exhaustion of tribal remedies exists, they provide sufficient justification to allow a federal court to hear a case that has not been fully decided in tribal courts yet. Furthermore, the courts have consistently held that when a forum selection clause is valid, it should be given controlling weight unless there are exceptional circumstances. *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013). The validity of the forum selection clause in this case means that it falls under one of the accepted exceptions to the exhaustion doctrine. Despite the great importance of comity and tribal sovereignty, the YIN explicitly agreed to the terms of the contracts with Mr. Smith and Ms. Smith. The YIN could have chosen to have language other than "a court of competent jurisdiction," but it did not do so. The forum selection clauses of the contracts in this case provide satisfactory exceptions to the general exhaustion doctrine.

Since the general exhaustion rule does not apply to this case here, because of the forum selection clause in both the YIN-Thomas contract and the Thomas-Carol contract means, the YIN trial court should stay this suit while Mr. Smith and Ms. Smith seek a ruling in the Arizona federal district court.

II. THE YIN, THE EDC, AND THE EDC OFFICIALS ARE NOT PROTECTED BY SOVEREIGN IMMUNITY

The Court should find that the YIN, the EDC, and the EDC officials are protected by sovereign immunity from the Smiths' claims.

A. YIN waived its immunity through contract and opened itself up to counterclaims in recoupment by filing the initial lawsuit.

The YIN waived its sovereign immunity in its contract by Mr. Smith by including explicit language about litigation as a means of dispute resolution. And even if this were not the case, the YIN waived its sovereign immunity in regards counterclaims arising in recoupment, such as the ones being brought by the Smiths.

i. The YIN waived its sovereign immunity in its contract with Mr. Smith by agreeing to litigate all disputes arising from the contract.

By entering into a contract with Mr. Smith that specified that "all disputes arising from the contract to be litigated in a court of competent jurisdiction," the YIN clearly and explicitly waived its sovereign immunity.

A waiver of tribal sovereign immunity "must be unequivocally expressed" and "clear" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509 (1991). However, a waiver does not have to use the term "sovereign immunity" in order to be explicit. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 420 (2001).

In *C & L Enterprises*, which concerned a contract specifying that disputes be resolved through arbitration, the Court found a waiver of sovereign immunity in the contract language specifying that "judgment upon the arbitration award may be entered in any federal or state

court having jurisdiction thereof." *Id.* at 415. By signing this contract, the Court found that "the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures." *Id.* at 420. The Court held that "the arbitration clause ... would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed." *Id.* at 422 (internal citations omitted).

This holding is equally applicable to the contract the YIN signed with Mr. Smith, which allowed for "all disputes arising from the contract to be litigated in a court of competent jurisdiction." This language closely tracks the contractual language in *C & L Enterprises*. Through this clause, the tribe explicitly agreed to certain dispute resolution procedures that would be meaningless if the tribe did not waive sovereign immunity. Thus, through signing a contract agreeing to litigate all disputes in courts with jurisdiction, the tribe clearly and unequivocally waived its sovereign immunity.

ii. Even if the YIN had not contractually waived its sovereign immunity, the Smiths' counterclaims against the YIN would not be barred because they fall under the recoupment counterclaim exception.

The Smiths' counterclaims against the YIN are not barred even with the full protection of sovereign immunity because they sound in recoupment.

When a sovereign nation commences a lawsuit, it waives immunity as to counterclaims arising in recoupment. *See United States v. U. S. Fid. & Guar. Co*., 309 U.S. 506, 511 (1940); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552–53 (8th Cir. 1989). According to *Berrey v. Asarco Inc.,* "claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an

amount in excess of that sought by the plaintiff." *Berrey v. Asarco Inc.,* 439 F.3d 636, 643 (10th Cir. 2006).

Counterclaims arising out of the same transaction or occurrence are those which are compulsory to join under the Federal Rules of Civil Procedure. *Id.* at 645.

> A counterclaim is compulsory if: (1) the issues of fact and law raised by the principal claim and the counterclaim are largely the same; (2) res judicata [i.e., claim preclusion] would bar a subsequent suit on defendant's claim; (3) the same evidence supports or refutes the principal claim and the counterclaim; and, (4) there is a logical relationship between the claim and counterclaim.
>
> *Id*.

Additionally, "waiver under the doctrine of recoupment … does not require prior waiver by the sovereign or an independent congressional abrogation of immunity … The scope of the waiver under the doctrine of recoupment is limited only by the requirements for a recoupment claim." *Id.* at 644.

Thus, a court has broad authority to hear counterclaims as long as they are compulsory, seek the same relief, and do not seek relief exceeding that claimed by the plaintiff. The Smiths' counterclaims fit comfortably within this doctrine.

In this case, the YIN sued for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. The Smiths counterclaimed for monies due under the contract and for defamation, which both sound in recoupment.

Both the Smiths' counterclaims for monies due under the contract and for defamation arise out of the same transaction or occurrence. Their claim for the monies due under the contract arise out of the same transaction or occurrence as the YIN's claim for breach of contract because both claims revolve around the interpretation of the contract between the YIN and the Smiths. The issue of fact and law would be largely the same and focus on the

facts surrounding the signing of the contract and its alleged breach, and the interpretation of the contract and its terms. Res judicata would also bar the Smiths' later suit for monies due under the contract, because the parties would be the same in a hypothetical later suit by the Smiths and both claims arise out of the same transaction or occurrence. The evidence that would be introduced for both claims would be very similar, relating to the interpretation of the contract. There is also a strong logical relationship between the claim and the counterclaim, since both arise out of the same contract. It would be in the interest of judicial efficiency and fairness to hear both at one time.

The Smiths' counterclaims for defamation also arise out of the same transaction or occurrence as the Tribe's suit, because the defamation was the result of the alleged breach of contract and is closely related to the tribe's claims for violation of fiduciary duties and violation of confidentiality. The counterclaim for defamation would also be compulsory. The issues of fact and law would be largely the same, since the litigation would center on whether the Smiths in fact violated any duty to the Tribe. Res judicata would also prevent a second claim by the Smiths, since the parties would be the same and both claims would arise out of the same transaction or occurrence, that is, the alleged breach of duty. The evidence would also be similar and focus on the events surrounding the Smiths' communications with the Attorney General, as well as the interpretation of the terms of the contract.

The relief sought by the Smiths' counterclaims are also of a similar nature that being sought by the tribe. The tribe is seeking damages, and since the Smiths are seeking monies due from the contract, they also wish to be granted monetary relief. The Smiths are most likely also seeking damages for their defamation claim, so this relief is also similar in nature to that which is sought by the tribe.

The damages sought by the Smiths are also not greater than the relief the tribe is asking for, so the relief sought by the counterclaims does not exceed that demanded by the tribe.

Because the Smiths' counterclaims arise out of the same transaction or occurrence, seek relief similar to that sought by the tribe, and do not request relief greater than that which the tribe requests, the claims clearly sound in recoupment and are allowable even without a waiver of sovereign immunity.

Even if the Court were to follow the 9th Circuit and claim that a waiver of sovereign immunity is limited to issues necessary to decide the action brought by tribe and not necessarily broad enough to encompass related matters, even if arising from same set of facts, this would not be dispositive. *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). In *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, the Supreme Court accepted that a non-Indian defendant could assert a counterclaim "arising out of the same transaction or occurrence that is the subject of the principal suit as a setoff or recoupment." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986).

Additionally, although 2 YIN Tribal Code 2-214(4) purports to limit the waiver of sovereign immunity through compulsory counterclaims, federal courts have held that "waiver under the doctrine of recoupment … does not require prior waiver by the sovereign or an independent congressional abrogation of immunity." *Berrey*, 439 F.2d at 644. Thus, the absence of a waiver of sovereign immunity in the YIN Tribal Code should not be a bar to the court finding a waiver.

B. The YIN Economic Development Corporation is not protected by sovereign immunity because it has waived its sovereign immunity in several ways.

The YIN cannot extend its sovereign immunity in this suit because it has already waived it. Additionally, even if it could extend its sovereign immunity, the EDC is not an arm-of-the-tribe and therefore cannot be covered by sovereign immunity. Furthermore, it consented to suit through a "sue and be sued" clause. Sound public policy also casts strong doubt on the wisdom of extending tribal sovereign immunity to business corporations competing in the marketplace.

i. Because the YIN has waived its immunity with regards to the contract at issue in this case, it cannot extend its sovereign immunity to the EDC.

Although "tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself," even if the EDC were an arm-of-the-tribe it would not be protected by the YIN's sovereign immunity for the purposes of this suit because the YIN has waived that immunity through its contract with Mr. Smith. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). Because the YIN does not have sovereign immunity to extend in this case, having waived it as a part of the contract, the EDC should not be able to take on the sovereign immunity of the tribe.

ii. The EDC is not an arm-of-the-tribe and thus does not share YIN's sovereign immunity.

Even if the YIN had not waived the EDC's immunity, the EDC would not have a claim to it because it is not an arm-of-the-tribe.

Cook sets out a five-factor test for whether or not a tribal corporation is an arm-of-the-tribe. The five factors are: (1) whether the corporation was created pursuant to a tribal

ordinance or intergovernmental agreement; (2) whether the corporation is fully owned and managed by the tribe; (3) whether economic benefits produced by the corporation inure to the Tribe's benefit; (4) whether the majority of the board are Tribe members; and (5) whether the Tribe's council performs corporate shareholder functions for the benefit of the Tribe. *Cook*, 548 F.3d at 726.

These factors analyze how closely related a tribal entity is to the tribe itself, to determine whether or not the entity can justifiably be cloaked in the tribe's sovereign immunity. According to *Allen v. Gold Country Casino,* "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." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). The factors elucidate why the tribe created the entity and the closeness of the relationship between the tribe and the entity.

First, the YIN created the EDC pursuant to a 2009 tribal commercial code. This supports the finding that the EDC is not an arm-of-the-tribe. In *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co*, the court found that the tribal entity was governmental instead of corporate because it had been created through constitutional powers and not commercial powers. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1294 (10th Cir. 2008). In contrast, in the current case, EDC is clearly a corporate entity because it was created through the commercial code. Its stated purpose "to create and assist in the development of successful economic endeavors" further demonstrates that EDC is meant to be purely an economic entity.

Second, although the EDC is a wholly owned subsidiary of the tribe, it is steered by an independent board of directors and thus not wholly managed by the tribe. The EDC is

also not authorized to borrow or lend money in the name of or on behalf of the YIN, and no debts of the EDC can encumber the assets of the nation.

Since a "historic purpose" of sovereign immunity was to protect the sovereign Tribe's treasury, EDC's inability to encumber assets of the nation strengthens the argument for not extending the tribe's sovereign immunity, since a "historic purpose" of sovereign immunity is to protect the sovereign Tribe's treasury. *Allen*, 464 F.3d at 1047. If judgment was entered against the EDC, it could in no way harm the tribe. Because of this limitation of liability, there is no reason to extend the tribe's sovereign immunity to the EDC.

Third, EDC's profits do not all inure to the tribe. In fact, only fifty percent of *net* profits are to be paid to the tribe, which means a substantial share of profits do not inure to the tribe's benefit. The EDC has also not been financially successful and is currently eight million dollars in debt to the tribe. Therefore, it is not contributing to the tribe's financial wellbeing.

Fourth, the steering of the board also does not support finding the EDC as an arm-of-the-tribe. Although three-fifths of the board are tribe members, the rest of the are not only permitted but *required* to be non-Indians or non-tribe members. Therefore, it is clear that the corporation was set up so that the board would maintain significant independence from the tribe. The board members are also required to be "experienced in business endeavors." This suggests that their business acumen is more important than their tribal status for the purpose of the board. The board is thus not structured in such a way as to be an arm-of-the-tribe.

Fifth, the Tribe's Council also does not perform corporate shareholder functions. While the Tribal Council selected the initial board and is authorized to remove any board member by 75% vote, these are not shareholder functions. And although the Tribe provided

initial funding to the EDC, the Council does not perform the shareholder function of voting for future board members after the initial board appointment.

These factors clearly demonstrate that the EDC is not an arm-of-the-tribe in the eyes of the law, no matter what the tribe may claim. The corporation is largely independent of the tribe and should not be treated as a part of the tribe for the purposes of tribal sovereign immunity.

iii. Even if EDC is an arm-of-the-tribe, it consented to be sued through the "sue and be sued" clause in its corporate charter.

A tribe can also waive its immunity is through a "sue and be sued" clause in a corporate charter. *Rosebud Sioux Tribe*, 874 F.2d at 552. Even if a "sue and be sued" clause does not waive a tribe's sovereign immunity, it waives the tribal corporation's sovereign immunity. *Native Am. Distrib.,* 546 F.3d at 1293.

In the Business Corporation Code of the YIN's Tribal Code, there is a "sue and be sued" provision which states that "a corporation may sue and be sued, complain and defend and participate as a party or otherwise in any legal, administrative, or arbitration proceeding, in its corporate name." 11 YIN Tribal Code § 161-3. This is a clear and explicit waiver of sovereign immunity that closely tracks the language in *Rosebud*. Thus, even though the YIN explicitly extended sovereign immunity to the EDC, legally it could not because of this clause.

Although some federal circuits have found the "sue and be sued" clause not to waive sovereign immunity of tribal entities, a greater consensus may be emerging. According to *Cook*, "the issue whether a "sue and be sued" clause in a tribe's enabling ordinance effectuates a waiver of tribal sovereign immunity [for a tribal corporation] remains a live

issue for determination in [the 9th] circuit. *Cook,* 548 F.3d at 726. In *Cook,* the 9th Circuit notes that it previously held that a sue and be sued clause waives sovereign immunity for tribal entities in *Marceau v. Blackfeet Hous. Auth. (Marceau I)*. *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978–83 (9th Cir. 2006). The court writes in *Cook* that "although we later vacated that holding [in *Marceau I*] on tribal exhaustion grounds, so as to facilitate an initial review of the issue by tribal court, we did not disavow or reject our initial and now vacated analysis. *Marceau v. Blackfeet Hous. Auth. (Marceau III)*, 540 F.3d 916, 921 (9th Cir.2008)." *Id.* at 726. Therefore, the court had been prepared to find a sue and be sued clause to waive tribal sovereign immunity, as should this court.

iv. Extending sovereign immunity to the EDC is not good public policy because it is unfair to those who wish to do business with a tribal entity.

The Supreme Court is grudging on the subject of extending sovereign immunity to tribal corporations, writing that

> there are reasons to doubt the wisdom of perpetuating [tribal immunity] .... [T]ribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce… In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter.

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998).

Although the Supreme Court has maintained the force of tribal sovereign immunity for both tribes and tribal economic entities, it is clear that they do so with significant unease. Tribal sovereign immunity, especially for economic entities is unsound for public policy reasons and should be significantly limited if not eliminated.

Since the YIN and the EDC were relying on the Smiths for economic advice and signed a contract, it is unfair to allow tribal immunity to extend to the EDC since the YIN

and the Smiths were engaged in a commercial transaction relating to the tribe's corporate activities and not its governmental ones. The Smiths should not be forced to abandon their legitimate counterclaims and claims arising out of a business contract because of an outdated and unjust doctrine.

C. The EDC Officers are not protected by sovereign immunity

i. Even if the EDC officers are protected by sovereign immunity in their official capacity, they are not protected in their individual capacity.

Even if the EDC officers are immunized from suits in their official capacity, they are not in their individual capacity because they are not being sued because of their powers to grant relief. According to *Native Am. Distrib.*,

> "the general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities…Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Native Am. Distrib., 546 F.3d at 1296.

Thus, only individual suits brought because of their official capacities would be barred by the tribe's sovereign immunity.

The claims against the EDC officers were not brought because of their official capacities or ability to grant relief, since the EDC would be vicariously liable for any actions by the EDC officers in any case. Since the Smiths would receive damages from the EDC, there would be no additional reason to sue Captain and Bluefoot for their ability to grant relief. Therefore, Captain and Bluefoot are not immunized from suits brought against them in their individual capacity arising out of actions they took in their official capacity.

CONCLUSION

This Court should reverse its finding of jurisdiction over the Smiths and its order to dismiss the Smiths counterclaims. First, the YIN courts do not have jurisdiction over the Smiths. Even if the YIN courts were to have jurisdiction, the language of the contracts permits the Smiths to seek a ruling in the federal court system. Next, the Yuma Indian Nation, the YIN Economic Development Corporation, and the EDC CEO and accountant are all protected by sovereign immunity from the Smiths' claims.