No. 17-024

IN THE

Yuma Indian Nation Supreme Court

THOMAS SMITH & CAROL SMITH,
Appellants,
v.

YUMA INDIAN NATION,
Appellee.

On Writ of Certiorari to
YUMA INDIAN NATION APPELLATE COURT

BRIEF FOR THE APPELLEE

Team No. 115

Counsel for Appellee

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QUESTIONS PRESENTED

1. Do the Yuma Indian Nation courts have personal and subject matter jurisdiction over Appellants, or in the alternative, should the trial court stay this suit while Appellants seek a ruling on the trial court's authority to hear the suit in the Arizona federal court?

2. Does sovereign immunity, or any other form of immunity, protect the Yuma Indian Nation, the Yuma Indian Nation Economic Development Corporation, or employees of the Yuma Indian Nation Economic Development Corporation (Fred Captain and Molly Bluejacket) from the Appellants' claims?

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

The Yuma Indian Nation and its Economic Development Corporation ("EDC") filed a civil action in the Yuma Indian Nation trial court seeking recovery of the liquidated damages amount as outlined in a contractual agreement it had with Appellants. ROA[1] 3. Appellants responded by filing special appearances and identical motions to dismiss the Yuma Indian Nation's suit based on lack of personal jurisdiction and subject matter jurisdiction. *Id*. The Yuma Indian trial court denied both motions. *Id*.

Subsequently, Appellants filed answers denying the Yuma Indian Nation claims and counterclaimed against the Yuma Indian Nation. Appellants argue that the Yuma Indian Nation owes them money due under their contracts and seek damages for defamation for "impugning their professional skills." *Id*. Additionally, Appellants impleaded the EDC and two employees (Chief Executive Officer, Fred Captain, and the EDC's in-house accountant, Molly Bluejacket) in their individual and official capacities. *Id*. The Yuma Indian Nation trial court dismissed all of Appellants' claims against the Yuma Indian Nation, the EDC, Mr. Captain, and Ms. Bluejacket, holding that the doctrine of sovereign immunity protected these parties from suit. *Id*.

Appellants have since filed an interlocutory appeal with the Yuma Indian Nation Supreme Court. *Id*. The Yuma Indian Nation Supreme Court granted the interlocutory appeal, certifying two questions: (1) whether the Yuma Indian Nation courts have personal jurisdiction over Appellants and subject matter jurisdiction to hear claims; and (2) whether sovereign

[1] "ROA" refers to Record of Appeal.

immunity protects the Yuma Indian Nation, the EDC, Mr. Captain, and Ms. Bluejacket from Appellants' counterclaims. *Id.*

II. STATEMENT OF FACTS

This case involves a number of parties—the Yuma Indian Nation, the EDC, Fred Captain, Molly Bluejacket, Thomas Smith, and Carol Smith. The nature of the relationship between the parties underpins the legal questions in this case.

The Yuma Indian Nation and Mr. Smith were the first two parties to engage in business together beginning in 2007. ROA 1. The Yuma Indian Nation, a federally-recognized tribe with a reservation in southwest Arizona, sought advice from Mr. Smith, a nonmember financial planner and accountant who resides in Arizona, on issues arising from the Yuma Indian Nation's plans to develop the Yuma Indian Nation's economy. *Id.* Mr. Smith provided these services under contract with the Yuma Indian Nation. *Id.* The contract provided for "any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." *Id.* The contract also required Mr. Smith to maintain absolute confidentiality regarding any and all tribal communications and economic development plans. *Id.*

Mr. Smith provided a wide range of advice to the Yuma Indian Nation. *Id.* Mr. Smith communicated with the Yuma Indian Nation tribal chairs and Yuma Indian Nation Tribal Council members via frequent emails and telephone calls. *Id.* Additionally, Mr. Smith prepared written reports and in-person report presentations. *Id.*

In 2009, the Yuma Indian Nation, with the authorization of the Yuma Indian Nation Tribal Council, created the EDC under a federal charter of incorporation issued by the Secretary of the Department of the Interior. SQ[2] 1. The EDC's purpose is to promote the

[2] "SQ" Refers to Substantial Questions.

prosperity of the Yuma Indian Nation's citizens and further the Yuma Indian Nation's economic development. ROA 2. The EDC is a wholly owned subsidiary of the Yuma Indian Nation and is an "arm-of-the-tribe." *Id.* 1.

The EDC's leadership consists of a separate five-person board of directors qualified by their business experience, three of which are Yuma Indian Nation members and two of which are not. *Id.* The Yuma Indian Nation Tribal Council may remove directors with a supermajority vote. *Id.* While the EDC must defer to the Tribal Council for some things like borrowing or lending money, it has autonomy to buy and sell real property on- or off-reservation. *Id.* The Tribal Code also permits the EDC to "sue and be sued." *Id.*

The Yuma Indian Nation loaned money to the EDC from its general fund but required the EDC to repay that loan. *Id.* The EDC must keep its own set of books and records, which are submitted to and approved by the Yuma Indian Nation Tribal Council. *Id.* Additionally, the Yuma Indian Nation Tribal Code expressly blankets the EDC, its board, and all employees with tribal sovereign immunity to the fullest extent of the law. ROA 2. After the Yuma Indian Nation created the EDC, Mr. Smith gave his advice primarily to Fred Captain, the EDC CEO, and Molly Bluejacket, EDC's in-house accountant. ROA 1. In 2010, Mr. Smith, the EDC, and the Yuma Indian Nation required additional assistance from a licensed securities broker. ROA 2. Mr. Smith, with the permission of the Yuma Indian Nation Tribal Council, entered into a contract with Carol Smith, Mr. Smith's sister who lives and works in Oregon. *Id*. In entering into this relationship, Ms. Smith agreed to fully comply with all of the terms of Mr. Smith's 2007 contract with the Yuma Indian Nation. *Id.*

Ms. Smith provides advice to the Yuma Indian Nation through Mr. Smith who then forwards that advice to the Yuma Indian Nation Tribal Council, Mr. Captain, and Ms.

Bluejacket. *Id.* The EDC pays Ms. Smith directly upon receipt of an emailed invoice from her. *Id.* Additionally, Ms. Smith physically visited the Yuma Indian Nation twice with Mr. Smith. *Id.*

In 2016, the Yuma Indian Nation pursued an amendment to the Yuma Indian Nation Tribal Code that would permit it to cultivate marijuana for any legal on-reservation use despite a failed bid by state legislators to amend the Arizona state law to expand legal marijuana use from medical to recreational. *Id.* After the EDC conferred with Mr. Smith on this business prospect, Appellants, citing moral reasons, informed the Arizona Attorney General of the EDC's plans. *Id.* The A.G. then wrote the Yuma Indian Nation and the EDC a cease and desist letter prompting the Yuma Indian Nation and the EDC to take legal action against Appellants for breach of contract, fiduciary duties, and confidentiality. *Id.* 2-3.

ARGUMENT

The Federal Rules of Civil Procedure are not applicable to the Yuma Indian Nation courts. Yuma Indian Nation Tribal Code § 2-110. However, federal law, including federal common law, is applicable. *Id.* § 2-111. If no federal common law exists, then laws of any state or other jurisdiction which the Yuma Indian Nation courts find compatible with tribal public policy and needs shall be applicable. *Id.* § 2-111(1)(C).

Although the Yuma Indian Nation Tribal Code outlines the ability of the Yuma Indian Nation courts to dismiss or stay proceedings, the code does not outline the method of appeal or standard of review for appeals. *Id.* §§ 2-222.2 & 2-1011; *See, generally,* Yuma Indian Nation Tribal Code, tit. 2. The Yuma Indian Nation courts, therefore, may look to federal common law, then to state and other jurisdictions, to define the standard of review for motions to dismiss and stay proceedings. *Id.*

This court should review a motion to dismiss a claim *de novo,* "applying the same standard as the district court, and accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the non-moving party." *Draper v. Rudin*, 710 F.3d 425 (12th Cir. 2005). Thus, this court should uphold the Yuma Indian Nation Appellate Court's denial of Appellants' motion to dismiss under the Yuma Indian Nation Tribal Code, because the Yuma Indian Nation pled facts sufficient to support their assertion that its tribal courts have subject matter jurisdiction and personal jurisdiction to hear this case and sovereign immunity protects the Appellees from suit.

The Appellants argue, in the alternative, that this court should stay the tribal court proceedings pending appeal to the Arizona Federal District Court. However, the parties must exhaust all tribal remedies before such appeals are granted. *See Iowa Mutual Ins. v. LaPlante*, 480 U.S. 9, 21 (1987) (holding that the parties must exhaust all avenues through the tribal court system before seeking review in a federal court). The Court has articulated three exceptions to the exhaustion prudential rule. First, the parties need not exhaust tribal court remedies when doing so is motivated by a desire to harass or is conducted in bad faith. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856-857 (1985). Second, the parties need not exhaust tribal court system remedies when the requirement would "serve no purpose" because the tribal court system has no regulatory jurisdiction over the nonmember activity. *Id.* (citing *Strate v. A-1 Contractors,* 520 U.S. 438, 459-460 n.14 (1997)). Third, the exhaustion rule does not apply when the underlying, substantive claim would be removable to federal court if brought in state court. *El Paso Nat. Gas v. Neztsosie,* 526 U.S. 473, 477 (1999). In this case, bona fide issues of law as to the extent of the Yuma Indian Nation tribal court's jurisdiction and the extent of sovereign immunity exist. Further, only issues of securities fraud, not contract claims arising

from securities-related services, generally are removable from state to federal court. *See, e.g., SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963) (holding that the SEC may obtain injunction against investment advisor who engaged in sales of his securities at a profit after recommending those same securities to his clients); *see also*, 17 C.F.R. § 240.10b5-2(a) (outlining scope of rule as breach of duty of trust or confidence by engaging in insider trading). This case does not implicate fraud, but rather, common law claims for breach of contract, confidentiality, and fiduciary duty. Thus, none of the three exceptions to exhaustion apply and the Yuma Indian Nation courts have the first opportunity to rule on this case.

I. BECAUSE THE YUMA INDIAN NATION AND APPELLANTS HAD A CONSENSUAL RELATIONSHIP, CONDUCTED ACTIVITY RELATED TO THIS CONSENSUAL RELATIONSHIP ON-RESERVATION, AND APPELLANTS COULD REASONABLY EXPECT TO BE WAIVED INTO THE YUMA INDIAN NATION TRIBAL COURTs, THE YUMA INDIAN NATION TRIBAL COURTS HAVE JURISDICTION TO HEAR THIS CASE.

Generally, a tribe's inherent sovereign powers to regulate and adjudicate activity do not extend to the activities of non-tribal members ("nonmembers.") *Montana v. U.S.*, 450 U.S. 544, 565 (1981) (citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978)). Under certain exceptions, however, a tribe's inherent sovereign powers will allow the tribe to regulate and adjudicate certain nonmember activity. *See Id.* The Court has articulated and affirmed two such exceptions to this general rule called the *Montana* exceptions. *Id.* The first *Montana* exception provides that when a nonmember enters into a consensual relationship with a tribe or its members, through commercial dealing, contracts, leases, or other arrangements, the tribe may exercise civil jurisdiction. *Id.* The second *Montana* exception provides that when a nonmember's actions threaten or have some direct effect on the political integrity, economic security, or the health and welfare of the tribe, the tribe may exercise civil jurisdiction. *Id.* Because the second *Montana* exception carries a very high standard, the Yuma Indian Nation

directs the Yuma Indian Nation Supreme Court's attention to the first *Montana* exception. *See, e.g., Williams v. Lee,* 358 U.S. 217, 220 (1959) (referencing crimes by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive).

To support a holding under the first *Montana* exception, a tribe must prove the nonmember activity meets a factor-based test. *Nevada v. Hicks,* 533 U.S. 353, 360 (2001). The factor-based test balances such things as: (1) the extent of the tribe's sovereignty; (2) whether the tribe and nonmember had a consensual relationship; (3) where the activity in question took place and whether the nonmember was physically present on the reservation when that activity occurred; and (4) whether public policy balances for or against tribal jurisdiction. *Id*. If the factor-based test balances in favor of the tribe, then the Court will find subject matter and personal jurisdiction sufficient for the tribal court to hear the case.

A. Because Congress has not limited the Yuma Indian Nation's inherent sovereignty to adjudicate claims arising out of consensual contracts, the Yuma Indian Nation Supreme Court should apply the first *Montana* exception to determine its authority to hear this case.

The Court made clear that a tribe's inherent sovereignty sets limits on the tribe's power to adjudicate claims. *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). The tribe may only adjudicate claims that do not exceed the tribe's regulatory jurisdiction. *Id.* To determine whether a tribe has regulatory jurisdiction, the Court reviews relevant statutes, treaties, and other materials, and then applies the *Montana* exceptions. *Id.* at 449. As the Court has already generally reviewed statutes and other materials when it created the *Montana* exceptions and found none, only subsequent statutes or other materials, or a treaty between the United States and the Yuma Indian Nation granting or limiting the Yuma Indian Nation's regulatory jurisdiction over contract matters, could impact this case. *See Id*. The record indicates no such

subsequent statutes or other materials nor a treaty between the United States and the Yuma Indian Nation. *See, generally,* ROA. Finding no other limit to the Yuma Indian Nation's jurisdiction, the Yuma Indian Nation Supreme Court should apply the first *Montana* exception to this case.

B. The consensual relationship between the Yuma Indian Nation and Appellants supports the Yuma Indian Nation tribal courts' exercise of adjudicatory authority.

The first *Montana* exception recognizes tribal sovereign authority to hear disputes involving nonmembers who entered into consensual relationships with the tribe or its members. *Montana,* 450 U.S. at 565. Activity such as operating a general store, grazing livestock, selling goods, and selling cigarettes on-reservation will create a consensual relationship sufficient to confer civil regulatory authority. *See, e.g., Williams,* 358 U.S. at 217 (holding tribe had jurisdiction to hear collections claim by nonmember against Indian because nonmember voluntarily conducted activity on reservation); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (holding tribe could impose a permit tax on nonmember ranchers grazing livestock within an Indian reservation); *Buster v. Wright* 135 F. 947 (8th Cir. 1905) (holding tribe could impose a permit tax on nonmember traders conducting business within an Indian reservation); and *Washington v. Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding tribe had concurrent jurisdiction with the state to impose cigarette and sales tax)).

The four illustrative cases cited in *Montana* have certain commonalities the Court has identified in subsequent common law. First, these cases all involve "private consensual relationship[s]." *Hicks,* 533 at n. 3. Second, they also involve "private commercial actors." *Id.* at 372. Thus, finding a private consensual and commercial relationship existed, the Court will weigh that factor in favor of tribal court adjudicatory jurisdiction. *Id.* at 360.

Of the illustrative cases, *Williams* is the most analogous case to the present case. The Court held that the tribe had jurisdiction over a claim brought in tribal court by a nonmember for payment of goods purchased on credit by a tribal member. *Williams,* 358 U.S. at 217-218. The Court found this type of consensual relationship between a nonmember and a tribal member constituted an internal affair of the Indians. *Id.* Like the nonmember in *Williams*, the Appellants entered into a consensual relationship with the Yuma Indian Nation by agreeing to provide a variety of consulting services including investment advice, accounting, and brokering services. ROA 1-2. Further, the Appellants received payment for these services from the Yuma Indian Nation, further suggesting a correlation to *Williams*. *Id.*

While the Appellants may seek to distinguish this case from *Williams* because *Williams* involved a nonmember plaintiff instead of a nonmember defendant, that argument will not hold up to scrutiny. 358 U.S. at 222. The Court's analysis in *Williams* focused on whether Congress had abrogated tribal authority to govern themselves. *Id.* Finding that Congress had not, the Court held that consensual activity between a nonmember defendant and tribal member would subject the nonmember to tribal adjudicatory jurisdiction. *Id.* at 223. After *Williams*, the Court further affirmed emphasis on the consensual relationship, rather than the status of the nonmember as plaintiff or defendant, as the basis of the first *Montana* exception. *See Montana*, 450 U.S. at 565-566.

After *Williams* and *Montana*, the Court acknowledged that it had not expressly answered the question of whether a tribal court could exercise jurisdiction over a nonmember in a civil proceeding. *See Hicks,* 533 U.S. 404 n.2. Rather, it "leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* In one case, the Court had an opportunity to further comment or make clear whether a tribal court could adjudicate a civil

case involving a nonmember defendant. *See, generally, Plains Commerce Bank v. Long Family Land and Cattle*, 554 U.S. 316 (2008). In *Plains Commerce Bank*, the Court analyzed whether a tribal court had jurisdiction over a nonmember bank's sale of fee land. Tribal members brought the suit in tribal court alleging, among other claims, breach of contract. *Id. at* 323. The Court completely bypassed the issue of the bank as a nonmember defendant, instead focusing on the nature of the bank's conduct on-reservation. *Id*. Further, the Court, as in predecessor cases, focused again on "the *activities* of nonmembers." *Id.* at 330. Thus, at every opportunity from the *Williams* decision to *Plains Commerce Bank*, the Court has affirmed the requirement to evaluate the on-reservation activities of nonmembers, not the nonmember's status in the litigation.

Thus, this Court should not consider the Appellants status in the litigation as original Defendant because the Court does not instruct the use of the nonmember's status in analyzing this factor. Rather, the Appellants' consensual relationship with the Yuma Indian Nation subjected the Appellants to Yuma Indian Nation tribal court jurisdiction.

C. Appellants' presence on-reservation when fulfilling their contract with the Yuma Indian Nation, in addition to Appellants' other on-reservation activity, support the Yuma Indian Nation tribal court's exercise of adjudicatory authority.

In analyzing the first *Montana* exception, the Court will consider whether the nonmember was on-reservation when the activity occurred. *Williams*, 358 U.S. at 223. If the nonmember was on the reservation when the activity occurred, then this factor alone may outweigh all other considerations in the factor-based test. *See Hicks*, 533 U.S. at 370. In *Williams*, a nonmember operated a general store on the Navajo Indian Reservation under a federally authorized license. 358 U.S. at 217. The Court upheld the nonmember's tribal court judgment against a tribal member for failure to pay for goods purchased on credit. *Id*. The key

question answered by the Court was "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id. at* 220. When the activity occurs on a reservation, the state has no power to regulate those activities as doing so would infringe on tribal inherent sovereignty. *Id. at* 219.

As in *Williams*, the Appellants and the Yuma Indian Nation entered into consensual dealings on-reservation. Mr. Smith periodically submitted reports to the Yuma Indian Nation tribal council and "presented these reports in person at Council meetings *on the reservation*." ROA 1 (emphasis added). Ms. Smith also visited the reservation with Mr. Smith on two occasions. ROA 2. Although Ms. Smith was on vacation when she visited, one need not use much imagination to infer that she visited the reservation with Mr. Smith because of a desire to promote their commercial relationship with the Yuma Indian Nation for personal benefit.

The Appellants will argue that they were not present on-reservation when all of the activity in question occurred, such as breach of confidentiality. The Courts have not expressly addressed the extent to which a consensual relationship must occur on-reservation. *See, generally, Morris,* 194 U.S. at 384. In one case, the Court emphasized on whether the *activity* occurred on-reservation, not whether the nonmember was physically present on-reservation. *Id.* at 384-385. That case addressed on-reservation grazing by nonmembers. *Id.* In that case, the Court found that mere grazing on-reservation conferred regulatory jurisdiction, which the Court later cited as authority in support of a tribe's civil jurisdiction to hear civil matters. *Id.; see also, Montana,* 450 U.S. at 566. The grazing activity occurred on-reservation, without any reference to whether the person directing the activity was on-reservation. *Morris*, 194 U.S. at 384-385. Likewise, in *Williams,* the Court focused on the nonmember's on-reservation activity—operating a general store—and not the extent to which the nonmember was

physically present on-reservation when the tribal member purchased goods. 358 U.S. at 217-219. Thus, the Court's precedence focuses on whether the nonmember activity occurs on-reservation; however, if the nonmember was physically present on-reservation such a finding will support a finding that activity occurred on-reservation.

The Appellants conducted on-reservation activity materially significant in a finding under this factor. First, Mr. Smith was both physically present on-reservation and conducted commercial activity while on-reservation, meeting the rule outlined in both *Hicks* and *Williams*. *See, generally,* ROA 1. Further, Mr. Smith "nearly daily" emailed and telephoned various Yuma Indian Nation tribal chairs and the EDC. ROA 1. He submitted written reports to the Yuma Indian Nation Tribal Council. *Id.* Likewise, Ms. Smith conducted commercial activity on-reservation. *See, generally,* ROA. She went to the reservation on two occasions with Mr. Smith with a strong inference that they conducted commercial activity during those visits. ROA 2. Even assuming *arguendo* that Ms. Smith was never physically present on-reservation while conducting commercial activity, she conducted sufficient activity on-reservation to support tribal jurisdiction. *See, generally,* ROA. She submitted information to Mr. Smith, which she had to know would be reported to the Yuma Indian Nation as the Yuma Indian Nation paid her for this information. ROA 2.

Thus, the Appellants were physically present and conducted activity on-reservation. This factor should outweigh any other factor of consideration in the *Montana* exceptions. Alternatively, it should very substantially weigh in favor of tribal jurisdiction.

D. Appellants could reasonably anticipate that their consensual relationship with the Yuma Indian Nation would subject them to tribal jurisdiction and public policy balances in favor of allowing the Yuma Indian Nation tribal courts to exercise their authority to adjudicate the Yuma Indian Nation's and Appellants' claims.

The Court has articulated several public policy concerns when considering whether a nonmember has consented to tribal jurisdiction, including: (1) the tribal court is a "sovereign outside the basic structure of the Constitution"; (2) tribal courts differ from traditional American courts in a number of significant respects; and (3) nonmembers have no part in the laws and regulations that govern the tribal territory. *Plains Commerce Bank,* 554 U.S. at 337.

First, while the tribal court operates outside the Constitution, the Yuma Indian Nation has adopted key due process rights into its tribal code. Yuma Indian Nation Tribal Code § 2-1213. Some courts have addressed due process rights by requiring a finding of both subject matter jurisdiction and personal jurisdiction in addition to the applicability of a *Montana* exception. *See*, e.g., *Red Fox v. Hettich*, 494 N.W. 2d 638 (S.D. 1993) (holding that tribal court had subject matter jurisdiction to hear a claim by member Indian against nonmember who owned fee land within the reservation and left his dead horse on a tribal road causing an automobile accident involving Indian). When reviewing subject matter jurisdiction, the *Red Fox* court found no bar on or categorical grant of a tribal court's jurisdiction over certain civil matters because of the absence of federal statutes, decisional law, or treaties. *Id. at* 645. The court found that the tribal code granted civil adjudicatory jurisdiction to the tribal court; therefore, the court had jurisdiction to hear a tort claim. *Id.* Here, the court operates under authority granted in the tribal code, but would likewise find the same lack of federal statutes, decisional law, or treaties that could potentially grant or bar civil jurisdiction to hear the Yuma Indian Nation's and Appellants' breach of confidentiality arising from their contractual agreement, along with additional ancillary claims related to that contractual agreement. *See*,

generally, ROA. Thus, Appellants' due process rights are protected according to the *Red Fox* standard.

The court in *Red Fox* went on to analyze personal jurisdiction holding that the presence of heightened "minimum contacts" could support tribal jurisdiction. In that case, the tribe had not enacted a long-arm statute, and the parties did not have a contractual relationship. *Id.* The court held, however, that the tribe could still exercise long-arm jurisdiction if the tribal court had regulatory jurisdiction under a *Montana* exception over the nonmember. *Id.* The court then turned to *Montana*'s exceptions to determine whether regulatory jurisdiction existed. *Id.* at 646-647. Distinguishably, the Yuma Indian Nation Tribal Code contain a long-arm statute. Yuma Indian Nation Tribal Code § 1-107. Additionally, the Yuma Indian Nation and Appellants have had an ongoing and long-standing relationship on-reservation. ROA 1-2. Thus, the Yuma Indian Nation Supreme Court would move onto analyzing the *Montana* exceptions, which has already been analyzed herein. *See supra* Part I.

Second, the Yuma Indian Nation court is not dissimilar from "traditional American court" because it follows an American court structure and has both statutory and common law. *Red Fox*, 494 N.W. 2d at 638. The Yuma Indian Nation has a civil procedure and other code sections. *See, e.g.,* Yuma Indian Nation Tribal Code § 1-107. The Yuma Indian Nation tribal court follows a similar court structure to state and federal courts because it has both a trial court and appellate court. *Id.* It hears similar types of issues as traditional American courts, both factual and legal. *Id*. This motion is one such example of the sort of legal question the Yuma Indian Nation Supreme Court is authorized to hear.

Third, even though Appellants have no part in the laws and regulations that govern the tribal territory, this fact is not distinguishable from other instances where Appellants may be

subject to long-arm statutes. Whenever a person engages in commercial activity across state borders, that person may be subjected to law that the person had no part in supporting. *Long-arm Jurisdiction*, Black's Law Dictionary (10th ed. 2014). For instance, Ms. Smith lives and works in Oregon. ROA 2. When she engages in securities activity in Arizona, however, she is subject to Arizona blue sky laws. *See* Ariz. Rev. Stat. Ann. § 44-1991. That law applies when a sale of a security is conducted within Arizona regardless of where the person conducting the sale resides. As a licensed securities broker, Ms. Smith is subject to this blue sky law even though she had no part in making it, just like she is subject to the tribal laws even though she had no part in making them.

Finally, in *Plains Commerce,* the Court suggested, although reserved for later, the question of whether a nonmember engaging in commercial activity could "reasonably have anticipated that its various commercial dealings . . . could trigger tribal authority to regulate those transactions." 554 U.S. at 338. The Court reserved that question because the nonmember in that case dealt only with "general business dealings" limited to commercial lending to a tribal member. *Id.* This case is distinguishable from *Plains Commerce* in this regard. Appellants' dealings were conducted directly with the Yuma Indian Nation and the EDC, not with an individual tribal member. ROA 1-3. Appellants conducted specific commercial dealings with the Yuma Indian Nation including providing investment and business advice on economic development both on- and off-reservation. *Id.* Appellants conducted these business dealings over for a long period (a decade for Mr. Smith and nearly that for Ms. Smith.) *Id.* Based on all of this business activity, Appellants knew or should have "reasonably anticipated that its various commercial dealings . . . could trigger tribal authority to regulate" their contractual relationship with the Yuma Indian Nation.

Thus, the public policy weighs in favor of recognizing tribal jurisdiction over a contractual relationship between a "private commercial actor" and the tribe. Appellants' due process rights are protected under the tribal code, including limitations on tribal sovereignty to bring them into tribal court and their right of appeal. Even though they had no say in the tribal laws to which they are subjected, their situation is no different than any cross-border commercial activity they conduct where they would be subject to, for instance, another state's blue-sky laws.

In conclusion, the Appellants are subject to tribal civil regulatory and adjudicatory jurisdiction. They entered into a "private consensual relationship" via a contractual agreement with the Yuma Indian Nation wherein Appellants became "private commercial actors." Appellants had many contacts with the Yuma Indian Nation on the Yuma Indian Nation's reservation through their consensual relationships. Mr. Smith provided advice to the Yuma Indian Nation and EDC via telephone, email, and in-person at board meetings. Ms. Smith provided advice to the Yuma Indian Nation and EDC via Mr. Smith, and her services were paid for directly by the EDC. Appellants also visited the Yuma Indian Nation reservation on at least two occasions. Finally, Appellants agreed to litigate any claims arising out of their consensual relationship in a court of competent jurisdiction, which would include the Yuma Indian Nation tribal courts. Appellants could reasonably anticipate they could be hailed into the Yuma Indian Nation tribal courts, where they would receive the similar constitutional protections as under federal law.

II. THE YUMA INDIAN NATION, THE EDC, MR. CAPTAIN, AND MS. BLUEJACKET ARE AFFORDED TRIBAL SOVEREIGN IMMUNITY AGAINST THE SMITHS' CLAIMS BECAUSE THE YUMA INDIAN NATION IS A FEDERALLY-RECOGNIZED TRIBE, THE EDC IS AN ARM OF THE TRIBE, AND THE EMPLOYEES ACTED WITHIN THEIR AUTHORITY.

Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). As "domestic dependent nations" with inherent sovereign immunity, Indian tribes are barred from suit by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). This immunity from suit is known as the doctrine of sovereign immunity. Sovereign immunity extends to businesses operated by the tribe when the business operates as the tribe's alter ego. *Multimedia Games v. WLFC Acquisition*, 214 F. Supp. 2d 1131 (N.D. Okl. 2001).

A. The Yuma Indian Nation is a federally-recognized tribe which is immune from suit because neither Congress nor the Yuma Indian Nation waived the Yuma Indian Nation's immunity from suit.

Tribes that are recognized by the federal government are afforded sovereign immunity "absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Part of sovereign immunity is the "common-law immunity from suit traditionally enjoyed by sovereign powers," which is to be employed and afforded to Indian Nations unless Congress has authorized otherwise. *Santa Clara Pueblo*, 436 U.S. at 58 (1978) (citing to *Turner v. United States*, 248 U.S. 354, 358 (1919)). Furthermore, Arizona courts have also recognized the doctrine of tribal sovereign immunity, conceding that tribes are immune from suit and cannot be subjected to the jurisdiction of Arizona courts without tribal consent or authorization from Congress. *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 560 (Ct. App. 1985) (citing to *Morgan v. Colorado River*

Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968)). If the tribe has no government-to-government relationship, Congress has waived the tribe's sovereign immunity, or the tribe has waived its sovereign immunity, then the tribe will not enjoy immunity from suit.

First, the Yuma Indian Nation is a federally-recognized tribe that enjoys sovereign immunity. Its relationship with the federal government is evidenced by its reservation, which is land held by the federal government in trust for the Yuma Indian Nation. ROA 1. Additionally, the Yuma Indian Nation was issued a corporate charter by the Secretary of the Department of Interior under the Secretary's statutory authority. ROA 1; 25 U.S.C. § 5124. Thus, the Yuma Indian Nation enjoys sovereign immunity.

Second, Congress did not waive the Yuma Indian Nation's sovereign immunity. In *Santa Clara Pueblo*, the Court held that waivers of sovereign immunity must be "unequivocally expressed" and, in the absence of express abrogation of sovereign immunity by Congress, sovereign immunity bars suits against tribes. 436 U.S. at 58. Likewise here, there is no suggestion that Congress has "unequivocally expressed" the retraction of the Yuma Indian Nation's sovereign immunity, and like the Court held in *Santa Clara Pueblo*, the claims should be barred. *See Id*.

Third, the Yuma Indian Nation did not waive its sovereign immunity. A waiver by the tribe must be "clear." *Okla. Tax Comm'n*, 498 U.S. at 509. In fact, the Yuma Indian Nation Tribal Council has adopted three separate tribal code sections, each of which indicates that the tribe does not intend to waive its sovereign immunity. ROA 3; Yuma Indian Nation Tribal Code §§ 1-110, 2-106, & 11-081. The Appellants may argue that the Yuma Indian Nation waived its sovereign immunity by filing a lawsuit in response to which the Appellants are entitled to bring a counterclaim. The Court has held, however, that "a tribe does not waive its

sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Okla. Tax Comm'n*, 498 U.S. at 509. Tribes possess the same immunity from cross-suit that they possess from direct suit. *Id.* In this present case, the Yuma Indian Nation filed suit against Appellants and Appellants countersued. However, the Yuma Indian Nation's sovereign immunity protects the Nation against direct suits, and thus indirect suits, brought by Appellants. Therefore, the Nation has not waived its sovereign immunity.

Because the Yuma Indian Nation is a federally recognized tribe, the Yuma Indian Nation is entitled to sovereign immunity from Appellants' counter-suit. Neither Congress nor the Yuma Indian Nation waived the Yuma Indian Nation's sovereign immunity. Thus, dismissal of Appellants counterclaims against the Yuma Indian Nation was proper.

B. The EDC, a federally chartered corporation, did not waive sovereign immunity even though it had the authority to do so under the "sue or be sued" provision in its federal charter.

Tribes seeking to conduct commercial activities may do so through a charter of incorporation issued by the Secretary of the Interior, under Section 17 of the Indian Reorganization Act (IRA). 25 U.S.C. § 5124. After the Secretary issues the charter, the tribe may create tribal corporations and conduct business through those corporations. *Brugier v. Lac du Flambeau Band of Lake Superior Chippewa Indians,* 237 F. Supp. 3d 867, 872 (W.D. Wis. 2017). While the IRA is silent on whether these federally chartered corporations enjoy tribal sovereign immunity, subordinate tribal entities are generally afforded tribal sovereign immunity even if their charter explicitly states that the federally charted corporation may "sue and be sued." *Id*.

In this case, the Secretary issued the Yuma Indian Nation a charter of incorporation. SQ 1. Under this charter, the Yuma Indian Nation created the EDC, which the Yuma Indian Nation uses to conduct its business, such as developing land and engaging in business ventures. Even though the Yuma Indian Nation's charter provides that the Yuma Indian Nation's federally chartered corporation—the EDC—may "sue and be sued, the EDC is immune from suit. ROA 2.

The Appellants will argue that "sue or be sued" constitutes a waiver of immunity by the EDC. Numerous courts have addressed this issue and found that "sue or be sued" does not expressly waive sovereign immunity by the federally chartered corporation; rather, it merely allows the federally chartered corporation to take legal action or waive sovereign immunity. *See Brugier,* 237 F. Supp. 3d at 872; *Howard v. Liberty Mem. Hosp.,* 752 F. Supp. 1075, 1077 (S.D. Ga. 1990); *Garcia v. Akwesasne Hous. Auth.*, 268 F. 3d 76, 86 (2d Cir. 2001).

In *Howard*, the court analyzed whether Georgia had waived sovereign immunity for a government-run hospital operating under Georgia's Hospital Authorities Law, which contained a provision permitting the hospital to "sue and be sued." 752 F. Supp. 1075, 1077 (S.D. Ga. 1990). The court held that the "sue and be sued" clause meant only that a hospital operating under that law had the status and capacity to enter the courts. *Id.* The court did not find the "sue and be sued" provision to expressly signify a waiver of immunity against suit. *Id.* In *Garcia*, the court analogized waiver of tribal sovereign immunity to waiver of sovereign immunity by both state and foreign sovereigns. As other courts have held for state and foreign sovereigns, the court held that a clause like "sue and be sued" in a tribal ordinance does not equate to a waiver of sovereign immunity. 268 F. 3d 76, 86 (2d Cir. 2001). Rather, it simply means that the entity may be amenable to suit in its home jurisdiction, but not necessarily in

other jurisdictions. *Id*. Finally, in *Brugier*, although the court decided the case on other facts, it stated that the "sue and be sued" clause merely meant that the federally charted corporation had the *power* to waive sovereign immunity and that the tribe had not *expressly* waived immunity. 237 F. Supp. at 872.

Here, the EDC, a federally chartered corporation, is authorized in its charter to sue and be sued. ROA 2. The authority to "sue and be sued," however, ultimately means: (1) the EDC has the power to waive its sovereign immunity; (2) the Yuma Indian Nation tribal court is the most appropriate place to bring a suit as the home jurisdiction of the EDC; and (3) the EDC has not consented to suit in courts outside of its home jurisdiction. Despite the authority to do so, the EDC has not waived its sovereign immunity. Even if it had waived its sovereign immunity, the tribal court, and not the federal court, would be the most appropriate place to bring a suit.

C. The EDC is an arm of the Yuma Indian Nation that meets the criteria of a "subordinate economic entity," blanketing the EDC with the same sovereign immunity as the Yuma Indian Nation.

Absent express waiver by the tribe, entity, or Congress, courts may consider extending tribal sovereign authority to entities based on several factors which ultimately determine whether the entity qualifies as a "subordinate economic entity entitled to share in a tribe's immunity." These factors include: (1) the method of the creation of the economic entity; (2) the purpose of the entity; (3) the structure and management of the entity, including the tribal control exerted over the entity; (4) the tribe's intent with respect to sharing immunity; (5) the financial relationship between the tribe and the entity; and (6) the underlying public policies of tribal sovereign immunity and their connection to tribal economic development.

Breakthrough Mgmt Group v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 (10th Cir. 2010).

First, the Yuma Indian Nation created the EDC via a charter of incorporation issued by the Secretary of the Department of Interior, which supports the EDC's status as a "subordinate economic entity" entitled to sovereign immunity. ROA 1.

Second, the Yuma Indian Nation created the EDC for the purpose of enhancing the social welfare of the tribe. Where a federally chartered corporation has health, education, or welfare of the tribal members as a purpose, the tribe's sovereign immunity will blanket the corporation. *See Ransom v. St. Regis Mohawk Educ. & Cmty. Fund,* 86 N.Y. 2d 553, 560 (1995). Likewise, the EDC, a funding entity, was created by the Yuma Indian Nation for the purpose of "promot[ing] the prosperity of the Nation and its citizens . . . [and] creat[ing] and assist[ing] in the development of successful economic endeavors . . ." ROA 1. Because the EDC was created by the tribe and for the tribe, as was the case in *Ransom*, this factor supports the EDC's status as a "subordinate economic entity" entitled to sovereign immunity.

Third, the Yuma Indian Nation retains authority to dismiss or otherwise remove directors that serve on the EDC board, thus lending support to the fact that the tribe has authority over the entity. In *Breakthrough Management Group*, the tribal corporation's board of directors also served as members of the tribal council; thus, the tribal council was identical to the tribal corporation's board. 629 F.3d 1173 at 1193. The court held that this factor, among other factors, supported a finding that the tribe and the tribal corporation were so "closely related" that the activities of the tribal corporation constitute activities of the tribe. *Id.* at 1195. In another case, the court held that a tribal corporation was a "subordinate economic entity" because: (1) the tribal council selected the board members from outside the council

membership; (2) the tribal council could suspend a board member for cause; (3) the tribal council set the qualifications for board membership; (4) the board had full authority to act for and on behalf of the tribe; (5) the tribal council determined board compensation and dispensed the board of director's salaries; (6) the tribe had authority to advance, give, or loan funds to the tribal corporation; (7) the tribal purchasing agent approved tribal corporation purchases according to tribal policies; and (8) title to property, with a few exceptions, was held by the tribe. *White Mtn. Apache Indian Tribe v. Shelley*, 480 P.2d (Ariz. 1971) (*en banc*).

The Yuma Indian Nation and EDC substantially meet the standard set by *Shelley:* (1) the Yuma Indian Nation Tribal Council selected the initial board of directors for the EDC from outside the council; (2) the tribal council retains the right to remove any director for or without cause at any time with a 75% vote; (3) the tribal council set the qualifications, which include consideration for tribal and non-tribal membership and business acumen; (4) the board, with the exception of borrowing or lending money in the name of the Yuma Indian Nation, may act on behalf of the tribe; (5) the tribe actually advanced funds totaling $10 million to the EDC; (6) the tribe must review and approve any corporate and financial records. The overwhelming presence of six out of eight factors supports the conclusion that the EDC is a "subordinate economic entity" and the tribe exercises significant and varied control over the EDC.

While *Shelley* addressed a tribal corporation and not a federally chartered corporation as presented here and in *Breakthrough Management Group*, that fact was not relevant in the court's determination that the corporation was a "subordinate economic entity" of the Yuma Indian Nation. Thus, the court's analysis in *Shelley* should instruct the court in this case, weighing this factor heavily in favor of a finding that the EDC is a "subordinate economic entity" entitled to sovereign immunity.

Fourth, the Yuma Indian Nation intended for the EDC to share its tribal sovereign immunity. In *Breakthrough Management Group*, the tribal ordinance included language in a provision titled "Sovereign Immunity" that asserted protection for the tribal corporation, its board, and its employees under the tribe's sovereign immunity. 629 F.3d at 1193. Likewise, the Yuma Indian Nation included in its charter that "the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law." ROA 2. The fact that the Yuma Indian Nation clearly and expressly intended to share its immunity as did the entity in *Breakthrough Management Group* weighs heavily for a finding of immunity.

Fifth, the EDC and the Yuma Indian Nation have a strong financial relationship. In *Breakthrough Management Group,* the court found that a strong financial relationship between the tribe and the tribal corporation because the entity was required to provide the tribe with a monthly payment of profits. This fact supported the court's finding that the tribal corporation was a "subordinate economic entity" entitled to immunity. 629 F.3d at 1193. Here, the Yuma Indian Nation provided the EDC with a start-up loan of ten million dollars, required the EDC to provide yearly deposits into the general fund consisting of 50% of their profits, as well as quarterly financial reports. Thus, the Yuma Indian Nation and EDC can demonstrate a strong financial relationship weighs in favor of finding the EDC is a subordinate economic entity entitled to sovereign immunity.

Finally, as a matter of public policy, the courts will hold in favor of sovereign immunity for subordinate economic entities as long as the entity's objective remains to enhance tribal welfare, even if its activities are commercial, rather than governmental, in nature. *Id*. In *Breakthrough Management Group*, the court held that the actions of the tribal corporation—a casino—were so closely related to the tribe's objectives of self-determination and economic

development that the commercial nature of the activity was outweighed by the need for sovereign immunity. *Id*. This holding echoed in another case in which the court stated that it did not matter whether the tribe was engaged in an enterprise which was private or commercial rather than governmental; all enterprises under Indian tribes need protection if they are to support the tribe. *See Maryland Cas. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1966). Similarly, the court in *Shelley* stated, "We believe it would defeat the purpose of Congress in granting immunity to Indian Tribes were we to treat a subordinate economic organization of an Indian tribe as governmental corporations or federal instrumentalities are treated. If it is the intent of Congress that such organizations be treated as [that way] . . . it is a matter best left to Congress for action." *White Mtn. Apache Tribe v. Shelley*, 480 at 654 (distinguishing tribal corporations from government corporations or federal instrumentalities where sovereign immunity does not extend to commercial activity).

While the EDC has elected to investigate the possibility of marijuana cultivation in order to increase profitability, which may be a purely commercial endeavor, the purpose of doing so is to forward Congress's and the Yuma Indian Nation's objectives of self-determination and economic development. The EDC is a tribal entity that requires protection under sovereign immunity in order to effectuate Congressional and tribal purpose. Failure to grant the EDC protection under sovereign immunity would contravene Congressional intent. Congress, and not the court, should change this over-arching policy if and when it sees fit to do so. Thus, the public policy established by Congress compel a grant of sovereign immunity to the EDC.

In conclusion, the underlying purpose of the EDC is immaterial. Because the EDC was created by the Yuma Indian Nation for the purpose of enhancing the tribe and its members, the

tribe maintains control over the EDC, the Yuma Indian Nation intended to extend sovereign immunity to the EDC, there is a close financial relationship between the Yuma Indian Nation and EDC, and public policy weighs in favor of immunity, the Yuma Indian Nation's sovereign immunity should extend to the EDC.

D. Mr. Captain and Ms. Bluejacket are tribal employees who acted within their scope of employment, and therefore, sovereign immunity protects them from suit in both their official and individual capacities.

Tribal sovereign immunity extends to individual tribal officials who are acting within the scope of their authority (or official capacity) when the alleged harms are committed. *Bassett v. Mashantucket Pequot Tribe*, 204 F. 3d 343, 360 (2d Cir. 2000)(citing *Romanella v. Hayward*, 933 F. Supp. 163 (D. Conn. 1996)). As such, a claimant may not "circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004). Further, the claimant "may not simply describe their claims against . . . tribal official[s] as in [their] 'individual capacities' in order to eliminate tribal immunity," because it would ultimately defeat the purpose of and remove the protections given to tribes that protects against claims arising under state or federal law. *Bassett v. Manshantucket Pequot Museum & Research Ctr.*, 221 F. Supp. 2d 271, 280 (2002). If, however, the claimant brings a claim against tribal officials in their individual capacities because the tribal official acted "manifestly or palpably beyond [their] authority," then the claim against the tribal official may proceed. *Basset*, 204 F.3d at 359 (quoting *Doe*, 81 F.3d 1204, 1210 (2d Cir. 1996)).

Further, courts have deemed the tribal immunity shield extends beyond tribes themselves also to cover tribal corporations deemed "arms of the tribe." *Kiowa Tribe of Okla.*

v. Mfg. Techs., 523 U.S. 751, 758 (1981). The Court expressly declined "to draw [any] distinction that would confine immunity to . . . noncommercial activity." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2037 (2014) (quoting *Kiowa,* 523 U.S. at 758) (internal quotes omitted). In arriving at that decision, the Court carefully addressed, and even "expressed a fair bit of sympathy," toward the dissenting opinions, which argued sovereign immunity should not extend to tribal commercial activity when it does not extend to state or federal commercial activity. *Id.* (citing *Kiowa,* 523 U.S. at 758). Thus, the Court affirmed that "it is fundamentally Congress's job, not [the Court's], to determine whether or how to limit tribal immunity." *Id.* at 2037. It also held that tribal immunity extends beyond immunity granted to states when the tribe engages in commercial activity. *Id.* Thus, it follows that employees of the tribal corporation acting as an "arm of the tribe" are protected by sovereign immunity.

Thus, applying this line of cases, especially the decisively stated decision in *Kiowa,* makes clear that sovereign immunity extends to all Yuma Indian Nation employees and officials, including Mr. Captain and Ms. Bluejacket, which the Court has decisively stated this decision in *Kiowa* and its progeny. Second, sovereign immunity extends to the Yuma Indian Nation's commercial activity even if that results in sovereign immunity more expansive than sovereign immunity granted to states' or the federal government's commercial activity. Third, sovereign immunity extends to the Yuma Indian Nation's employees and officials when those individuals engage in commercial activity on behalf of the tribe and in the scope of their authority and employment. Fourth, Mr. Captain and Ms. Bluejacket, as employees and officials of the EDC and acting as an arm of the Yuma Indian Nation, are considered employees and officials of the Yuma Indian Nation. Thus, sovereign immunity extends to Mr. Captain and Ms. Bluejacket.

Further, Mr. Captain and Ms. Bluejacket are employed by the EDC. In 2009, the Yuma Indian Nation created the EDC and transferred all authority to manage the contractual relationship with Thomas Smith to the EDC. ROA 1. Additionally, when Carol Smith began providing services, she provided some of those services to the EDC. When the EDC discontinued services received by the Smiths, the EDC employees acted within the scope of their official capacities. As the CEO, Mr. Captain had responsibility for daily operations, including contract management. Furthermore, Ms. Bluejacket, as an accountant, acted in her official capacity when she did not remit payment to only because the Smiths refused to continue rendering services to the EDC, ultimately resulting in a lack of services that needed to be compensated. Thus, Mr. Captain and Ms. Bluejacket acted in their official capacities when they allegedly breached their contract with the Appellants.

The Appellants may argue that tribal immunity does not extend so far as to cover employees or officials of a tribal corporation. In fact, one court seemed to suggest just that, but avoided the analysis by deciding the case on different grounds. *Native Am. Distrib. v. Seneca-Cayuga Tobacco*, 546 F.3d 1288 (10th Cir. 2008). The Court posited that if the claimant seeks money damages against the officer in an individual capacity for unconstitutional or wrongful conduct that the claimant can fairly attribute to the officer, sovereign immunity will not bar the suit as long as relief is sought from the individual, not the sovereign. *Id.* at 1297. However, the court clarified this statement in a preceding section of its analysis by stating that "suits brought against [tribal officials] *because of* their official capacities" are immunized from suit. *Id.* at 1296.

In another case, the court had opportunity to define what acting "because of" an official capacity meant. In *Garcia*, the court held that the defendant, who acted as Chairman of the

Board of Commissioners, was afforded an extension of tribal sovereign immunity when he terminated the plaintiff's employment. 268 F. 3d at 88. The former employee sued the tribal official in his individual capacity for terminating her, stating that the tribal official had done so outside the scope of his tribal authority because he had a personal or retaliatory objective. *Id*. at 82. The court refused to address the motive behind the tribal official's actions; rather, the mere fact that the tribal official had the authority to make such hiring and firing decisions, and that he had done so within the scope of his employment, meant that he had acted within his authority, and therefore, remained protected by tribal sovereign immunity. *Id*. at 88 (remanding for findings on whether firing created a cause of action against the official under the law). Similarly, despite the reasons behind the termination of the contract and the withholding of funds, both Mr. Captain and Ms. Bluejacket acted well within their authority to do so. Their jobs afforded them the right to end a contract and thus discontinue payment for services not rendered, and an extension of tribal sovereign immunity is appropriate.

Garcia and the present case are materially indistinguishable. Both involve respected employees of a tribal entity that made an unpalatable decision to the plaintiff. Though the plaintiffs in both cases disliked the decisions, the acts were well within the official's scope of employment and official capacities, thus barring claims brought against the official in an official or individual capacity. The ultimate decision to terminate the contract for the Appellants' refusal to render services based on their own personal, moral beliefs and the non-payment of funds were each acts that Mr. Captain and Ms. Bluejacket could carry out in their positions without question. Because they acted well within their scope of and *because of* their authority, and their actions equated to those reasonably taken in an official capacity, tribal sovereign immunity should be granted.

Therefore, Fred Captain and Molly Bluejacket, acting in the scope of and because of their official capacity with the EDC, which is an arm of the Yuma Indian Nation, are protected from suit by the same sovereign immunity that protects the Yuma Indian Nation from suit.

In conclusion, the Yuma Indian Nation is a sovereign nation and is afforded tribal sovereign immunity. *See Kiowa,* 523 U.S. at 753. Additionally, the EDC is a legal entity which has not waived its immunity. Entities that act as "arms of the tribe" and not as "mere businesses" are entitled to tribal sovereign immunity. *See Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir.2000). Furthermore, Mr. Captain and Ms. Bluejacket acted well within their authority granted by the EDC when they ended the EDC's contract with the Smiths and discontinued payment for services not rendered. Thus, the Yuma Indian Nation, the EDC, Mr. Captain, and Ms. Bluejacket are afforded tribal sovereign immunity from the Smiths' claims that they breached their contractual obligations.

CONCLUSION

This court should uphold the Yuma Indian Nation Appellate Court's decision to dismiss all of the Appellants' counterclaims against the Yuma Indian Nation, the EDC, Mr. Captain, and Ms. Bluejacket and uphold the Yuma Indian Nation Appellate Court's findings against the Appellants. First, the Yuma Indian Nation tribal courts may exercise adjudicatory jurisdiction over the Appellants because the Appellants engaged in a consensual relationship with the tribe, conducted activity related to the consensual relationship on-reservation, and could reasonably expect to be waived into tribal court. Further, the doctrine of sovereign immunity broadly protects the Yuma Indian Nation, the EDC, Mr. Captain, and Ms. Bluejacket from suit even for their commercial activity. As such, the Yuma Indian Nation meets its burden to demonstrate

that bona fide issues of law exist requiring exhaustion of remedies through the Yuma Indian Nation tribal court system before seeking review in a federal court.

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

January 2018 *Counsel for Appellee*