

No. 17-024

IN THE
Yuma Indian Nation Supreme Court

YUMA INDIAN NATION
Plaintiff/Appellee,

v.

THOMAS SMITH AND CAROL SMITH
Defendants/Appellants.

**On Writ of Certiorari to
the Yuma Indian Nation Trial Court**

BRIEF FOR DEFENDANTS/APPELLANTS

Team Number 168

Counsel for Defendants/Appellants

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TABLE OF CONTENTS

QUESTIONS PRESENTED	5
STATEMENT OF FACTS	6
STATEMENT OF PROCEEDINGS	8
ARGUMENT	9
CONCLUSION	35

QUESTIONS PRESENTED

- I. Whether Yuma Indian Nation (YIN) courts have jurisdiction over this case and Thomas and Carol Smith.
- II. Whether YIN courts should stay this suit while the Smiths seek relief in federal court.
- III. Whether tribal nations may transfer their sovereign immunity to non-governmental tribal corporation.
- IV. Whether employees of a non-governmental tribal corporation are entitled to sovereign immunity.

STATEMENT OF FACTS

In 2007, Thomas Smith, a certified financial planner and accountant, entered into a contract with representatives from the Yuma Indian Nation (“YIN” or “Nation”) to provide as-needed financial advice regarding the Nation’s economic development. The parties signed the contract at Mr. Smith’s office in Phoenix, Arizona, where he lives and works. Mr. Smith is not a member of the YIN. The contract stated that any disputes arising from the contract were to be litigated in a court of competent jurisdiction and that Mr. Smith was required to maintain strict confidentiality regarding the Nation’s economic development plans.

In fulfillment of his contract with the YIN, from 2007 to 2009 Mr. Smith engaged in frequent email and telephone communication with tribal chairs and Tribal Council members to provide financial advice on various economic development issues. After the Nation established the YIN Economic Development Corporation (“EDC”) in 2009, Mr. Smith’s primary communication was with the EDC’s CEO, Fred Captain, and its accountant, Molly Bluejacket. Throughout the period from 2007 to 2017, when this dispute arose, Mr. Smith also prepared and submitted quarterly written reports to the Tribal Council, which he presented in person at Tribal Council meetings held on the YIN reservation.

The Nation created the EDC to further the development of tribal business endeavors on and off the reservation. Established under a 2009 commercial code that allows the Nation to charter corporations to operate tribal businesses, the EDC was chartered as a wholly owned subsidiary of the Nation. However, the EDC is governed by its own board of directors instead of directly by the Tribal Council. This board is required under the charter to consist of three tribal citizens and two nonmembers of the YIN. The Tribal Council selected the initial five-member board of directors and may remove any director for any reason and at any

time by a 75% vote, but sitting directors are responsible for electing or reelecting a member for each expiring seat.

Crucially, the EDC is prohibited from entangling the Nation's assets in its financial arrangements. Apart from receiving a one-time \$10 million loan from the Nation's general fund at its founding and providing the Nation with 50 percent of its net profits annually, the EDC is a completely distinct financial entity from the YIN. The debts of the EDC are entirely its own; the EDC may not encumber or implicate the assets of the Nation's general fund. Moreover, the EDC may not borrow or lend money in the Nation's name or on its behalf. The EDC is required to submit its financial records to the Tribal Council on a quarterly basis, but there is no indication that the Tribal Council maintains an active or regular role in the financial decisionmaking of the EDC.

Although the EDC is formally authorized to sue and be sued, the Nation has attempted to extend its tribal sovereign immunity to the EDC, its board, and its employees. This was done with the intention of protecting the EDC and the Nation from litigation and to insulate the EDC as it pursues economic development.

In 2010, acting with the express consent of the Tribal Council, Thomas entered into a contract with his sister, Carol Smith, a licensed stockbroker. This contract, which was identical to Mr. Smith's contract with the Nation, designated that Ms. Smith would provide securities-related advice to Thomas, the EDC, and the YIN. Ultimately, Ms. Smith provided her advice directly to Mr. Smith, which he often conveyed to the Tribal Council, Mr. Captain, and Ms. Bluejacket. Ms. Smith submitted monthly bills via email to Mr. Captain, and the EDC mailed payments to Ms. Smith's home in Oregon. She visited the YIN reservation on only two occasions, neither time on official business.

In 2016, the EDC began to look into cultivating and selling marijuana. That same year, the EDC convinced the Tribal Council to enact a tribal ordinance legalizing recreational marijuana cultivation and use on the reservation. Recreational marijuana use remains unlawful under Arizona law and federal law. After obtaining Mr. Smith's advice on the matter, the EDC began to pursue the development of recreational marijuana operations.

Mr. Smith, who along with his sister has a moral objection to facilitating the cultivation and use of marijuana, informed the Arizona Attorney General's office of the EDC's plans for marijuana operations. This led the Attorney General to order the Nation and EDC to cease and desist in the development of recreational marijuana operations.

STATEMENT OF PROCEEDINGS

The Tribal Council filed suit against Mr. and Ms. Smith in YIN trial court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. The Nation sought to recover contractually articulated liquidated damages.

The Smiths filed special appearances and identical motions to dismiss the suit based on the tribal court's lack of personal and subject matter jurisdiction over them and this suit. In the alternative, the Smiths sought a stay of the suit while they pursued a ruling on the jurisdictional issues in Arizona federal district court.

After the YIN trial court denied both of the Smiths' motions, the Smiths, continuing under their special appearances, filed answers denying the YIN's claims against them. They also filed counterclaims against the YIN for monies due under their contracts and for defamation, as their professional skills had been impugned. The Smiths also impleaded the EDC, as well as Mr. Captain and Ms. Ms. Bluejacket in their official and individual capacities.

The trial court dismissed the Smiths' counterclaims and third-party claims, citing sovereign immunity. In response, the Smiths have filed this interlocutory appeal, requesting that the YIN Supreme Court conclude that YIN courts lack personal and subject matter jurisdiction over the Smiths and this case or, in the alternative, issue a writ of mandamus ordering the trial court to stay the suit so the Smiths can pursue their claims in federal court.

ARGUMENT

I. YIN Courts Lack Valid Jurisdiction over the Instant Case

The Yuma Indian Nation (YIN) courts have neither valid subject matter jurisdiction nor valid personal jurisdiction over this case or Mr. Smith and Ms. Smith. Tribal courts must have both subject matter jurisdiction and personal jurisdiction in order to adjudicate a case.

Water Wheel Camp Rec. Area, Inc. v. Larance, 642 F.3d 802, 819 (9th Cir. 2011).

Because both personal jurisdiction and subject matter jurisdiction are lacking, the YIN courts do not have the power to adjudicate this case.

A. YIN Courts Do Not Have Personal Jurisdiction over Mr. Smith and Ms. Smith

YIN courts cannot establish valid personal jurisdiction over the Smiths, because the Smiths have not been physically present in YIN territory, have not given explicit consent to jurisdiction in YIN courts, and have not had sufficient minimum contacts with the YIN such that asserting jurisdiction over them comports with the requirements of due process. The case for asserting personal jurisdiction is more compelling with regard to Mr. Smith than Ms. Smith, as his direct ties to the tribe are stronger than Ms. Smith's. Despite Mr. Smith's contacts with the tribe, however, YIN courts cannot assert personal jurisdiction over him because he did not purposefully avail himself of the tribal forum and could not reasonably have foreseen being haled into YIN court. As YIN courts do not have personal jurisdiction

over Mr. Smith, they cannot establish personal jurisdiction over Ms. Smith based on her considerably less substantial contacts with the tribe.

1. The Smiths Were Not Present or Served with Process in Sovereign Tribal Territory

Physical presence in the territory in which a court sits is the “touchstone” of personal jurisdiction. *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 619 (1990). *See also Pennoyer v. Neff*, 95 U.S. 714, 720 (1878). Thus, personal jurisdiction can be established over a defendant who is a domiciliary of the territory in which the court sits, and it can be established over one who is served with process in the territory. *Burnham*, 495 U.S. at 619. Because the Smiths do not live on the YIN reservation, personal jurisdiction cannot be established through the traditional basis of physical presence.

2. The Smiths Have Not Made a General Appearance in YIN Court

A defendant who makes a general appearance in court is understood to have effectively consented to that court’s jurisdiction. A defendant may circumvent this by making a special appearance in court for the purpose of contesting the court’s jurisdiction. 5 Am. Jur. 2d *Appearance* § 2 (1998). *See also Strate v. A-1 Contractors*, 520 U.S. 438, 444 (1997). The Smiths only have made special appearances, which means they have not consented to personal jurisdiction in YIN court.

3. The Smiths Have Not Given Explicit Consent via a Forum Selection Clause

If a defendant has given advanced consent to jurisdiction in a forum by signing a forum selection clause that specifies that disputes will be adjudicated in the forum’s courts, personal jurisdiction can be established there. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589 (1991). Although both Mr. and Ms. Smith signed a contract with the YIN that included a

forum selection clause, it merely specified that any disputes would be adjudicated in a proper forum. This does not constitute advanced consent to personal jurisdiction in YIN court.

4. Assertion of Personal Jurisdiction over the Smiths Would Offend Due Process

Even without physical presence or explicit consent, personal jurisdiction can be established over a defendant with “sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice,” to permit jurisdiction. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). A defendant’s contacts with the forum state are considered sufficient if (2) the defendant has demonstrated purposeful availment of the laws of the forum state, and (3) the defendant could have reasonably foreseen being haled into court in the forum state. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Moreover, establishing jurisdiction comports with traditional notions of fair play and substantial justice if (4) it is reasonable in light of a variety of interest factors. *See, e.g., Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987).

Although the Smiths each signed a commercial contract and transacted business with the YIN, Mr. Smith clearly has had a closer commercial relationship with the Nation than Ms. Smith. Thus, in order to demonstrate that YIN courts lack personal jurisdiction over Ms. Smith, it is sufficient to demonstrate the lack of personal jurisdiction over Mr. Smith.

(1) Minimum Contacts

The strongest argument for personal jurisdiction over Mr. Smith rests on his commercial contract with the YIN. In 2007, Mr. Smith contracted to serve as a financial adviser to the YIN; thereafter, he routinely communicated with members of the Nation,

including tribal chairs and Tribal Council members. On regular occasions, he traveled to the YIN reservation to make presentations to the Tribal Council.

If the mere existence of a business relationship between a defendant and the forum state were sufficient to establish personal jurisdiction, then YIN courts would have personal jurisdiction over Mr. Smith. However, settled precedent instructs that the existence of minimum contacts does not conclude the personal jurisdiction analysis; jurisdiction must also be reasonable in light of traditional notions of fair play and substantial justice. *See, e.g., McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

(2) Purposeful Availment

YIN courts also lack valid personal jurisdiction over Mr. Smith because he did not purposefully avail himself of the laws of the Nation. The standard for purposeful availment comes from *Hanson*, where the court held, “It is essential in each case that there be some act by which the defendant *purposefully avails itself* of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” 357 U.S. at 253. The reasoning behind this standard is that a defendant who takes advantage of the benefit of doing business in a particular forum must also be subject to the burdens of the legal system that he or she sought out in the first place. *See, e.g., Asahi*, 480 U.S. at 110.

Although Mr. Smith engaged in substantial contacts with the YIN, he did not receive any benefits from doing business in the YIN forum, nor did he take on the YIN as a client for the purpose of taking advantage of the Nation’s laws. Mr. Smith treated the YIN as a financial planner and accountant would treat any commercial entity that he or she advises. He routinely communicated via email and telephone with tribal chairs and Tribal Council members; this is effectively the same as communicating with board members and directors of

a company. Quarterly, he traveled to the reservation to present his reports at Tribal Council meetings, the same way that any accountant would travel to his clients' board meetings for a presentation.

In Mr. Smith's relationship with the YIN, he did not benefit from tribal laws. By operating out of Phoenix, he remained subject to state and federal taxes and employment regulations. He worked out of a Phoenix office while living in Phoenix. In terms of his legal obligations, he was no different than any other individual living and working in Phoenix. Had Mr. Smith re-located his office to reap the benefits of a favorable YIN tax regime, or to avoid certain pesky state-level regulation, then a case could be made that Mr. Smith purposefully availed himself of the YIN forum. As the facts stand, however, Mr. Smith received no benefit from his commercial relationship with the YIN, and he cannot be viewed to have purposefully availed himself of the YIN forum.

Mr. Smith's case can be contrasted with the landmark personal jurisdiction case *International Shoe*. The case centered on whether International Shoe was required to pay into the state's unemployment fund and whether they could be sued for payment in Washington state courts. *Int'l Shoe*, 326 U.S. at 311. Although the explicit "purposeful availment" standard was not introduced by the Supreme Court until over a decade after *International Shoe*, see *Hanson*, 357 U.S. at 235, an underlying justification for the finding of valid personal jurisdiction in *International Shoe* was the fact that the company had taken advantage of doing business under the laws of Washington State. International Shoe employed around a dozen salesmen in Washington State; if International Shoe had been forced to lay off any of these employees, Washington would provide them with unemployment insurance. *Int'l Shoe*, 326 U.S. at 313. In availing themselves of this benefit,

International Shoe took on the burden of paying into the state's unemployment fund and being subject to enforcement of the laws of Washington in the state's courts.

There is no comparable example of a benefit-burden tradeoff of any kind in Mr. Smith's case. Of course, the purposeful availment standard can still be satisfied even when a defendant has not received any tangible benefit from doing business in a particular forum, but the case for purposeful availment is especially strong when a defendant's receipt of a benefit justifies his or her bearing of a burden. Not only has Mr. Smith not received any benefit from doing business under YIN laws, but has he not been subject to YIN laws in any way that would have given him the opportunity to benefit from those laws. Mr. Smith has lived and worked as a citizen of Arizona, receiving the benefits and assuming the costs of the laws of that state and the federal government. He is not a multistate corporation that simultaneously could be subject to the laws of multiple states; he is one man who works from Phoenix. Though he conducted business with a legal entity outside of Arizona that happens to be a tribe, this does not render him subject to the legal jurisdiction of that tribe.

Mr. Smith's case also differs from *Allstate Indemnity Company v. Stump*, in which the court suggested the insurance company Allstate had purposefully availed itself of a tribal forum's laws by selling a policy covering travel in the Rocky Boy Reservation to a resident of the reservation. *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1075 (9th Cir. 1999). Providing a driver with insurance coverage entails anticipating accidents and litigation in the area of coverage. As the court noted in *Farmers Insurance Exchange*, on which the *Allstate* court relied heavily in its brief purposeful availment analysis, "automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. Thus[,] litigation requiring the presence of the insurer is not only

foreseeable, but it was purposefully contracted for by the insurer.” *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 (9th Cir. 1990) (citation omitted). An insurer has chosen to cover a particular forum, which by its nature means opening itself up to its laws. By contrast, a financial adviser does not open him- or herself up to litigation in the forum state in which he or she may conduct business, because providing financial advice does not beget accidents and litigation in nearly the same way.

(3) Foreseeability

For a forum state’s courts to have valid personal jurisdiction over an out-of-state defendant, the defendant also must have been able to foresee ending up in those courts. *World-Wide Volkswagen*, 444 U.S. at 297. A defendant must not only have purposefully availed him- or herself of the laws of the forum state, he or she must also have been able to reason at the time of making contacts with the forum state that he or she could be brought into court in that state.

In conducting business with the YIN, Mr. Smith could not have reasonably foreseen being haled into YIN courts for several reasons. First, although he signed a forum selection clause in his contract with the YIN, the clause did not specify that any disputes would be heard in tribal court. Relatedly, due to the rarity of a tribal court’s having valid subject matter jurisdiction over the conduct of a nonmember defendant, particularly when such conduct occurred outside tribal land, Mr. Smith reasonably could have expected not to end up in tribal court due to perceived lack of subject matter jurisdiction. Finally, in light of federal and state laws on controlled substances and the particularly complicated nature of stratified marijuana law, Mr. Smith reasonably could have expected not to end up in tribal court even after his alleged breach of contract in contracting the Arizona Attorney General.

The forum selection clause included in Mr. Smith's contract specified only that any disputes arising from the contract would be tried in a court of competent jurisdiction. This clause did not specify that Mr. Smith could expect any disputes arising from the contract to be adjudicated in tribal court, so he could not have reasonably foreseen ending up in tribal court based on the presence of this clause alone.

Because legal precedent renders it unlikely that a tribal court will have subject matter jurisdiction over the conduct of a nonmember occurring outside of tribal land, Mr. Smith may have anticipated at the time of signing that the forum selection clause in his contract would mean that no disputes would ever end up in YIN court. *See Rolling Frito-Lay Sales LP v. Stover*, No. CV 11-1361-PHX-FJM, 2012 U.S. Dist. LEXIS 9555, at *5 (D. Ariz. Jan. 26, 2012). In *Rolling Frito-Lay*, the court noted, "To this day, the Supreme Court has 'never held that a tribal court had jurisdiction over a nonmember defendant.' This speaks volumes." *Id.* Mr. Smith's forum selection clause specifies that legal disputes will be adjudicated in courts of competent jurisdiction, which Mr. Smith, with any knowledge of Native law, could have taken to mean that YIN courts would never have subject matter jurisdiction over any contractual dispute.

Mr. Smith also may not have foreseen being haled into tribal court because he expected any disputes arising from the marijuana issue would belong in federal or state court. In disclosing the EDC's marijuana development plans to the Arizona Attorney General, Mr. Smith believed he was reporting the planned violation of federal and state criminal laws to a state governmental official. He reasonably could have expected any legal dispute that may arise from this disclosure to be adjudicated in federal or state court.

Finally, although ordinarily one who breaches a contract may reasonably foresee being haled into court as a result, Mr. Smith would have been justified in believing that his disclosure to the Arizona Attorney General did not constitute a breach of contract and would not trigger any legal action. Mr. Smith was placed in a legally untenable position when he was consulted by the EDC about the development of marijuana operations. Not only does Arizona law render an individual culpable who “aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense,” which includes producing marijuana, Ariz. Rev. Stat. Ann. §§ 13-301 (2008), 13-3405 (2010), but federal law also makes it “unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,” including marijuana. 21 U.S.C. §§ 802, 812, 841. By counseling the YIN on the development of marijuana operations, Mr. Smith exposed himself to potential state and federal criminal charges, especially as the Department of Justice has made clear that U.S. Attorneys may opt to prosecute tribal marijuana production. U.S. Dept. of Justice, Memorandum from Executive Office for U.S. Attorneys, *Policy Statement Regarding Marijuana Issues in Indian Country* (2014). For this reason, the confidentiality provision of Mr. Smith’s contract with the YIN is likely void as contravening public policy as applied to preventing Mr. Smith from disclosing the EDC’s plans to develop marijuana operations. It runs contrary to public policy for Mr. Smith’s contract to prevent him from disclosing to law enforcement any intentions of his client to engage in activities that clearly violate federal laws, especially when he may be legally implicated as an accomplice if he fulfills his contract and provides financial assistance in the development of marijuana operations.

(4) *Reasonableness*

Given the lack of purposeful availment and foreseeability, YIN courts should not have personal jurisdiction over Mr. Smith. Even if there were a compelling demonstration of purposeful availment and foreseeability, the courts' assertion of personal jurisdiction over Mr. Smith would fail to meet the reasonableness standard.

To determine reasonableness, there are four key factors courts should weigh: the interest of the plaintiff in proceeding in the forum, the burden on the defendant of having to defend in the forum, the interest of the forum state in the subject matter of the lawsuit, and “the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.” *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987) (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

First, the plaintiff does not have a substantial interest in proceeding in the forum. Because federal law must be applied regardless of where this dispute proceeds, the YIN will not face a different result in federal court.¹ The only reason the YIN would have a substantial interest in proceeding in YIN courts would be if the Nation expected to receive a favorable result in its home court system; and if this were the case, fairness would dictate that this case be tried in federal court, where neither party has an advantage.

¹ Regardless of venue, federal law must be applied to the Smiths in this case. Because the Smiths are not members of the tribe and their actions that led to the suit did not occur on tribal lands, there can be no tribal law that governs their behavior. For YIN law to be read as governing nonmembers who are acting outside of tribal land would be a significant expansion of tribal jurisdiction, and would raise fundamental challenges to the federalist framework of the Constitution. For YIN law to be applied to the Smiths would raise a fundamental question of federalism. Under the Constitution, the states maintain significant power to govern their own people and affairs. The courts and Congress have similarly recognized the rights of tribes to maintain their sovereignty in the interest of self-government. However, the jurisdiction of any of these entities is limited.

Moreover, it would cut against broader tribal interests to require the Smiths to submit to tribal jurisdiction. The Nation, especially as it tries to expand its economic development, must attract outside businesses to conduct business with the Nation; businesses may be deterred from doing so if they fear being haled into tribal court for any dispute. Conversely, by setting a precedent that personal jurisdiction does not exist over the Smiths, YIN courts can make a statement to non-tribal businesses that the Nation is open to working with them on equal footing.

In addition, YIN courts likely have an interest in protecting their hard-won authority. This interest is undermined when federal courts overturn them. By finding a lack of personal jurisdiction over the Smiths, YIN courts can ensure that federal courts will not have an opportunity to overturn their decisions on this matter, which is especially important given that the Smiths likely would bring any unfavorable decision in YIN courts to federal court, particularly given the federal interest in adjudicating marijuana-related issues. Furthermore, if YIN courts determine that personal jurisdiction exists over the Smiths, the Smiths undoubtedly will bring this jurisdictional issue to federal court. If federal courts have an opportunity to decide on this issue, YIN courts run the risk that federal courts will come down against tribal jurisdiction on this issue. By dismissing on jurisdictional grounds now, YIN courts can prevent federal courts from having an opportunity to review this issue and potentially curtail the authority of tribal courts.

Turning to the second factor of the reasonableness test, although the logistical burden on the defendant of litigating in the YIN courts is limited, the burden of being tried in an unfamiliar legal system on the Smiths is significant. Mr. Smith lives relatively close to the reservation, and thus traveling there would not be burdensome. Although Ms. Smith lives

further away, she would face a similar burden in traveling to a federal court in Arizona, so this does not weigh against personal jurisdiction in the YIN courts. However, both Mr. and Ms. Smith face a unique burden: adjudicating their dispute in a court system unfamiliar to them, with judges who have been seated by a government in which they have no representative stake. When a defendant is sued in the courts of another state, he or she faces some degree of hardship in being tried in a less familiar court system with judges who were appointed or elected through processes in which he or she was not involved; but the Smiths face the exacerbated burden of being tried in a court system existing outside of the U.S. Constitution. See *Plains Commerce Bank*, 554 U.S. at 337.

Finally, there is a significant fairness and efficiency interest in trying this case in federal court through diversity jurisdiction, which cuts against allowing the YIN courts to exercise personal jurisdiction over the Smiths. Allowing a case to proceed against an out-of-state defendant must comport with traditional notions of fair play and substantial justice in order to satisfy due process requirements. In one influential personal jurisdiction case, the court addressed fairness outright, noting that the out-of-state defendant “has failed to demonstrate how jurisdiction in [the forum state] would . . . be fundamentally unfair” in concluding that the forum state had personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985). In the Smiths’ case, it would be fundamentally unfair to the Smiths for this dispute, which pits tribal interests against the Smiths’ own interests, to be adjudicated in tribal court.

Diversity jurisdiction exists primarily to ensure fairness in legal disputes between citizens of different states. The framers of the Constitution and the United States Congress recognized that parties may face an unfair disadvantage in the courts of another state, so

diversity jurisdiction was established to provide the option of commencing a lawsuit between citizens of different states in a federal court. 28 U.S.C. §§ 1332, 1441. Diversity jurisdiction particularly made sense in the early days of the United States when each state had a distinct identity and concerns about out-of-state defendants facing prejudice were not unfounded. However, even as the states have become increasingly integrated and Americans identify to a greater degree as Americans as opposed to as Arizonans or New Jerseyans, diversity jurisdiction remains, likely out of concerns about the potential for conflicting state interests and the perception of unfairness.

This case between the Smiths and the YIN represents precisely the kind of case that should be heard by a federal court sitting in diversity jurisdiction. YIN judges are members and leaders of the Nation, and understandably they in many cases will have the best interests of the Nation in mind. That is not to say that YIN judges would not be able to provide this case with a fair hearing, just as state judges would be able to separate their identity as a state citizen from their duty as a neutral decisionmaker. However, the risk remains that this dispute could be adjudicated by a judge who either allows or is perceived to allow bias in favor of tribal interests to seep into the judgment.

If this continues in YIN court and the Smiths receive an unfavorable decision, they may perceive that the decision was influenced by bias against them as nonmembers, and this implicates efficiency concerns. In that scenario, the Smiths likely will attempt to bring suit in federal court even after this case has made its way through the YIN court system, assuming that the YIN courts' decision does not have claim preclusive effect in federal court. This means that judicial resources will be wasted, as two different court systems must deal with this case. Both YIN courts and federal courts have an interest in this case being resolved

efficiently, which means allowing this case to move forward in federal court now without spending limited time and judicial resources adjudicating it in YIN courts first.

B. YIN Courts Do Not Have Subject Matter Jurisdiction to Adjudicate This Case

Even if the YIN courts were found to have personal jurisdiction over the Smiths, the courts' overall jurisdiction over this case still must fail for lack of subject matter jurisdiction. Because the Smiths do not belong to the YIN, YIN courts presumptively lack jurisdiction to adjudicate legal disputes arising from the Smiths' conduct. *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, at *8. Although conditions exist in which tribal courts may exercise adjudicative authority over the conduct of nonmember defendants, none of these conditions is present in the instant case.

Typically, subject matter jurisdiction analysis focuses on the type of case a court may adjudicate. Determining whether a tribal court has subject matter jurisdiction over a particular case involving a nonmember, however, entails first ascertaining whether the tribe has authority over that nonmember's conduct. See *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 818 (9th Cir. 2011).

A tribal court's adjudicative authority over the conduct of nonmembers cannot surpass the tribe's regulatory authority over that conduct. *Id.* at 809 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)). Typically, then, if a tribe has the authority to regulate nonmember conduct, tribal courts can adjudicate issues arising from said conduct. Similarly, if conduct by a nonmember falls outside the bounds of a tribe's regulatory authority, tribal courts likely do not have adjudicatory authority, or subject matter jurisdiction, over that conduct. See *Water Wheel*, 642 F.3d at 814.

Tribes presumptively lack regulatory authority over the conduct of nonmembers. “Nonmembers have no part in tribal government” and thus “no say in the laws and regulations that govern tribal territory,” so a tribe must be able adequately to justify imposing those laws and regulations on nonmembers. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). Similarly, tribal courts ““differ from traditional American courts in a number of significant respects,”” and exist outside the formal structures of the Constitution, so they may only impose adjudicative authority on nonmembers in a limited capacity. *Id.* (citing *Nevada v. Hicks*, 533 U.S. 353, 383 (2001)).

The starting point for establishing a tribe’s authority over the conduct of a nonmember is consent, whether express or implied. *Id.* If a nonmember has given his or her consent to the tribe’s authority, it may suggest that a tribal court has the basis for establishing subject matter jurisdiction over that individual’s conduct. Two bases exist for finding nonmember consent: the nonmember’s presence on tribal land and the existence of a commercial relationship between the nonmember and the tribe or the members thereof. Once consent has been established, tribal authority still “must stem from the tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.” *Plains*, 554 U.S. at 337. In other words, the tribe must be able to ground its authority in one of its established sovereign powers.

In limited circumstances, a tribal court may be able to establish jurisdiction over a nonmember defendant even in the absence of consent. In such instances, the tribe’s interest in regulating or adjudicating the nonmember’s conduct must be so strong that it outweighs concerns about consent.

Two “frameworks” exist for determining whether a tribe has authority to regulate the conduct of a nonmember. *Window Rock Unified Sch. Dist. v. Reeves*, No. 13-16278, 2017 U.S. App. LEXIS 14254, at *9 (9th Cir. Aug. 3, 2017). These frameworks diverge based on whether the nonmember conduct occurred on or off tribal land. If it occurred on tribal land, courts look to the first framework, and the tribe may ground its authority over the nonmember in its inherent sovereign authority and its concomitant power to exclude. If the nonmember conduct occurred outside of tribal land, however, courts look to the second framework to determine whether either of the two so-called *Montana* exceptions apply.

Under the first framework, nonmember conduct has occurred on tribal land, and the tribe has “considerable control.” *Window Rock*, 2017 U.S. App. LEXIS 14254, at *14 (citing *Strate*, 520 U.S. at 454). The second framework involves nonmember conduct outside of tribal land that nonetheless implicates tribal interests. Because this conduct has occurred outside of tribal land, a tribe cannot ground its authority to regulate in its inherent sovereign power to exclude. As discussed above, a tribal court must be able to ground its power over a nonmember in its inherent sovereign authority. Although tribal courts presumptively lack subject matter jurisdiction over the conduct of a nonmember, particularly when it has occurred outside of tribal land, two exceptions exist. These are known as the *Montana* exceptions, and a tribe may exercise authority over nonmember conduct that has occurred outside tribal land if the scenario fits within one of the exceptions outlined in *Montana*. See, e.g., *Water Wheel*, 642 F.3d at 809.

Although courts have engaged in considerable debate over whether tribal authority over nonmember conduct must fit within one of the *Montana* exceptions even when the conduct occurred on tribal land, recent precedent suggests that, because tribal authority over

nonmember conduct occurring on tribal land derives from the tribe's inherent sovereign power to exclude, the authority need not be justified with reference to one of the *Montana* exceptions as well. See, e.g. *Water Wheel*, 642 F.3d at 811; *Salt River Project Agric. Improvement & Power Dist. v. Lee*, No. CV-08-08028-PCT-JAT, 2013 U.S. Dist. LEXIS 10952, at *31 (D. Ariz. Jan. 28, 2013). It is only when a tribe cannot ground its regulatory and adjudicative authority in its plenary power over tribal land that it must establish an alternative basis for authority through one of the *Montana* exceptions. See *Window Rock*, 2017 U.S. App. LEXIS 14254, at *13.

1. This Lawsuit Did Not Arise from Nonmember Conduct Occurring on Tribal Land

When nonmember conduct has occurred on tribal land, which means a nonmember arguably has voluntarily subjected him- or herself to the territorial power of tribal courts, a tribal court can establish adjudicative over that conduct through its inherent power to exclude. One of the basic tenets of tribal sovereignty is the power to set conditions on entry into tribal land. *Allstate*, 191 F.3d at 1074. In the instant case, however, the conduct that triggered the instant lawsuit did not occur on tribal land. Mr. Smith presumably informed the Arizona Attorney General of the tribe's marijuana cultivation plans far outside of tribal land. Moreover, the Smiths only entered YIN land infrequently, so it would be difficult to point to any conduct of theirs that could be said to have occurred on tribal land. Thus, the YIN courts' power to adjudicate this dispute cannot be justified with reference to the tribe's inherent sovereign power to exclude, so tribal authority must be grounded with reference to one of the *Montana* exceptions.

2. This Case Does Not Fit into Either of the Two *Montana* Exceptions

Even when nonmember conduct occurred outside of tribal land, tribal courts may have adjudicative authority if the nonmember has given implicit consent and tribal interests are sufficiently implicated that authority over that defendant is justified. This set of circumstances constitutes the first *Montana* exception. The second *Montana* exception allows for tribal courts to establish adjudicative power of nonmember defendants in the rare case in which the tribe's need to regulate nonmember conduct rises to the level of existential.

Courts have employed three factors to determine whether tribal authority fits within the first *Montana* exception. *Salt River*, 2013 U.S. Dist. LEXIS 10952, at *34-35. All three factors must be satisfied in order for adjudicative power to exist under the first *Montana* exception. *Id.*

The first factor is that a consensual relationship based on commercial dealing exists between the nonmember and the tribe or its members. *Id.* The archetypal consensual relationship to satisfy this factor is one arising from a commercial contract, which is clearly present in the case of the Smiths. *Id.* at *37. Next, jurisdiction over the nonmember defendant must have a “nexus” to the consensual relationship. *Id.* at *34 (citing *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001)). Because the breach of contract claim against the Smiths goes to the heart of the consensual relationship, which is based on a commercial contract, this factor is also met.

Finally, however, jurisdiction over the nonmember defendant must be grounded in “the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.” *Plains*, 554 U.S. at 336. In *Salt River*, the court found that nonmember plaintiffs were “a business enterprise with enough substantial connections to the tribe to intrude on internal relations,” which allowed the tribe to regulate

the plaintiff's employment of tribal members. *Salt River*, 2013 U.S. Dist. LEXIS 10952, at *42. Tribes have also been able similarly to justify taxation on nonmembers and regulations on nonmembers that affect access to tribal land. *Plains*, 554 U.S. at 336.

Adjudicative authority over the Smiths' conduct cannot similarly be grounded in the YIN's inherent sovereign authority, especially given that, in practice, the first *Montana* exception has not been applied to nonmember conduct occurring completely outside of tribal land. See, e.g., *Ford Motor Co. v. Todocheene*, 258 F. Supp. 2d 1038, 1051 (D. Ariz. 2002) (citing *Strate*, 520 U.S. at 457). Even where subject matter jurisdiction has been imposed on insurance companies operating outside of tribal land, the car accident that triggered the lawsuit occurred either on tribal land or on a road running through tribal land. *Id.* at

However, even if there were precedent for finding that nonmember conduct with no physical nexus to tribal land has implicated a tribe's inherent sovereign authority, the Smiths' conduct did not have a sufficiently strong effect on the tribe's self-government or internal relations that adjudicative authority over such conduct can be justified under the first *Montana* exception. At most, the impact of Mr. Smith's disclosure of tribal economic development plans had an economic impact on the Nation: because of the cease and desist order, the Nation is no longer able to pursue its marijuana development plans. The extent of any economic boon the Nation would have received from marijuana operations is purely speculative, however, so the actual harm caused by the disclosure cannot be quantified. Moreover, the YIN had not yet begun developing marijuana operations, so the disclosure did not trigger any legal recourse against the Nation.

The second *Montana* exception goes even further than the first, suggesting that a tribe can assert authority over nonmember conduct only if the effect of that conduct on the tribe is

so significant that regulation is warranted even in the absence of a consensual relationship between the nonmember and the tribe. Because this case does not fall within the first *Montana* exception, it certainly does not fall within the second.

The threshold for tribal effect for the second *Montana* exception is exceptionally high. It allows regulation of the conduct of nonmembers when such conduct “menaces the ‘political integrity, the economic security, or the health or welfare of the tribe.’” *Plains*, 554 U.S. at 341 (citing *Montana v. United States*, 450 U.S. 544, 566 (1981)). This exception has been interpreted as imposing a high standard for tribal authority over nonmembers without their consent: “The conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community.” *Id.* (citing *Montana*, 450 U.S. 544 at 566). One commentator has noted that ‘th[e] elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.’” *Id.* (citing Felix Cohen, *Handbook of Federal Indian Law*, § 4.02[3][c], at 232, n. 220). The second *Montana* exception “should be applied narrowly to ensure that tribal court jurisdiction is, in fact, permitted only in those rare cases where the particular conduct in question has a substantial impact on the tribe as a whole.” *Ford*, 258 F. Supp. 2d at 1052.

In the instant case, tribal power over the Smiths is not necessary to prevent grave existential harm to the tribe; it is not even necessarily required to prevent minor harm to the tribe. The tribe has not yet begun growing marijuana, so it has not violated any state or federal marijuana laws. The harm that Mr. Smith inflicted on the tribe in speaking to the Arizona Attorney General is limited, if not negligible. Moreover, were this case to proceed in federal court, as opposed to tribal court, the tribe would likely win the liquidated damages amount specified in its contracts with the Smiths. Jurisdiction in tribal court is not necessary.

II. The YIN Trial Court Should Stay This Suit While the Smiths Seek a Ruling on Jurisdiction in Federal District Court

YIN courts should stay this suit while the Smiths seek a decision on the YIN courts' jurisdiction in Arizona federal district court. Generally, exhaustion of tribal court remedies is required before a nonmember defendant may pursue remedies in federal court. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). However, the exhaustion requirement does not apply where a tribal court "plainly lacks" jurisdiction. *Ford*, 258 F. Supp. 2d at 1055 ("It is well established that where the tribal court plainly lacks jurisdiction, exhaustion serves no other purpose than delay and is, therefore, unnecessary.") (citing *Nevada*, 533 U.S. at 369). Because YIN courts plainly lack jurisdiction over this case and the Smiths, the Smiths are free to pursue a decision in federal court without exhausting tribal court remedies.

Although in theory the exhaustion requirement applies broadly, in practice it has been applied narrowly to disputes either that arose from events occurring on tribal land or that might have arisen there. *See, e.g., Window Rock*, 2017 U.S. App. LEXIS 14254, at *19 ("Tribal jurisdiction is plausible in this case because (a) the schools operated by the Districts are located on tribal land over which the Navajo maintains the right to exclude."); *Allstate*, 191 F.3d at 1075 ("The authorities thus suggest that the estates' bad faith claim should probably be considered to have arisen on the reservation. At the least, they make it impossible to say that the claim plainly arose off the reservation."). *See also Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013). Moreover, even when a legal dispute has arisen from conduct on tribal land, courts have neglected to apply the exhaustion requirement. *See, e.g., Ford*, 258 F. Supp. 2d at 1055 (exhaustion not required in case involving car accident on Navajo land); *Rolling Frito-Lay*, 2012 U.S. Dist.

LEXIS 9555, at *14 (exhaustion not required in case involving slip-and-fall accident occurring on Salt River Pima-Maricopa Indian Reservation). In *Ford* and *Rolling Frito-Lay*, the court found that jurisdiction was plainly lacking, even though the accidents that arguably gave rise to those cases occurred on tribal land. Given the even greater presumption against the tribe's having jurisdiction over nonmember conduct that *did not* occur on tribal land, jurisdiction should be found to be plainly lacking in this case, especially considering that the *Montana* analysis does not come out in favor of finding valid subject matter jurisdiction.

III. Tribal Nations Possess Inherent but Limited Common Law Sovereign Immunity

As a tribal government that has not explicitly waived its sovereign immunity in its contract with the Smiths, the Yuma Indian Nation (YIN) retains its common-law right to immunity from suit. Thus, the Smiths are prevented from suing the tribe directly for damages. However, courts have held that some tribal enterprises and members are exempt from the sovereign immunity enjoyed by tribes when they are not acting directly as agents of the tribe. Furthermore, the common-law right to suit is not without limit. The Smiths have a right to bring suit for declaratory and injunctive relief against the tribe in so far as the YIN's suit would interfere with the federal suit against the EDC.

Courts have consistently held that tribal governments enjoy sovereign immunity. In *Santa Clara Pueblo vs. Marr*, the court again upheld that tribes hold "the common-law immunity from suit traditionally enjoyed by sovereign powers" as "separate sovereigns preexisting the Constitution." See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978). Though tribes can waive their sovereign immunity rights through contract, such waivers cannot be merely implied. In *United States v. Testan*, the court held that such a

waiver “must be unequivocally expressed.” *United States v. Testan*, 424 U.S. 392, 96 S. Ct. 948 (1976).

In this contract it is clear that the YIN neither implicitly nor explicitly waive their right to sovereign immunity. By stating in the EDC charter that “the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law,” the tribe clearly indicated that in their dealings with the EDC they had no intention of waiving their sovereignty rights. *See Record* at 1.

Tribal rights to sovereign immunity are inherent to the tribe and cannot be implicitly surrendered. Through treaties with the federal government and explicit Congressional statute, some of the inherent sovereignty of tribes has been limited. However, the courts have consistently held that those limitations must be explicitly stated in the treaty or statute that limits those inherent rights. In the few cases where the court has held in favor of sovereignty rights being implicitly limited, it has been based on the unique domestic dependent relationship between tribes and the federal government.

Congress has not abrogated sovereign immunity in contracts between tribes and nonmembers. In the Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Congress explicitly maintained the rights of Indian tribes to engage in business with nonmembers without abrogating their inherent sovereignty rights. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). However, those rights are still largely limited to the tribe’s sovereignty over their members and their land, or to jurisdiction over people whose behavior directly impacts the tribe or its members. In recognizing the inherent sovereignty of tribal nations, the federal government of the United States has not surrendered its own sovereignty over its people and territory. For a

tribal government to assert its authority over the off-reservation actions of non-tribal members opens the possibility that tribal sovereignty rights could be curtailed by federal courts or Congressional action.

A. The YIN Cannot Punish Nonmembers for Fulfilling Their Obligations as Citizens of Arizona

Tribal governments cannot punish nonmembers for fulfilling their obligations as citizens of the United States or the several states. In reporting the EDC to the Arizona Attorney General's office for attempting to start a business that was illegal under state and federal law, the Smiths were fulfilling their citizenship responsibilities to their state and nation to uphold the law and prevent its violation where they were empowered to do so. For the purposes of this case, there is no need to determine whether the EDC or the tribe have a sovereign right to engage in a business that is illegal under state and federal law. However, for the tribe to sue non-tribal members for engaging in behavior that was not only acceptable but laudable under state and federal law is a clear overstepping of their sovereignty.

The YIN's tribal immunity cannot protect the tribe from a suit brought due to their interference in a rightful federal lawsuit. Because tribal sovereign immunity is designed to protect both the sovereign and its treasury from harm caused by a lawsuit, the Smiths cannot sue the tribe itself for damages. However, they have a clear right to sue the tribe for injunctive and declaratory relief against any continued defamation against their business or interference in their suits against the EDC and its officers. These issues speak directly to the right of the Smiths to seek relief in court while threatening no financial harm or impediment of services to the YIN. Thus, the YIN's sovereign immunity cannot be used to shield the tribe from such suits.

In assessing the sovereign immunity claims of the YIN, the EDC and its agents should be considered separately from the Nation itself. Though the YIN maintains its inherent sovereignty absent Congressional action, the sovereign immunity that entails does not extend to every entity either created by or under the jurisdiction of the YIN. Therefore, the EDC and its officers must be considered as separate entities from the tribe in weighing whether they are entitled to the tribe's sovereign immunity.

B. Tribes Have a Limited Ability to Extend Their Sovereign Immunity to Tribal Corporations

In certain circumstances, the sovereign immunity of tribes has been extended to corporate entities or businesses operated by tribes. In *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, the court established a five-factor test to determine whether a tribally-created entity qualifies for sovereign immunity:

(1) the method of creation of the entity; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe exercises over the entity; (4) the tribe's intent with respect to the sharing of the sovereign immunity; and (5) the financial relationship between the tribe and the entity. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010).

In determining whether the sovereign immunity of the YIN should extend to the EDC, each of these factors must be weighed individually. Except for the first, each of these factors indicates that the EDC should not be extended sovereign immunity.

C. The EDC Does Not fulfill the *Breakthrough* Test for Sovereign Immunity Eligibility

By incorporating under tribal law as a wholly owned subsidiary of the Nation, the YIN clearly intended to create an entity that had significant ties to the Nation. Using language that describes the EDC as an "arm-of-the-tribe" in the charter further suggests that the YIN sought to create an entity that was closely held by the tribe. Based on this method of

creation and the language of the charter, the first element of the *Breakthrough* test indicates that this factor is in favor of extending the tribe's sovereign immunity to the EDC. However, there is still some question as to whether the tribe has the authority to create such a devolved entity that is imbued with the sovereignty of the tribe.

Tribal sovereign immunity is closely tied to the inherent sovereignty of tribes over their members and lands. Congress and the courts have repeatedly upheld the inherent authority that tribes possess to manage their own affairs as nations preexisting the Constitution. *See Santa Clara Pueblo*, 436 U.S., *Breakthrough*, 629 F.3d., *Testan*, 424 U.S. However, that sovereignty has not been recognized as allowing tribal nations to delegate their sovereign authority without limits. Within the domestic dependent framework of tribal governments, the federal government recognizes tribal governments that have fulfilled particular criteria as the legitimate representatives of the tribal nations that preexist the Constitution. It is these entities that possess the inherent sovereignty and resulting sovereign immunity recognized by the courts. For tribes to unilaterally delegate that sovereignty to other entities runs counter to the nature of tribal sovereignty.

The second prong of the *Breakthrough* test weighs against extending sovereign immunity to the EDC. In *Breakthrough*, the court found that a corporation formed by a tribe to manage their casino was "created for the financial benefit of the Tribe and to enable it to engage in various governmental functions." *See Breakthrough*, 629 F.3d at 59. On its face, the same could be said for the YIN EDC. However, the casino in that case contributed 50% of its revenue to tribal functions, 15% to further economic development, 10% to a tribal trust fund, and the remaining 25% to individual tribal members. *See Id.* at 53. The Nation's EDC has no such central economic function for the YIN. Instead, it is obligated to spend 50% of

its revenue repaying the initial loan received from the YIN, with the remaining 50% unallocated. Thus, while the EDC was created for the financial benefit of the tribe, there is no clear link between its revenue and the essential government services of the tribe.

In attempting to extend sovereign immunity to an entity that can have no direct negative financial impact on the tribe if successfully litigated against, the YIN is extending the limits of what tribal investments can be protected from litigation. Should the EDC be considered eligible for sovereign immunity, the types of businesses that could be extended the same privileges would be nearly limitless. Any business willing to incorporate under tribal law, receive a loan from the tribal government, and reserve a number of board seats for tribal members would be largely immune from suit. Such legal protection would be an asset for small companies seeking to avoid legislation and would create a potentially huge source of revenue for the tribe. However, it would also shield companies that have little substantial connection to a tribal sovereign from being haled into court for legitimate cause.

According to the criteria used in *Breakthrough*, the Nation's EDC falls short of the threshold needed to secure the tribe's sovereign immunity under the third factor. In weighing the "structure, ownership, and management, including the amount of control the tribe exercises over the entity," the court in *Breakthrough* determined that a corporation with a board made up entirely of the Tribal Council, but with several non-tribal members as officers and directors of the casino itself, did not definitively fulfill the factor test for sovereign immunity. *See Id.* at 30. The Nation's tribal council exerts significantly less control over the EDC in this case than the Chukchansi tribal council did over their corporation. While that board of directors was made up entirely of the Chukchansi tribal council, the YIN EDC board is required to be 40% nonmembers of the tribe. Unlike the Chukchansi corporation, only

some of the officers of the YIN EDC are required to be tribal members. However, there is no explicit requirement that directors of individual businesses run by the EDC be tribal members, and the YIN tribal council's only direct influence over the board is the ability to fire any member at will with a 75% majority vote. While the tribe wholly owns the EDC, this structure does not entitle the EDC to tribal sovereign immunity.

Though the YIN demonstrated in its charter that they intended to share their sovereign immunity with the EDC, their purpose in doing so fails to meet the fourth factor of the *Breakthrough* test. The sovereign immunity of tribes is not granted either by tribal or Congressional statute. In *United States v. Wheeler*, the court described tribal sovereignty as follows:

[Tribal sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. ISee *United States v. Wheeler*, 435 U.S. 323, 98 S. Ct. 1079 (1978).

While tribes maintain their sovereignty rights until those rights are abrogated by Congress, the sovereign immunity inherent to those rights is not unilaterally decided by the tribe. Furthermore, sovereignty rights cannot be expanded or granted to other tribal entities through tribal statute or contract. Were the EDC a department of the tribal government or wholly owned and operated by the tribe, it would clearly be covered by the tribe's inherent sovereign immunity; but immunity cannot be extended to entities that are not naturally covered simply by tribal fiat. Thus, the charter's assertion that the EDC and its officers are extended the Nation's tribal immunity is inadequate to fulfill the fourth factor of the *Breakthrough* test.

The YIN's actual purpose in attempting to extend sovereign immunity to the EDC was to shield the EDC from lawsuits. Were this to be adequate reason to fulfill the

Breakthrough test, it would allow tribes to unilaterally extend sovereign immunity to any enterprise undertaken by a tribe. While this would be a boon to tribes, allowing them to create entities that are not directly under tribal control but can conduct extensive business outside of tribal lands while being exempt from suit in non-tribal courts, such an expansion of tribal sovereignty would fundamentally alter the government-to-government relationship that has been refined since the drafting of the Constitution. Such a rebalancing would have profound implications for the sovereignty rights not only of tribes, but of the state and federal governments that interact with them. By granting such a broad and robust power to tribes in the name of sovereignty, the court would risk undermining the sovereignty of any state where a non-tribal member did business with a tribe by stripping that state of the right to keep its citizen out of a foreign court.

Breakthrough's final factor in determining whether sovereign immunity should be extended to tribal enterprises weighs heavily against doing so for the YIN EDC. In the EDC charter, the YIN explicitly protects tribal assets from being encumbered by the EDC. By limiting the ability of the EDC to avail itself of tribal assets, the tribe is fundamentally separating the EDC from tribal assets. In fact, the EDC is not directly financially linked to the tribe through anything but a one-time loan. Financially separating the EDC allowed the tribe to shield their assets from potential business failures of the EDC, but it also means that the EDC has no more financial connection to the tribe than any homeowner has to his or her mortgage lender.

Furthermore, the protection of the tribal treasury, which is a primary justification of sovereign immunity, does not apply to the EDC. Unlike the casino in *Allen*, the EDC is not a primary source of tribal revenue. *See Record* at 1. Its operations are not funded with an

ongoing stream of tribal funds, and its failure does not place tribal assets at direct risk. Were the EDC to become entirely insolvent, the tribe's financial situation would remain unchanged. Thus, the EDC's financial situation cannot be seen to threaten the solvency of the tribe. Extending the EDC sovereign immunity runs counter to the fundamental logic of sovereign immunity, transforming the concept from a legal recognition of the sovereign and its fundamental interests into a tool that allows any pseudo-tribal entity the ability to evade rightful lawsuits.

Though the Smiths initially filed suit against the YIN, their clear target was the EDC. The Supreme Court in *Clarke v. Lewis* noted that in examining claims of sovereign immunity, "In the context of lawsuits against state and federal employees or entities, courts look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *See Clarke v. Lewis*, 565 U.S. 1166, 132 S. Ct. 1117 (2012). In this case, the EDC is clearly the real party in interest. As the Smiths primarily communicated with the EDC, and their relationship with the EDC engendered this lawsuit, the EDC must be considered the real party at interest. As the EDC is not a direct tribal entity and fails to meet the *Breakthrough* factors for sovereign immunity, the Smiths may continue their suit against the EDC without concern for sovereign immunity.

Considering these factors, it is clear that the EDC fails to meet the standards set out in *Breakthrough* for extending sovereign immunity to a tribal enterprise. As such, neither the EDC nor its officers should be immune to the suits filed by the Smiths.

IV. Employees of a Non-Government Tribal Corporation Are Not entitled to Immunity

As officers of the EDC, which has been established to be a distinct entity from the tribe, Fred Captain and Molly Bluejacket are not immune from suit for acting in their roles as

the EDC's CEO and accountant, respectively. Furthermore, the court has ruled that in actions where relief is sought against a tribal employee acting in their individual capacity, tribal sovereignty does not extend to those individuals. In seeking relief from Mr. Captain and Ms. Bluejacket individually, the Smiths are seeking relief not from the sovereign YIN, but from employees acting in their individual capacity.

Because the EDC is a distinct entity without a claim to sovereign immunity, its agents cannot be working directly on behalf of the tribe. Were the EDC a department of the tribal government, its employees would have some claim to sovereign immunity in certain cases. Suits brought against tribal employees that arise from actions taken as part of their duties can be blocked on sovereign immunity grounds. However, there is no blanket immunity granted to employees of businesses that operate on tribal lands or that have a relationship with the tribal government and that do not fulfill the *Breakthrough* factors. Thus, the employees of the EDC cannot fall under the tribe's sovereign immunity solely because of their connection with the corporation.

A. Tribal Employees Are Not entitled to Sovereign Immunity When Acting in an Individual Capacity

Individual tribal employees are not covered by sovereign immunity when acting in an individual capacity. In *Clarke v. Lewis*, the Supreme Court ruled that a tribal member who was driving a tribal vehicle as a tribal employee could be individually sued for tortious behavior. *See Clarke*, 565 U.S. at 1168. In that case, the suit was directed solely at the individual who had engaged in the behavior, and not the tribe. As the sovereign itself was not implicated in the suit, sovereign immunity was not needed to shield the tribe. This reading is consistent with the methodology for extending sovereign immunity outlined in

Breakthrough. Because sovereign immunity is designed to protect the sovereign from suits that could damage or destroy their position, to extend that protection to individuals whose legal liability would not extend to the tribe would be excessive.

Mr. Captain and Ms. Bluejacket are not entitled to sovereign immunity for their individual actions, even if they are tribal members working on behalf of the tribe. The suits against Mr. Captain and Ms. Bluejacket neither directly impact the tribe nor threaten its sovereign interests. In taking action to defame the Smiths, they acted as individuals. Thus, they can be held liable as individuals without implicating the YIN as a tribe. For the sovereign immunity of the tribe to cover their behavior would require the actions of Mr. Captain and Ms. Bluejacket to have been undertaken in their official capacity as tribal employees. Leaving aside the fact that they are employed by an entity that is not part of the tribe, there are few circumstances in which the defamation of a business or its owners could be considered an official act.

Were the tribe to bar its officials or departments from doing business with the Smiths, leading to a diminution of their professional status, the sovereign immunity argument may hold; but the defamatory actions of individual tribe members who are not part of tribal leadership are well outside the scope of official tribal business. As such, Mr. Captain and Ms. Bluejacket can only have acted in their individual capacity and cannot be immune from suit.

CONCLUSION

In their suit against the Smiths, the YIN has failed to meet the standards required to assert jurisdiction of tribal courts on grounds of either personal or subject matter jurisdiction. Thus, this case must be decided in federal court. In their countersuit, the Smiths have targeted

entities that do not qualify for the sovereign immunity inherent to tribes. Thus, their countersuit must move forward in the appropriate federal courts.