No. 17-024

In the Supreme Court of the Yuma Indian Nation

YUMA INDIAN NATION, PLAINTIFF-APPELLEE

v.

THOMAS SMITH AND CAROL SMITH, DEFENDANTS-APPELLANTS

On Interlocutory Appeal

To The Yuma Indian Nation Supreme Court

For The Yuma Indian Nation Tribal Court

BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

I. Under Supreme Court jurisprudence in *Montana*, stating that tribes generally do not have jurisdiction over nonmembers unless the nonmembers have a consensual relationship stemming from the transaction with the tribe or the nonmembers' actions severely threaten the tribe, does the Yuma Indian Nation have personal or subject matter jurisdiction over nonmembers Thomas and Carol Smith when Thomas Smith's actions only affected a business on the reservation that was not part of the contract between the parties, and Thomas and Carol did not do anything that threatens the Yuma Indian Nation itself?

II. Under established Indian law precedents finding that sovereign immunity does not extend to entities that are not arms of the tribe, individuals who are not officials of the tribe, employees who are sued in their individual capacities, or to counterclaims sounding in recoupment, does sovereign immunity protect the Economic Development Corporation, Molly Bluejacket and Fred Captain, or the Yuma Indian Nation when the Economic Development Corporation does not meet the *White* or *Breakthrough* factors, Molly Bluejacket and Fred Captain are not high-level or governmental officials performing discretionary duties for the Yuma Indian Nation and were sued in their individual capacities, and counterclaims brought by Thomas and Carol were not only from the same occurrence as the Nation's claims, but also sought the same type of relief, which was not in excess of that which the Nation requested?

STATEMENT OF CASE

I. STATEMENT OF PROCEEDINGS

From 2007 to 2017, the Yuma Indian Nation ("Nation") worked with Thomas and Carol Smith, nonmembers of the Nation, in order to help the Nation pursue economic opportunities. R. at 1-2. Thomas is a certified financial planner and accountant living and working in Phoenix, Arizona. R. at 1. Carol is a stockbroker living and working in Portland, Oregon. R. at 1-2. Both Thomas and Carol signed contracts with the Nation that did not mention the Economic Development Corporation ("EDC"). R. at 1-2. When the EDC began pursuing marijuana development on the reservation, Thomas Smith informed the Arizona Attorney General of the operation, and the Attorney General then sent the Nation a cease and desist letter. R. at 2.

Upon receiving the cease and desist letter, the Nation filed suit against Thomas and Carol in the Yuma Indian Nation Tribal Court. R. at 3. The Nation asserted breaches of contract, fiduciary duties, and confidentiality, seeking liquidated damages in the amounts set out in contracts. R. at 3. Thomas and Carol filed motions to dismiss based on lack of personal and subject matter jurisdiction. R. at 3. In the alternative, Thomas and Carol sought a stay of proceedings by the Yuma Indian Nation Tribal Court in order to get a determination in Arizona federal district court regarding whether the Tribal Court had jurisdiction to hear the case. R. at 3. After both motions were denied, Thomas and Carol, moving forward under special appearances, filed answers denying all claims the Nation brought against them. R. at 3. Thomas and Carol also counterclaimed that the Nation owed them money under their contracts and also that the Nation had defamed them by impugning their professional skills. R. at 3. Thereafter, Thomas and Carol impleaded the EDC and its employees Fred Captain and Molly Bluejacket,

in both their individual and official capacities, asserting the same claims against the EDC and its employees as they did against the Nation. R. at 3. The Yuma Indian Nation trial court dismissed all of Thomas and Carol's counterclaims on the basis of sovereign immunity. R. at 3. Thereafter, Thomas and Carol filed an interlocutory appeal in the Yuma Indian Nation Supreme Court requesting a writ of mandamus ordering the trial court to stay the suit and also requesting this Court to decide these issues. R. at 3. The Yuma Indian Nation Supreme Court ultimately granted the interlocutory appeal on these issues. R. at 3.

II. STATEMENT OF FACTS

In 2007, two years before the formation of the EDC, Thomas Smith signed a contract with the Nation for the purpose of giving financial advice to the Nation. R. at 1. The contract was signed in Thomas Smith's office; in his home city of Phoenix, Arizona. R. at 1. While including a confidentiality clause, the contract provided that all disputes arising from the contract must be litigated in a court of competent jurisdiction. R. at 1.

For the first ten years of the contract, Thomas performed his duties specified under the contract without issue from the Nation. R. at 1. On a daily basis, Thomas communicated with the Nation from his office in Phoenix via email and telephone, and only made personal appearances on the reservation four times per year. R. at 1. After the formation of the EDC, which was two years after the contract was signed, Thomas communicated primarily with the EDC's CEO, Fred Captain, and the EDC's accountant, Molly Bluejacket. R. at 1.

In order to benefit the Nation, Thomas contracted with his sister, Carol Smith, a stockbroker who lives and works in Portland, Oregon. R. at 2. Thomas signed this contract with the written permission of the Nation, and his contract with Carol was entirely identical to the contract between the Nation and Thomas prior to the EDC's formation. R. at 2. Although

Carol communicated with the EDC regarding billing matters, Carol provided all of her advice directly to Thomas, who would in turn forward some communications to the Nation as needed. R. at 2. Carol has only entered the Nation twice, both times while on vacation. R. at 2.

The EDC was formed in 2009 under the Nation's tribal commercial code. R. at 1. This occurred after the Nation leant the EDC $10 million for a startup loan, of which the EDC has paid back $2 million. R. at 1-2. Its primary purpose is to "create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona." R. at 1. Put another way, the commercial code allows the Nation to create corporations that operate businesses both on and off the reservation. R. at 1. While the EDC is wholly-owned by the Nation, the EDC operates independently of the Nation. R. at 1-2. Any director of the EDC may be removed for cause or no cause by the Tribal Council, however, removal must be by a 75% vote. R. at 1. The EDC charter requires that the board consist of two directors who are nonmembers of the tribe- including non-Indians- in addition to three directors who are tribal members. R. at 1. The charter also purports to give sovereign immunity to all EDC members. R. at 2.

Like a typical business, the EDC may buy and sell real property anywhere, in fee simple title and in whatever form of ownership. R. at 2. The EDC is also like a typical business in that it can sue and be sued, and must keep detailed corporate and financial records. R. at 2. The EDC must submit their records to the Tribal Council for review and acceptance, however, it does not have the ability to borrow or lend money in the name of the Nation. R. at 2. The EDC also cannot borrow or lend money on behalf of the Nation. R. at 2. Furthermore, the EDC cannot in any way implicate or encumber the assets of the Nation. R. at 2. In other words, the

EDC cannot attach any security interests to the assets of the Nation. R. at 2. Finally, only fifty percent of the EDC's net profits are paid to the Nation. R. at 2.

In 2016, the state of Arizona conducted a state-wide referendum on expanding the lawful uses of marijuana from medicinal uses only to full recreational use. R. at 2. The citizens of Arizona responded by voting against this regulation, and marijuana remains illegal for recreational uses in Arizona. R. at 2. In spite of marijuana's illegality in the surrounding state, the EDC requested and convinced the Tribal Council to enact legislation making recreational uses of marijuana legal on the reservation. R. at 2. The EDC then began exploring marijuana cultivation and sales and ultimately began quietly pursuing the development of a marijuana operation. R. at 2. Due to Thomas and Carol's concerns about marijuana, Thomas informed the Arizona Attorney General of the Nation's plans for the drug operation, and the Attorney General in turn sent a cease and desist letter to the Nation regarding their recreational marijuana operations. R. at 2. After receiving the cease and desist letter, the Tribal Council initiated this litigation in the Nation's trial court. R. at 3.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT THE YUMA INDIAN NATION IS WITHOUT JURISDICTION TO ADJUDICATE THE CLAIMS AGAINST THOMAS AND CAROL SMITH BECAUSE THE GENERAL RULE IS AGAINST TRIBAL JURISDICTION, NEITHER EXCEPTION TO THIS RULE IS MET, AND THE FACTS IN THIS CASE DO NOT THREATEN TRIBAL SOVEREIGNTY OR SELF-GOVERNMENT OR, IN THE ALTERNATIVE, THIS COURT SHOULD STAY PROCEEDINGS IN TRIBAL COURT WHILE THOMAS AND CAROL SEEK A RULING IN THE ARIZONA FEDERAL DISTRICT COURT.

Tribes have civil jurisdiction wherever state actions would infringe on the right of tribes to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217, 220 (1959). However, the exercise of tribal power beyond what is necessary to protect tribal self-

government or control internal relations is inconsistent with the dependent status of tribes and does not give rise to civil jurisdiction, unless Congress expressly grants jurisdiction to the tribe. *Montana v. United States*, 450 U.S. 544, 564 (1981). The Supreme Court has repeatedly stated that a tribe's adjudicatory jurisdiction is no broader than its regulatory jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *Nevada v. Hicks*, 533 U.S. 353, 358 (2001); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). A tribe's adjudicatory jurisdiction may not even be as broad as its regulatory jurisdiction; a question the Supreme Court has left open. *Hicks*, 533 U.S. at 367. However, at the very most, the power to adjudicate is no broader than the power to regulate. *Id.* Here, the Yuma Indian Nation ("Nation") is without power to adjudicate because (A) the general rule in *Montana* is that tribes do not have jurisdiction over nonmembers and neither exception to this general rule is met, and (B) tribal court jurisdiction in this case is beyond what is necessary for tribal self-government. In the alternative, (C) exhaustion is not required because tribal jurisdiction would serve no purpose other than delay.

A. The Yuma Indian Nation Does Not Have Jurisdiction In This Case Under The Precedent Of *Montana v. United States* Because Thomas And Carol Smith Are Nonmembers Of The Nation And Did Not Have A Consensual Relationship With The Nation, Nor Did Thomas And Carol's Actions Threaten The Political Integrity, Economic Security, Health Or Welfare Of The Nation.

In *Montana v. United States*, the "pathmarking case" concerning tribal civil authority over nonmembers, the United States Supreme Court stated that the general rule is that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *Strate*, 520 U.S. at 445 (quoting *Montana*, 450 U.S. at 565). This general rule is subject to two exceptions based on the principle that *Montana* limits tribal regulation of nonmember conduct inside the reservation to situations that implicate the tribe's sovereign

interests. *Plains Commerce*, 554 U.S. at 332. First, a tribe may regulate the activities of nonmembers who enter into consensual relationships with the tribe through commercial dealings, contracts, leases, or other arrangements. *Montana*, 450 U.S. at 565. Second, a tribe may regulate the activities of nonmembers when the conduct threatens or has some direct effect on the political integrity, economic security, health or welfare of the tribe. *Id.* at 566. In order to assert adjudicatory jurisdiction over nonmembers of the tribe, the facts of a particular case must, at a minimum, satisfy one of the two *Montana* exceptions for tribal regulatory jurisdiction, since a tribe's adjudicatory jurisdiction cannot exceed its regulatory jurisdiction. *Hicks*, 533 U.S. at 367; *Phillip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 940 (9th Cir. 2009). Here, the tribal court cannot assert regulatory or adjudicatory jurisdiction because neither *Montana* exception is met.

1. The First *Montana* Exception Is Not Met Because The Lawsuit Did Not Arise Out Of A Consensual Relationship Between The Parties As Contemplated By The United States Supreme Court's Jurisprudence Because Thomas And Carol Smith Would Not Have Reasonably Expected To Be Haled Into Tribal Court Over Actions Affecting The Economic Development Corporation, A Party Not Involved Or Named In Their Contract With The Yuma Indian Nation.

As stated above, the first exception to *Montana*'s general rule prohibiting tribal adjudicatory jurisdiction over nonmembers applies when nonmembers enter into consensual relationships with the tribe through commercial dealings, contracts, leases, or other arrangements. *Montana*, 450 U.S. at 565. *Montana* expressly limits this first exception to the activities of nonmembers, allowing these nonmembers to be regulated only to the extent necessary to protect tribal self-government and control internal relations. *Plains Commerce*, 554 U.S. at 332. Therefore, *Montana* does not allow a tribe unlimited regulatory or adjudicatory authority over a nonmember; a tribe can only have jurisdiction over the *activities*

of the nonmember under the first *Montana* exception. *Big Horn Cty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000). Furthermore, the mere fact that a nonmember has some commercial contacts with a tribe or tribal member does not mean that the tribe has civil jurisdiction over all suits involving that nonmember. *Phillip Morris*, 569 F.3d at 941. A nonmember's consensual relationship with the tribe or a tribal member in one area does not subject that nonmember to tribal regulatory or adjudicatory authority in other areas. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). In the area of tribal regulatory and adjudicatory jurisdiction, it is not "in for a penny, in for a pound." *Id.*

Tribal laws and regulations may only be fairly imposed on nonmembers when those nonmembers have consented, either expressly, or by their actions. *Plains Commerce*, 554 U.S. at 337-38. Put another way, the question of whether a "consensual relationship" exists turns on if the nonmember could have reasonably expected to be haled into tribal court based on the consensual relationship. *Id.* In *Plains Commerce*, a tribal family farm that was operated on the reservation contracted with a nonmember, off-reservation bank for a lease of farmland with an option to purchase at the end of the lease. *Id.* at 321. The family was not able to afford the lease option, so the bank commenced eviction proceedings against the family. *Id.* at 322. Meanwhile, the bank sold the land to non-Indian buyers on terms that were allegedly more favorable to the non-Indians. *Id.* The family then initiated discrimination proceedings against the bank in tribal court, and the bank claimed that the tribal court did not have jurisdiction over the bank. *Id.* The United States Supreme Court agreed that the tribal court did not have jurisdiction, and reversed the lower courts' holdings. *Id.* at 330. The Court reasoned that the bank's "consensual relationship" with the tribal family was the contract financing the lease of the land, and not the subsequent discrimination claim filed by the tribal family. *Id.* at 338. The Court said that the

bank may reasonably have anticipated that its various commercial dealings with the tribal family could have resulted in tribal jurisdiction over those transactions, but that there was no reason the bank should have anticipated that its general business dealings with tribal members would permit the tribe to regulate subsequent issues between the tribe and the bank. *Id.*

In this case, the Court should hold that the tribe is without jurisdiction to adjudicate this case due to the lack of a consensual relationship. Like the bank in *Plains Commerce*, the Smiths would not reasonably have expected to be haled into tribal court for actions that harmed the Economic Development Corporation ("EDC"). At the time the contract between the Nation and Thomas Smith was signed in Phoenix, Arizona, the EDC did not yet exist. R. at 1. Thomas Smith contracted only with the Nation, and would only have reasonably expected for tribal jurisdiction to exist for issues arising out of dealings with the Nation. R. at 1. Thomas Smith would not reasonably have expected to be haled into tribal court over an issue with a corporation that was not named in the contract and did not even exist at the time of the signing of the contract. R. at 1. Likewise, Carol Smith signed an identical contract to the one signed by Thomas Smith, and the EDC was not named as a party to that contract either. R. at 2. Additionally, Carol Smith is even further removed from tribal authority, as she merely gave advice to her brother who in turn gave advice to the Nation. R. at 2. Therefore, Carol Smith would also not have reasonably expected to be haled into tribal court over her tangential involvement with tribal matters. As discussed above, the Court in *Plains Commerce* held that the nonmember bank did not have a consensual relationship with the tribe due to the fact that the bank wouldn't reasonably have expected to be haled into tribal court over matters outside the scope of the contract. *Plains Commerce*, 554 U.S. at 337-38. Therefore, this Court should likewise hold that Thomas and Carol did not have a consensual relationship with the EDC

because Thomas and Carol wouldn't have expected to be haled into tribal court over actions allegedly harming a corporation that was not a part of their contract with the Nation.

The Appellees may argue that the Nation's Tribal Court has jurisdiction over Thomas and Carol due to Thomas and Carol's use of the tribal court system. In *Smith v. Salish Kootenai College*, the Ninth Circuit held that the nonmember plaintiff consented to the civil jurisdiction of the tribal court by suing in the tribal court even though the claims did not result from a contract or lease or other commercial relationship with the tribe as laid out in the United States Supreme Court precedents. 434 F.3d 1127, 1136 (9th Cir. 2006). However, under this precedent, the most important issue is the party status of the nonmember, whether the nonmember is the plaintiff or the defendant. *Phillip Morris*, 569 F.3d at 940. This is in line with the analysis above regarding whether a nonmember reasonably expects to be haled into tribal court. The Court has repeatedly ruled against nonmember defendants being required by tribal courts to defend themselves in an unfamiliar forum. *Phillip Morris*, 569 F.3d at 940; *Strate*, 520 U.S. at 442. In this case, the Nation sued the nonmembers in tribal court, prompting Thomas and Carol, nonmembers of the Nation, to counterclaim in tribal court. R. at 3. These facts make this case distinguishable from *Smith*, and more in line with *Phillip Morris*, in which tribal court jurisdiction was invoked by the tribal member and not by the nonmember plaintiff. *Phillip Morris*, 569 F.3d at 940-41. Therefore, *Smith* is not implicated and does not require tribal jurisdiction in this case.

Because Thomas and Carol Smith signed contracts that did not include the EDC, signed these contracts outside of Indian Country, and generally wouldn't have expected to be haled into tribal court to defend themselves for these claims, Thomas and Carol did not have a

"consensual relationship" with the tribe as contemplated in the United States Supreme Court jurisprudence. Therefore, the first *Montana* exception is not met.

2. The Second *Montana* Exception Is Not Met Because The Conduct Of Thomas And Carol Does Not Rise To The Incredibly High Burden Set Out By The United States Supreme Court For A "Direct Effect" To The Political Integrity, Economic Security, Health Or Welfare Of The Nation To Be Found.

The second exception to *Montana*'s general rule prohibiting tribal adjudicatory jurisdiction over nonmembers applies when the conduct threatens or has some direct effect on the political integrity, economic security, health or welfare of the tribe. 450 U.S. at 566. The burden for meeting this exception is extremely high, as the conduct must be "demonstrably serious." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431 (1989). It must do more than just injure the tribe, it must "imperil the subsistence" of the community. *Plains Commerce*, 554 U.S. at 341. This exception is only triggered by nonmember conduct that threatens the tribe; it is not to be invoked to allow civil jurisdiction whenever it might be considered necessary to self-government. *Atkinson Trading*, 532 U.S. at 657 n.12. The second exception is to be invoked in situations where the nonmember conduct poses a *direct threat* to tribal sovereignty. *Phillip Morris*, 569 F.3d at 943.

Montana's second exception requires more than just acts that jeopardize tribal members, it requires a situation where tribal power is necessary to avoid catastrophic consequences. *Plains Commerce*, 554 U.S. at 341. As discussed above, *Plains Commerce* involved claims of bad faith resulting from commercial relationships between tribal members and a nonmember bank. *Id.* at 322. The United States Supreme Court held that *Montana*'s second exception was not met and that tribal jurisdiction was not appropriate in this case. *Id.* at 341. The Court reasoned that the actions of the nonmember bank were likely disappointing

to the tribe, but could not reasonably be considered "catastrophic" for tribal self-government. *Id.*

The Court here should hold that the second *Montana* exception is inapplicable because the facts in this case could not reasonably be considered catastrophic for tribal self-government. Like the tribal family in *Plains Commerce*, an argument can be made that the conduct of the nonmembers is "disappointing" to the Nation, or harms the EDC or its individual members. Divulging the EDC's economic plans to the state Attorney General- resulting in a cease and desist letter from the Attorney General- is obviously something that is harmful to the EDC and the Nation. R. at 2. However, it is not something that "imperils the subsistence" of the Nation to the degree imagined by the United States Supreme Court in *Plains Commerce* or its other *Montana* II cases. The EDC can still pursue countless other economic opportunities to develop a sustained and thriving economy for the Nation. Civilizations have for years maintained strong economies without doing business in recreational marijuana. Furthermore, an argument can even be made that cultivating and selling marijuana on the reservation for recreational use would threaten the health and welfare of the Nation based on the history of alcohol use in Indian Country. Alcohol has been a serious issue in Indian Country since Indian people were first contacted by Europeans, and the Nation may put itself in danger by introducing other recreational drugs into the community. Mark T. Baker, *The Hollow Promise of Tribal Power to Control the Flow of Alcohol into Indian Country*, 88 VA. L. REV. 685, 688 (2002). Because the Court in *Plains Commerce* held that the conduct of the nonmember bank was not catastrophic enough to meet the high burden for the second *Montana* exception, this Court should also hold that the conduct of Thomas and Carol Smith is not enough to meet this lofty burden.

Because the facts in this case do not support the conclusion that the actions of Thomas and Carol threaten the Nation in a way that meets the lofty burden set out by the United States Supreme Court, Thomas and Carol's actions do not threaten the political integrity, economic security, health or welfare of the Nation. Therefore, the second *Montana* exception is not met. Since neither exception to *Montana*'s general rule against tribal civil jurisdiction can be found, the Nation does not have jurisdiction in this case.

B. Even If The Facts In This Case Give Rise To One Of The *Montana* Exceptions, The Tribal Court Is Still Without Jurisdiction Because Regulating In The Area Of Marijuana Is Beyond What Is Needed For Tribal Sovereignty And Self-Government.

Tribal courts have regulatory and adjudicatory power stemming from their sovereignty and right to exclude nonmembers. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-44 (1982). However, as discussed above, the United States Supreme Court has consistently stated that the inherent sovereign powers of an Indian tribe to regulate and adjudicate generally do not extend to the activities of nonmembers of the tribe. *Montana*, 450 U.S. at 565; *Hicks*, 533 U.S. at 358-59. The Court has also consistently stated that it is inconsistent with the dependent status of tribes for those tribes to exercise tribal power beyond what is necessary to protect tribal self-government and control the tribes' own internal relations. *Strate*, 520 U.S. at 456; *Montana*, 450 U.S. at 557; *Hicks*, 533 U.S. at 359. Any tribal authority beyond what is necessary to protect these interests cannot survive without express congressional authority. *Hicks*, 533 U.S. at 359.

Courts have not recognized an inherent authority of tribal regulation in the area of controlled substances. *Rice v. Rehner*, 463 U.S. 713, 722 (1983). In *Rice*, the Respondent operated a general store on a tribal reservation. *Id.* at 715. The Tribe's council had adopted an ordinance allowing the sale of liquor on the reservation provided that it complied with state

law. *Id.* at 715-16. The respondent sought a declaratory judgment stating that she did not need a license from the state to sell liquor on tribal land. *Id.* at 716. The Court held that the respondent had to comply with state law in the area of liquor sales even when selling liquor on the reservation. *Id.* at 725. The Court reached this conclusion for two main reasons: the lack of any congressional action demonstrating a federal policy of promoting tribal self-sufficiency in the area of liquor regulation, and the potential "spillover effect" of alcohol being sold on the reservation and being taken off the reservation onto state land. *Id.* at 724.

Here, this Court should hold that state and federal courts have the exclusive power to adjudicate these claims due to the significant state interests involved. Like the respondent in *Rice*, the EDC wishes to be exempt from state laws that regulate the sale of a controlled substance. In this case, the controlled substance at issue is marijuana. R. at 2. The case at bar touches on issues involving the Nation's plans for engaging in marijuana cultivation and sales. R. at 2. States have a heightened interest in issues of marijuana regulation because, like in the case of alcohol, marijuana sold and purchased on the reservation can and will be brought off the reservation and onto state land. Marijuana regulation is arguably even more important to Arizona than alcohol regulation, considering marijuana remains unlawful for recreational use in the State of Arizona. R. at 2. As discussed above, the Court in *Rice* held that the sale of liquor is a special area of law in which the state has a heightened interest, and therefore the Tribe could not regulate. *Rice*, 463 U.S. at 724. Therefore, this Court should likewise hold that the State of Arizona has a heightened interest in regulating issues involving the sale of marijuana on the reservation, and the Nation should not have regulatory authority. If a tribe cannot regulate in these areas, it follows that a tribal court cannot adjudicate in these areas

because tribal adjudicatory authority cannot exceed tribal regulatory authority. *Strate*, 520 U.S. at 453.

The Appellees may argue that the tribal court has jurisdiction in this case due to their right to exclude nonmembers. In *Merrion*, the Court held that the tribe did not lose its sovereignty and right to exclude merely by contracting with nonmembers, and could still assert adjudicatory jurisdiction over the nonmembers. 455 U.S. at 147. While this right to adjudicatory jurisdiction is in fact retained by tribal courts over nonmembers who do business with a tribe, it still cannot exceed the tribe's regulatory jurisdiction. *Strate*, 520 U.S. at 453. *Merrion*, therefore, is easily distinguishable from the case at bar because *Merrion* involved a tribal ordinance attempting to impose a severance tax on a nonmember business operating on tribal lands. 455 U.S. at 133. In this case, however, the issues involve marijuana cultivation and sales, an area of law in which Congress almost certainly would not allow tribes to regulate, as explained above. The United States Supreme Court was clear that cases involving controlled substances are qualitatively different from cases involving income taxes or taxes on goods, and that a state's regulatory interest will be particularly substantial if the state can point to effects felt off the reservation, which the state clearly can in cases involving alcohol and marijuana. *Rice*, 463 U.S. at 724. Because, as stated before, a tribe's adjudicatory authority does not exceed its regulatory authority in issues involving marijuana, the Nation does not have jurisdiction in this case. *Strate*, 520 U.S. at 453.

Because the State of Arizona has a strong interest in regulating in the area of marijuana, and tribal self-government does not require regulation in this area, the Tribal Court does not have jurisdiction over this case.

C. In The Alternative, This Court Should Hold That The Tribal Court Should Stay This Suit While Thomas And Carol Seek A Ruling In The Arizona Federal District Court Because Tribal Jurisdiction Would Serve No Purpose Other Than Delay.

As a principle of comity, tribal remedies must generally be exhausted in tribal court before a federal district court may address the question, despite the federal question jurisdiction under 28 U.S.C. § 1331. *Iowa Mut. Life Ins. Co. v. Plante*, 480 U.S. 9, 15 (1987). However, when it is plain that no federal grant provides for tribal governance of nonmembers' conduct, tribal courts clearly lack adjudicatory jurisdiction over an action and exhaustion would serve no purpose other than delay. *Strate*, 520 U.S. at 459 n.14.

Exhaustion is not required in cases where tribal courts are clearly lacking jurisdiction and exhaustion would not serve any purpose other than delay. *Phillip Morris*, 569 F.3d at 938. In *Phillip Morris*, a well-known, non-tribal member seller of cigarettes throughout the United States sued a tribal tobacco company in federal court for infringing on their patent-protected packaging. *Id.* at 935-36. The tribal tobacco company responded by filing an action in tribal court on their reservation and the nonmember cigarette seller sought an injunction in federal court against the tribal proceedings. *Id.* at 936. The court concluded that the tribal court did not have jurisdiction over the tribal action and that exhaustion was not required. *Id.* at 938. The court reasoned that this case was different from cases in which courts have required exhaustion due to the breadth of the challenged activity. *Id.* at 943. The court said that this suit was different from other exhaustion cases because it touched on issues affecting federal trademarks, worldwide internet sales, and off-reservation sales, and therefore the focus of the complaint was on issues beyond tribal jurisdiction. *Id.*

Here, this Court clearly lacks adjudicatory jurisdiction over this action due, in part, to the breadth of the claim, and exhaustion in tribal court would serve no purpose other than

delay. While not quite as broad as the internationally relevant claim in *Phillip Morris*, this claim involves secrets divulged outside of the reservation, based on a contract signed outside of the reservation, and harmed a party that was not an arm of the Nation and was not a part of the contract. R. at 1-2. Furthermore, the secrets divulged were about an area of law, marijuana regulation, in which Congress and the United States Supreme Court would almost certainly not want tribes to regulate, as discussed above. Because the court in *Phillip Morris* held that the effects of the claim were too far outside of Indian Country for the tribal court to have jurisdiction and exhaustion would therefore serve no purpose other than delay, this Court should likewise hold that the effects of this claim are too far outside of Indian Country, and that exhaustion would serve no purpose other than delay.

To be sure, tribal courts are competent jurisdictions and are the rightful places for many issues to be litigated. This claim against exhaustion does not imply that tribal courts should not ever be called on to adjudicate issues, even those involving nonmembers in certain circumstances. However, this is an example of a case in which tribal jurisdiction is clearly lacking due to the breadth of the effects felt off of the reservation, and exhaustion in tribal court would serve no purpose other than delay. Therefore, this Court should hold that the trial court should stay this suit while Thomas and Carol seek a ruling in federal court.

II. SOVEREIGN IMMUNITY DOES NOT PROTECT ANY OF THE YUMA INDIAN NATION, THE ECONOMIC DEVELOPMENT CORPORATION, FRED CAPTAIN, OR MOLLY BLUEJACKET FROM COUNTERCLAIMS ASSERTED BY THOMAS AND CAROL SMITH BECAUSE THE ECONOMIC DEVELOPMENT CORPORATION IS NOT AN ARM OF THE TRIBE, FRED CAPTAIN AND MOLLY BLUEJACKET WERE SUED IN THEIR INDIVIDUAL CAPACITIES AND ARE NOT OFFICIALS OF THE YUMA INDIAN NATION, AND THE COUNTERCLAIMS AGAINST THE NATION SOUND IN RECOUPMENT.

It is undisputed that American Indian tribes are domestic dependent nations which enjoy "a common law immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The United States Supreme Court has acknowledged that sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). However, that immunity is not absolute. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). It can be waived by Congress and waived by the tribe itself. *Id.* Furthermore, it does not extend to every entity of the tribe, but only those that can show that they are truly arms of the tribe, meeting stringent factored tests. *See generally White v. Univ. of California*, 765 F.3d 1010 (9th Cir. 2014). Additionally, while tribal official immunity may be available as a defense, it should only be available when the duties in question represent discretionary actions by the individual claiming to be a tribal official. *See generally Turner v. Martire*, 82 Cal. App. 4th 1042 (Cal. Ct. App. 2000). However, when a plaintiff sues a tribal employee in their individual capacity for a tort occurring during the course of their employment, sovereign immunity will not shield the individual from suit. *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017).

Here, the Economic Development Corporation ("EDC") is not able to meet any of the tests outlined by courts around the United States to prove that it is an arm of the Nation, and thus is not entitled to the sovereign immunity of the Nation. This further means that Fred

Captain and Molly Bluejacket were not officials of the Nation, as the EDC is a separate entity not entitled to sovereign immunity. Furthermore, they were sued in their individual capacities by Thomas and Carol Smith. R. at 3. The siblings are seeking relief directly from Fred Captain and Molly Bluejacket in their individual capacities, and not from the Nation, so sovereign immunity will not protect the Appellees. However, even if this Court finds that the EDC is an arm of the Nation, and the individuals were employees of the Nation, they were not tribal officials acting in the scope of their authority because they do not perform any discretionary or policymaking duties that tribal officials normally perform. Therefore, they are not entitled to sovereign immunity. Lastly, this Court should find that the counterclaims asserted by Thomas and Carol sound in recoupment, and thus waive the sovereign immunity of the Nation as to these claims.

A. Because The Economic Development Corporation Is Not An Arm Of The Yuma Indian Nation, It Does Not Have Sovereign Immunity From Suit.

Tribal sovereign immunity not only protects tribes, but it can protect entities that are arms of the tribe. *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 705 & n.1 (2003). However, federal circuit courts and other courts around the United States are employing factored tests to limit when an entity is an arm of the tribe. *See generally White v. Univ. of California*, 765 F.3d 1010 (9th Cir. 2014); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010). These tests look at both formal and functional considerations; in other words, the tests look at "not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe." *People ex Rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 361 (Cal. 2016). For example, in the Ninth Circuit, the court looks at (1) how the entity was created; (2) the purpose of the entity; (3) the management, ownership,

and structure of the entity, which includes an analysis of how much control the tribe exerts over the entity; (4) the intent of the tribe to share its sovereign immunity with the entity; and (5) the pecuniary relationship of the entity and tribe. *White*, 765 F.3d at 1025. The Tenth Circuit takes it even further by adding in a sixth factor, which looks at "whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." *Breakthrough*, 629 F.3d at 1181. Tribal courts are also adopting this factored test. *See generally Redsleeve Golf, LLC v. Sequoyah Nat. Golf Club, LLC*, 13 Am. Tribal Law 203 (Eastern Cherokee Ct. 2014); *Pequot Pharmaceutical Network v. Connecticut Hospice, Inc.*, No. CV-GC-2015-104, 2015 WL 9601099, (Mash. Pequot Tribal Ct. 2015). Although all factors are important, courts around the United States have found that the financial relationship between the entity and the tribe is of paramount importance. *See Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 550 (N.Y. 2014) (finding "[i]f a judgment against a corporation created by an Indian tribe will not reach the tribe's assets, because the corporation lacks the power to bind or obligate the funds of the tribe, then the corporation is not an arm of the tribe"); *See also Runyon ex Rel. B.R. v. Ass'n of Village Council Presidents*, 84 P.3d 437, 441 (Alaska 2004) (finding that it is only when a tribe is "legally responsible for the entity's obligations" that other factors will need to be analyzed).

When all five *White* factors are present, a court is likely to find that the entity is an arm of the tribe. *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, No. CV-16-08077-PCT-SPL, slip op. at 3 (D. Ariz. Sept. 11, 2017). In *Dine Citizens*, the court employed the *White* factors to find that a tribal energy company was an arm of the tribe. *Id.* at 3. First, the energy company, a wholly-owned tribal corporation, was created under that tribe's law. *Id.* Second, the purpose of the energy company was "to protect and promote the economic and

financial interests" of the tribe while also protecting the tribe's natural resources. *Id.* More specifically, the energy company was formed in order to purchase a mine located on the reservation. *Id.* Third, the management of the energy company consisted entirely of members of the tribal council. *Id.* Furthermore, *all* of the profits from the energy company went to the tribe. *Id*. Last, the tribe's intent was to share with the energy company its sovereign immunity by explicitly stating in the operating agreement and in a resolution that it was an "arm and subordinate instrumentality" of the tribe. *Id*. Finding all five factors to be present, the court found that the energy company was an arm of the tribe. *Id*. at 4.

Here, this Court should find that the EDC is not an arm of the Nation, as it cannot meet all or even a majority of the *White* factors. As to factors one and four, like the tribal energy company in *Dine Citizens*, it is not disputed that both the EDC was created under tribal law and that the Nation intended for the EDC to share in the sovereign immunity of the Nation. However, a blanket statement attempting to confer sovereign immunity to the entity on its own cannot be enough to determine that an entity is an arm of the Nation. All factors must be taken into consideration.

For factor two, unlike in *Dine Citizens* where the purpose of the company was to benefit the tribe and its citizens exclusively, it is clearly stated in the EDC charter that the purpose of the EDC is "to create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation *and in* southwestern Arizona. R. at 1. The fact that the EDC charter specifies "southwestern Arizona" implies that the purpose of the EDC is not just to benefit the Nation, but to benefit the surrounding state land. Furthermore, also unlike *Dine Citizens* where the tribal energy company was created specifically to buy a mine on the reservation to benefit the tribe, the EDC was created for the purpose of "any legal type of

business" anywhere in southwestern Arizona. R. at 1. Therefore, the purpose stated does not explicitly limit the tribal entity to specifically benefit the Nation's members, but rather, is phrased in a way that could benefit others outside of the Nation. This factor weighs in favor of finding the EDC is not an arm of the Nation.

For factor three, the EDC and the tribal energy company in *Dine Citizens* also differ greatly in the way they operate these entities. Unlike the tribal energy company in *Dine Citizens* that was operated directly by the Tribal Council, the EDC is operated by its own board of directors, where two of the five directors must be nonmembers of the Nation. R. at 1. Furthermore, the EDC appears to operate as a completely separate entity from the Nation, as it is allowed to buy and sell real property and other types of property in *whatever form* of ownership in fee simple title, whether it is on the reservation or not. R. at 2. If the Nation wished for the EDC to be arm of the Nation, it would likely require the EDC to purchase these types of property in a way that would allow the Nation to ensure that the property would be part of the reservation. This factor weighs in favor of finding the EDC is not an arm of the Nation.

For factor five, unlike the tribal energy company in *Dine Citizens* where *all* profits from the tribal energy company were wholly obtained by the tribe, here, only fifty percent of the EDC profits go to the Nation. R. at 2. Additionally, the EDC does not have the power to lend money, permit liens, or borrow money in the name of or on behalf of the Nation; the Nation cannot be responsible for the EDC's monetary ventures; the EDC can sue and be sued in its corporate name; the Nation will not be responsible for judgments of the EDC; and the EDC can buy and sell on its own, and cannot implicate the Nation in its financial obligations. R. at 1-2. These facts show that the EDC is a separate entity from the Nation, and therefore, not an

arm of the Nation. *See* Winnebago Tribal Code tit. 11, art. 10, subdiv. 3(b) (stating "any recovery against such corporation shall be limited to the assets of the corporation"); Winnebago Tribal Code tit. 11, art. 1.16, subdiv. 3 (stating "a corporation may sue and be sued . . . in its corporate name").

Last, even considering the sixth *Breakthrough* factor, whether granting immunity furthers federal policies geared toward protecting Indian tribal autonomy, the EDC is still not considered an arm of the Nation. *Breakthrough*, 629 F.3d at 1187. The United States Supreme Court has indicated that protecting tribal money is a goal of furthering these policies. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987). Here, as noted above, the Nation is not responsible for any of the EDC's financial obligations or any judgments against the EDC. By not extending sovereign immunity to the EDC, the Nation's money is still protected. Therefore, these policies of tribal economic development are still served.

Overall, three of the five *White* factors, and the sixth *Breakthrough* factor, weigh heavily in favor of finding that the EDC is a separate entity from the Nation. Therefore, the EDC should not be considered an arm of the Nation, and should not have sovereign immunity.

B. Molly Bluejacket And Fred Captain Do Not Have Sovereign Immunity Because They Were Not Officials Of The Yuma Indian Nation And They Were Sued In Their Individual Capacities.

The United States Supreme Court has recently refused to extend sovereign immunity to provide greater protections for tribal members over their state and federal counterparts. *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017). The Court ruled that tribal employees may be sued in their individual capacities for torts committed within the scope of their employment, and therefore, are not entitled to sovereign immunity in these suits. *Id.* at 1288. This is true

even if the employee was acting within the scope of his or her employment. *Id*. The Court will employ a "remedy-focused" analysis to determine who the real party of interest is because when the suit seeks damages from the sovereign's treasury, and not from the individual personally, it is the sovereign that is the real party. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013). However, courts will also analyze whether the individual suit would interfere with the sovereign's ability to serve its people or the "effect of the judgment would be to restrain the sovereign from acting, or to compel it to act." *Maxwell*, 708 F.3d at 1088. Furthermore, even if a tribe indemnifies an employee of the tribe for torts that may be committed while in the scope of their employment, that provision itself cannot extend sovereign immunity to the individual employee. *Lewis*, 137 S. Ct. at 1292.

Tribal employees who have been sued in their individual capacity cannot assert sovereign immunity where the remedy would not operate against the sovereign, and instead, would operate against the employee individually. *Lewis*, 137 S. Ct. at 1288. In *Lewis*, the plaintiffs were traveling on a state highway when they were rear-ended by an employee of a tribal agency, who was transporting customers of the tribe's casino to their homes. *Id*. at 1289. Thereafter, the plaintiffs sued the defendant in his individual capacity rather than in his capacity as an employee of the tribe. *Id*. The defendant filed a motion to dismiss on the grounds that the tribal agency he worked for was an arm of the tribe, he was acting within the scope of his employment, and therefore he was entitled to sovereign immunity. *Id*. The United States Supreme Court found that the defendant was not entitled to the sovereign immunity of the tribal agency because the lawsuit against the defendant would in no way affect the tribe's ability to govern itself independently. *Id*. Furthermore, even though the tribe had an ordinance that indemnified the defendant, the Court found that an indemnification provision cannot

extend sovereign immunity to individual employees who would otherwise not have this immunity. *Id*. at 1292.

Thomas and Carol Smith have sued Molly Bluejacket and Fred Captain in their individual capacities for the tort of defamation for impugning their professional skills and for monies due under the contract, and any judgment against them will not run against the Nation. R. at 3. As previously discussed, the EDC is not an arm of the Nation, so sovereign immunity does not protect either of Bluejacket or Captain from suit in their individual capacities. This is a case similar to *Lewis*, in that in both *Lewis* and the present case, the tribal employees were acting within the scope of their employment when the alleged tort was committed. As *Lewis* has indicated, this itself is not enough to invoke sovereign immunity. 137 S. Ct. at 1288. The analysis must look at who is the real party in interest. *Id.* Here, the party in interest is not the EDC or the Nation, as the EDC is in financial trouble and could be judgment proof, while the Nation could be protected by sovereign immunity, as discussed below. R. at 2. Therefore, the real party in interest is the employees in their individual capacities. Also, as tort victims, Thomas and Carol will have no other remedy for the damages of the tort as contemplated in *Lewis*. 137 S. Ct. at 1290.

Furthermore, suing Bluejacket and Captain in their individual capacities does not force the Nation to act, does not restrain the Nation from acting in any way, and it does not interfere with the Nation's ability to govern itself, as the court in *Maxwell* cautions. *Maxwell*, 708 F.3d at 1088. This is different from *Hardin v. White Mountain Apache*, in which the plaintiffs sued high-ranking members of the tribal council in their individual capacity for voting to remove the plaintiff from the reservation boundaries. 779 F.2d 476, 478 (9th Cir. 1985). When examined by another court, it was suggested that *Hardin* in reality was an official capacity

suit- which would have been barred by sovereign immunity- disguised under an individual capacity suit. *Maxwell*, 708 F.3d at 1089. Holding the defendants liable for their legislative activities would have "attacked the very core of tribal sovereignty." *Id.* Here, holding Bluejacket and Captain liable in their individual capacities would not interfere with the Nation's ability to govern itself because Bluejacket and Captain are merely employees of a business on the reservation that is separate from the Nation, its government, and its funds.

Furthermore, while the United States Supreme Court has indicated that employees sued in their individual capacities may be able to assert *personal* immunity defenses, even these defenses do not protect Fred Captain and Molly Bluejacket. *Lewis*, 137 S. Ct. at 1292. The Court has found a personal immunity defense for actions against officials in their individual capacities such as absolute immunity for individuals who perform legislative and judicial functions. *See Stump v. Sparkman*, 435 U.S. 349 (1978) (absolute immunity for judicial acts); *see also Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 503 (1975) (immunity for legislators acting in their legislative capacities). Immunity, as suggested by the Court in *Lewis*, could also lie in prosecutorial immunity. 137 S. Ct. at 1292. However, this immunity is for prosecution of criminal cases. *See Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). There is also immunity for witnesses in judicial proceedings. *See generally Briscoe v. La Hue*, 460 U.S. 325 (1983). In addition, there exists a personal immunity defense for relying on law which the individual believes is in place at the time in question. *See generally Anderson v. Creighton*, 483 U.S. 635 (1987). While there are many personal immunity defenses available for individual capacity suits, none apply to Captain and Bluejacket. The individuals were not witnesses in a prosecution, legislators for the Nation, or relying on any type of law when they made defamatory statements. Furthermore, this is not a criminal case, so prosecutorial

immunity does not come to play. Bluejacket and Captain were sued in their individual capacities and do not have any applicable personal immunity defenses available to them. Therefore, they are liable to Thomas and Carol in their individual capacity.

C. Even If This Court Finds That The Economic Development Corporation Was An Arm Of The Nation And Bluejacket And Captain Were Considered Officials Of The Yuma Indian Nation, The Duties Of Molly Bluejacket And Fred Captain Were Not Discretionary In Nature Under The *Westfall* Test, And Therefore, They Are Not Entitled To Tribal Official Sovereign Immunity.

While the United States Supreme Court has found that Indian tribes enjoy sovereign immunity, it does not protect the individual members of the tribe. *Puyallup Tribe, Inc. v. Dept. of Game of State of Washington*, 433 U.S. 165, 172 (1977). However, courts have found that tribal official immunity is available to individuals in the tribe who perform official duties within the scope of their authority. *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Furthermore, although the United States Supreme Court has left open the question of tribal official immunity, the Court often looks to immunity exercised by state and federal officials for an example of how far to extend sovereign immunity in the tribal context. *See Lewis*, 137 S. Ct. at 1291 (reversing the Connecticut Supreme Court, finding that this court extended tribal sovereign immunity beyond what is typical at common law for state and federal officials). Therefore, courts should not expand tribal immunity past the immunity available to federal officials as outlined in *Westfall v. Erwin*. 484 U.S. 292 (1988). Under *Westfall*, in order for an individual to have official immunity, they must have discretionary duties that could be inhibited by the threat of civil liability. *Westfall*, 484 U.S. at 296-97. In the context of Indian law, lower courts have already formulated tests that take into account the discretionary function of *Westfall*, while also further limiting the immunity to only certain individuals holding official positions in the tribe. *See generally Turner v. Martire*, 82 Cal. App. 4th 1042 (Cal. Ct. App.

2000) (finding that only those who hold governmental or high-level positions in the tribe should be considered tribal officials).

In order to claim tribal official immunity, the individual must hold a high-level or governmental position in the tribe and perform duties that are discretionary in nature. *Turner*, 82 Cal. App. 4th at 1055. In *Turner*, two union organizers were at a tribal casino speaking with employees regarding their legal rights when one of the organizers started to take photographs. *Id*. at 1045. Defendants, tribal law enforcement officers, confiscated the camera and detained the plaintiffs without probable cause. *Id*. The plaintiffs filed suit alleging assault, battery, false imprisonment, conversion, and civil rights violations, and the defendants asserted tribal official sovereign immunity. *Id*. The court found that the defendants were not tribal officials because, as law enforcement officers, they performed typical law enforcement duties, and not discretionary or policymaking functions within or on behalf of the tribe. *Id*. at 1054. The court ultimately found they were not tribal officials entitled to sovereign immunity. *Id*.

Molly Bluejacket and Fred Captain were not acting in their official capacities for the Nation because they do not hold governmental or high-level positions within the Nation and the duties they undertook were not discretionary in nature. R. at 1-2. This court should follow *Turner*, in which the court placed great emphasis on the fact that tribal official immunity should extend only to those individuals who conducted discretionary and policymaking duties on *behalf of the Tribe*. 82 Cal. App. 4th at 1055. In *Turner*, even though the law enforcement officers were employed by the tribe itself, they did not perform any discretionary duties on behalf of the tribe, as they performed typical law enforcement duties. *Id.* at 1054. Furthermore, they did not have a governing or high-level role in the tribe that would favor finding them as tribal officials. *Id.* The same conclusion is true for Bluejacket and Captain. Bluejacket and

Captain are even further removed than the law enforcement officials in *Turner*, as they merely worked for the EDC, a business on the reservation, and not the Nation itself like in *Turner*. R. at 1-2. Although the facts are silent here as to what duties Bluejacket and Captain actually performed, Bluejacket was an accountant and Captain was the CEO of the EDC. R. at 1. Neither of these positions would entail duties that include policymaking for the Nation itself, as an accountant would have duties typical of financial bookkeeping of the EDC, and a CEO would ensure the vitality and overall operations of the EDC. R. at 1. Furthermore, although Captain was the CEO of the EDC, arguably a high-level position, it was a high-level position of the EDC and *not* of the Nation, and as previously discussed, the EDC is not an arm of the Nation. R. at 2; *see also supra* II(A). Therefore, Bluejacket and Captain are not tribal officials of the *Nation* and are not entitled to tribal sovereign immunity.

The Appellees will likely argue that *Westfall* should not apply because Congress subsequently eliminated the "discretionary" requirement by statute, giving broader immunity to federal officials for state-tort actions. 28 U.S.C. § 2679 (commonly known as the "Federal Tort Claims Act"). However, courts have stated that the *Westfall* test remains the pertinent inquiry for deciding when nongovernmental persons or entities are entitled to immunity typically reserved for governmental actors. *See generally Turner v. Martire*, 82 Cal. App. 4th 1042 (Cal. Ct. App. 2000) (citing *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1997)). Here, Bluejacket and Captain are nongovernmental actors, and therefore, *Westfall* would apply.

D. This Court Should Find That The Counterclaims Asserted By Thomas And Carol Smith Sound In Recoupment And Therefore The Sovereign Immunity Of The Nation Is Waived For These Claims.

While tribes generally enjoy sovereign immunity, it is not absolute, and there are times when it may be waived. *Kiowa*, 523 U.S. at 754. There are two different ways in which tribes may lose the ability to assert sovereign immunity: when Congress waives the immunity on behalf of the tribe, and when the tribe itself waives the immunity. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014). If Congress waives the immunity, it must be explicit and unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 51-52. Any waiver by the tribe need only be clear. *See generally C&L Enters., Inc. v. Citizen Band, Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). While filing a lawsuit does not necessarily itself act as a waiver of sovereign immunity by the tribe, there are times when the tribe opens itself up to a possible waiver by virtue of the lawsuit. *Oklahoma Tax Comm'n v. Citizen Band, Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *See also Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093, 1097 (9th Cir. 2017). Furthermore, the scope of a limited waiver by virtue of filing a lawsuit depends upon the nature of the claims that the tribe initially puts before the court. *Quinault*, 868 F.3d at 1097. One such limited waiver occurs when a party asserts a counterclaim against a tribe that sounds in recoupment. *Id*. To effectuate a valid recoupment claim the counterclaim must (1) arise out of the same occurrence as the tribe's suit; (2) seek the same type of relief the tribe seeks in its suit; and (3) the amount sought cannot be more than the tribe's requested relief. *Id*. Furthermore, these claims cannot be for injunctive or declaratory relief, but must be for monetary relief. *Id*.

For a counterclaim to sound in recoupment it must be for monetary, not injunctive or declaratory relief. *Quinault*, 868 F.3d at 1097. In *Quinault,* litigation ensued for years over

whether a convenience store run by a now deceased tribal member violated tribal tax laws regarding the sale of cigarettes. *Id*. at 1096. The tribe brought suit against the plaintiffs on grounds of fraud and breach of contract. *Id.* The estate of the deceased tribal member then counterclaimed against the tribe seeking declaratory relief that the cigarette sales did not violate tribal tax laws and an order compelling the tribe to issue building and business permits. *Id.* The estate further sought lost profits and damages regarding an alleged antitrust scheme by the tribe. *Id*. The court explicitly found that any relief other than monetary damages was excluded. *Id*. at 1097. The court also found that the lost profits, lost income for price fixing, and damages incurred for filing suit were not "logically related" to the tribe's initial claim, which was that the estate failed to pay taxes due under tribal law. *Id*. The court further found that because the estate's damage request was more than the tribe's, there was no recoupment claim. *Id*.

The counterclaims alleged by Thomas and Carol Smith sound in recoupment, and therefore, the sovereign immunity of the Nation should be waived for this limited purpose. Thomas and Carol Smith's counterclaims, money due under their contracts and damages for defamation, arise out the same occurrences as the Nation's suit. R. at 3. Unlike in *Quinault* where the lost profits and lost income did not logically relate to the tribe's initial claim of withholding taxes, the counterclaims asserted by Thomas and Carol Smith are logically related to the Nation's claims. The Nation is asserting that Thomas and Carol breached their contracts, violated fiduciary duties, and also breached their duty of confidentiality by informing the Arizona Attorney General of the Nation's plans for the development of marijuana. R. at 2-3. Defamation of this magnitude can seriously harm the professional reputations of Thomas and Carol. R. at 2-3. If the Nation made defamatory statements about Thomas and Carol's ability

to meet their fiduciary duties and comply with confidentiality, this could harm their ability to perform their professional skills. Therefore, these tort claims are directly related to the money judgment claims, and the first prong of the *Quinault* test is clearly met.

Next, the Nation is seeking purely monetary relief, which Thomas and Carol are also seeking. Unlike in *Quinault* where the estate was seeking relief different from the tribe in that it was seeking declaratory relief along with the monetary relief the tribe sought, here, both the Nation and Thomas and Carol are seeking monetary relief due under the contracts. R. at 3. Thomas and Carol are also pursuing a defamation claim, however defamation judgments typically are monetary. None of Thomas and Carol's requested relief sounds in declaratory judgments. Therefore, the second prong of the *Quinault* test is clearly met, as all parties are seeking monetary relief.

Last, Thomas and Carol Smith are not seeking monetary relief that is in excess of what the Nation is seeking in their suit. Unlike in *Quinault* where the estate was seeking money in excess of what the tribe was initially seeking through the withheld taxes, here the Nation is seeking liquidated damages for amounts set out in the contract, and the Smiths are seeking money due under that same contract. R. at 3. The facts are not clear exactly what damages Thomas and Carol are seeking regarding the defamation for impugning professional skills, so at this stage, it is unclear whether Thomas and Carol are seeking money due under the contract, which could include liquidated damages. In fact, it could even be less than the Nation is seeking. Therefore, on the facts provided, Thomas and Carol are not seeking monetary relief in excess of the Nation and the third prong of the *Quinault* test is met.

Overall, because all three prongs of the *Quinault* test are met here, this Court should find that the counterclaims asserted by Thomas and Carol sound in recoupment, and thus, the

sovereign immunity of the Nation should be waived for this limited purpose as to these counterclaims.

CONCLUSION

For the reasons stated above, this Court should find that the Yuma Indian Nation does not have personal or subject matter jurisdiction over Thomas and Carol Smith, or in the alternative, should stay this suit while Thomas and Carol seek a ruling in federal court. In addition, for the reasons stated above, this Court should find that sovereign immunity does not protect the Economic Development Corporation, Molly Bluejacket and Fred Captain in either their official or individual capacities, or the Yuma Indian Nation.