No. 17-024

IN THE

Yuma Indian Nation Supreme Court

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YUMA INDIAN NATION,
Plaintiff/Appellee,

v.

THOMAS SMITH & CAROL SMITH,
Defendant/Appellant,

_____

On Appeal for the Yuma Indian Nation Tribal Court

_____

BRIEF FOR THE DEFENDANT/APPELLANT

_____

TEAM 106

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Questions Presented

I. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.

II. Whether the Smiths are barred by sovereign immunity, or any other type of immunity, from bringing their claims against the Yuma Indian Nation, the Economic Development Corporation, or Fred Captain and Molly Bluejacket.

Statement of the Case

I. Statement of the Facts

The Yuma Indian Nation is located in southwest Arizona — Thomas Smith is a certified financial advisor and accountant, who lives and works in Phoenix, Arizona, which is located in central Arizona. R. at 1. In 2007, at his office in Phoenix, Thomas signed a contract with the Nation, agreeing to provide financial advice "on an as-needed basis regarding economic development issues." R. at 1. The contract required Thomas to "maintain absolute confidentiality regarding any and all tribal communications and economic development plans" and "provided for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." R. at 1.

Under the authority of the Nation's commercial code, the tribal council created the Economic Development Corporation through a corporate charter in 2009. R. at 1. According to the charter, the primary 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 (emphasis added). The EDC is authorized to make real estate transaction both on and off the reservation, and to sue or be sued, so long as the debts do not encumber or implicate the assets of the Nation. R. at 1. The tribal council put a provision in the charter, mandating tribal sovereign immunity for the EDC, its board, and all employees, to the fullest extent of the law, because it wants to protect the entity and the Nation from unconsented litigation. R. at 1. The Nation funded the EDC with a one-time $10 million loan from its general fund. R. at 1. The EDC is to pay 50% of its profits to the Nation's general fund on an annual basis. R. at 1. The EDC thus far has paid back $2 million on the Nation's initial loan. R. at 1.

For ten years Thomas provided economic development financial advice, mostly through daily emails and telephone calls. R. at 1. The first two years Thomas communicated with tribal council members, then after the EDC was created, he communicated primarily with Fred Captain, the CEO of EDC, and Molly Bluejacket, the EDC accountant. R. at 1. He also submitted quarterly reports to Council and presented them at Council meetings on the reservation. R. at. 1.

In 2010, with the approval of the Nation's tribal council, Thomas contracted with his sister Carol Smith, a licensed stock broker who works and lives in Portland, Oregon. R. at 2. This contract is identical to Thomas's 2007 contract, plus it has a provision that requires both Thomas and Carol to comply with that earlier contract. R. at 2. Carol was retained to give advice regarding stocks, bonds, and securities, to Thomas, the Nation, and the EDC. R. at 2. In practice, she gives her advice directly to Thomas via email, phone, postal, or delivery service, and he passes it on to the tribal council, Fred Captain, and Molly Bluejacket. R. at 2. She emails her bills to Fred Captain and the EDC mails her checks. R. at 2. Carol has only visited the Yuma Indian Nation reservation on two occasions, both times while she was on vacation, and both times with Thomas. R. at 2.

In 2016, a referendum to legalize recreational marijuana in Arizona failed, but the EDC convinced the tribal council to enact a tribal ordinance legalizing marijuana on the reservation "for any and all purposes." R. at 2. EDC began quietly pursuing the marijuana business and it conferred with Thomas Smith several times for financial advice, but both Thomas and Carol are opposed to marijuana for moral reasons. R. at 2. Thomas is acquaintances with the Attorney General for Arizona and informed him of the Nation's plans.

R. at 2. The A.G. wrote a letter to the Nation and the EDC telling them to cease and desist with their marijuana operations. R. at 2.

II. Statement of the Proceedings

The YIN Tribal Council filed suit against Smiths in Tribal court for breach of contract, violation of fiduciary duties, and violation of duty of confidentiality. They sought recovery of liquidated damages as set out in contracts. R. at 3. The Smiths filed special appearances and motions to dismiss in Tribal court for lack of both personal and subject matter jurisdiction. In the alternative, they requested the Tribal court to stay the lawsuit pending federal district court decision on whether the YIN Tribal court has jurisdiction. The trial court denied both motions. R. at 3. Still under special appearances in tribal court, the Smiths denied YIN claims and counterclaimed for breach of contract and defamation for impugning their professional skills. R. at 3. They sought payment for money owed under the contracts. R. at 3. The Smiths impleaded third-party defendants Fred Captain and Molly bluejacket in both their individual and official capacities, along with the EDC, claiming breach of contract and defamation. R. at 3. The trial court dismissed all counterclaims due to sovereign immunity. R. at 3. The Smiths filed an interlocutory appeal in the Yuma Indian Nation Supreme Court, and are requesting the court to decide the questions presented *supra*, and issue a writ of mandamus ordering the court to stay suit.

Argument

I. The Yuma Indian Nation Cannot Assert Subject Matter Jurisdiction or Personal Jurisdiction over Petitioners Smith.

The Yuma Indian Nation Court cannot assert jurisdiction over Thomas or Carol Smith, and the court should thus dismiss the case. Under the Yuma Indian Nation Tribal Code, the tribal court system shall have civil jurisdiction over all civil actions arising under

the Constitution, laws, or treaties of the tribe, including Tribal common law, over all general civil claims which arise within Tribal jurisdiction. YIN Tribal Code 1-107. The code further allows the court to assert personal jurisdiction for civil actions over any person who transacts, conducts, or performs any business or activity within the reservation, or any person who commits a tortious act on or off the reservation and causes harm within the reservation. YIN Tribal Code 1-104.

Standing alone, these provisions may allow the tribal court to assert jurisdiction over Thomas and Carol Smith. In the circumstances of this case, federal case law imposes limits on the tribal court's jurisdiction, because the Smiths are nonmembers and because there are ambiguities as to whether their alleged breach and tortious conduct happened within the Yuma Indian Nation.

A. The Yuma Indian Nation should not have subject matter jurisdiction over Thomas and Carol Smith because the tribe's inherent sovereign powers do not extend over the Smith's actions.

The Yuma Indian Nation cannot assert subject matter jurisdiction over the Smiths because of the limits on Indian Tribes' civil authority over nonmembers. Under the general rule of *Montana v. United States*, the dependent status of tribes limits the exercise of tribal powers to what is necessary to protect tribal self-government or to control internal relations. *Montana v. United States*, 450 U.S. 544, 564 (1981). This rule severely narrows the circumstances where tribes have civil authority over nonmembers. For a tribe to have civil jurisdiction over nonmembers, the nonmembers must fall under an exception provided by *Montana*. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). In fact, the Supreme Court has stated that jurisdiction over nonmembers is presumptively invalid, and the burden is on the tribe to show that the nonmember defendants meet one of the exceptions. *Id.*

The *Montana* exceptions are as follows. A tribe may regulate the activities of nonmembers who enter consensual relationships with a tribe or its members through commercial dealings, contracts, leases or other arrangements. *Montana*, 450 U.S. at 565. A tribe may also exercise civil authority over nonmembers when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Id.* at 566. Although the Yuma Indian Nation will argue that this case falls under both exceptions, the Court has construed *Montana* very narrowly.

i. The Contract between the Smiths and the Yuma Indian Nation does not bring the Smiths under the first Montana exception.

The first *Montana* exception appears to explicitly place all nonmember contractors under tribal jurisdiction, but the Smiths' contract does not place them under civil jurisdiction for every cause of action. In *Plains Commerce Bank*, members of the Cheyenne River Sioux Tribe filed claims in tribal court against a bank over the sale of on-reservation fee-land that the bank previously foreclosed on them. 554 U.S. at 320. The plaintiffs alleged that the bank had discriminated against them by selling the land to nonmembers on more favorable terms. *Id.* The U.S. Supreme Court found that tribal courts lack jurisdiction to adjudicate on the sale of non-Indian fee land because Indian tribes do not have authority to regulate the sales of fee lands. *Id.* at 331-2. The rule of *Montana* only allows tribes to regulate the activities and conduct of nonmembers within the reservation. *Id.*

There has to be more than a contract with members for tribal courts to have civil authority over nonmembers. Tribal jurisdiction cannot reach discriminatory sales of land that members were previously in contract to buy. It should not reach contracts that promise to give financial advice to members. Thomas Smith did enter a contract with the Yuma Indian Nation and he did communicate with tribal members in performance of that contract. R. at 1.

His performance of the contract did not bring him within the reservation as *Plains Commerce* required.

Thomas Smith's contract to provide financial advice and Carol Smith's contract to for stock trading advice, should not allow for civil authority for giving information to the Arizona Attorney General. A nonmember's consensual relationship in one area does not trigger tribal civil authority in another area. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). To impose civil authority over a nonmember contractor, the civil authority imposed must have a nexus to the consensual relationship itself. *Id.* Just because the nonmember has some consensual commercial contacts with a tribe does not give the tribe jurisdiction over all suits involving that nonmember. *Phillip Morris United States v. King Mt. Tobacco Co.*, 569 F .3d 932, 941 (9th Cir. 2009).

There is not a sufficiently strong nexus between the Smith's contractual relationship with the Yuma Indian Nation and the conduct for which the Nation filed their complaint. The Yuma Indian Nation filed their claim for breaching his duty of confidentiality when he disclosed the Attorney General that the Tribe's plans to cultivate marijuana. R. at 3. While confidentiality was part of the contract itself, the nexus between this disclosure and the basis of the contractual relationship is tenuous. The case law disfavors such a broad scope of tribal jurisdiction over nonmembers.

ii. A civil suit for disclosing marijuana cultivation is not necessary to protect the political integrity, the economic security, or the health or welfare of the tribe.

The Smith's conduct does not fall under the second exception because their disclosure did not threaten or harm the political integrity, economic security, or the health or welfare of the tribe. The Court has said that this second *Montana* exception is only triggered by nonmember conduct that threatens the Indian Tribe itself. *Atkinson Trading Co*., 532 U.S.

645, 657 n. 12. It does not allow civil authority where it might be considered necessary to self-government. *Id.* When a tribe asserts civil authority over nonmembers, that assertion must be connected to the right of Indians to make their own laws and be governed by them. *Nevada v. Hicks*, 533 U.S. 353, 364 (2001). Under the Supreme Court's view, tribes have the authority to punish tribal offenders, determine tribal membership, regulate domestic relations among their members and prescribe rules of inheritance. *Id.* at 360. An assertion of civil authority of nonmembers should be concerned with protecting these sovereign rights.

The cease and desist letter that the Attorney general may be an attempt to infringe on the tribe's independent self-government, but it cannot fairly be characterized as a threat to the tribe. Marijuana cultivation would provide the tribe with economic benefits. Nevertheless, hurdles to cultivating a presently illegal substance should not qualify as a threat to the political integrity, economic security, or health or welfare of the tribe. Holding nonmembers accountable for revealing information about marijuana cultivation is not necessary to protect any of these aspects of self-government.

Because the Smiths and their conduct do not fall within either of the two *Montana* exceptions, the petitioners respectfully request that the court dismiss this action for lack of subject matter jurisdiction.

B. It would be improper for the Yuma Indian Nation Court to assert personal jurisdiction over the Smiths considering the conduct that gave rise to this action.

The Smith's contractual relationship with the Yuma Indian Nation does not create a sufficient connection to justify personal jurisdiction over them. For state courts to assert personal jurisdiction over nonresident defendants, their assertion must comport with due process limitations of the Fourteenth Amendment of the U.S. Constitution. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). Indian tribes are separate and distinctive sovereignties

which aren't constrained by the Fourteenth Amendment. *R.J. Williams Co. v. Ft. Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983). Although tribes aren't limited by the Constitutional due process clause, the Indian Civil Rights Act contains its own due process clause. 25 U.S.C. § 1302(a)(8). That section provides that "no Indian tribe in exercising powers of self-government shall…deprive any person of liberty or property without due process of law. *Id*. By instituting this portion of the ICRA, Congress used its plenary authority to limit tribes power of self-government with similar restrictions contained in the Fourteenth Amendment. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-7 (1978). Tribal courts generally look to Supreme Court precedent to construe the due process portion of ICRA. *See Estate of Tasunke Witcko* (Rosebud Sioux S. Ct. 1996). When considering Supreme Court case law construing personal jurisdiction, it is inappropriate to hale the Smith's into tribal court.

There are two types of personal jurisdiction: general and specific. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). General jurisdiction allows a court to assert jurisdiction over non-resident defendants when their corporate operations within a state are so substantial that they justify suits arising entirely separate from those corporate operations. *Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). For individuals named as defendants, the forum state must be their domicile to allow for general jurisdiction. *Id.* A court can assert specific jurisdiction if the suit arises out of the defendant's contacts with the forum. *Diamler AG*, 134 S. Ct. at 754.

General jurisdiction over the Smiths is improper in the Yuma Indian Nation because they do not have their domiciles there. Thomas lives in Phoenix, and Carole lives in Portland, Oregon. R. at 2-3. Specific jurisdiction over the Smiths is also improper because their

contacts with the Yuma Indian Nation are not sufficiently connected to the tribe's cause of action.

i. The Yuma Indian Nation's suit against the Smiths does not arise out of the Smith's contact with the Yuma Indian Nation as a forum.

Asserting specific jurisdiction over the Smiths in Yuma Indian Nation Court does not comport with due process. For specific jurisdiction to comport with due process, there must be a showing that the defendant has purposefully directed his activities at residents of the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). There must also be a showing that the litigation results from alleged injuries that arise out of or relate to those activities. *Id.* Although Thomas and Carol Smith purposefully directed their activities at the Yuma Indian Nation by entering a contract and communicating with its employees and leaders, the alleged breach of contract does not arise out of the relationship that the Smith's built with the nation.

The dispute over the present contract is distinguishable from other contractual disputes where specific jurisdiction is proper. In *Burger King*, the defendants were Michigan residents who entered a franchise agreement with the Florida based restaurant chain. *Id.* at 464. After the defendants failed to pay their franchise fees, Burger King terminated the franchise and ordered the defendants to vacate the premises. *Burger King*, 471 U.S. at 464-8. The court found that the Florida courts properly asserted personal jurisdiction over the defendants in Michigan. *Id.* at 478. It reasoned that the franchisees purposefully reached out to the Florida corporation in order to derive the benefits from an affiliation with a nationwide organization. *Id.* at 479-80.

While *Burger King* demonstrates how a contractual relationship can help determine specific jurisdiction for a non-resident defendant, contractual relationships alone do not

guarantee specific jurisdiction. *Id.* at 478. The Court emphasized that the defendants entered into a carefully structured, 20-year relationship with Burger King, demonstrating that they expected the contacts in Florida to be well established. *Id.* at 480. To find minimum contacts, the Court examined the parties' prior negotiations, contemplated consequences, the terms of the contract, and the parties' actual course of dealing. *Id.* at 478.

Unlike the franchisees in *Burger King*, Thomas Smith did not expect that his business relationship would involve him in activity that was illegal under Arizona law. Thomas entered into a very general contract to provide financial advice on an as needed basis. R. at 1. He mainly communicated with the EDC, a corporation whose purpose was to create and assist in the development of successful economic endeavors, of any *legal* type or business, on the reservation and in southwestern Arizona. *Id.* The alleged breach of contract, where Thomas disclosed information to the Attorney general, only occurred after the nature of his relationship with the tribe had materially changed. Because of Thomas's moral opposition to marijuana, it is likely that he would not have entered into the contract or kept continuous contacts with the tribes. The Smiths are being hailed into Tribal court for conduct that they did not contemplate when entering the contract and which is unrelated to the original contract.

Although the alleged harm was felt in the Yuma Indian Nation, the complained conduct occurred outside of the Nation's boundaries. Regardless of where a plaintiff lives or works, the injury is jurisdictionally relevant for showing that the defendant has formed contact with the forum. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014). The court should not focus on where the plaintiff experienced a particular injury but on whether the defendant's conduct connects them to the forum in a meaningful way. *Id.* Thomas's actions giving rise to

the suit and his contacts with the tribe are separate. Although the harm of his disclosure was felt in the Yuma Indian Nation, conversation with the Attorney General occurred in Arizona state.

Although Thomas Smith kept in contact with members of the forum tribe, this suit does not arise out those contacts, nor does it arise out of his original relationship with the Yuma Indian Nation. There is also nothing on the record that shows that Carol had direct contacts with the Yuma Indian Nation nor that she committed acts that led to the complained conduct. For these reasons, the petitioners respectfully request that this court dismiss the suit for lack of personal jurisdiction over them in the Yuma Indian Nation Court.

C. If this court will not dismiss the case for lack of jurisdiction, it should stay the proceedings to allow the U.S. District Court to weigh in on the question of jurisdiction.

If this court does not agree that the trial court lacks jurisdiction, it should still say the trial court proceedings to allow the petitioners to seek a ruling in the U.S. District court on the question of jurisdiction. The U.S. District court is within its authority to stay proceedings in this case because the alleged breach or tortious acts occurred outside the reservation boundaries. In *Stock West Corp. v. Taylor*, the 9th Circuit found that a federal court should abstain from adjudicating a legal malpractice claim while a related contract dispute was being litigated in tribal court. 964 F .2d 912 (9th Cir. 1992). The court focused its analysis on the fact that the lawyer committed malpractice within the reservation by preparing a harmful memorandum for the plaintiff. *Id.* at 919. The court said that this evidence created a colorable question of whether the legal claims arose on tribal land. *Id.* A colorable question is a factual assertion that is plausible and appears to have a valid or genuine basis. *Id.* Courts value the location of the acts that gave rise to the claims when determining whether they should stay tribal proceedings. The Supreme Court has found that the principles of comity favor

exhausting tribal court proceedings before seeking relief in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). Again, the court was concerned with protecting tribal sovereignty through keeping tribal authority over activities of nonmembers on reservation lands. *Id.* at 18.

In the present case, some of the Smith's contract was performed on the reservation, but there is no evidence that Thomas's conversation with the Attorney General occurred on the reservation. *See* R. at 2. The act that gave rise to this claim presumptively occurred off the reservation. Much of Thomas and Carol's contract performance occurred off of the reservation as well. There is less interest here in protecting tribal sovereignty because the case has a significant connection outside the tribal forum as well. This court should thus stay the tribal court's proceedings to allow the petitioners to seek a judgment in U.S. District Court on the question of jurisdiction.

II. Neither sovereign immunity, nor any other type of immunity, protects the Yuma Indian Nation, the EDC, or Fred Captain and Molly Bluejacket from the Smiths' claims.

Justice Oliver Wendell Holmes "explained sovereign immunity as 'based on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" *See Nevada v. Hall*, 440 U.S. 410, 415-16 (1979) (citing *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)). Tribes enjoy sovereign powers similar to those "traditionally enjoyed" by states and the federal government. *Santa Clara Pueblo*, 436 U.S. at 58[1]. Tribal sovereign immunity is a judge made doctrine that rose from humble beginnings. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,

[1] *But see, Michigan v. Bay Mills*, 134 S.Ct. 2024 n. 1 (2014) (Thomas, J., dissenting) (*citing U.S. v. Lara*, 541 U.S. 193, 219 (2004) (Thomas concurrence)) ("Unlike the states, Indian tribes 'are not part of this constitutional order,' and their immunity is not guaranteed by it.")

523 U.S. 751, 753 (1998). Despite skepticism from some recent members of the Court[2], it consistently applies the doctrine. *Id.* As such, sovereign immunity is a bar from suit against a tribe, unless Congress abrogates a tribe's sovereign immunity, or a tribe expressly waives its rights. *See Santa Clara Pueblo*, 436 U.S. at 58. A tribe's sovereign immunity may extend to tribal entities and employees, but "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 137 S.Ct. 1285, 1290 (2017) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)).

This section of the argument is organized in three parts adressing sovereign immunity as it applies to the Nation, the EDC, and the EDC employees. Part one argues that Yuma Indian Nation expressly waived its sovereign immunity in three ways. First its claims for breach of contract, breach of fiduciary duty, and breach of confidentiality opened the door to the Smith's counterclaims under the recoupment theory. Second, the claims against the Smiths waives the Nation's sovereign immunity under the waiver by litigation doctrine. And third, the Nation waived its sovereign immunity by its consent to resolve "any and all disputes arising from the contract . . . in a court of competent jurisdiction". R. at 1. Part two argues that the corporate charter language "sue and be sued" expressly waives any claim the EDC has to sovereign immunity. Additionally, the profits from the EDC do not inure to the benefit of the Nation and the EDC subsequently does not receive the protection of the Nation's sovereign immunity. Part three argues that when Fred Captain and Molly Bluejacket

[2] In the first paragraph of the *Kiowa* majority opinion, Justice Kennedy states, "these precedents rest on early cases that assumed immunity without extensive reasoning." Additionally, Justice Stevens stated, "The doctrine of sovereign immunity is founded upon an anachronistic fiction" in the first paragraph of his concurrence in *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (Stevens, J., concurring) (citing *Nevada v. Hall*, 440 U.S. at 414-16 (1979).

are sued in their individual capacities they are not protected by the Nation's sovereign immunity, because the Nation is not the real party in interest.

A. The Nation waived its sovereign immunity to counterclaims under both the equitable recoupment and waiver by litigation doctrines.

An Indian tribe is immune from suits against it, unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 118. The Court recognizes that "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indians*, 532 U.S. 411, 418 (2001) (quoting *Oklahoma Tax Com'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). The fact that a tribe has sued a party does not itself create a waiver for a defendant's compulsory crossclaims under Federal Rule of Civil Procedure 13(a). *See Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 489 U.S. 505, 509 (1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).[3] Exceptions to this general rule are recognized when the claims are grounded in the doctrines of equitable recoupment or litigation by waiver. *See Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194, 1201-5 (D. Ariz. 2016) (listing cases).

The following section of the argument will show first how the Smiths' counterclaims for specific performance on the breach of contract serves to set-off the Nation's suit to recover liquidated damages. Next, it will show how the Smiths' defamation counterclaim is a direct answer to the Nation's breach of fiduciary duty and confidentiality claims. Lastly, it will demonstrate how the contractual consent to resolve disputes arising under the contract in

[3] YIN Tribal Code 2-214(4) states, "A compulsory counterclaim does not waive the defense of sovereign immunity when made by the Tribe or an officer or an agency thereof."

a court of competent jurisdiction is a clear and express waiver of the Nation's sovereign immunity.

i. The Smiths' breach of contract counterclaim is not barred, because it offsets the Nation's request for liquidated damages and therefore meets the equitable recoupment exception to sovereign immunity.

When counterclaims "arise[] out of the same contractual transaction, seek[] similar monetary relief, and [are] for an amount less than that sought and recovered by the Tribe, . . . the Tribe has specifically waived its immunity to the counterclaim." *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 553 (8th Cir. 1989); *see also Berrey v. Asarco Inc.*, 439 F.3d 636, 645 (10th Cir. 2006); *United States v. Washington*, 853 F.3d 946, 968–69 (9th Cir. 2017)[4]. Courts recognize that equitable recoupment "is a 'narrow exception' to the doctrine of sovereign immunity." *Tohono O'odham Nation*, 174 F. Supp. 3d at 1202 (quoting *United States v. Park Place Assoc., LTD.*, 563 F.3d 907, 932 n. 16 (9th Cir. 2009)). Equitable recoupment allows a defendant "sued by a sovereign to recast an affirmative defense (typically, a set-off, contribution, or indemnity defense) as a counterclaim." *Id.* (citing *Bull v. United States*, 295 U.S. 247, 262 (1935); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940)). Any recovery cannot be for an amount "beyond the amount necessary as a set-off." *United States v. Shaw*, 309 U.S. 495, 502 (1940). It is not an affirmative relief, but only "seeks to 'defeat or diminish recovery by the sovereign.'" *Tohono O'odham*, 174 F. Supp. 3d at 1202 (D. Ariz. 2016) (citing *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970)). Equitable recoupment by necessity is only available in "suits for money damages." *Id.* (citing *Citizen Band Potawatomi Indian Tribe of Okla. v. Okla. Tax Com'n*, 888 F.2d 1303, 1305

[4] Adopting the *Asarco* recoupment standard — claim must "(1) arise from the same transaction or occurrence . . . (2) seek relief of the same kind or nature . . . (3) seek an amount not in excess of the plaintiff's claim."

(10th Cir. 1989) *aff'd in part rev'd in part on other grounds*, 498 U.S. 505 (1991)); *see also Washington*, 853 F.3d 946, 968 (9th Cir. 2017) ("a recoupment claim is a monetary claim").

Tom and Carol Smith ask this Court to use its equitable powers to apply this remedy to the case at hand and hold that equitable recoupment is an exception to the Nation's sovereign immunity from counterclaims. This case is on all fours with the rule laid out in *Rosebud Sioux, supra.* The allegations of both parties arise from one contractual transaction, the Smiths' service contracts with the Nation. R. at. 3. Both the Nation and the Smiths demand recovery for breach of contract. *Id*. The Smiths want specific performance for the unpaid amount due them under their contracts, while the Nation wants the amount due them under the liquidated damages provision of the contract. *Id.* Barring the unlikely event that liquidated damages as set forth in the contract are less than specific performance on the unpaid balance of the Smith's contract, the set-off requirement is met. If ever a case met the elements of equitable recoupment, it is this one.

The Nation cannot claim sovereign immunity from the breach of contract counterclaim, because under equitable recoupment, the Smiths are able to set-off the liquidated damages award.

ii. The Smiths' defamation claim is not barred, because the waiver by litigation doctrine creates a narrow exception to sovereign immunity.

The waiver by litigation doctrine is an equitable remedy that allows a court to fully decide any issue before it. *See generally United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981).[5] A litigating tribe "assume[s] the risk that its position [will] not be accepted, and

[5] The Yakima Tribe entered a suit as an intervenor on behalf of treaty fishing rights, and the court held that an intervening party "makes himself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervener and the adverse party." *Id.* (citing Wright & A. Miller, *Federal Practice and Procedures* 1920, at 24-671 (1972)).

that the Tribe itself [will] be bound by an order it deemed adverse." *Id.* "Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy." *McClendon v. U.S.*, 885 F.2d 627, 629 (9th Cir. 1989). The ninth circuit, however, recognizes that waiver by litigation is "limited to the issues necessary to decide the action brought by the tribe" but is not "broad enough to encompass related matters, even those arising from the same set of underlying facts." *Id.*

The Yuma Indian Nation code states, "[t]he Court, in any actual controversy before it, shall have the authority to declare the rights of the parties of that suit in order to resolve disputes even though a money judgment or equitable relief *is not requested* or due." YIN Tribal Code 2-107 (emphasis added). Furthermore, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." YIN Tribal Code 2-1006.

The Nation brings two causes of action besides breach of contract, breach of fiduciary duty and breach of duty of confidentiality. *See* R. at 3. The Smiths respond directly to these allegations with a counterclaim of defamation. *Id.* The professional reputation of the Smiths is tarnished by the Nation's baseless claims. When the Nation made these claims, it assumed the risk that the Smiths would respond by defending their reputation through tort actions. The Smiths deserve the opportunity to show that they acted professionally and ethically in response to the Nation's illegal action.

This case is analogous to *Tohono O'odham Nation*. There, the Nation brought a lawsuit (in federal district court) against a non-member (director of Arizona Dept. of Gaming), seeking declaratory judgment that federal law preempts state law authority. *See Tohono*

O'odham Nation, 174 F. Supp. 3d at 1197. The director counterclaimed for promissory estoppel, fraudulent inducement, and material misrepresentation, seeking declaratory judgment establishing the state's authority and injunctions stopping the Nation from continuing construction of a new casino. *Id.* The court held that the director's counterclaims, put "squarely at issue the question of whether it has a federal right to engage . . . in gaming . . . and the Director's assertion that the Compact is invalid due to fraud responds directly to this issue." *Id.* at 1205. Here, the Smiths' counterclaims necessitate this court to exercise its equitable powers and declare that the Smiths did not breach their duties to the Nation. The defamation suit here is as on point if not more on point than the Director's counterclaims against *Tohono O'odham.* This Court may exercise its equitable powers to entertain the Smiths' defamation counterclaim and make a declaratory judgment that they did not breach their duties to the Nation. *See* YIN Tribal Codes 2-107; 2-1006, *supra.* Without this equitable remedy, "tribal immunity might be transformed into a rule that tribes may never lose a lawsuit." *See United States v. Oregon*, 657 F.2d at 1014.

The Nation assumed the risk that its claims against the Smiths would be decided adversely to its position, therefore the waiver by litigation doctrine applies.

iii. The Nation's contractual consent to a court of competent jurisdiction created an express waiver of sovereign immunity in disputes arising from the contract.

Tribes are "immune from suit in state court even for breach of contract involving off-reservation commercial conduct unless 'Congress has authorized the suit or the tribe has waived its immunity.'" *C & L Enterprises, Inc.*, 532 U.S. at 418 (2001) (quoting *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 (1998)). The Court in *C & L Enterprises* held that clear consent to an arbitration agreement results in an express waiver of tribal sovereign immunity. *See id. at 414*; *cf Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50

F.3d 560, 561 (8th Cir. 1995) (reversing district court dismissal of breach of contract counterclaims, "because we find that the contract's arbitration clause operated as a waiver of the Tribe's immunity"). The *Val-U Construction* court noted, "while the Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." *Val-U Const.*, 50 F.3d at 563. Without the contractual consent to litigation exception, no court can have jurisdiction over a defendant's counterclaims. *See C & L Enterprises*, 532 U.S. at 421. The Court recognizes there is public policy issue when a Tribe can sue with impunity, but defendants have no remedy. *Id.*

This case is analogous with *Val-U Construction.* There, the tribe terminated a contract with Val-U Construction to build 76 housing units on the Rosebud Sioux Reservation. Val-U sought to enforce an arbitration clause that read, "[a]ll questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." *Val-U Const.*, 50 F.3d at 562. The Tribe claimed sovereign immunity and instead sued Val-U Construction for breach of contract (and other causes of action), Val-U counterclaimed for breach of contract, loss of reputation (and other causes of action). *Id.* at 561. The court held that "[t]he parties clearly manifested their intent to resolve disputes by arbitration, and the Tribe waived its immunity with respect to any disputes under the contract." *Id.* at 563. In the present case, the contracts between the Smiths and the Nation provide "for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." R. at 1. Like the arbitration clause in *Val-U Construction*, the litigation clause here serves as a waiver of sovereign immunity for disputes "arising from the contract". *Id.*

If clear and explicit contractual consent principles do not waive the Nation's sovereign immunity to suits arising under the contract, then contractual provisions become meaningless. *See generally C & L Enterprises*, 532 at 422 (citing *Vall Del, Inc. v. Superior Court*, 145 Ariz. 558, 703 P.2d 502, (Ct.App. 1985)). Public policy demands that the Nation be held accountable in a court of competent jurisdiction when it specifically states such in its contract with the Smiths. Clear expression of waiver does not require "magic words" but rather a "clear[] manifestation of . . . intent" to waive immunity for contract disputes. *Val-U Const.*, 50 F.3d at 563. The contractual provisions in this case are clear and explicit and this court has the power to declare such.[6] The Smiths respectfully request this court to follow contractual consent principles and bar the Nation's assertion of sovereign immunity from the Smiths' claims.

The Yuma Indian Nation clearly waived its sovereign immunity by contractual consent and the Smiths counterclaims are not barred in this action.

B. The language and purpose of the EDC corporate charter expressly waives its sovereign immunity to the Smiths' claims.

The extension of tribal sovereign immunity to a Tribe in its commercial endeavors, is accepted begrudgingly by the Supreme Court. *See Kiowa Tribe*, 523 U.S. at 528. The Court acquiesces to the doctrine, but makes clear that it should be revisited by Congress. *Id.* The Supreme Court has not ruled directly on whether wholly owned tribal corporations are protected by tribal sovereign immunity. But, the ninth circuit follows the established rule that "tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity

[6] Unless the court decides it does not have personal or subject matter jurisdiction, then this argument is moot. *See* YIN Tribal Code 2-102, Jurisdiction in civil actions.

granted to the tribe itself." *See Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

This section will address two reasons why the Smiths claims against the EDC are not barred by tribal sovereign immunity. First, the "sue and be sued" language contained in the corporate charter creating the EDC is an express waiver of sovereign immunity. Second, the purpose of the EDC is not the benefit of the membership and therefore it does not function as an arm of the tribe.

i. The words "sue and be sued" in the EDC corporate charter, create a clear and express waiver of sovereign immunity.

Waiver of sovereign immunity "cannot be implied but must be 'unequivocally expressed.'" *Santa Clara Pueblo,* 436 U.S. at 58 (citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)). Corporations formed by a tribe can waive immunity for corporate activities (but not governmental activities) by adopting "sue and be sued" language in its corporate charter. *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002).

In 2009, when the Yuma Indian Nation formed the EDC, it stated that the Nation can "sue and be sued" provided the debt does not "implicate in any way, the assets of the Nation." R. at 2. The Council also required that the EDC pay the nation 50% of its profits annually to the Nations' general fund, and to date it has paid $2 million. This case is distinguishable from *Cook v. AVI Casino* because here the relief runs directly against the EDC and not the Nation. In addition, *Cook* failed to argue that the tribal corporation waived its sovereign immunity.[7] In his concurrence in *Cook*, Judge Gould stated that his "concerns

[7] Judge Gould from the ninth circuit stated in his *Cook* concurrence, "the issue whether a sue and be sued clause in a tribe's enabling ordinance effectuates a waiver of tribal sovereign immunity remains a live issue for determination in this circuit." *Cook v. Avi*, 548 F.3d 718, n6 (2008) (Gould, J., concurring).

would be alleviated if one were to hold that the "sue and be sued" clause in a tribal enabling ordinance effectuated a waiver of tribal sovereign immunity (an issue we think not raised on Cook's appeal)." *See Cook*, 548 F.3d 718, 728 (Gould, J., concurring).

Gila River, supra is persuasive authority here because only the EDC's corporate activities and not the government's activities are at issue. In 2010, both the Smiths signed a contract requiring them to comply with the contract Thomas signed with the Nation in 2007. *Id.* Carol Smith forwards her bills directly to the EDC CEO Fred Captain and the EDC mails her checks. Thomas on numerous occasions conferred with the EDC about its marijuana cultivation plans. *Id.* These activities are corporate in nature and are precisely the activities that lead to this lawsuit. The Smiths' counterclaims for breach of contract and defamation are in direct response to the EDC's corporate activities. Carol Smith wants specific performance of the money owed her by the EDC and Thomas Smith wants his reputation returned by a declaration from this Court that he did not breach his fiduciary duty or duty of confidentiality by expressing concerns about the Nation's plan to participate in illegal corporate activities.

The activities of the EDC in this instance were clearly of a corporate nature, the relief runs against the EDC and not the tribe, and therefore the "sue and be sued" language from its corporate charter waives the EDC's sovereign immunity to the Smiths' claims.

ii. The EDC does not receive the protection of the Nation's sovereign immunity because the profits from the EDC do not inure to the Nation's benefit.

A tribal corporation is considered an arm of the tribe for sovereign immunity purposes when economic benefits "inure to the Tribe's benefit." *Cook*, 548 F.3d at 726. The court in *Cook* refused to waive the tribal sovereign immunity as it applied to the tribal corporation because it determined that profits from the corporation benefitted the tribe.

Cook is distinguishable from this case. The EDC, not the Yuma Indian Nation, is the beneficiary of the profits generated by its corporate activities. Unlike *Cook*, the EDC corporate charter provides that only fifty percent of the net profits are paid into the Nation's general fund. R. at 1. The Avi Casino Enterprises, Inc. (ACE), in *Cook*, is a corporate entity of the Fort Mojave Indian Tribe, but unlike the Yuma's corporate charter, ACE's charter requires that "all capital surplus not used for corporate development must be deposited in the Tribe's general fund." *Cook*, 548 F.3d at 721. The EDC kept profits of $2 million dollars since its inception. The charter does not provide for how that money is to be invested. It is not unreasonable for that money to be used to make the Smiths whole.

The Nation's sovereign immunity does not bar the Smiths' claims for breach of contract and defamation against the EDC.

C. The Smith's claims against Fred Captain and Molly Bluejacket in their individual capacity do not implicate the Nation's sovereign immunity because the Nation is not the real party in interest.

When determining whether a Tribe's sovereign immunity extends to one of its employees, it is imperative to first determine if that employee is acting in his or her individual or official capacity. *See Lewis v. Clarke*, 137 S.Ct. 1285, 1290-91. The necessary factor to determine is the "real party in interest." *Id.* Sometimes an official employee of the Tribe is acting solely in an official capacity, therefore the Tribe not the named employee is the real party in interest. *Id* (citing *Edelman v. Jordan*, 415 U.S. 651, 663-65 (1974) *see also Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). On the other hand, "'officers sued in their personal capacity come to court as individuals' . . . and the real party in interest is the individual, not the sovereign." *Id.* (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). Officials acting under the color of law, but sued in their individual capacity "*may* be able to assert personal immunity defenses, such as,

for example, absolute prosecutorial immunity *in certain circumstances*." *Id.* (citing *Van de Kamp v. Goldstein*, 555 U.S. 335, 342-44 (2009)) (emphasis added).

Captain and Bluejacket are both employees of the Yuma Indian Nation's Economic Development Corporation. R at. 2. Captain is the CEO and Bluejacket the accountant. *Id.* Carol Smith submits her bills directly to Captain and the EDC sends her a check for her services. *Id.* It is presumably Captain's oversight and Bluejacket's individual responsibility to ensure that contract employees are getting compensated for their services. Their inaction has caused the breach of contract and the Smiths must have a remedy to collect their unpaid salary. If this court determines both the Tribe and the EDC are protected from the Smiths' claims for specific performance of their contract, then the only possible remedy is to collect from Captain and Bluejacket in their individual capacities. In this instance the remedy operates, not against the Nation, but against Captain and Bluejacket, therefore Captain and Bluejacket are the real party in interest.

The Smiths suit against Fred Captain and Molly Bluejacket are not barred by sovereign immunity because they are being sued in their individual capacities are the real parties in interest.

Conclusion

For all the foregoing reasons, the Smiths request the Court to dismiss for lack of jurisdiction or in the alternative stay this suit pending a jurisdictional ruling in Arizona federal district court. If the Court asserts jurisdiction, then the Smiths ask it to rule that sovereign immunity is not a bar to the Smiths' counterclaims against the Nation, the EDC, or Fred Captain and Molly Bluejacket.